ANNOTATIONS INCLUDE VOL. 197

NORTH CAROLINA REPORTS

VOL. 99

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FEBRUARY TERM, 1888.

REPORTED BY
THEODORE F. DAVIDSON

ANNOTATED BY
WALTER CLARK, 1912
(FURTHER ANNOTATIONS ADDED, 1929)

(2D EDITION, ANNO.)

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FEBRUARY TERM, 1888

FRANCES L. EDWARDS ET AL. v. AUGUSTUS M. MOORE.

Judicial Sales—Action to Recover Land—Evidence—Record.

In an action to recover land where the defendant set up title under a decree of the court in which the premises had been sold to make assets, and the record showed that plaintiffs had accepted service of the summons in the proceedings in which the decree was made: *Held*,

1. That the record could not be collaterally attacked by evidence that the acceptance of service was made by one who had no authority.

2. The courts will be slow to exercise the power to vacate judicial proceedings where persons relying upon their integrity have acquired rights thereunder, or where the parties asking such relief have allowed a long time to elapse and no meritorious reason is shown.

CIVIL ACTION to recover land, tried before *Avery, J.*, at Spring Term, 1887, of CHOWAN Superior Court.

The plaintiffs claimed title as heirs at law of T. J. Bland, deceased, and the defendant claimed under a purchase from R. B. Bland, administrator of T. J. Bland, at a sale made in pursuance of a decree in the case of R. B. Bland, administrator of T. J. Bland, (2) deceased, against the heirs at law of his intestate, made 6 July, 1869, to sell the land described in the complaint in this action to make assets to pay the debts of the deceased.

The plaintiffs introduced the record of that proceeding, which shows:

1. The petition of an order of sale, which is set out in full in the record;

2. The order of sale dated 6 July, 1869;

3. The summons in the cause, dated 6 July, 1869, and endorsed as follows: "Filed 6 July, 1869; Wm. R. Skinner, clerk"; and also, "Service accepted, T. B. Bland, F. M. Edwards and wife F. L. Edwards, J. C. Fletcher and wife M. G. Fletcher, Martha P. Rogerson, by T. B. Bland";

4. Report and confirmation of sale, and order for title, 30 September, 1869.

The following entry appeared on the docket: "R. B. Bland, administrator, *v.* T. J. Bland's heirs at law; petition to make real estate assets; prayer granted; service accepted by the heirs at law; sale ordered at thirty days' notice at courthouse door and three other public places in Chowan County."

The plaintiffs introduced T. B. Bland as a witness, who testified that he was "the son of T. J. Bland, who died in December, 1866; that he knows Frances L. Edwards and M. G. Fletcher; that they were married women on and prior to 6 July, 1869; that Mrs. Edwards is still married; that Mrs. Fletcher is dead, leaving four children . . ."

The plaintiff further proposed to show by this witness "that he accepted service of the summons aforesaid for his married sisters and Mrs. M. P. Rogerson without their knowledge or authority and not in their presence, and without the knowledge or authority of any of them. Defendant objected upon the ground that the record in the proceeding of Bland, administrator, *v.* Bland's heirs at law, could not be collaterally attacked in this action. Objection sustained."

(3)

Upon the rejection of this evidence and intimation of the Court, the plaintiff submitted to a nonsuit and appealed.

John Gatling for plaintiffs.
J. B. Batchelor for defendants.

DAVIS, J., after stating the case: The lands of T. J. Bland, deceased, were sold in 1869, at a judicial sale, made under an order in a proceeding instituted by his administrator against his heirs at law to make assets to pay debts, and this action was commenced in 1885, more than fifteen years after, by the plaintiffs, who are some of the heirs at law of said T. J. Bland, to recover land so sold, and this right to recover is based upon the alleged ground that they were not parties to the proceeding under which the land was sold by the administrator.

They proposed to show in this action, by T. B. Bland (their brother, who was also one of the heirs at law and one of the defendants in the

proceeding, the judgment in which, they insist, was void as to them), that he accepted service for them, not in their presence, and without their sanction or authority.

This cannot be allowed in this action. Assuming the facts to be as alleged, and that T. B. Bland signed their names to the acceptance of service of the summons without any authority therefor, the court in the exercise of its power to amend its records and vacate an irregular or erroneous judgment, should be careful and cautious in the exercise of that power, when not only the interests and rights of persons acting upon the integrity of judicial proceeding are involved, but where, after long delay, no meritorious reason is given for the correction. In this case, if the proceeds of the land were applied to the payment of the debts of the ancestor for which the land was bound, it would—so far from being meritorious—be unjust to permit the plaintiffs to recover from the purchaser and hold the land discharged of the (4) debts of the ancestor which the money of the purchaser had paid. *Weaver v. Jones,* 82 N. C., 440; *Doyle v. Brown,* 72 N. C., 393. In the latter case the action was properly instituted for the direct purpose of vacating a decree made in an action to which it was alleged the plaintiff was not a party, but it was said the record "must stand until vacated."

In a direct proceeding to annul the judgment the right of all parties may be protected, but as long as the judgment and order of sale remain, though the proceeding be irregular, yet if not void the judgment cannot be collaterally impeached and the conveyance authorized by it must stand. The judgment can only be vacated by a direct proceeding for the purpose.

The judgment in this case was not void. *Sumner v. Sessoms,* 94 N. C., 371; *Cates v. Pickett,* 97 N. C., 21, and the cases there cited.

There is no error.

Cited: McIver v. Stephens, 101 N. C., 260; *Tyson v. Belcher,* 102 N. C., 115; *Williams v. Johnston,* 112 N. C., 437; *Lowe v. Harris, ibid.,* 490; *Yarborough v. Moore,* 151 N. C., 122.

THE STATE EX REL. S. J. TOPPING v. G. H. WINDLEY ET AL.

Clerk of Superior Court—Guardian—Ward—Surety—Measure of Damages—Evidence—Commissions—Estoppel—Interest.

1. The clerks of the Superior Court are liable upon their official bonds for all losses sustained by reason of their failure to require proper security upon guardian bonds.
2. The record of the appointment of a guardian is sufficient evidence of such appointment.
3. Neither the clerk nor his sureties will be heard to deny that a guardian, appointed by the former, improperly received funds which he is shown to have taken possession of for his ward.
4. Where a guardian keeps no accounts and makes no report of his trust, as a general rule he will not be allowed commissions.
5. The measure of damages in an action upon a clerk's or guardian's bond for a failure to perform any duty required of them is the amount of the principal received, with compound interest at six per cent until the ward arrives at full age.
6. A surety on a guardian bond, the principal being dead, is a competent witness to prove the insolvency of the bond.

(5) CIVIL ACTION, tried before *Avery, J.*, at February Term, 1887, of the Superior Court of BEAUFORT County.

The complaint alleges that the defendant, G. L. Windley, was, on 1 May, 1874, clerk of the Superior Court and judge of probate for the county of Beaufort, and that as such he executed and delivered to the State of North Carolina his official bond and renewal bond, to which the other defendants are sureties; that on 1 May, 1874, the defendant, Windley, acting in his official character, appointed one Ira H. Topping as guardian of the relator, who was then a minor, aged about eleven years, and issued letters of guardianship, general in their character and extending to the property as well as to the person of the relator; that said Windley, at the time of issuing the said letters of guardianship, failed and neglected to require of said guardian a good and sufficient bond, but accepted one wholly insufficient and insolvent, with only one surety and not justified; that only one renewal bond was given by the guardian, and that in 1879, which was then and still is insolvent, and that the guardian failed to file any account of his guardianship, and died in March, 1883, totally insolvent; that the guardian entered upon his duties at once upon his appointment, received and took into his possession the estate of the relator, receiving the rents of lands and the proceeds of lands sold by him as guardian under judicial proceedings

and failed to account to the relator therefor, or to pay over the same or any part thereof, and asks judgment, etc.

The answer admits that Windley was clerk, and as such gave (6) the usual bonds, and that the defendants were his sureties.

It is denied that Windley appointed I. H. Topping guardian to the relator, or that he ever acted as such.

The defendants ask that they be furnished with the particulars of the property of the relator alleged to have been received by the said Ira H. Topping, and further say that the action did not accrue within six years, etc., and is barred by statute.

The plaintiff filed a statement specifying the sums demanded.

At February Term, 1886, the issue raised, "Was Ira Topping appointed guardian of the relator, T. J. Topping, then an infant, by Geo. L. Windley, clerk of the Superior Court of said county?" was tried before his Honor, Judge Gudger, by an inspection of the records, and upon said inspection it was adjudged that Windley was clerk of said court on 1 May, 1874, and acting as such on that day appointed the said Ira H. Topping guardian of the relator.

To this judgment the defendants excepted.

It was then referred to Goethe Wilkens, clerk of the court, to state and report an account showing:

"1st. Whether said Windley, as clerk aforesaid, took from said Ira, in his appointment as guardian as aforesaid, any and what bond, and if any, whether it was good and sufficient when taken.

"2d. What property . . . was or might and ought to have been received by said guardian, what was expended for or paid over to said ward, and what balance, if any, is owing to said ward?

"3. What damage, if any, the relator has sustained by reason of the insufficiency of the said guardian bond.

"4. Also showing in what proportions and for what sums, if any, the sureties to the several bonds of Windley, as clerk as aforesaid, are liable among themselves, and which of said sureties are now (7) solvent."

No exception was taken to the order of reference, and the referee reports in substance: That Windley, as clerk, etc., upon the appointment and qualification of Ira H. Topping as guardian of the relator, accepted a guardian bond which was insufficient, having but one surety, and said surety totally insolvent; that the said guardian at various times received money belonging to his ward, and expended money for him, an itemized account of which was reported, in which the guardian was charged with 8 per cent interest upon his receipts, and a like rate of interest was allowed upon his disbursements, and in which no commissions were allowed, "as said guardian has at no one time since his appointment

filed or rendered an inventory or annual account of his ward's estate"; that there was a balance of $290.18 due the relator unpaid, and by reason of the insufficiency of the guardian bond, as taken by Windley, clerk, etc., the relator is endamaged to the extent of said balance.

He also reports as to the solvency and liabilities of the sureties.

Before the referee the plaintiff introduced as evidence the record of the appointment of Ira H. Topping as guardian, etc., dated 1 May, 1874, to which defendants objected "as incompetent and insufficient."

He then introduced the guardian bond of Ira H. Topping, of the same date, signed by I. H. Topping and Mary E. Topping, which was objected to by defendants.

He then introduced the record of a special proceeding instituted in the Superior Court of the county of Hyde upon the petition of Ira H. Topping, guardian, to sell certain land of his ward therein named, showing the petition verified before Geo. L. Windley, clerk of the Superior Court of Beaufort, affidavits as to the benefits to the ward of such sale, the order of sale signed by W. A. Moore, judge, 9 May, 1874, report of the sale at the price of $650, the order of confirmation signed by
(8) the clerk and approved by M. L. Eure, judge, order for title to the purchaser, and a certified copy of deed to the purchaser, all of which was objected to "as insufficient, irregular and for want of jurisdiction in the court to order the sale."

The plaintiff then introduced as a witness one W. J. Bullock, who testified that on 1 May, 1874, Mary Topping, the surety on the guardian bond, was insolvent, and that witness rented from the guardian the lands of his ward for three years, beginning either in 1874 or 1875, for which he paid $50 per year.

This witness was on the guardian bond of Ira H. Topping, executed 27 August, 1879, and Ira H. Topping being dead, his testimony was objected to as incompetent under section 590 of The Code. This witness also testified that he was insolvent in 1879, when he signed the bond as surety for the guardian, and that he at the time so told the clerk.

The defendants filed the following exceptions to the report of the referee:

1. For that it does not appear that Ira H. Topping was ever legally appointed guardian of Solomon Topping.

2. For that it does not appear that Ira Topping had any authority to sell the land of said Solomon Topping in Hyde County, and to receive the price with which he is charged.

3. For that said alleged sale was void and the land is still the property of its former owners.

4. That the order of said clerk did not authorize the receipt of the funds arising from the sale of the lands, without giving further security

therefor; and the sale having taken place in Hyde County, the bond of this clerk is not liable for the funds arising from it.

5. For that the clerk refused to allow commissions to the guardian.

6. For that he has charged interest at 8 per cent, instead of 6 per cent as he should have done.

7. For that the clerk has found that over $270 worth of prop- (9) erty went into the supposed guardian's hands for which the clerk's bond was liable, when in truth and fact only about $83 did so go into the hands of said supposed guardian.

8. For that the clerk received and heard improper evidence, as indicated by the exceptions to the evidence.

At February Term, 1887, upon the report of the referee and exceptions, all the exceptions were overruled except the 6th, and as to that the referee was ordered to reform and modify the account by charging six instead of eight per cent, and thus modified the report was confirmed and judgment rendered in favor of the plaintiff, from which the defendants appealed.

Wm. B. Rodman, Jr., for plaintiff.
C. F. Warren and Geo. H. Brown, Jr., for defendants.

DAVIS, J., after stating the case: It is the duty of clerks of the Superior Courts to appoint guardians. The Code, sec. 1586; to take and approve their bonds, requiring two or more "sufficient sureties," section 1574; to see that the bonds are renewed, sections 1581 and 1582; and if they fail to take "good and sufficient sureties" that they are made liable "for all loss and damages sustained for want of security being taken." Section 1614.

Formerly the Superior and County Courts had cognizance of all matters concerning orphans and their estates, and the judge or justices were liable for all damages resulting from a failure by them to take sufficient bond; and in the old County Courts, clerks were required to record the names of justices on the bench accepting guardian bonds. Clerks and the sureties on their official bonds are now liable, as the justices were under the old system, for any loss or damages resulting from a failure to take good bonds, and the record of the (10) appointment of the guardian is sufficient evidence of such appointment. *Davis v. Lanier,* 2 Jones, 307. So there is nothing in the first exception of the defendants.

The 2d, 3d and 4th exceptions, relating to the sale of the ward's land in the county of Hyde, are equally unfounded. If the clerk failed to take a sufficient bond he is liable for all loss by reason thereof, and the

measure of damages is the amount of the principal received by the guardian, with compound interest on the principal up to the time of the ward's arrival at full age. The guardian bond would be liable for what the guardian, as such, collected or received for his ward, and neither he nor his sureties would be heard to say that he improperly received it, or that it was not the property of his ward.

The record shows a sale of the ward's property by the guardian, and the receipt of the proceeds by him. He has failed to account for it to the relator, and the defense sought to be set up cannot be maintained. *Davis v. Lanier, supra; Humble v. Mebane,* 89 N. C., 410.

The ruling of the court upon the 5th exception must stand. When a guardian keeps no account, and the burden is devolved upon the ward of hunting up the evidence to charge him, the general rule is that he will not be allowed commissions, which are intended as compensation for the proper discharge of his duties, and there is nothing in this case to induce a departure from the rule.

No returns were made, and it does not appear how the ward's funds were used. *Finch v. Ragland,* 2 Dev. Eq., 141; *Burke v. Turner,* 85 N. C., 500; *Grant v. Reese,* 94 N. C., 720.

The report of the referee was properly modified by the direction of the court in conformity with the 6th exception. The legal rate of interest in the State is six per cent, and no more can be allowed, except
(11) as provided in section 3835 of The Code, and this disposes of the only exception of the plaintiff.

The 7th exception is disposed of with the 4th, and cannot be sustained.

All the exceptions to the evidence were properly overruled. The witness, Wm. J. Bullock, was competent to prove the insolvency of the sureties, and his testimony in regard to the payment of rent was immaterial, as it was a part of the $83 which, it was admitted, went into the hands of the guardian.

There is no error.

Cited: Latham v. Wilcox, post, 373.

W. W. LEWIS v. JOHN L. ROPER LUMBER COMPANY.

Injunction—Irreparable Damage—Receiver.

1. Upon an application for an injunction, it is not sufficient to simply allege that the plaintiff will suffer irreparable damage—he must set out the facts so that the court may determine the necessity for its intervention.
2. As a general rule an injunction will not be granted where the plaintiff may be compensated in damages.
3. Where the plaintiff sought to enjoin the defendant from cutting and carrying away timber from lands which both parties claimed, and each offered strong proofs in support of his titles; and it appeared that the defendant had in good faith expended large sums of money in establishing and prosecuting its business and great loss might result from arresting it: *Held*, that the court should have required a bond from the defendant to indemnify the plaintiff for the value of the timber, and if need be appoint a receiver, before resorting to an injunction.

THIS was an application for an injunction, heard at Chambers, in Tarboro, on 17 August, 1887, before *Philips, J.* The action was pending in WASHINGTON County.

The plaintiff alleged that he was the owner in fee of the land (12) in controversy; that it is swamp land and mainly valuable for the timber on it; "that defendant has wrongfully, wantonly and forcibly entered upon the land of plaintiff, and has cut and carried away timber from the same, and threatens to continue to cut and carry away the timber of the plaintiff, to his irreparable damage," etc., etc.; and he produced his own affidavit and those of sundry other persons tending strongly to prove his allegations. He likewise set forth his evidence of title to the land, and stated facts going to show that the defendant was insolvent, etc.

The defendant denied the allegations of the plaintiff, that he was the owner of the land, and, on the contrary, alleged that it belonged to a corporation, The Albemarle Swamp Land Company; that it had leased from the last named company "all of its real and personal property in the counties of Beaufort, Washington and Hyde, with full, ample and complete authority and right to cut, manufacture and remove from the said real property the growing timber thereon for the term of five years from said date; that the land described in the complaint is a part of the land so leased, and the defendant entered upon said land by authority of said lease"; it admitted that the land is chiefly valuable for the timber on it; that it had cut and carried away timber from the land; that it was then engaged in doing so; that it intended to continue to do so; it

averred that it did so rightfully, and denied that the plaintiff had sustained or would sustain irreparable damages; it alleged further, that it "is largely engaged in the lumber business at the places named and has expended much money in getting ready for the work, and has now in the woods a number of hands, teams, and other appliances for getting out the timber, and in addition has expended and is now expending a large sum of money to construct and run a railroad to the Albemarle Sound, from and beyond the land, for the purpose of moving the timber,
(13) and such other as it may own and buy, all of which expenditures have been made in good faith, and in the belief, promoted as aforesaid by the action of the plaintiff himself, that its title was good; and if stopped now the defendant's operations will be much impeded and irreparable damage done to it; that the defendant is entirely solvent and able to respond in damages to the plaintiff to much greater amount than any possible recovery by plaintiff in this action; that the timber on the land has no special or peculiar value which may not be easily measured and compensated for in damages, if the plaintiff shall prevail in this action"; and it produced sundry affidavits tending strongly to support its allegations. It also set forth the documentary evidence of the title of the company under which it claimed, etc.

The court granted the motion for an injunction, and from the order in that respect the defendant appealed.

J. E. Moore, by brief, for plaintiff.
John Gatling for defendant.

MERRIMON, J., after stating the case: In *Lumber Co. v. Wallace,* 93 N. C., 22, it is said: "The provisions of The Code, secs. 338-379, in express terms invest the court with very large and comprehensive powers to protect the rights and prevent the perpetration or the continuance of wrong in respect to the subject-matter of the action, and to take charge of and protect the property in controversy, both before and after judgment, by injunctions and through receivers, pending the litigation; they facilitate and enlarge the authority of the courts in the exercise of their remedial agencies, and do not in any degree abridge the exercise of like general powers that appertain to courts of equity to grant the relief specified, or to grant perpetual injunctions in proper cases, or the like relief."

(14) But such powers are not to be exercised in every case. On the contrary, they should be applied cautiously, and only when, in the sound discretion of the court, such application is necessary to protect the substantial rights of the party complaining and the property in controversy that may be in jeopardy of loss or injury during the litigation,

and also when the subject-matter of litigation is serious in importance to the party demanding the relief, and ordinarily he should show strong apparent right to relief. Moreover, the court should have in view and due regard for the rights and interests of the party complained against. Its orders and decrees should be so shaped as to serve the best purposes of the law in the application of such powers, and put the parties to as little inconvenience and disturb the course of business and industries as little as practicable.

In this case, the affidavits and other evidence produced by the plaintiff in support of his motion for relief by injunction tends strongly to support his allegations and right to relief; but on the other hand, the defendant makes pertinent counter allegations, and the evidence produced by it tends strongly to support them. In such a case, the plaintiff should have relief, because he shows strong apparent right, and the defendant, by allegations largely in confession and avoidance, only shows that the plaintiff may not recover. The latter is entitled at least to have a sum of money equal to the value of the timber secured pending the litigation, so that, in case he shall obtain judgment, it may be applied in discharge of the same. The timber may belong to the plaintiff, and if so, he ought to have it, or at least the value of it, and this in some way secured pending the litigation, he properly securing the defendant indemnity against damages occasioned by the plaintiff's groundless action, if it turns out to be such.

But the plaintiff is not entitled certainly to relief by injunction and no other. The injury of which he complains is not one for which he cannot be compensated in damages. If it were, he would be entitled to that particular remedy. It is true he alleges in general (15) terms, "irreparable injury," but he fails to allege and give evidence of facts showing that he may sustain such injury. It is not sufficient to simply allege such injury—facts must appear from which the court can see and determine that it is such, and probable. It appears that the defendant is cutting and carrying away from the land ordinary forest timber suited to the purpose of making lumber for the markets. Obviously, the plaintiff may be compensated in damages for this timber.

The defendant is extensively engaged in the manufacture of lumber. It prosecutes that business at large expense, and has employed in it many laborers, wagons, horses, etc., etc. The business is a legitimate one, and ought not to be arrested, especially if this can be avoided consistently with the rights of the plaintiff. Indeed, it is against the policy of the law to restrain industries and lawful enterprises. It ought not to be done, unless in extreme cases, certainly when it may be avoided. We, therefore, think the court, instead of granting the injunction, should have required the defendant to execute a bond, with approved security,

in such reasonable sum as the court might deem proper, payable to the plaintiff claiming the property, conditioned that the defendant will pay to the former such damages as the court may adjudge in his favor against the defendant upon the final determination of the action. And the court might, if the circumstances render it necessary, appoint a receiver to take, state and keep an account of the timber cut and removed. If the defendant cannot, or will not, give such bond, the court might take such other steps as it might deem meet and just. This is substantially the course pursued in *Lumber Co. v. Wallace, supra;* and while it will serve the just purpose of securing the rights of the plaintiff, it avoids a suspension of the business of the defendant.

(16) To the end that such action as that indicated in this opinion may be taken in the action, let this opinion be certified to the Superior Court.

Error.

Cited: Ousby v. Neal, 99 N. C., 148; *Caldwell v. Stirewalt,* 100 N. C., 205; *Mock v. Coggin,* 101 N. C., 366; *Bond v. Wool,* 107 N. C., 153; *Nav. Co. v. Emry,* 108 N. C., 133; *R. R. v. Lumber Co.,* 116 N. C., 925; *McKay v. Chapin,* 120 N. C., 160; *Sharpe v. Loane,* 124 N. C., 2; *Newton v. Brown,* 134 N. C., 445; *Kestler v. Weaver,* 135 N. C., 389; *Lumber Co. v. Cedar Co.,* 142 N. C., 418; *Griffin v. R. R.,* 150 N. C., 315; *Taylor v. Riley,* 153 N. C., 203; *R. R. v. Thompson,* 173 N. C., 262; *Stewart v. Munger,* 174 N. C., 405; *Hurwitz v. Sand Co.,* 189 N. C., 5.

R. J. BRYAN ET AL. v. EMMA V. MORING ET AL.

Appeal—Motion to Dismiss—Rules of the Supreme Court.

1. An appeal will not be dismissed if it is docketed "within the first eight days of the term (of Supreme Court) or before entering on the call of cases from the judicial district to which the case belongs," but will be continued.

2. An appeal will not be dismissed because the clerk of the Superior Court fails to send up a proper transcript, but the appellant will be given an opportunity to perfect record.

THIS was an issue of *devisavit vel non,* tried before *Shepherd, J.,* at Fall Term, 1887, of CHATHAM Superior Court.

In this Court the appellees made a motion to dismiss the appeal.

John Hinsdale and C. M. Busbee for plaintiffs.
Geo. H. Snow, John W. Graham and Jno. Manning for defendants.

MERRIMON, J. The appeal in this case was taken at the last October Term of the Superior Court of the county of Chatham, but it was not sent up and docketed in this Court until 10 March, too late to stand for argument at the present term, as it would have done if it had been brought up regularly under the rule as it should have been, and docketed "within the first eight days of the term, or before entering on the call of cases from the judicial district to which the case belongs." (17) As it was not thus docketed, the appeal stands continued under Rule 2, sec. 7.

After the appeal had been docketed here, the appellees exhibited a certificate of the clerk of the Superior Court and moved to docket and dismiss the appeal, as they insisted they might do under section 8 of the Rule of this Court, cited *supra.* It is settled that this motion cannot be allowed. *Barbee v. Green,* 91 N. C., 158; *Hughes v. Boone,* decided at the present term.

Why the appellants failed to docket their appeal within the time prescribed does not appear. Such delays are frequent, and the Court may find it necessary to provide a remedy against them by prescribing an appropriate rule of practice.

The appellees also moved to dismiss the appeal upon the ground that what is filed as a transcript of the record of the appeal is not such in fact or in contemplation of law. It must be conceded that what is intended to be a transcript of the record is very defective, but we can see sufficiently from what the clerk recites and certifies under the seal of the court, that an action was tried at the last October Term of the Superior Court mentioned above before a judge named. As the transcript of the record appears at present it is insufficient, but a perfect one may be obtained before the case shall stand for argument.

The statute (The Code, sec. 551), provides that "The clerk receiving a copy of the case settled as required in the preceding section, shall make a copy of the judgment-roll and of the case and within twenty days transmit the same duly certified to the clerk of the Supreme Court." It seems that the clerk of the Superior Court has been remiss in transmitting a proper transcript of the appeal to the Clerk of this Court as the statute directs, and it is manifest that he misapprehends what such a transcript must embrace, and as well the form of it. The appellants should not suffer on this account. They are not, however, (18) free from neglect; they should have beeen careful to give their appeal prompt attention.

We take occasion here to suggest that the transcript of the record of the appeal should embrace only so much of the record of the action in the Superior Court as may be necessary to present the questions raised by the assignments of error for the decision of this Court. It not infrequently happens that transcripts come here that embrace a vast deal of unnecessary, redundant matter, which multiplies the cost to be paid by the parties, and unnecessarily increase and confuse, more or less, the labors of counsel and the Court. This might easily be obviated by a careful and intelligent preparation of the transcript of the necessary record for this Court. *Sudderth v. McCombs,* 67 N. C., 353.

We are of opinion that the appellees fail to show such cause as entitles them to have their motion allowed.

Motion denied.

Cited: Bailey v. Brown, 105 N. C., 129, 130; *Porter v. R. R.,* 106 N. C., 478; *Triplett v. Foster,* 115 N. C., 390; *Howard v. Speight,* 180 N. C., 654.

B. W. JONES v. R. E. PARKER AND BENJ. SAUNDERS.

Deed—Easement—Boundary—Variance.

A deed conveying "a certain tract of land, including the mill seat and mill, known as the Jethro R. Franklin mill, *embracing as far as high water mark,* and bounded as follows," etc., is a conveyance of the *land* covered by the waters of the mill pond as far as the high water mark, notwithstanding this construction should produce a wide variance between the amount of land embraced in this boundary and that mentioned in the deed.

THIS is a civil action, which was tried before *Avery, J.,* at Spring Term, 1887, of GATES Superior Court.

(19) This action is prosecuted to recover damages for trespasses alleged to have been committed on the plaintiff's land, the title to which is derived under a deed made on 2 January, 1869, by the defendant Richard E. Parker to Joseph J. Jones and William T. Jones, and subsequent conveyances from them to the plaintiff. In each of these deeds the land is described in similar terms, and as follows: "A certain tract or parcel of land, including the mill seat and mill known as the Jethro R. Franklin mill, the said tract of land situated in the county of Gates, *embracing as far as high water mark,* and bounded as follows: 'On the

north by the lands of Richard E. Parker, Reddick Brinkley and others; on the east by the lands of Harrison Brinkley and others; south by the desert road; west by the lands of Josiah H. Reddick and others, including two acres of land on the west side of said mill, containing ten acres, more or less.' "

The title of the defendant, R. E. Parker, is deduced from a deed of John J. Gatling, administrator of Jason Franklin, made by virtue of a judgment of the court in proceedings instituted to convert the intestate's real estate into assets for the payment of debts, wherein the land is thus described: "On the north by James W. Brinkley's line; on the east by Parker's mill pond; on the west by B. W. Jones' (the plaintiff) line; on the south by the Edenton road, the line of Peter Franklin and others, containing one hundred acres, more or less."

The intestate claimed under a deed to him executed in 1821 by Josiah Reddick, conveying the land afterwards disposed of by the administrator in the year 1872.

The trespasses for which compensation was demanded were committed upon land within the high water boundary of the pond, and when full covered by its waters, in cutting down and carrying away timber trees standing thereon, and the result of the action depends upon the construction and effect of the deeds which constitute the plaintiff's chain of title. If the land under water up to the highest usual margin passes to the plaintiff, he is entitled to recover damages under the ad- (20) missions of the parties; if not, he fails in the action, and this is the question before us for solution.

The court charged the jury that it being admitted that the plaintiff was in the actual possession of the mill under the deed offered in evidence when the trees were cut, the plaintiff was the owner and in the constructive possession of the mill pond to high water mark, and was entitled to recover the reasonable market value of all timber cut by the defendants from the mill pond below the high water mark. The jury having found the issues in favor of the plaintiff and assessed his damages at $65.50, and judgment rendered thereon, the defendants appealed.

John Gatling and Leroy Smith for plaintiff.
Pruden & Van and T. J. Skinner, by brief, for defendants.

SMITH, C. J., after stating the case: The charge of the court, it will thus be seen, puts an interpretation upon the descriptive words of the plaintiff's deed, "embracing as far as high water mark," which covers all the overflowed land up to its high water boundaries, and vests the estate therein in him.

The use of the water of the pond is necessary to the running of the mill, and it would be valueless without the ownership of the submerged land or of the easement in the covering waters. The principal and primary intent in the conveyance is to secure all the privileges incident to the working of the mill, and to enable the bargainee to enjoy the advantages of operating afterwards as before, and even to convey the land itself or an easement as essential to its enjoyment. The language used in describing the subject-matter upon which the deed was to operate clearly points to the land, and not to an encumbering easement.
(21) It is a "tract of land," and embraces the land "as far as high water mark," which the deed purports to convey, and thus within the marginal boundaries of the pond.

The references in the brief of appellants' counsel to which our attention is called, that construe the terminus of a line at a pond created by artificial obstructions or dams upon a running stream to obtain a water power as extending into the water as far as the channel, have no application to the present case, since reversing the running of the line the water covered land, that is, a parcel of land defined by the margin of the pond is described and the estate therein conveyed. *Lee v. Woodard,* N. C. Term R., 100 (537).

We concur in the construction put upon the deed by the court, that its operative words are not restricted by the fact that there is a variance in the area of the tract, it being from 40 to 60 acres, from that mentioned in the deed, which may be explained by supposing the bargainor intended only to apply the words to the upland end, not to the pond.

There is no error.

JOHN R. PERRY ET AL. v. LOUIS HARDISON AND ASA ELLIS.

Exceptions—Reference—Levy—Fraud—Evidence—Execution Sale.

1. The Supreme Court will only consider the exceptions to the *rulings of the court below* in confirming or disaffirming the report of a referee.
2. The return of an officer reciting a levy is only prima facie evidence of the fact.
3. While a levy may be made upon real property without the officer being at or taking formal possession of it, it is necessary, to constitute a valid levy on personal property, that the officer should go to it and have it in his power to take possession of it if necessary.

4. The fact that property—the title to which is in dispute—sold under execution brought a price far below its true value is no evidence of fraud.

5. The facts that the mortgagor was sued; that he executed a mortgage to one in his employment who had no other means of subsistence than his labor, to secure wages partly due and yet to become due; that the deed was falsely dated; that the mortgagor remained in possession and the mortgagee was a son-in-law of the mortgagor, are evidence to be considered by a referee or jury upon the bona fides of the deed, and their finding thereon is conclusive.

6. A conveyance, if made with intent to hinder creditors, is void, although upon a sufficient consideration, if the vendee had knowledge of the purpose for which it was made.

CIVIL ACTION, tried before *Avery, J.*, upon exceptions to (22) referee's report, at February Term, 1887, of BEAUFORT Superior Court.

The tract of land, the title to which is drawn in question in this action, as described in the complaint, belonged to the defendant, Louis Hardison, under whom the plaintiffs claim by virtue of a sale under two executions to Charles F. Warren on 1 July, 1878, and a conveyance from him to the plaintiffs.

The defendant, Asa Ellis, derives his title under a mortgage deed from said Hardison to secure the sum of two hundred dollars, made after the institution of the suits, but before the docketing of the judgments rendered thereon, pursuant to the executions issued, on which the sheriff made sale; and alleged that this mortgage was executed in good faith to secure the payment of wages then due and to become due under a contract for services rendered and to be rendered as a laborer; and that his codefendant Hardison occupied the land as his tenant at will. The plaintiffs charged that the mortgage was fraudulent, and asked that it be so adjudged and canceled.

At Spring Term, 1882, there was a reference, by consent, to (23) John H. Small, Esq., directing him to inquire and report whether the mortgage deed was fraudulent and the sum, if any, due thereon, and such other matters, whether of fact or law, as arose upon the case, subject to exceptions to be passed on by the court.

After several reports and recommittals the referee made a final report to January Term, 1887, the material portions of which are:

"That the defendant, Lewis Hardison, has been seized and possessed of the land in controversy for many years prior to the bringing of this action; that he was in possession at the commencement thereof, and is now in possession; that his possession has been continuous, say since the war; that on 9 May, 1878, a judgment was rendered against said

Hardison in favor of D. V. Warren, executrix, upon a note for four dollars, dated 8 December, 1852, which judgment was docketed in the Superior Court of Beaufort County on the same day. The execution was issued 13 May, 1878.

That on 30 April, 1878, a summons was issued against Hardison at the instance of Wm. Baynor upon a note for $25, dated 25 April, 1860; the summons was served on 1 and 4 May, 1878, and judgment was rendered and docketed in the Superior Court of Beaufort County on 9 May, 1878, and execution was issued on 13 May, 1878.

That under the executions above named the land was sold 1 July, 1878, and purchased by Charles F. Warren, to whom T. J. Satchwell, sheriff, conveyed the same.

That said Warren duly conveyed the land to plaintiffs by deed, dated 21 December, 1881.

That the claim of defendant Ellis is founded upon a mortgage which bears date 27 February, 1878, but was not executed or delivered until 6 May, 1878; that it was proved on the same day by Robert T. Hodges, a justice of the peace, who affixed the signature of Mrs. Hardison, she being unable to write, and that it was filed for registration the
(24) same day; that the summons in favor of Wm. Baynor was served on 1 and 4 May, 1878, before the execution of the mortgage; that defendant Ellis resided with Hardison during or most of the year 1877 and up to 3 August, 1878, when he married Hardison's daughter and removed to Martin County.

The defendant Ellis testified that he had worked with Hardison only about two or three months before the apparent date of mortgage, and that on its date he and Hardison came to town and it was written and signed; that the words 'Asa Ellis' and 'Martin County' and 'two hundred' were filled in the mortgage on 6 May, 1878, by R. T. Hodges, a justice of the peace.

That defendant Ellis was dependent upon his daily labor for his support, and from the evidence introduced his daily labor was not more than sufficient for his support; that during the time it is claimed by defendant Hardison he was working with him on account of this mortgage, he, Ellis, was working elsewhere on his own account, and at such times merely residing at Hardison's.

No note was introduced, and the defendant Ellis in his testimony did not account for the loss of it.

That the total value of defendant Hardison's taxable property was, in 1878, as listed for taxation, $170, including the land in controversy, and that the total value of defendant Ellis' property in said year was $26; the actual value of the land was $300.

That under the execution in favor of D. V. Warren, administratrix, *v.* Louis Hardison, the sheriff levied upon the following personal property, as appears from said levy, viz.: One horse, 7 head of cattle, 4 hogs, 14 sheep, and other personal property; that said sheriff copied the enumeration of said articles from the "tax list" of Beaufort County for 1878; that said sheriff never attempted to enforce said levy on said personal property by taking said property in possession or otherwise, and did not advertise the same for sale, and did not actually (25) sell same, and that defendant Hardison, both prior and subsequent to said sale of the land, retained the possession and use of said personal property as long as it existed.

I find as conclusions of fact:

That the defendant Ellis did not pay or render any valuable consideration for the said mortgage, and that there is nothing due thereon.

That it was made to defraud the creditors of defendant Hardison, and is fraudulent and void.

That it was made to hinder and delay the creditors of defendant Hardison, whether there was any consideration or not.

From these facts I find as conclusions of law: That the plaintiff having acquired the legal title by due process of law, and the defendant Hardison being admitted to be in possession of the land, the plaintiffs are entitled to recover the land in controversy, with the costs of this action, and I so adjudge."

The court adopted the findings of fact, overruled the defendant's exceptions, confirmed the report, and rendered judgment for the plaintiffs, from which the defendants appealed.

Geo. H. Brown, Jr., for plaintiffs.
Wm. B. Rodman, Jr., for defendants.

SMITH, C. J. The sole issues raised in the pleadings are as to the validity of this sale, and if upheld, the *bona fides* and legal efficacy of the mortgage deed.

The record in this case, as in others of which we have had occasion to speak, fails to assign *error in the rulings of the court,* and compels us to search through the voluminous pages of the report and the testimony taken, as well as among the exceptions to the action of the referee, to ascertain what are his conclusions of law which are reviewable and open to correction here. The practice cannot be allowed, and if our admonitions are to be disregarded, we shall be constrained to (26) refuse to take cognizance of the cause and dismiss the appeal.

The errors alleged to have been committed by *the court* should be dis-

tinctly and plainly pointed out, as those intended to be presented and heard on the appeal.

The objections made on the rulings of the referee as questions of the admissibility of evidence, to wit, as to the usage of farmers in the employment of laborers and paying them wages; the manner in which another employer of defendant Ellis paid his wages; the novelty of providing and securing them by a mortgage deed in advance of their being earned, were properly overruled, since, while their pertinency to the issue of fraud is not very apparent, we do not see how the evidence tended to mislead the referee.

The introduction of the tax books, as tending to show the financial resources of the defendants in an inquiry as to their means of self-support, is, in our opinion, not obnoxious to objection, and its force and effect was for the referee, acting in place of a jury, to pass on and determine.

The defendants insist that no judgments were rendered by the justice against the defendant Hardison, upon the claims sued on, and that the certified transcripts of such as were docketed and under executions on which the land was sold, were without an original, and were in consequence nullities, the sale passing no title to the purchaser, the attorney and agent of the creditors whose claims he was collecting.

Whatever may have been the legal consequences, if the facts were, as supposed, they are misconceived and incorrectly stated. The justice's civil docket shows a service of summons accepted, a trial, and "judgment given against the defendant and in favor of the plaintiff for the sum of $4, with interest from 8 December, 1852," etc., in the one case,

(27) and a substantially similar entry in the other, *mutatis mutandis*, and these fully sustain the transcripts sent up and docketed in the Superior Court.

II. The defendants except further to the validity of the sale of the land until the personal property levied on, as shown in the sheriff's return upon the executions, and shown to have been fully sufficient in value to pay them, had been sold, and the proceeds applied in satisfaction.

The referee finds that in fact no levy was ever made upon the personal goods mentioned in the return, and that the return was thus made upon an inspection of the tax lists and without their ever being in the possession or under the dominion of the officer, these being the constituents of a legal seizure.

The delivery by the debtor of a list of his personal property to the officer, it not being present, is not a levy. *Gilkey v. Dickerson*, 3 Hawks, 293; *Bland v. Whitfield*, 1 Jones, 122.

The return of a levy made is but prima facie evidence of the fact, and, remarks *Pearson, J.*, in the case cited: "In regard to land it may be made in the office, although it may be ten miles distant, and the officer has never seen it. In regard to personal property, it is necessary for the officer to go to it, *so as to have it in his power to take it into actual possession* if he chooses."

See, also, as to a sale of an ungathered crop in the field, *Skinner v. Skinner,* 4 Ired., 175, and *Rives v. Porter,* 7 Ired., 74, and other cases.

Here the prima facie proof is rebutted, and it is shown there never was any levy, and that the goods remained uninterfered with, in the defendant's hands, and were appropriated by him to his own use.

The imputation of bad faith in the conduct of the officer in making the sale finds no support in the facts found, and the mere fact that an insignificant sum was bid, must be attributed to the dispute about the title, growing out of the execution of the mortgage, and an unwillingness to buy a lawsuit in buying the land.

But the essential controversy is as to the bona fides of the (28) mortgage deed and its sufficiency to pass the title against a creditor pursuing the property under legal process.

The referee finds, and the court sustains the finding, that the defendant Ellis had no legal claim against his associate as a consideration to support the conveyance, and if there was a debt, it was made with the fraudulent intent of evading his creditors and placing his property beyond their reach. While the recited consideration is that of a present indebtedness of $200 intended to be secured, it was testified by the mortgagor that this sum constituted the wages to be paid to the mortgagee for services in part already rendered and to be thereafter rendered as to the residue, and further that the latter was in his service from some time in the fall of 1876 to August, 1878, when having married the mortgagor's daughter he moved away.

The exception to the finding that there was no debt due or liability incurred by Hardison sufficient as a consideration to support his mortgage against creditors, and that it was but a donation to a stranger, raises the only question we care to consider, which is whether there is *any evidence* to warrant a finding in direct opposition to the testimony that there was a contract for services, to secure which the deed was given; that such services were rendered during a period of about twenty months, and had not been paid for. There was some evidence, however, of the poverty of Ellis and as his means of support were dependent upon his labor, that necessity must have forced him to require payment. However weak may be the grounds of such an inference in opposition to the positive testimony offered on this point, its sufficiency to rebut the testi-

mony is not a question to be here considered; but belonging to the court below, is conclusively settled, and we cannot say there is no evi-
(29) dence and that the testimony ought to have been accepted as proof of the facts.

But the matter becomes unimportant in presence of the further finding that the mortgage, whether made on a bona fide liability or not, was made with an intent to hinder, delay and defraud the creditors of the mortgagor, as this would defeat the operation of the conveyance, if known to and participated in by the mortgagee. *Cannon v. Young,* 89 N. C., 264, and cases therein cited.

The defendants insist that no evidence appears of the existence of the vitiating element.

We do not concur in this contention, for there is much evidence tending to prove the fraudulent purpose.

The deed falsely sets out a *present indebtedness* evidenced by a bond alleged to be lost; whereas on the testimony it was to secure wages largely to be rendered in the future. It was executed just before the issuing of the warrants which were followed by judgments and executions under which the sale was made, and after being pressed for payment.

The giving such a security under the circumstances which might utterly fail, and even if intended to provide the means of paying the debts would and must be understood to have been meant to put off and delay the payment, and prevent an early disposition of the property and the appropriation of the proceeds thereto.

There are other evidences of fraud apparent in the concurrent acts of the parties and presented in the proofs, from which the illegal purpose is deduced that tended to show, and was evidence, more or less strong, showing the object and effect of the deed, and of these, as facts, the determination vested in the court below.

These are the prominent rulings pressed in the argument for the appellants, and on which their counsel seem to rely, nor do we discover in the record any error in others.

There is no error, and the judgment must be

Affirmed.

Cited: Bobbitt v. Rodwell, 105 N. C., 245; *Mann v. Allen,* 171 N. C., 222; *S. v. Jackson,* 183 N. C., 700.

(30)

W. F. KORNEGAY v. N. K. EVERETT AND CHARLES KENNEDY.

Equity—Evidence—Mistake of Law—Correction of Deed.

1. Where it is admitted or proved that an instrument, executed in pursuance of a prior agreement, by which both parties meant to abide, is inconsistent with the purpose for which it was designed; or that by reason of some mistake of both parties, it fails to express their intention, a Court of Equity will correct it, although the mistake be one of law.
2. The proof of such mistake must be full and clear—such as would have satisfied a chancellor or Court of Equity under the former practice—before the relief will be administered.

THIS is a civil action, tried before *Merrimon, J.*, upon exceptions to the report of a referee, at September Term, 1887, of WAYNE Superior Court.

It is alleged by the plaintiff that the defendants, N. K. Everett and wife, on 1 October, 1883, executed a mortgage to W. F. Kornegay & Co., conveying in fee certain lots of land described in the complaint, to secure an indebtedness of N. K. Everett to Kornegay & Co., and a steamboat called the "Rough and Ready"; also, that the defendants, Everett and wife, on 28 October, 1881, executed a deed to H. Weil & Bros., conveying to them certain lots described in the complaint, to secure an indebtedness of N. K. Everett to Weil & Bros., and that the plaintiff was the assignee and owner of all the indebtedness secured in those mortgages; that on 26 May, 1884, the defendant Everett executed a deed of trust, in which his wife joined, conveying all his property, including that embraced in the several mortgages, to the defendant, John R. Smith, in trust, after allotting to Everett his homestead and personal property exemptions, to sell and pay the debts owing by him in the order set out in the trust, including the mortgage debts; that some time after the last deed of trust was executed, the plaintiff, being the owner of the larger part of the debts, and the indebtedness to him being (31) secured by the mortgages, an arrangement or settlement between the plaintiff and N. K. Everett and the trustee, was entered into, whereby an unencumbered title in fee to the lots embraced in the mortgages to Kornegay & Co. and to Weil Bros. was to be conveyed to the plaintiff in settlement of the mortgage debts, and he was to surrender said debts and release the mortgage which he held upon the steamboat "Rough and Ready"; that in pursuance of this arrangement, and to carry the same into effect, the plaintiff surrendered the said mortgage indebtedness and released his mortgage on the steamboat, and the defendant, John R.

Smith, trustee, with the concurrence and approval of N. K. Everett, executed two deeds, one dated 29 November, 1884, purporting to convey to the plaintiff the lots conveyed in the mortgage to Kornegay & Co., and the other dated 1 January, 1885, purporting to convey to the plaintiff the lot embraced in the mortgage to Weil Bros., and that the plaintiff took possession of the lots as his property, all the parties believing that the deed of the trustee was a sufficient and proper conveyance to carry out the agreement; that the deeds to the plaintiff were not signed by the defendants, Everett and wife, "by reason of the mistake of the plaintiff and the defendants, in the belief that the trustee was the proper person to convey, and that his deed would convey the unencumbered title in fee."

It is further alleged that the defendant Everett "refuses to abide by said settlement, and to recognize said deeds, and has taken and wrongfully withholds possession of said land from the plaintiff.

The prayer for relief is that the defendant refusing to abide by it, the settlement be set aside, the parties placed in *statu quo,* and that the plaintiff be allowed to foreclose the mortgages.

(32) The defendant Smith, trustee, filed no answer. The defendant Everett answers, denying that the lands referred to were intended to be conveyed to the plaintiff in fee, and says that the only agreement was that Smith, trustee, should execute to the plaintiff a deed, which was done at the time of the agreement, on 29 November, 1884, after which the plaintiff surrendered to the defendant the mortgage upon the steamboat; that the deed was drawn by plaintiff's attorney and accepted by him, knowing well its contents, etc.

By consent, the action was referred to C. B. Aycock, Esq.

On the trial before the referee, the plaintiff Kornegay and the defendant John R. Smith were witnesses on behalf of the plaintiff, and their testimony tended to prove that the deeds made by Smith, trustee, to the plaintiff, were executed in pursuance of a settlement and agreement, by which the plaintiff was to surrender his mortgage on the steamboat and his claims secured by the mortgages; and in consideration therefor Smith, the trustee, was to convey to him a title in fee simple to the lots embraced in the mortgages; that the deeds were executed by Smith, trustee, with the knowledge of the defendant Everett, and with the understanding of all the parties that the deeds would convey a fee simple title unencumbered; that all the parties (Kornegay, Smith and Everett) thought that Smith's deed would convey a good title in fee, and that was the intention of the parties upon which they settled.

"The evidence of both these witnesses" (which is set out in full in the record) "was objected to by the defendants, on the ground that the deeds should speak for themselves, and that it was not competent to show by parol what the parties intended in the execution of the deeds, and if there

was any mistake it was a mistake of law as to the effect of the deeds, without any allegation of a mistake of fact, fraud, undue influence, or other equitable element; and also, that it was incompetent to show by parol an agreement to convey land."

The objection was sustained by the referee, and the evidence (33) was ruled out, and plaintiff excepted.

The case was heard by his Honor upon this exception, who held that "the evidence offered was competent, but that it was insufficient to show a mistake in the execution of the deeds." He thereupon confirmed the report, and judgment was rendered accordingly. The plaintiff appealed.

J. W. Bryan, by brief, for plaintiff.
W. C. Monroe for defendant.

DAVIS, J., after stating the case: The deed executed by Smith, trustee, while purporting to convey an absolute estate in fee in the property to plaintiff, by reason of the reservation of the homestead in the deed of trust to Smith, in fact conveyed an estate subject to the homestead, the defendant Everett and wife not joining the trustee in the execution of the deed to plaintiff, by reason of the mistake of all the parties, in supposing that the deed of the trustee would convey an absolute title, as it was intended it should do.

The plaintiff says that, having surrendered his claims and the mortgages by which they were secured, the defendant refuses to give effect to the agreement, but claims the homestead, and he asks that if the defendant will not comply, it be rescinded.

The questions presented are:

1st. Will the court correct such a mistake of law? and,

2d. If so, was the evidence sufficient to establish the mistake?

The evidence offered by the plaintiff to show the mistake was, upon objection by the defendant, ruled out by the referee as incompetent, but it was held by the court below to be competent, but insufficient. There was no appeal by the defendant from so much of his Honor's ruling as held that the evidence was competent, and it may be that the first question is not necessarily before us in the case on appeal, but as the sufficiency or insufficiency of the evidence would be of no conse- (34) quence if the court had not the power to correct the mistake, and as that was the chief question discussed by counsel, we think it proper that it should be considered.

It is undoubtedly the general rule, as laid down by the *Chief Justice* in *Thomas v. Lines,* 83 N. C., 191, "that a written instrument disposing of property or constituting a contract, cannot be altered, impaired or explained by parol proof of a different purpose or understanding from

that contained in the writing." And it is said by Adams (Equity, sec. 169): "The prima facie presumption of law is, that the written contract shows the ultimate intention, and that all previous proposals and arrangements, so far as they may be consistent with the contract, have been deliberately abandoned. It seems, however, that the instrument may be corrected, if it is admitted or proved to have been made in pursuance of a prior agreement, by the terms of which both parties meant to abide, but with which it is in fact inconsistent; or if it is admitted or proved that an instrument intended by both parties to be prepared in one form, has by reason of some undesigned insertion or omission, been prepared and executed in another," etc.

What was the document intended to be? If it is admitted, or, as was said in *Jones v. Perkins,* 1 Jones Eq., 337, established by clear and convincing proof, that by mistake of the parties (and it must be the mistake of both parties if the equity rests upon mistake) the instrument fails to express the intention of the parties, it will be corrected, and this will be done whether the mistake be one of fact or of law, as is clearly shown in *McKay v. Simpson,* 6 Ired. Eq., 452; *Hart v. Roper,* 6 Ired. Eq., 349; *Womack v. Eacker,* Phil. Eq., 161; *Lynam v. Califer,* 64 N. C., 572; *Lutz v. Thompson,* 87 N. C., 334.

The question is discussed at length in *Benson v. Markol,* decided in the Supreme Court of Minnesota in May, 1887, published in Vol. 36, page 44, of the Albany Law Journal, and after a review and
(35) citation of a great number of authorities, it is said: "A careful consideration of the authorities has led us to the conclusion that the power of Courts of Equity to afford relief from the consequences of the mutual mistake of parties to written instruments is not strictly limited to mistakes of fact, but extends also to mistakes of law."

The defendant relied with confidence upon the decision of this Court in *Sandlin v. Ward,* 94 N. C., 490, in which it is said: "A Court of Equity never corrects mistakes of law, save in exceptional cases, where the mistake is mixed up with other equitable elements," etc.

Of course a Court of Equity will only correct a mistake when *equity* requires it.

Was there such an equitable element in this case?

If the plaintiff held a security for his debt, which was discharged in pursuance of the agreement, and with the understanding and intention of both parties that it should be discharged upon the execution of the deed conveying the lots contained in the deed from Smith, trustee, to the plaintiff, free from all incumbrance, and it was intended and thought by all the parties that such a title was conveyed, then would it not be manifestly inequitable for the defendant to retain the benefit derived from the

release of the debts and surrender of the mortgages by the plaintiff, without giving full effect to the agreement, by securing to the plaintiff the title in fee to the land conveyed to him by the trustee? Would not the plaintiff have a right to have the contract rescinded and to be relegated to his original security?

Assuming the facts to be as alleged, the defendant cannot assert any claim to the property conveyed by the deed of his trustee, adversely to that deed, without restoring to the plaintiff the security lost by him in consequence of the acceptance of that deed.

If it be said that, peradventure, the wife of the defendant will (36) not join in the execution of such an instrument as will carry the agreement into effect, the answer is to be found in *Welborn v. Sechrist,* 88 N. C., 287, and he must make reasonable effort to comply with the agreement.

There was no error in ruling that the evidence was competent.

As to the sufficiency of the evidence to correct the mistake, the proof must be full and clear and not merely preponderant, but such as would have satisfied a chancellor or Court of Equity under the old practice. *Loftin v. Loftin,* 96 N. C., 94, and cases cited.

The only witnesses were the plaintiff and the defendant Smith, the trustee; there was no conflicting testimony, and if these witnesses are to be believed, the deed from Smith, trustee, to the plaintiff was intended to convey a title in fee unencumbered, and it was thought by all the parties at the time that it did convey such a title, so that, nothing else appearing, it was sufficient; but the referee having excluded this evidence, and thus rendering it unnecessary for the defendant to offer any evidence controverting, as his answer does, the facts as testified to, he has a right to be heard in denial, and this case will be certified to the end that it may be further proceeded with in accordance with this opinion.

Error.

Cited: Morisey v. Swinson, 104 N. C., 554; *Pollock v. Warwick, ibid.,* 641; *Berry v. Hall,* 105 N. C., 165; *White v. R. R.,* 110 N. C., 461; *McMillan v. Baxley,* 112 N. C., 586; *Banking Co. v. Morehead,* 124 N. C., 624; *Warehouse Co. v. Ozment,* 132 N. C., 847; *Condor v. Secrest,* 149 N. C., 204; *Ellett v. Ellett,* 157 N. C., 163; *Pelletier v. Cooperage Co.,* 158 N. C., 406; *Montgomery v. Lewis,* 187 N. C., 579.

(37)

JOHN C. JARVIS v. C. L. DAVIS AND J. E. GHERKIN.

Construction of Deed—Descent—Condition.

Where J. conveyed a tract of land to his daughter M. "and the lawful heirs of her body. . . . To have and to hold to her the said M., her natural life and her children; should she die not leaving any children, then to her husband D., his natural life. . . . *Provided*, that the said D. keeps the fences and ditches in good repair," and M. died leaving one child surviving, but which died without issue: *Held*,

1. That M. took an estate for life and her child the remainder in fee, and upon the death of the latter the estate vested in D. as the heir of the child.

2. That the condition in the proviso attached to the life estate of D., of which he would have been seized upon the death of his wife without issue; but as that contingency had not occurred, it was inoperative, and D. held the estate as the heir of the child, unaffected by the condition.

CIVIL ACTION, tried before *Avery, J.*, at February Term, 1887, of BEAUFORT Superior Court.

It appeared that the plaintiff, John C. Jarvis, and his wife, Nancy, executed their deed of conveyance (the wife joining only for the purpose of barring and releasing her right of dower and homestead) to their daughter, Mary L. Davis, wife of the defendant, C. L. Davis, and the parts thereof material to a proper understanding of the opinion of the court are as follows:

"This deed, made this 5 May, A.D. 1881, by John C. Jarvis and Nancy Jarvis, his wife, of the first part, to Mary L. Davis, wife of C. L. Davis, of the second part, both parties of the county of Beaufort and State of North Carolina: *Witnesseth*, That the said John C. Jarvis and Nancy Jarvis, parties of the first part, for and in consideration of the natural love and affection they have for their daughter, Mary L. Davis, party of the second part, and in further consideration of the sum of
(38) one dollar to them paid by said Mary L. Davis, party of the second part, the receipt of which is hereby acknowledged, have given, granted and conveyed, and by these presents do give, grant and convey unto the said Mary L. Davis, wife of C. L. Davis, party of the second part, and the lawful heirs of her body, a certain tract or parcel of land lying and being in the county of Beaufort and State aforesaid, on the west side of Pantego Creek, it being a part of the Malynes Patent, adjoining the land of the Whitley heirs: Beginning, etc. . . .

"To have and to hold the aforesaid tract of land and all privileges and appurtenances thereto belonging, except firewood and timber, a sufficient

quantity for the use and benefit of the parties of the first part and their assigns to the use of the balance of the homestead, and the privilege of draining down and through the lead ditch that passes through the above-described lands, to her, the aforesaid Mary L. Davis, wife of C. L. Davis, party of the second part, her natural life and her children. Should she die, not leaving any children, then to her husband, C. L. Davis, his natural life, if he be the longest liver of the two: *Provided,* that the said C. L. Davis keeps the fences and ditches in good repair and condition.

"And after the decease of the aforesaid parties of the second part, and there not being any living issue of the said Mary L. Davis, then in that case, the aforesaid described tract of land to go to the last will and testament of said John C. Jarvis, one of the parties of the first part."

The complaint, among other things, alleges in substance:

"That after the making of the deed Mary and Caleb took possession of the land; that Mary died, leaving a child surviving her who afterwards died without issue; that after her death Caleb continued and now is in the possession, claiming under the deed; that at and for a long time before the making of the deed there were and had been fences on and around the land, which at the making of the deed were in good order, etc., and there were also and had been divers ditches (39) on the land, which were necessary for the draining as well of those as of other lands, of which plaintiff at and after the making of the deed was and still is seized and possessed, and which adjoin the lands conveyed; the surplus water which falls upon these last mentioned lands at the making of the deed, and for a long time before, had been accustomed to flow through said ditches and ought rightfully so to do; that after the death of Mary and her child, the defendant Caleb wilfully, unreasonably and for a long time permitted the fences and ditches to get out of good repair and condition, and so to remain for a long time, and failed and neglected to clean out and repair them as was essential and necessary for the proper cultivation of the lands, and the ditches and fences were in the bad condition aforesaid at the commencement of this action; that the said Caleb had sold to defendant Gherkin a large part of the timber on the land, and Gherkin at and before the commencement of this action was in the actual possession of the land described in section 2 hereof, or of some part thereof, as tenant of Caleb, or in some way for and under him; that plaintiff repeatedly requested said Caleb to clean out the ditches and repair the fences and put the same in good order, but he constantly failed and neglected to do so; that in the year 1884, defendant Gherkin, by the license of defendant Caleb, and under his direction, cut and carried from the land a large quantity of timber of great value, so that not enough was left thereon for the use of the plaintiff, as owner

of the rest of the original tract as reserved by the deed; that by reason of the premises, the said Caleb and his assignee Gherkin, have forfeited all their several estates in said lands, and that the same have ceased and determined, and that plaintiff is entitled to the immediate possession thereof, and plaintiff has repeatedly demanded of defendants
(40) that they give him possession, which they have refused and still refuse to do."

The defendants denied the material allegations of the complaint.

A number of witnesses were sworn and examined on the trial on the part of the plaintiff, and gave evidence tending to support the allegations of the complaint.. The plaintiff having closed his testimony, the judge announced that if the jury should find all the issues for the plaintiff he could not recover.

Thereupon the plaintiff, in submission to the opinion of the court, suffered a judgment of nonsuit and appealed.

Wm. B. Rodman, Jr., and Geo. H. Brown, Jr., for plaintiff.
J. H. Small for defendants.

MERRIMON, J., after stating the case: We are of opinion that in no proper view of the complaint and the deed to be interpreted, taken in connection therewith, is the plaintiff entitled to recover, and therefore his assignment of error is groundless.

It appears from the premises and the *habendum* clause of the deed, that the chief and leading purpose of the maker of it was to make a provision for his married daughter therein named, and such child or children as she might at her death leave surviving her. The words "and the lawful heirs of her body," appearing in the premises, under the statute (The Code, sec. 1329), are to be taken as implying her *children,* nothing to the contrary appearing, and nothing does so appear. The *habendum* clause expressly provides that she shall take an estate for her own life, and in legal effect, with remainder in fee to her children surviving her. Although it is not in terms provided that the children shall have the remainder in fee simple, the statute (The Code, sec. 1280), enacted before the deed was executed, provides that "when real estate shall be conveyed to any person, the same shall be held and construed to be
(41) a conveyance in fee, whether the word 'heirs' shall be used or not, unless such conveyance shall in plain and express words show, or it shall be plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity."

There is no provision in the deed that in terms or effect fairly indicates a purpose to convey to the surviving children a less or other estate

than the remainder in fee. Indeed, no provision is made to apply beyond surviving children. Hence, the daughter having died leaving a child surviving her, the deed operated to convey that estate to the surviving child, thus serving the chief purpose of its maker.

The deed, however, further provides, that the husband named in it shall have an estate in the land for his own life, if he should survive his wife and the latter should die leaving no children surviving her, "provided that the said C. L. Davis (the husband) keeps the fences and ditches in good repair and condition."

This condition, if it be such, is not expressed with clearness and precision, but treating it as sufficient in substance as a condition that might be effectual, it applied only to the life estate provided for the husband, and not to the estate of the wife and children. It looked to the return of the land to the grantor in good condition as to the fences and ditches. He did not contemplate or expect its return, if his daughter should die leaving children surviving her.

The condition does not refer in terms or by necessary implication to the estate of the wife and children by an unusual condition, not dependent on their acts, but the acts of one whom they might not be able to control. It appears in the separate and distinct clause of the deed which provides a life estate in the land for the husband, and clearly applies to it. Moreover, it is a condition subsequent and intended to defeat the estate. Such conditions are not favored by the law, and are construed strictly. It should appear clearly that they apply to the estate intended to be affected and defeated by them. They (42) cannot be extended unless by the strongest implication or necessary inference.

The contingency upon the happening of which the husband would have taken a life estate for his life in the land under the deed never happened, and can never happen, because the wife died leaving a child surviving her. This child, as we have seen, took the estate in remainder in fee simple, unaffected by the condition mentioned.

Nor did the contingency happen in which it was provided that the tract of land should "go to the last will and testament of said John C. Jarvis" (the father of the grantor), or revert to him, because the husband and wife did not both die, the latter leaving no surviving issue. She died leaving a child surviving her, who took the absolute estate in remainder as indicated.

It appears that the child afterwards died leaving "no issue capable of inheriting, nor brother, nor sister, nor issue of such," but leaving its father surviving it. The inheritance vested in the latter under the Statute of Descents (The Code, sec. 1281, Rule 6). And for the reasons already

stated, he thus took the inheritance unaffected by the condition mentioned. By virtue of the statute, he took under his deceased child, and he did not take under the deed. As the estate of the child was not affected by the condition in its lifetime, so it was not after it came to the father, under the statute.

Affirmed.

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(43)

J. W. EVANS v. J. W. ETHERIDGE ET AL.

Deed—Registration—Probate—Commissioner of Affidavits—Purchasers—Creditors.

The registration of a deed or other instrument upon proof of execution before a commissioner of affidavits, without the adjudication of the clerk of the Superior Court having jurisdiction, is invalid as against creditors and purchasers for value. The distinction between probates by clerks of the Superior Courts and commissioners of affidavits pointed out.

CIVIL ACTION, tried before *Avery, J.*, at the Spring Term, 1887, of the Superior Court of the county of DARE.

By consent a trial by jury was waived and it was agreed that issues of fact as well as of law should be tried by the court.

The material facts are in substance, that on 21 May, 1886, the defendants, J. W. Etheridge and his wife, then and still residents of the District of Columbia, executed a deed of trust to W. T. Brinkley conveying to him the property therein and for the purposes named.

The deed of trust was delivered to the register of deeds for the county of Dare and registered, and the following is the certificate of probate and the certificate of registration:

DISTRICT OF COLUMBIA—County of Washington—*ss.*

I, Sam'l C. Mills, a Commissioner of Deeds and Affidavits of the State of North Carolina, resident in the District of Columbia, do hereby certify that J. W. Etheridge and Carrie F., his wife, personally appeared before me this 22 May, 1886, and acknowledged the due execution of the foregoing deed. The said Carrie F. Etheridge, being by me privately examined separate and apart from her said husband touching her voluntary execution of the same, doth state that she signed the same
(44) freely and voluntarily, without fear or compulsion of her said husband or any other person, and that she doth still voluntarily assent thereto; and at the same time before me personally appeared

W. T. Brinkley, the within mortgagee, and made oath in due form of law that the consideration in the foregoing is true and bona fide as therein set forth.

Witness my hand and seal this 22 May, A.D. 1886.

SAM'L C. MILLS,
Commissioner of Affidavits, etc.,
For the State of North Carolina,
District of Columbia.

[Com's Seal.]

Received 26 May, 1886; registered in Book B, pages 389 and 390, 14 June, 1886.

The above deed of trust was registered in Book B, page 380, 5 June, 1886, without probate, by advice of Judge Albertson.

I hereby certify the foregoing to be a true copy of deed of trust as recorded in this office. This 6 November, 1886.

G. B. BLIVEN,
Register of Deeds.

The summons in this action was issued on 28 May, 1886, by J. W. Evans, the plaintiff, who was on 21 May, 1886, and has been continuously since, clerk of the Superior Court of Dare County, and the same day that the summons was issued a writ of attachment was issued by the plaintiff in this action, which was levied 31 May, 1886, and the property conveyed in the deed of trust. It was admitted that the account sued on by the plaintiff is just and still due to him.

W. T. Brinkley died on 4 December, 1886, and soon thereafter (45) the defendant, J. W. Albertson, qualified as his administrator, and on 21 December he was regularly appointed trustee in the place of the said W. T. Brinkley, deceased, to execute the deed of trust.

Upon the facts found it was, among other things, adjudged that the "deed of trust constitutes a lien upon the property therein conveyed from 26 May, 1886, and that said lien is superior to the lien of the attachment issued in this cause."

It was also adjudged that the plaintiff recover of the defendant Etheridge the sum of $441.11, with interest on $415.20 from 9 May, 1887, till paid, together with costs, to be paid from the proceeds of the sale of the property in controversy, after first paying the debt secured by the deed of trust, charges, etc.

To so much of the judgment as declared the deed of trust a lien upon the property from 26 May, 1886, and first to be paid, the plaintiff excepted and appealed.

E. F. Aydlett for plaintiff.
E. C. Smith for defendant.

DAVIS, J., after stating the case: Though the case states that the summons and writ of attachment were issued by the plaintiff, who was the clerk, no question is raised as to their validity, that having been settled on a former appeal (96 N. C., 42), and the only question presented for our consideration is: Was the deed from Etheridge and wife to W. T. Brinkley so proved and registered as to give it validity against creditors of the bargainor? The appellee says it was; the appellant says it was not, and insists that an adjudication by the clerk of the Superior Court that the deed was duly acknowledged or proved was an essential prerequisite to a valid registration. He further insists that Samuel C. Mills had ceased to be a Commissioner of Affidavits, etc., for the State of
(46) North Carolina on 18 January, 1886, and was not such on 22 May, 1886, and that he had no authority to take the acknowledgment of deeds, etc.; and for proof of this he refers to the lists of Commissioners of Affidavits, etc., as printed in the volumes of the Acts of 1885 and 1887, as required by sections 636 *et seq.*, of The Code, which show that the said Mills was appointed on 18 January, 1884; that his term of office expired on 18 January, 1886, and that he was not thereafter appointed.

In addition to the requirement that the list of Commissioners, etc., be printed with the Acts of the General Assembly, section 634 makes it the duty of the Secretary of State forthwith, upon the appointment of such commissioners, to certify the same to the several clerks of the Superior Courts of the State and in like manner to certify to said clerks all removals of commissioners, and of all whose commissions have expired.

If the appellant is correct in either of these positions the judgment below is erroneous.

Section 1254 of The Code provides that "No deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors, . . . but from the registration of such deed of trust or mortgage in the county where the land lieth," etc.

It is necessary that all deeds, to be valid as against creditors or purchasers for value, etc., shall be proved in some of the modes prescribed by law and registered as prescribed. One of the modes is found in section 1250 of The Code, and is as follows: "Where the acknowledgment or proof of any deed or other instrument is taken or made in the manner directed by the laws of this State before any commissioner of affidavits for the State of North Carolina, appointed by the Governor thereof, in any of the states or territories of the United States or in the District of Columbia, and where such acknowledgment or proof is certified by such commissioner, the clerk of the Superior Court having juris-
(47) diction, upon the same being exhibited to him, shall ajudge such

deed or other instrument to be duly acknowledged or proved in the same manner as if made or taken before him."

It is insisted by the appellees that the deed in question was proved in compliance with this section before a commissioner of affidavits, and that the adjudication of the clerk is only directory and not an essential prerequisite to registration, and that, having been registered upon the certificate of the commissioner, though without any adjudication and order of registration by the clerk, it is valid, and the purpose of registration being to give notice, the spirit and purpose of the law is fully met. We are referred to a number of cases (*Young v. Jackson,* 92 N. C., 144; *Holmes v. Marshall,* 72 N. C., 37, and other cases) in which it was held that "the provisions requiring the certificate of probate by the probate judge of a county other than that of registration to be passed on by probate judge (the clerk) of the county of registration, is directory, and that a registration upon a probate which has not been so passed on is not void." The analogy between those cases and that before us is lost in the fact that the functions of the clerk are broader than those of the commissioner. He not only takes the proof or acknowledgment, but *adjudges* the fact "of due execution," whereas the commissioner of affidavits, and perhaps others, only take and certify the acknowledgment or proof.

"Probate of a deed is taken," says *Pearson, J.,* in *Simmons v. Gholson,* 5 Jones, 401, "by hearing the evidence touching the execution; *i. e.,* the testimony of witnesses or the acknowledgment of the party, and from that evidence *adjudging the fact* of its execution.

"Where the evidence is offered to the court the entire probate is taken by it, but where the agency of a commissioner is resorted to, a part of the probate, *i. e.,* hearing the evidence, is taken by him and certified to the court, and thereupon the probate is perfected by an adjudication, that the certificate is in due form and that the fact of the (48) execution of the deed is established by the evidence so certified."

In cases of probate before clerks who can both take the evidence and adjudicate the fact, it has been held that, though it ought not to be omitted, the *fiat* of the clerk of the county of registration is not an absolute prerequisite to a valid registration, but the validity of the registration in such cases rests upon the fact that there has been an adjudication of "due execution" by an officer competent to both hear evidence and adjudicate.

The register has no authority to put the deed upon his books unless proved and so adjudged in some one of the modes prescribed by the statute. "The probate is his warrant for doing so," and if registered without this warrant it does not create such an equity in the mortgagee or trustee as to affect creditors or subsequent purchasers for value.

It was so adjudged in *Todd v. Outlaw,* 79 N. C., 235, and we refer to that case and the authorities there cited.

We conclude that the deed from Etheridge and wife to Brinkley was registered without proper warrant therefor, and that such registration did not give it validity as against the plaintiff, who was a creditor.

This renders it unnecessary for us to consider the second point made by the appellant.

There is no error.

Cited: Devereux v. McMahon, 102 N. C., 289; *Buggy Co. v. Pegram, ibid.,* 544; *White v. Connelly,* 105 N. C., 68, 69; *Duke v. Markham, ibid.,* 138; *Lewis v. Roper,* 109 N. C., 20; *Johnson v. Lumber Co.,* 147 N. C., 250; *Cozad v. McAden,* 148 N. C., 12; *S. v. Knight,* 169 N. C., 344; *Fibre Co. v. Cozad,* 183 N. C., 604; *McClure v. Crow,* 196 N. C., 660.

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(49)

E. M. SHORT v. W. A. BLOUNT.

Bill of Exchange—Order—Draft—Acceptance—Contract.

Where upon the presentation of an order for the payment of money the drawee declined to accept it, alleging that the drawer had overdrawn, but retained the order, and subsequently said, "I think there will be money enough—it will be all right—I will pay it," but there was no written acceptance: *Held,* that this conduct amounted to an acceptance in law.

CIVIL ACTION, tried at February Term, 1887, before *Avery, J.,* of BEAUFORT Superior Court.

This action began before a justice of peace to recover the money specified in the order sued upon, of which the following is a copy:

"20 APRIL, 1885.

"Dr. W. A. Blount will please pay E. M. Short $58.55 for value received, and oblige. J. E. LORDLEY."

It is alleged that the defendant, on whom the order was drawn, verbally accepted and agreed to pay the same.

This the defendant denied.

The justice of the peace gave judgment in favor of the defendant, and the plaintiff appealed to the Superior Court.

In the latter court, on the trial, it was in evidence that the firm of Lordley & Gardner, contractors, had contracted in writing to furnish all material at their own expense and build and complete a house for defendant; that defendant was to pay so much therefor at different stages of the work, if done as per contract and completed; that this order was drawn and given to Short by Lordley for material Lordley & Gardner used in the building.

E. M. Short testified that he presented the order and defendant (50) would not pay it, complaining that contractors had overdrawn and there was not that due them; and they were not progressing and doing their work according to contract, and said, "Let me see Lordley first"; next day defendant told plaintiff that he thought he would have to lose $46; about ten days after defendant said to plaintiff, "I think there will be money enough to pay you, and it will be all right, and I will pay it"; the next Saturday after date of order witness sent Hancock to defendant; he did not get the money; some time in July or August defendant said he could not pay the order; the order was left with defendant by witness when first presented and retained by him, with plaintiff's consent, until shortly before the magistrate's trial.

Hancock testified that at Short's request he went to see defendant, and presented an order for laths for $7, which Short had on defendant, and which Short had delivered to Lordley on defendant's special order; that defendant paid this order, and witness asked him about the other order, when he said "he would not pay it that afternoon, but tell Short it is all right, and I will pay it," which reply witness communicated to plaintiff.

This evidence was denied by defendant, who testified that he had no funds of Lordley, and that the contractors never completed the contract.

Plaintiff testified that according to his calculation there ought to have been enough money in Blount's hands to pay the order at its date. The plaintiff requested the court to charge the jury:

"1. If the defendant, on being presented by Hancock, plaintiff's agent, with this draft, conveyed the impression such as to satisfy an intelligent man that he would pay this draft, and this order was accepted by the plaintiff, the defendant is liable.

"2. If the defendant, the drawee, retained the order or draft (51) from the day when it was presented, 20 April, 1885, and his acts and conduct indicated an intention to comply with the request of drawer; or if defendant, by telling plaintiff he would pay it, or by message sent by Hancock, justified plaintiff in drawing conclusion that drawee intended to accept it, should be regarded as an acceptance and defendant is liable."

The court declined these instructions and instructed the jury as follows:

"1. That if the jury believe the testimony of plaintiff, defendant did not accept the draft when first presented and the only question arising out of his testimony is whether on the next day the defendant said to plaintiff (as testified by plaintiff) 'I think there will be money enough to pay it, and it will be all right, and I will pay it,' and whether if he did use those words it amounted in law to an acceptance. The court holds this language is too uncertain and equivocal to amount to an acceptance. The court also instructs you—

"2. That the language alleged to have been used by defendant when plaintiff's agent, Hancock, demanded payment of the order, to wit: 'I cannot pay it (meaning the order sued on), but tell Mr. Short (the plaintiff) that it is all right, and I will pay it,' does not amount to an acceptance in law on the part of the defendant."

Plaintiff excepted to the refusal of the court to instruct the jury as requested, and to the instructions given in lieu.

The jury found the issue submitted in favor of defendant.

There was judgment in favor of defendant, from which plaintiff appealed.

J. H. Small for plaintiff.
Geo. H. Brown, Jr., for defendant.

(52) MERRIMON, J., after stating the case: By the acceptance of a bill of exchange is meant the act or declaration by which the drawee therein named evinces—makes manifest—his assent and agreement to comply with and be bound by the request and order contained in the bill directed to him according to its tenor, if the acceptance be absolute. It is in substance an agreement to pay the sum of money specified in the bill as therein directed. Chit. on Bills, 281; Story on Bills of Ex., sec. 238; 1 Par. on Notes and Bills, 281.

No particular words or form of words or manner of expression are necessary to a valid acceptance, but it should generally be in writing, because this is orderly, promotes the convenience of business transactions, renders them more certain, and facilitates the proof of acceptance.

Writing, however, is not essential in the absence of statutory legislation requiring it; the acceptance may be verbal or in writing; either method is valid; but it must appear by express words or reasonable inference. The intention of the acceptor to pay the bill must clearly appear in whatever manner evinced.

Usually the drawee makes his acceptance by writing his name across the face of the bill, and just over it the word "accepted," but it may be

made by any word or phraseology implying substantially the same thing. Any words used by the drawee to the drawer or holder, or the agent of either, which by reasonable intendment signify that he honors the bill—will pay it—will amount to an acceptance. And though he may not on presentment of the bill accept at once, if he afterwards does so, this will be sufficient to bind him, although the holder would have the right to insist upon prompt acceptance according to the terms of the bill.

Now if the evidence produced on the trial be accepted as substantially true, we think that what the defendant said and did was an acceptance of the order in question. He at first, in the month of April, refused to pay it on the ground that the contractors had "overdrawn"; he took the order and kept it until shortly before the action began (53) on 8 August, 1885; he said, having in view some disposition of it, "let me see Lordley first."

About ten days after first seeing the order, having it in his possession, he said to plaintiff: "I think there will be money enough to pay you, and it will be all right, and I will pay it." Afterwards the plaintiff sent to the defendant for the money; it was not paid. After that time the plaintiff again sent his agent, who asked the defendant "about the order"—the one in question. The latter said "he would not pay it that afternoon, but tell Short (the plaintiff) it is all right, and I will pay it." The agent so informed the plaintiff.

The defendant thus cautiously took ample time to examine the state of the drawer's account with himself, and to determine whether or not he would agree to pay the order.

After such consideration—understanding the whole matter—it must fairly be so taken—he said, without qualification, to the plaintiff's agent: "Tell Short it (the order) is all right, and I will pay it."

The defendant was fully advised; he must have understood the purport of his language; it was plain, direct and positive, and an absolute promise to pay the order. He could scarcely have employed more unequivocal or more pertinent words. If he made the promise to pay, he accepted the order and impliedly admitted that he had money of the drawee to pay it. The promise was to pay the order on the day next after the promise; he said he would not pay it the afternoon of the day he made it.

The defendant testified that he did not make the promise last mentioned. Whether he did or not was a question of fact for the jury to determine. The court instructed the jury that the promise was not an acceptance if made. We think it was, if the evidence, taken as a whole, were true.

There is error, and the plaintiff is entitled to a new trial.

Error.

(54)

HENRY A. WINDLEY AND SAMUEL WINDLEY, EXECUTORS OF R. C. WINDLEY, v. R. T. BONNER, ADMINISTRATOR, ET AL.

Assignment—Estoppel—Revival of Judgment.

Where the assignee of a judgment which had become dormant instituted in his own name, as assignee, proceedings for leave to issue execution, to which the defendant was a party but made no opposition, and the leave was granted, the defendant and those claiming under him were concluded by those proceedings from denying the assignment.

CIVIL ACTION, tried before *Avery, J.*, at May Term, 1887, of the Superior Court of BEAUFORT County.

The complaint alleges the plaintiff's testator (who died since the commencement of this action) to be the owner of a certain judgment recovered in the Superior Court of Beaufort, at Fall Term, 1869, by Samuel Windley, administrator of William S. Cordon, against Benjamin F. Tripp and William H. Trip, in the sum of two hundred dollars, with interest from 21 May, 1850, and costs, the issue of numerous executions to enforce payment thereof; the death of said William H., leaving a will in which he devises the land described in the complaint to the defendant, Araminta, his widow, with the proviso that she pay all his debts; her neglect and refusal to make such payments, and the insufficiency of the personal estate in the hands of the defendant, R. T. Bonner, administrator with the will annexed, for their discharge. The other defendants are the heirs at law of the testator, and the object of the action is, after laying off the exemption, to have the excess sold and the proceeds applied in discharge of the indebtedness.

The answer of the defendants, while admitting many of the plaintiffs' allegations, sets up divers defenses, and among them denies the assignment of the debt due on the judgment, or that the plaintiffs have any right or claim thereto if in fact it has any validity. This
(55) denial of the transfer raises the only issue upon the trial of which the alleged erroneous ruling was made, and which alone on the plaintiffs' appeal comes up for review in this Court. In support of their claim to the fund the plaintiffs introduced the following documentary proofs in the course of the proceedings in the former suit, and the action of the court upon them:

Samuel Windley, administrator of W. S. Cordon, deceased, having filed his petition for the sale of notes, judgment and accounts belonging to the estate of said intestate, and it appearing that the said chose in

action cannot be collected by due course of law, it is therefore ordered by the court that the said administrator advertise and sell said notes according to law. 2 March, 1874.

GEO. L. WINDLEY,
Probate Judge.

R. C. WINDLEY, Assignee of Samuel Windley, Administrator of Wm. S. Cordon, deceased,

v.

B. F. and W. H. TRIPP.

I. R. C. Windley, being duly sworn, deposes and says that he is the owner of the above-entitled judgment by purchase at a public sale.

II. That said judgment was granted at Fall Term, 1869, for $200, with interest from 21 May, 1860, and $16.90 costs, and that no part thereof, to the best of affiant's knowledge and belief, has been paid.

That said judgment is docketed in the Superior Court of Beaufort County. R. C. WINDLEY.

Sworn to and subscribed before me on this 24 July, 1861.

JNO. G. BLOUNT, *Clerk.*

To WM. H. TRIPP, ESQ.:

Take notice that the undersigned will move the Superior Court (56) of Beautfort County on the 4th Monday in January, 1876, for leave to issue execution in the above-entitled judgment. Said motion will be made on the affidavits hereto annexed.

R. C. WINDLEY.

Executed by del. copy to W. H. Tripp.

F. J. SATCHWELL, *Sheriff.*

It appearing to the court that personal service of the notice herein has been served on W. H. Tripp, and no answer being made, it is, on motion, ordered that the plaintiff have leave to issue execution against W. H. Tripp in this action.

W. A. MOORE, *Judge.*

The court being of the opinion that the evidence thus produced was not sufficient to support the alleged assignment, the plaintiffs, in deference thereto, submitted to a nonsuit and appealed.

W. B. Rodman, Jr., and Geo. H. Brown, Jr., for plaintiffs.
C. F. Warren and J. H. Small for defendants.

SMITH, C. J., after stating the case: Previous to the recent changes in the mode of procedure, the assignee of the subject-matter of the action, if capable of legal transfer, could not be substituted in place of the plaintiff, and in his own name prosecute the action. If assignable only in equity, the action proceeded as if no such transfer had been made, but for the use of the assignee.

It is now otherwise, and by virtue of section 188 of The Code, and as a consequence of the union of legal and equitable remedies in a single procedure, the action may "be continued in the name of the
(57) original party," or by the consent of the court the assignee may be substituted in his place. When the substitution is made the assignee becomes thenceforth a party to the record, and prosecutes the suit upon the same cause of action as succeeding to it. If the plaintiff died and the cause of action survived, his personal representative could take his place, and the cause was retained in the court for two terms for the application to be made. Rev. Code, ch. 1, sec. 1.

This could be done by the issue of a *scire facias* at the instance of the defendant against or to such representative, or the latter could be made a party by motion, as is pointed out and explained by *Ruffin, C. J.*, in *Borden v. Thorpe,* 13 Ired., 298.

The plaintiff claiming the debt reduced to judgment and unpaid, after notice to the administrator of the debtor of his intended motion, and upon his own affidavit of the assignment, and without any opposition, obtained leave to sue out execution in his own name, as owner of the judgment, which order at the same time restored life and activity to the dormant judgment. The notice was proper in this case, since the action had been prosecuted to judgment, and the defendant is not chargeable with knowledge of what transpires afterwards in the proceeding to enforce it.

The adjudication upon the plaintiff's motion by which he is made a party plaintiff of record in the action is conclusive of his right to proceed, as proposed, in the enforcement of the judgment against the real estate, and indeed it is not material to the administrator who receives the money, so that the debt is satisfied and the judgment discharged. If there has been no transfer, the money may be claimed by the original party, but the right cannot be contested by the debtor who has had his day in court, and has, by his own negligence, failed to avail himself of it.

There is error, and the judgment is reversed.

Error.

(58)

D. H. STEVENSON AND H. SLINGHUFF v. THOS. FELTON ET AL.

Appeal—Trial by Jury—Reference—Client and Attorney.

1. Where the parties to an action have once waived a trial by jury and selected another mode of trial, neither can afterwards, as a matter of right, demand a jury trial; nor has the court, against the will of either party, the discretion to set aside the agreement for a reference.
2. The consent to waive a jury trial may be made by counsel without special authority.
3. The refusal of the judge to pass upon the report of a referee under a consent reference, as also his order, without consent of both parties, striking out the reference, is a ruling affecting a substantial right, and will be reviewed upon appeal.

CIVIL ACTION, tried before *Shipp, J.*, at February Term, 1888, of WILSON Superior Court.

In August, 1882, the plaintiffs were partners doing business in the city of Baltimore, and on the 23d of that month sold and delivered to the defendants Felton & Scarboro goods and merchandise to the amount of $518.05, which sum they promised to pay, but no part of which has been paid.

On 21 December, 1882, the defendants Felton & Scarboro made an assignment to the defendant Woodard of their entire stock of goods, etc., in trust to pay the debts of the firm, which are divided into two classes, the debt due to the plaintiffs being in the second or unpreferred class.

On the same day the defendant Felton conveyed to the defendant Woodard his entire real and personal estate to be held by him in trust for the wife of the said Felton, in the manner stated in the said deed, which is set out in the pleading.

The plaintiffs allege that the defendant Scarboro has no estate whatever, and that the deed executed by Felton to Woodard, trustee, etc., was made by him with the purpose and intent "to put his said property beyond the reach of his creditors and enjoy the same for his (59) own use and comfort," and they ask judgment for the amount due to them, etc., and among other things that the deed from Felton to Woodard, trustee, be declared fraudulent and void as to them, etc.

The defendants answer admitting the debt, and that it has not been paid, but denying the other allegations of the complaint, and averring the bona fides of the deed of trust and setting out in detail the consideration upon which it was made.

At Fall Term, 1886, the following order, signed by counsel for plaintiffs and defendants, was made:

"By consent of counsel this cause is referred to W. R. Allen to decide all issues therein under the Code."

At the Fall Term, 1887, the referee filed his report and the defendants filed a number of exceptions thereto, all of which appear in the record.

The plaintiffs' motion was that the report of the referee be confirmed. The court expressed the opinion that the pleadings raised issues involving questions of fraud, and that the cause was improperly referred, and thereupon denied the motion, declined to pass upon the exceptions and rendered the following judgment:

"This cause coming on to be heard upon the report of the referee, and the court being unwilling to proceed to judgment upon the report, denied a motion to confirm said report, and ordered and adjudged, upon motion of John E. Woodard, counsel for the defendants, that the order of reference heretofore made be stricken out, and that issues be formulated from the pleadings, to be submitted to a jury."

The plaintiffs excepted for that:

"1. The court committed error in denying the motion to confirm the report.

"2. The court committed error in declining to hear, pass upon and overrule the exceptions filed by the defendants.

(60) "3. The court committed error in striking out the consent reference heretofore made in this cause, and submitting the cause to a jury.

"4. The court committed error in holding that there were any issues to be submitted to a jury, whereas it appeared by the report of the referee that the defendants demurred to the plaintiff's evidence, and thereby no questions of fact were raised.

"5. The court committed error in declining to hold that, upon the testimony, the plaintiffs were entitled to recover."

Exceptions overruled. Plaintiffs appealed.

F. A. Wooward for plaintiffs.
No counsel for defendants.

DAVIS, J., after stating the case: Section 420 of The Code provides that "all or any of the issues in the action, whether of fact or of law, or both, may be referred upon the written consent of the parties, except in actions to annul a marriage or for divorce and separation."

This action does not come within either of the exceptions. It was referred "by consent" in writing, signed by the counsel of plaintiffs and

defendants, and there is nothing in the character of the action or of the issues involved to invalidate the reference. We are not aware of any case in which a reference under The Code was held to be improper because questions of fraud might be involved.

Many such references have been made and questions of fraud passed upon by the referee without objection on that account, and notably the case of *Young v. Lathrop,* 67 N. C., 63, cited by counsel.

If objected that the reference was by the "written consent" of counsel and not of the parties, it is fully met by *Morris v. Grier,* 76 N. C., 410, and the cases there cited, in which it is said "it is believed to be the practice throughout the union for suits to be referred by consent of counsel without special authority."

Parties litigant have the constitutional right (Art. IV, sec. 13 (61) of the Constitution), to waive trial of issues of fact by a jury, and when, by consent, they have waived a trial by jury and selected another mode of trial (and a reference by consent is such a waiver) neither party can afterwards demand a jury trial as a matter of right, nor has the judge the power, at his discretion and against the will of either party, to set aside, or strike out, or discontinue an order of reference entered by the written consent of the parties. An order of reference once properly made by the written consent of the parties cannot be revoked or vacated at the instance of one. Either party has *a right* to have the order carried into effect and complied with by a full report of the referee, and further action by the court can only be had upon such report. *Perry v. Tupper,* 77 N. C., 413; *Flemming v. Roberts,* 77 N. C., 415; *White v. Utley,* 86 N. C., 415; *McEachern v. Kerchner,* 90 N. C., 177; *Harris v. Shaffer,* 92 N. C., 30; and many similar cases.

The court below erred in declining to hear and pass upon the exceptions filed to the report of the referee and in striking out the order of reference and directing that issues be formulated to be submitted to the jury.

The report of the referee and the exceptions thereto are not now properly before us. The appeal, though not from a final judgment, was from a ruling affecting the substantial rights of the parties, and is clearly within the principle laid down in *Grant v. Reese,* 82 N. C., 72.

There is error, and this must be certified to the end that the cause may be properly proceeded with below.

Error.

Cited: White v. Morris, 107 N. C., 101; *Deaver v. Jones,* 114 N. C., 652; *Lumber Co. v. Lumber Co.,* 137 N. C., 438.

(62)

THE RALEIGH & GASTON RAILROAD COMPANY v. R. J. LEWIS, SHERIFF OF HALIFAX COUNTY.

Constitution—Injunction—Taxes—Statute.

The act of the General Assembly (chapter 137, section 84, Laws 1887), forbidding the granting of injunctions to restrain the collection of any tax, unless such tax is levied for an illegal or unauthorized purpose, does not conflict with either the Federal or State Constitutions.

THIS was an application for an injunction, made in an action pending in HALIFAX Superior Court, and heard before *Graves, J.*, on the ..... day of January, 1888.

The defendant, who, as sheriff, is tax collector of the county of Halifax, having in his hands the tax list of 1887, in which the plaintiff is charged with a tax of $23.40, assessed on lots of land belonging to the company, and necessary in the prosecution of its business, proceeded after a levy upon them to advertise a sale for the payment thereof, the plaintiff having refused to acknowledge its liability, whereupon this action was brought to restrain the defendant from so doing.

The complaint insists upon the exemption of the lots under a clause in the charter of the plaintiff, the scope and extent of which has been passed upon and the exemption adjudged by the Supreme Court of the United States in *R. R. v. Reed,* 13 Wall, 264, reversing the contrary ruling by this Court, found in 64 N. C., 155, and followed by the recognition of such nonliability in *R. R. v. Commissioners,* 87 N. C., 414.

No answer was put in, and a demand having been made for a restraining order and refused, the plaintiff appealed.

W. H. Day for plaintiff.
No counsel for defendant.

(63) SMITH, C. J., after stating the case: The ruling of the Court is predicated on the Act of 1887, ch. 137, sec. 84, which is in these words, so far as applicable to the matter in dispute:

"No injunction shall be granted by any court or judge in this State to restrain the collection of any tax or any part thereof, hereafter levied, nor to restrain the sale of any property for the nonpayment of any such tax, except such tax or the part thereof enjoined be levied or assessed for an illegal or unauthorized purpose, nor shall any person be permitted to recover by claim and delivery or other process, any property taken or distrained by the sheriff, or any tax collector, for the nonpayment of any

tax except such tax be levied or assessed for an illegal or unauthorized purpose; but in every such case, the person or persons claiming any tax or any part thereof, to be for any reason invalid, or that the valuation of his property is excessive or unequal, who shall pay the same to the tax collector or other proper authority in all respects as though the same was legal and valid, such person may at any time within 30 days after such payment demand the same in writing from the Treasurer of the State or of the county, city or town for the benefit, or under the authority, or by the request of which the same was levied; and if the same shall not be refunded within 90 days thereafter, may sue such county, city or town for the amount so demanded, including in his suit against the county both State and county tax," etc.

The statute in terms applies to all taxes, and bears upon its face no indication of a purpose to shield a tax debtor from his liability as such, but to free the process of collection from unavoidable embarrassments so injurious to government both State, county and municipal. It is obvious that a suit at the instance of all taxpayers, as a class, to restrain the collection of a particular general tax might result in great inconvenience to the public in the deprivation of the means of (64) carrying it on.

In *Huggins v. Hinson,* Phil., 126, the action was in the nature of an assumpsit for money received by the sheriff upon a tax list in his hands which the plaintiff was forced to pay, and in *Gore v. Mastin,* 66 N. C., 371, the action was in trespass for the seizure and sale of a mule, the tax in both cases being charged to be illegal, and it was decided that in neither form of proceeding could a recovery be had, inasmuch as the tax list was in legal effect an execution supported by a judgment, and in the former case that the remedy was to be sought in an application to the County Court. To the same effect are *S. v. Lutz,* 65 N. C., 503, and *Mulford v. Sutton,* 79 N. C., 276.

The authorities are divergent as to the right of a taxpayer, wrongfully assessed, to the remedy by injunction against the enforcement of the tax, the general rule being, according to Mr. High in his work on Injunctions, sec. 35, that "Equity will not interfere to restrain a tax which is illegal or void, merely because of its illegality, but there must be some special circumstances attending the injury threatened to distinguish it from a mere trespass, and thus bring the case within some recognized head of Equity jurisprudence; otherwise, the person aggrieved will be left to his remedy at law."

In *Worth v. Commissioners* in Winston's Eq., 70, while admitting that relief by injunction may be had against an unlawful tax imposed by a *municipal corporation* (and this was conceded to be the law in *London*

v. Wilmington, 78 N. C., 109), the *Chief Justice* questions the propriety of a resort to such process when a county or State tax is in process of collection, and remarks that "an injunction against tax collectors, the effect of which is to stop all collections, might seriously obstruct the operations of the government," etc., adding thereto very forcible reasons against the practice, and practical difficulties hard to overcome in the enforcement of the order.

(65) All these considerations tend in the direction of the statute which expressly forbids the issue of an injunction to arrest the collection of taxes, and remits the party to the remedy which it points out by a demand upon the State or county treasurer to refund, and upon refusal gives him an action against the county, city, or town to recover the taxes respectively received, and against the county for its own, and the illegal taxes exacted by the State. As there are ample means of redress provided for remedying the wrong, the statute does not contravene the provisions of the Federal or our own Constitution, while it obviates the mischiefs resulting from an interference with the collector.

The injury is not irreparable, for the payment of the small tax exonerates the property and gives the taxpayer recourse to those into whose treasuries the money has passed for refunding the money. This is in the line of former adjudications, and we sustain the refusal of the court to grant the motion in the face of the prohibitory statute.

Affirmed.

Cited: Mace v. Commissioners, post, 66; *Mathews v. Commissioners, post,* 70; *R. R. v. Reidsville,* 109 N. C., 499; *Guilford v. Georgia Co.,* 112 N. C., 36; *Ragan v. Doughton,* 192 N. C., 501.

F. BORDEN MACE v. THE COMMISSIONERS AND SHERIFF OF CARTERET COUNTY.

Constitution—Taxation—Pleading—Statute—Injunction.

1. An injunction to restrain the collection of taxes, which it is alleged, are levied for an unlawful or unauthorized purpose, will not be granted unless the facts are fully set forth from which the court can determine the character or object for which they are levied. A general allegation that the purpose was illegal or unauthorized, or that the assessment was in excess of the constitutional limitations, is insufficient.

2. The prohibition against granting injunctions to restrain the collection of taxes, in chapter 137, section 84, Laws 1887, embraces those cases where it is alleged the tax is in excess of the constitutional limitations.

CIVIL ACTION pending in CARTERET County, and heard upon (66) motion for an injunction before *Philips, J.,* at Chambers in Kinston on 16 November, 1887, brought by the plaintiff in behalf of himself and all other taxpayers, etc., to restrain and prevent the collection of certain taxes which are alleged in the complaint to be in excess of the taxes allowed by the Constitution and laws of the State to be levied for State and county purposes; and it is further so alleged that such taxes in excess were "levied for an illegal or unauthorized purpose."

The answer denies that the taxes complained of are illegal, and that the same are "levied for an illegal or unauthorized purpose."

A restraining order was granted by a judge at Chambers, but afterwards, upon hearing a motion for an injunction pending the action until the hearing upon the merits, the restraining order was dissolved, and the motion was denied.

From the judgment in this respect the plaintiff appealed to this Court.

W. R. Allen for plaintiff.
Clement Manly for defendants.

MERRIMON, J. The tax levy complained of was for the ordinary county purposes of the county of Carteret, and we are unable to distinguish this case from that of the *R. R. v. Lewis,* decided at the present term, in which the statute (Acts 1887, ch. 137, sec. 84), is construed and applied, and it is held that an injunction to restrain the collection of taxes cannot be granted except to restrain the collection of taxes "levied for or assessed for an illegal or unauthorized purpose." That case is directly in point, and must be decisive of this.

It is alleged in the complaint in general terms that the taxes, (67) the collection of which is sought to be restrained, were "levied for an illegal or unauthorized purpose"; but this is wholly insufficient. The constituent facts necessary to complete and show the alleged "illegal or unauthorized purpose," must be alleged in the pleading, so that the court can see from it what the purpose is and determine its character. The facts being alleged, it is the province of the court to determine whether or not the purpose is "illegal or unauthorized."

The learned counsel for the appellant contended on the argument that it appears from the pleadings that the tax levy was in excess of the limitations prescribed by the Constitution, and that the exceptive words, "except such tax or the part thereof enjoined be levied or assessed for an

illegal or unauthorized purpose," of the statute above cited, are broad enough to embrace, and do embrace, all taxes levied in excess of the constitutional limitation, or in any way illegally levied. This interpretation cannot be allowed. It would practically render the statute nugatory. It is seldom that the collection of taxes is resisted upon grounds other than that the levy of the same was in some way illegal. The exceptive words apply not to the levy or illegal levy of the taxes, but to the "illegal or unauthorized" *purpose* of the levy. The collection of taxes shall not be interfered with, by injunction, unless the *purpose* of the same be "illegal or unauthorized."

In *Worth v. Commissioners,* Winst. Eq., 70, this Court expressed some doubt as to the authority of a Court of Equity to restrain the collection of State and county taxes by injunction. The Legislature, acting, no doubt, upon the doubt thus expressed, expressly provided by statute (Acts 1885, ch. 32, sec. 1), "That the writ of injunction shall be allowed under the usual rules in all cases against the collection of so much of said taxes (public taxes) as may appear to have been illegally
(68) imposed or assessed." The authority thus conferred upon Courts of Equity was general and comprehensive, and was fully exercised until the enactment first above cited, which provides broadly that "No injunction shall be granted by any court or judge in this State to restrain the collection of any tax or any part thereof hereafter levied, nor to restrain the sale of any property for the nonpayment of any such tax, except such tax or the part thereof enjoined be levied or assessed for an illegal or unauthorized purpose," etc. Plainly this prohibition extends to all taxes, however levied for lawful purposes, the general purpose being to prevent the interference of the courts by injunction with the collection of such taxes. The power of the government to raise revenue promptly and without judicial interference is very great, and its continued wants and necessities that require money to meet them are correspondingly great. It is deemed better that the individual taxpayer shall suffer occasional temporary inconvenience than that the administration of government shall be impeded or embarrassed to the general detriment of the people; and this is the more tolerable when a means is provided, as is done by the statute last mentioned, whereby unlawful exactions shall be returned to the taxpayer.

But such restrictions upon the authority of the courts is not absolute. It frequently happens, especially of late years, that taxes are levied for particular purposes, and the legality of these is sometimes very questionable. Where taxes are levied for such illegal purposes the courts may interfere to prevent the collection of them by injunction, the reason as to the exception as to them being that such limited interference will not

likely materially prevent the collection of the public revenues. It is not probable that taxes will be levied for illegal or unauthorized purposes.

It was argued by the counsel for the appellant that the words, "levied for an illegal or unauthorized purpose," as used in the eighty-fifth section of the statute first above cited, tends to support his contention that if the tax levy was illegal the court might grant (69) relief by injunction. This is a misapprehension. The words as there employed are intended to enable the taxpayer to have returned to him the money he may have paid in discharge of taxes "levied for an illegal or unauthorized purpose." It might be that a taxpayer could not, for some reason, invoke the interference of the court in such a case, and would pay the taxes demanded from him for such purpose. If so, the money so paid shall be returned to him upon proper application, as in other cases provided for in the statute.

Affirmed.

Cited: Mathews v. Commissioners, post, 70; *R. R. v. Reidsville,* 109 N. C., 499; *Ragan v. Doughton,* 192 N. C., 501.

JAMES L. MATHEWS ET AL. v. COMMISSIONERS OF SAMPSON COUNTY ET AL.

This case is controlled by the principle announced in *R. R. v. Lewis, ante,* 62, and *Mace v. Commissioners, ante,* 65.

THIS was an action to restrain the collection of taxes, heard upon motion for injunction before *Philips, J.,* at Fall Term, 1887, of SAMPSON Superior Court.

The plaintiffs are taxpayers of Clinton Township in the county of Sampson, and they bring this action to restrain and prevent by injunction the collection of certain taxes levied by the defendants, commissioners of that county, and about to be collected by the defendant sheriff thereof, alleged for sundry causes stated in the complaint to be illegal, and to have been illegally levied. A judge at Chambers granted an injunction pending the action, until the hearing upon the merits, and the defendants having excepted, appealed to this Court. (70)

W. R. Allen and W. S. Thompson for plaintiffs.
Geo. Davis for defendants.

MERRIMON, J. It is alleged in the complaint that the taxes complained of were, for numerous causes stated, levied illegally, but it is not alleged or contended that they were "levied or assessed for an illegal or unauthorized purpose."

Indeed, so far as appears, the purpose was a proper and lawful one. The court therefore had no authority to grant relief by injunction, as has been expressly decided in *R. R. v. Lewis, ante,* 62, and *Mace v. Commissioners, ante,* 65. This case is in all material respects like and must be governed by those cases.

There is error in that the court granted the injunction.

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

Error.

GEORGE E. WORTHAM v. A. M. BASKET AND JOSEPH BASKET.

Execution and Judicial Sales—Statutes—Terms of Court.

1. A sale of real property under execution or by order of the courts must be made at the times and places prescribed by the statute (The Code, secs. 454-472), and if not so made they are void, unless the debtor in good faith, at the time of the sale, waives a compliance with the statutory requirements in these respects.

2. Where there are several statutes relating to the same subject, as here, regulating the terms of the Superior Courts, they will be so interpreted, if possible, as to secure harmony in their operation and effectuate the general purpose of the legislation.

(71) THIS is a civil action to recover land, and was tried before *Shipp, J.,* at Fall Term, 1887, of VANCE Superior Court.

Issues of fact having been raised by the pleadings, putting directly in question the plaintiff's title, he put in evidence and relied upon a deed of conveyance executed to him by the sheriff of the county of Vance, dated 2 July, 1883, purporting to convey to him the land in question in pursuance of a sale thereof made by that sheriff under and by virtue of an execution issuing from the Superior Court of the county named, commanding a sale of the land. The defendant objected to the admission of this deed in evidence, upon the alleged ground, among others, that it was void, "because the sale at which plaintiff purchased, and under which the deed was executed, was made on the first Monday in June, 1883, and that a regular term of the Superior Court of Vance County was held during that month, to wit, on the second Monday, and that the sale could only be made during the first three days of the term."

The court overruled the objection, and this is assigned as error. There was a verdict and judgment for the plaintiff, and the defendant appealed to this Court.

W. H. Cheek, J. B. Batchelor and John Devereux, Jr., for plaintiff.
T. M. Pittman for defendants.

MERRIMON, J., after stating the case: It is the just purpose of the statute (The Code, secs. 454-472), regulating sales of real property under execution or by order of court, that they shall be made at prescribed times and places so that all persons may know when and where to attend to purchase such property to be sold. The time and place of such sales are fixed by law and every one takes notice of (72) this. A principal object is to secure as far as practicable a fair, open, public sale, and thus multiply and encourage bidders and promote the interests of those persons interested in having the property sell for a fair price. There are other minor details prescribed by the statute, intended to promote the same end that are mainly directory to the sheriff, which he omits to observe at his peril, but the time and place are established by it, and a due observance of them is essential to the validity of the sale, and also, the deed executed by the sheriff to the purchaser in pursuance of it. So that such a sale made at a place or time, not prescribed by law, and a deed of the sheriff executed in pursuance thereof to the purchaser, are inoperative and void, unless in possible cases when the execution debtor by his assent in good faith at the time of sale waives the statutory requirements. The language of the statute (section 454) is mandatory, and any interpretation of it other than that we have given would destroy its efficiency and defeat in large measure the salutary ends intended to be accomplished by it. *Mayers v. Carter,* 87 N. C., 146, and numerous cases there cited.

Hence our opinion in the case before us is, that the supposed sale under the execution mentioned, and the deed executed in pursuance of it by the sheriff to the plaintiff, by virtue of which the latter derives title to the land in question, are inoperative and void.

The statute (Acts 1876-77, ch. 216, sec. 2) regulating such sales, in force at the time of the sale in question, provided "That sheriffs and other public officers selling real estate under execution shall sell the same at the courthouse of the county in which the property or some part thereof is situate, on the first Monday in every month, except the month in which the Superior Court is held therein; then the sales shall be made during the first three days of the court." The sale in question was made at the courthouse on the *first Monday in June,* 1883. (73)

But that was not a sale day for such sales in that month as prescribed by the statutory provision just cited, because "the Superior Court is (was) held" in that, Vance County, the second Monday in that month, and the sale should have been made on that Monday, or "during the first three days of the court." The sale was, therefore, unlawful and void.

The counsel of the appellee contended on the argument here, that the Superior Court of Vance County could not properly and lawfully be held on the second Monday of June, 1883, but it should lawfully have been held on the first Monday of that month, and nothing appearing in the record to the contrary, it must be taken that it was then held, because the statute (Acts 1879, ch. 58, sec. 1) then in force, provided that "Rockingham (Superior Court should be held on the) twelfth Monday after the first Monday of March and September," and the statute (Acts 1881, ch. 113, sec. 7) creating Vance County, provided that "the judge of the Superior Court in and for the Fifth Judicial District shall hold the Superior Court for said (Vance) county, for one week, commencing *the Mondays after the termination* of the Spring and Fall Terms of said court in Rockingham County in each and every year," etc. The contention is, that the terms of the Superior Court of Rockingham County under the statute continued but one, and not two weeks, and therefore, the Superior Court of Vance County could be lawfully held only on the first and not the second Monday of June, 1883, thus giving effect to the sale and deed in question.

The several statutory provisions bearing upon this contention are not very clear as to their meaning, but we think, fairly interpreted, they imply with sufficient certainty that the terms of the Superior Courts of Rockingham County embraced two weeks, and that the terms of the Superior Court of Vance County began on the second Monday after the like terms began in Rockingham County.

(74) The first statutory provision (Bat. Rev., ch. 17, sec. 11) applicable, is a general one of the Code of Civil Procedure, regulating the times of holding the Superior Courts of the State. Subsequent enactments, presently to be referred to, repealed it in some respects, modified it in others, and left it operative as to others. It provided that "The terms of the several Superior Courts of this State shall begin in each year, at the times herein stated, and shall continue to be held *for two weeks* (Sundays and legal holidays excepted), unless the business be sooner disposed of." The times of holding the courts of each circuit was then so arranged as to give each in succession a term of two weeks.

Afterwards a general statute (Acts 1876-77, ch. 255) on the same subject was enacted, and, among other things, it provided that "the Superior Courts in the several counties shall be opened and held at the

times hereinafter expressed, and each court shall continue in session one week, or two weeks, as the case may require, and *this act will allow,* unless the business thereof be sooner disposed of," etc. The regulation as to time was then so arranged as to allow some counties one week and others two weeks terms; and the courts of Rockingham County were arranged to be the last of the Fifth Judicial District, so that the statute would *allow* the terms of this Court to continue for two weeks as provided by the statute (Bat. Rev., ch. 17, sec. 11) above cited. This statute was not expressly repealed—it was repealed in some respects, modified in others, and left operative in others by implication arising from provisions inconsistent with it to some extent in statutes subsequently enacted. Indeed, it seems that the purpose of the Legislature in subsequent legislation on the subject was to leave it operative, unless repealed by subsequent inconsistent enactments. Hence the provision, "each court shall continue in session one week, or two weeks, as the case may require, and this act will allow." Otherwise, the time of (75) holding many of the courts must have been left in doubt, uncertainty and confusion. It is not to be presumed that the Legislature intended such unreasonable and injurious results to come about, nor can several statutes on the same subject be so construed as to allow of such results, when a different construction can reasonably be given that serves the general purpose of the legislation. In such case, the several statutes must be construed together, and their various parts and provisions so interpreted, if this can reasonably be done, as to produce consistency and effectuate the intent appearing. The first of the two last mentioned statutes gave the county of Rockingham a two weeks term of the Superior Court; the second one did not in terms abridge that term, nor do we think it did by reasonable implication—it did not necessarily, nor does any purpose to have it do so appear. The terms of the courts of some counties, in the arrangement as to time, were cut down to one week, but nothing appears in terms or by implication to show such purpose as to Rockingham County. The reasonable inference is, there was no such purpose.

Another subsequent statute (Acts 1879, ch. 58) was enacted, changing the times for holding the courts of the Fifth Judicial District, but it contains no provision inconsistent with the interpretation of the statutes we have already given, and we need not advert to it further here.

The appellant is entitled to a new trial.

Error.

Cited: Lowdermilk v. Corpening, 101 N. C., 650; *McNeill v. McDuffie,* 119 N. C., 339; *S. v. Patterson,* 134 N. C., 620; *Palmer v. Latham,* 173 N. C., 61.

(76)

F. R. KNOTT v. N. H. WHITFIELD.

Evidence—Payment—Burden of Proof—Contract.

The defendant being indebted to the plaintiff, gave an order on M. for the amount. The plaintiff swore that he received the order with the understanding that it should be credited only in the event it was paid, while the defendant testified that he did not remember any such understanding. The plaintiff sent the order by another person to M. with instructions to bring it back if it was not paid. M. accepted it, but refused to return it, saying the plaintiff was indebted to him: *Held*,

1. There was some evidence to go to the jury that the plaintiff accepted the order as a payment.
2. That it was the duty of the plaintiff to properly present the order and if then payment was refused he might look to the drawer.
3. That whether M.'s conduct was justifiable was a question between him and the plaintiff, and could not affect the defendant.
4. That under the circumstances of this case it was not error to instruct the jury that the burden was on the plaintiff to make out his case by a preponderance of the evidence.

THIS was a civil action, originally commenced in GRANVILLE County, before a justice of the peace and carried by appeal to the Superior Court, where it was tried before *Philips, J.*, at May Term, 1887.

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

The facts are stated in the opinion.

Robert W. Winston filed a brief for plaintiff.
No counsel for defendant.

DAVIS, J. The plaintiff alleged that the defendant was indebted to him in the sum of twenty-three dollars as a balance due on a bond for $95, secured by a mortgage.

(77) The defendant claimed a credit of $22.50, alleged to have been paid in an order on McGuire & Bryan for that amount, which was accepted by the plaintiff.

There was evidence on the part of the plaintiff tending to show that the defendant gave the plaintiff the order, but that it was received with the understanding that if paid by McGuire & Bryan it would be credited on defendant's bond; that the plaintiff sent the order to McGuire by a boy, with instructions to bring it back if not paid, and that the boy

handed the order to McGuire, who refused to give it back, saying that "Knott owed him and he was going to hold the order."

There was evidence on the part of the defendant tending to show that he gave the order for $22.50 to the plaintiff in payment of the bond, and the plaintiff took it and went off with it; that the order was sent to McGuire by a boy, and that McGuire accepted it and put it in his pocket, and sent a message by the boy to the plaintiff that he would settle with him that evening or pay it; that plaintiff went to McGuire for a settlement, when a controversy arose between them as to the state of their accounts, and upon disagreement plaintiff refused to settle with McGuire, and said that he would warrant the defendant on his bond. Plaintiff did not tell McGuire to credit the amount on his (plaintiff's) account, as testified to by McGuire, "after crediting his account by the order he still owed him" (McGuire). As testified to by the plaintiff, upon a settlement McGuire would be indebted to him.

The following issues were submitted to the jury:

"Is the defendant indebted to the plaintiff? and if so, in what sum?"

The answer was, "Fifty cents and interest."

1. Upon the trial "the plaintiff asked the court to charge the jury that there was no evidence to go to them that Knott had accepted the Whitfield order on McGuire & Bryan as money, or that he agreed to credit the $95 bond by said order." This was declined, and (78) plaintiff excepted.

There was some evidence. The defendant gave the plaintiff the order. He says, as stated in the case on appeal, "he (plaintiff) came for money, and I gave him the order." He says that it was in payment, and it was clearly the duty of the plaintiff either to have refused to accept the order, or, if accepted conditionally by him, to have presented it for payment, and if payment was refused to have returned it to the defendant. The evidence was conflicting, and the instruction was properly refused.

2. The court was asked to charge "that in any aspect of the case the plaintiff must recover $23 and interest." This was declined, and the plaintiff excepted.

The plaintiff only alleged a balance of $23 to be due.

The action is for a balance due on the bond, and if the order was accepted in payment of that balance the plaintiff should have presented it properly for payment, and if protested or payment was refused, he could have then looked to the defendant for payment.

3. The court was asked to charge "that if McGuire came by the order wrongfully, he could not use it without Knott's authority." This was declined, and plaintiff excepted.

After the order was delivered by the defendant to the plaintiff and accepted by him, it passed out of the control of the defendant, and if,

without any fault of his, a controversy arose between the plaintiff and McGuire as to the ownership of the order, we are unable to see how the defendant could be affected by it, or why he should be involved in the controversy between them. If McGuire had wrongfully gotten possession of the order, the plaintiff should have sought redress against him.

It was not the defendant's duty, nor do we see how it was in his power, to remedy the wrong. Could he charge that it was wrongfully in the possession of McGuire? Or upon settlement, could he resist it as an item placed to his debit in his account with McGuire?

(79) 4. "Among other things the judge charged that in all civil cases the plaintiff must make out his case by a preponderance of the evidence." To this the plaintiff excepted and asked his Honor to charge that in this case the defendant must establish his contention by a preponderance of the evidence. This was denied. His Honor recited the evidence and charged "if the order was given by Whitfield and accepted by Knott with the understanding that it should be credited on the bond and after acceptance it was ratified by Knott, then Whitfield was entitled to it as a credit; if not, he was not." Plaintiff excepted.

Undoubtedly the burden of proving an affirmative defense is on the party who makes it. This, as was truly said by counsel for the plaintiff, "is common learning," and needs no citation of authority, but as applicable to this case we can see no just ground of exception on the part of the plaintiff, either to the refusal to charge as requested or to the charge as given. It is not denied that the plaintiff received from the defendant the order for $22.50, whether as a payment as the defendant says, or conditionally as the plaintiff says, and it rested upon him to account for it.

The testimony of McGuire tends to show that there was no question about the order until after he and the plaintiff had entered upon a settlement "when he (the plaintiff) found that after crediting his account by the order he still owed" him (McGuire) and the exceptions that "there was no evidence to go to the jury to support the charge of his Honor" cannot be sustained.

No error.

Cited: Hicks v. Kenan, 139 N. C., 346.

(80)

EDWARDS & MURCHISON v. RICHARD E. BOWDEN AND BETTIE J. BOWDEN.

Deed—Description—Evidence.

The description in a deed of "a tract of land lying in Greene County, N. C., adjoining the lands of P. L. and R. N., situate on the east side of the road leading from Jerusalem church to Patrick Lynch's, it being a portion of their part of the original P. tract and containing fifty acres," is not so vague and uncertain that parol evidence may not be received to aid in the identification of the land intended to be conveyed.

CIVIL ACTION, tried before *Merrimon, J.*, at Spring Term, 1887, of GREENE Superior Court.

The following is a copy of the material part of the case stated on appeal:

"The action was brought to foreclose a mortgage. The descriptive words of the deed are: 'A tract of land lying in Greene County, N. C., adjoining the lands of Patrick Lynch and R. N. Bowden, situate on the east side of the road leading from Jerusalem Church to Patrick Lynch's, it being a portion of their part of the original Gray R. Pridger tract and containing fifty acres.'

"The jury having been empaneled, the plaintiffs offered to read said deed to the jury, and the judge having intimated that the description therein was insufficient and that the plaintiffs could not recover, they submitted to a nonsuit and appealed."

W. C. Monroe for plaintiffs.
No counsel for defendants.

MERRIMON, J. Generally, if the description of the land intended to be embraced and the title thereto conveyed by the deed is so indefinite or uncertain as that it fails to designate the land meant, the deed is inoperative and void. It is however a general rule that the (81) deed must be upheld if possible, and the terms and phraseology of description will be interpreted with that view and to that end if this can reasonably be done. The Court will effectuate the lawful purpose of deeds and other instruments if this can be done consistently with the principles and rules of law applicable. *Proctor v. Pool,* 4 Dev., 370.

We think that the description in the deed in question of the land embraced by it sufficiently points to a particular tract of land—not an indefinite and undefined part of a tract—but a certain tract so described as that it may be ascertained.

If the words "it being a portion of their part of the original Gray R. Pridger tract and containing fifty acres," be omitted from the description, it would be substantially like that held to be sufficient in *Kitchen v. Herring,* 7 Ired. Eq., 190. The words in that case were "a certain tract of land lying on the southwest side of Black River, adjoining the lands of William Haffland and Martial," and in *McLawhorn v. Worthington,* 98 N. C., 199, the description held to be sufficient was "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, Cobb Tripp and others, containing three hundred and sixty acres, more or less." So that if the words of description were only these, "A tract of land lying in Greene County, N. C., adjoining the lands of Patrick Lynch, and R. N. Bowden, situate on the east side of the road leading from Jerusalem Church to Patrick Lynch's," there could be no reasonable question as to the sufficiency of the description. Then do the additional words, "it (the land) being a portion of their part (that is the part of Patrick Lynch and R. N. Bowden) of the original Gray
(82) R. Pridger tract and containing fifty acres," control the description and render it insufficient? We think not.

The last recited words were not the principal or leading words of description, but intended simply to give the description more particularity by designating the land as "a tract lying," etc., "it being a portion (a designated, described portion) of their part," etc., that is a tract of fifty acres identified and taken from "their part of the original," etc. Hence the land is described as "a tract," a body of land having distinctive identity, "adjoining the lands of," etc. How could it adjoin the lands of the persons named if it were not designated by some boundary? If it were a confused, undescribed portion of "their part of the original Gray R. Pridger tract," it is not at all probable that it would have been described as "a tract of land lying," etc., adjoining "their" land.

The interpretation of the description of the land we have thus given it seems to us is reasonable, and it renders the deed operative, if the plaintiff can on the trial by proper evidence identify the land as described in the deed. He must give evidence of a tract of land as designated.

Error.

Cited: Blow v. Vaughan, 105 N. C., 205; *Perry v. Scott,* 109 N. C., 382; *Martin v. Chambers,* 116 N. C., 673; *Potato Co. v. Jenette,* 172 N. C., 5; *Randolph v. Lewis,* 196 N. C., 54.

THOMAS J. NICHOLLS ET AL. v. R. J. DUNNING.

Appeal—Certiorari—Lost Record.

Where it appears from the return of the writ of *certiorari* that the original record has been lost or destroyed, so that a transcript cannot be made, the Supreme Court will not direct further action until the record is restored or substituted.

(See same case, 91 N. C., 4.)

THIS is an application for the writ of *certiorari*, to be directed (83) to the clerk of the Superior Court of BERTIE County, commanding him to send up a transcript of the record in this cause, which had been tried at the Spring Term, 1882, before *Bennett, J.*

It was heard upon petition, answer and affidavits.

The action was tried at Spring Term, 1882, and upon the verdict, judgment was rendered for the plaintiff, and the defendant appealed. To prepare the case on appeal, the original papers passed into the hands of the judge. Other papers, among which were the defendant's exceptions to the ruling and the case prepared by his counsel and a copy served on plaintiff's counsel, were afterwards transmitted to him by mail. The papers not being returned, and the judge retiring from office in July following, application was made for a writ of *certiorari* and granted, and successive but ineffectual writs were issued to the clerk of the Superior Court to compel the sending up of a transcript of the record, to the last of which a return was made to the effect that the papers were carried away by the judge, and had never been sent back. Therefore at October Term, 1884, the plaintiff moved for a new trial, which was refused because no effort appeared to have been made to cause their restoration to the office. All this appears in the case as reported in 91 N. C., 4.

In the present renewed application, it is stated that while repeated efforts were made to the judge to procure the papers, and the answer was that they were lost or mislaid, he announced to defendant's counsel that they had been found and would be forwarded. This was in the fall of 1886. This was not done, and upon another application an answer under date of 23 April, 1887, came, in which it was stated that they were again mislaid, and a search would be made to discover them. His next letter, written on 3 October, 1887, said they were found and transmitted to the clerk, and about 20 November a package containing some of the papers was received.

The response made by one of the plaintiffs is that the papers (84) without the retention of copies in the office to replace them in

case of loss, were taken out by one of defendant's counsel and sent to the judge, and that in consequence of their absence the plaintiffs instituted proceedings to replace them with copies, which were resisted by defendant's counsel, and after successive continuances, it appearing that the papers had been found, dismissed.

R. B. Peebles for plaintiff.
No counsel for defendant.

SMITH, C. J., after stating the case: From this narrative of facts it is manifest that the fault lies not at the door of the appellant, and that the inability to make up the record was in consequence of the absence of the original papers in the hands of the judge who tried the cause. But that a proper effort had not been made to obtain their restoration a new trial might have been awarded, as intimated in the opinion upon the hearing of the former application, and upon the authority of the cases therein referred to. "Our power," say the Court, "is to cause the record to be sent up, and when there is none from which the transcript can be made, as is said in the clerk's return, it is obviously first required to have the original papers necessary to this end restored to the office; or copies of such as are destroyed or lost supplied and substituted in place of the originals, under the direction of the court to which they belong. Until this is done, and the record then transmitted, no remedial action can be here had such as is demanded by the petitioner."

Upon this intimation, after numerous efforts by direct application to the judge, a part of the papers has reached the office, and this is a basis upon which the writ may be awarded.

(85) While it is attended with great inconvenience for a judge to carry off the papers, or that they be sent to him because of his omission to act upon the appeal during the sitting of the court, it has been so common a practice that we are not disposed to regard it as involving such culpability in counsel as to deny to the client a right lost by the action of the judge, especially when not opposed.

The writ will issue, and we reserve further action until the record is sent up, and it may be in so mutilated a form as not to warrant our determining the matter involved in the appeal.

Writ granted.

M. B. PITT, EXECUTOR OF JAMES LAWRENCE, v. E. L. MOORE.

Specific Performance of Contract—Statute Frauds—Betterments—License—Parties.

1. The specific performance of a parol contract to convey land will not be enforced, unless the person charged with the execution thereof submits to a decree, or unless he admits the contract and does not insist upon the statute of frauds.
2. Although a parol contract for the sale of land will not be enforced, the law will not permit him who repudiates it, to enjoy the benefits of the labor and money expended in the betterment of the property by one relying on the contract, without compensation.
3. One who enters under a license and makes improvements which permanently enhance the value of the property is protected by the same principle.
4. The mortgagees of lands should be made parties to actions in which it may become necessary to sell them and distribute the proceeds of sale.

CIVIL ACTION, tried before *Avery, J.*, at Fall Term, 1887, of (86) the Superior Court of EDGECOMBE.

It is alleged and admitted that James Lawrence, late of Edgecombe, died in said county in 1884, leaving a last will and testament, which was duly proved, and the plaintiff, executor therein named, duly qualified as such, and that by the terms of said will he is authorized to sell the interest of his testator in the property mentioned in the pleadings. It also appears that at the time of the death of the testator, and for some time prior thereto, he and the defendant were partners and tenants in common of certain mill property, situated near the village of Sparta, in Edgecombe County, each owning one-half interest.

It is further alleged, among other things, that the testator and defendant carried on a general milling business at the mill owned by them, and that for the better utilization of the property, the mill house and a double tenement house used therewith, "were moved about forty yards up stream, where a new dam had been built for more than twenty years, which said dam is upon the lands of the said Moore, on the one side of the stream, and the lands of Lawrence & Moore on the other, and was built at a place on the stream formerly covered by the mill pond, and the mill was built on the land of Moore, immediately below said dam, and above the old dam, and the opposite side of said stream belongs to Moore & Lawrence, the mill wheel now being at a place in the mill pond as it was constructed before the old dam broke and the new one built; he (Moore) agreeing and contracting in consideration of a payment made by said Lawrence to him to convey by deed, a title in fee, to one-half

interest in the site or parcel of land on which said houses were located after the changes mentioned, being about one-tenth of an acre, so that it should become the common property of the partnership."

The complaint further alleges that the defendant promised from time to time to convey to the testator his half interest in the new site, as set forth, and has repeatedly admitted the payment therefor by said
(87) testator, but he never conveyed said title in the lifetime of the testator, and that since his death the plaintiff executor has demanded of the defendant "that he convey said title to those lawfully entitled thereto, which he has refused to do, alleging that the entire property was his, and that he did not intend to account for it in any way."

The complaint also alleges that the defendant is insolvent; that up to the time of the death of the testator, he and the defendant divided the tolls weekly; that the plaintiff has demanded that the defendant continue to make such a division until the property could be divided by sale, but that the defendant refuses to so divide, but takes and appropriates the entire tolls, etc., to the irreparable damage of the estate of the plaintiff's testator, and he asks for judgment declaring that the estate of his testator is entitled to an interest of one-half in the property; that a sale be ordered and a receiver appointed, etc.

The answer, so far as it is material, states in substance, that after operating the mill by plaintiff's testator and defendant on the first site until about eight years prior to this action, "the mill house and machinery in it was, by their joint action, removed up the stream and put upon lands then in possession of the defendant, which he had thereafter conveyed by mortgage to A. T. Bruce & Co., and that said Bruce & Co. had no notice of such removal until it was accomplished, and they are still the owners of the same as mortgagees"; that neither before the removal of the mill, nor at the time of its removal, was anything said by plaintiff's testator to the defendant about purchasing the land, and the first time the subject was mentioned between them was about a year after the removal, when the testator said to the defendant: "We have never agreed about the price of the land where the mill now sets," to which defendant replied that he "was ready to fix the price and execute
(88) the deed for it," when the plaintiff's testator said, "it made no difference about a deed, so he kept it as long as he lived, he was satisfied." They continued thereafter to operate the mill by managers of their selection, and to divide the proceeds equally, till the death of the testator. He describes the location, and says that when removed every part of the mill was put upon his land, and denies that he ever promised, except as stated, "to make title to plaintiff's testator for one-half interest in the present mill site, or that he has ever admitted that he has received payment therefor," etc.

He denies that he is insolvent. It was agreed that the mortgage to Bruce & Co. was executed subsequent to the erection of the mill on the present site, and that they knew nothing of any agreement between plaintiff's testator and the defendant, and that the following, which shall be taken in lieu of a copy of the mortgage, is all therein pertaining to the mill property in controversy, to wit: "Also my one-half interest in the five acres of land sold by said Moore to Geo. C. Sugg, and afterwards sold by his administratrix, including the large grist mill and fixtures and all the personal property used therewith, known as the 'Sparta Mills.'"

There was no evidence in writing of any agreement or contract in regard to the removal or erection of the mill upon the land of the defendant, and he objected to the 1st and 6th issues as there was no evidence, other than parol, bearing upon them; and he insisted that whether claiming under the parol contract for the purchase of an interest in the land, or under a license, the plaintiff must fail.

The following are the issues submitted (the 1st and 6th objected to by defendant), with the responses thereto, and judgment of the court:

"1. Did the defendant promise to execute a deed to Lawrence for one-half of the present mill site? Answer: Yes.

"2. Did Lawrence pay the defendant for the one-half interest? (89) Answer: No.

"3. If not, what is the value of one-half of the land on which the mill sets? Answer: Ten dollars.

"4. What is the value of the permanent improvements put upon the land of the defendant by the defendant and Lawrence as copartners? Answer: $1,500.

"5. Did Lawrence contribute his half of the expenses incurred by the erection of the same? Answer: Yes.

"6. Was the mill moved by Lawrence and defendant upon defendant's land with the understanding and agreement that the land was to be partnership property upon the payment by Lawrence of one-half the value of the land? Answer: Yes.

"Upon the verdict the plaintiff moved for the judgment of the court declaring a lien upon the land upon which the mill sets and the permanent improvements thereon to the extent of one-half the value of said permanent improvements as found by the jury, and the appointment of a commissioner to sell the land and improvements to enforce the lien, unless the defendant shall in the meantime pay off and discharge the same. Upon consideration, it is adjudged by the court that the motion is disallowed, and the defendant moving for judgment *non obstante veredicto*, it is adjudged by the court that the defendant go without day."

Thereupon the plaintiff appealed.

J. L. Bridgers for plaintiff.
J. B. Batchelor for defendant.

DAVIS, J., after stating the case: 1. Is the plaintiff entitled to have a *specific performance* of the promise made by the defendant to execute to his testator a deed for one-half of the mill site?

(90) The plaintiff insists that though not in writing, the contract as alleged is substantially admitted by the defendant, and the equity of the plaintiff not denied, and that the objection that it was not in writing, but by parol, could only be taken by answer, and as the statute was not set up as a defense in the answer, that question is not before the Court.

We take a different view.

The defendant does not admit any payment or performance, or part performance, by the testator, so far as it relates to any contract or agreement for the purchase of or title to the land to which the mill was moved.

There is not only the fact, as found, that the testator, Lawrence, never paid the defendant for the one-half interest, but the plaintiff fails to set out the consideration or price to be paid, which is an essential and necessary part of the contract. It is true the jury finds that there was an agreement to convey, and that the land was to be partnership property, and that it was worth $10; but what was the *contract price?* None is alleged in the complaint, and none seems to have been agreed on. The law required the contract to be in writing, and there is nothing to distinguish it from *Gulley v. Macy,* 84 N. C., 434, and like cases in which it is held that the courts will not enforce parol agreements for the sale of land, unless in cases when the defendant in his answer submits to perform the parol contract as charged in the complaint, "or when he admits it and neither by plea nor answer, insists on the statute."

2. Is the defendant liable to the estate of plaintiff's testator for the permanent improvements put upon the land jointly by the testator and the defendant, to the extent of the one-half of the costs thereof paid by said testator?

Whatever may have been the ancient rule, it is now well settled by many decisions from *Baker v. Carson,* 1 D. & B. Eq., 381, in which there was a divided Court, but *Ruffin, C. J.,* and *Gaston* concurring, and *Albea v. Griffin,* 2 D. & B. Eq., 9, by a unanimous Court, to

(91) *Hedgepeth v. Rose,* 95 N. C., 41, that where the labor or money of a person has been expended in the permanent improvement and enrichment of the property of another by a parol contract or agreement which cannot be enforced because, and only because, it is not in writing, the party repudiating the contract, as he may do, will not be allowed to take and hold the property thus improved and enriched, "without com-

pensation for the additional value which these improvements have conferred upon the property," and it rests upon the broad principle that it is against conscience that one man shall be enriched to the injury and cost of another, induced by his own act.

In the case before us, the land on which the mill was situated was of little value—only $10—the improvements put upon it were valuable—worth by the finding of the jury $1,500—and put up by the plaintiff's testator and the defendant, at their joint expense, with the understanding and agreement that they should own the property as partners, and they continued to deal with it as partnership property down to the death of the testator. While this agreement cannot be enforced as a valid contract for the sale of land, equity will not permit the defendant to enjoy the benefits of it without compensation. It was not by his *mere license* that the improvements were put upon his land—it was coupled with an expenditure of money by which the land was improved, and therefore coupled with an *interest,* which gave to the testator *rights,* of which the defendant cannot deprive him by a repudiation of his parol agreement. *Will. & Tar. R. R. Co. v. Battle,* 66 N. C., 541.

In *Bridges v. Purcell,* 1 D. & B., 492, it is left an open question, "whether a license to do an act which in its consequences permanently affects the property of him who gives it, when so acted on, that what is done cannot be conveniently undone, may be regarded as a grantee of an interest to the extent of the consequences thereby authorized and therefore not revocable; or whether the license does not neces- (92) sarily imply a permission for the thing done to remain, notwithstanding the continuing consequences; and therefore the licenser, on a principle of good faith, may be forbidden to withdraw it, without indemnifying him who trusted thereto." The settlement of these questions was not necessary, as *Judge Gaston* said, to the determination of that case, but we think that they have been settled by adjudications since, in favor of the equity of those who, acting in good faith, have expended money or labor in improving the property of others in whom they trusted. Such, we think, is the equity of the plaintiff in this case.

He is entitled to compensation to the extent of one-half of the value added to the land in question, by the permanent improvements made thereon.

3. It is conceded that by the terms of the testator's will, the plaintiff has authority to make sale of his interest in the mill, but the defendant objects that the plaintiff sets up a partnership between his testator and the defendant, and that this action cannot be maintained, because the property, being partnership property, vests in the surviving partner under section 1326 of The Code.

The action is substantially for the settlement of the partnership, and the plaintiff is entitled to have an account and to receive one-half of the net profits accrued since the last settlement between the defendant and his testator, and one-half of the enhanced value to the land by reason of the improvements, and this relief is within the scope of the plaintiff's prayer and warranted by his complaint.

4. It appears that after the erection of the mill, A. T. Bruce & Co. became the mortgagees of the defendant's "one-half interest" in the property in question, and as they thereby became the legal owners of defendant's interest, and their rights may be affected by the settlement, they ought to be made parties to this action.

(93) There is error, and this will be certified to the end that further proceedings may be had in accordance with this opinion.

Error.

Cited: Tucker v. Markland, 101 N. C., 427, 8; *Vann v. Newsom,* 110 N. C., 126, 130; *Field v. Moody,* 111 N. C., 358; *Pass v. Brooks,* 125 N. C., 131; *Gammon v. Johnson,* 126 N. C., 67; *Luton v. Badham,* 127 N. C., 100, 1, 2, 3, 6; *Kelly v. Johnson,* 135 N. C., 673; *Joyner v. Joyner,* 151 N. C., 182; *Jones v. Williams,* 155 N. C., 189; *Reid v. King,* 158 N. C., 91; *Jones v. Sandlin,* 160 N. C., 154; *Ballard v. Boyette,* 171 N. C., 26; *Carter v. Carter,* 182 N. C., 190; *Eaton v. Doub,* 190 N. C., 22.

LEWIS BLOUNT v. W. A. GUTHRIE.

Implied Contract—Evidence—Judge's Charge.

1. Where one stands by in silence and sees work done or material furnished for work done upon premises belonging to him, of which he accepts the benefit, a promise to pay the value thereof may be inferred from the circumstances.

2. Therefore, where the defendant contracted with R. to build a house—including the necessary plumbing for gas and water—under the supervision of an architect, and R. contracted with the plaintiff to furnish the materials and do the plumbing, but R. was discharged before completing his contract, the defendant taking charge of the work and the plaintiff subsequently completed his: *Held,* (1) That there was some evidence to go to the jury that the defendant had assumed to pay the amount due the plaintiff under his contract; but (2) that this was an inference of *fact* for the jury and not of *law* for the court, and it was error to instruct the jury that the law implied a promise to pay from these facts.

BLOUNT *v.* GUTHRIE.

CIVIL ACTION, originally commenced before a justice of the peace for the county of DURHAM, and carried by appeal to the Superior Court of that county and tried before *Merrimon, J.*, at February Term, 1888.

On 5 August, 1886, the defendant entered into a written contract with one Joseph Ransley, by which Ransley was to build for him a dwelling-house in the town of Durham. The written contract and specifications are set out in full in the record, and are minutely drawn and of considerable length, but for the purpose of this controversy it is only necessary to state that Ransley was to complete the dwelling "to (94) the full and entire satisfaction of the architect"—one Pugin, employed by defendant—by 1 November, 1886, for which the defendant was to pay to him the sum of $3,484, as follows:

"When the foundations are complete and ready for framing, $225; when the entire building is under roof, $700; when the entire building is plastered, $200; when the entire wood work is completed, $1,000; and the final payment when all work of every kind is completed and upon a written acceptance of such by the architect."

The work was to be done "in accordance with drawings prepared by the architect, under his supervision and to his satisfaction and acceptance." Among other things, the specifications provided for gas and water pipes.

The plaintiff testified in substance that he was engaged in plumbing, and did work on defendant's house for hot and cold water and gas, and furnished the material, under a contract made with Ransley.

The work was begun during the second week in November, and finished some time in December, 1886. There was an estimate submitted by witness and accepted by contractor for $226; in this estimate there was a water tank which was taken off at defendant's suggestion, value $25.

Witness was directed by Pugin to make the connection for an additional gas pipe in dressing room. Pugin looked over and saw all material and gave the order. Defendant paid for the extra gas pipes. "Pugin pointed out every position where pipes, etc., were to be placed; defendant was there once or twice during the work; he did not tell me he had discharged Ransley, and I did not know it till my conversation with Guthrie in last of December, when work was done; Guthrie directed the pipe from tank to boiler to be stopped; these directions were all observed by me; the $200 has not been paid; made demand before I brought this suit; my work was included in the contract with Ransley; don't know whether Ransley had made the contract (95) when I furnished my estimate; I had put in all the gas pipe before I ever spoke to defendant about it; it was not defendant who first ordered me to put in the extra piece of gas pipe—it was Pugin; for that piece of pipe I have been paid by defendant; before the contract was

accepted, contract to be approved by Pugin; he said he had not yet seen Mr. Guthrie, but he thought he would accept my estimate; Pugin asked me in July to make my estimate and hand it to Ransley; I did so; most of the work was done after Ransley quit; Hill was Ransley's foreman; Guthrie said he had taken the contract away from Ransley—that he had failed to comply; told Guthrie he would look to him for the money; Guthrie said Ransley had been gone for several weeks."

T. B. Hill testified: "Ransley was discharged by Mr. Guthrie's direction for drunkenness; I then took charge; Guthrie hired me to take charge of the house and superintend it; Blount at that time had not finished his work, and had not finished it at the time I completed the work; while the work was going on Mr. Guthrie was there; Pugin gave orders for changes, etc., in defendant's name; Pugin had charge of the work, to see that it was carried out according to plans and specifications; Guthrie said he had never authorized Pugin as his agent, but had authorized me; he said whatever work was done after Ransley left he was responsible for, for he had assumed the work; I think plaintiff was nearly through before Ransley was discharged."

Plaintiff recalled: "The pipe that Guthrie stopped was the first water pipe put in—all water pipe was put in after 13 November; $37.08 done before 13 November; Guthrie was there and saw me at work, and did not notify me."

Defendant testified: "I was to furnish the lot and the old house that stood upon it, and Ransley was to build me a house for $3,484, to be finished by 1 November, according to plans and specifications by
(96) Pugin; plumbing, etc., in contract; Pugin was my architect to superintend—not authorized to make contracts; in October I came to Durham; found gas pipes had all been put in; was in the house; called Blount in and asked him if he considered the gas piping done; he answered, 'yes'; never paid Blount for anything but that amount for the price for a drop light; never made myself responsible for any other item; I directed water tank to be left off; had no other conversation with Blount till last of December; he had then completed all his work except putting on the cocks and connecting the pipes with the bath tub; I took charge 17 November; I inspected the premises—went over the whole place; no work was done by plaintiff between 13 and 17 November; discharged Ransley 17 November; time had passed for completing the house, and it was about half done; at the time I discharged Ransley I had paid him $1,897.95—this prior to 17 November, 1887, at the time the plaintiff's lien was filed, to wit: 25 January, 1887, I had paid on account of the work, $3,867.80, including what I paid Hill for Ransley on 17 November; I paid him more than the work was worth; when I took charge entire building was under roof but not plastered; several

rooms had not been; the entire wood work was not half done—it was probably one-fourth done. At date of discharge defendant would, under his contract, have owed Ransley $925; never have had any written acceptance of house by architect; Hill receipted as Ransley's foreman; I saw Blount working there before Ransley's discharge, but made no inquiry as to whether he had been paid; when payments made I had not written certificates from Pugin that there were no liens; did not give Ransley three days' notice of intention to take charge of the contract; the man I talked to about drop light spoke as sub-contractor under Ransley; never had anything to do with Blount's estimate; I never saw it or heard of it till lien was filed; Blount never notified me of any claim he had before I discharged Ransley; I have never (97) made any settlement with Ransley; did not go into details as to what the value of the work was up to date of discharging Ransley; I sent the checks for Ransley to Pugin in order that he might hold them if the work had not been done, or pay them over if it had been done."

Pugin testified: "I never made any contract with Blount; Blount's work nearly all completed when Ransley discharged; I think, when Ransley discharged, frame complete; roof partially on; small amount of plastering on; according to contract-price work was about half done; I handed Blount's estimate to Mr. Guthrie 26 January, 1887; I had never seen it till Hill gave it to me; this after Ransley was discharged, before Blount's suit; sent the estimate to Guthrie 26 January, 1887; Ransley had not complied with the contract; the work had been neglected, consequence failure to finish the house; I asked Blount to make an estimate, probably; I never accepted the house; never notified defendant that there were no liens upon it; accepted Blount's work in writing."

With the record there is a copy of the "estimate of gas and water pipes for house of W. A. Guthrie," dated 12 July, 1886, and signed by Lewis Blount, and also copies of checks of the defendant payable to the order of Joseph Ransley and endorsed by the said Ransley and B. A. Pugin, drawn in August, September and October, aggregating $1,125, and the balance of $1,897.95 was paid to Hill as Ransley's foreman on 13 November, 1886.

The issues submitted were:

"1. Did plaintiff do work and labor for and furnish material under a contract with the defendant?

"If so, what sum, if any, is due from defendant to plaintiff for such work and material?"

The following instructions were asked for defendant:

"1. That there is no evidence of any contract by the defendant to pay the plaintiff for the work done by him.

(98) "2. That the provisions of the contract between Guthrie and Ransley were for Guthrie's protection, and no one not a privy to said contract can have benefit from it; that Guthrie had a right to pay as he chose to Ransley, and in advance, if he wished to do so; and the plaintiff having relied upon Ransley, could only look to him for pay.

"3. That as Guthrie was not indebted to Ransley at the time the plaintiff instituted his action, there was no liability on his part to plaintiff, as plaintiff could only recover such amount from Guthrie as he, Guthrie, was then owing to Ransley.

"4. That the burden of proof is upon the plaintiff, and it is his duty, by a preponderance of evidence, to satisfy the jury that the defendant contracted with him to do the work, and if he has failed to satisfy the jury he is not entitled to recover.

"5. That under the contract between Guthrie and Ransley, Ransley was only entitled to three days' notice if he failed to supply materials during the progress of the work; and as the time for the completion of the work had expired, Guthrie had the right to take charge of the work after 1 November, 1886, without any notice to Ransley, and complete the work; and unless Blount did the work after that time under a contract with Guthrie (or Pugin, as his agent, or if they knew of his doing the work after that time and accepted it) then the plaintiff cannot recover."

His Honor refused to give the first, third and fifth instructions, and declined to give the last clause of the second instruction, to wit: "And the plaintiff, having relied upon Ransley, could only look to him for pay."

To the refusal of his Honor to give the instructions asked for the defendant excepted.

His Honor charged the jury as follows:

(99) "(1) If defendant discharged Joseph Ransley, the contractor, without making any settlement with him and took charge and control of the work himself, and permitted and encouraged the plaintiff to go on and supply materials and perform work, to complete the engagement he had made with Ransley, and plaintiff did go forward after Ransley's discharge and complete the engagement he had made with Ransley, and his materials and work were accepted by Pugin, defendant's architect, for defendant, and used and enjoyed by defendant, the law implies a promise by defendant to pay the plaintiff the value of the materials furnished and labor performed by him, and the plaintiff would be entitled to recover not only for the work and materials done and furnished after, but also before Ransley was discharged.

"(2) Was the plaintiff unable to carry out his contract with Ransley (if the contract was between plaintiff and Ransley only) by the act of

the plaintiff? If the plaintiff by his act in discharging Ransley prevented him from going on with his contract, his act necessarily made it impossible for plaintiff to carry out his contract with Ransley, and the plaintiff could only proceed by the defendant's permission, and if by defendant's permission he did go forward, he will be entitled to recover the value of his materials and labor, if he has not already been paid, and the plaintiff would be entitled to recover not only for the work and materials done and furnished after, but also before, Ransley was discharged.

"(3) If plaintiff supplied materials and performed labor, made a contract with Pugin professing to act as agent for defendant, and defendant received, used and enjoyed the materials and work, it will be the duty of the jury to answer the first issue in the affirmative."

To the first, second and third instructions of his Honor, above set out and mentioned, the defendant excepted.

The jury responded "yes" to the first issue, and "$200" to the second.

There was judgment for plaintiff, and defendant appealed.

W. W. Fuller for plaintiff. (100)
J. W. Graham and John Hinsdale for defendant.

DAVIS, J., after stating the case: There was no error in refusing the first instruction asked for by the defendant. There was evidence to go to the jury from which a contract might be implied.

The familiar principle, so confidently relied on by the defendant "that where there is a written contract concerning the whole subject-matter" there can be no implied promise, we think finds no application in the facts of this case.

It was not pretended that there was any written contract at all between the plaintiff and the defendant. In fact the learned counsel for the defendant deny that there was any contract, express or implied, by which the defendant was to pay the plaintiff, and they say that the evidence shows that the work was completed under the plaintiff's contract with Ransley, and referring to the evidence they ask, "Did not Guthrie have the right to suppose under these circumstances that Ransley himself had paid Blount out of prior remittances or otherwise arranged with him?" On the contrary, we cannot see how in any view of the evidence the defendant could suppose that Ransley had paid or arranged to pay or would pay Blount for work done after the discharge of the former, and while a different view is insisted upon in the printed brief of the able and learned counsel for the defendant, we do not understand them in the oral argument before us as denying the right of the plaintiff to recover

for so much of the work as was done by him after the defendant discharged Ransley and undertook himself to have the dwelling completed. It appears from the evidence that after the defendant discharged Ransley the work was continued under Hill, who had been Ransley's foreman, and who was employed by the defendant "to take charge of the house
(101) and superintend it," and the dwelling was completed under the same foreman and under the direction and supervision of the same architect, without any notification to the plaintiff of any change and without the knowledge on his part of any change until after he had completed the portion of the work which he had undertaken.

If this evidence is to be believed, and there is no conflict in this respect, might it not be reasonably inferred that the defendant meant to pay, certainly for the work done after the discharge of Ransley? Would not this be fairly and justly implied, and was not the evidence proper to go to the jury to be considered by them upon the question of implied liability of the defendant to the plaintiff, not only for the work and labor performed and materials furnished after, but also before, the discharge of Ransley? If Ransley was discharged and the work continued by the direction of the defendant under the same foreman and architect directing the details, without any notification to the plaintiff and without any opportunity on his part to elect to continue or discontinue the work if he was not to be paid for it, was there a reasonable inference or implication that the defendant would pay for it?

In *Bailey v. Rutjes,* 86 N. C., 517, it is said, "It is unquestionably true that if, in the absence of all express understanding, one stands by in silence (and much more if he actively encourages) and sees work done, or material furnished for work upon premises belonging to him, and of which he must necessarily get the benefit, and afterwards he does accept and enjoy it, a promise to pay the value thereof may be inferred and ordinarily will be, and the inference under the circumstances will be purely one of fact, viz., whether the party's conduct has been such that a reasonable man might understand from it that he meant to recognize the benefit as one conferred on himself, and to pay for it. In such a case there can be no difficulty in making such an inference against the
(102) party, since the premises being his, the benefit of the labor done or material furnished must necessarily result to him, and withal he had the opportunity and the power to countermand it, if he would."

But his Honor instructed the jury that if certain facts stated were found to exist "the law implies a promise by defendant to pay," etc. We think in this there was error, which entitles the defendant to a new trial. It was not an inference of law but of fact to be determined by the jury, and it was for them to say whether from all the evidence the conduct of the parties, and under all the circumstances the plaintiff might reason-

ably understand that the defendant was liable to him for the work done, and a reasonably implied obligation or promise on the part of the defendant to pay him for the work. These are questions of fact and not of law, and it is for the jury to find from the evidence whether there was or was not a reasonably implied contract.

For this error the defendant is entitled to a new trial, and it becomes immaterial to consider the other questions presented as they are not involved in the aspect of the case indicated in this opinion.

Error.

Cited: Morrison v. Mining Co., 143 N. C., 256; *Blackwood v. R. R.*, 178 N. C., 344; *Brown v. Williams*, 196 N. C., 250.

(103)

JOSEPH G. BRICKHOUSE v. DEBORA SUTTON ET AL.*

Evidence—Record—Service—Jurisdiction—Estoppel—Return of Sheriff—Deputy—Dower—Irregularity.

1. The statutes enacted to cure irregularities in respect to the jurisdiction of the courts in special proceedings are valid.
2. The recital in the record of a cause that the defendants therein had been served with process, is evidence that the service was made and the court acquired jurisdiction of the persons. Such record cannot be attacked collaterally; if assailed for irregularity it should be by a motion in the cause; if for fraud, and the action be ended, by independent suit.
3. The sheriff is not required to attest the report of the jury to allot dower.
4. Whether the return of process by a deputy sheriff in his own name is sufficient, *Quære.*

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

The action is brought to recover possession of the land described in the complaint. The plaintiff claims a life estate therein for the life of Elizabeth Sutton by virtue of a deed of conveyance executed by her to him on 26 March, 1880, she being the widow and doweress of Henderson Sutton, who died intestate in December, 1868. The defendants are the heirs at law of the latter.

At February Term, 1869, of the Superior Court of the county of Tyrrell, the widow named filed her petition in that court to obtain dower

*SMITH, C. J., having been of counsel, did not sit on the hearing of this cause.

in the land mentioned. Process issued returnable to the next fall term of the court to make the heirs at law parties defendant to such application to obtain dower. This process was directed to the heirs at law of the intestate, summoning them each personally, and the same pur-
(104) ported to be returned executed thus: "To hand 12 August, 1869, J. W. Woodhouse, Deputy Sheriff; executed 24 August, 1869, J. W. Woodhouse, Deputy Sheriff."

At the Spring Term, 1860, the court made an order in the proceeding to obtain dower, whereof the following is a copy:

"It appearing to the court that the defendants have been served with process and copies of the petition, and they failing to appear and plead or demur, it is adjudged and decreed by the court that the petition be taken *pro confesso*. And the cause thereupon coming on to be heard, it is adjudged and decreed that the petitioner is entitled to dower in the lands in the petition mentioned. And it is further ordered that the following named persons, to wit: Samuel Norman, Asa Etheridge, John Patrick, Edmund McClees, Marcus D. Newberry, be appointed commissioners to lay off and assign to the petitioner one-third part of said lands, including the mansion and other houses and put her in possession of the same, and let a writ of dower issue accordingly."

Thereupon a proper writ issued to the sheriff commanding him to summon the commissioners, freeholders named in the above order, to proceed to allot to the petitioner dower in the lands in question. These freeholders did assign dower and made report and return of their action, describing the land so set apart and that they had placed the petitioner in possession. The report recites that the freeholders were duly sworn, but it does not appear who administered the oath to them. They were attended by a deputy sheriff, and he signed the report and return thus: "Attest: B. Jones, *Deputy Sheriff*."

The plaintiff claims as the grantee of Elizabeth Sutton, who is admitted to be still living. And while he admits that Elizabeth Sutton was not entitled to dower otherwise in the land in controversy, he insists that the defendants are estopped by a record offered by him from claiming her right to dower in said land and the plaintiff's right as her
(105) grantee to recover possession during her lifetime.

The defendants claim that their ancestor Henderson Sutton above named in his lifetime conveyed the land to persons named, who afterwards conveyed the same in fee to the defendant Debora C. Sutton, under whom they claim.

It was admitted that Elizabeth was not entitled to dower unless by estoppel of record; that Henderson acquired the land before the year 1860, and was married to Elizabeth before that year.

As bearing on the question of estoppel defendants contended:

1. That the Superior Court had no jurisdiction in 1869 to assign dower.

2. That the service of the subpœna, appearing by endorsement thereon, was not valid.

3. That the attestation of writ of dower by B. Jones, deputy sheriff, was not valid.

Upon intimation from the court that the jury would be instructed that upon the whole of the testimony and the facts admitted the plaintiff could not recover, the plaintiff suffered a judgment of nonsuit and appealed.

Pruden & Vann and R. P. Felton, by brief, for plaintiff.
E. F. Aydlett for defendants.

MERRIMON, J., after stating the case: The objection that the Superior Courts did not have jurisdiction of the proceedings to obtain dower in 1869 cannot be sustained. The statute (Acts 1868-69, ch. 93, sec. 40; Bat. Rev., ch. 117, sec. 9; The Code, sec. 2111), expressly conferred such jurisdiction upon them. Soon after the enactment of the statute just cited some doubt prevailed as to whether or not such proceeding should begin in the Court of Probate or in the Superior Court before the clerk thereof, or before the court in term time. This doubt grew (106) out of the novel and not very clearly defined duties of the clerk of the court. It gave rise to some conflict of judicial decision, and the result was the Legislature enacted the statute (Acts 1870-1, ch. 108, sec. 1; Bat. Rev., ch. 17, secs. 425, 426), which cures irregularities as to the jurisdiction of the courts in respect to proceedings to obtain dower and other like special proceedings begun before its enactment. This statute has been repeatedly upheld as valid. *Ward v. Lowndes,* 96 N. C., 367, and the cases there cited.

We need not decide whether the return of the original process—the "subpœna"—in the proceeding mentioned of Elizabeth Sutton to obtain dower, in the name of the deputy sheriff and not in the name of the sheriff by the deputy—was sufficient of itself or not, because in our judgment the ascertainment of the fact and the recital of the same in the record by the court that the defendants in that proceeding named had "been served with process and copies of the petition" therein, was altogether sufficient evidence—certainly prima facie—that the defendants had been served with process, and that the court got and had jurisdiction of them. It appears from the proceeding that the court had jurisdiction of the parties and the subject-matter thereof. The proceeding—the order and judgments therein—were therefore apparently regular and

valid—not void—at most in any case only voidable. So that they could not be disregarded and treated in this action as void, nor could they be attacked collaterally for irregularity or for fraud. To correct or set them aside for irregularity, a motion in the proceeding would be a proper remedy; and as the proceeding is ended, it could be attacked for fraud only by an independent action. *Fowler v. Poor,* 93 N. C., 466, and cases there cited.

It is the service of the process for the purpose by some officer or person authorized by law to receive it, ordinarily the sheriff, that causes the jurisdiction of the court to attach to and lay hold and give the
(107) court control of the party to be brought into court in the action or proceeding. The return of the process, including a minute in writing indicating what action the officer took under and in pursuance of it, made by the sheriff, when it purports to be served, is evidence—strong evidence—prima facie, that it was served, and that the jurisdiction of the court has attached to the party. The service thus appearing to have been made is regular and efficient, and prevails until it shall be overthrown by some proper proceeding for the purpose. The court is presumed by law to be cognizant and to take judicial notice of the officer to whom it directs its precepts, and of his returns of the same. The presumption is that the return is true—else the court would not act upon it, and when the court, acting upon the return, proceeds in the action or proceeding, the strong presumption is that it had jurisdiction of the parties; its action is at least apparently regular, and must prevail until reversed or set aside in some proper way.

The return of process in question was made by a person professing to be and acting as deputy sheriff in his own name. This was irregular, at least—the return should have been made in the name of the sheriff by the deputy—but the service was unquestionably sufficient and regular, if made by the deputy—such service gave the court jurisdiction of the parties served, and the irregularity was in the return, not in the service—there was the absence of the regular evidence of the service of which the court could take judicial notice. Such evidence would have been the return in the name of the sheriff by the deputy. The defective return might have been amended upon proper application, if the facts warranted such action. But the court might have made inquiry and ascertained that service was actually made by the deputy sheriff; indeed, it appears from the record that it did—it is recited therein, and in effect adjudged that service of process was made on the defendants. It
(108) would be more satisfactory if the recital in the record of the fact of service had been fuller, and made some reference to the evidence of service, but this is not essential. Every intendment is in favor of the action of the court and its sufficiency.

The ascertainment and recital of facts in the record by the court imports verity and binding effect, and must be so treated for all proper purposes of the action, until in some proper way the action of the court shall be successfully impeached. Thus, in this case it must be taken that the court, acting upon proper evidence, ascertained and set forth in the record the important fact that the defendants in the proceeding in question were served with the process against them—that is, served regularly—effectually.

And so, also, where the parties go into court and submit themselves to its jurisdiction for a proper purpose, and this fact is recited in the record, such record including the recitals, import verity and binding effect upon the parties everywhere; they cannot be heard to allege the contrary or attack the judgment in a collateral proceeding or action. This must be so, else the records of courts would have neither certainty, permanency, nor efficiency—they would be snares to the innocent oftentimes, and utterly untrustworthy.

It is only when a court of general jurisdiction undertakes to grant a judgment in an action or proceeding where it has not jurisdiction of the parties or the subject-matter of the action, and this appears from the record by its terms or necessary implication, or by the absence of something essential, that the judgment will be absolutely void and have no effect, and may therefore be disregarded and treated as a nullity everywhere. In that case, the action of the court would be *coram non judice. Doyle v. Brown,* 72 N. C., 393; *Spillman v. Williams,* 91 N. C., 483, and numerous cases there cited; *Morrow v. Weed,* 4 Iowa, 77; Wade on Notice, sec. 1370.

As to the third ground of exception: The statute does not require the sheriff to attest the "writ of dower" or the report of the (109) jury assigning the same; but if it were otherwise, the attestation of the report by the deputy would not render the proceeding void—it could only render it in such respect irregular and erroneous.

The principal question argued before us was that as to the sufficiency of the return of the process in question by the deputy sheriff in his own name and not in that of the sheriff by him. As it appears above that we have not found it necessary to decide this question, not entirely free from doubt; regularly, as we have said, returns should be made in the name of the sheriff by the deputy.

It was held in *Holding v. Holding,* 2 Law Rep., 440, that the return of a subpœna in the name of the deputy was insufficient. In *M'Murphey v. Campbell,* 1 Hay., 181, such return was held to be sufficient, although irregular, and in *S. v. Johnston, ibid.,* 293, its sufficiency was doubted. In *Dobson v. Murphy,* 1 Dev. & Bat., 586, the Court held that such return was not such as could be taken notice of judicially, as that of an

officer recognized by the law. See Murfree on Sheriffs, secs. 76, 856. We cite these authorities here to help the convenience of reference in future cases in which they may be pertinent.

The judgment of nonsuit must be set aside, and the action tried according to law.

Error.

Cited: Spivey v. Harrell, 101 N. C., 50; *Spencer v. Credle,* 102 N. C., 74; *Tyson v. Belcher, ibid.,* 115; *Whitehurst v. Transportation Co.,* 109 N. C., 344; *Harrison v. Hargrave,* 120 N. C., 103; *Oates v. Munday,* 127 N. C., 443; *Lanier v. Heilig,* 149 N. C., 387; *Reynolds v. Cotton Mills,* 177 N. C., 424; *Clark v. Homes,* 189 N. C., 707.

(110)

HACKNEY BROTHERS v. PATTIE D. ARRINGTON.

Proceedings Supplemental to Execution.

While the statute (The Code, sec. 488), in its present form dispenses with the necessity that an affidavit to obtain proceedings supplemental to execution shall allege that the judgment debtor has no "equitable estate in land subject to the lien of the judgment, and that he has choses in action or other things of value unaffected by the lien of the judgment and incapable of levy," it is still essential that it shall allege the want of known property liable to execution.

THIS was a motion to dismiss proceedings supplemental to execution, heard upon appeal from the clerk of the Superior Court of WAKE County, by *Shipp, J.,* at Chambers, 20 January, 1888.

The plaintiff having recovered judgment before a justice of the peace in order to sue out supplementary proceedings for its enforcement against the debtor, offered an affidavit in the following terms:

"1. That on 19 November, 1887, a judgment was duly rendered by a justice of the peace in Wake County, in favor of plaintiff and against the defendant for the sum of $252.38.

"2. That on 21 December, a transcript of the judgment was docketed in the Superior Court of Wake County, and on that day an execution duly issued from said court for the collection of said judgment, and said execution is now in the hands of the sheriff of Wake County.

"3. That the judgment debtor Arrington resides in Wake County and has property which she unlawfully refuses to apply towards the satis-

faction of said judgment. That at ..... Term, 1887, of the Superior Court of Vance County the said Arrington recovered a judgment for the sum of $9,247, with interest, in the action pending in said court entitled Pattie Arrington *v.* W. N. Arrington *et al.*, which judgment and recovery she refuses to apply to the payment of the judgment in (111) favor of said Hackney Bros., plaintiffs in this proceeding.

"4. That affiant is one of the plaintiffs in said action of Hackney Bros. *v.* Pattie Arrington.

"5. That there are no other proceedings supplementary to execution pending against said Pattie Arrington, to the best of affiant's information and belief."

The order for the examination of the debtor having been issued, and the hearing been resumed before the clerk on 13 December, 1887, the defendant's counsel moved to vacate the order on the ground of insufficiency of the affidavit upon which it was made, and the motion being denied, the defendant appealed to the judge.

The examination thereupon proceeded, and the following interrogatory was propounded:

"What property have you, real or personal, or both, other than that set apart to you, or to which you are entitled as homestead or personal property exemption?"

The witness declined to make answer, for the reason that until the ruling upon the subject-matter of the appeal, the examination must be suspended in order to await the result; whereupon a continuance was ordered until 29 December, and meanwhile the restraining order, forbidding the debtor "to pay, receive, transfer, dispose of, or in any way interfere with her property not exempt from execution," was kept in force, and from this ruling the defendant again appealed.

Upon the hearing before the judge he declared the affidavit essentially defective, and that the motion to dismiss ought to have been sustained. From this judgment the plaintiffs appealed to this Court.

S. F. Mordecai for plaintiffs.
Spier Whitaker for defendant.

SMITH, C. J. The only inquiry to be here made is as to the (112) sufficiency of the plaintiffs' affidavit to support the order for an examination of the defendant.

In construing the provisions of the Code of Civil Procedure, sec. 264, and following, now contained, with some modification, in section 488 *et seq.*, of The Code, in the light of previous practice which they were intended to supersede, *Rodman, J.*, speaking on behalf of the Court, says: "We think that the purpose of The Code was to give those remedies

to a plaintiff only in case the defendant had *no known property liable to execution.*" *McKeithan v. Walker,* 66 N. C., 95.

In *Hutchison v. Symons,* 67 N. C., 156, equally explicit, and almost the same language is used by *Pearson, C. J.*: "The Court holds that the purpose of The Code was to give supplemental proceedings only in case the debtor has no property liable to execution, or to *what is in the nature of an execution,* viz.: *proceeding to enforce its sale.*"

In *Weiller v. Lawrence,* 81 N. C., 65, *Dillard, J.,* uses this language: "It was moved to dismiss upon the ground that the affidavit of the plaintiffs was insufficient to warrant the order of examination, in that whilst it negatived property in the defendants liable to execution, it did not *negative the existence of equitable interests which could be reached by proceedings to enforce a sale in the nature of an execution.*"

It was certainly necessary that the affidavit should be thus definite, as decided by this Court in *McKeithan v. Walker,* 66 N. C., 95, and *Hutchison v. Symons,* 67 N. C., 156.

The same doctrine is reiterated and put in a more precise form in *Hinsdale v. Sinclair,* 83 N. C., 338, wherein the judge last mentioned says: "That to authorize the grant of an order of examination, these three facts must be made to appear by affidavit or otherwise, to wit: the want of *known property* liable to execution which is proved by the sheriff's return of *'unsatisfied';* the non-existence of any equitable estate in land within the lien of the judgment; and the existence of
(113) property, choses in action and things of value unaffected by any lien and incapable of levy."

And again in reiteration it is declared with emphasis in *Magruder v. Shelton,* 98 N. C., 545, that the construction of the statute must now be deemed "settled" and at rest. The appellant's counsel rely on the amendment introduced in The Code which annexes to the second paragraph of section 488 at its close, these words: "And the judgment creditor shall be entitled to the order of examination under this subdivision, and under subdivision one, although the judgment debtor may have an equitable estate in land, subject to the lien of the judgment, or may have choses in action or other things of value unaffected by the lien of the judgment, and incapable of levy." This addition, it is contended, was made to remove the necessity of any averment or proof of the debtor's possessing property exposed to execution, preliminary to his undergoing examination.

In reference to the effect and extent of this legislative change in the statute, we remark:

1. The very words of the section preceding are reënacted in The Code in the form in which they appear in the Code of Civil Procedure, and this with the construction given to it by the Court.

2. There is nothing in the amendment dispensing with the allegation of the nonexistence, so far as known, of property which could be subjected to execution.

3. In the absence of any evidence of a purpose to open the way to this examination into the financial resources of the debtor, when he had ample visible property to meet the demand and the kind of remedy sought was wholly unnecessary, it can hardly be supposed that such a result was intended, or it would have been clearly expressed, and not left to a strained inference.

4. In the cases referred to, one of the conditions of relief mentioned is an averment negativing the debtor's having any equitable estate in land subject to a judgment lien yet not saleable under execu- (114) tion, and the amendment expressly applies to this, and dispenses with the averment.

5. The other kinds of property described, the possession of which must not obstruct the remedy, are such as are "unaffected by the lien of the judgment, and incapable of levy."

In *Hutchison v. Symonds, supra,* the Chief Justice, after the sentence we have already extracted from the opinion, proceeds to say: "And so if the debtor has property on which the creditor has acquired a lien, it must be shown either by a sale of the property, or by affidavit, that the property is insufficient in value to satisfy the debt; otherwise, the application for supplementary proceedings has not sufficient ground to rest on; for it does not appear that the debt will not be made out of the property bound by the execution, and so a resort to the extraordinary proceedings is not shown to be necessary."

And so one of the essential averments in *Hinsdale v. Sinclair,* already recited, is declared to be "the nonexistence of any equitable estates in land within the lien of the judgment."

Now, it is plain that the effect of the change brought about is to dispense with any allegation that there was no such *trust estate or interest* in the debtor as is specified, and to extend it to other classes of property when no lien attaches, and which the officer cannot sell, in order to the payment of execution in his hands. But it is nowhere indicated that it was the intent of the additional enactment to permit a creditor to have direct resort to the redress given upon an affidavit that the debtor "has property which he unjustly refuses to apply toward the satisfaction of the judgment against him," when there was ample property, real and personal, which could be appropriated by a sale under execution to the plaintiff's demand, and to reverse the repeated rulings of this Court upon the point. If such a purpose existed (and the result would be a very radical change in the law if it did), it was quite

(115) easy to give it expression, while the language used, very particular in its terms, says nothing which can fairly warrant such a deduction, and we cannot assent to the argument which makes it.

The general reasoning that has led to the ruling by which the statute is construed, and its true meaning arrived at, is based upon the previous analogous practice that prevailed in the Courts of Equity, and in order to its conformity thereto, of which, in the language of *Dillard, J.*, "it is in part a substitute," and this will appear by reference to *Frost v. Reynolds,* 4 Ired. Eq., 494; *Kirkpatrick v. Means,* 5 Ired. Eq., 220; *Wheeler v. Taylor,* 6 Ired. Eq., 225, and other cases.

The ruling of the judge must therefore be affirmed, and it is so adjudged.

Affirmed.

DANIEL L. RUSSELL v. ANTHONY DAVIS AND F. D. KOONCE.

Appeal—Clerk of Superior Court—Certiorari.

1. The duties prescribed for the clerk of the Superior Court in respect to making and transmitting transcripts of records upon appeals are ministerial, and he has no authority to pass upon the question whether the appeal has been perfected.
2. If the appellee files no exceptions to the appellant's statement it will be treated as the case on appeal; if the appellee files exceptions and the appellant fails to have the case settled by the judge, the exceptions will be treated as amendments to the case on appeal.

The facts are stated in the opinion.

D. L. Russell and Thos. Strange for plaintiff.
John Devereux, Jr., and S. W. Isler for defendants.

(116) MERRIMON, J. This is an application begun by petition filed by the defendant at the last term of this Court for the writ of *certiorari* to compel the clerk of the Superior Court of the county of New Hanover to transmit to this Court the transcript of the record of an appeal taken by the petitioner from a judgment rendered in that court in favor of the plaintiff and against the petitioner at the Spring Term, 1887, thereof.

It appears that the petitioner duly perfected his appeal; that he tendered to the clerk of the Superior Court the costs of transmitting a transcript of the record thereof to the Clerk of this Court; that the clerk of the Superior Court refused to so transmit a transcript of the

record, unless the petitioner "would consent with counsel for the plaintiff to a case agreed" for the "statement of the case on appeal," or would request the judge to fix the time and place for "settling the case." The petitioner had filed a statement of the case on appeal for this Court in the Clerk's office and served a copy thereof on the appellees, and contended that the latter had not returned the same within three days as required by the statute (The Code, sec. 550), "with his approval or specific amendments endorsed or attached." The Clerk contended otherwise, and that the case on appeal had not been settled by the judge as the statute required, and therefore he ought not to transmit a transcript of the record to the Clerk of this Court.

The Clerk misconstrued the statute (The Code, sec. 551), which provides that "The Clerk on receiving a copy of the case settled, as required in the preceding section, shall make a copy of the judgment roll and of the case, and within twenty days transmit the same duly certified to the Clerk of the Supreme Court." This provision is directory. It does not imply when an appeal is taken that the clerk shall not transmit a transcript of the record if no case stated or settled on appeal shall be received by him. He will not ordinarily do so until the lapse of the time prescribed or contemplated in the next preceding section (117) referred to within which such case should be filed in his office; but if it shall not be filed within that time, or if the appellant shall direct him to transmit the transcript to the Clerk of this Court, it is his duty to do so at all events. It may be that a case stated or settled is not necessary, or that it is delayed or prevented by causes over which the appellant has no control, to his prejudice, and he needs to have his appeal in this Court so that he can the better apply for such remedies as it can grant. The case stated or settled is not essential to the appeal. Nor is it the province of the clerk to determine that an appeal shall or shall not be sent up, nor that the case stated or settled is or is not sufficient. If a case stated or such case with amendments endorsed or attached by the appellee be filed, or a case settled by the judge be filed, the clerk should send a copy of the same as part of the transcript and this Court will determine whether they are sufficient or not and their effect, and exercise its authority in that respect for any proper purpose. The duty of the clerk in respect to the appeal is ministerial and the appellant has the right to have a transcript of the record thereof sent to this Court, when he may direct, and in the absence of special direction, the clerk will transmit it in the orderly course as above indicated.

In this case, if it turns out that the copy of the case stated on appeal by the appellant was not duly returned with amendments endorsed or attached, then the case as stated by the appellant will be the case for this Court; if on the other hand, the same was so returned, then the case for

this Court will be that stated by the appellant as amended by the appellee. It may, however, turn out that there are reasons why this Court ought, upon application, to direct the case to be settled by the judge. But questions in this respect will be determined when the appeal is brought into this Court.

(118) It appears that the petitioner perfected his appeal mentioned in the petition, and that the clerk of the Superior Court, for no adequate cause, refused to transmit a transcript of the record thereof to the Clerk of this Court, as he ought to have done; he is therefore entitled to have the writ of *certiorari* directed to that clerk commanding and requiring him forthwith to so transmit such transcript.

Certiorari granted.

Cited: Mitchell v. Haggard, 105 N. C., 174; *Simmons v. Andrews,* 106 N. C., 203, 204; *Booth v. Ratcliff,* 107 N. C., 8; *S. v. Carlton, ibid.,* 957; *S. v. Price,* 110 N. C., 600; *Arrington v. Arrington,* 114 N. C., 116; *McDaniel v. Scurlock,* 115 N. C., 297; *S. v. King,* 119 N. C., 910; *Stevens v. Smathers,* 123 N. C., 498.

THE STATE EX REL. WILLIS THARINGTON AND WIFE, SUSAN, v. FENNER THARINGTON AND R. O. PURNELL, EXECUTOR OF WILLIE WINSTON.*

Guardian and Ward—Husband and Wife—Reference.

1. All the evidence taken by a referee should accompany his report, to the end that it may be considered by the court in reviewing his findings.
2. A guardian will not be permitted to use more than the accruing profits of his ward's estate in the maintenance and education of the ward, except with the sanction of the court, or in extreme cases of urgent necessity.
3. Where a portion of the fund due the ward was from the proceeds of the sale of lands in 1859, and she married shortly thereafter and attained full age in 1861: *Held,* that the interest and profits accruing thereon after marriage belonged to the husband as tenant by the curtesy, and the payment to him by the guardian was proper.
4. Where it appeared that there was a balance due a ward in 1862, in the hands of an administrator; that the ward was of age and was married; that there was no suggestion of the insolvency of the administrator, though he afterwards became insolvent by the results of the war: *Held,* that under the peculiar circumstances the guardian was not liable for more than nominal damages for failure to collect from the administrator.

*DAVIS, J., having been of counsel, did not sit upon the hearing of this case.

5. *It seems* that the husband and co-plaintiff of a ward will be required, in an action against a guardian for a settlement, to account to the latter for any payments made to him for his wife, though they were such for which the wife may not be chargeable.

THIS is a civil action, which was tried upon exceptions to (119) referee's report, before *Merrimon, J.*, at April Term, 1887, of FRANKLIN Superior Court.

Joshua Paschall died in the year 1856, and in December administration on his estate was granted to Robert Paschall.

The intestate left real and personal estate, and among his other heirs at law and distributees the relator Susan, a daughter being an infant; the defendant, Fenner Tharington, was at September Term, 1858, of the County Court of Franklin appointed her guardian, and entered into the bond with several sureties, of whom the testator of the defendant, R. C. Purnell was one, upon which the present action is brought for an account and delivery over of the trust estate. The *feme* plaintiff intermarried with the other plaintiff on 25 December, 1859, and attained full age in 1861.

The complaint and answer having been filed at January Term, 1883, the cause was referred to B. B. Massenburg to take and state an account of the administration of the trust estate in the hands of the guardian, and for which he is liable.

The referee accordingly made his report setting out the admitted facts already cited, and finding a balance due the *feme* relator at that date of seven hundred, seventy-six dollars and sixty-four cents. It appears that the administrator Robert was indulged by the court in filing his final account from time to time, until early in 1862, when it was rendered and showed to be in his hands $4,482.45, less commissions, $293, for distribution among the eight children of the intestate. The relators filed no exceptions to the report of the referee, but moved to confirm the same, while the defendants did except, and thereupon (120) the relators moved a recommittal of the report to the referee, to the end that he might report the evidence omitted, and hear further proofs, and, this being allowed, the defendants further except to this ruling and reserve the exception upon a future appeal.

Upon the coming in of the second report of the referee, in which he makes no change in the account, the relators filed exceptions as follows:

1. For that the referee does not make a separate account of the money derived from the sale of the ward's real estate. They insist that this should have been done and that there should be no disbursement allowed as against this fund, except the commissions to the guardian on his receipts.

2. That the referee allows the guardian credit for payments made to J. A. Henly and C. C. Blacknot when there is no evidence that the accounts were owing by the guardian or that they were for proper and necessary articles; that they exceed largely the interest and profits of the ward's estate, and as the further ground that these payments were made by the guardian after the marriage of the relator Susan to the other relator, and he was not authorized by either of said relators to pay said debts.

3. That the referee allowed the guardian credit for $304.44 for board of the relator on insufficient and incompetent evidence, it being allowed on the evidence of Fenner Tharington alone, the relators claiming that Susan lived in the family of the guardian who was her brother-in-law, for a while preceding her marriage; that she went there upon his invitation, and while there her services were worth as much as her board, and that no charge was made against her by Fenner Tharington on that account until after the commencement of this action.

4. That the referee has allowed disbursements in excess of the interest and profits of the ward's estate.

(121) 5. That the referee has allowed the guardian $152.44 commissions.

6. That he has not charged the guardian with $23 received for his ward from sales of wheat and charged by him in his account filed in 1858.

The defendants also filed exceptions as follows:

1. That the referee admitted as evidence and acted upon the note executed 31 December, 1856, by Fenner Tharington and W. J. Winston to Robert L. Paschall, administrator of Joshua Paschall, for $930, to the introduction of which the defendant objected upon the ground that it was incompetent, irrelevant, and had nothing to do with the matter in controversy.

2. To the finding that Fenner Tharington is largely indebted to the relator, Willis Tharington, as agent, upon the ground that said finding is not warranted by the evidence; on the contrary the evidence shows that the said Willis Tharington was largely indebted to the defendant, Fenner Tharington.

3. The defendant excepts to the finding of the referee that Fenner Tharington is indebted on account to the relator Susan in the sum of $523.58, with interest from November Term, 1862, of the County Court of Franklin, it being the amount due his ward as shown by the final settlement of account of Robert Paschall, administrator of Joshua Paschall, and this exception is upon the following grounds:

The referee finds, and the record shows, that Robert Paschall, administrator of Joshua Paschall, was allowed by the court, from time to time,

to make a settlement of his account as administrator till March Term, 1862, of the County Court of Franklin, when the settlement of said accounts was had and his final account filed and approved, showing a balance in his hands, after paying the debts of the estate and the cost of administration, of $4,482.45, less $293 commissions allowed him. The evidence shows, and the referee finds the fact, that the relators intermarried on 25 December, 1859, and that relator Susan (122) became of age in 1861, and these defendants say that the guardianship of defendant, Fenner Tharington, having ceased, he was in no way liable for the distributive share of the personal property due to relator Susan in the hands of the administrator, R. L. Paschall, at the March Term, 1862, of the County Court of Franklin; that no portion of said distributive share came into his hands as guardian.

4. The referee fails to credit the defendant, Fenner Tharington, with $67.65, paid J. R. Glenn for the relator Willis in 1869.

The case being heard upon the exceptions and report, the court allowed exception 4 of the plaintiffs, and overruled exceptions 1, 2, 3, 5 and 6, to which ruling, allowing exception 4, the defendants excepted. The court further gave judgment overruling the exceptions 1, 2, 3 and 4 of the defendants, to which the defendants also excepted.

It appearing from the facts that the guardian had expended more money on behalf of the relator Susan than the income of the estate, the defendants insisted that the money so expended was spent for the actual necessities of the ward, but the guardian had obtained no order of court allowing him to infringe upon the *corpus* of the estate. His Honor ruled that the guardian could not be allowed for these expenditures on settlement with his ward, to which the defendants excepted.

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

C. M. Cook for plaintiff.
N. Y. Gulley for defendants.

SMITH, C. J., after stating the case: It was entirely proper that all the evidence before the referee should be before the court in determining upon his findings. There is no cause furnished to the defendants for complaint of the action of the judge in recommitting the (123) report, and it is sustained.

It is a well-settled principle that in the management of the trust estate committed to the guardian, he will not be allowed to use more than the accruing profits in the maintenance and education of his ward, except with the sanction of the court, or in extreme cases and of urgent necessity. The law is so explicitly declared by the Court, *Ruffin, C. J.*, delivering the opinion, in *Long v. Norcum,* 2 Ired. Eq., 354, and so uni-

versally accepted and acted on since, that we deem it needless to look elsewhere for precedent or authority.

The Court say that while it is not an inexorable rule to refuse to allow expenditures that encroach upon the principal estate, unless the previous authority to do so has been given by the Chancellor, so as to admit of no exceptions, as he has often taken part of the capital for the present benefit of the ward, and in cases where such sanction, if asked in advance, would be unhesitatingly given, sustain such expenditure when made under the circumstances by the guardian acting without permission. And this may be done when, in the language of the court, "from the possession of the property the infant cannot be entitled to maintenance as a pauper, and from mental imbecility or want of bodily health or strength he cannot be maintained from the profits of his property, nor put out apprentice and maintained by his master. In such a case, while there is any part of the estate, it must be used to keep the unfortunate infant alive."

In that case the property consisted of a single slave worth, perhaps, $300, and during the guardianship others were born until their aggregate value was nearly $1,500, and the principal was not only not diminished by the disbursement, but largely augmented in value, so that if the increase be considered, there was in fact no encroachment upon the principal.

(124) There are no such necessities shown in the present case, and the general rule must prevail. It may be that an investment in the education and training of the infant for the duties and pursuits of mature life would be, and generally it is, far more valuable to him than the money thus expended would be if retained and paid him after arrival at age, but until the General Assembly shall otherwise provide, the law must be, enforced as it has come down from the past, and infants must, beyond income, make their own struggles to acquire knowledge, or their guardian must expend their moneys, and in the words of the opinion, *"depend on the sense of honor and justice of the ward and his living to come of age."*

In this connection, however, it may be observed that the proceeds of the sale of land in the distribution among the tenants is principal, and the accruing profits or interest thereon could be used in the support of the ward up to the time of her marriage, and that, thereafter arising, would belong to the husband as tenant by the curtesy, and, if received by him, could not constitute a claim against the guardian.

We are next to consider the matters embraced in the overruled exceptions of the defendant to the account.

The first and second of defendant's exceptions are overruled, the irrelevancy of the objectionable testimony, not having so far as we can see any

misleading tendency upon the mind of the referee, and the other too vague in terms. *Currie v. McNeill,* 83 N. C., 176; *Morrison v. Baker,* 81 N. C., 76.

The third exception to the report is that the guardian is charged with the entire amount of the *feme* relator's distributive share in her father's estate, when it never went into his hands.

The ground of this exception is that no final account was filed by the administrator until 1862, more than two years after marriage, when the fund, under the law then in force, became the property of the husband on his reducing it to possessions, and that the loss from (125) insolvency is the result of his neglect and delay in collecting and not that of the guardian, and this on the principle enunciated in *S. v. Skinner,* 3 Ired., 564.

This case decides that the mere neglect of a collecting officer to collect a solvent debt—it remaining good and no actual loss sustained by reason of the delay, such as the intervention of the statute of limitations and the like—until the making the change by statute. Rev. Code, ch. 78, sec. 3, did not charge him with the debt, but only with nominal damages. See, also, *Willey v. Eure,* 8 Jones, 320.

Again, while it does not distinctly appear in the report that Robert, the administrator, was entirely solvent when his final account was rendered and the debt could have been collected, it seems to have been so assumed by the referee and that insolvency afterwards supervened in consequence of the general wreck of property brought about by the war; and while the plaintiff Willis, by his inaction, is quite as blamable for the loss as the guardian, it may be that letting the indebtedness rest upon the security of the administration bond, seemed to both as safe a course of action as collecting the money would have been, and the general destruction of property and especially of the currency in use that followed, seems to justify what was done, or rather left undone. We do not think the defendants should be held liable for more than nominal damages for the imputed neglect to have a settlement with the administrator, and especially in view of the subsequent course of the husband in letting the debt remain, the contrary of which would be to make the guardian an insurer or guarantor.

The last exception, in view of what is said, becomes of no importance in the result.

The guardian is charged with the money derived from the sale (126) of the land, and interest thereon. The interest is income and should be applied to the disbursements and charges for the ward's support, and if consumed thereby, the guardian is not chargeable therefor. And so since the marriage and during the husband's life, he, as tenant

by the curtesy, is entitled to the accrued interest, his wife only to the unimpaired principal at his death.

The referee finds that in general terms the defendant Fenner is personally indebted to the relator Willis, and then very properly holds, that as the action is upon the guardian bond, these personal accounts between them are outside the reference, and he disregards them.

The defendant Fenner in his answer, says he never received any of his ward's personal estate, and that the money derived from the land was expended in part for the *feme* relator, and the residue for her husband, and that to this extent he is primarily liable in exoneration of himself, and that he is solvent.

The facts in reference to this matter are not before us in the report, and to enable us to pass on the question, ought to be ascertained. If it be true, it would not relieve the guardian from the consequences of his maladministration of the trust, but to avoid another suit, this liability, if incurred by said Willis, should be adjusted in the action.

The liability of a husband to account to the heirs at law of his deceased wife for a fund received by him from a sale of her land is decided in the case of *Scull v. Jernigan,* 2 Dev. & Bat. Eq., 144. This inquiry may be determined upon a rereference, rendered necessary in reforming the account according to this opinion.

To this end the cause is remanded and judgment reversed.

Error.

Cited: Duffy v. Williams, 133 N. C., 196.

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(127)

THOMAS BOWEN v. EMMA FOX, EXECUTRIX OF WILLIAM FOX.

Appeal—Certiorari—Negligence.

1. *It seems* that the proper way to obtain relief against a judgment of the Supreme Court dismissing an appeal, where the dismissal turned upon a question of law, is by a petition to rehear and not by a motion to reinstate.

2. A motion to reinstate an appeal will not be allowed, nor will a *certiorari* be granted where it appears that the appellant has lost his appeal by negligently failing to give the necessary undertaking within the prescribed time.

3. A memorandum of the clerk, evidently not made by the order of the court, appearing in the record proper, will not be allowed to prevail over a distinct statement of fact in the case on appeal.

(DAVIS, J., dissenting.)

BOWEN *v.* FOX.

THIS was a motion to reinstate an appeal and the writ of *certiorari* made at this term.

The case is stated in the opinion.

Geo. H. Snow for plaintiff.
J. B. Batchelor and John Devereux, Jr., for defendant.

MERRIMON, J. The plaintiff obtained judgment against the defendant in the Superior Court of the county of Vance at May Term, 1887, from which the defendant appealed to this Court. By consent of counsel, the defendant had until the first day of July following to give the necessary undertaking on appeal, but such undertaking was not given until 22 August next thereafter.

At the Fall Term of 1887 of this Court, the appeal having been docketed here, the plaintiff moved to dismiss the same upon the ground that the undertaking on appeal had not been given within the time allowed by law as extended by the parties, and the motion was allowed. *Bowen v. Fox, Ex.*, 98 N. C., 396.

At the present term the defendant moved to reinstate the appeal (128) on the docket, and have the same heard and determined, suggesting that it had been improvidently dismissed, and the court's attention was directed to an entry on the record in respect to the appeal in these words: "It is allowed upon his giving bond according to law in the sum of $50, with A. C. Zollicoffer as surety, said bond is duly executed, and is herewith sent." But it likewise appears in the case stated on appeal that "by consent of plaintiff's counsel defendant is given until the first day of July next to file said undertaking."

And it was conceded on the argument of the motion to dismiss the appeal, that the undertaking was not given until 22 August, 1887; it is so stated in the defendant's petition for the writ of *certiorari*, presently to be considered, and it so appears from the affidavits filed with this petition. There is no question that the undertaking was in fact not given until the day last mentioned. But it is earnestly contended that the court is bound by the recital in the record first above recited—that the record is conclusive.

There might be more plausibility in this contention if the recital affirmatively appeared to be that of the court, or that the entry was made by its order; but it is manifest that the material part of it was simply a memorandum of the clerk, whose duty it was to take the undertaking. He made the minute, no doubt, on the day the undertaking was given, without entering the date of the same. The last sentence of it could have no consistency with any pertinent order of the court. Indeed, it did not need to have been put on the record at all. It noted nothing to

be done by the court and nothing to be attributed to it, unless it appeared in some affirmative way to be of it. The case stated on appeal states the facts, no doubt, and it is not inconsistent with the record proper, or the facts of the matter apart from the record.

(129) As it is not the duty of the court to receive the undertaking, if it does, as it may, this must appear—not by implication—but affirmatively. *S. v. Wagner,* 91 N. C., 521. So that the motion to reinstate the appeal upon the docket cannot be allowed.

It may be questioned whether a motion to reinstate on the docket an appeal dismissed, is a proper remedy, where the dismissal turned upon a question of law raised. It would seem that in such case the proper remedy would be an application to *rehear* the motion to dismiss.

The case of *Wiley v. Logan,* 94 N. C., 564, was not like this one. The appeal in that case was dismissed upon the ground that the record had not been printed—simply the requirement of a rule of court had not been complied with—and a motion to reinstate the appeal was considered and allowed at the term next after the dismissal. It referred to neglect of counsel in this Court in respect to matters that ordinarily do not come within the sphere of professional duty.

The defendant also filed her petition praying that the writ of *certiorari* be allowed in her favor as a substitute for her appeal so lost. We are constrained to deny this application. It is not suggested that the appeal was lost or that the petitioner suffered prejudice in respect thereto by anything said or done by the plaintiff or his counsel. The defendant made her counsel her agent to give the necessary undertaking, and she must be bound by his laches. She and he resided in the town of Henderson, near the office of the clerk whose duty it was to take it. It might have been given in ten minutes. The time to give it was extended by consent of plaintiff more than a month, yet it was not given until after the lapse of more than two months. The excuse given for such delay is, that the agent was absent in a distant city attending his wife who was ill, and there for medical treatment until after the lapse of the

(130) time allowed. It does not appear that his absence was really necessary or continuous. But on the contrary, it appears that he was not there continuously; that he was at his place of business, and "attended to considerable legal business in law office" during that time. Moreover, it appears that he had a clerk in his office and several associate counsel—one of them residing in the same town, and the others within easy reach of it. He might easily, if he found it inconvenient for any cause to give his personal attention to the matter of the undertaking, have requested one of them to give it prompt attention. It does not appear that he did. To file the undertaking required but a few minutes, but it was important—emergent—to file it within the time allowed. The

failure to do so was not constrained; there was manifest neglect in contemplation of law, whether it was occasioned by inadvertence or forgetfulness, and as a consequence important rights of the plaintiff supervened that are not within our control. We are not at liberty to overlook such neglect of the defendant, while the plaintiff insists upon his rights growing out of it. The authorities cited and relied upon by counsel of the plaintiff are strongly in point. *Winborn v. Byrd,* 92 N. C., 7; *Churchill v. Insurance Co., ibid.,* 485; *Turner v. Quinn, ibid.,* 501.

The motion to reinstate the appeal must be denied, and the petition dismissed.

DAVIS, J., dissenting: I cannot concur in the refusal to grant the writ of *certiorari.* Accepting the construction placed by this Court upon chapter 121 of the Acts of 1887 as settled by the decision in this case at the last term, and without questioning that decision, I think the affidavits and the record made a part of the affidavit of the defendant disclose facts which entitle the defendant to the writ.

It appears from the record that the security offered when the (131) appeal was taken was accepted as sufficient, the bond was executed before the appeal was sent up, so no harm came or could have come to the appellee by reason of the fact that it was not executed within the time named; for it was not a bond to stay execution, and that could have been issued as well after as before the execution of the bond for costs.

If the merits are with the plaintiff, he is protected and can lose nothing by the trial; but if with the defendant, as she alleges, then she suffers loss without remedy, by a failure to comply, technically, with the letter of a statute strictly construed, which, I think, was intended to secure the trial of causes upon their merits, and which should therefore be liberally construed.

Cited: Griffin v. Nelson, 106 N. C., 238; *Graves v. Hines, ibid.,* 327; *S. v. Wheeler,* 185 N. C., 672.

WILMINGTON & WELDON RAILROAD COMPANY v. C. C. SMITH.

Condemnation of Land—Appraisement—Presumption.

1. The sum assessed against the owner of land over which a railroad is constructed, for benefits arising therefrom, cannot exceed that which may be assessed in his favor for damages, and must be for those benefits which are special to the owner, and not such as he shares in common with other persons.

2. It is not necessary that the commissioners appointed to assess benefits and damages should set forth in their award the particulars in which they consisted; and nothing to the contrary appearing, it will be presumed that they acted upon the proper rules in estimating the assessments.

THIS is a summary proceeding to condemn land, which was heard upon exceptions to report of commissioners by *Merrimon, J.*, at Fall Term, 1887, of NASH Superior Court.

(132) The plaintiff company proposing to run a branch railroad from a point at Rocky Mount on its own track towards and by the town of Nashville in its southwestern extension, and being unable to come to an agreement with the defendant as to the purchase of the right of way over the lands owned by him in the line of survey, applied to the Superior Court for the appointment of five commissioners to examine the land to be condemned and assess the value thereof in damages to the defendant, as also the value in benefits to accrue thereto from the construction of the road.

No answer was put into the petition, and the order of appointment as asked, and for the purposes mentioned, was accordingly made, and with the consent of the defendant, who had been duly served with notice of the intended application.

The commissioners, or "jurors" as they are called in the record, met on the premises, the defendant being present, examined the same and made report as follows:

"We the undersigned jurors, appointed by John T. Morgan, clerk of the Superior Court of Nash County, to assess the damages on C. C. Smith's lands by reason of the railroad running through the same, do hereby make the following report:

Damages, $12.50 per acre	$ 92.75
Benefit derived from said road	300.00

All of which is respectfully submitted.

22 Sept., '86." (Signatures.)

The defendant filed exceptions to the report, which may be summarized thus:

1. For that too low an estimate is put upon the value of the land. (This exception was afterwards withdrawn.)

2. For that in the estimate of accruing benefits the defendant's claim to compensation for the easement acquired is extinguished, and that entering into the excessive valuation were benefits not specially pertaining to him considered and acted on. The clerk, exercising the

(133) functions of the Superior Court, after a recital of the proceed-

ing in his adjudication, overruled the exception, confirmed the report and condemned the "seven and one-half acres" described in the report for the uses of the railroad, from which the defendant appealed to the Superior Court in term time. Upon the hearing before the judge he rendered the following judgment:

"This cause coming on to be heard, the defendant withdrew his exceptions to so much of the report as fixed the amount of damages at $12.50 per acre for seven and one-half acres, $92.75, and moved for judgment for said sum, with interest from 22 September, 1886. The court being of the opinion that the charge for benefits was too vague, in that the report does not state of what the benefits consisted, offered to the plaintiff to recommit the matter to the jury, to the end that they might state the particular benefits derived, the plaintiffs declining to ask for this:

It is therefore ordered and adjudged by the court, that the defendant recover of the plaintiff ninety-two dollars and seventy-five cents ($92.75), with interest thereon from 22 September, 1886, and the cost of this proceeding.

From this judgment the plaintiff appealed.

J. Battle for plaintiff.
C. M. Cook filed a brief for defendant.

SMITH, C. J., after stating the case: There is no controversy as to the regularity of the proceeding for the condemnation to the use of the plaintiff of the right of way over the defendant's land for the purpose of constructing and operating the projected branch road, and the only point brought up for review is the rejection of the estimate of advantages to the defendant because of the vagueness in the report.

It is not disputed, but in the briefs of counsel of the respective (134) parties conceded, that the benefits conferred upon the owner of the land from the building of the road, the value of which is to go in the lessening his claim for damages resulting from taking and condemning his property, are not such as he shares in common with other landowners or near residents, but such as are special to himself, and the allowance cannot extend beyond the extinguishment of the claim for compensation for the property taken, nor constitute a counterclaim for the excess. *Asheville v. Johnston,* 71 N. C., 399, and other cases referred to in appellant's brief.

But it is assumed in the absence of any evidence to the contrary, and we think rightfully assumed, that the commissioners understood and acted upon the proper rule in estimating the value of these benefits, inasmuch as the defendant was present and did not then insist upon a

different rule of admeasurement of the benefits, nor does he state that ground of objection in his exception to the report, at least with any particularity, if at all.

The exception is for that the commissioners in the assessment took into consideration the supposed benefits which might arise from the construction of said branch road, and while they said the defendant's land was damaged to the extent of seven acres at $12.50 per acre, they extinguished it in the estimate of benefits "which defendant is advised and believes is unlawful."

We do not concur in the opinion of the judge that greater particularity is required, and that the report ought to have shown in what the "benefits" estimated consists. A general verdict is sufficient unless error enters into it, and if such there were it ought to appear. The response meets the error, and if it did not objection should have been made when the report was submitted.

There is error, and this will be certified for further action in the court below.

Error.

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(135)

E. G. McDANIEL v. ROBERT ALLEN ET AL.

Agricultural Lien—Mortgage—Claim and Delivery—Judgment—Contract—Evidence.

Where A., the tenant of P., executed to M. an agricultural lien to secure advances on the crops to be grown on the land of P., and the latter at the same time agreed with M. to release three bales of cotton to be grown, and upon which he claimed he held a prior lien: *Held,*

1. That the declarations of P. made after suit was brought that M. should have the three bales of cotton, was irrelevant.

2. That as no particular bales of cotton had been specifically set apart to be released by P., M. could not maintain an action against him for the recovery thereof; and that his remedy, if any, was for the breach of contract to release.

CIVIL ACTION for the recovery of personal property, tried before *Connor, J.,* at March Term, 1887, of the Superior Court of JONES County.

In February, 1883, the defendant Allen executed to the plaintiff an agricultural lien on the crops of corn, cotton, etc., to be raised by him "during the year 1883, on the lands of J. C. Parker, or elsewhere," to secure advancements to the amount of $300. By the same instrument

there was also conveyed two horses, a buggy and other personal property as additional security. At the same time J. C. Parker wrote to the plaintiff as follows: "I will release three bales of cotton for Bob to pay you on the horse he bought of you; the bales shall weigh 500 each." It is admitted that "Bob" meant the defendant Allen.

On the same day that the summons was issued in this action the plaintiff sued out claim and delivery for the personal property mentioned in the lien executed to him by the defendant Allen, and it was seized by the sheriff.

The crop was replevied by the defendant Parker, and the other personal property was delivered to the plaintiff.

After the complaint was filed, the defendants Parker & Simmons were permitted to interplead, and they filed an answer (136) alleging ownership of the crops in themselves.

At Spring Term, 1887, the plaintiff filed an amended complaint alleging indebtedness of defendant Allen for supplies advanced to enable him to make a crop in 1883, on the lands of the defendant Parker.

The defendants, Parker & Simmons, also filed an amended answer, in which it is admitted that the defendant Parker agreed to release his claim as landlord to three bales of cotton to be raised by Allen to be applied to the payment of a horse sold to said Allen by the plaintiff, but they say the plaintiff had other security primarily liable for said debt, which he had seized and sold and purchased himself, and which should be so applied.

The plaintiff introduced as evidence the lien which also included the mortgage of personal property, the paper written by Parker releasing three bales of cotton, the note of Allen for $300, and also himself as a witness, to show that he sold to Allen a horse and buggy and took the note for $300 and the mortgage and release from Parker; that Allen was Parker's tenant, and used the horse in making the crop; that he made no other advancements; that he seized and sold the personal property for $140, and that Allen owed him $188 on his note; that more than three bales of cotton were raised by Allen, and three bales were worth $142.

For the defendants, Parker & Simmons, there was evidence to show indebtedness from Allen to them to a considerable amount, which was a lien upon or secured by a mortgage on the crop.

The plaintiff was recalled as a witness, and offered to show that after the cotton was seized the defendant Parker promised that he should have three bales of cotton.

This was objected to by the defendants as irrelevant, and excluded by the court, and plaintiffs excepted.

(137) The following issues were tendered by the plaintiff and assented to by defendants:

"Is the plaintiff the owner and entitled to the possession of three bales of cotton of the crop if made by Robert Allen during the year 1883 on the lands of defendants?"

The court instructed the jury that upon the testimony the plaintiff was not entitled to recover. The plaintiffs excepted.

The plaintiffs moved for judgment against Robert Allen for $188 and for the personal property described in the complaint, the same having been delivered to him, the plaintiff, by the sheriff. This judgment was, without objection, rendered. The plaintiff then moved for judgment against the sureties on the undertaking given by defendant. The court denied this motion, because it was conceded that the plaintiff had taken possession of and sold the property. The plaintiff excepted.

The court then rendered the judgment which appears in the record. Plaintiff appealed.

S. W. Isler for plaintiff.
Clement Manly for defendants.

DAVIS, J., after stating the case: The first exception was to the exclusion of the evidence of the plaintiff offered to show that after the cotton was seized the defendant Parker promised that he should have three bales of cotton.

This is not an action against Parker for a refusal to comply with a contract or promise to deliver three bales of cotton, but an action of claim and delivery, and the only issue presented is as to the right of the plaintiff to the possession of three bales of cotton of the crop made by "'Bob' Allen during the year 1883 on the land of the defendant." If Parker had agreed to deliver three bales of cotton to the plaintiff under a contract of sale, or if he had conveyed to the plaintiff by mortgage three bales of cotton, or if, as was proposed to be shown in this (138) case, he had promised that the plaintiff should have three bales of cotton, it would only have given to him the right to sue for the *value* of three bales of cotton if not delivered. There were no *specific three bales* of cotton identified and separated from all other cotton conveyed to the plaintiff, or promised to him, and to which he was entitled to possession. To entitle him to claim and delivery the cotton must be identified.

This has been well settled since the "Buggy Case." *Blakely v. Patrick,* 67 N. C., 40; *Atkinson v. Graves,* 91 N. C., 99, and cases cited. Concede that, as against Allen, who executed the agricultural lien, the crop to be raised "during the year 1883 on the lands of J. C. Parker or

elsewhere," was sufficiently definite, as insisted by the plaintiff, to enable him to maintain claim and delivery against Allen for the crop so raised, it could give no such right against Parker upon his alleged promise that the plaintiff should "have three bales of cotton"; as against him, the plaintiff at most could only have a chose in action, and it was in this view only that the case of *Threadgill v. McLendon,* 76 N. C., 24, and other cases cited by counsel for the plaintiff, were applicable.

The evidence offered was properly excluded as irrelevant to the issue.

We can see no error in the instruction of his Honor that upon the testimony the plaintiff was not entitled to recover, nor can we see any error in the refusal of the court to give judgment against the sureties on the undertaking given by the defendant. Only the crop was replevied by the defendant Parker, and as to that the plaintiff was not entitled to possession.

The other property had been delivered to the plaintiff and sold by him.

No error. Affirmed.

Cited: Boone v. Darden, 109 N. C., 77; *Mizell v. Ruffin,* 113 N. C., 23; *Moore v. Brady,* 125 N. C., 38; *Pfeifer v. Israel,* 161 N. C., 430; *Milling Co. v. Stevens, ibid.,* 512.

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(139)

THE MERCANTILE TRUST AND DEPOSIT COMPANY OF BALTIMORE ET AL. V. ATLANTIC AND NORTH CAROLINA RAILROAD COMPANY ET AL.

Trust and Trustees—Mortgage.

1. A provision in a deed that the trustees therein named—to whom the property is conveyed to secure an indebtedness—shall be entitled to just compensation for all services which they may render under the trust, to be paid by the vendor, creates no lien on the property conveyed for such compensation.
2. *It seems* that ordinarily a court will not decree a release and satisfaction of the indebtedness and property until a proper compensation has been made to the trustees.

THIS is a civil action, heard before *Merrimon, J.,* upon a motion for judgment upon the pleadings, at September Term, 1887, of WAYNE Superior Court.

The plaintiffs alleged in substance that the defendant corporation, in 1868, executed to Thomas Bragg, James Bryce and the defendant, J. F.

Pickerell, a mortgage upon its roadbed, franchise and other property to secure a bonded indebtedness of about two hundred thousand dollars; that two of the trustees, Bragg and Bryce, having died, the defendant John H. Dillard was appointed in the stead in pursuance of a provision in the mortgage; that the indebtedness thus secured has been fully paid and discharged chiefly by the delivery to the secured creditors of other bonds issued by the defendant corporation and secured by mortgage in the year 1887; that they are the owners or have some interest in the last named bonds, but cannot negotiate the same because the defendant trustees refuse to execute proper deeds of release and in discharge of the former mortgage. They ask that the court adjudge that the original indebtedness is paid and the mortgage to secure it be canceled, etc.

(140) The defendant corporation admits all the allegations in the complaint and does not resist the relief demanded, but the defendant trustees, while admitting the payment of the bonds as alleged, aver that by the terms of the mortgage they are entitled to compensation for their services, which is a lien upon the property conveyed, and which has never been paid; and that they ought not to be required to execute any release until their demands are satisfied.

"The answer and replication were filed 16 September, 1887. On same day the plaintiff moved for judgment, which was resisted by defendant Pickerell on the ground that the matter was not properly before his Honor at this term, and that no judgment could be rendered until the determination of the action. His Honor made the following order or judgment:

"This action coming on to be heard at this term of the court, upon the complaint and answer herein, by which it is admitted that the mortgage debt secured by the mortgage of 1868 has been paid: It is ordered and adjudged that upon the plaintiff's filing, or causing to be filed, with the clerk, to be approved by him, a justified bond in the sum of $10,000, to secure the payment of such sum as Pickerell shall recover in this action, as compensation as trustee, the mortgage or deed of trust, executed in 1868 by the Atlantic and North Carolina Railroad Company to J. F. Pickerell, James Bryce and Thomas Bragg, shall be deemed to be fully discharged and satisfied, and the same shall be canceled; and the clerk shall, upon the filing said justified bond, cause to be recorded in the register's office of Wayne, Lenoir, Jones, Craven and Carteret counties a copy of this judgment, and that the same shall have the same force and effect as a formal satisfaction of record of said mortgage or deed of trust made by the present trustees, John H. Pickerell and John H. Dillard; and this action be retained for further directions."

(141) From which the defendant Pickerell appealed.

John W. Hinsdale for plaintiffs.
J. B. Batchelor for defendant Pickerell.

MERRIMON, J. The subject-matter of this action is wholly equitable in its nature, the purpose being to have a mortgage of the defendant corporation therein named, which had been in effect discharged by the payment of the debt secured by it, formally discharged by proper acknowledgment of the trustees named in it. The principal parties are the plaintiff and the defendant corporation, and the latter answering confesses the complaint. The appellant, who is one of the trustees of the mortgage, while admitting in his answer that the mortgage debt has been paid, insists that he is entitled to be compensated the sum of five thousand dollars for his services as such trustee, and that he has a lien upon the property embraced by the mortgage, which cannot be discharged until his compensation shall be ascertained and paid. He claims that his lien arises by virtue of the following provision of the mortgage: "That each of the said trustees shall be entitled to just compensation for all services which he in common with his associates, or either of them, or otherwise, may hereinafter render under the trust created by these presents, which compensation shall be paid by the party of the first part," who was the defendant corporation.

This provides for compensation, but there is no provision or clause of the mortgage that such compensation shall constitute a part of the mortgage debt, or that it shall be a lien of any nature upon the property embraced by the mortgage. The most that could be claimed was that the court, when its aid should be asked, would not, in the exercise of a sound and just discretion, compel the trustees to acknowledge the satisfaction and discharge of the mortgage until reasonable compensation to them should be paid by the mortgagor. The court would probably thus protect and help the trustee in a case like this, but this (142) source of protection was not a lien on the property; it is simply a power of the court to compel fair dealing, not to be so exercised as to do prejudice to any party interested. This seems to have been the view taken and acted upon by the court below. The defendant admitted the plaintiff's cause of action, and was content that a proper judgment should be entered at the appearance term.

This might be done by consent—indeed, the plaintiff might move, as of right to have judgment, because nothing was left to be tried. The objection and exception of the appellant were therefore unfounded, certainly in so far as they applied to the appellee and the defendant corporation. They consented to and desired the judgment, and do not complain of the requirement that the bond shall be given for the appellant's benefit.

The judgment as to the appellant was interlocutory, and the bond required was for his benefit—intended to secure the payment of such sum of money as the court, on the final hearing, may adjudge due to him for compensation.

The action as to him will be tried in the ordinary course of procedure. He contends that the court could not substitute the bond required by the order appealed from for and thus discharge his lien upon the mortgage property. We need not say that he could or could not. As we have seen, he had no such lien; but if he had, his right remains to be litigated in the further progress of the action.

The error complained of is unfounded, and the exception is not sustained. Let this opinion be certified to the Superior Court, to the end that further proceedings may be had in the action according to law.

Affirmed.

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(143)

H. G. SPEIGHT v. JOHN H. JENKINS AND WIFE.

Pleading—Demurrer—Action to Recover Land.

1. Where the complaint contains several causes of action, the defendant may answer as to some and demur to the others, but he cannot demur to one allegation and answer other allegations in the same cause of action. The answer or demurrer must embrace the entire cause of action.
2. If any one allegation is defective it extends to the whole of that cause of action, and a demurrer will be sustained.
3. In an action to recover land it is sufficient if the complaint distinctly describes the land and alleges that the defendant is in the unlawful possession and refuses to surrender, without setting forth what particular portion he withholds.

CIVIL ACTION, tried before *Shipp, J.*, at Fall Term, 1887, of GREENE Superior Court.

The plaintiff's complaint alleged in the first section that he was the owner of a tract of land containing 184 acres, describing it by metes and bounds; and in the second, "that the defendants are unlawfully in possession of some three or five acres of the said described land and unlawfully and wrongfully withholds the same from him." The defendants demurred to the second section of the complaint and for cause of demurrer said "that the first allegation of the complaint describes a tract of land said to contain 184 acres, and the allegation contained in the second demurred to, 'that the defendants are unlawfully in possession of some three or four acres of the said described land and unlawfully

and wrongfully withholds the same from him,' does not sufficiently describe what part of said 184 acres of land the defendants are alleged to be in possession of, and is too uncertain a description."

Upon the hearing, the court being of the opinion that the description was sufficient, overruled the demurrer, to which the defendants excepted.

The defendants were allowed to answer, and the jury having found all the issues in favor of the plaintiff, judgment was ren- (144) dered in his favor, and the defendants appealed to the Supreme Court.

No counsel for plaintiff.
W. C. Munroe for defendants.

MERRIMON, J. The complaint alleged a single cause of action.

The defendants answered except as to the second allegation of the complaint, and as to this he demurred. As the demurrer applied to a single allegation of the cause of action it was insufficient and the court might have disregarded it. A party cannot answer as to some of the allegations of a cause of action and demur as to others. The demurrer must embrace the whole, else it will be bad. If there be several causes of action alleged, the party defending may answer as to one and demur as to another. The pleading as to each cause of action must have unity and consistency. Each allegation must be taken in connection with the other and the whole together, so that if there is a single allegation fatally defective it extends to the whole, and a demurrer should embrace the whole. *Ransom v. McClees,* 64 N. C., 17; *Sumner v. Young,* 65 N. C., 579; *Von Glahn v. DeRosset,* 76 N. C., 292.

But we think that if the pleading had been sufficient, the objection was unfounded. The complaint alleged that the plaintiff was the owner and entitled to the possession of a tract of land specifically described—that the defendant was unlawfully in possession of a part thereof, three or five acres—and wrongfully withheld the same from him. The alleged ownership and the extent thereof as to boundary was thus pointed out to the defendant, and he knew, or might have known, whether or not he was in possession of any part thereof and could have (145) made his defense, if he had any.

If on the trial the plaintiff proved his allegations to be true, he was entitled to recover, whether the possession of the defendant extended to the whole tract, to three, five or fifty acres. The allegation that the possession of the defendant extended to three or five acres was an unnecessary, immaterial, redundant allegation.

The leading material allegation was that the plaintiff was the owner and entitled to the possession of the land described, and the defendant

was unlawfully in possession of some part of it and refused to surrender the same. The extent of the possession was not material. If for some possible reason the extent of the possession had become material, the defendant might have asked the court to make the description more definite.

Generally, the pleadings in actions to recover land, under the present method of procedure, are very simple, brief and comprehensive. A leading object of them is to avoid technicalities and afford the parties large opportunity to prove title in any way they may properly be able to do. If in some cases they fail to give such precise information to the opposing party as may be fairly necessary, the court will, upon application, require the particular allegation or the pleading complained of to be made more precise. *Johnston v. Pate,* 83 N. C., 110; *Fitzgerald v. Shelton,* 95 N. C., 519; *Richards v. Smith,* 98 N. C., 509.

Affirmed.

Cited: Bryan v. Spivey, 106 N. C., 99.

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(146)

JAMES L. OUSBY ET AL. V. JAMES B. NEAL ET AL.

Injunction—Receiver.

While the act of 1885 (ch. 401), dispenses with the necessity for an allegation of insolvency of the persons against whom an injunction is sought to restrain a trespass continuous in its nature, or the cutting of timber trees, it does not limit the discretion of the court to make such orders as may be necessary to protect the rights of the parties pending the litigation; and where the trespass is admitted or proved, the court should require the defendants to execute a bond to secure the plaintiffs against any damages they may recover upon the final determination of the action, and upon failure to do so, appoint a receiver or make such other order as may be necessary to secure the rights of the parties.

THIS was a motion to dissolve a restraining order, granted in an action pending in CARTERET Superior Court, heard before *Avery, J.,* in Chambers, on 1 December, 1887.

The plaintiffs allege that they are the owners of a tract of land described in the complaint, situated in the county of Carteret, containing four hundred acres, more or less; that the defendants, by their agents, etc., after having been forbidden by the plaintiffs so to do, have tres-

passed upon the land by cutting down the timber trees growing thereon, selling and carrying off the same, and are now trespassing and cutting timber thereon and hauling it therefrom, and they threaten to continue to do so; that the land is unoccupied and unenclosed, and chiefly valuable for the timber trees growing and standing thereon, and that it is specially valuable for those which command a ready sale; that a continuance of the trespass as aforesaid "will work irreparable injury to the plaintiffs, and if persisted in will render their land valueless"; that they have already been damaged at least $100, and if the trespasses are continued and all the trees cut from the land they will be still further endamaged at least $500; that neither of the defendants are worth anything above the exemptions allowed by law, and they ask judgment for (147) $100 damages sustained, and that the defendants be perpetually enjoined from trespassing in any way on the land.

The defendants answer and deny title in the plaintiffs, and allege title in the defendant Smith. They admit that the land is mainly valuable for timber, and that the defendant Smith has caused to be cut and sold therefrom some of the timber growing thereon, but they deny that they have been forbidden to do so, and it is denied that the defendant Neal has cut or sold any of the timber from the land.

They deny irreparable injury, etc., and all damage to the plaintiffs.

They deny the allegation that neither of the defendants is worth anything above the exemptions allowed by law, and say the defendant Neal is a man of considerable means and worth largely more than his exemptions allowed by law; that he is amply able to answer the plaintiffs in damages, and that any judgment they may recover against him can readily be collected by legal process.

They further allege that the defendant Smith and those under whom he claims have been in the sole, undisputed and continuous possession of the land for twenty-five years, using the same, as it can only be used, for wood, etc.; and they rely upon the bar of the statute, etc.

The motion to vacate the restraining order was granted, and plaintiffs appealed.

John Devereux, Jr., for plaintiffs.
No counsel for defendants.

DAVIS, J., after stating the case: Chapter 401 of the Acts of 1885 provides "that in an application for an injunction to enjoin a trespass on land, it shall not be necessary to allege the insolvency of the defendant when the trespass complained of is continuous in its (148) nature, or is the cutting or destruction of timber trees."

The purpose of this action is to recover damages for the alleged trespasses mentioned in the complaint, and to perpetually enjoin the defendants from trespassing on the lands described.

It is insisted by the plaintiffs that it was intended by the act just recited that in trespasses of the character complained of the injunction should not only issue without any allegation of the insolvency of the defendant, but should be continued to the hearing.

While the statute relieves plaintiffs of the necessity of alleging the insolvency of defendants in trespasses of the class named, we apprehend it was not the purpose of the law to limit the power of the court in the exercise of its discretion in making such orders as will protect the rights of all parties in respect to the subject-matter about which the litigation may be pending.

The rulings of the Court in *Lewis v. Lumber Co., ante,* 11, following the decision in *Lumber Co. v. Wallace,* 93 N. C., 22, are applicable to and govern this case.

The defendants should be required to execute such reasonable bond, with sufficient security, as the court may deem proper, payable to the plaintiffs, conditioned to secure to them such damages as the court may adjudge in their favor upon the determination of the action, and in the event of failure to give such bond the court may make such order or orders in the cause by the appointment of a receiver, or otherwise, as will protect the rights of the parties pending the litigation.

This will be certified to the Superior Court, that the parties, if they so desire, may proceed in accordance with this opinion.

Modified and remanded.

Cited: Bond v. Wool, 107 N. C., 153; *McKay v. Chapin,* 120 N. C., 160; *Sharpe v. Loane,* 124 N. C., 2; *Kisler v. Weaver,* 135 N. C., 390; *Stewart v. Munger,* 174 N. C., 405.

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(149)

GEORGE D. NEWBY v. SAMUEL B. HARRELL AND C. W. HARRELL.

Partnership—Negligence—Judge's Charge.

1. **While the general rule is, one partner cannot maintain an action against his copartner to recover money which might have been taken into account of the partnership, until after a settlement, he may sue before such settlement to recover for the wrongful conversion or destruction of the joint property, or for the loss or destruction of his individual property used in the business, resulting from the negligent use by the other partner.**

2. One who uses machinery in his business is bound to provide it with such appliances as will insure the safety of the property of others; and for any loss resulting from such failure he is responsible to the sufferer in damages, unless the latter, by his want of care, contributed to the loss.

3. The judge is not required to give instructions asked, and to which the party is entitled, in the words or in the order in which they are presented; it is sufficient if they are substantially given.

CIVIL ACTION, tried before *Graves, J.*, at Fall Term, 1887, of the Superior Court of PERQUIMANS County, to recover damages alleged to have been sustained by the burning of gin, gin-house, etc.

In August, 1883, the plaintiff and defendants entered into an agreement "to run a gin at G. D. Newby's house, jointly."

The defendants were to furnish an engine and fireman, and two hands to perform any work in connection with the ginning. The plaintiff was to furnish a house and gin and press, and three hands—fit up the gin and press and house at his own expense, but the defendants to furnish "the money, if he should need it, to run the whole business, at 8 per cent interest upon the amount used."

The plaintiff was also to furnish "his own oil and fixtures to engine, etc." The plaintiff was to have control and "give it his attention," and the gin was to be responsible for repairs done on same. (150) They were to divide the profits equally.

They continued to operate under this contract till 6 November, 1885, with one modification, to wit: in the summer of 1884 the plaintiff, being about to leave his farm to live in Hertford, told defendants that he would have to hire some one to take his place, to which they agreed, and he did hire a man, but the defendants having complained that he was not competent the plaintiff discharged him and employed another at once, who remained till the fire. The engine and appliances in use at the time of the fire were the same that had been used constantly since the contract was entered into. The property was destroyed by fire about 5 November, 1885.

The defendants introduced evidence tending to show that the engine and appliances, including spark arrester and smokestack, were complete and of the proper kind; that they did not live at or near the gin, and that no notice or complaint of any defect in the engine, spark arrester or other appliance was made to them till two days before the fire, when they were informed by the man in charge in Newby's place that the engine needed work; that they immediately sent one Coppage, who was a competent machinist, to repair it, who, on the day before the fire, put it in proper condition, and no other complaint was made.

They further offered evidence tending to show that the house furnished by plaintiff was not a proper and sufficient one; that the roof was de-

cayed and inflammable; that they complained of its condition, but that the plaintiff failed to remedy the same, and the fire occurred because of its condition.

The plaintiff offered evidence tending to show there was no spark arrester, and that the fire was the result of its absence; that notice and complaint was made to the defendants of the condition of the engine a month before they sent Coppage to repair it, and that Coppage
(151) was incompetent; and that when such complaint was made the defendant, S. B. Harrell, promised to provide the engine with a spark arrester at once and failed to do so at all; that the plaintiff knew nothing about machinery; that the defendants had sole management of the engine; that the defendant, C. W. Harrell, was present at the fire; that the house and roof were repaired at the commencement of the business and were in proper condition; and that no complaint was made by the defendants that they were not in proper condition. The only negligence of which any evidence was offered by plaintiff was as to the engine.

The defendants asked the court to charge as follows:

"That the plaintiff and defendants were partners at the time of the fire, and the plaintiff cannot recover in this action; that if the plaintiff knew that there was no spark arrester, and that there was danger because there was none, and failed to notify the defendants, but continued with this knowledge to use engine without it, he cannot recover in this action; nor can he recover though he notified the defendants, if the defendants on receiving the information did all that a prudent man ought to have done to have the danger removed.

"By the terms of the contract the control of the business and engine was in the plaintiff, and if he failed to notify the defendants that the engine was dangerous because of the absence of the spark arrester, or to remedy the same, but continued to work it in that condition, he cannot recover in this action.

"Although the partners retained the title of the property, yet during the continuance of the copartnership the property belonged to the copartnership and was under control of the plaintiff.

"If the plaintiff occupied and acquiesced in the engine and appliances furnished by defendants, with full knowledge of these defects, if they existed, he cannot recover in this action."

(152) The court refused to give instructions requested except so far as they are embodied in the charge given as hereinafter set out. Defendants excepted.

The court charged as follows:

1. The legal effect of the contract is, the plaintiff and defendants are copartners in the business of ginning cotton, the plaintiff retaining title to his gin and gin-house, except, so far as it is necessary for the business

to be engaged in, to place the property under control of the copartnership, and the defendant in like manner retaining title to the engine and fixtures.

2. The peculiar provisions of this contract of copartnership, as between the parties themselves, leaves the parties each the owners of the property used in the copartnership, except so far as it was needed for the business of copartnership, and the defendants are responsible to the plaintiff for the want of the care which a man of ordinary prudence would use; and on the other hand the liability of the defendants for the want of due care would be removed if the injury to the plaintiff was the result of his own negligence or want of care.

3. It then becomes necessary for you to determine how the truth is in regard to the negligence or want of proper care on the part of the defendants, and therefore the first issue is submitted to you: and also to determine whether the plaintiff, by want of proper care, has contributed to the alleged injury, and therefore the second issue is submitted to you.

4. If one uses in his business machines, the machines so used ought to be such as are properly supplied with proper appliances to provide for safety in the operation of them. If, then, in operating steam engines with greater security from fire, spark arresters are necessary, and men of ordinary prudence in business use them, the defendants used their engine without such arrester, they would, in that regard, be guilty (153) of negligence. It is not necessary that the appliances should be of any particular kind or in any particular place, but they must be of such kind and placed in such position as are provided by men of ordinary prudence in machines of the same kind. If the defendants used such appliances for arresting sparks and diminishing the danger of fire as are used by men of ordinary prudence, then they would not be guilty of negligence on that account.

5. If the defendants did not use due care they would not be liable for loss unless the loss arose from that negligence. It then becomes necessary to determine whether plaintiff's loss was caused by defendant's negligence, and the plaintiff must satisfy you that the fire originated from the engine of the defendants, and that the engine did not have the proper appliances for diminishing the danger of fire.

6. The contract gave to the plaintiff the control of the business, at least to the extent of general supervision, and if the plaintiff with the consent of the defendants employed another to do the work required of him, it would not affect the right of the plaintiff to recover, if the work was done as required of the plaintiff.

7. Although the defendants may have been guilty of negligence, if the plaintiff was guilty of contributory negligence he would not be entitled to recover any damages. If the loss was the direct result of plaintiff's

want of due care, then the loss is the result of his own negligence, and he is said to be guilty of contributory negligence.

8. If the plaintiff and defendants were partners and the plaintiff had general oversight of the business; if the steam engine furnished by the defendants was defective because there was no spark arrester, and the plaintiff knew there was danger because there was no spark arrester, and knowing this danger he continued to use the engine in that condition, he was not using due care, and if the loss was the direct result of such
(154) want of care it was contributory negligence; but if he or his agent notified the defendant of the defective engine, and after having been notified of the defect the defendants failed to have the defect repaired, then it would not be contributory negligence on the part of the plaintiff.

9. If the defendants were notified of the defect in the engine and failed to repair or have it repaired within reasonable time, they would be guilty of negligence, and if loss result from such negligence then the defendants are liable. A failure to repair for a day or two would not be unreasonable delay. A failure to repair for a month would be unreasonable delay.

The defendants objected to charges 1, 2, 3, 4, 5, 6, 7, 8 and 9, etc., as given.

One Boyce, a juror, was challenged by defendants for cause, that he had served on a jury in this court within two years. It appeared that Boyce was of the regular panel, and had been engaged as a juror in the trial of a capital felony on the day before. When the verdict in the capital felony was rendered the night before the judge said to the jurors: "The talesmen are discharged, and such of the regular panel as wish to do so may go home tonight and will not be required to return. Those who remain will be in attendance upon the court tomorrow morning."

The juror Boyce did not go home and was in the court next morning and took his seat in the jury box, having been called in by the sheriff. The court held that Boyce was a regular juror, and that the ground of challenge was not sufficient. The defendants excepted and exhausted their challenges.

The defendants asked the court to submit the following issues to the jury:

(155) 1. Did defendants, by negligently failing to furnish a sufficient spark arrester and smokestack to their engine, set fire to and burn defendants' property? Did plaintiff accept as sufficient the engine and appliances furnished by the defendants, including spark arrester and smokestack?

2. Did the plaintiff and defendants engage in ginning cotton in 1883, under the contract set out in the complaint?

3. How much does plaintiff owe defendants?

The court refused these issues, and submitted the following:

1. Did defendants set fire to and burn the property of the plaintiff, mentioned in the complaint, by their carelessness?

2. Did plaintiff by his conduct contribute to the alleged injury?

3. What damages has plaintiff sustained by reason of defendants' negligence?

Defendants excepted.

The response to the first issue was "Yes," to the second "No," and to the third "$1,660."

T. G. Skinner and J. H. Blount, by brief, for plaintiff.
John Gatling and Leroy Smith for defendants.

DAVIS, J., after stating the case: 1. The first exception is to the refusal of the court to give the instructions asked for.

The court is not required to give instructions, though proper and such as the party is entitled to, in the very terms asked; and if such as are asked for, to which the party is entitled, are embodied, substantially, in the charge as given, it is not error. In this case the instructions asked for were substantially given, except the first, and that presents the question: Can one partner maintain an action against a copartner for injury to his separate and individual property used in the copartnership business, if such injury is the result of negligence or tort of the (156) copartner?

It may be laid down as a general rule, that before one partner can sue another partner at law, the settlement of the firm must be complete, and his right to recover only arises after a settlement of all partnership business. *Graham v. Holt,* 3 Ired., 300; or, as laid down by Collyer on Partnership, sec. 269, one partner cannot maintain an action against a copartner to recover money, when the sum sought to be recovered might be placed as an item in the partnership account. Among the exceptions to the general rule is the right of one partner to maintain an action against another for the destruction of the joint property, or its wrongful conversion. *Lucas v. Wasson,* 3 Dev., 398; Collyer on Partnership, sec. 382. If one partner may maintain an action against another for the destruction of the joint property, *a fortiori,* may the action be maintained when the property destroyed is the individual property of a partner used in the business of the partnership?

2. The defendant's second exception is to the entire charge of the court as set out in the record, without specifying or pointing out the errors therein, or the grounds of exception. This is too indefinite, but we have examined the charge of his Honor, *seriatim,* in view of the conflicting evidence, and no error appears to us.

3. The third exception cannot be maintained. Boyce was a regular juror, and there was nothing disqualifying in the facts settled.

4. Exception is taken to the judgment, but upon what ground is not stated. It follows the verdict, and we can see no objection to it.

Affirmed.

Cited: Waller v. Bowling, 108 N. C., 294; *S. v. Booker,* 123 N. C., 725; *Owen v. Meroney,* 136 N. C., 477; *Doyle v. Bush,* 171 N. C., 12; *Newby v. Realty Co.,* 182 N. C., 40; *Martin v. McBryde, ibid.,* 184; *Pugh v. Newbern,* 193 N. C., 260; *Enloe v. Ragle,* 195 N. C., 40.

(157)

GEORGE A. PECK v. S. H. MANNING AND E. E. BURRISS.

Evidence—Witness—Sale—Security—Deed.

1. Where, for the purpose of impeaching a witness, an instrument executed by him containing alleged contradictory statements, was introduced, it was competent to permit the witness, by way of explanation, to testify that the instrument, although an absolute conveyance upon its face, was in fact intended as a security for a loan.

2. In determining whether a deed conveying property, absolute in its terms, was intended as a security only, it is competent to show that the vendor remained in possession, exercised control over it and that the vendee treated it as a security.

CIVIL ACTION, tried before *Philips, J.,* at Fall Term, 1887, of the Superior Court of NEW HANOVER.

It is alleged and admitted that the defendant is sheriff of New Hanover County, and as such had in his hands executions against W. E. Davis and W. B. Davis, partners trading as W. E. Davis & Son, issued on judgments in favor of the plaintiff; that by virtue of said executions he levied on and seized certain property in the possession of the defendants in the executions and advertised it to be sold to satisfy the same; that thereafter without selling the property and without notice to plaintiff, he delivered it to "The First National Bank," released the levy and returned the executions unsatisfied.

This action is brought to recover damages for the alleged wrongful and unlawful action of the defendant in releasing the property without satisfying the executions.

Two issues were submitted:

1. Was the property levied on by the defendant the property of W. E. Davis & Son at the time of the levy?

2. What was the value of the property so levied on at the date (158) of the levy?

On the trial the plaintiff introduced a witness—W. B. Davis, one of the defendants in the executions referred to—who testified that the property levied on was the property of W. E. Davis & Son.

The plaintiff then turned the witness over to the defendants' counsel, who began to cross-examine him, and asked him if he (witness) would swear that the property levied on was the property of W. E. Davis & Son? Witness answered that "he would and did do so." Whereupon defendant introduced, and put in evidence, a bill of sale, absolute in form, purporting to have been signed by W. E. Davis, and by the witness, W. B. Davis, comprising the said firm of W. E. Davis & Son, and asked witness if he made that bill of sale. To which the witness answered that he did, and drew it himself, and that "he gave that as security for a loan of $400, borrowed by him from the First National Bank, the party to whom it was made." Upon direct reëxamination, plaintiff asked witness, "what was the purpose and object of giving said bill of sale?" Defendant objected, because the bill of sale could not be attacked collaterally. The court allowed the question, and the defendant excepted.

Witness answered: "I went to Burriss, president of the bank, and asked him to loan me some money. He asked me what security I could give him? I told him all that I had was this property, and he consented to let me have it. I told him I had a blank bill of sale and would draw it up. I went off and returned with it. I kept the property in my possession from then, and before that, up to the time the sheriff took it under the levy in 1885. We listed it in our name for taxation in 1883 and 1884, and also insured it in our name. At the time father signed the bill of sale I told him I had borrowed the money under the arrangements detailed above, and that we were giving this as security."

Plaintiff then offered in evidence the original sworn tax returns (159) for the year 1883 or 1884 of the First National Bank. Defendant objected. The court asked plaintiff's counsel what was the object in introducing it? Plaintiff's counsel stated that as the First National Bank had set up a bill of sale for said property, which had been put in evidence by the defendants' counsel, that these tax returns were offered as some evidence to show that the bank did not claim the property as its own during said years and did not list it for taxation, and also in corroboration of the witness Davis.

W. E. Davis was recalled as a witness, and testified without objection: "I received notification from the bank to come around and pay the interest on $400 every three months in advance, which we did pay for over two years."

After which W. B. Davis was then recalled by plaintiff, who testified that "we got several notices from the bank to come around and pay the interest on this loan, which we did pay." Defendants' counsel stated that he objected to this last evidence. Court allowed the testimony and defendant excepted.

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

J. D. Bellamy and W. L. Thompson for plaintiff.
D. L. Russell for defendants.

DAVIS, J., after stating the case: The first exception was as to the admissibility of the question asked the witness Davis as to the purpose and object of giving the bill of sale. It had been introduced by the defendant himself, and the witness Davis was examined in relation thereto with the manifest purpose, as the examination shows, of contradicting his statement that the property at the time of the levy belonged to Davis & Son. It is conceded that the property when levied on (160) by the sheriff was in the possession of Davis & Son, the defendants in the execution, and when it was sought to impeach the witness on cross-examination by asking him if he had not made the bill of sale to the bank, he had a right to explain, if he could, the apparent contradiction between the statement made on his examination in chief and the bill of sale, which he, himself, was called on to prove; and it was competent for the plaintiff in this action to inquire into the real nature of the transaction, and to show that the bill of sale, though absolute on its face, was intended as a security and void as against his judgments. However it might be in a controversy between the bank and Davis, as between the plaintiff and the defendant in this action, it was competent to show by parol that the bill of sale was not absolute, but only intended as a security. This we think, has been the law, certainly since *Gregory v. Perkins,* 4 Dev., 50; *Dukes v. Jones,* 6 Jones, 14.

As showing the character of the relation which the defendants in the execution bore to the property, it was also competent to show their continuous possession of it up to the time of the levy, and that they had listed it for taxation and had paid the taxes, and that the bank, in which the defendant alleged the title to be, did not give it in for taxation, and for this purpose the tax returns were admissible. *Austin v. King,* 97 N. C., 339.

This disposes of the second exception.

The third exception is to the statement of W. B. Davis in regard to the notices received from the bank to pay interest. W. E. Davis had previously testified, without objection, to the same fact, and we cannot

see how the notification by the bank that interest was due, and the payment of the interest upon such notification, can be considered as a mere declaration of the bank and therefore inadmissible as "hearsay" evidence, as insisted by counsel. The notification was an inci- (161) dent—the material fact was the payment of the interest—and that was competent.

Affirmed.

JOHN H. HANNON v. JAMES M. GRIZZARD ET AL., COMMISSIONERS.

Petition to Rehear—Office—Election—County Commissioners.

1. The principle upon which a cause was once decided in this Court will be reheard is again stated.
2. The duties imposed upon the boards of county commissioners in respect to the induction of persons to the offices to which they may have been elected are more than merely ministerial; they are *quasi*-judicial; and for an honest error in their exercise the commissioners are not liable either civilly or criminally.
3. The ruling in same case, reported in 96 N. C., 293, is reaffirmed.

THIS is a petition to rehear the appeal determined at February Term, 1887, and reported in the 96 Vol. N. C. Rep., 293.

W. H. Day and J. M. Mullen for plaintiff.
T. N. Hill and R. B. Peebles for defendants.

SMITH, C. J. On the rehearing of the case of *Watson v. Dodd,* reported in 72 N. C., 240, the late *Chief Justice* uses this language: "The weightiest considerations make it the duty of the courts to adhere to their decisions. No case ought to be reversed upon petition to rehear unless it was decided hastily, and some material point was overlooked or some direct authority was not called to the attention of the Court." The rule is reiterated by *Reade, J.,* in *Hicks v. Skinner,* (162) in the same volume, and by the present Court in *Haywood v. Daves, Devereux v. Devereux* and *Lewis v. Rountree,* reported in the 81st volume of the report and decided at the same term.

The petition in the present case simply alleges an erroneous ruling in law in the former decision, setting out wherein it consists and is supported by the argument of one of our most eminent and learned lawyers, concurred in by another, by which a conclusion is reached adverse to our own.

No case is cited and no authority referred to in either, and so we are asked to reverse a judgment just rendered in the Superior Court and affirmed in this Court, merely upon a course of reasoning and without a compliance with those essential conditions on which a right to ask for a review and correction of a previous ruling is dependent.

The decision was not hastily reached, but only after a patient and protracted examination of the subject, a full interchange of views among the members of the court, and a careful consideration of the authorities called to our attention and an investigation of our own. Under such circumstances and even after the numerous citations contained in the reargument, which are in the line of those produced at the first hearing, we might be content to leave the opinion and the course of reasoning that pervades it to its self vindication against the attacks now made upon its correctness and to declare our adhesion to it, nor do we deem it needful to rehearse what has been said or to fortify it with a new elaborate discussion.

The fallacy in the argument for the plaintiff lies in the assumption that the action of the commissioners is purely and only ministerial, and hence the refusal to admit the plaintiff to the office is the denial of a personal right that entitles him to full damages for the loss occasioned by his being kept out of office. There was certainly no necessity (163) for laboring this point, for generally a refusal to perform an enjoined and plain legal duty is actionable at the instance of the injured party. But this is taking for granted the very matter in contest. The general jurisdiction to admit to county offices those who may have been chosen upon the electoral vote as counted and ascertained by the board of county canvassers, is given to the board of county commissioners, and this is exercised in an examination into the regularity of the returns of the result of the election, which when regular are conclusive of the election, the sufficiency of the official bond tendered and the administration of the required oath.

In the case of a sheriff who has previously held the office, the board must go further and see that he is not delinquent in the payment of the taxes of a previous term. It is equally plain that an elected person, not competent to hold office under the Constitution, has no right to be admitted to office nor cause of action for being excluded. This necessarily implies an inquiry into his constitutional capacity to take and exercise the functions of the office to which he may have been chosen, and if, in making it, the commissioners commit an error in fact, they do not become personally responsible; it is an error of judgment alone. This forms no excuse when the error is one of law, because of the inexorable rule that presumes every person to know the law, and permits no excuse founded upon an alleged ignorance of it.

Now the jurisdiction committed to the commissioners comprehends all that is essential to an induction into office, and if its exercise in an honest endeavor and purpose to perform what is deemed by them a duty to the public, they mistake and overstep the limits of that jurisdiction, in an inquiry into the capacity of the person elected, under the Constitution, whose mandates are alike obligatory on all, do they render themselves liable, criminally or civilly, for the consequences?

If not strictly judicial, these functions are *quasi*-judicial at least, so far as to give protection against mere errors of judgment, (164) and the reverse holding would, we think, be fruitful in mischiefs to the public service and unjust to those engaged in it.

We propose to advert to a single case in our own reports, not hitherto referred to, in which the principle underlying our adjudication is directly and clearly recognized and declared, and is a conclusive authority for our own ruling.

In *Cunningham v. Dillard,* 4 D. & B., 351, the action was against a justice of the peace for accepting an insolvent surety against the plaintiff's objection upon an appeal to the County Court, the surety being the defendant's father. Delivering the opinion, *Gaston, J.,* thus expresses the views of the Court: "Whether in granting the appeal and accepting the security the magistrate did not act in a *judicial character* and in a matter *within his jurisdiction* is a question that may be well worthy of deliberate examination. If he did then the action was not maintainable. The law is clear that in general no action can be supported against a judge or justice of the peace acting judicially and in the sphere of his jurisdiction, however erroneous his decisions or malicious the motive imputed to him." . . . "But if the act complained of be *not a judicial act then we concur with his Honor in the opinion that the defendant was not liable if he acted bona fide and according to his best information.*"

And so *Chief Justice Taney* remarks in a case where suit was brought against the Postmaster-General for damages: "He committed an error in supposing that he had a right to set aside an allowance for services rendered upon which his predecessor in office had finally decided. But as the case admits that he acted from a *sense of public duty and without malice his mistake in a matter properly belonging to the department over which he presided can give no cause of action against him.*" *Kendall v. Stokes,* 3 Howard (U. S.), 98-99.

The principle enunciated by the Supreme Court of the United (165) States seems equally to protect the defendants in executing the functions of their office in inducting one chosen by the electors into his office and exempts them from personal responsibility. After a care-

ful and diligent study of a decision which counsel so confidently pronounce erroneous, we see no reason to reverse or change it, and therefore it must be affirmed and the petition dismissed.

Petition dismissed.

Cited: Fry v. Currie, 103 N. C., 206; *Gay v. Grant,* 105 N. C., 481; *Weisel v. Cobb,* 122 N. C., 69; *Elmore v. R. R.,* 132 N. C., 866; *Graded School v. McDowell,* 157 N. C., 319; *Herring v. Williams,* 158 N. C., 13; *S. v. Carter,* 194 N. C., 297; *Gower v. Carter,* 195 N. C., 698.

THOMAS W. STRANGE, ASSIGNEE, ETC., v. S. H. MANNING ET AL.

Complaint—Pleading—Demurrer.

If the complaint alleges several causes of action, some of which are bad, but one is good, it is error to sustain a demurrer to the whole complaint. The plaintiff should be allowed to proceed upon his good assignment.

THIS action was heard upon complaint and demurrer, before *Philips, J.,* at Fall Term, 1887, of NEW HANOVER Superior Court.

The complaint set out two causes of action—the *first* alleging, in substance, that the defendant Manning, as sheriff of New Hanover County, by the direction of his codefendants, and who had also executed to him an indemnity bond had unlawfully seized and sold under executions issued on judgments in favor of the said codefendants against one Crapon, certain property belonging to the plaintiff, and demanded judgment for the value of the property so sold, together with special damages, which it was alleged were suffered in consequence of the unlawful act of the defendants.

(166) The second cause of action stated, in substance, the same facts, and, in addition thereto, that the conduct of the codefendants was induced by malice toward the plaintiff (or his assignor) and demanded judgment: (1) against all the defendants for the value of the property and damages for its unlawful seizure; (2) against the defendant sheriff alone for damages for unlawfully and wilfully seizing and selling the property; and (3) against his codefendants for "maliciously ordering the seizure of said property," etc.

The defendants demurred and assigned the following causes:

1. That two causes of action have been improperly united in this: That the first cause of action is against all of the defendants for the

seizure of the property mentioned therein, while the second cause of action is against the defendant, the First National Bank, alone for a malicious injury; and, further, that the two causes of action do not affect all of the defendants, the said bank only being affected by the second cause of action and the other defendants having no interest therein.

2. And the defendants further demur to the second cause of action on the ground that the same does not state facts sufficient to constitute a cause of action in this: That the malice therein charged is not alleged to have been against the plaintiff, but is substantially alleged to have been against George M. Crapon and his wife, Mary Emma Crapon, who are not parties to this action.

Wherefore defendants pray that this action be dismissed at plaintiff's cost.

The demurrer was sustained, and the plaintiff appealed.

Thos. W. Strange for plaintiff.
D. L. Russell for defendants.

MERRIMON, J. The complaint is not orderly and precise, but (167) it, in substance and effect, alleges with sufficient intelligence a cause of action against all the defendants. What is termed a second cause of action is, in substance, the first one, with facts alleged in aggravation of damages as to some of the defendants. If the demurrer should have been sustained as to the second cause of action, obviously it should not have been as to the first one.

It is important, proper and very much better, that all pleadings shall be orderly and formal, avoiding unnecessary repletion and redundancy in the allegations embraced by them, but though they be informal and disorderly, if they set forth with reasonable certainty and intelligence the substance of the matter pleaded, the Court will take notice of and uphold them as pleadings, and, if need be, direct amendments as to mere matters of form.

The effect of sustaining the demurrer as a whole was to put the plaintiff out of court, although he had sufficiently alleged a cause of action as to all the defendants. If he could not by reason of defects in the pleadings have recovered in the full measure and in every aspect of his case, as claimed by him, he should have been allowed to do so as far as he could. *Singer Manufacturing Co. v. Barrett,* 95 N. C., 36.

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

Error.

(168)

W. J. MURRAY v. G. M. HAZELL.

Homestead—Bankruptcy—Cloud upon Title—Jurisdiction.

1. The jurisdiction of the courts to afford relief against deeds or other instruments which cast a cloud upon the title to the property of the party complaining extends only to those cases where the instrument has apparent validity, or where it is capable of being used to the prejudice of the true owner and he is without other remedy; nor will the court interfere where the deed cannot operate to the injury of the owner of the property.

2. A homestead allotted by the Federal Courts in bankruptcy proceedings is by the authority of the acts of Congress, and the Constitution, statutes and judicial decisions of North Carolina have no application to it, save in respect to the measure of the allotment, which has been adopted by the statute of the United States.

CIVIL ACTION, tried upon demurrer at March Term, 1887, of ALAMANCE Superior Court, before *Philips, J.*

The plaintiff was duly adjudged a bankrupt in a court of bankruptcy, and thereafter, according to law, the assignee in bankruptcy assigned to him his homestead in an undivided two-thirds interest in the tract of land mentioned in the complaint.

The complaint alleges:

"3. That afterwards, to wit, on 31 May, 1884, the assignee advertised and sold said tract of land, subject to the homestead interest of the bankrupt, and at the sale G. M. Hazell became the purchaser.

"4. That afterwards, to wit, on 6 January, 1885, the assignee executed and delivered to Hazell a deed in fee simple, conveying to him the two-thirds undivided interest in said tract of land, subject to the homestead of plaintiff, which deed is duly recorded.

"5. That on the ..... day of ....., 1885, the plaintiff received his discharge in bankruptcy.

(169) "6. That said deed being spread upon the register's book of Alamance County and purporting to convey, as it does, the reversion after the homestead estate, this plaintiff is informed and believes it is invalid in law, is a cloud upon plaintiff's title.

Wherefore the plaintiff demands judgment:

1. That said deed be delivered up to be canceled.

2. For such other and further relief as to the court shall seem fit.

3. For the cost of this action."

The material parts of the defendant's answer are as follows:

"2. That article second is admitted, except the allegation that plaintiff is the owner of a two-thirds undivided interest in the land described, and that is denied. The plaintiff is in possession of the land, and has an

estate therein for the term of his natural life, and should he die leaving infant children, then to survive till the youngest arrives at the age of twenty-one years; while the defendant is the owner of the fee simple estate in the land, and his right to possession will accrue upon the death of plaintiff, or upon the arrival at the age of twenty-one years of his youngest living child, whichever of these two events shall last happen.

"3. In answer to article three, defendant says that the sale alleged was made by order of the District Court of the United States for the Western District of North Carolina, held at Greensboro; that defendant did buy the land at the sale subject to the life estate of defendant, and should he die leaving infant children, then said children to have an estate therein till the youngest living one arrives at the age of twenty-one years; that at the sale the plaintiff was present with his wife, who was the competitor of defendant in the bidding for the land, the plaintiff standing by her and prompting and directing her bidding.

"4. In answer to allegation in article fourth the defendant (170) says: That after the sale J. A. McCauley, the assignee in bankruptcy of plaintiff, made full report thereof to the District Court of the United States, and thereupon a copy of the report of sale was served upon plaintiff, and also upon his wife, together with a notice from the court to the plaintiff and his wife to show cause, if any they could, why the sale should not be confirmed, and the plaintiff and his wife both failed to file any exceptions to the report, or show any cause why the report and sale should not be confirmed, and after the time limited to file exceptions or show cause, an order of the court was made confirming the sale and directing title to be made to the defendant for the land, and the title was accordingly made to defendant, by virtue of which he is the owner in fee thereof.

"6. In answer to article six, defendant says that plaintiff has no estate save for his natural life in the land described, and his deed is not a cloud on any right, estate, or title plaintiff has in said land."

The plaintiff demurred to the answer as follows:

"1. That the sale by the assignee, report, orders and decrees attempting to sell and convey title to the purchaser of the land in question or any interest or right thereto to the defendant as set out and insisted on by the defendant in said answer, is in violation of the plaintiff's right to his homestead as secured to him by the Constitution and laws of this State and by the terms of the Bankrupt Act providing a Uniform System of Bankruptcy for the United States, and is therefore void."

The court gave judgment as follows:

"This action coming on to be heard upon the demurrer of plaintiff to the answer of defendant, after argument by counsel, it is adjudged that the demurrer be overruled; and it is further adjudged that defend-

ant go without day, and that said defendant recover the cost of this action, to be taxed by the clerk against plaintiff and his surety
(171) on bond for cost."

From this judgment the defendant appealed.

John Devereux, Jr., for plaintiff.
John W. Graham for defendant.

MERRIMON, J., after stating the case: The complaint fails to allege a cause of action.

The deed of the assignee in bankruptcy executed to the defendant, and under which the latter claims to derive title to the land mentioned subject to the plaintiff's homestead therein, is in no respect, way or manner inconsistent with, nor does it in terms or legal effect interfere with the plaintiff's right to his homestead. On the contrary, it purports to recognize it and to convey an estate subject to it, and does so in legal effect. It does not in any degree becloud, complicate, obscure, or imperil the plaintiff's title to his homestead, nor can it do so in the future, and this is plainly to be seen and understood by himself and all persons who may in the future desire to purchase or have anything to do with it. The deed, whenever it shall be read, will declare upon its face the character of the estate it conveys, and that it is subject to the plaintiff's homestead in the land.

The jurisdiction of a Court of Equity to afford relief against deeds and other instruments in writing which in their nature and apparent validity operate in such improper and unjust way as to cast doubt upon the title or right of the party complaining arises only when the deed or other instrument in question has such present apparent validity and effectiveness, or where it is capable by reason of such causes, of misuse in the future to his prejudice, and he has no other remedy. If the deed or other instrument is, upon its face, void, or if the complaining party may have a present legal remedy, a Court of Equity will not interfere; nor will its authority be interposed where the purpose of the deed is
(172) clear and it cannot operate presently or in the future to the injury of such party, as in the present case. *Busbee v. Macy,* 85 N. C., 329; *Busbee v. Lewis, ibid.,* 332; *Pearson v. Boyden,* 86 N. C., 585; *Byerly v. Humphrey,* 95 N. C., 151; Story's Eq. Jur., secs. 699, 701.

The bankrupt law (Rev. Stat. U. S., sec. 5045) allows to a bankrupt homestead in the same measure as it is allowed to him by the laws of the State in which he has his domicil to be exempt from levy and sale upon execution or other process or order of any court. In view of this provision, it was contended, in the argument before us, that inasmuch as

any estate or interest of the debtor in the land embraced by the homestead is not subject to levy and sale upon any execution or other process or order of any court in this State until the homestead shall be over, as has been decided in *Markham v. Hicks,* 90 N. C., 204, and other similar cases, therefore the sale of such estate by the assignee in bankruptcy and the deed made in pursuance thereof by the assignee to the defendant were void.

If this contention were well founded, the plaintiff could not maintain this action, because in that case the deed upon its face would be inoperative and void, and for the reason already stated a Court of Equity would not interfere. The court would not do the vain thing to declare a deed void which upon its face appears to be so.

But the plaintiff misapprehends the law applicable. The homestead is allowed by the bankrupt law—not by the laws of the State—the sale of the bankrupt's real property conveyed by him to the assignee in bankruptcy, subject to the homestead in the measure allowed by the State, is made by virtue and in pursuance of the bankrupt law and not the laws of the State. The bankrupt law requires the assignee to sell all the bankrupt's estate and interest in his lands, subject to the homestead (Rev. Stats. U. S., secs. 5045, 5062); and in this case, he sold the land subject to the homestead. So that the provisions (173) of the Constitution and statutes, and judicial decisions of this State in respect to homestead have no application except in respect to the measure of it, and as to this they have application only because the bankrupt law so provides.

There is no error and the judgment must be

Affirmed.

Cited: Browning v. Lavender, 104 N. C., 73; *Peacock v. Stott, ibid.,* 155; *McNamee v. Alexander,* 109 N. C., 245; *Bostic v. Young,* 116 N. C., 768; *Williams v. Scott,* 122 N. C., 548; *Joyner v. Sugg,* 132 N. C., 590; *McArthur v. Griffith,* 147 N. C., 550.

A. BRANCH AND T. J. HADLEY v. W. H. GRIFFIN ET AL.

Judicial Sale—Record—Purchaser for Value—Trustee—Devise—Evidence—Fraud.

1. Where, pending an action to foreclose a mortgage, a proceeding to set up a lost record essential to plaintiffs' recovery was instituted between the same parties and concluded, and the record thus restored was offered in

evidence upon the trial of the action to foreclose: *Held*, that it was a distinct proceeding, though in aid of the first, and could not be collaterally impeached.

2. Inadequacy of price is good ground for refusing to confirm a sale, but it is not sufficient to set it aside after confirmation.

3. Although a trustee will not be permitted to buy at his own sale, if he does so, either directly or indirectly, a purchaser from him for value and without notice, will acquire good title.

4. Where a will devised land to a trustee for the sole and separate use of M., and at her death "for the use and benefit of the children of the said M.": *Held*, that the children took as a class, and that a sale under a decree of the court, in which the children then *in esse* were represented, passed the title against those born afterwards.

5. Where a mortgage was executed to secure a contemporaneous as well as a preëxisting debt: *Held*, that the mortgagee was a purchaser in good faith and for value to the extent of the entire amount secured.

6. The facts that the records of the courts showed a sale of land by a trustee under a decree; a purchaser by and a conveyance to a person not a party to the proceeding, who immediately reconveyed to the trustee; and that the price paid was inadequate, do not constitute such constructive notice of fraud as will affect the title of a purchaser for value from the trustee.

(174) DEFENDANTS' APPEAL.

CIVIL ACTION, tried before *Merrimon, J.*, at Spring Term, 1887, of NASH Superior Court.

It is alleged and admitted, that on 9 February, 1883, Presley Griffin executed to the plaintiffs his note for $791.65, and that on 27 January, 1881, he executed to Wm. Barnes his note for the sum of $200; and that for the purpose of securing the payment of these notes, he and Margaret, his wife, executed to the plaintiffs a mortgage upon the real estate mentioned in the pleadings; that the sum of $121.25 has been paid on the note of $791.65, and that no other sum has been paid on either of said notes, and that Presley Griffin died intestate during the year 1884, and the defendants are his widow and heirs at law, and the defendant Wm. Griffin has duly qualified as his administrator.

The plaintiffs ask for judgment against Wm. Griffin, administrator, etc., for the amount of the debts, interest and cost, and against all the defendants for a foreclosure of the mortgage and sale of the land.

The defendants file an answer and a supplemental answer, in which, after admitting the facts as alleged in the complaint, and the willingness of the administrator defendant to pay the plaintiffs' debts, but for the want of assets they say by way of defense that James Sullivant, of the county of Nash, died in 1851, seized in fee of the lands referred to in

the complaint, leaving a last will and testament, which was duly proved at November Term, 1851, of the County Court of Nash, and recorded.

That Margaret Hammond, mentioned in the will, married Presley Griffin, and is the same person named in the complaint, (175) and that the land mentioned in the will is the same as that referred to in the complaint.

They then insist that the pretended mortgage to the plaintiffs passed no title; that the order made to sell the land described in the complaint in the cause, entitled Presley Griffin, *ex parte,* and under which it was sold on 26 June, 1869, when R. J. Morgan was the last and highest bidder at the price of $451.75, was a fraud upon the rights of the defendants and a mere contrivance on the part of Presley Griffin to destroy the equitable title held by the defendant Margaret for life, and after her death by her children.

That at the time the petition was filed by Presley Griffin for the sale of the land, the defendants, except Margaret, were infants, or not then *in esse,* four of them having been since born, and none of them had any notice or knowledge of the petition, nor of the decree and sale, nor of the confirmation thereof; that they have received no part of the price paid, or alleged to have been paid, for said land, and that they have never ratified or assented to the proceedings under which it was sold; that the price of $451.75 was grossly inadequate, and that no part of it was paid, the purchaser, R. J. Morgan, being "a mere man of straw," buying as agent for Griffin, taking a deed and immediately after reconveying to him.

The defendants further say, that the record of the proceedings under which the land was sold was sufficient to put the plaintiffs upon inquiry, and that they are not purchasers for value without notice, etc.

The plaintiffs reply among other things, that at Spring Term, 1856, of the Court of Equity for Nash County, Presley Griffin and wife, Margaret, on behalf of themselves and their children, filed a petition against Jacob Strickland, trustee, etc., alleging that he was misusing the trust property, and asking for his removal and the appointment (176) of some suitable person in his stead; and that in said cause a decree was made removing Strickland and appointing Presley Griffin in his stead, requiring of him a bond in the sum of $5,000 for the faithful discharge of his duties as trustee, which bond was duly executed. That thereafter, at Spring Term, 1869, a petition was filed by Presley Griffin and wife Margaret, and the defendants, the infants being represented by their next friend and trustee, their father, for a sale of the land now in controversy, and under an order made therein it was sold, etc.; that on 9 February, 1883, Presley Griffin and wife, then in possession of the

land, borrowed of the plaintiffs the sum of $791.65, and executed a mortgage thereon to secure its payment, and on 12 February, 1884, the said mortgage was renewed, including therein the note due to Wm. Barnes.

They deny all notice of any fraud or irregularity in the proceedings under which the sale was made, and say that Presley Griffin was a man of excellent character, and deny that he was a party to any fraud upon his children.

The material part of James Sullivant's will is as follows:

"I give and bequeath all the aforesaid residue, my estate both real and personal, to Jacob Strickland, to him and his heirs, in trust and upon the conditions nevertheless, that the said Jacob Strickland will hold the same for the sole and separate use and benefit of Margaret Hammond (now aged about fourteen years) free from the control of any person or persons whomsoever, and more particularly free from the control of any person she may hereafter marry, and should she marry, then the said Strickland is to hold the said property in trust for her, the said Margaret's use as fully as if she were a *feme sole* and unmarried, and free from the control and use and disposal of her said husband, and at the death of the said Margaret Hammond, it is my will and desire that the said Jacob Strickland should hold the said property, both real
(177) and personal, for the use and benefit of the children of the said Margaret."

At the Spring Term, 1886, a petition was filed, after due notice, by the plaintiffs in this action against the defendants, "alleging that the petition and decree of sale filed by Presley Griffin and wife and others for the sale of the lands, part of which is included in the mortgage sought to be foreclosed in the above-entitled action, has been lost, mislaid or destroyed," etc., and asking to have the lost records restored, etc.

This petition was heard before his Honor, Judge Shepherd, when "the defendant Margaret and all her children were present," and it was offered to prove by them that they had no knowledge of the proceedings instituted by Presley Griffin to sell the land; that they never authorized the use of their names, assented to the sale, or received any part of the proceeds. This evidence was excluded by the court, and the defendants excepted, but no appeal was taken. His Honor gave judgment for the restoration and perpetuation of the lost records, etc.

When the cause came on for trial at Spring Term, 1887, "his Honor intimated an opinion that the matter of impeaching the proceedings under which the land was sold could not be effected in this action, but that the defendants should have brought a separate action for that pur-

pose. The plaintiffs thereupon declared their wish to waive all such irregularities and to proceed at once with the trial.

The following issues were then submitted to and answered by the jury:

1. Was the sale of the land in controversy a fraud upon the rights of the defendants, or any of them, and a mere contrivance on the part of Presley Griffin to destroy the equitable title held by the defendants?

To this the jury responded "Yes."

2. Are the plaintiffs bona fide purchasers of said land for value (178) and without notice?

To this the jury responded "Yes," under instructions from his Honor.

3. Were the defendants Ophelia, Nina, Charles and Annie born after the sale by Presley Griffin, trustee?

To this the jury responded "Yes."

4. What part of the $791.65 note was a present or contemporaneous loan?

To this the jury responded, "$500."

The defendant produced in evidence the report of sale made by Presley Griffin, trustee, etc., under the decree of the Court of Equity filed at Fall Term, 1869, and the deed from said Griffin, trustee, etc., to R. J. Morgan, dated 27 January, 1870, and the deed from said Morgan to said Griffin, dated 15 July, 1870, both of which deeds were duly registered, and both of which embrace the land in controversy in this action.

The defendants insisted that the facts which appear on the face of these deeds, through which plaintiffs claim title, were sufficient to put them upon inquiry. His Honor held that there was no evidence of notice, and directed the jury to find the second issue in the affirmative. Defendants excepted.

Defendants also introduced the equity proceedings under which Jacob Strickland was removed as trustee, etc., and Griffin was appointed; also W. H. Griffin, who testified that he had no notice of the proceedings to sell the land, and that at the date of the sale in 1869, four of the children of Margaret (naming them) were unborn, and that, at low figures, the land was worth two or three dollars per acre. Another witness testified that it was worth $3 per acre at the time of the sale.

It was in evidence that when the first mortgage was executed, 9 February, 1883, a portion of the money loaned was for a preëxisting debt, but at least $500 was cash loaned, and it was admitted that the Barnes' note was a preëxisting debt. It was also admitted that (179) the mortgage of 12 February, 1884, was in renewal of the mortgage of 9 February, 1883. There was no evidence that plaintiffs had any actual notice of fraud, but defendants insisted that "the report of sale, decree of confirmation, deeds from Griffin to Morgan, and from the

latter to the former, were enough to apprise the plaintiffs that the land had been sold only colorably," etc.

His Honor declined to so hold, and defendants excepted.

"3. The defendants further insisted after verdict (this point having been reserved) that the land was held in trust under James Sullivant's will for the sole and separate use of the defendant Margaret, and then at her death was to be held in trust for her children, that is, for such of her children as would then answer that designation; that the Court of Equity had therefore no power to order the sale of the children's interest and estate in the premises.

His Honor decided otherwise, and the defendants excepted.

4. The defendants contended that in any event the plaintiffs were bona fide purchasers for value and without notice only as to the $500 loaned by them to Presley Griffin, 9 February, 1883.

The plaintiffs insisted that as to the entire debt of $791.65 they were purchasers for value and without notice.

His Honor ruled in favor of the defendants, and the plaintiffs excepted.

His Honor then rendered judgment as set forth in transcript and both parties appealed to the Supreme Court."

F. A. Wooten and H. F. Murray for plaintiffs.

J. Battle and C. M. Cook (Bunn & Battle filed a brief) for defendants.

(180) DAVIS, J., after stating the case: 1. There is with the record sent to this Court a voluminous transcript of certain proceedings, commenced by a summons regularly issued on 12 April, 1886, by the clerk of the Superior Court of Nash, at the instance of A. Branch and T. J. Hadley (who are the plaintiffs in this action) *v.* W. H. Griffin and others (naming them, who are the defendants in this action), returnable to Spring Term, 1886, to restore and perpetuate certain records alleged to have been lost or destroyed. That proceeding was by petition and seems to have been prosecuted in compliance with sections 60 *et seq.* of The Code. It was heard before Shepherd, Judge, at Fall Term, 1886, of Nash Superior Court, when judgment was rendered as stated in the case on appeal.

The defendants insist that that proceeding was by a petition in this action, and that the ruling of Judge Shepherd, to which exception was taken, but from which there was no appeal, is now the subject of our review, and that his Honor, Judge Merrimon, erred in the intimation of the opinion "that the matter of impeaching the proceedings, under which the land was sold, could not be effected in this action, but that the de-

fendants should have brought a separate action for that purpose." We think that the proceeding to restore and perpetuate the alleged lost records could not be injected into this action, and that the judgment therein was final, and the transcript thereof has no proper place in this appeal. It was collateral, and while it may sometimes be just and right to continue a pending action until some collateral fact or issue, material to its just determination and requiring a separate action, can be tried, it cannot be that controverted questions of law or fact involved in the collateral issue and determinable in a separate proceeding, can be incorporated in and become a part of the record of the pending action. This would be to make "confusion worse confounded." We cannot try in this action any controversy as to the existence or nonexistence of the alleged lost records. That was settled in the proceeding insti- (181) tuted to determine it, and we think the first exception of the defendants cannot be sustained.

2. But the defendants insist that the facts of record were sufficient to put the plaintiffs on inquiry and that they were not purchasers for value without notice. They say that the will of James Sullivant, showing the character in which the property was held, the equity proceedings by which Jacob Strickland was removed as trustee, and Presley Griffin appointed in his stead, the grossly inadequate price, and the deed from Griffin, trustee, to Morgan, and the deed from Morgan reconveying to Griffin, all of which were of record, were sufficient to put them on inquiry, and the inquiry, if prosecuted, would have disclosed the fraud; and that therefore they were affected with notice.

It is true that without actual knowledge or information a party may be "affected with notice by information of any fact or instrument relating to the subject-matter of his contract, which if properly inquired into, would have led to its ascertainment." Adams Eq., 158; *Ijames v. Gaither,* 93 N. C., 358; *Johnson v. Prairie,* 91 N. C., 159; *Hulbert v. Douglas,* 94 N. C., 122. But is there anything in the facts relied on to put the purchasers from Griffin and his wife on inquiry, as to whether he had not acquired title by a fraud upon his *wife,* who signed the deed with him, and his children?

Certainly there was nothing in the will of James Sullivant that could create any suspicion of fraud, and the equity proceeding and the decree under which Jacob Strickland was removed (and the regularity and validity of that proceeding are in no way impeached) disclose the fact that Jacob Strickland was removed for a failure to discharge his duty to the beneficiaries under the will, and that upon the appointment of Griffin a bond of $5,000 for the faithful discharge of his duties was required and given, and surely there could be nothing in that (182) to put him on inquiry.

Inadequacy of price may have been a good cause for refusing to confirm a sale, but after confirmation of the sale it could furnish no ground for setting it aside and annulling the sale made under it. *Sumner v. Sessoms,* 94 N. C., 371.

That a trustee cannot buy at his own sale is too well settled to need the citation of authority. If he buys directly, or indirectly through another, he holds the property at the election of the *cestui qui trust,* to take the price or demand a resale of the property, but a sale by a trustee to another (though made with a fraudulent intent) passes the legal title to the purchaser, and a bona fide purchaser from such a fraudulent vendee, for value and without notice, acquires a good title. *Young v. Lathrop,* 67 N. C., 63.

However fraudulent the transaction may have been as between the original parties to the sale, a purchaser who acquires the legal title for value and in good faith, without notice, is not affected by it, and is protected. Such a purchaser, as was the case in *Young v. Lathrop,* acquires a good title by purchase at private sale, and the courts are equally and perhaps more careful in protecting bona fide purchasers who derive title through judicial sales, and even where the proceedings under which such sales have been made have been annulled and vacated the purchaser has been protected.

This protection of purchasers, bona fide and for value at judicial sales, is illustrated in *Fowler v. Poor,* 93 N. C., 466; *England v. Garner,* 90 N. C., 197; *Sutton v. Schonwald,* 86 N. C., 198, and the many cases cited in them.

Following the rulings of the court in these cases, we think the second exception of the defendants cannot be sustained.

3. The third exception rests upon the denial of the power of the Court of Equity to order a sale of the interest and estate of the defendants under the will of James Sullivant. The property is given for the use of Margaret for life, and then "for the use and benefit of the children of the said Margaret."

(183) The children take as a class, and some of them were *in esse* at the time of the sale, and this distinguishes it from the cases cited by the learned counsel for the defendants. It is more like *ex parte* Dodd, Philips' Equity, 97. In that case it is said: "It is certain if land be devised to a person for life, with an executory devise in fee to his children, the court cannot order a sale of the land before the birth of any child, because not being *in esse* there can be no one before the court to represent its interests. . . . But if there be any children *in esse* in whom the estate in fee can vest, a sale may be ordered, because, if their interests require it, they may be represented by guardian; and this

may be done though all of the children of the class may not yet have been born." Such is the case before us. As was said in *ex parte Dodd,* this distinguishes it from *Watson v. Watson,* 3 Jones Eq., 400, as it also does from *Williams v. Hassell,* 73 N. C., 174; *Young v. Young,* 97 N. C., 132; *Ex parte Miller,* 90 N. C., 625, and similar cases.

There was no error in the ruling of the court below in the matters excepted to by the defendants.

No error.

PLAINTIFF'S APPEAL.

The facts are the same as those set out in the defendants' appeal.

The jury having found that the sale by which Presley Griffin acquired title was fraudulent, and that the plaintiffs were bona fide purchasers for value without notice, and having also found that $500 of the note executed to the plaintiffs was for money loaned, his Honor held that the plaintiffs were purchasers for value and without notice only to the extent of the amount ($500) loaned, and from this the plaintiff appealed.

It is admitted that the mortgage of 12 February, 1884, was in (184) renewal of the mortgage of 9 February, 1883, and it appears from the record that the credit or time of payment was extended. A mortgage deed executed to and accepted by a creditor without notice and in renewal of a prior mortgage, certainly cannot place the creditor in a worse condition than he occupied under the first mortgage. The greater and substantial part of the consideration of the first mortgage was the money then loaned, and doubtless the inducement and consideration for the loan then made was the security given by the execution of the mortgage. It was not a mortgage simply to secure a preëxisting debt. It was executed for a present and valid consideration moving from the plaintiffs—the advantage to them being the security of their debt, and the advantage to the mortgagor being the use of the money loaned, and the extension of time to pay, and whether the mooted question as to the difference between a mortgage executed to secure a preëxisting debt and one executed to secure a present loan, or upon a present consideration, has been settled or not, there seems to be no question that a mortgage executed upon a valid cotemporaneous consideration, and accepted by the mortgagee in good faith, and without notice of any invalidating equity in others, will be upheld. *Potts v. Blackwell,* 4 Jones Eq., 58, and *Brem v. Lockhart,* 93 N. C., 191; *Bank v. Bridgers,* 98 N. C., 67, and the cases cited.

We think that both upon authority and reason the plaintiffs are entitled to have the property conveyed in the mortgage declared a security

for their debt named therein to its full amount, and that there was error in limiting it to the amount of the money loaned at the time of the execution of the mortgage.

The judgment of the court below must be reformed in this respect.

Reformed and affirmed.

Cited: Bank v. Adrian, 116 N. C., 548; *Barcello v. Hapgood,* 118 N. C., 726; *Springs v. Scott,* 132 N. C., 553; *Fowle v. McLean,* 168 N. C., 541; *Lumber Co. v. Herrington,* 183 N. C., 89.

(185)

JOHN TAYLOR AND WIFE v. THE SEABOARD AND ROANOKE RAILROAD COMPANY.

Contract—Common Carrier—Evidence—Agency—Waiver.

1. A contract, endorsed on a ticket for passage to a place and return, between a common carrier and a passenger, that the latter shall identify himself as the original purchaser of the ticket and have it stamped by the former's agent at a particular place, is a simple contract, and any of its provisions may be waived in parol.

2. To show such waiver it is competent to prove that the agent of the carrier, other than that at the station designated in the contract, recognized the ticket by permitting the passenger to identify himself and by stamping it for the return trip.

THIS is a civil action, which was tried before *Philips, J.,* at Fall Term, 1887, of NEW HANOVER Superior Court.

This case embraces two actions consolidated by order of the court. The plaintiffs respectively brought them to recover damages from the defendant, occasioned by their wrongful expulsion from one of the passenger cars of the defendant by its agents while regularly carrying passengers over its road from Portsmouth in the State of Virginia, to Weldon in this State.

The following is a copy of so much of the case stated on appeal as is necessary to a proper understanding of the opinion of the Court:

"On the trial the plaintiff, John Taylor, was introduced as a witness in behalf of plaintiffs, who testified that he and his wife purchased at Wilmington, N. C., at a price less than regular fare from Wilmington, N. C., to Old Point, Va., and return, two certain tickets (which were shown to witness, identified and put in evidence), one of the tickets being signed by himself and the other by his wife; that in buying the tickets

he and his wife did not expect or intend to stop at Old Point, but to go directly by there to New York, intending to purchase at Old Point or Norfolk other tickets to New York; that plaintiffs stopped a day in Norfolk and did not go to Old Point at all, being informed by (186) a fellow-passenger that they could have their tickets stamped at Norfolk instead of Old Point. By his advice they applied to a person appearing to be a ticket agent or purser on board one of the steamboats of the Bay Line, which was then lying in Norfolk, to have the tickets stamped; that person examined the tickets and signed and stamped them, and caused plaintiffs to sign their names on the back of their respective tickets; that plaintiffs left Norfolk by another route, known as the Cape Charles route, for New York, and came back from New York by the same route, and did not go to Old Point at all. Upon his return the conductor on board the train of the defendant, after leaving Portsmouth, refused to receive the tickets of himself and wife because they were not properly stamped, and demanded the regular fare from Portsmouth to Weldon, which was paid by plaintiff.

Plaintiffs then offered to prove that the person who signed and stamped the tickets at Norfolk was the authorized agent of the defendant. Defendant objected, and the court sustained the objection, and the plaintiffs excepted.

The plaintiffs put in evidence the "tickets" mentioned held by each, which were precisely similar, except as to the name of the holder. The following is a copy of the material portions of one of these tickets, and the endorsements thereon:

WILMINGTON & WELDON RAILROAD COMPANY.

"Good for one continuous first-class passage to Old Point, Va., and return, as per coupons attached, when officially stamped.

Subject to the following conditions:

Having purchased this ticket at a reduced rate, I do, in consideration thereof, agree to be bound by and comply with the following conditions in respect thereto: The trip from point of sale hereof to point of destination shall be made within ..... days from the date of issue (187) stamped hereon. The return trip from point of departure to point of destination shall be made within ..... days from date of departure, such date to be stamped on the return checks, which shall be presented to the agent at Old Point, Va., for that purpose, and until such date is stamped thereon such checks cannot be used. The original purchaser hereof must be identified as such by a signature to be made

hereon, in the presence of and witnessed by said agent, who shall determine whether such signature is genuine by comparing the same with the signature of such purchaser hereto attached. *This ticket and all checks attached shall be used in conformity with the above conditions prior to date punched in margin, and in any event shall be void on and after that date.* This ticket and checks attached shall be void unless the foregoing conditions are complied with.

Signature, D. TAYLOR. T. M. EMERSON,
Witness, R. E. BRANCH. *Gen'l Passenger Agent."*

The court being of opinion that the plaintiffs could not recover, they suffered to a judgment of nonsuit and appealed.

D. L. Russell for plaintiffs.
Thomas W. Strange for defendant.

MERRIMON, J., after stating the case: The counsel for the appellee contends in the argument before us, and it may be here conceded to be so, that the "tickets" put in evidence on the trial each embodied a contract in writing between the holder thereof and the defendant. The latter and the holder of the ticket each had a right to insist upon
(188) a strict observance of every material stipulation, provision and requirement contained in it. Particularly for the present purpose, the defendant had the right to require that the plaintiffs should each be present in person and respectively present to its proper agent at Old Point in Virginia, his or her ticket and identify himself or herself as the original holder thereof by writing his or her name thereon and having the return "checks" stamped as in the check provided, which the plaintiff did not do.

But the contract being a simple contract in writing, it was competent for the defendant at any time after it was made, and before any particular provision of it had been complied with, to waive a compliance with the same on the part of the plaintiffs by a subsequent verbal agreement—one not in writing. It is true, that a simple contract completely reduced to writing cannot be contradicted, changed or modified by parol evidence of what was said and done by the parties to it at the time it was made, because the parties argreed to put the contract in writing and to make the writing part and evidence thereof. The very purpose of the writing is to render the agreement the more certain and to exclude parol evidence of it. Nevertheless, by the rules of the common law, it is competent for the parties to a simple contract in writing before any breach of its provisions, either altogether to waive, dissolve or abandon it, or

to add to, change or modify it, or vary or qualify its terms, and thus make it a new one, which must in such case be proved partly by the written and partly by the subsequent unwritten parol contract, which has thus been incorporated into and made part of the original one. The reason for this seems to be that simple contracts, whether written or otherwise, are of the same dignity in contemplation of law, and therefore the written may be changed, modified, or waived in whole or in part by a subsequent one, express or implied. Smith on Contracts (*), 29; Chitty on Contracts (*), 105, and notes; Waits (189) Ac. & Def., 344, 362.

The plaintiffs did not contend on the trial that the "tickets" referred to did not correctly express the contract between them respectively and the defendant as of the time they were issued, but that subsequently the defendant, through its properly authorized agent, agreed to waive and did waive so much of each contract, "ticket" in writing, as required the plaintiffs to appear personally before the defendant's agent at Old Point in Virginia, and there produce the tickets and identify themselves respectively as the original holders of them, by writing each his or her name on their tickets respectively and having the return checks attached to them stamped as required. It was competent for the defendant to waive such requirement in writing or by parol agreement, and it was likewise competent for the plaintiffs to prove such agreement of waiver by parol.

The evidence produced and received in the trial tended to prove such agreement—that the defendant's agent, or a person representing himself to be its properly authorized agent at Norfolk and not at Old Point, identified the plaintiffs in the proper connection and did there what the defendant might have required to be done at Old Point, to give the "tickets" effect for the return trip. The plaintiffs further "offered to prove that the person who required and stamped the tickets at Norfolk was the authorized agent of the defendant"—that is, fairly interpreting the record—authorized to do what he purported and undertook to do.

Upon objection the court refused to allow the plaintiffs to produce such evidence. We think it was pertinent and competent, and should have been received. As it was not, the plaintiffs are entitled to a new trial, and we so adjudge.

Error.

Cited: Wood v. R. R., 118 N. C., 1064.

(190)

ALLEN WARREN, TRUSTEE, v. GEORGE HOWARD AND R. C. WARREN, EXECUTORS OF J. R. THIGPEN.

Trust and Trustee—Parties.

Where the trustee, in a conveyance to secure creditors, died before fully administering the trust, and another person was appointed trustee under the statute—The Code, sec. 1276—*Held:*

1. The substituted trustee could maintain an action against the personal representatives, heirs at law or devisees of the deceased trustee for such portion of the trust estate as the original trustee was seized or possessed at his death.

2. That in such action it was not proper to make creditors of the trustee, whose demands were contested, parties, as they were not necessary to the settlement of the only issue raised, viz., the amount and custody of the unadministered trust estate.

(DAVIS, J., dissented.)

THIS was a civil action tried before *Shipp, J.*, at September Term, 1887, of PITT Superior Court.

On 22 May, 1882, Frank L. Thigpen, being a merchant much embarrassed by debt, conveyed by deed of trust to James R. Thigpen, trustee, real and personal property, including credits of the value of about $25,000, with power to sell the property and collect the credits, and apply the fund so collected to the payment of the debts classified and mentioned in the deed in the order therein directed. The trustee sold the property and collected such of the credits as he could, realizing $23,127.20. He disbursed of this sum $19,785.62 in the payment of the trust debts embodied in classes 1, 2, 3 and 5 and commissions due to himself. He also paid to A. T. Bruce & Co., creditors of the sixth class in the deed, on account of the debt due them, $709.31. Afterwards the last named creditors obtained judgment against the trustee for $2,215.24, including interest and for costs.

(191) Afterwards, in April of 1886, the trustee died testate, and the defendants duly qualified as executors of his will, and the plaintiff was duly appointed trustee in the said deed of trust *vice* James R. Thigpen.

The plaintiff, such substituted trustee, having made demand upon the defendant executors for the balance of the trust fund in the hands of their testator at the time of his death, and payment thereof having been refused by them, brought this action.

The defendants admitted in their answer that there was a balance of the trust fund in the hands of their testator at the time of his death which came into their hands, but they further answer in respect thereto as follows:

"6. The defendants are informed and believe that their testator received notice from creditors interested in the due execution of the trust not to pay the debt set forth in clause 4, and claimed by the administrator of Martha J. Thigpen, for that it was not a valid debt and they desired to contest the validity and payment of the same; that they have been further notified there is a judgment against their testator in favor of A. T. Bruce & Co., under the sixth clause of the deed of trust, and it is claimed that said judgment is a valid lien upon the trust fund and that their testator is personally responsible therefor as well as responsible out of the trust fund.

"7. The defendants aver that to pay these two claims under clause 6, if both are valid, will require a larger sum than has come to the hands of their testator, and they set up a defense that the claim of Martha J. Thigpen, by her death, she not being indebted to any one which is averred by defendants, became the property of said F. L. Thigpen, and as such was extinguished under the trust as claimed by other creditors, and that the judgment of A. T. Bruce & Co., the regularity and validity of which they ask to have determined before the fund shall be taken from them. That the same was based on the invalidity of said claims either for the above cause or being invalid at the time of the execution of the trust. That if said judgment is valid and their (192) testator responsible therefor, they ask that the same be decreed to be paid out of the fund. That as representing their testator they stand ready, as they have at all times done, to account for and pay over the fund to whomsoever the law may direct under a decree of this court.

Wherefore the defendants ask the court that A. T. Bruce & Co., and all other creditors and parties interested in the distribution of said trust fund, may be brought into court so that such decree may be made in the premises as will protect the defendants in the due and proper discharge of their respective duties as executors aforesaid.

The court gave judgment as follows:

"It is adjudged that the plaintiff recover against the defendants judgment for the sum of $2,855.99, with interest from 25 September, 1887, on $2,632.21 until paid, out of the trust fund, including the cost in Hearne, administrator of Martha Thigpen *v.* J. R. Thigpen, which is to follow this case. That after paying the costs and expenses and reserving to himself proper commissions and counsel fees, the plaintiff shall hold the residue of the fund until the rights of the various creditors secured in said trust shall be ascertained."

From this judgment the defendants appealed, and assign as error:

1. The court erred in refusing to grant the defendants' prayer in asking that A. T. Bruce & Co. be made a party, so that the validity of the judgment, a copy of which is hereto attached and marked "D" might be passed on before the fund should be taken from them, if the fund ought to be applied to said judgment, and if not binding on the fund in its entirety, that a reference might be had to ascertain how much of said fund should be applied to said judgment.

2. The court erred in refusing to have all other creditors and
(193) parties interested in the distribution of said trust fund made parties in this action, so such decree will protect the defendants in their duties.

John Devereux, Jr., for plaintiff.
George V. Strong for defendants.

MERRIMON, J., after stating the case: The testator of the defendants was a trustee of an express trust, having in his hands at the time of his death a considerable part of the trust fund with which he was charged by the trust that he had not distributed to the creditors entitled to have the same. This it appears passed into the hands of the defendants, the executors of his will, not to be administered by them—they have and hold it for no such purpose—but simply to turn the same over to the substituted trustee, *vice* their testator, the deceased trustee. *University v. Hughes*, 90 N. C., 537.

The plaintiff was duly appointed such substituted trustee, as allowed by the statute (The Code, sec. 1276), which authorizes and empowers the clerk of the Superior Court of the county where the deed of trust was executed, as in the statute provided, "to appoint some discreet, competent person to act and execute the said deed of trust according to its true intent and meaning, and as fully as if appointed by the parties to the deed."

This provision plainly and necessarily implies and contemplates that the trustee so appointed must have possession and control of and dominion over the trust property just as the original trustee had, of course subject to the control of the proper court upon due application asking its interference. Otherwise the substituted trustee could not execute the various provisions of the deed, dispose of the property, pass the title thereto, collect debts and administer the trust fund as contemplated by it.

(194) Incident to the right of the trustee to so have the property of the trust of whatever nature, is his right to sue for and recover the same in a proper action for that purpose, when it is unlawfully

withheld from him. It may be that the legal title to the trust property, in cases like the present one, if the property be real estate, passes to the heir at law of the deceased trustee, and if personalty, to the executor or administrator, as was held in the case of *Guion v. Melvin,* 69 N. C., 242; but the heir and personal representative hold simply the legal title for the substituted trustee and should pass the same to the latter, to the end he may properly execute the trust as intended by its terms and as contemplated by the statute. The trust must be administered by the trustee—the statute so provides.

This action is brought by the substituted trustee only for the purpose of recovering from the executors of the will of his deceased predecessor the remainder of the trust fund in their hands, which they have refused to surrender to him. It is not any part of its purpose to litigate and settle the rights of parties claiming an interest in the trust fund, or to administer it at all—the purpose is to enable the trustee to obtain possession of it, and then, as suggested by the court below in its judgment, the trustee or the *cestui que trust* may, if need be, bring an action for the purpose of settling the rights of parties claiming, and the distribution of the fund.

In this action the only proper thing to be done was to ascertain what the remainder of the trust fund in the hands of the defendants was, and give judgment in favor of the plaintiff for the same. This seems to have been done.

The assignments of error do not extend to the judgments directly, but to the refusal of the court to order that A. T. Bruce & Co., creditors, and all other persons interested in the trust fund, be made parties to the action; thus practically turning it into an action to settle and administer the fund in the hands of the defendants. This cannot be done. Certainly it cannot, unless by agreement of all parties, with the sanction of the court. Because to do so would be to incorporate (195) into the action a multiplicity of inconsistent causes of action, and bring into it parties more or less numerous, having diverse rights, the settlement and determination of which, in this action, would lead to confusion. To recover the balance of the trust fund and have it in hand to be administered, as the plaintiff seeks to do by this action, is distinct and essentially different from the purpose of an action brought by the plaintiff to have settled the conflicting rights of creditors of the fourth and sixth classes to share in that fund, as provided in the deed of trust. In the present action A. T. Bruce & Co. and other creditors are not parties necessary to a complete determination of the matter in litigation. They will, however be proper parties in an action brought to close the trust and settle their respective rights to share in the trust fund. If in

such action it should turn out that A. T. Bruce & Co. were entitled by virtue of their judgment named against the first trustee or their debt on which it is founded, to share in the trust fund, they would be allowed to do so, otherwise they would not. The court could not in any case hear and determine in this action any question as to the regularity or propriety of their judgment; it could not set it aside for irregularity, error or fraud; taking it to be such a judgment, as it appears to be, it could not be attacked in this or any action collaterally.

The assignments of error cannot be sustained, and the judgment must be affirmed.

Affirmed.

DAVIS, J., dissenting: This action is brought by Warren, the new or substituted trustee, against the executors of the deceased trustee to recover a sum of money in their hands which came to their testator as trustee.

(196) The defendants allege that there are conflicting claims to the fund; that the administrator of Martha J. Thigpen asserts a claim to it, and that A. T. Bruce & Co. also assert a claim to have a judgment which they obtained against their testator for a debt in the sixth class paid out of the fund, and that the fund is not sufficient to pay these claims if it shall be adjudged that both are to be paid. They ask to have the validity and regularity of the judgment against their testator determined, and "if said judgment is valid and their testator responsible therefor they ask that the same be decreed to be paid out of the fund." It came rightfully into their hands, subject to the trusts which attached to it in the hands of the testator.

As was said by the Court in *Guion v. Melvin*, 69 N. C., 242, upon the death of the trustee "the real property descends to the heirs and the personalty goes to his administrator (or executor) clothed with the trusts."

I think the executor or administrator, if there is no doubt or dispute as to the right of the *cestui que trust* to receive the fund, may safely pay it directly to such *cestui que trust* without waiting for the appointment of a new trustee, and such payment would be a discharge of the estate of his testator; but if there be any doubt or question as to who is the proper person to receive the fund, or if the testator or intestate has incurred any liability in respect to the trust property, he has a right to have that question settled before he is required to part with it, and in the settlement of that question (which under the old practice was of equitable jurisdiction) he has a right to have all conflicting claimants made parties.

Under the old practice would not the settlement of this trust have been a subject of equitable jurisdiction, and would not the court have required all parties interested to be before it?

If the testator was living would he not have the right to demand, before parting with the fund, that all conflicting claims thereto be determined? If so, is it not equally clear that his executors who find the fund in their hands not simply the subject of conflicting (197) claims between *cestui que trusts,* but with a responsibility of their testator, protected before they can be required to surrender the fund? If it shall be that the judgment of A. T. Bruce & Co. ought to be paid out of trust fund, but the substituted trustee when he gets the fund in his hands shall refuse to pay it and the executors of the deceased trustee shall be made to pay it under the judgment against their testator, will they not be subrogated to the rights of Bruce & Co., and have cause of action against the plaintiff?

It will not do to say that it is not probable, for that is the very question they ask to have settled in this action, and which is resisted.

Ruffin, J., in *Hoover v. Berryhill,* 84 N. C., 132, says "that Courts of Chancery had but few, and those very simple rules, for determining the proper parties to a suit, and that a leading one was that every person who had an interest in the subject-matter of the suit should be a party thereto, and this with the twofold idea of making it safe for the defendant to perform the decree and of avoiding unnecessary litigation." Again in *Barrett v. Brown,* 86 N. C., 556, it is said "a better reason for the rule (requiring all parties to be before the court) seems to be given in 1 Daniel's Chancery Practice, 240, where it is said to depend upon the intention of the Court to do complete justice by deciding upon and settling the rights of all the persons interested in one action, so as to prevent future litigation and to render the performance of the decree perfectly safe to those who may be compelled to act under it."

I think that the conclusion at which I have arrived, that the defendants have a right to the protection asked for by them, is fully warranted by the cases cited and the authorities referred to in them, and by Adams in his treatise on Equity, sec. 315, *et seq.* (198)

Where an interest exists which requires protection, it is possible that a claim exists in respect to that interest, and the defendant is entitled to have all such claims settled together, so that the matter may be completely and effectually disposed of.

The judgment in this very action seems to be pregnant with the "future litigation" indicated by the answer of the defendants. It provides "that after paying the costs and expenses and reserving to himself proper commissions and counsel fees, the plaintiff shall hold the residue

of said fund until the rights of the various creditors secured in said trust shall be ascertained."

If the testator of the defendants has incurred any liability in respect to the trust fund in their hands as executors, and that is one of the rights "to be ascertained," why may it not be—why ought it not to be—settled in this action? Why subject them to the hazard of having to pay the judgment of Bruce & Co. against their testator and then litigate with the very plaintiff in this action, the question now raised as to whether it ought not to be paid out of the trust fund?

C. E. COWAND AND WIFE v. ROBERT A. MEYERS.

Pleading—Demurrer—Will—Estate—Injunction—Waste.

1. A demurrer to a complaint containing but one cause of action must go to the whole matter alleged, otherwise it will be disregarded.
2. A devise to P. for life, remainder to testator's daughter N., provided she "shall have lawful heirs of her body, and if not, I gave it unto my son," vests in N. upon the death of P. an estate for life which will be enlarged into a fee if she should have issue at her death; and the son took an estate in fee contingent upon the event that N. died without issue, and was entitled to be protected by injunction against waste.

(199) CIVIL ACTION, tried before *Shipp, J.*, upon complaint and demurrer, at Spring Term, 1887, of BERTIE Superior Court.

George Wynne, a resident of Bertie County, in this State, in the year 1855, executed a will wherein he devises the tract of land on which he lived and described as "the Manor plantation" to his wife Phœbe for life, and in a subsequent clause disposes of the remainder as follows:

"I give unto my daughter Nancy Wynne one tract of land whereon I now live, that I lent to my wife Phœbe Wynne her natural life, provided my daughter Nancy Wynne shall have lawful heirs of her body, and if not, I give it unto my son William D. Wynne forever."

Phœbe Wynne died the last of the year 1859, and the said Nancy went into possession and subsequently intermarried with the defendant Robert A. Meyers.

William D. Wynne, the devisee, died in 1864 intestate, leaving an only child, Bettie E., who intermarried with C. E. Cowand, and they bring this action to recover possession of the land, the damages committed thereon in the alleged cutting down and disposing of the growing timber, and to restrain further waste.

The defendants demurred to the complaint upon the grounds:

1. That under the will of the testator the *feme* defendant has a defeasible fee simple or a fee simple estate subject to be determined for want of issue of her body, or a fee simple absolute.

2. That the plaintiffs are not entitled to the relief they ask.

Upon the hearing the court rendered the following judgment:

"In this case it is considered by the court that the defendants are entitled to an estate in the land described in the will of her (200) father and devised to her and that she is entitled to possession of the same. It is therefore adjudged that the demurrer be sustained to that extent and that defendants have and recover their costs, to be taxed by the clerk."

The plaintiffs appealed and assigned the following errors:

1. In holding that the defendant Nancy derived under the will mentioned any interest in the land.

2. In not holding that the *feme* plaintiff's' father at the death of the life tenant became the owner in fee of said land and entitled to the possession thereof.

3. In not granting or continuing the injunction against waste.

4. In dismissing the action and giving judgment for case against plaintiffs.

R. B. Peebles for plaintiffs.
No counsel for the defendants.

SMITH, C. J., after stating the case: While in a complaint several separate and distinct causes of action or counts are set out, a demurrer may be entered to one or more and answer made to others. *Ransom v. McClees,* 64 N. C., 17. If the complaint contains but a statement of one cause of action, the demurrer must be to it as a unity or it will be disregarded, and in such cases it must be sustained or overruled as a whole and not in parts. *S. v. Young,* 65 N. C., 579.

The judgment apparently leaves undisposed of the demand for damages and for relief against their being repeated, except as it may be involved in the ruling that the defendants are entitled to an estate in the land and to possession, both of which are consistent with a contingent remainder or executory devise over as the will may be construed to operate, to the deceased father of the *feme* plaintiff. But we are con- (201) strained to regard the action of the court as denying any relief under the complaint upon the facts stated.

We concur in the construction put upon the clause of the will recited that it vests an estate in remainder to take effect at the death of the wife (Phœbe), and which then came into the possession of the defend-

ant (Nancy) for her life—enlarged into a fee if the said Nancy at her decease should have issue.

No estate is given to such issue if coming into existence and surviving, but the effect is to defeat the limitation over to the son, William D., and transmute a life estate into an estate in fee in Nancy. The estate of the *feme* plaintiff is therefore contingent, and though Nancy has attained the age of fifty-five years, and in the course of nature cannot be expected to have children, the nature of the estate inherited by the *feme* plaintiff from her deceased father is unchanged and remains the same, dependent upon a contingency as before, yet it will be protected against unauthorized waste and injury to the damage of the inheritance.

In *Gordon v. Lowther,* 75 N. C., 193, the facts were similar, except that the limitation over and after the life estate, was to such children as the life tenant might have who attained the age of twenty-one years, and to the plaintiff if there were none such left; and the life tenant, as in our case, had passed the period of child-bearing, and it was decided that no recovery could be had for damages from waste already committed, but the plaintiff was entitled to protection against future waste and destruction by the exercise of the restraining power of the court. This case is not distinguishable in principle from that before us and is decisive of the appeal.

There is error in sustaining the demurrer and refusing all (202) relief, and the ruling must be reversed, so that, if allowed, the cause may proceed by answering the complaint, if the defendants shall be so advised and elect.

Error.

Cited: Jones v. Britton, 102 N. C., 205; *Conant v. Barnard,* 103 N. C., 320; *Pritchard v. Commissioners,* 126 N. C., 914; *Peterson v. Ferrell,* 127 N. C., 170; *Blackmore v. Winders,* 144 N. C., 218; *Thompson v. Express Co., ibid.,* 392; *Patterson v. McCormick,* 177 N. C., 456.

THE McNEAL PIPE AND FOUNDRY COMPANY v. A. H. HOWLAND AND THE DURHAM WATER COMPANY.

Removal of Actions to Federal Courts—Jurisdiction.

1. A defendant is not entitled to have an action removed for trial from the State to the Federal Courts, under the acts of Congress, unless the latter has original jurisdiction of the action.

2. When a proper case for removal is made out, no formal order to transfer the action is necessary—the State court will simply suspend further proceedings unless the Federal Court should remand the cause.

MOTION to remove the action to Federal Court for trial, heard before *Merrimon, J.*, at January Term, 1888, of DURHAM Superior Court.

The action is upon a contract entered into between the plaintiff, a corporation formed under the laws of the State of New Jersey, and the defendant, A. H. Howland, a citizen and resident of the State of Massachusetts, to recover damages for the breach thereof, in the non-payment of goods sold and delivered, and is prosecuted against the other defendant, The Durham Water Company, a corporation created and acting under the laws of this State, to establish and enforce a lien therefor upon the property of the latter.

The complaint was filed at Fall Term, 1887, of the Superior Court of Durham, to which the summons was returned and separate answers of the defendants put in purporting to be at that term, while the verification of each was made in November, after its expiration.

The defendant Howland, alleged to owe the plaintiff for goods (203) delivered under the contract in more than twenty thousand dollars, applied by petition (when filed does not appear, but which was passed on and denied at January Term afterwards) asking for the removal of the cause to the Circuit Court of the United States for the Western District of North Carolina under the several acts of Congress. The plaintiff resisted the application for removal, contending that a cause for removal by the said Howland was not presented in the record for these reasons:

"First, because his petition and bond were not filed in apt time; secondly, because the bond did not conform to the requirements of the act of Congress, in that it was not conditioned to provide for the payment of costs in the United States Court; thirdly, because the pleadings did not show a severable controversy such as was provided for in the act of Congress of 1887; fourthly, because defendant Howland being a citizen and resident of the State of Massachusetts and not being an inhabitant of the Western District of North Carolina, and the plaintiff being a citizen and resident of the State of New Jersey—and as therefore the United States Circuit Court would not have jurisdiction of a suit originally brought in that court, it would not have jurisdiction of this cause when removed, and on that account the motion to remove should be refused."

The defendant offered to file an additional bond, or to amend the present one in any particular necessary.

The court being of opinion that no order of the State court was necessary to the removal of the cause if it were a proper case for removal, and being further of opinion that the bond was insufficient and it had no power to allow an amendment thereto or a new bond to be filed, and that in the suit in which defendant's petition was filed there is not "a controversy which is wholly between citizens of different States," and
(204 that the Circuit Court of the United States would have no jurisdiction of the action, declined to make the order allowing defendant Howland to file a new bond or to amend the bond on file, and also declined to make an order removing the action to the Circuit Court, from which rulings defendant Howland appealed.

The bond was in the following form:

Know all men by these presents: That we, A. H. Howland, as principal, and S. W. Holman, as surety, are held and firmly bound unto The McNeal Pipe and Foundry Company in the penal sum of two hundred and fifty dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves jointly and severally, firmly by these presents.

The condition of this bond is such, that if said A. H. Howland shall enter and file or cause to be filed in the next Circuit Court of the United States for the Western District of North Carolina, on the first day of its session, copies of all process, pleadings and deposition testimony and other proceedings in a certain suit now pending in the Superior Court of Durham County, State of North Carolina, in which The McNeal Pipe and Foundry Company is plaintiff and said A. H. Howland and the Durham Water Company are defendants, and shall do such other appropriate acts as, by act of Congress, in that behalf are required to be done upon the removal of such suit from said State court into the said United States Court, then this obligation to be void, otherwise of force.

Dated this 23 November, 1887.

A. H. HOWLAND. [Seal.]
By W. W. FULLER, Attorney.
S. W. HOLMAN. [Seal.]

(205) *John Hinsdale for plaintiff.*
No counsel for defendant.

SMITH, C. J., after stating the case: The act of Congress approved on 3 March, 1887, and amendatory of that of 3 March, 1875, makes important changes in the law which authorizes the transfer of causes pending in a State court to the United States Circuit Court for trial. It confines the right to apply for and obtain a removal to nonresident defendants, the plaintiff having elected to bring his action in the jurisdic-

tion of a State court, the sum in controversy must be more than $2,000 instead of $500, the former limit, exclusive of interest and costs; the application must be made at or before the time when, under the law or rules of the State courts, the defendant is required to answer or plead; a bond properly secured must be entered into for filing a copy of the record in the Circuit Court on the first day of its next sitting "and for paying all costs that may be awarded if said court shall hold that the suit was wrongfully removed," etc.

The first section of the amending statute provides, moreover, that in order to the exercise of orginal jurisdiction, the action "shall be brought only in the district of either the plaintiff or defendant," and in the recent case of the *County of Yuba v. Pioneer Gold Mining Co.*, decided in U. S. Circuit Court, N. D., California, in August last, it is held, *Mr. Justice Field* and the Circuit and District Judges concurring in the opinion, that under the second section no cause can be removed of which the Circuit Court would not have had original cognizance.

While it is true that the present suit is brought in a district where one of the defendants resides who is content to let it remain, the other defendant, who seeks another jurisdiction, is a citizen and resident of another State, and if there were a several controversy between them and it could be severed and removed, the anomalous result would follow that a cause would be there constituted which could not (206) have originated in that court in that form.

The principle of the ruling in the case cited, seems to apply to the present proposed removal and with the sanction of such high authority agreeing with our own reading of the enactment and its general scope and policy, we must sustain the ruling of the court below.

We pretermit passing upon the other grounds of objection to the transfer of the cause, to wit: (1) that the application was not made at the first term of the court as of which the pleadings are filed; the want of diversity in the controversies between the plaintiff and defendants, their connection and dependence, so that presence of each in the one action is necessary to a full determination of the cause; the absence of any provision in the bond for the payment of costs, all of which have great force, since it is sufficient to say the cause was not in law removable.

It may be observed that no order of removal was necessary since a compliance with the prescribed conditions effected a removal, and all required of the State Court was to suspend all further proceedings, unless thereafter the case should be remanded by the Circuit to the State Court for a resumption of jurisdiction.

We therefore consider the appeal before us to be from the ruling of the judge to proceed in the cause. *Fitzgerald v. Allman*, 82 N. C., 492.

As to what are separable controversies, see *Ayers v. Wisnall,* 112 U. S., 187; *St. Louis Railroad Co. v. Wilson,* 114 U. S., 60; *Louis. & Nash. Railroad Co. v. Ide, ibid.,* 52; *Putnam v. Ingram, ibid.,* 57; *St. Louis & S. F. Railroad Co. v. Wilson, ibid.,* 60.

Affirmed.

Cited: Bowley v. R. R., 110 N. C., 319; *Pruett v. Power Co.,* 167 N. C., 599.

(207)

JESSE D. WALKER, ADMINISTRATOR OF JOHN BROOKS, v. J. L. BROOKS ET AL.

Contract—Married Women—Advancement—Fraud.

1. Coverture disables a woman to enter into a binding contract, but it does not constitute a protection for her fraud, and if she repudiates her promises she must surrender what she has acquired by reason of them.

2. Where it appeared that the father had delivered to his daughter—a married woman—property of the value of one thousand and seventy dollars, and took her bond payable on demand for six hundred and seventy dollars, but made no charge against her upon his books of advancements: *Held,* (1) that the difference between the value of the property and the bond was not intended as an advancement, but a gift; (2) that although the payment of the bond could not be enforced, the obligor was not entitled to participate in the distribution of her father's estate until she paid it or submitted to have it charged against her.

THIS is a special proceeding, heard by *Shepherd, J.,* at Fall Term, 1887, of PERSON Superior Court, upon exceptions and appeal from the clerk.

This action, begun before the clerk of the Superior Court of Person, against the distributees of the intestate and the husbands of such as have married, is prosecuted for the purpose of settling the estate in the hands of the plaintiff as his administrator.

It does not appear that service of summons was made upon any, though the defendants W. W. Hill and wife, Ida T., come in after an order of publication as to them, they being nonresidents, and make answer to the complaint. It is unnecessary to pursue the cause in its singular and irregular course in which all the defendants have borne a share in view of and for the protection of their several interests in the result, and thus make themselves parties to the action.

The only controversy finally evolved and the ruling upon which is brought up for review in the appeal of said W. W. Hill and wife, is between them and the administrator, and arises out of the following facts:

On 25 February, 1885, the said Ida received from the intestate, (208) her father, a railroad bond of the value of $1,070, and at the same time gave him her bond, as follows:

"$670. On demand and payable with six per cent interest from date, I bind myself, assignees, etc., to pay John Brooks, six hundred and seventy dollars, for full value received of him. I hereby waive the benefit of my homestead exemptions as regards this debt.

I hereby set my hand this 25 February, 1885.

IDA D. HILL. [Seal.]

The clerk charges the said Ida with advances to the amount of $45, according to her own inventory filed, and with nothing in distributing the estate of the intestate, and from his refusal to charge her with the bond, the plaintiff appealed to the judge of the Superior Court, who upon the hearing rendered the following judgment:

"This cause coming on to be heard, and all the exceptions except one, having been abandoned or passed upon by Judge Clark at a previous term, and counsel stating that the only difference between them was in reference to the amount which should be charged against Ida D. Hill as an advancement, and the court having considered the testimony, exhibits and agreement of counsel, which latter is filed in the papers herein, the court is of the opinion, and so finds and adjudges, that the coupon bond to the extent of six hundred and seventy dollars was intended as an advancement to the said Ida, and that she should be charged therewith in the settlement of the estate, her bond being returned to her by the administrator. Plaintiff's exception is therefore sustained. It is further adjudged that this cause be remanded to the clerk to the end that his report be reformed according to this order."

The defendant Ida excepted thereto and appealed. (209)

John W. Graham for plaintiff.
R. C. Strudwick for defendant.

SMITH, C. J., after stating the case: The intestate left no charges on his books for advancements to the said Ida as he did against others of his children, and she voluntarily renders an account for articles of the value of $45 furnished her, and submits to be charged therefor, and it is

quite manifest that in the contemporary delivery to her of the railroad security and her execution of her bond to him for $670, the intent was to give to her as an advancement, or to pay her for kind services to him, and not to be accounted for—the sum of $400, the difference in their amounts—and this only as a severance in the indebtedness upon the railroad security. The absence of any charge upon the intestate's books for this sum, and the execution of the bond for $670, a debt intended to be created and put in the form of an obligation, repel the idea of an intended advancement, and show that the purpose was to make a present contract capable, were she not a *feme covert,* of immediate enforcement.

Now, while in law it is not binding, it is an essential condition entering into and connected with the transfer of the railroad security, so that she cannot retain its full amount and repudiate her own part of the transaction in its entirety. In substance, the transfer is of the $400 excess, and such the parties evidently regarded it. It is not a question of her ability to bind herself by a contract, but whether she can be allowed to retain so much as enures to her own benefit and disavow her own part of the agreement, which was the consideration and condition on which that benefit was accepted.

Coverture disables a woman to enter into a binding contract, but it affords no protection or shelter for fraud, and she must perform what she promised, or return what she gets by reason of it. This is (210) well recognized as a controlling principle. *Boyd v. Turpin,* 94 N. C., 137; *Burns v. McGregor,* 90 N. C., 222; *Towles v. Fisher,* 77 N. C., 437; *Hodge v. Powell,* 96 N. C., 64.

The distributee Ida cannot, therefore, keep the railroad bond and refuse to recognize her responsibility for the amount mentioned in her own bond. As, however, this suit contemplates merely a distribution of assets in the hands of the administrator, she can take none until her own debt is paid, and it goes to increase the sum to be distributed. If she refuses to do this and if charged with it, would, as we understand, be entitled to no part of the augmented fund, she must, if persisting in her purpose, be debarred from participating in the distribution of the personal estate. The judge, though calling this an advancement, charges her with it; and the same results follow, whether it be called an *advancement* or a *debt,* and the misnomer is an immaterial matter. We approve the ruling and affirm the judgment. This will be certified to the court below.

Affirmed.

Cited: Farthing v. Shields, 106 N. C., 300; *Wood v. Wheeler, ibid.,* 514; *Hinton v. Ferebee,* 107 N. C., 156; *Blount v. Washington,* 108 N. C., 233; *Browne v. Davis,* 109 N. C., 27; *Hart v. Hart, ibid.,* 373;

Fort v. Allen, 110 N. C., 192; *Williams v. Walker,* 111 N. C., 610; *Draper v. Allen,* 114 N. C., 52; *Loan Assn. v. Black,* 119 N. C., 328; *Millsaps v. Estes,* 137 N. C., 546; *Nobles v. Davenport,* 183 N. C., 210; *Morris Plan Co. v. Palmer,* 185 N. C., 119; *Freeman v. Ramsey,* 189 N. C., 796.

THE BOARD OF COMMISSIONERS OF WINSTON v. W. B. AND J. P. TAYLOR.

Municipal Corporations—Taxation—Penalty—Ordinance.

1. Municipal corporations can impose no taxes except such as are authorized by their charters.
2. The charter of the town of Winston authorizes the imposition of privilege or license taxes upon trades, etc.
3. One who, in the prosecution of his business as a tobacco manufacturer, buys leaf tobacco in the town of Winston to be manufactured in a place without the town, is liable to the penalty imposed by the corporation for refusal to pay the tax upon the occupation of dealer in leaf tobacco, though he may be a nonresident.

THIS action was originally commenced before the mayor of the (211) town of Winston by a warrant issued upon complaint against the defendants for violating an ordinance of the town relating to taxes, and carried by appeal to the Superior Court of FORSYTH County, wherein it was tried before *McRae, J.,* at October Term, 1886.

Upon the trial, and upon the plea of not guilty, the jury returned a special verdict in these words:

"The defendants compose the firm of W. B. Taylor & Bro., who are, and were, at the time the warrant was issued, tobacco manufacturers, living and having their place of business in the town of Salem, N. C., where they were engaged in the manufacture of plug tobacco. They were not dealers in leaf tobacco, but made a business of purchasing their stock of leaf on the floors of the tobacco warehouses in the town of Winston, and carrying the same on drays to their factory in Salem. They attended the auction sales of leaf tobacco regularly, for the purpose above indicated. That there are leaf dealers in Winston, whose business is to buy and sell leaf.

"The defendants denied the right of the town authorities to collect the special license tax imposed, as claimed by the authority of the town, and demanded by the tax collector, and upon their refusal, the warrant in the

case was issued against them for the penalty imposed, for failure to take out license to purchase tobacco, as above set forth. The jury further find that the defendants, without paying the special license tax and obtaining a license, regularly purchased leaf tobacco for their factory in Salem, upon the warehouse floors in Winston, as above set forth. If the court should be of the opinion, from the foregoing finding, that the
(212) defendants are guilty, then the jury find them guilty; but should the court be of the opinion, from the foregoing facts that the defendants are not guilty, then the jury find them not guilty."

The plaintiff claimed authority to collect the license taxes out of the defendants, and the penalty for failure to pay under the charter and amendments thereto, and the ordinances passed thereunder.

His Honor, being of opinion that the defendants were liable, gave judgment upon the verdict against them, from which the defendants appealed.

By an amendment to the charter of the town of Winston—chapter 31, Private Acts, 1885—it is, among other things, enacted: "That the commissioners of the town of Winston, in addition to the powers of taxation already granted in the charter of said town, shall be and are hereby empowered to levy and collect annually a privilege or license tax on all trades, professions, agencies, business operations, exhibitions and manufactories in said town."

By an ordinance adopted by the commissioners 6 June, 1885, there was imposed a tax of "$10 upon every leaf dealer buying annually less than 100,000 pounds, and $5 for every additional 100,000 pounds bought, or fractional part thereof."

At a meeting held by the commissioners 17 August, 1885, as a substitute for the above it was declared "that a tax of $2.50 be levied upon every person buying or offering to buy leaf tobacco and scraps, provided that a tax of $5 be laid upon every person buying more than 50,000 pounds, and less than 100,000 pounds, and that a tax of $5 be laid upon every additional 100,000 pounds, or fractional part thereof bought by such person."

It was also provided that "any persons violating any of the provisions of ordinance 4 or 6, under the head of taxes, shall forfeit and pay
(213) for each offense a sum equal to double the amount of the license therein contained."

The tax complained of is imposed under ordinance 6, as amended 17 August, 1885.

R. B. Glenn for plaintiff.

J. C. Buxton for defendant.

DAVIS, J., after stating the case: We think there can be no doubt as to the validity of the provision in the charter of the town of Winston which authorizes the commissioners "to levy and collect annually a privilege or license tax on all trades," etc., mentioned in the charter. *Wilmington v. Macks,* 86 N. C., 88; *Holland v. Isler,* 77 N. C., 1.

It is also clear that the authorities of the town can impose no taxes except as authorized by its charter. *Commissioners v. Means,* 7 Ired., 406; *Pullen v. Commissioners,* 68 N. C., 451; *S. v. Bean,* 91 N. C., 554.

The counsel for the defendants insists that they are not buyers or dealers in leaf tobacco within the meaning of the ordinance; that they only purchase their stock of tobacco on the floors of the warehouses in Winston to be used in their factory in Salem, and not being residents of Winston they cannot be taxed there. The question is purely one of construction, and we think the case of *Moore v. Commissioners of Fayetteville,* 80 N. C., 154, cited by counsel for defendants to distinguish it from this case, is authority for the position that the trade, profession, business operations, etc., of nonresidents, carried on in the town, may be taxed for municipal purposes, if authorized by its charter and ordinances.

In that case the plaintiff resided outside of the corporate limits of the town of Fayetteville, but carried on his business as a merchant in the town. He owned bank stock in a bank located in the town, on which the corporate authorities attempted to collect a tax such as was assessed upon similar property possessed by residents.

In that case the *Chief Justice,* after citing *Buie v. Commis-* (214) *sioners of Fayetteville,* 79 N. C., 267, in which it was held that shares of stock in National Banks, held by persons residing in the State, are subject to taxation in the county of the owner's residence as part of his personal estate, and not elsewhere for State and county purposes, says, "the present case presents the case whether such stock owned by one whose residence is just outside, but whose business is within the corporate limits, may be taxed for municipal purposes in like manner as if his residence was also in the town. As the place and manner, as well as extent of taxation of its citizens are regulated by the laws of the State, the solution of the question must be found in the proper interpretation to be put upon the clause of the amended charter, and in our opinion is free from all reasonable doubt. The words are direct and positive, that such property as is held by the plaintiff shall be subject to the burden of municipal taxation." So here the law which authorizes "a privilege or license tax" "on trades, professions, agencies, business operations," etc., in the town of Winston, is direct and positive. And why should it not be so?

A nonresident doing business in the town has his business protected and enjoys all the advantages and benefits of police and other regulations that resident business men have, and should be content if the law allows no discrimination against him.

If a liveryman or drayman resident in Greensboro should send his omnibus and hacks or drays into the town of Winston and claim and be allowed the privilege of doing business there without payment of taxes, because he was a nonresident, it would be deemed a very unjust discrimination by the resident liverymen and draymen.

We see no error in the ruling of the court below.

Affirmed.

Cited: Redmond v. Commissioners, 106 N. C., 127; *Hall v. Fayetteville,* 115 N. C., 283; *Guano Co. v. Tarboro,* 126 N. C., 70; *Plymouth v. Cooper,* 135 N. C., 6; *Range Co. v. Campen, ibid.,* 525; *Winston v. Beeson, ibid.,* 277; *Drug Co. v. Lenoir,* 160 N. C., 573; *Mercantile Co. v. Mount Olive,* 161 N. C., 126; *Charlotte v. Brown,* 165 N. C., 437; *Bickett v. Tax Commission,* 177 N. C., 436.

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(215)

WILSON A. RAMSAY AND WIFE v. DAVID B. GHEEN AND W. A. RAMSAY, EXECUTORS OF GEORGE H. GHEEN.

Contract—Specific Performance.

1. The specific performance of a contract is not a matter of absolute right, but rests in the sound discretion of the court; if the contract is oppressive or will enable one of the parties to obtain an inequitable advantage in consequence of unforeseen events, a Court of Equity will not interfere, but leave the parties to their remedy at law.
2. Where a father executed a bond conditioned to convey to his daughter certain lands if she and her husband should move to his home, live with him, cultivate and manage his farm and support him, and he died shortly thereafter while the obligees were engaged in making the necessary removal—they having furnished some necessary supplies: *Held,* that a specific performance would not be decreed.

CIVIL ACTION, tried before *Clark, J.,* at November Term, 1887, of ROWAN Superior Court.

It appeared that George H. Gheen died testate in the county of Rowan on 21 January, 1887, and thereafter the defendants duly qualified as the executors of his will, which latter was duly proven.

The testator executed to the husband plaintiff his bond for the sum of $1,500, and the following is a copy of the condition thereunder written:

"The condition of the above obligation is such, that if the said Wilson A. Ramsay enters into an obligation as agreed upon, to move on to my farm, cultivate the same, all except where George Goodman cultivates, take full charge and management of the same, live with me in my house and support me during my life in a comfortable manner. In consideration of the above agreement, when fully entered into by said Ramsay, and for the further consideration of one dollar to me in hand paid by him, I hereby obligate myself to make to S. A. Ramsay, wife of said Wilson A. Ramsay, a good and lawful deed in fee simple for (216) one hundred acres of land at the north side of my plantation, said land to be selected by said Wilson A. Ramsay; and when all the above conditions, obligations and agreements are complied with, and the title made to said land as soon as the same can be properly surveyed, then, and in that case, the above obligation to be null and void; otherwise to remain in full force and effect."

It appeared further, that in pursuance of the terms and as contemplated by the said condition, the plaintiffs—husband and wife—removed to the home and farm of the testator on 14 January, 1887; that the *feme* plaintiff remained with the testator to nurse and care for him while the husband, after remaining a few days, furnishing some supplies and making necessary arrangements for the comfort of the testator, returned to the county of Iredell to complete the removal of his effects to the home of the testator; that the testator having died, the plaintiff husband selected, designated and had surveyed the one hundred acres of land as contemplated by the condition of the bond above recited; that he made demand upon the defendants executors, that they execute to the *feme* plaintiff a proper deed of conveyance for the same and they refused to comply with such demand.

The plaintiffs demand judgment, "that defendants, as executors aforesaid, be required to specifically perform the contracts and covenants set out in said paper-writing, by executing to the *feme* plaintiff, S. A. Ramsay, a deed in fee simple for said described tract of land and for costs."

The defendants answered as follows:

"5. For further answer and as a defense to this action, defendants say that the plaintiff Wilson A. Ramsay: (1) failed to perform the stipulations and conditions contained in the said paper-writing, in this: that he failed to enter into an obligation to move on the farm of the said George H. Gheen and support him in a comfortable manner, (217) as provided in said agreement. (2) He did not move upon the farm of the said George H. Gheen in the lifetime of the said George H.

Gheen, and did not support the said George H. Gheen during his life. That said agreement was made and entered into 4 January, 1887, and the said George H. Gheen died on the 21st of the same year and month, and before the said Wilson A. Ramsay, as defendants are informed and believe, had performed any of the conditions and stipulations contained in said agreement."

Upon the facts agreed, the court gave judgment in favor of the defendants, and the plaintiffs having excepted appealed.

Theo. F. Kluttz for plaintiffs.
No counsel for defendants.

MERRIMON, J., after stating the case: The purpose of this action is to compel specific performance of an alleged contract appearing and suggested by the condition set forth above of the bond mentioned in that connection.

We need not stop to consider whether or not any executory contract was consummated so as to become operative as contemplated by the terms and purpose of the condition, and whether the defendants might under possible circumstances be compelled to perform it specifically, because conceding that there was such contract, we are clearly of opinion that it is not such a one as the court ought to require to be specifically performed. The testator of the defendants died a few days after he executed the bond and while the plaintiffs were just beginning to do for him what it was intended they should do, and what it is plain the parties supposed would continue to be done through a considerable period of time—perhaps years. The expectations of the parties were suddenly disappointed by the unexpected sudden death of the testator. It (218) would, in our opinion, be unjust and unconscionable for the plaintiffs to take the land by virtue of such a contract, when they had done only a very small fraction of the service and benefit to the testator that he and they must have contemplated in making the alleged contract.

The specific execution of a contract cannot be insisted upon in equity as a matter of absolute right in the party demanding it; but it rests in the sound discretion of the court, whether or not it will require it to be done. If the contract be hard and exacting in its terms, contrary to its spirit—oppressive, unjust and inequitable under the circumstances—not strictly what the parties contemplated in entering into it, or if the specific execution of it will operate unjustly to the detriment of the party complained against, the court will leave the parties to their remedy at law. A Court of Equity will not lend its aid to a party who seeks to take inequitable advantage of unforeseen events and circumstances not

contemplated by the contracting parties, especially when the complaining party can have adequate remedy at law. It is not the province of a Court of Equity to defeat a valid contract, but it will not enforce it against conscience. *Leigh v. Crump,* 1 Ired. Eq., 299; *Cannaday v. Shepard,* 2 Jones Eq., 224; *Lloyd v. Wheatly, ibid.,* 267; *Herren v. Rich,* 95 N. C., 500; *Love v. Welch,* 97 N. C., 200; Ad. Eq., 87 and notes.

We concur with the court below in the opinion that the plaintiffs are not entitled to the relief they demand. If such contract as they allege exists, they have their remedy at law. The pleadings in this action do not contemplate such remedy, nor are they sufficient for that purpose.

Judgment affirmed.

Cited: Burnap v. Sidberry, 108 N. C., 309; *Whitted v. Fuquay,* 127 N. C., 69; *Rudisill v. Whitener,* 146 N. C., 411.

(219)

GEORGE P. HORTON v. JAMES C. HORNE.

Claim and Delivery—Judgment—Costs.

1. If in an action to recover personal property the plaintiff establishes title to a portion of the property which has been taken and delivered to him under claim and delivery proceedings, he will be entitled to judgment for his costs.

2. In respect to that portion which he fails to recover, the judgment should direct a return to the defendant, or that the value thereof, to be ascertained by the jury, should be paid him if a return cannot be made.

CIVIL ACTION, to recover personal property, tried before *Clark, J.,* at May Term, 1887, of ANSON Superior Court.

The summons was issued in May, 1881, and at the same time the plaintiff having filed the requisite affidavit and undertaking, the sheriff was directed to take the property mentioned therein and deliver it to the plaintiff, as provided in section 321, *et sequiter* of The Code, and which was done as appears by the sheriff's return.

The plaintiff alleged that he was "the owner and entitled to the immediate possession of the property" sued for, by virtue of a contract set out at length in the complaint.

The allegations were denied by the answer, in which, among other things by way of defense, it is alleged that at the time of the seizure of

the property by the sheriff, about one hundred dollars worth of lumber was put into the possession of the plaintiff which was not claimed by him in this action, and "which made a full payment to the said Horton of the balance then due him by the defendant." He asks judgment among other things, for the return of the property or the value, etc.

The only exception taken by the appellant is to the judgment of the court, which is as follows:

(220) This cause coming on to be heard, and jury having responded to the issues submitted by the court, as follows, viz.:

1. Is the plaintiff the owner and entitled to possession of the property sued for? Answer: Yes, except the logs and lumber on mill yard.

2. What damage, if any, has plaintiff sustained by wrongful acts of defendant? Answer: Six hundred and fifty-five dollars ($655).

3. What part of the purchase money has been paid? Answer: Six hundred and sixty-three dollars and eighty-three cents.

4. What was the value of defendant's property if any, wrongfully taken in this action? Answer: One hundred and twenty-five dollars ($125).

On motion it is ordered and adjudged that the defendant do recover of the plaintiff, and the sureties on plaintiff's undertaking, the sum of one hundred and thirty-three dollars, with interest on the same from this time.

And it is further adjudged, that the plaintiff recover of the defendant the property described in complaint, except the logs and timber, and that he recover the costs of this action, except as are stated to the counterclaims, to be taxed by the clerk.

The plaintiff insisted that so much of the judgment as related to the property wrongfully taken should have been in the alternative—*i. e.*, for the return of the property or for the value thereof, and that no part of the costs should have been adjudged to be paid by him, and he appealed from the judgment in those particulars.

J. A. Lockhart for plaintiff.
No counsel for defendant.

DAVIS, J., after stating the case: Section 431 of The Code prescribes the manner in which the judgment in actions for the recovery of personal property shall be rendered. "Judgment for the plaintiff

(221) may be for the possession, or for the recovery of possession, or for the value thereof, in case a delivery cannot be had, and the damages for the detention. If the property has been delivered to the plaintiff and the defendant claims a return thereof, judgment for the

defendant may be for a return of the property, or for the value thereof in case a return cannot be had, and damages for taking and withholding the same."

In the case before us the personal property in controversy having been put into the possession of the plaintiff, the judgment should have declared his right to the possession of so much of it as by the verdict of the jury he was found to be "the owner and entitled to the possession of," and for the return to the defendant of that which was wrongfully taken, or for the value thereof, as found by the jury, in case a return cannot be had. *Manix v. Howard,* 79 N. C., 553.

The plaintiff was also entitled to his judgment for costs. Section 525 of The Code provides that "costs shall be allowed of course to the plaintiff upon a recovery . . . in an action to recover the possession of personal property."

This was an action for the recovery of personal property, and a substantial recovery by the plaintiff. The action was rendered necessary by the wrongful detention of his property by the defendant, and though he did not recover *all* the property claimed, there was a recovery as to the greater part of it, and he is entitled to his costs. In *Wooley, Admr., v. Robinson,* 7 Jones, 30, the plaintiff in an action of *detinue* to recover several articles, succeeded in recovering some and failed as to others, and it was held that the witnesses examined for the plaintiff in regard to the articles only as to which he failed, were not, *ipso facto,* to be excluded from his bill of costs.

In *Wall v. Covington,* 76 N. C., 150, it was held that no part of the costs of an action can be taxed against the party recovering (222) judgment.

The judgment of the court below must be modified and reformed so as to accord with this opinion.

Error and judgment modified.

Cited: Hall v. Tillman, 103 N. C., 281; *Spencer v. Bell,* 109 N. C., 43; *Wooten v. Walters,* 110 N. C., 258; *Ferrabow v. Green, ibid.,* 416; *Field v. Wheeler,* 120 N. C., 270; *Williams v. Hughes,* 139 N. C., 20; *Vanderbilt v. Johnson,* 141 N. C., 373; *Phillips v. Little,* 147 N. C., 283; *Cotton Mills v. Hosiery Mills,* 154 N. C., 467.

GIDEON HAMPTON ET AL. v. W. H. WHEELER.

Will—Tenants in Common—Statute of Limitations.

Devise of land to wife for life, and after her death one-half to one of testator's daughters and the other half to H. and wife (the other daughter), and their children. There were seven children living at the time of testator's death. H. and wife sold, and the defendant holds under *mesne* conveyances from them: *Held*, that the children (plaintiffs) were tenants in common with their parents, and having asserted their claim within twenty years, the statute is no bar to their right to recover their share of the land—one-ninth each.

CIVIL ACTION, tried at Fall Term, 1887, of FORSYTH Superior Court, before *Gilmer, J.*

It appears that Christian Reich died prior to 1864, leaving a last will and testament, which was duly proven. The following is a copy of so much of this will as it is necessary to set forth here:

"1. I give and bequeath to my beloved wife, Isabella Reich, my home plantation, containing fifty acres, together with all improvements thereon during her lifetime.

2. After the death of my beloved wife, I will that one-half of the home plantation and all improvements be the property of my beloved daughter, Nancy Reich, and the other half of my home plantation and all improvements to be the property of Alfred Hampton and his wife, Jureda Reich, and their children."

(223) Isabella Reich, the surviving widow, died in the year 1864. Alfred Hampton and his wife, Jureda, died—the former in 1878, the wife in 1885. In their lifetime, on 7 May, 1866, they executed a deed purporting to convey the land mentioned in the clauses of the will above set forth to William Reed. He thereupon at once took possession of the land and occupied the same about three years, and then sold and purported to convey the same to C. S. Bauner, who afterwards, in 1869, died intestate, and, afterwards in 1870, his administrator sold the same in fee to the defendant, who has been in possession, holding adversely, since that time.

The plaintiffs are the children of said Alfred Hampton and his said wife; and they were all in being at the death of the testator; and the youngest of them attained his majority more than three years next before the commencement of this action. They bring the action to recover possession of the land and "contend that by a proper construction of the will the plaintiffs took a fee simple estate in the lands, subject to the life estate of Isabella Reich and Alfred Hampton and wife."

Defendant contends:

"1. That Alfred Hampton and wife had a right to claim by their deed a fee simple estate, and defendant acquired a good title to the same.

2. That if not a perfect title vested in Alfred Hampton and wife, they at least took an estate in common with the plaintiffs.

3. That defendant's title, if not perfect, has ripened into a good title by long adverse possession under color of title."

The court was of opinion on the case agreed, that the plaintiffs are not the owners, nor entitled to the possession of the premises described in the complaint, their interest therein having been barred by the statute of limitations, and that by reason of his deed in fee, the defendant is the owner and entitled to the possession of said lands.

The plaintiffs excepted. There was a judgment against them, (224) from which they appealed to this Court.

Robt. B. Glenn for plaintiffs.
J. C. Buxton for defendant.

MERRIMON, J., after stating the case: The clauses above recited of the will mentioned, are not affected as to their meaning by any other clause of it, or by anything appearing in it in terms or by implication. They are to be construed as they appear.

The mere fact that the quantity of land devised was small—but fifty acres—that the testator devised to one of his daughters one-half of it, to the other, her husband and their children the other half, subject to the life estate of his widow, cannot reasonably be allowed to so affect and change the plain meaning of the words employed as to make them imply that the testator intended to devise one-half of his land, subject to the life estate of his widow, to the husband and wife for life, remainder in fee to their children.

The considerations mentioned, if they could be allowed to affect the meaning of the words used at all, would rather suggest that the testator intended to give his married daughter one-half of the land on which she would live with her family, but any departure from the ordinary meaning of the words could only give rise to mere speculative conjecture that could have no just weight or effect.

The real purpose of the testator seems to have been that his daughter, her husband and their children should own the land jointly, and for their common benefit—perhaps a place on which they could live and have a common home. He probably did not look beyond this to see what might be the strict legal rights of the devisees severally. He wanted his

(225) daughter and her family to share what he had after the death of his wife. The rules of law applicable must now determine the legal meaning and effect of the clauses of his will in question.

Then, as Alfred Hampton, his wife and their children were all alive at the time the will took effect, they, under the clauses of it mentioned, took the fee simple estate in one-half of the land as tenants in common, except that the husband and wife took as to themselves by entireties, subject to the life estate of the widow of the testator. It would be otherwise, if at the time the will took effect the husband and wife had no children and there were no children or respresentatives of deceased children. The rule applicable is clearly settled, and we need not here advert further to it. *Moore v. Leach,* 5 Jones, 88; *Chestnut v. Meares,* 3 Jones Eq., 416; *Gay v. Baker,* 5 Jones Eq., 344; *Hunt v. Satterwhite,* 85 N. C., 74.

There were seven children of the husband and wife. The latter took under the will two-ninths of the land, as indicated above. Their deed of conveyance to William Reed, although it purported to convey to him the fee simple estate in the whole of the land, only had the effect to pass such estate as they had—two-ninths. The estate of the children remained in them, and they became tenants in common with William Reed, and such tenants with the defendant claiming to derive title from him, unless the defendant has in some way obtained title as against the plaintiffs by adverse possession.

It is said in the case stated on appeal that the defendant has been in possession of the land, claiming under his deed and holding adversely, since 1870. It does not, however, appear that such adverse possession was other than that the defendant simply had the actual possession of the common property, and applied the rents and profits to his own use.

This is not such possession as to the plaintiffs, tenants in common with the defendant, as with color of title and seven years adverse possession will give him a good title as against his cotenants.

(226) He is presumed, in such case, to hold by his rightful title and his possession is not adverse to, but that of, his cotenants, as well as his own, until the lapse of twenty years, when, by such continuous possession, his title to the whole land becomes absolute and good as against his cotenants. This is well settled in this State. *Caldwell v. Neely,* 81 N. C., 114; *Ward v. Farmer,* 92 N. C., 93; *Hicks v. Bullock,* 96 N. C., 164; *Page v. Branch,* 97 N. C., 97; *Breeden v. McLauren,* 98 N. C., 307.

So the defendants' title to the land in question was not rendered perfect by seven years adverse possession up to known visible lines and boundaries with color of title; nor by twenty years adverse possession as to the plaintiffs, his cotenants in common (for, under the statute, the

time from May, 1861, to 1 January, 1870, is excluded). The plaintiffs are therefore entitled to be let into possession with the defendant as tenants in common with him according to their respective rights.

The judgment must be reversed and judgment entered in accordance with this opinion.

Error.

Cited: Heath v. Heath, 114 N. C., 550; *Silliman v. Whitaker,* 119 N. C., 93; *King v. Stokes,* 125 N. C., 516; *Shannon v. Lamb,* 126 N. C., 46; *Darden v. Timberlake,* 139 N. C., 182; *Whitehead v. Weaver,* 153 N. C., 90; *Moore v. Trust Co.,* 178 N. C., 124; *Davis v. Bass,* 188 N. C., 205; *Crocker v. Vann,* 192 N. C., 429.

(227)

GEORGE R. HORTON AND WIFE v. JUDSON LEE.

Will—Election—Parol Evidence.

Devise of "the tract of land whereon I now live" to testator's wife for life, then over to a daughter. Certain crops raised on the "tract" were also given to the wife. The tract on which the testator lived embraced 59 acres (the subject of the suit) which descended to the wife from her father's estate:

Held, the presumption that the testator did not intend to include the 59 acres in the devise to the wife may be rebutted, and parol evidence is competent to show what was in fact included in the "tract" whereon he lived.

Held further, where in such case the evidence tended to show that the wife elected to take the property devised, knowing that the 59 acres were included in the "tract," and occupied the premises, until her death, without dissenting from the testator's will, then no one claiming under her can set up any claim that would defeat the will. An election once made, though by matter *in pais,* is binding.

CIVIL ACTION, tried before *Merrimon, J.,* at August Term, 1887, of WAKE Superior Court, for the recovery of land and damages for its detention.

The material facts are as follows:

Wm. Lee died in the county of Wake, in 1861, leaving a last will and testament, which was duly proved at the August Term, 1861, of Wake County Court, and which among other things contains the following:

"Item 1. I lend to my beloved wife the tract of land whereon I now live during the term of her natural life.

"Item 2. I lend to my beloved wife a certain tract of land adjoining William A. Rhodes, known as the Herndon place, during the term of her natural life.

"Item 4. I give and devise to my beloved wife all my household and kitchen furniture, and the corn made on the tract of land whereon I now live and on the Herndon place.

(228) "Item 6. I give and bequeath to my youngest daughter, Sarah, the tract of land whereon I now live and my negro man named Squire, after the death of her mother."

It was admitted that Mrs. Martha Lee died on the ..... day of January, 1887; that Sarah Horton, the plaintiff, was the youngest daughter of William Lee and the person mentioned in the sixth item of said will.

It was admitted that the widow of Wm. Lee took possession of the tracts of land devised to her in said will, and used and occupied them until her death, and did not dissent from the will.

It was admitted that while the complaint sought the recovery of the whole tract of some 180 acres, yet that, since the bringing of said action, possession of the tract had been given the plaintiffs, with the exception of the 59 acres described in the answer, and that said 59 acres were alone in controversy.

It was further admitted that the 59 acres, spoken of in the answer, was inherited by Mrs. William Lee from her father.

At this stage of the trial the plaintiffs offered to show by witnesses that the words used by Wm. Lee in the first and sixth items of his will, to wit: "the tract of land on which I now live," included the 59 acres hereinbefore referred to as having been inherited by Mrs. Lee from her father, and now in controversy.

After the will was offered and read the court said that, as it was admitted that at the time the will was executed Martha Lee was the owner of the 59 acres in controversy, the same having been set apart to her in partition proceedings as her share of her father's real estate, it would be presumed that the testator did not intend to embrace the said 59 acres in his devise to his wife, but only his own land.

Plaintiffs' counsel excepted.

The counsel for the defendant objected to the reception of such (229) other evidence, but the court permitted it to be offered, and it was as follows:

"W. A. B. Richardson testified, that he knew the tract of land on which Wm. Lee lived at the time of his death, since 1853 or '54; been over the entire tract, of between 100 and 200 acres; when first knew it,

was like great many other old plantations; don't know where the particular 59 acres are; the entire tract was cultivated as one; no distinction or separation in it; the tract was known as Wm. Lee's tract of land, and the one on which he lived at his death; Lee had a good many other tracts—one known as the Herndon place; another on the other side of Little River; never heard Wm. Lee speak of it. . . . The 59 acres is part of the David Bunch land; the mother of the plaintiff Sarah and the defendant inherited it from her father, David Bunch; that Wm. Lee, who married Martha Bunch, bought of her brother and sisters their interests in their father David Bunch's land after partition, and those interests thus bought, together with Martha's 59 acres, constituted one tract since Wm. Lee married Martha, and that was the one on which Wm. Lee lived at the time of his death.

"Wm. Underhill testified, that he knew the land well; is 75 years old; the place Wm. Lee lived on was known as the Bunch place or Aunt Polly's place; never heard it called anything else; since it got out of Bunch it has been called the Lee place; the 59 acres in controversy and the interests bought by Wm. Lee from the Bunch heirs are adjoining—one tract; Lee lived on the place he got from the Bunch heirs. . . . Wm. Lee and Miss Martha Bunch, who are father and mother of Sarah Horton and defendant, were married before 1831, and had children before 1848.

"Report of the commissioners partitioning the David Bunch land was introduced, which showed that the part inherited by Martha was allotted to her husband, Wm. Lee, although plaintiffs admit that the legal title, by virtue of the partition, was in Mrs. Martha Lee at the (230) time Wm. Lee made his will.

"W. A. B. Richardson, recalled, says, that the defendant last fall admitted to him that his father, Wm. Lee, gave in the tract for taxation, as a whole, including the 59 acres.

"Gideon Liles testified, that he was 58 years old; lived always about one-fourth mile from land in controversy; knew it well; Wm. Lee cultivated it all together, under one farm—the whole plantation; it was all called Wm. Lee's home; it was all together as one plantation.

"W. A. B. Richardson, recalled, testified, that Mrs. Martha Lee, widow of Wm. Lee, died in January, 1887; have heard Mrs. Martha Lee say several times the land was hers and she intended it for her daughter Sallie—meaning the plaintiff; that her husband had willed it to her for life, and after that to his daughter Sallie; witness always thought she meant the whole land, but she made no definition and no distinction; she said it was her land.

"Thadeus Lee, brother of plaintiff and defendant, testified, that he heard his mother, Martha Lee, say all of the tract was her land, and at her death it went to Sallie; father cultivated the land all together in his lifetime.

"Geo. R. Horton testified, that in all the land willed to Mrs. Martha Lee by Wm. Lee, there were some 300 acres out of 500 acres.

"Defendant objected, specially to the testimony of W. A. B. Richardson and Thad. Lee as to declarations of Martha Lee, set out above.

"The following issue was submitted to the jury:

"Are the plaintiffs the owners and entitled to the possession of fifty-nine acres of land described in the answer of the defendant?

"The court instructed the jury that if they believed the testimony and admissions of the parties, the plaintiff was not entitled to recover,
(231) and directed the issue to be answered in the negative. There was a verdict for defendant, under the court's direction, and judgment accordingly.

The plaintiffs excepted to the charge of the court, and appealed from the judgment rendered.

Fuller & Snow for plaintiffs.
Battle & Mordecai for defendant.

DAVIS, J., after stating the case: Whatever was embraced in the first clause of the will of William Lee passed under the sixth clause to the plaintiff after the death of Martha Lee.

The plaintiff says it embraced and included the fifty-nine acres in dispute. The defendant says, no—that as to the fifty-nine acres Martha Lee held, not under the will of Wm. Lee but under a title derived by inheritance from her father, and that she was not put to her election to take under the will or to hold by her independent title in fee.

Two questions are involved:

1st. Was the land in controversy included in "the tract of land whereon" the testator resided and embraced in the first and sixth clauses of his will?

2d. If so, did Martha Lee accept the devises to her with a knowledge of the fact that it was so included?

1. There is no ambiguity upon the face of the will. The testator devised "the tract of land whereon" he resided. The area and extent of that tract and what was included therein, are questions of fact. Did it include the fifty-nine acres? Did the testator intend to include the fifty-nine acres? It is true, as was said in *Isler v. Isler,* 88 N. C., 581, "that there is a prima facie presumption always that a testator means

only to dispose of what is his own, and what he has a right to give; and if it be at all doubtful by the terms of his will, whether he had in fact a purpose to dispose of property really belonging to another, that doubt will govern the courts, so that the true owner, even though he should derive other benefits under the will, will not be driven (232) to make an election. But if, on the other hand, there should be a manifest purpose expressed in the will to dispose of the thing itself, then it is wholly immaterial whether he should recognize it or not as belonging to another, or whether he shall believe that the title and right to dispose of it vested in himself or not."

It is the clearly expressed purpose of the testator that the plaintiff should have "the tract of land whereon" he resided, after the death of her mother, but when it appeared that the land in dispute was inherited by the devisee Martha from her father, "it would be presumed," as was said by his Honor, "that the testator did not intend to include the fifty-nine acres in the devise to his wife, but only his own land"; but this presumption may be rebutted, and parol evidence is competent to fit the thing to the description and show what was in fact included in the tract. *Stowe v. Davis,* 10 Ired., 431; 1st Greenleaf, sec. 288; *Dodson v. Green,* 4 Dev., 438; *Bolick v. Bolick,* 1 Ired., 244.

When there is no doubt, as here, apparent upon the face of the will as to what was meant by the testator, but the doubt is raised by something extrinsic—that is *latent*—parol evidence is competent to show what was meant. 1 Greenleaf, sec. 297; *D. & D. Institute v. Norwood,* Bus. Eq., 65; *Kincaid v. Lowe,* Phil. Eq., 41.

In *Branch v. Hunter,* Phil. Law, 1, evidence offered to show that a tract of land, called the "Enfield tract," embraced the land in controversy was rejected by the court below, but on appeal was held to be error.

Light may be thrown upon the first clause by the fourth. When the testator gave to his wife, among other things, "the corn and fodder raised on the land whereon I now live," would she not have been entitled to the corn and fodder made on the entire farm cultivated as one, or would it have been the duty of the executors to sell what was raised on the fifty-nine acres?

2. If the land in controversy was embraced in the tract on (233) which the devisee resided, did Mrs. Lee elect to take the devises made to her with a knowledge of that fact? It is only material that she should have known the *fact* that the fifty-nine acres were included in the tract given to her for life and then to her daughter Sarah, and if, with this knowledge, she accepted the property given to her for life, then neither she, nor any one claiming under her, would be heard to assert any claim that would defeat the will of the testator. Adams Equity, sec. 96

and note. It is there said that "an election once made, though by matter *in pais,* is binding."

There was error in the instruction of the court, and the plaintiff is entitled to a new trial.

Error.

Cited: Austin v. Stewart, 126 N. C., 527; *Woodlief v. Woodlief,* 136 N. C., 138.

E. W. TIMBERLAKE v. W. C. POWELL ET AL.*

Lessor and Lessee—Rights of assignee of judgment in claim and delivery—Conversion.

Lessor recovered judgment against lessee in an action of claim and delivery to recover possession of crops and enforce his lien for rent. Pending the suit, the lessee delivered a portion of the crop to the defendants to pay for supplies furnished him. The judgment was assigned to the plaintiff who sues defendants for damages for the conversion: *Held,*

1. The plaintiff assignee acquired no title to any property not mentioned in the judgment, and he must accept the assessed money value of such as cannot be delivered under the judgment.

2. The assignment is not of all the rights of the lessor, but of the right vested in him by virtue of the judgment and to enforce the same against the lessee.

3. The assignee cannot maintain an action against defendants for an independent liability incurred by their alleged tortious act.

(234) CIVIL ACTION to recover damages of defendants for an alleged conversion of certain personal property, tried at April Term, 1887, of FRANKLIN Superior Court, before *J. H. Merrimon, J.*

The plaintiff appealed.

C. M. Cooke and F. S. Spruill for plaintiff.

N. Y. Gulley for defendants.

SMITH, C. J. In 1885 J. N. Perkinson leased from R. E. Gill a tract of land, to be cultivated during that year, for the sum of one hundred dollars, and to recover possession of the crops and enforce his lien the

*Mr. ASSOCIATE JUSTICE DAVIS, having been of counsel below, did not sit at the hearing of this cause.

latter, in November, instituted his action against the former under the provisions of The Code, sec. 321 to 333. The property was accordingly seized by the sheriff, but returned to the debtor on his executing a written undertaking as prescribed in section 326.

At the January Term of the Superior Court next ensuing he recovered judgment, the substance of which is in these words: "It is adjudged that the plaintiff recover of the defendant and R. H. Timberlake, his surety, the property described in the affidavit for claim and delivery in this action, to wit, about 2,000 pounds of seed cotton, 15 barrels corn, 300 pounds tobacco, and four stacks fodder, and in case a delivery of said property cannot be had, then and in that event it is adjudged that the plaintiff recover of the said defendant and of R. H. Timberlake, his surety, aforesaid, the sum of $96.20, with interest thereon from 1 December, 1885, till paid, and the costs of this action.

On 17 June, 1886, the plaintiff in that action made an assignment to the plaintiff in this, as follows:

For value received, I transfer and assign this judgment to E. W. Timberlake, without recourse.

R. E. GILL, *Adm'r and Agent.*

It was in evidence that three bales of cotton, the product of the (235) farm, as well as cotton raised upon other land, went into the possession of the defendants to pay for supplies furnished by them to Perkinson; that during the pendency of the before-mentioned suit, the cotton therein sued for was ginned and put in two bales, of which the defendants got possession, as well as the proceeds of said tobacco, and converted all to their own use.

The present action is to recover damages for the conversion and appropriation of the five bales of cotton delivered by Perkinson to the defendants. The right to the converted goods is derived solely under this assignment.

The court being of opinion that it gave the plaintiff no title whatever to any property not mentioned in the judgment, and that as to the other property, if he could not get it under the assignment, he must accept the money value thereof as estimated therein.

Upon this intimation, the plaintiff suffered a nonsuit and appealed.

The appeal brings up solely the question of the correctness of this ruling, in deference to which the progress of the action was interrupted by the judgment of nonsuit, and this we are not to consider.

The validity of the transfer as an equitable conveyance of the assignor's interest in the judgment is not disputed, and only the extent of its operation and effect.

The assignment is not of all the rights possessed by the lessor under his contract with Perkinson to pursue all the crops by whomsoever taken in the assertion of his lien-security until his demand is satisfied, but it is of the rights vested in the lessor *by virtue of the judgment and to enforce it* against Perkinson and the security to his undertaking in any manner in which it could have been done by the assignor, and to no greater extent. The present suit is not upon the judgment, but upon an alleged independent liability incurred by other *tort-feasors,* (236) by their conversion of the same and other property to which the lien attached. This cause of action is separate and distinct from that involved in the former adjudication, and is outside the scope of the assignment.

The assignee may take any steps open to the assignor in the enforcement of the judgment against the parties to it, and there his rights end.

We, therefore, concur in the opinion of the judge in the court below, and his judgment is

Affirmed.

Cited: Redmond v. Staton, 116 N. C., 144.

DENNIS SIMMONS, GUARDIAN, v. J. D. BIGGS, ADMINISTRATOR.

Insurance Money.

Where a husband insures his life for the benefit of his wife and children, and the wife dies intestate, before her husband, leaving children, her interest, after payment of her debts, goes to the husband, and upon his death to his personal representative—affirming *Conigland v. Smith,* 69 N. C., 303, to the effect that, upon delivery of a policy, the sum to be paid under it vests in interest in the beneficiary.

THIS is a controversy submitted without action in compliance with section 567 *et seq.* of The Code, and heard before *Phillips, J.,* at September Term, 1887, of MARTIN Superior Court, upon the following facts as a "case agreed."

"1. Hardy W. Mizzell and Annie M., defendant's intestate, were married in the year 1866.

"2. That during the life of the said Hardy W. Mizzell he took out the following policies of insurance on his own life in manner and form as follows: One for $3,000 in the Ætna Life Insurance Company (237) of New York, payable to his wife Annie M. and their children;

one for $328 in the aforenamed company, payable to his wife, Annie M. and their children; one for $135 in the aforenamed company, payable to his wife Annie M. and their children; one in the Equitable Life Insurance Company of New York for $2,000, for the benefit of his wife Annie M. and her children; one in the aforenamed company for $3,000, for the benefit of his wife Annie M. and her surviving children; one in the Knights of Honor Insurance Company for $2,000 for the benefit of his wife Annie M. and her children; three several policies each for $1,000, in the Hartford Life Annuity Insurance Company, for the benefit of Annie M. his wife and their children equally.

"3. That the said Hardy W. Mizzell and wife Annie M. had issue, the plaintiff's wards who survived them both.

"4. That Annie M., the wife, died on 14 September, 1886, intestate, and letters of administration on her estate were granted to the defendant on 4 January, 1887, none having been before granted; that Hardy W. Mizzell, the husband, died on 21 November, 1886, intestate, and letters of administration on his estate have been granted to defendant Biggs on 19 February, 1887.

"5. That the plaintiff has been duly appointed guardian of the children named.

"6. That the defendant, administrator of Annie M. Mizzell, has received from the said insurance companies one-third of the several amounts specified in said policies.

"7. That the defendant's intestate owed no debts.

"8. That the estate of Hardy W. Mizzell, the husband, is largely insolvent.

"9. The plaintiff claims that, subject to his charge for commissions and expenses of administration, he is entitled to receive from the defendant the said fund for his said wards, as the distributees of the defendant's intestate Annie M. That he has demanded the same but the defendant refuses to pay or account with the plaintiff, (238) insisting that the intestate Hardy W. Mizzell, the husband, is the sole distributee of Annie M., the wife, and that he shall hold and administer the same as assets of his estate.

"If upon the foregoing facts his Honor shall be of opinion with the plaintiff, then he is to sign judgment in his favor for ..... dollars; and if of opinion for the defendant, then he is to sign judgment in his favor for costs.

His Honor being of opinion with the defendant gave judgment accordingly, from which judgment the plaintiff appealed."

Batchelor & Devereux for plaintiff.
James E. Moore for defendant.

DAVIS, J. This case is in principle like that of *Conigland v. Smith*, 79 N. C., 303, and following the decision made in that case, there was no error in the judgment of the court below.

Affirmed.

Cited: Pippin v. Ins. Co., 130 N. C., 25; *Lanier v. Ins. Co.*, 142 N. C., 18.

J. B. WILLIAMSON ET AL. v. JOHN S. BOYKIN ET AL.

Certiorari—Laches.

The writ of *certiorari* will not be granted where the petitioner failed to perfect his appeal by reason of an agreement between the parties that lapse of time should not deprive him of the appeal, if they failed to compromise the matter, and it was alleged by the respondent, but not denied by the petitioner, that a compromise was effected. The writ is allowed when the petitioner is guilty of no laches, or has been misled by the opposing party.

(239) PETITION of defendants for a writ of *certiorari*, heard at February Term, 1888, of the Supreme Court.

F. A. Woodard and W. C. Munroe for plaintiffs.
H. F. Murray and G. V. Strong for defendants.

MERRIMON, J. This is an application for the writ of *certiorari* as a substitute for an appeal lost.

It appears that the respondents obtained judgment in an action lately pending in the Superior Court of the county of Wilson, at the Fall Term thereof in 1886, for the recovery of the land described in the complaint for damages and costs. The defendants in that action, the present petioners, took an appeal from that judgment and notice thereof was waived and they were allowed thirty days within which to perfect their appeal, but they never did so.

They allege in the sworn petition, that they did not perfect their appeal because they and the plaintiffs in the action, by common consent, undertook to compromise the matter in dispute embraced by the judgment with a view that they might abandon their appeal, and it was agreed between the parties that lapse of time should not deprive the petitioners of their appeal if a compromise should not be effected; that afterwards the respondents refused to allow them to perfect their appeal as of the proper time, and thus they lost the same.

The affidavits produced by the respondents tend strongly to show that the plaintiffs in the action mentioned and the defendants therein—the present petitioners—did effect a compromise, certainly to some extent and perfect the same. The evidence leaves no doubt upon our minds as to this, and that the petitioners paid the judgment mentioned, less fifty dollars, the sum agreed to be abated and the costs. Very strangely while the petitioners allege that a compromise was contemplated they make no reference to a compromise made; nor do they offer any explanation in respect thereto; nor do they deny in their petition that a (240) compromise was made, as alleged by the respondents.

The affidavit of their counsel simply states without explanation that no compromise was effected. It seems that he derived his information from his clients. Some compromise was made and the petitioners paid the money in pursuance of it, as above stated. If it was only partial they should have so alleged and made the fact manifest. As they did not, it must be taken, under the circumstances, that they could not. They ought, at least, to have offered some explanation in such respect and they failed to do so.

The writ of *certiorari* as a substitute for an appeal lost, as alleged in this case, will be granted only when the petitioner shows that he has been diligent and there has been no laches on his part in respect to his appeal, and further, that his failure to take and perfect the same was occasioned by some act or misleading representation on the part of the opposing party, or some other person or cause, in some way connected with it not within his control.

The writ will be granted or refused in the sound discretion of the court, and as we are clearly of the opinion that the petitioners fail to show such merits as entitle them to the relief prayed for, the petition must be dismissed.

It is so ordered.

Cited: Graves v. Hines, 106 N. C., 324.

(241)

L. T. SMITH v. THE RICHMOND AND DANVILLE RAILROAD COMPANY.

Negligence—Evidence—Burden of Proof.

1. The facts being admitted or proved, negligence and contributory negligence are questions of law.

2. Where the injury is shown and there is nothing in the plaintiff's proofs from which it may be implied that his own want of care contributed to it,

the burden of proving contributory negligence is cast on the defendant; but if the undisputed facts, disclosed by the plaintiff's case, show that he contributed to the accident by his own negligence, it will not be error in the court to direct a nonsuit.

3. Where the facts, in respect to the contributory negligence are controverted, the issue should be submitted to the jury upon the whole evidence with instructions that the plaintiff cannot recover if his own carelessness was the contributory and proximate cause of the injury.

CIVIL ACTION to recover damages for personal injuries, tried before *Merrimon, J.*, at January Term, 1888, of DURHAM Superior Court.

The plaintiff alleges that in June, 1887, he entered the regular passenger car attached to the freight train of the defendant at Durham for the purpose of going to Hickory, and by the negligence of the defendant company he was seriously injured while in the coach at Durham.

The defendant company denies the negligence and alleges that the injury received by the plaintiff, if any, was caused by his own negligence.

The following issues were agreed upon:

1. Was plaintiff injured by defendant's negligence, as alleged in complaint?

2. Did plaintiff's negligence contribute to his injury?

3. If so, was plaintiff's negligence the proximate cause of the injury?

4. What damage, if any, has plaintiff sustained?

(242) The plaintiff entered the coach at Durham on the morning of 15 June, 1887, and his testimony is as follows:

"I went to the depot at Durham to take the train about three o'clock in the morning of the 15th. A man in the railroad uniform, whom I think I saw afterwards taking up tickets, and whom I took to be the conductor, was asked by me if that was the place to get on, and he replied that the train would soon pull down in front of the ticket office. Pretty soon it did pull down, and he told me we could get on, and I assisted my wife to get on. When they pulled down, the engine and freight cars were cut loose, and were carried forward and thrown back on a side track; that was the condition of the cars when we got on. This train was the regular early morning freight, with passenger cars attached; it had a sleeper and first and second-class and baggage cars; it may have had the mail car, but I can't say. I bought tickets at the regular ticket office to Hickory for my wife and myself—first-class; I got in the first-class coach, and walked back near the middle and took a seat in the regular way. About that time a friend of mine came in; I got up and passed the usual salutations; I then sat down on the arm of the seat, my feet on the floor of the aisle, my elbow on the back of the seat, my hand clutching around the corner of the back of the seat next

to the aisle, my wife sitting on a seat on the opposite side of the aisle—one or two seats in my rear; I had been sitting there maybe a minute or more when a sudden shock came; the engine, with the freight cars, was thrown back against the coach, and I was thrown back against the corner of the seat in my rear; I was sitting on the arm of the seat, and the seat next in front was turned towards the rear of the coach, and the seat next in front was turned forward, bringing the backs near together. I had no warning of the approach of the train. When I was thrown against the corner of the seat the sensation was a very (243) painful one, with an indentation of the rib, and the second effect was to cause severe nausea. I was familiar with the methods of the night freight in Durham; I had traveled on it several times before; the train generally stays in Durham some time, shifting and coupling. There is a great deal more jolting and bumping in the coupling of freight trains than in passenger trains, and I knew this at the time. I knew when I got on the arm of the seat that the freight cars had not been coupled to the passenger coaches, and that they were to be coupled. Before I met my friend I had been sitting in the seat. I have traveled frequently on freight trains, and on this train, but the shock was more severe than usual."

There was other testimony in respect to the character and effect of the injuries sustained by plaintiff, which were of a serious nature.

Upon the conclusion of this testimony his Honor held that plaintiff was not entitled to recover.

Whereupon the plaintiff asked and obtained leave to submit to a nonsuit, and then appealed to the Supreme Court, alleging for error the aforesaid intimation and ruling of his Honor.

W. W. Fuller for plaintiff.
F. H. Busbee and C. M. Busbee for defendants.

DAVIS, J., after stating the case: The facts being admitted or proved, the question of negligence and of contributory negligence are questions of law. Does the evidence of the plaintiff (and it is to be taken most strongly in his favor) constitute contributory negligence, and was that negligence the proximate cause of the injury? If so, the ruling of the court below was correct; if not, there was error.

The plaintiff gives a clear and intelligent statement of the (244) facts, leaving no doubt as to how the unfortunate injury occurred.

The Reports, English and American, abound in cases involving questions of negligence and of contributory negligence, and as the broad mark which separates due diligence and watchful care from gross negligence and reckless carelessness is narrowed to the point where it is not easy to

distinguish between ordinary care and slight negligence, many conflicting decisions are found.

Even if the line could be clearly and distinctly defined, it would still, in many cases, be difficult to determine with certainty on which side to place them.

We understand the counsel, who so ably represented the plaintiff, to insist that if there is evidence of any negligence on the part of the defendant, whatever may be the evidence of contributory negligence on the part of the plaintiff, the issue must go to the jury, and that his Honor erred in holding that upon the testimony in the case the plaintiff was not entitled to recover.

We understand the rule to be well laid down in *Tuft v. Warman,* 94 Eng. Com. Law Rep., 573, cited by the *Chief Justice* in *Turrentine v. R. R.,* 92 N. C., 638.

It is there said that the question for the jury is: "Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that but for such negligence and want of ordinary care and caution on his part, *the misfortune would not have happened?*

"In the first place the plaintiff would be entitled to recover, in the latter not, as but for his own fault the misfortune would not have happened."

In *Owens v. R. R.,* 88 N. C., 502, cited and relied on by counsel for the plaintiff, it is said, giving the authority for it, that "if negligence appears by the plaintiff's own testimony the defendant might rest
(245) on it as securely as if proved by himself." Again, citing *Roberson v. Gray,* 28 Ohio St. Rep., 241: "It is only where the injury is shown by the plaintiff, and there is nothing that implies that his own negligence contributed to it, that the burden of proving contributory negligence can properly be said to be cast on the defendant; for where the plaintiff's own case raises the suspicion that *his own negligence* contributed to the injury, the presumption of due care on his part is so far removed that he cannot properly be relieved from disproving his own contributory negligence by casting the burden of proving it on the defendant. . . . The question should be left upon the whole evidence to the determination of the jury, with the instruction that the plaintiff cannot recover if his own negligence contributed to the injury." Of course if there be no dispute about the facts, and in law they constitute contributory negligence, and that is a question for the judge, he must instruct the jury that the plaintiff cannot recover.

In *Harris v. R. R. Co.,* 27 Am. and Eng. R. R. Cases, 216, it was held, as we have held in *Wallace v. R. R.,* 98 N. C., 494, that the dangers

naturally incident to travel by rail are greater on freight than on passenger trains, and call for a correspondingly higher degree of care on the part of passengers. In that case the train (a freight train with a caboose attached for passengers) had stopped to do some switching, and it was held to be such contributory negligence as would bar the plaintiff's recovery, if he knew, or by ordinary care could have known, that a part of the train was likely to be backed against the part to which the caboose was attached and that some concussion or jar would be the result, and "then without thinking about the approach of the cars, and without paying any attention to whether they were approaching or not, left his seat and stood up in the car and was thrown down and injured, when he would not have been, had he kept his seat or resumed the same before the cars struck," his negligence was the proximate (246) cause of the injury.

Ashe, J., in *Farmer v. R. R.*, 88 N. C., 564, says: "If the act of the plaintiff is directly connected, so as to be concurrent with that of the defendant, then his negligence is proximate and will bar his recovery."

The counsel for the plaintiff relies on the case of *Gee v. Mid. R. R. Co.*, 8 Q. B., 161, which was fully discussed and considered with great care and which he thinks bears an exact analogy to the case before us. Upon a careful examination, we arrive at a different conclusion and can find in it nothing which is at variance with the decisions of this Court. In that case the plaintiff, being a passenger on defendant's railway, "got up from his seat and put his hand on the bar which passed across the window of the carriage with the intention of looking out to see the lights of the next station and that the pressure caused the door to fly open and the plaintiff fell out and was injured."

Two questions were left to the jury: 1. Whether there was negligence on the part of the defendant in not properly fastening the door? 2. Whether there was negligence or improper or imprudent conduct on the part of the plaintiff?

It appears from the case (and such we understand to be the fact) that in England, railway carriages on leaving stations are shut and fastened from the outside, and it is the duty of the railway servants, when a train leaves a station, to see that the doors are properly fastened. It seems that the passenger when he enters the carriage is shut in and the door fastened from the outside, and *Grove, J.*, says: "the doors are so constructed, and properly so, because if you arranged a door so that the passenger could open it from the inside, it would be an extremely perilous system—passengers would be continually opening the door and it would be very much worse for the general safety of the public." This

being so, it is said that a passenger who rises from his seat to
(247) look out to view the scenery or for any other lawful purpose, "has a right to assume and is justified in assuming that the door is properly fastened; and if by reason of its not being properly fastened his lawful act causes the door to fly open the accident is caused by the defendant's negligence." There was no negligence on the part of the passenger. It was held in *Bridgers v. R. R.*, cited in that case, that "if facts are disclosed in the plaintiff's case, the truth of which is not disputed, and which, if true, clearly shows that the plaintiff contributed to the accident, then the judge may nonsuit, not because he can take upon himself to find the contributory negligence proved, but because, in such a case, the plaintiff fails upon an issue which lies upon him, viz.: the issue whether the damage is caused by the negligence of the defendants."

There is no dispute in the case before us as to how the injury occurred. The plaintiff was sitting on the arm of the seat, when the engine and freight cars were thrown back against the coach, with a sudden shock, and the plaintiff says that "there is a great deal more jolting and bumping in the coupling of freight trains than in passenger trains, and I knew it. I knew when I got on the arm of the seat that the freight cars had not been coupled to the passenger coaches and that they were to be coupled." If the negligent and thoughtless act of the plaintiff was the contributory and proximate cause of the injury, as we think the undisputed facts show, there was no error in the ruling of his Honor.

No error.

Cited: McAdoo v. R. R., 105 N. C., 151; *Deans v. R. R.*, 107 N. C., 694; *Browne v. R. R.*, 108 N. C., 45; *Taylor v. R. R.*, 109 N. C., 237; *Emry v. R. R., ibid.*, 592; *Marable v. R. R.*, 142 N. C., 564; *Peterson v. R. R.*, 143 N. C., 267; *Suttle v. R. R.*, 150 N. C., 674; *Braswell v. Morrow*, 195 N. C., 131.

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(248)

THOMAS A. McNEILL, ADMINISTRATOR OF ALICE SMITH ET AL., v. JAMES P. HODGES ET AL.

Jurisdiction—Venue.

Except by consent, or in those cases specially permitted by the statutes, the judge of the Superior Court has no jurisdiction to hear a cause or make orders therein outside of the county in which the action is pending.

MCNEILL *v.* HODGES.

THIS is a special proceeding, began in the county of CUMBERLAND, for the settlement of a guardianship, and heard upon exceptions before *Clark, J.*, at Chambers, in RICHMOND County, on 7 June, 1887.

In the course of the action there was a reference and report to which exceptions were filed. Thereupon the plaintiff served ten days notice on the defendant Hodges to appear at Chambers, in Rockingham, Richmond County, on 7 June; and the defendant Hodges, by his counsel, appeared accordingly, and insisted to the court that it was irregular and not according to law, and contrary to the practice of the court to require a defendant to come out of his own county to Richmond County, to try a case that was regularly on the docket of Cumberland County, and asked that the case be continued until the next regular term of Cumberland County.

This was overruled and defendant Hodges excepted.

The court then proceeded to hear the exceptions to the account as filed by defendants Hodges and Smith, and gave judgment for the plaintiffs, from which the defendants appealed.

R. H. Battle for plaintiffs.

P. D. Walker (N. W. Ray filed a brief) for defendants.

MERRIMON, J., after stating the case: Regularly, an action (249) must be conducted, tried and disposed of not only in the courts, but as well in the county where it is pending. The several statutes prescribing and regulating the jurisdiction of the courts, the method of procedure and practice, so in effect provide, except in particular cases and respects specially provided for, such as the granting of injunctions pending the action until the hearing upon the merits, the appointment of receivers and the like. *Bynum v. Powe,* 97 N. C., 374.

Such special exercise of authority is exceptional and should not be extended by mere implication or possible inference. An important and valuable part of the purpose of establishing courts in every county is to promote the fairness of trials, the convenience of parties, and to economize time, costs and personal expenses. Although in some cases and in some aspects of cases, parties are to be taken from their respective counties in matters of litigation, the general purpose of the law is to avoid this as much as practicable, and it may be done only when the statute certainly allows it.

The statute (The Code, sec. 423), upon which the judge based his action complained of, provides among other things, that "the report of the referee shall be made to the clerk of the court in which the action is pending; either party, during the term, or upon ten days notice to

the adverse party, out of term, may move the judge to review such report and set it aside, modify or confirm the same in whole or in part, and no judgment shall be entered on any reference except by order of the judge."

The authority thus to be exercised "out of term," must, we think, be exercised in the county in whose court the action in which the report is made is pending. The words "out of term may move the judge," etc.—nothing further being provided as in the statutory provision cited—means "out of term," within the territorial jurisdiction of the judge as to that action—not beyond and outside of it, unless by the com-
(250) mon consent of the parties. There is nothing in the statute cited that can be construed to mean that either party "may move the judge," etc., outside of the county in whose court the action is pending; nor can the statutory provision of The Code, in respect to granting injunctions and the like, be invoked in aid of such exercise of authority, because these expressly authorize the judge to grant injunctions anywhere within the judicial district in which he presides, and under some circumstances in actions pending in courts adjoining districts. (The Code, secs. 334, 337.) Indeed, these provisions rather tend to show that the interpretation we give that in question is the correct one; they serve to show that the Legislature, where it intended to extend the authority of the judges beyond the ordinary course of procedure, said so in such terms as left no doubt as to the intent. Moreover, it is not at all probable that the Legislature intended that a suitor should be required, perhaps at great inconvenience and expense, to go from the county in whose court his action is pending, to another adjoining—perhaps a distant one—to have his case heard and determined out of the ordinary course of trying actions. The more probable and reasonable view is, that the purpose had in view was to expedite the hearing of the action in the case provided for out of term in the county where the action is pending.

If it be said, how can the judge in vacation time be in the county where the action is pending, when his duties require him to be elsewhere? the reply is, he may sometimes as convenience may allow, be there and thus meet the purposes of the statute. This is more reasonable, it seems to us, than that suitors in cases like this, should follow him in the course of his circuit to have him decide their cases upon its merits.

The case, therefore, ought not to have been heard in the county of Richmond, and hence the judgment must be set aside, and the
(251) case heard and determined according to law. To that end let this opinion be certified to the Superior Court.

Error.

Cited: Godwin v. Monds, 101 N. C., 355; *Skinner v. Terry,* 107 N. C., 109; *Fertilizer Co. v. Taylor,* 112 N. C., 145, 151; *Parker v. McPhail, ibid.,* 504; *Ledbetter v. Pinner,* 120 N. C., 457; *Bank v. Peregoy,* 147 N. C., 296; *Cahoon v. Brinkley,* 176 N. C., 7; *S. v. Humphrey,* 186 N. C., 536; *Bisanar v. Suttlemyre,* 193 N. C., 712.

WILLIAM WARDEN ET AL. v. NARCISSA MCKINNON, ADMINISTRATRIX, ET AL.

Appeal—Amendment—Res Adjudicata.

1. The refusal of the subordinate courts to allow additional pleadings to be filed, or original pleadings to be amended, is not reviewable upon appeal.
2. A question once judicially determined, cannot again be raised and tried between same parties in a different form.

THIS was a special proceeding in the nature of a creditor's bill, brought before the clerk and heard upon appeal by *Connor, J.,* at July Term, 1887, of the Superior Court of CUMBERLAND County.

The cause was before this Court at February Term, 1886 (94 N. C., 378). Upon filing the certified opinion of the Supreme Court at Fall Term, 1886, of the Superior Court of Cumberland, Judge Gilmer made the following order:

"This cause coming on to be heard on the record, judgment, orders and decrees heretofore made, and the opinion of the Supreme Court duly certified to this Court, it is ordered and adjudged that the clerk of this Court proceed with the cause, in accordance with the directions and the law as indicated in the said opinion of the Supreme Court."

The defendants, heirs at law, asked leave to file an additional answer, this was refused by the court and the said defendants excepted.

The clerk of the Superior Court, pursuant to said order, on (252) 20 March, 1887, after due notice to the parties, proceeded to hear the cause, when the defendants, heirs at law, asked leave to file an answer setting up the statute of limitations.

This having been denied, they asked the clerk to find the facts following, which they allege appear from the pleadings in this cause.

"This is an application to subject money belonging to the heirs of M. McKinnon, deceased, which is a part of the proceeds of the sale of land for a division among them. The pleadings in the cause show:

"1. That the intestate died in December, 1872.

"2. Letters of administration issued 15 January, 1873.

"3. That public advertisement was made by the administrator 15 January, 1873.

"4. That this action was commenced by L. J. Barclay and K. S. Barbee by petition 29 June, 1883.

"5. That the creditors' bill was commenced 27 April, 1876.

"6. That the complaint of Barclay and Barbee was filed some time after 19 July, 1883, praying that the funds arising out of the sale of land belonging to the heirs of M. McKinnon, deceased, be apportioned to pay the alleged claim.

"The defendants ask that the above facts be found by the clerk, as facts appearing and being admitted in the pleadings in this action."

This was denied and the defendants excepted.

The clerk then rendered a judgment, which, after reciting certain facts, among them that there is no suggestion of any creditors other than the plaintiffs (executors of M. Barclay) and that the next of kin of Murdock McKinnon, deceased, had received from the administrator *de bonis non* of his estate $63.16 for which they are liable as heirs, the same being so received by them as next of kin, and as they are parties to these proceedings;

(253) "It is considered, ordered and decreed that plaintiffs L. Barclay and K. S. Barbee, executors of M. Barclay, upon filing a good and sufficient undertaking as required by his Honor, J. C. McRae, are entitled to receive the full amount of their judgment, principal, interest and costs out of the fund of $700, now in the hands of the clerk, which said fund is a part of the proceeds of sale of real estate of the said Murdock McKinnon, he heretofore made in *ex parte* proceedings. And said judgment will be paid by the clerk, whenever said undertaking is filed; and further, that the plaintiff recover the costs of the proceeding, to be taxed by the clerk and to be paid out of said fund."

From this judgment there was an appeal to the Superior Court in term, where, before *Connor, J.*, the judgment was affirmed, and defendants appealed to the Supreme Court.

R. P. Buxton for plaintiff.
Thos. H. Sutton for defendant.

DAVIS, J., after stating the case: 1. The first exception that appears in the record was to the refusal of Gilmer, J., to allow the defendants to file an additional answer when the order was made directing the clerk to proceed with the cause.

This was a matter of discretion and not the subject of review in this Court. *Reese v. Jones,* 84 N. C., 597, citing *Boddie v. Woodard,* 83 N. C., 2, in which the defendant had sought to protect himself from lia-

bility, after the time for answer had elapsed, by a plea of the statute of limitations, and this Court held that it was a matter within the discretion of his Honor, and that in its exercise he could not be reviewed or controlled in this Court.

2. The second exception was to the refusal of the clerk, after (254) the order to proceed was made and after the refusal of the judge to allow an additional answer to be filed, to permit the defendants to file the answer offered.

The question as to whether the clerk had the power to allow the answer to be filed, is not presented for our consideration, as no objection is based upon that ground, and the answer to the foregoing exception is an answer to this.

3. The third exception was to the refusal of the clerk to find the facts as set out.

This action was before this Court at February Term, 1886, and all questions then passed upon and adjudicated were settled, and cannot be reopened in the manner proposed.

Questions of fact had been passed upon by the jury under the charge of the court below; one of them, and the main, and we may say the only one sought to be again reopened in this appeal, was the bar of the statute. Having been settled on that appeal, it was *resadjudicata,* and is not the subject of our review in this.

When a question has once been judicially settled, it cannot again be raised and tried in a different form. *Holley v. Holley,* 96 N. C., 229; *Ogburn v. Wilson,* 96 N. C., 210.

Affirmed.

Cited: Moore v. Garner, 109 N. C., 159; *Dickens v. Long, ibid.,* 172.

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(255)

L. H. CLEMENT AND E. L. GAITHER, ADMINISTRATORS OF J. M. CLEMENT, v. COLEMAN FOSTER AND SAMUEL FOSTER.

Appeal—Interlocutory Orders and Judgments.

1. Appeals will not be entertained from interlocutory orders or judgments unless they determine the action or affect some substantial right. Exceptions to such orders or judgments should be made on the record and reserved to be passed upon, if necessary, after a trial upon all the issues raised, to the end that all the questions which it is desired may be reviewed shall be adjudicated upon one appeal.

CLEMENT *v.* FOSTER.

CIVIL ACTION tried before *Gilmer, J.*, at Fall Term, 1887, of the Superior Court of DAVIE County.

The plaintiffs alleged that on 6 July, 1882, the defendants executed to J. M. Clements a bond for the payment of the sum of $489.50, of which the following is a copy:

"$489.50.

One day after date we or either of us, as joint principals, promise to pay J. M. Clement four hundred and eighty-nine dollars and fifty cents, with interest from date at eight per cent per annum, interest payable annually on 6 July of each year. Witness our hands and seals, this 6 July, 1882.

(Signed) COLEMAN FOSTER. [Seal.]
SAMUEL FOSTER. [Seal.]

That subsequently J. M. Clement died intestate, and the plaintiffs were duly appointed and qualified as his administrators, and that no part of said bond has been paid. Wherefore plaintiffs demand judgment, etc.

The defendant, Samuel Foster, filed the following answer, in substance (Coleman Foster filed no answer):

That the statements contained in the complaint are untrue,
(256) except in so far as the same are admitted, as follows: That on or about 6 July, 1882, this defendant met Coleman Foster in Mocksville, who requested this defendant to sign a note to J. M. Clement as surety for him for about the sum mentioned in the note sued upon, and this defendant being the brother of Coleman Foster, and willing to do him the favor, agreed with him to sign said note as his surety, and accordingly went to the office of said J. M. Clement, and together with said Coleman signed his name to a note which defendant now supposes to be the note sued upon.

That the note was not read by defendant, nor read in his hearing, and this defendant avers that he signed the note as surety for his brother, and never heard the words "joint principal" used in connection therewith until the complaint was read over to him, and he denies that he ever contracted with plaintiff's intestate as a joint principal with said Coleman Foster, as alleged in complaint, except in so far as the same may be implied by law by defendant's said act of going with Coleman Foster and signing the note as above set forth.

That said note was given, as this defendant is informed, for and on account of money borrowed by the said Coleman Foster from the said J. M. Clement, and this defendant was never requested by Clement or any other person to assume the relation of a joint principal, but, upon

the contrary, said Clement well knew at the time of said signing that there was no reason for, and in point of fact, this defendant did not knowingly assume the relation of joint principal, but signed the same as surety aforesaid.

This defendant further says, that as to him the plaintiff's action is barred by the statute of limitations, wherefore he demands judgment, etc.

Plaintiffs moved for judgment by default against Coleman Foster (who filed no answer), and also moved for judgment upon the complaint and answer against Samuel Foster upon the ground that he could not be heard to contradict the note under seal by parol (257) testimony, and to show that he was only surety when he signed the note as joint principal and, as plaintiffs contend, was in fact a joint principal. The motion of plaintiff was overruled, and the plaintiff excepted and appealed.

J. B. Batchelor for plaintiffs.
J. A. Williamson filed a brief for defendants.

DAVIS, J., after stating the case: The plaintiffs were entitled to judgment against Coleman Foster, and there was error in refusing it.

The motion for judgment against Samuel Foster was predicated upon the insufficiency of his answer and was in the nature of a demurrer thereto. Being refused, the plaintiffs' exception should have been noted and the action tried upon the issues raised by the complaint and answer, as it may have resulted that after the trial, no appeal would have been necessary. In this respect the appeal was premature, and, as no substantial right could have been lost to the plaintiff by the delay, upon the refusal of motion, the trial should have been proceeded with to a final judgment upon all the issues involved, and thus rendering only one appeal necessary.

Since the doubt expressed in *The Commissioners of Wake v. Magnin,* 78 N. C., 181, whether an appeal could be entertained by this Court under a proper construction of section 548 of The Code (C. C. P., sec. 299), except from a judgment which determined the action or affected some substantial right, it has been repeatedly held that appeals will not be entertained from orders or judgments disposing of fragmentary parts of the action, but that exceptions might be taken to such orders or judgments and reserved to be passed upon, if necessary, after "trial *upon all the issues* raised by the pleadings according to the regular practice of the court; and if the court should have erred in its judg- (258) ment or any of its rulings, *then to have brought up the whole case by appeal,* that its decisions upon questions of law, involved *and*

controverted, might be finally adjudicated." Hines v. Hines, 84 N. C., 122; *Commissioners v. Satchwell,* 88 N. C., 1; *Grant v. Reese,* 90 N. C., 3; *Arrington v. Arrington,* 91 N. C., 301; *Emery v. Hardee,* 94 N. C., 787, and many similar cases.

The appeal must be dismissed and the cause proceeded with below as if no appeal had been attempted. To that end let this be certified.

Dismissed.

Cited: Blackwell v. McCaine, 105 N. C., 463; *Emry v. Parker,* 111 N. C., 261; *Sinclair v. R. R., ibid.,* 509; *Brice v. Crabtree,* 116 N. C., 530; *Brown v. Nimocks,* 126 N. C., 810; *Ledford v. Emerson,* 143 N. C., 537.

M. J. EDWARDS v. J. H. BAKER.

Estoppel—Res Adjudicata—Former Judgment.

A judicial determination of the issues in one action is a bar to a subsequent one between the same parties having the same object in view, although the form of the latter and the precise relief sought therein is different from the former.

THIS is a civil action, which was tried before *Clark, J.,* at June Term, 1887, of the Superior Court of RICHMOND County.

The action was begun on 11 May, 1883, by the issue of a summons against Peregrine P. Clements, J. J. Lawrence and J. H. Baker, on the last named of whom due service was made, and an ineffectual effort to have service made upon the others, who were nonresidents, by publication attempted.

The complaint alleges that Lawrence and Baker, on 7 Decem-
(259) ber, 1868, entered into a penal bond in the sum of $4,000, payable to Clements, with condition as follows:

"Whereas the said P. P. Clements has agreed to deliver to the said J. J. Lawrence forty gross of Rosadalis, the same being a part of eighty-five gross belonging to said Lawrence now in the hands of said Clements, and which has been attached in his (Clement's) hands by an attachment sued out by M. J. Edwards (the present plaintiff). Now, if the said J. J. Lawrence shall, when the said forty gross of Rosadalis are delivered and sold, apply the net proceeds of sale of the forty gross towards the satisfaction of the claim of the said Edwards against said

Lawrence, which is an attachment as aforesaid, then this obligation to be void, or else to remain in full force and virtue."

It further alleges that the claim referred to in the condition was a note for $12,500, dated 28 September, 1868, and due on 28 October following, bearing interest at the rate of eight per cent per annum, no part of which has been paid, and it was taken by the plaintiff from Lawrence in discharge of a debt he owed the plaintiff for a much larger sum, with the assurance that it would be paid at maturity; that the forty gross of Rosadalis was soon thereafter delivered, and in a few months (less than a year) were sold, as plaintiff learns, for $4,200—no part of which has been paid to the plaintiff, and this notwithstanding his demand for the same.

There are two other causes of action contained in the complaint, which modify in some particulars, but do not essentially change the case made in the first. The answer of the defendant Baker, admitting some and controverting other of the plaintiff's charges, proceeds to say that his own action in disposing of the Rosadalis was purely in his character as clerk for Lawrence and under his direction by which he assumed and incurred no personal responsibility for the alleged trusts. The answer sets up the further defense of a prior suit (260) for the same cause of action prosecuted by the plaintiff against the defendant, which ended adversely by a verdict and judgment against the plaintiff, which stands unreversed in the Superior Court of Wilson, whereof is annexed as an exhibit a duly certified transcript, and this is relied on as a bar to the present action.

The complaint in the former suit alleged the indebtedness of Lawrence to the plaintiff by note in the sum of $12,500, dated 28 September, 1868, and due at thirty days; that no part of it had been paid and it was still the property of the plaintiff; that about 15 December, 1868, P. P. Clements, at the request of Lawrence, delivered to the defendant Baker forty gross Rosadalis (a medicine valuable in the market and worth by wholesale $105 per gross) to sell and pay over the proceeds upon said note, the Rosadalis being the property of said Lawrence; that defendant, according to plaintiff's information, sold the article at that price, receiving $4,200, of which sale the plaintiff was ignorant until just before bringing his suit in the spring of 1881, when he preferred his demand for the money and it was refused.

The demand was for judgment against defendant for an account of the fund and for the payment of such sum as may be found due.

The defendant admitted the allegations as to the debt of Lawrence—its nonpayment—the property in the article to be in Lawrence—his sale of it as clerk for the latter and not as trustee—and his accounting therefor to Clements under the provisions of the penal bond, of which he

annexed a copy and which he then took up, and set up a further defense that the plaintiff sued out an attachment against Lawrence, which was levied on the lot of Rosadalis in December, 1868, and that within three months thereafter the said Lawrence was adjudicated a bankrupt, and one John C. Baker appointed his assignee, and that he was
(261) subsequently by a decree of the bankrupt court discharged from his debts.

The bond referred to in the answer is the same as that, the condition of which is inserted in the plaintiff's present complaint.

The transcript further showed that certain issues were eliminated from the pleadings and placed before the jury, which, with such responses as the jury were required to make, were as follows:

Were forty gross of Rosadalis delivered to the defendant in trust for the plaintiff on or about 15 December, 1868? Answer: No.

Did the defendant, on 28 April, 1873, transfer the proceeds of said Rosadalis to P. P. Clements? Answer: No.

If yes, when did the plaintiff first have knowledge of said transfer? Answer: He never had knowledge.

Was the note of said Lawrence the property of the plaintiff at the commencement of this action? Answer: Yes.

Did the defendant, on 28 April, 1873, settle his liability with said Clements? Answer: Yes.

The court, upon an inspection of the transcript of the record of the former trial, in connection with the pleadings in the present suit, intimated an opinion that the matter was *res adjudicata,* and that the action could not be maintained, in deference to which the plaintiff suffered judgment of nonsuit, and appealed.

George V. Strong and Jno. D. Shaw for plaintiff.
C. W. Tillett for defendant.

SMITH, C. J., after stating the case: It is quite apparent that both actions have a common and the same object in view, and that is to enforce the obligations created under the penal bond and the trusts alleged to have been assumed by Lawrence, not directly but inter-
(262) mediately, through Clements to the plaintiff. It is not necessary to inquire whether such trusts were formed for the benefit of the plaintiff as he could compel to be executed out of a contract to which he was not a party, nor whether an action at law could lie against the defendant, as surety to the undertaking of Lawrence, for the latter's breach of the bond, for such is not the case before us. The present appeal raises the sole question whether the first action concludes the subject-matter of this action and obstructs a recovery in it, and this is

the ruling in which error is assigned and the appeal is taken to correct. It may be—we do not undertake to decide the proposition—that the plaintiff having an attachment may follow the fund, as burdened with a trust, which has been substituted in place of the property seized, but we are now required to determine the effect of the first unsuccessful suit upon the plaintiff's right to renew his demand in this suit, and upon this point we concur in the opinion of the court below.

The verdict establishes these propositions:

1. That the Rosadalis was not delivered to the defendant upon the alleged trust.

2. That the defendant did, in April, 1873, settle with Clements his liability in respect to the Rosadalis sold.

These findings of the jury were deemed an acquittal of defendant, and judgment rendered against the plaintiff upon the cause of action stated in his complaint, and this determination seems to us to put an end to the controversy between the parties upon the subject of the claim against the defendant according to the maxim, *Nemo debet bis vexare pro eadem et una causa.*

It cannot be necessary to refer to authority in support of the proposition that a determination upon the merits of an action, prosecuted upon a claim asserted by the same plaintiff against the same defendant, is a bar to a second suit, and we forbear to refer to any.

Affirmed.

Cited: Dickens v. Long, 109 N. C., 172; *Lumber Co. v. Lumber Co.,* 140 N. C., 442; *McArthur v. Griffiths,* 147 N. C., 549; *In re Will of Lloyd,* 161 N. C., 560; *Barcliff v. R. R.,* 176 N. C., 42; *Distributing Co. v. Carraway,* 196 N. C., 60.

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H. A. BURR AND E. P. BAILEY v. J. A. MAULTSBY ET AL.

Liens—Notice—Purchasers for Value.

Upon the filing of the notice within the time and in the manner prescribed by the statute, the lien given mechanics and laborers attaches to the property upon which the labor or materials have been bestowed and has relation back to the time of the beginning of the work or furnishing the materials; and is effectual, not only against all other liens or encumbrances which attached subsequently, but against purchasers for value, and without notice.

BUBB *v.* MAULTSBY.

THIS is a civil action, which was tried before *Clark, J.*, at January Term, 1887, of the Superior Court of COLUMBUS County.

The action began before a justice of the peace and was carried up to the Superior Court by an appeal.

The parties agreed upon and submitted the following facts to the court for its judgment:

"That the plaintiffs furnished material and performed labor in the repair of the property, lot No. 6, in the town of Whiteville. The work and labor done, and material furnished, began on 2 September, 1884, and ended on 20 November, 1884. That a lien for the same was filed and recorded in due form of law on 5 August, 1885, in the office of the clerk of the Superior Court of Columbus County.

That on the ..... day of December, 1884, the defendants, Maultsby & Son, who were the owners of the property against which the lien was filed, and who alone contracted for the work and material performed and furnished, conveyed said property to the defendants Kerchner & Calder Bros., for value, and without notice of the plaintiffs' claim, and the conveyance (or deed) was duly recorded on 2 December, 1884; that this deed was made and delivered before the filing of the lien; that (264) the amount of the work and labor performed and material furnished is (sixty-one dollars and eighty-six cents) $61.86; that J. A. Maultsby & Son had no right, title or interest whatever in the land, lot No. 6, in the town of Whiteville when the plaintiff's notice of lien was filed with the clerk of said court; that the lien was filed in the time required by law."

The court upon consideration gave judgment for the plaintiffs as follows:

"This cause coming on to be heard upon the statement of the facts found as a special verdict, and the court being of opinion that the plaintiffs were entitled to recover, now on motion of John D. Bellamy, Jr., attorney for the plaintiffs, it is ordered and adjudged that the plaintiffs are entitled to and have a lien on the property described in the notice of lien for the sum of sixty-one dollars and eighty-six cents, with interest from 17 September, 1884, and the costs of this action. And it is hereby ordered that all the right, title and interest of the defendants, J. A. Maultsby & Son, in the said land and property which said defendants had therein on 2 September, 1884, the time of the commencement of the furnishing of the material, be sold to satisfy said debt, interest and costs, and that the defendants be foreclosed and barred of any interest therein acquired subsequent to said date, provided the debt, interest and costs aforesaid be not paid within thirty days."

From this judgment the defendants having excepted, appealed to this Court.

E. Haywood for plaintiffs.

W. F. French and D. G. Lewis (J. B. Shelton filed a brief) for defendants.

MERRIMON, J., after stating the case: It is not denied that the plaintiffs were entitled to a lien upon the lot of land in question as they claim, but it is contended that inasmuch as notice of such claim of lien was not filed by them in the office of the Superior Court (265) clerk of the proper county, as required by the statute (The Code, secs. 1784, 1789) before the defendants purchased the land from J. A. Maultsby & Son, and they had no notice of the lien, therefore it did not attach to the land as against them, or in any way affect their title. And for the like reason the defendants further insist, that at the time the plaintiffs filed their notice of lien J. A. Maultsby & Son "had no right, title or interest whatever in the land," having before that time sold and conveyed the same to them.

So that the question we are called upon to decide is, did the lien on the land when filed in the office of the clerk of the Superior Court have relation back to the time it first arose? We are of opinion that this question must be answered in the affirmative.

The first statute, giving a mechanic's and laborer's lien (Acts 1868-69, ch. 117, sec. 4), prescribed that the lien should be filed "at any time before or within thirty days after the performance and completion of the labor, or the final furnishing of the materials, or the gathering of the crop." This clause of the statute was interpreted by this Court in *Chadbourn v. Williams,* 71 N. C., 444, and it was held that the lien in that case had relation back to the time it began to arise, and while it continued to arise, thus defeating certain mortgages that had been registered prior to the time of filing the notice of the lien, the Court saying that, "It must be clear that unless the claim when filed has relation back to the commencement of the furnishing the materials the object of the act would be liable to be defeated at the pleasure of the vendee of the materials by his selling or mortgaging his estate. The act would be idle and inefficacious against the very mischief it was intended to (prevent) cause. . . . We think the notice of lien had relation back, and was prior to the claim of the defendant, as to the materials furnished before the date of the mortgage."

In view of this decision and without modifying or changing (266) its force the Legislature enacted the statute (Acts 1876-77, ch. 53, sec. 2), extending the time within which the notice of such lien might be filed to sixty days. And again, afterwards, the time was extended by statute (Acts 1881, ch. 65, sec. 1) to six months; and again by the statute (Acts 1883, ch. 101, sec. 1, The Code, sec. 1789) to twelve

months. The time was thus simply extended. It would seem, therefore, that the Legislature approved of the interpretation given to the first statute cited, and intended that it should apply to those subsequently enacted. It was all along after the first enactment advertent to the subject of such liens, and frequently legislated in respect thereto, amending the first and subsequent statutes. If it had intended that such lien should have no force or effect as against purchasers and incumbrances until the filing of notice thereof, the just inference is it would have so provided.

The statute (The Code, sec. 1791) in respect to such liens, provides that "upon judgment rendered in favor of the claimant an execution for collection and enforcement thereof shall issue in the same manner as upon other judgments in actions arising on contract for the recovery of money only, except that the execution shall direct the officer to sell the right, title and interest which the owner had in the premises or the crops thereon at the time of filing the notice of the lien, before such execution shall extend to the general property of the defendant."

On the argument it was contended for the defendants that J. A. Maultsby & Son had no "right, title and interest" to the land in question "at the time of filing the notice of the lien," to be sold, and as the statute just recited directed such interest to be sold, this went to prove that the Legislature did not intend that the lien should relate back to the time it arose.

(267) This argument is not sound. The lien prevailed continuously next after it arose, and J. A. Maultsby & Son, who then had title to the land, could not divest themselves of it, except subject to the lien. So there was "right, title and interest" in them to be sold as contemplated by the statute.

The same statute (The Code, sec. 1782) further provides that "the lien for work on crops or farms or materials, given by this chapter, shall be preferred to every other lien or encumbrance which attaches upon the property subsequent to the time at which the work was commenced or materials furnished."

It was contended that this clause does not embrace absolute conveyances, and hence they are unaffected by such lien unless filed prior to their execution, and also that this provision tends to show that it was not intended that filing the laborer's notice of lien gave it efficacy as against prior purchasers. This is a mistaken view.

This clause has no such application. Its purpose is simply to prevent liens upon the property, created subsequently to the laborer's lien, from superceding it as to work done and materials furnished after such subsequent liens were created. *Wooten v. Hill,* 98 N. C., 48.

The purpose of the statute seems to be to favor the laborer—to give him a security—a lien upon the property continually efficient for all purposes after it arises until discharged, for his labor and materials supplied, without any public notice of it, until the lapse of twelve months; that it shall not be good after that time, unless it shall be filed as prescribed by the statute. If this is not so, why require notice to be filed at all? The lien extends only to the particular property affected by the labor done or materials supplied. If a sale of it by the owner operates to defeat the laborer's lien, then to file notice of it would be nugatory—a mockery.

It is said that such liens, until notice of them filed, are snares (268) to innocent buyers of the property to which they attach. This may be so in a measure, but the Legislature had power to provide for and allow them as it has done. It, and not the Court, must be the judge of the expediency and wisdom of such legislation. It may be said, however, that the same objection applied to the registration laws of this State until within a recent period, as to conveyances generally.

Wise registration laws promote convenience, confidence and safety in business transactions of great importance and encourage trade—they do not discourage the vigilant, honest dealer. In their absence, the buyer must rely upon his own scrutiny as to the title he gets.

Affirmed.

Cited: Lester v. Houston, 101 N. C., 612; *Rouse v. Wooten,* 104 N. C., 233; *Lumber Co. v. Hotel Co.,* 109 N. C., 661; *Pipe Co. v. Howland,* 111 N. C., 617; *Clark v. Edwards,* 119 N. C., 119; *Dunavant v. R. R.,* 122 N. C., 1001; *Cheesborough v. Sanatorium,* 134 N. C., 247; *McAdams v. Trust Co.,* 167 N. C., 496; *Porter v. Case,* 187 N. C., 636; *King v. Elliott,* 197 N. C., 97.

JOSEPH LIVINGSTON v. COLUMBUS DUNLAP.

Evidence—Trial—Appeal—Assignment of Error

1. The admission of immaterial evidence will not be sufficient to warrant a new trial, unless from its nature it is calculated to and may have misled the jury.

2. It is incumbent on the appellant to show that by the reception of immaterial evidence he was probably prejudiced.

THIS is a civil action, which was tried before *Graves, J.,* at Spring Term, 1886, of HENDERSON Superior Court.

This is an action brought to recover the land described in the complaint. The pleadings raised issues of fact. On the trial the plaintiff introduced evidence for the purpose of proving a continuous
(269) chain of title consisting of numerous *mesne* conveyances from the State to them. In the course of the examination of a witness for this purpose, the defendant objected to the admission of certain testimony in respect to the location of a particular grant from the State, which the plaintiff proposed to elicit from him. The court overruled the objection, admitted the evidence and the defendant excepted.

The court in its instructions to the jury told them that the plaintiff had failed to show a perfect chain of title; that a material *mesne* conveyance was missing; that the location of the grant referred to was immaterial, and that the evidence of the witness objected to, was likewise immaterial, and the plaintiffs could only rely upon the evidence that went to prove a continuous possession of the land up to known and visible lines and boundaries under color of title for seven years, etc. There was a verdict and judgment for the plaintiffs, and the defendant appealed to this Court.

S. V. Pickens (by brief) and Theo. F. Davidson for plaintiff.
No counsel for defendant.

MERRIMON, J., after stating the case: The court instructed the jury explicitly that the evidence objected to and the grant to which it referred, turned out in the course of the trial to be immaterial, and that the plaintiffs could recover, if at all, upon an entirely different kind of title, of which there was appropriate evidence. The jury were thus cautioned against the immaterial evidence. It did not in its nature and application tend to mislead them, nor did it in fact so far as appears. If it did so in fact, the appellant should have made this appear in some way.

The admission of immaterial evidence is not always ground for a new trial, even when objected to; it is so only when it is such as may from its nature or application, or both, have the effect to mis-
(270) lead the jury. If it is simply immaterial, the party complaining must show that he probably suffered prejudice by it. It would be trifling with serious matters to set aside verdicts and grant new trials because of the admission of evidence on the trial that could not or did not prejudice the losing party. It may be added, however, that the courts should, so far as practicable, exclude such evidence.

Affirmed.

Cited: S. v. Eller, 104 N. C., 856; *S. v. Parker,* 106 N. C., 712; *S. v. Stubbs,* 108 N. C., 775; *Street v. Andrews,* 115 N. C., 422; *S. v. Lane,* 166 N. C., 336.

L. C. PERRY AND SYLVA SMITH v. CASWELL PERRY.

Deed—Color of Title—Married Women.

A deed signed by a married woman with her husband, and delivered to the vendee, is color of title, though her privy examination has not been taken.

THIS was an issue of sole seizin joined in a special proceeding for partition, begun in August, 1882, in the Superior Court of STANLY County, and tried before *Clark, J.*, at Fall Term, 1887.

The defendant answered, alleging sole seizin in himself. The case on appeal states: "The testimony on the trial was to the effect that the plaintiffs and the defendant are the only heirs at law of their mother, Margaret Perry, to whom the land in question descended from her father, one Springer, in 1826; that said Margaret married John Perry, the father of the parties to this action, about 1830; that said John Perry died in 1863, and Margaret, his wife, in 1870; that they signed a deed for the land sought to be divided, 13 June, 1855; the deed was in form a fee simple conveyance to Caswell Perry (the defendant), (271) and the testimony on the part of the defendant tended to show that John Perry intended by said deed to convey a fee simple estate to Caswell. The deed was never acknowledged, proved or registered.

The testimony was that Caswell Perry had not been in possession of said deed, since the death of Margaret, except for a day or two, when it disappeared. There was evidence tending to show that the plaintiffs about the time of the death of Margaret, and a very short time thereafter, got possession of said deed without defendant's consent and destroyed it; that Caswell Perry took possession of the land about the time of the execution of the deed and has since that time been in the possession thereof, claiming it as his own. The court instructed the jury that if they found that the said deed was delivered to Caswell Perry they should find the issue of *sole seizin* in favor the defendant.

To this instruction of the court the plaintiffs excepted, and requested the court to instruct the jury: "That as the land belonged to Margaret Perry, who was a *feme covert* at the time of signing said deed, which was never acknowledged or proven, and the privy examination of said *feme covert* never having been taken, was inoperative, and no ouster by defendant as to plaintiffs could arise short of twenty years adverse possession; that the seven years statute, under color, would not avail the defendant, as he did not, after the death of his mother, hold the deed for more than a day or two under which he claims; that Caswell Perry did,

by said deed, take the life estate of John Perry, the husband of Margaret, and the deed was inoperative as color of title after the death of John Perry; and that, discounting the time of the suspension of the statute of limitations, between May, 1861, and January, 1870, twenty years have not passed, so as to raise the presumption of ouster of plaintiffs by the defendant."

This the court declined.

(272) The issue as to whether the deed had been delivered to Caswell Perry was found in the affirmative; and from the judgment pronounced thereupon the plaintiffs appealed.

J. B. Batchelor for plaintiffs.
No counsel for defendant.

DAVIS, J., after stating the case: This proceeding was commenced in August, 1882. Did the deed from John Perry and Margaret, his wife, executed to the defendant on 13 June, 1855, constitute color of title?

The plaintiffs say that it did not, and this is the only point relied on in this Court. The learned counsel for the plaintiffs says that as the private examination of Margaret Perry was not taken, the deed to Caswell was "absolutely null and void," and therefore could not constitute color of title. He refers us to *Scott v. Battle,* 85 N. C., 184. In that case the deed was executed by Mary Scott, *feme covert* alone, the husband did not join. *Ruffin, J.,* delivering the opinion of the Court, said: "The statute confers upon her (the wife) the power to convey by a simpler mode (than that of uniting with the husband in levying a fine), but it prescribes the terms and without their strict observance the act stands as it would in common law—absolutely null and void." This can only mean that it is absolutely inoperative and ineffectual to convey the *title* of the *feme covert.* For that purpose it could have no more effect than if executed by an absolute stranger, without any title and without any authority to convey.

The question here is not whether Caswell Perry acquired any title to the fee under the deed from John and Margaret, but whether the deed constituted color of title? Of course if the deed was valid, the other question would be of no consequence.

(273) In *Pearse v. Owens,* 2 Haywood, 234 (Battle's edition, 415), it was held that a deed from husband and wife to which her private examination had not been taken, and which therefore was not valid, was *color* of title. This case is cited with approval in *McConnell v. McConnell,* 64 N. C., 342, in which *Rodman, J.,* states clearly the doctrine of color of title and illustrates it by reference to a number of cases. The

general rule that every man is presumed to know the law has no application in determining what is or what is not color of title. As is said by *Rodman, J.*, in the last case cited, "the statute upon which the whole doctrine of color of title is founded, recites as the evils to be remedied that many persons had gone into the possession of lands upon titles having patent defects which, on the supposition that all men know the law, could have deceived no one and would not have deserved protection."

So an unregistered deed is color of title. In *Hardin v. Barrett,* 6 Jones, 159, *Ruffin, J.*, approving *Campbell v. McArthur,* 2 Hawks, 33, in which it was held that an unregistered deed was color of title, says: "As far as this Court is advised, it has not been doubted since up to this case, on the contrary it has been assumed, indirectly, on several occasions, as settled law. Why should it not be? Such a deed shows the nature of the possession taken under it to be adverse, just as much as if it were registered, and if the possession be continued for seven years, it affords evidence of its character sufficiently notorious to put the owner to his action."

Does not this reasoning apply with equal force to a deed executed by husband and wife? The writing professes upon its face to pass the title. *Keener v. Goodson,* 89 N. C., 273.

Affirmed.

Cited: Smith v. Allen, 112 N. C., 226; *Greenleaf v. Bartlett,* 146 N. C., 498; *Norwood v. Totten,* 166 N. C., 650; *Gann v. Spencer,* 167 N. C., 430; *Satterwhite v. Gallagher,* 173 N. C., 530; *Butler v. Bell,* 181 N. C., 89; *Clendenin v. Clendenin, ibid.,* 471.

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A. C. FREEMAN v. P. D. LEONARD.

Fixtures—Merger—Execution Sale—Purchaser—Penalty.

1. If the owner of personal property affixes it to the premises of another for a temporary purpose, and under an agreement with the owner of the soil that such property may be removed when the purpose is accomplished, it will not merge its character as personalty in the land to which it has been attached, nor will the title thereby pass from the owner.

2. If upon a sale under execution the property is purchased for the defendant with funds supplied by him, while it would be inoperative as a sale against other creditors, it is effectual as such between the officer making it and the execution debtors, and the officer will incur the penalty provided for a failure to comply with the statutes regulating the method of making sales.

3. Where, in an action to recover from a sheriff the penalty for a failure to properly sell property seized under execution, the complaint alleged that the property so sold was realty when in fact it was personalty, and the proofs showed that the sheriff had not complied with the requirements of the law in respect to the sale of personalty: *Held*, that the plaintiff was entitled to recover the penalty.

(DAVIS, J., dissenting.)

THIS is a civil action, which was tried before *Clark, J.*, at Fall Term, 1887, of DAVIDSON Superior Court.

Jane R. Wilkes, doing business in the name of "The Mecklenburg Iron Works," having recovered judgment in the Superior Court of Davidson against the plaintiff in this action, A. C. Freeman, John Snotherly and J. M. Peacock, trading under the partnership name of Freeman, Snotherly & Co. (which judgment was docketed in said court on 8 May, 1886), sued out execution on the same day and delivered it to the defendant, who was sheriff of said county, to be carried into effect. The latter made return thereof to the ensuing term, with endorsement as follows:

(275) "I have this day levied on the following personal property and taken the same into my possession to satisfy the within execution, viz.: One boiler, one engine, one corn rock, one flour mill and bolting cloth, one smutter, one planing matcher and matching machine, lot of belting and pulleys, three saws, one big saw and sawmill.

21 May, 1886." P. D. LEONARD, *Sheriff*.

Another endorsement shows a sale of the several articles and the price obtained for each, and the appropriation of the proceeds of sale, to wit: $373.41, to the discharge of the debt, interest and costs, in the aggregate $182.23, bearing date 31 May, 1886, and his official signature thereto.

The present action, begun on 19 June, 1886, is prosecuted by said A. C. Freeman, a defendant in that suit and plaintiff in this, against the said P. D. Leonard to recover the penalty imposed by section 461 of The Code, for selling property under execution contrary to the directions of chapter 10, of which that is part, and, after an adverse judgment of the justice of the peace, removed by defendant's appeal to the Superior Court.

It was there tried upon a single issue: Did the defendant sell real property, as claimed, contrary to the true intent and meaning of sections 456 and 487 of The Code? Answer: No.

It will be observed that no exception is taken to the restricted form of the inquiry, it being confined to land, while the complaint embraces property of any kind.

Besides the facts above summarily stated, the plaintiff further proved, that on the date of levy the sheriff took possession of the grist mill, sawmill and planing mill, all under the same roof, and locked up the building and delivered the key to J. M. Badgett to hold, with instructions to him to open the mill when necessary to deliver grist to customers, and to allow hands to work in the shed, but not to run the machinery; that the property levied on and sold consisted of a sawmill, a (276) planer bolted to timbers on the ground and framed into the building; a boiler in the mill set up and encased in masonry; an engine bolted to the timbers in the building; also mill stones, both flouring and corn, running and framed in the mill when built.

It was admitted that the defendant advertised at the courthouse door and some other places in the county by posters, nine days at courthouse and ten days at the other places. It was admitted that the above property belonged to the defendants in the execution.

It was proved also that J. M. Badgett was the general agent of the firm of Freeman, Snotherly & Co., in the transaction of the firm business generally.

The said J. M. Badgett further testified, that on the day of sale A. C. Freeman, one of the firm, placed in his hands $250, and instructed him not to let the property be sacrificed, but to bid it off, which he accordingly did; that after the sale, immediately thereafter, on same day, Snotherly, another of the firm and one of the defendants in the execution, gave him a check for one hundred dollars, and also that Peacock, the other member of the firm, paid him some money; that he thought Freeman furnished the money out of his own funds. It was further testified by the witness Badgett, that none of the property was removed from its position, either by the sheriff or himself after the sale, and that immediately thereafter the firm went into possession of all the property and began operating the mill as usual.

His Honor held that the property levied on and put up by the sheriff was realty, and required thirty days notice, as for sale of real estate, and the only question was whether there was a sale, as contemplated under the said section of The Code.

The plaintiff contended that as the sheriff actually sold and left Badgett in possession, and made return as shown in the exhibits, he could not be heard to deny in this action that there was a sale, and that according to the evidence there was a sale, and that the issue sub- (277) mitted by the court should be answered in the affirmative by the direction of the judge, and asked the judge so to charge. The judge refused the instructions and the plaintiff excepted.

The defendant insisted that if Badgett bid off the property as the agent of the firm, defendants in the execution, or for them, that then

there was no sale, such as is contemplated under said section of The Code, and that it should be left to the jury to decide, under the evidence, whether he so purchased, and if he did, that the judge should instruct the jury to find the issue in favor of the defendant.

The judge charged the jury that if they found from the evidence that Badgett bid off the property as his own, and was to hold it as security for the amount paid by him, with the right in the defendants in the execution to redeem, that this constituted a sale; but if he bid off the property for the defendants in the execution and only looked to them personally for the repayment of any money advanced by him in the payment of his bid, then there was no sale, and they should answer the issue, "No." Plaintiff excepted.

There was a verdict for the defendant. Judgment and appeal by plaintiff.

J. B. Batchelor for plaintiff.
No counsel for defendant.

SMITH, C. J., after stating the case: We do not pass upon the question as to the proper plaintiff to sue and whether the county, to whose use one moiety goes, should not be associated with the plaintiff, as no such point is made in the case.

The case was tried under the ruling of the court, and in accordance with the terms of the issue, as if the sale was of real estate in fact and whether the statutory requirements were observed in conducting
(278) the proceedings for such sale. The case does not state under what circumstances, and by what arrangement with the owner of the soil, these articles were there placed. If for a temporary purpose, and to be removed when that was accomplished, the mill and other things would not merge their character as personalty in the land upon which they stood, and the property therein vest in the owner of the premises who assented to this temporary use, and the property would not thereby pass to the latter and constitute and become his improved real estate, as would be the effect if such erections and fixtures owned by one and placed upon his own premises and the title to the articles as unchanged personal estate would remain in the same proprietor. It is quite certain the sheriff acted under the impression that he was levying on and selling personal property, as well from his designating it as such, as from his manner of selling in detached and separate articles, and so also the plaintiff considered his action by placing funds in an agent's hands to buy in the property when sold.

Again, the case states that it was admitted "that the above property (that is, such as was seized), belonged to the defendants in the execution," thus discriminating between the title to the goods and the title to the land upon which they stood, and indicating some such understanding between the separate proprietors, as has been suggested.

But this does not furnish a means of escape from the penalty, for, as personal goods, they were advertised but nine days at the courthouse, though the full period of ten days, as pointed out in the statute, elsewhere.

The charge of the court places the case before the jury as making the liability depend upon an effectual legal sale of the goods in passing the property to the purchaser, and instructed them if the bidding was in fact for the defendants, and their money was used in paying it, there was no sale in the sense of the statute and there would have been brought about no change of property. This would be so if an- (279) other creditor seized and sold it, the sale not obstructing his access to the debtor's property. But the levy put the property in the officer, and it would pass *out of him* by the sale, and if conveyed by deed the estate would pass to the purchaser, though he would hold in trust for the debtor. But the present case is not so strong, for the sales exceeded the sum deposited with Badgett the bidder and supposed agent by $123, while the other partners after the bidding though on the same day supplied him with more money.

Aside from the legal consequences of such a sale we understand the statute as applying to it as well. It was in fact a sale, a passing of the property vested in the officer by the seizure from him to the purchaser and as equally demanding an observance of the mandate of the statute in making the sale as if a stranger bought, for it is not less official delinquency in the officer in either case, and the penalty is incurred when he proceeds to sell and does sell without a proper regard to the law.

There is error, and the judgment must be reversed and a new trial awarded.

Error.

DAVIS, J., dissenting: The plaintiff seeks in this action to recover the penalty of $200 of the defendant, who is the sheriff of Davidson County, "for selling real property" contrary to "sections 456 and 457 of The Code." This is the allegation in his complaint, and the only allegation as the record shows.

The sheriff did not sell any real property, he did not advertise, or propose, or attempt, to sell any real property. In all that the sheriff did, the evidence does not disclose the first element of a sale, or of an attempt to sell *"real property,"* so he cannot be liable for that.

If the property sold was *personal property* then the plaintiff (280) cannot recover, for there is no *allegation* of that, there is no complaint of that. That must be advertised under section 460 of The Code.

The plaintiff cannot recover the penalty for the sale of real property contrary to sections 456 and 457 as alleged because there was no such sale made or attempted. He cannot recover the penalty for the sale of *personal property* under section 460, because there is no such allegation or complaint. So *quacunque via* he must I think fail in this action, and a new trial, it seems to me, can only result as the last.

The action for the penalty should be in the name of the State, The Code, sec. 1213. *Duncan v. Philpot,* 64 N. C., 479.

I do not think the plaintiff's action, as it appears in the record, is supported either by merit or law.

Cited: Causey v. Plaid Mills, 119 N. C., 181.

P. F. PATTON v. H. Y. GASH.

Appeal—Assignment of Error—Arrest and Bail—Surety—Judgment.

1. An appeal from the judgment of a justice of the peace discharging one who has been arrested in a civil action vacates the judgment, and the order of arrest continues in force pending the appeal.
2. After the judgment in an action in which the defendant might have been arrested, and in which an order of arrest was duly served, the plaintiff is entitled to a summary judgment against the sureties upon the defendant's undertaking—it appearing that execution has been issued against his property and person without effect.
3. The Supreme Court will not entertain exceptions which were not assigned below, or do not appear in the record proper.

THIS action was originally commenced before a justice of the peace of HENDERSON County against A. C. Robertson, and carried by appeal to the Superior Court of said county, and heard upon motion (281) before *McRae, J.,* at Spring Term, 1887, for judgment against the surety on an undertaking.

At the time of issuing the summons the plaintiff made an affidavit that the defendant Robertson "is not a resident of this State but has disposed of and removed all of his property from this State to the State

of South Carolina, with the intent, as affiant is informed and believes, of defrauding his creditors," and gave the undertaking required for arrest and bail. Thereupon an order of arrest was issued, under which Robertson was arrested by the sheriff and gave bail in accordance with section 299 of The Code, the defendant H. Y. Gash signing the written undertaking as one of his sureties.

The cause was continued by consent to 14 March, 1885, when the plaintiff filed a written complaint alleging that Robertson was indebted to him in the sum of $211.15 (but remitting the excess above $200), and that he had removed from this State and was a resident of the State of South Carolina. The defendant Robertson answered orally denying the allegation of the complaint and moved for his discharge from arrest.

The action was tried before the justice upon the question of indebtedness to the plaintiff, and "after hearing the proofs, allegations and arguments, the court ordered and adjudged that the defendant be discharged from arrest and plaintiff pay the costs of this action."

From this judgment the plaintiff appealed to the Superior Court.

At the Spring Term, 1886, of the Superior Court upon issues submitted to the jury it was found that Robertson was indebted to the plaintiff in the sum of $200, with interest, etc., for which, and for costs, judgment was rendered in favor of the plaintiff.

Upon this judgment execution was issued returnable to Fall Term, 1886, of the Superior Court, and the sheriff made return thereon, "no goods, chattels, lands or tenements to be found in my county, (282) State," etc.

Thereupon the plaintiff caused execution to be issued against the person of the defendant, to which the sheriff made return, "due search made and defendant not to be found."

Thereupon plaintiff caused notice to be served upon the defendant Gash of a motion for judgment against him as one of the sureties upon the undertaking signed by him as bail. This motion was heard before McRae, J., at Spring Term, 1887, when it was adjudged that the plaintiff recover of the defendant Gash, "surety upon the undertaking aforesaid, the sum of $200."

From this judgment the defendant Gash appealed to this Court.

E. C. Smith and Theo. F. Davidson for plaintiff.
S. V. Pickens filed a brief for defendant.

DAVIS, J., after stating the case: No exceptions appear in the record to have been taken or errors assigned in the court below, but the following errors are alleged in this Court:

1. The judgment against the appellant was rendered upon a state of facts found by the judge without any waiver by the appellant of his rights to have such issues or questions of fact determined by a jury.

2. No judgment should have been rendered against the appellant as surety until the alleged fraud had been fixed upon the defendant Robertson by a judgment.

Counsel for the plaintiff moved to affirm the judgment of the court below because there are no assignments of error and none appear upon the face of the record.

As to the first exception, the record does not show what issues or questions of fact, or that any issues or questions of fact, were asked to be submitted to a jury and refused, nor in fact does it appear that
(283) any questions of fact were determined or found by the judge except such as arose upon the record and were determined by an inspection of the record. The exception was not taken below, was not assigned as error in the record, and, as has been often held by this Court, will not for that reason be considered by us.

As to the second exception, the appellant insists that the error alleged is one that appears upon the face of the record; that the record proper shows that judgment against Robertson (for whom the appellant was bail) was for the debt only, and as no question of fraud had been tried, upon the rendition of the judgment, Robertson himself was discharged from arrest, his person could not be taken in execution, and therefore the Court had no *jurisdiction* as to the bail (the defendant Gash) and could render no judgment against him. That when the justice of the peace gave judgment discharging Robertson the bail ceased to be liable.

The last proposition is met by the fact that there was an appeal from the justice's judgment, which vacated it and the liability of the bail was not discharged but continued, and the first proposition is based upon a misconception of the character of the defendant's undertaking as bail, and of section 447 of The Code.

What was the defendant's undertaking, and how was it to be discharged?

Robertson had been properly arrested in accordance with the provisions of section 291 *et sequiter* of The Code, and the defendant Gash had become his bail by executing an undertaking as required by section 299 of The Code, "that the defendant (Robertson) shall at all times render himself amenable to the process of the court during the pending of the action, and to such as may be issued to enforce the judgment therein."

Section 303 provides that "the bail may be exonerated either by the death of the defendant, or his imprisonment in a State prison, *or by his*

legal discharge from the obligation to render himself amenable to (284) *the process, or by his surrender to the sheriff of the county where he was arrested, in execution thereof, at any time before final judgment against the bail."*

The defendant says that the process issued against the person of Robertson was not warranted by section 447 of The Code. That section provides: "If the action be one in which the defendant *might have been arrested,* an execution against the person of the judgment debtor may be issued to any county within the State, after the return of an execution against his property unsatisfied in whole or in part. But no execution shall issue against the person of a judgment debtor *unless an order of arrest has been served, as provided in Title Nine, sub-chapter one of this chapter, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by section 291."*

In the present case *an order of arrest* had been properly issued and *served,* in compliance with Title IX, etc., and it was therefore the duty of the clerk to issue the execution as required by sections 442, 447, of The Code. *Kinney v. Laughenour,* 97 N. C., 325.

The case of *Roulhac v. Miller et al.,* 90 N. C., 174, is relied on by the defendant for the position that no such judgment as was rendered in this case could be entered against the bail. That was an independent *action* brought against the defendants on their undertaking as bail for Brown. This is a *motion in the cause* against the bail on notice, in accordance with section 302 of The Code, which, it will be observed, is unlike section 160 C. C. P., which requires that the proceeding against bail should be by *action.* It is manifest that the purpose of the change was to substitute a summary remedy against the bail, for the *action* in C. C. P., 160, and was probably suggested by *Pearson, C. J.,* in *The Ins. Co. v. Davis,* 74 N. C., 78.

The ground for the arrest had been properly set forth and the (285) order for arrest obtained and served *before* judgment, and the case is therefore unlike that of *Peebles v. Foote,* 83 N. C., 102, in which it was held that the plaintiff in that case had no right to an "execution against the person of the defendant Foote without having first obtained an order of arrest and its service before judgment." Here there was both an order of arrest and service before judgment. *Roulhac v. Brown,* 87 N. C., 1.

The plaintiff having had execution against the person of Robertson it was his duty to surrender himself, or of his bail to surrender him in discharge of his liability. *Sedberry v. Carver,* 77 N. C., 319.

There was a lawful arrest before judgment, and this distinguishes the case before us from *Houston v. Walsh,* 79 N. C., 35.

It may also be distinguished from the case of *Claflin v. Underwood,* 75 N. C., 485, in which the defendant was arrested under execution against his person, and on writ of *habeas corpus* was discharged because by *consent* judgment was taken for the debt only, though we think the proper mode of discharge of a debtor under arrest is that pointed out in *Wingo et al. v. Hooper,* 98 N. C., 482.

Affirmed.

Cited: Mahoney v. Tyler, 136 N. C., 43; *Ledford v. Emerson,* 143 N. C., 534; *Pickelsimer v. Glazener,* 173 N. C., 639; *Williams v. Perkins,* 192 N. C., 178.

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AMBROSE GRUBB ET AL. V. W. C. FOUST ET AL.

Devise—Will—Description—Evidence.

The description in a will, "I give and devise to my wife all my interest in 1,029 acres of land for life," etc., and then, after giving to several persons named undivided portions thereof, "the balance of said land to be equally divided between all my children," etc., there being nothing to indicate that the testator had other lands, is not so vague as to render the devise void, and parol evidence is competent to identify the land.

CIVIL ACTION for the recovery of land, tried before *Clark, J.,* at December Term, 1887, of DAVIDSON Superior Court.

The plaintiffs claim title to the land, 1,029 acres, described in the complaint "as heirs at law and devisees of Joseph Gordon, Sr."

The defendants also claim title to the land in their possession, respectively derived from Joseph Gordon, Sr., or by long possession under color of title.

The separate answers of Robt. Williams, Mary P. Moore and E. A. Clodfelter are sent up with the record.

The answer of Robert Williams denies the title of the plaintiffs—alleges title in himself to 170 acres of the land claimed by plaintiffs, which is described by metes and bounds in his answer, disclaims as to the balance, and says "that he has been in the continued possession of the said tract of land (170 acres) under a deed for more than forty years under known and visible lines and boundaries, and under colorable title, claiming the same as his own adversely to the plaintiffs and all others, and for more than seven years before the commencement of this action," etc., and relies on the statute.

Mary P. Moore answers for herself and R. B. Hefler (her tenant), and denies the title of the plaintiffs. She claims title to 500 acres of the land described in her answer by virtue of a conveyance from "Joseph Gordon, Sr., ancestor of the plaintiff," made in 1838, (287) to one Lee, trustee, etc., and *mesne* conveyances—the land conveyed to Lee being the land described in the plaintiffs' complaint. She further says that she and those under whom she claims have been in possession under color of title up to known and visible boundaries, claiming adversely to all others, for more than forty years, etc., and relies upon the statute.

A. E. Clodfelter answers denying title of plaintiffs, and claiming title to thirty-four acres, described in his answer.

These answers present the questions in controversy.

On the trial the plaintiffs introduced a deed from John H. Finch, dated 22 October, 1838, conveying in fee 1,029 acres of land, alleged by plaintiffs to be the *locus in quo,* to Joseph Gordon, Sr., under whom all the plaintiffs and most of the defendants claim title.

Plaintiffs then introduced the will of Joseph Gordon, Sr., in which occurs the following:

"I give and devise to my beloved wife, Eve M. Gordon, all my interest in 1,029 acres of land to have during her life or widowhood, and I also will to my son, James Gordon's heirs, 25 acres of land, and also Joseph Gordon's heirs, 25 acres of land, and also John Gordon's heirs, 25 acres of land, and also William Gordon's heirs, 25 acres of land, and also my son Doctor, 125 acres of land, to him to hold to and his in fee simple forever, and also to Catherine Medley's heirs, 20 acres of land, and also to Mary Fine's heirs, 20 acres of land, and also to Eve Cecil's heirs, 20 acres of land, and also to Nelly Gordon's heirs, 25 acres of land, and also to Lydia Gordon, 25 acres of land, and also to Levi Shuler's heirs 10 acres of land. The balance of said land to be equally divided between all my children, heirs," etc.

The plaintiffs introduced evidence tending to show that the several tracts of land in possession of the defendants were conveyed by the deed from Finch to Gordon above mentioned; and also that plaintiffs were the grandchildren of Joseph Gordon, Sr., deceased, and (288) some of them his immediate heirs.

The plaintiffs then introduced a witness and proposed to show that the land mentioned in said will is the land in controversy in possession of defendants. The defendants objected on the ground that the descriptive words in the will were too vague to let in parol evidence for the purpose of fitting the description to the thing described. The court sustained the objection, and in deference to his Honor's ruling, the plaintiffs submitted to a nonsuit and appealed.

No counsel for plaintiffs.
C. C. Raper for defendants.

DAVIS, J., after stating the case: In the argument of counsel for the appellees it is insisted that parol evidence is admissible to show what lands were meant by the testator, Jos. Gordon, Sr., in the clause of the will recited, and that the several devises mentioned therein are incapable of definite location.

Whatever may be the rights of the devisees of Joseph Gordon, Sr., as between themselves and as affected by the specified number of acres mentioned in the will as given, respectively, to the "heirs of James Gordon" and the others named, it is plain that the purpose of the testator was to give to his wife, Eva M. Gordon, for life all his interest in 1,029 acres of land, with remainder to the persons and classes of persons mentioned in the will. There is nothing to indicate that the testator had more than one tract of 1,029 acres, and it was competent to show where that tract was. Most of the cases cited by the counsel for the appellees were of insufficient descriptions in deeds, which could not be aided by parol, but aside from the fact that a much more liberal rule is allowed in the interpretation of wills than of deeds, there is no (289) doubt that upon the face of the will there is a devise of 1,029 acres of land, and if there is any ambiguity it is *latent* and may be explained by parol. That *latent* ambiguities in wills may be explained by parol, is too well settled to need the citation of authorities.

In one and the same clause of the will 1,029 acres of land are devised to Eva M. Gordon for life, and specified numbers of acres to the classes of persons respectively named, "and the balance of said land to be equally divided between all my children's heirs," etc. It is too plain to admit of doubt that "the balance" meant, is what remains of 1,029 acres of land after deducting the several specified number of acres given to the classes of persons named, and whatever difficulty, if any, the plaintiffs may have, in the event of a recovery in partitioning the lands as between themselves, that cannot avail the defendants.

Under the old practice, it was well settled that tenants in common could recover on a joint demise, or a recovery might be had upon the demise of only one tenant in common, to the extent of the interest of such tenant in common, and it was perfectly competent for the plaintiffs to show that the land mentioned in the will is the land in controversy in possession of the defendants.

The plaintiffs claim title derived from Jos. Gordon, Sr., deceased, under his will or as heirs at law, and the defendants claim under a conveyance and mesne conveyances from the same person, and two issues

are raised by the complaint and answers, involving—first, the validity of the deeds through which the defendants derive title, and second, the statute of limitations, and the plaintiffs have a right to have these questions passed upon.

Error.

Cited: Wright v. Harris, 116 N. C., 465.

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M. H. LOVE ET AL. v. NANCY L. McCLURE.

Dower—Evidence—Contract for Sale of Land—Widow—Vendor and Vendee—Parties.

1. The right of the wife to dower is paramount to and does not arise from the estate of the heir, but is a continuation of that of the husband.
2. Where the husband entered upon land under a contract for its purchase, paid the price, but died before a conveyance was made to him, leaving his widow in possession: *Held,* that the vendor could not recover from her possession of the land, and that upon a verdict being rendered establishing the fact of the payment of the purchase money, she was entitled to judgment, notwithstanding the heirs at law of her husband were not parties to the action.
3. The declarations of the heir of the husband are not competent against the widow upon the trial of an action wherein it is sought to defeat her right to dower.

DEFENDANT'S APPEAL.

CIVIL ACTION, for the recovery of land, tried before *Graves, J.,* at Spring Term, 1887, of HAYWOOD Superior Court.

The plaintiffs are heirs at law of J. R. Love, and allege that they are the owners of the land described in the complaint, and that the defendant is in possession thereof and wrongfully withholds the same, etc.

The defendant Nancy L. McClure denies the allegations of the complaint, and as a defense to the action, and for affirmative relief, alleges that J. R. Love, the ancestor of the plaintiffs, in 1858, executed to Wm. McClure, now deceased, a bond for title to certain lands described in the answer, and the bond for title fully set out therein, and that the land mentioned in the complaint is included in the land so mentioned in the bond for title, and that Wm. McClure in his lifetime fully paid off and discharged the notes mentioned in the bond for title as the

(291) price of the land and was entitled to a deed in fee therefor; that Wm. McClure died in 1866 intestate, leaving the defendant his widow and the children named in the answer as his heirs at law, "and the defendant was entitled to dower in said land and now holds the same as widow of said William McClure," etc.; that J. R. Love died in 1863, leaving a last will and testament, which was duly proved and the executors therein named duly qualified; that the bond for title was duly registered in the register's office of Haywood County on 15 January, 1867; that J. R. Love in his lifetime, and his personal representatives since, have sold portions of the land mentioned in the bond for title as set out in the answer.

She asks that the surviving executors of J. R. Love (who are named) be made parties plaintiffs, and that the heirs at law of Wm. McClure (who are named) be made parties defendants; that a decree be made requiring the executors of J. R. Love and the plaintiffs to convey the lands mentioned in the bond for title to the heirs at law of Wm. McClure, and if they cannot convey the whole of the land, then for damages for so much as they may be unable to convey, and for such further relief as she may be entitled to.

At the special term, July, 1885, it was, by the court, referred to the clerk of the Superior Court to ascertain and report upon certain facts and to state an account. At the same term the following entry was made: "Leave granted to make the executors of J. R. Love parties plaintiff, and the heirs of Wm. McClure, deceased, parties defendant, and pleadings to be amended accordingly."

The referee made his report to the Spring Term, 1886, which, with the defendants' exceptions thereto (twenty in number), is fully and at length set out in the record, but in the view taken by this Court, it is only necessary to mention that the referee reported that J. R. Love executed to Wm. McClure, the husband of the defendant, the bond for title, etc., as alleged in the answer; that the purchase money had

(292) not been paid, and that the 18th and 20th exceptions to the report were as follows:

"18. That the referee erred in finding as a legal conclusion or fact that the purchase money for the land had not been paid, or any part thereof, as there was no testimony to warrant such finding.

. . . . . .

"20. And the defendant asks that a jury pass upon the issue of payment, and such other issue as may be necessary, to determine the merits of this action."

Upon the hearing on the report of the referee and the exceptions thereto, at said term of the court, the following order was made:

"This cause coming on to be heard, and being heard on exceptions to the report of the referee, made to this term, the exceptions filed by defendant from number 1 to number 19, both inclusive, are overruled by the court, and defendant excepts to the ruling of the court.

It appearing to the court that the defendant has demanded a jury trial in exception number 20, the court holds that the defendant, by virtue of said last named exception, is entitled to have the issue of payment of the notes mentioned in the bond for title passed upon by a jury, and that the burden will be upon the defendant to show affirmatively the actual payment of the notes mentioned in said bond for title. Defendant excepts.

"The following issues are framed, to be submitted to a jury at the next term of the court, involving only the question of payment:

"1. Have the notes mentioned in the bond for title, executed by testator of plaintiffs to defendant's husband, William McClure, been actually paid in full?

"2. If not, what sum has been actually paid by defendant or her said husband, or any agent of either, on the $477 note?

"3. What sum has been paid on the $823 note? (293)

"4. What sum has been so paid on the $150 note?

"Defendant excepts."

At the Spring Term, 1887, these issues were submitted to a jury, and the response to the first was in the affirmative, which rendered an answer to the others unnecessary.

The plaintiffs moved for a new trial, which was refused, and thereupon the defendant asked judgment:

"For a decree for the plaintiffs to execute title to the heirs at law of William McClure and for costs. This judgment the court refused to grant, for that theretofore the court had adjudged that the heirs of Wm. McClure were necessary parties, and had ordered them to be made parties, and now after the verdict, upon inspecting the record, found that they had not been made parties."

Thereupon the defendant moved the court for judgment as follows:

"This cause coming on to be heard upon the complaint, answer, issues submitted and found by the jury, and it appearing to the court that the defendant is the widow of William McClure, and that said William McClure had the bond of James R. Love, ancestor and testator of plaintiffs, for title to the land in controversy; and it further appearing to the court from the issues submitted and found by the jury, that the said William McClure, in his lifetime, fully paid the purchase money to said James R. Love for said lands, and that the widow, Nancy L. McClure, the defendant, is entitled to dower on said land: On motion of counsel

for defendant, it is considered by the court that plaintiffs take nothing by their writ; and the defendant have and recover of plaintiffs and security in prosecution, the costs in this behalf to be taxed by the clerk."

This motion the Court refused, and declined to make any judg-
(294) ment until all the facts necessary to a full determination of the matters in controversy were properly ascertained. From the refusal to grant the judgment asked for the defendant appealed.

R. D. Gilmer for plaintiffs.
E. R. Stamps for defendant.

DAVIS, J., after stating the case: In *Kirby v. Dalton,* 1 Dev. Eq., 195, the widow claimed dower in land purchased but which had not been paid for by her husband, and the title to which had been retained by the vendor as security for the payment of the purchase money. It was there held that the widow was not entitled to dower in her husband's equities, and that even if she was so entitled (as she now is by statute since enacted) her right would be subordinate to the vendor's right to have the purchase money paid, but in the case before us it has been found as a fact by the jury that all the purchase money was paid in the lifetime of the husband. If he were living, having paid for the land, the plaintiff could not recover the possession of him; having died, the widow's possession was a continuation of his, so that neither could J. R. Love, if living, or his heirs at law, he being dead, recover the possession of her. The defense of the widow against the vendor, who had been paid in full, would be the same as that of the husband, if suit had been brought against him, and as no recovery could have been had against him, so none can be had against her. The right of the widow to dower is a legal right, and is prior to that of the heir. *Campbell v. Murphy,* 2 Jones Eq., 357.

She has the right to have any charge or incumbrance upon the land removed by an application of the personal assets to that purpose. *Kluntz v. Kluntz,* 5 Jones Eq., 80; *Carson v. Cooper,* 63 N. C., 386. Her pos-
session is rightful. It is a continuation of that of the husband.
(295) It is not adverse to that of the heir. *Page v. Branch,* 97 N. C., 97; *Grandy v. Bailey,* 13 Ired., 221; *Buffalo v. Newsom,* 1 Dev., 208; *Williams v. Bennett,* 4 Ired., 122.

When the vendee has paid the purchase money for land and died, the widow may institute an action (formerly a bill in equity) against the heirs of the deceased husband and the vendor, or his heirs, if he be dead, to compel a conveyance of the land and assignment of dower to herself. *Smith v. Smith,* Winst. Eq. (Hinsdale Ed.), 581. If being out

of possession, she could bring her action to compel the assignment of dower, it must follow that being in possession, the equitable title being out of the vendor, he (or in this case his heirs) cannot recover of her.

In *Norwood v. Morrow et al.*, 4 Dev. & Bat., 442, it was held that a widow was not bound to await the action of the heirs at law of her deceased husband to regain the possession of land held adversely under a deed from the husband which was void because of an illegal consideration. She could file her petition against the person in possession under the void deed and the heirs of her deceased husband. In that case it is said by *Ruffin, C. J.*, that it is "not true that the wife gets her dower necessarily from the heir. She claims paramount to the heir. . . . In point of title, her estate does not rise or take effect out of the ownership of the heir or other person making the assignment, but is considered a *continuation* of that of the husband. . . . She does not require the assistance of the heir, but brings her action against any person who has the freehold, whether that be the heir or any other. . . . That this must be so, is evident when it is recollected that at common law the wife was entitled to dower (as she is now since the statute restoring common law right of dower) in all the land of which her husband was seized at the time of coverture, and that his conveyance did not defeat the right. Consequently she was entitled when the heir had nothing in the land, and therefore she was obliged to assert the (296) right for herself."

If, in this case, the widow were out of possession, and bringing her action against the plaintiff, they would be concluded in equity from setting up their mere legal title against her right to dower; and if so, it must follow, that being equitably in possession, she cannot be required to surrender that possession to persons who have no equitable right to it, and who, if in possession, could be declared trustees as to the legal title, and made to surrender the possession.

Nothing appears in the record except the entry made at July Special Term, 1885, to show that the heirs of William McClure were made parties, or that any answer or other action in the cause was made, or had by or against them. Whether the order to *amend* the pleadings as shown by that entry has not the legal effect of an actual amendment and does not make them parties, as the intimation in *Walton v. Pearson*, 85 N. C., 34, would seem to warrant, is not presented by the appeal which is only taken by the widow, but however that may be, for the purpose of her *defense*, the heirs of her husband are not necessary parties, and we are of the opinion that as against her, she is entitled to the judgment, that the plaintiffs take nothing, etc., and for her costs, and for the refusal to grant the motion for this judgment, there is error.

Error.

PLAINTIFF'S APPEAL.

In addition to the facts stated on the defendant's appeal, the following is necessary to a proper understanding of the question presented on this appeal:

"Upon the trial by a jury on the question of the actual payment of the purchase money by William McClure, evidence was offered tending to show actual payment by the defendant. In reply the plaintiffs offered evidence tending to show that the purchase money had not been
(297) paid, and offered to show by a witness the declarations of McClure, a son and heir of William McClure, and son of defendant, that the purchase money had not been paid. The defendant objected, and the objection was sustained, and thereupon the plaintiff excepted.

There was a verdict finding that the purchase money had been paid.

The plaintiff moved for a new trial for the alleged error in excluding their evidence, and for that the verdict was contrary to the weight of the evidence, and these motions were refused, and the plaintiff appealed."

Aside from the vagueness of the declarations of McClure, offered to prove a negative, upon the idea, we suppose, that being a son and heir of William McClure, the declarations were against his interests, we are at a loss to see how any declarations of his as to what had *not* been done by William McClure or any one else can be evidence against Nancy L. McClure. He might have him introduced and examined as a witness and if he knew any *facts* tending to show that the purchase money had not been paid, his testimony would have been competent, but his *declarations* could not be evidence against her. It does not appear where, or under what circumstances the alleged declarations were made. They were in no way connected with the defendant, who claims "under the law," as was said in *Pinner v. Pinner et al.,* Busbee, 475, in which one of the defendants and heir of William Pinner sought to defeat the dower of his widow, by asserting title under a deed from her deceased father alleged by the widow to have been made a short time before his death, with the intent to defraud her of her dower, and therefore void, and the declaration of the deceased husband, made about a month before his death, to the effect that he had made the deed to his daughter "for the land many years ago," was held to be incompetent.

(298) If the declaration of the deceased husband, in whom the seizin was alleged by the widow to have been at the time of his death were not competent as against her, certainly the declarations of the heir, not of the existence of some fact, but of the nonexistence of some alleged fact, could not be competent. There was no error in excluding the proposed declaration.

This Court cannot consider the exception to the refusal to grant a new trial because the verdict was contrary to the rights of the widow. As has been often held, that was a matter of discretion from which there is no appeal.

Affirmed.

Cited: Everett v. Newton, 118 N. C., 922; *Ins. Co. v. Day,* 127 N. C., 137; *Howell v. Parker,* 136 N. C., 374; *In re Gorham,* 177 N. C., 277; *Forbes v. Long,* 184 N. C., 40; *Chemical Co. v. Walston,* 187 N. C., 826; *Freeman v. Ramsey,* 189 N. C., 796.

W. C. TROY, ADMINISTRATOR OF THOS. McDONALD, v. THE CAPE FEAR AND YADKIN VALLEY RAILROAD COMPANY.

Negligence—Proximate Cause—Evidence—Damages—Trespasser —License—Trial—Railroads.

1. Walking upon the track of a railroad does not, *per se,* constitute such contributory negligence as will bar a recovery for injuries sustained from the negligence of the servants of the road.

2. Though the person walking upon the track of a railroad company be technically a trespasser, if he uses due care to avoid injury from the wrongful act of the company, he may recover damages for injuries thus sustained.

3. Where the public for a long series of years has been in the habit of using a portion of the track of a railroad company for a crossing, the acquiescence of the company will amount to a license, and impose on it the duty of reasonable care in the operation of its trains, so as to protect persons using the license from injury.

4. Acts, to constitute contributory negligence, must be the proximate, and not the remote, cause of the injury, and such acts as directly produced or concurred in directly producing the injury.

5. The duty of keeping a reasonable lookout is imposed upon those who have charge of railway trains; and a failure to do so, will render the company liable for injuries, though the person injured, at the time was a trespasser, if he did nothing else to contribute to the cause of the injury.

6. Although the person upon whom the injuries were inflicted contributed thereto by his negligence, if the defendant might have avoided them by ordinary care, and did not, damages may be recovered.

7. It is required of a railroad company to exercise more care, than otherwise necessary, in running its trains in a populous town.

8. The damages to which one who has been injured by the negligence of a railroad is confined to those that are actual.

9. Where the evidence in respect to the cause of the injury is conflicting, it should be left to the jury to find the fact under proper instructions from the court.

(299) CIVIL ACTION, tried before *Clark, J.*, at May Term, 1887, of the Superior Court of CUMBERLAND County, to recover damages for the alleged negligent killing of Thomas McDonald, the intestate of the plaintiff.

It is alleged and admitted that on or about the night of 19 October, 1883, Thomas McDonald was run over while on the defendant's track in the town of Fayetteville.

The plaintiff alleges that his intestate was walking on the defendant company's track at the time of the injury at a place where "it was and for a long time had been the habit and custom of the people of the town of Fayetteville and others to pass and repass and cross the track" of defendant's road, and that while so walking on the said road, he was run over by the carelessness and negligence of the defendant's servants, in charge of a locomotive engine, and received injuries from which he soon thereafter died.

The defendant denies negligence and says that the plaintiff's intestate was a trespasser and had no right to be on defendant's track; that he was a man of dissolute habits, frequently in a state of intoxication, was in that condition on the night of the injury, and was himself guilty of gross negligence in going on defendant's track in that condition,

(300) and that he was lying down and in such a position that he could not be seen by the engineer, when the accident occurred.

The following issues were submitted:

"1. Was the death of plaintiff's intestate caused by the negligence of the defendant?

"2. Was the plaintiff's intestate guilty of contributory negligence?

"3. What damage is the plaintiff entitled to receive?"

Many witnesses, thirty in number, were examined on the trial below, and the substance of their testimony was sent up with the case on appeal.

As there was no exception to any of the evidence by the appellant, it is unnecessary to set it out in detail, but only substantially so much of it as is necessary to a proper apprehension of the exceptions to his Honor's charge.

The tendency of that on behalf of the plaintiff, was to show that there is a crossing on a trestle of the defendant's road, upon which planks are placed, and that over this trestle the public have been accustomed to

pass and repass for twenty or twenty-five years, using it as a common passage way; that on the night of 19 October, 1883, between eight and nine o'clock, the plaintiff's intestate was crossing over the trestle, when the construction train of the defendant came into the town of Fayetteville, running slowly, not faster than three or four miles an hour, without giving any notice by sound of whistle or bell, and without any headlight; that it made so little noise some of the witnesses thought that it was only a hand car; that it sounded no alarm at the crossing, and that no whistle was blown or bell rung from Little River to Fayetteville; that the track was straight for a considerable distance and when the intestate saw the train approaching, "he tried to get across the trestle and could not, and then tried to get off and got his foot hung"; that he "saw the d—d thing coming, and tried to get out of the way, but could not"; that he made an outcry and sound of distress, which (301) could be heard at a considerable distance, according to one witness 800 or 900 yards; that the train was going slowly and could have been stopped within ten feet; that if the bell had been rung at the crossing, the intestate would have had ample time to have gotten off.

One witness (Smith) testified that he heard the distressing cry, got a lantern and waived it; that "if the engine had blown at the corporate limits, he would have had time to release McDonald; that he started as soon as he heard the outcry"; that the engineer was incompetent, "blind in one eye, and could not see well out of the other"; that the intestate was an industrious man and a skilled laborer, worth $1 per day; that he sometimes drank, but was not a drunkard; that he was sober at the time of the accident; that he was 55 or 60 years of age and in good health.

On behalf of the defendant, the evidence tended to show that the planks on the trestle were put there by defendant, not for public use, but for the employees of the road, when engaged about its business; that the defendant owned the property, and there was a notice at the gate, *"No admittance except on business"*; that McDonald was inside the gate and was drunk on the occasion of the accident; that he was in the habit of going on the track intoxicated and had been warned not to do so; that he was lying down; that if he had been standing up he could have been seen; that he himself said that "if he had not been drinking he would not have been caught there"; that he was drunk the evening of the accident, so much so that he "could hardly keep his feet"; that Wright was a competent engineer, and had always been trusted.

Wright, the engineer, testified that the headlight was burning; that he did not know whether the bell was rung or not; that "if a man had been standing up he could have seen him 300 yards—saw no man." He afterwards said that the "bell rung at the crossing; heard cry (302) about 100 feet off—cry of distress."

"The court charged the jury that, as to the first issue, if the accident was caused by negligence of defendant, the jury should answer yes, otherwise no, and that the burden was on plaintiff to show negligence; that if train was moving three or four miles an hour, defendant not being at a crossing, it was not negligence not to ring the bell or blow the whistle, unless such failure is shown to have contributed to the injury. It would have been negligence if there had been no headlight, since by the uncontradicted evidence the track was straight for half mile, but if there was a headlight it was sufficient warning to deceased, and there could have been no negligence in failing to ring bell or blow whistle. That if the agent or engineer of company had notice from the outcry or otherwise that a human being was fastened on the track, it was negligence not to stop his train, if he had time to do so after receiving such notice, that is if he received the notice at all.

As to the second issue, the court charged the failure of the engineer to sound whistle or ring bell, if such were the fact, did not relieve deceased from necessity of taking ordinary precautions for his safety. Negligence of company's employees in that particular was no excuse for his negligence. He was bound to look and listen before attempting to cross the trestle in order to avoid an approaching train, and not to walk carelessly into a place of danger. Had he used his senses he might have heard or seen the coming train. If he omitted to do so and walked thoughtlessly and carelessly on the track, he was guilty of culpable negligence and contributed to his own injury. If he did use his senses, saw the train coming or heard it, and yet undertook to cross the trestle instead of waiting for train to pass, and was injured, the consequences of the mistake cannot be cast on the defendant. No railroad
(303) company can be held for a failure of experiments of that kind.

But, notwithstanding the previous negligence of deceased (if the jury so find), if at the time when the injury was committed it might have been avoided by the exercise of reasonable care and prudence on the part of defendant, the defendant is liable, and the jury would find second issue in favor of plaintiff. *(Davis v. Mann,* as cited in *Gunter v. Wilkes,* 85 N. C., 312.)

Plaintiff requested court to charge:

1. If the railroad company had by long consent allowed the public to pass and repass the trestle work, then he was not a trespasser. This was given.

2. That if the engineer in charge was incompetent, or if, from the circumstances of the case, the servant of the defendant (the engineer) exhibited a careless or reckless disregard of life or limb, the defendants are liable in damages. This was given.

3. That in coming into a populous town (as is admitted in the pleadings) more care is necessary than otherwise, especially is this so when an engine is coming out of time or at an unusual hour. This was given.

4. That if the deceased was guilty of contributory negligence, and the jury believe that if ordinary care had been used or the accident might have been avoided, then, though they believe the deceased contributed to the accident, the railroad is liable. The court gave, instead of this, the words of *Davis v. Mann* as quoted in *Gunter v. Wilkes* on top of page 312 of N. C. R.

5. That what the damages are is to be fixed by the jury, under all the circumstances of the case, the same being left largely to the common sense and discretion. This was given, the court explaining, however, it must be restricted to actual damages, *i. e.*, the money loss, calculating the annual net earnings and expectancy of life, etc.

6. If the engineer was without headlight and did not ring the (304) bell or blow the whistle coming into town, this of itself is evidence of negligence on the part of the railroad company, especially where human life is the forfeit of his failure to use the above ordinary care. This was given, the court adding that it would be a circumstance (if true) to be weighed in connection with all the evidence in the case.

The defendant asked the court to charge as follows:

"1. If the jury believe that Thomas McDonald was run over by the engine of defendant at a place not a public crossing, but on private property of defendant, company would not be responsible unless engineer knew of deceased's dangerous position on the track, 'or with reasonable care and diligence might have known it.' This the court gave adding the words in quotation marks.

"4. If the deceased, in attempting to get off the track, caught his foot and was unable to get off, and was lying in such a position that he could not be seen by engineer, his accident was the result of his own recklessness, and the company is not responsible, 'unless there was such outcry that the engineer, with reasonable care, could have prevented the accident.' This the court gave adding the words in quotation marks.

"5. If the jury believe the statement made by deceased to plaintiff's witness, *to wit:* 'I saw the damned thing coming and tried to get out of the way, but couldn't,' and 'I saw the engine coming, thought I had time to cross trestle, found I had not, tried to get off and got my foot hung,' his conduct, *as thus stated,* was contributory negligence. 'This subject, however, to the condition that the defendant, with reasonable care and prudence, could have avoided consequence of deceased's negligence.' Given after adding words in quotation marks.

"6. If the jury believe the evidence introduced by plaintiff, and the uncontradicted evidence offered by defendant, they will find that de-

ceased was guilty of contributory negligence. This was not given, except as far as embraced in other charges given."

(305) To the first issue the jury answered "Yes," to the second "No," and to the third "$2,000."

Judgment and appeal by defendant.

Thos. H. Sutton for plaintiff.
Geo. M. Rose for defendant.

DAVIS, J., after stating the case: The charge of the court was given with care, and we think stated the law fully and fairly as applicable to every view presented by the evidence. We have given it, as sent up with the case on appeal, but only two exceptions—one to the first instruction asked for by the plaintiff, which was given, and the other to the sixth instruction asked for by the defendant, which was refused—were insisted upon in this Court, and as the other exceptions were not pressed, we dispose of them by saying that they were of no avail.

1. The defendant says that the plaintiff's intestate was a "trespasser," and being wrongfully on the defendant's road, the injury was the result of his own wrong. For this position many authorities are cited, and especially *Bacon et al. v. Balt. and Pot. R. R. Co.,* 15 Am. and Eng. R. R. Cases, 409, and the note in which many cases are cited to the effect that persons walking on the track of a railroad are trespassers, and generally considered to be guilty of such contributory negligence as to bar a recovery of damages for injuries sustained while so trespassing. We think that upon a careful examination of the cases cited by counsel for the appellant, it will be found that in most of them the injury was the result of contributory negligence of the party injured proximately causing it, and not resulting directly from the negligence of the defendant, and where they have gone beyond this, they are not in accord

(306) with the rulings of this Court, nor in harmony with the current of authority.

In *Byrne v. N. Y. Cen. and Hudson R. R. Co.,* 104 N. Y., 362 (58 Am. Reps., 512), it was said, "that when the public, for a series of years, had been in the habit of crossing the railroad, the acquiescence of the defendant in the public use amounted to a license or permission to cross at the point, and imposed the duty upon it, as to all persons so crossing, to exercise reasonable care in the movement of its trains, so as to protect them from injury," and this position is supported by abundant authority.

But even if he were a trespasser, we do not assent to the idea that the company is thereby released from reasonable care.

In *Vicksburg and Meridian R. R. Co. v. McGowan,* 62 Miss., 682, *Campbell, C. J.,* says: "One may be technically a trespasser, and if he uses due care to avoid injury from the wrongful act of another, he may recover; and he may not be a trespasser, and yet guilty of such contributory negligence as to preclude him from recovering."

He says: "The criterion is whether he observes due care, under the circumstances of his situation, whatever it may be, to avoid harm from the act complained of."

To constitute such contributory negligence as will defeat a recovery, it must be the *proximate* and not the *remote* cause of the injury. In *Bal: & Ohio R. R. Co. v. Trainer et al.,* 33 Maryland, 542, it is said: "By 'proximate cause,' is intended an act which directly produced, or concurred directly in producing the injury. By 'remote cause,' is intended that which may have happened, and yet no injury have occurred, notwithstanding that no injury could have occurred, if it had not happened. No man would ever have been killed on a railway if he had never gone on or near the track. But if a man does imprudently and incautiously go on a railroad track, and is killed or injured by a train of cars, the company is responsible unless it has used reasonable care and caution to avert it, provided the circumstances were not (307) such, when the party went on the track, as to threaten direct injury, and provided, that being on the track, he did nothing, positive or negative, to contribute to the immediate injury."

In *H. & T. C. R. R. Co. v. Symkins,* 54 Tex., 615, it is said, "that a reasonable lookout, varying according to the danger and surrounding circumstances, is a duty always devolving on those in charge of a railway train in motion, and railway companies are bound to exercise due care to avoid injury to others, and a failure to do so will render them liable for injuries, resulting even to a trespasser, who has not been guilty of contributory negligence."

In *Parker v. R. R.,* 86 N. C., 221, relied on by defendant, the deceased could, by using ordinary care, have avoided the injury, and the defendant could not stop the engine in time to prevent it.

We conclude that there was no error in giving the instruction complained of.

2. The second exception relied on here, was to the refusal to give the sixth instruction asked for by the defendant. This instruction "was not given except as far as embraced in other charges given."

There was evidence tending to show that the negligence of the defendant was the direct and proximate cause of the injury; and there was evidence tending to show that the deceased, being on the track, under the circumstances detailed in evidence (which was not *per se* such contribu-

tory negligence as relieved the defendant from liability for failure to use ordinary care), could not avoid the injury.

These questions were left fairly to the jury, and we can see no error in the instructions of the court excepted to, or in refusing those asked or denied.

There is no error.

Cited: Randall v. R. R., 104 N. C., 416; *McAdoo v. R. R.*, 105 N. C., 151; *Bullock v. R. R., ibid.*, 188; *Deans v. R. R.*, 107 N. C., 690, 694; *Taylor v. R. R.*, 109 N. C., 236; *Hinkle v. R. R., ibid.*, 473; *Clark v. R. R., ibid.*, 451; *Emry v. R. R., ibid.*, 596; *Smith v. R. R.*, 114 N. C., 738; *Styles v. R. R.*, 118 N. C., 1092; *Edwards v. R. R.*, 132 N. C., 101; *Credle v. R. R.*, 151 N. C., 52; *Monroe v. R. R., ibid.*, 377; *Norris v. R. R.*, 152 N. C., 511; *Exum v. R. R.*, 154 N. C., 419; *Horner v. R. R.*, 170 N. C., 653; *Brown v. R. R.*, 172 N. C., 606.

(308)

MARY E. BUCHANAN v. ANDREW H. BUCHANAN ET AL.

Will—Survivorship—Executory Devise—Cotingent Estate—Remainder.

B. devised to his son R. all his estate not otherwise disposed of in his will, and provided that "should R. die without bodily heir, it is my will and desire that my son A. should have it all." R. survived the testator and his brother A., and died without issue: *Held*,

1. That R. took an estate in fee terminable at his decease without issue, and in such an event the estate vested in the heirs of A.

2. The "dying without issue," upon which a contingent remainder vests, will be construed as referring to the death of the devisee of the first estate and not to that of the testator, unless the devise be to tenants in common with a clause of survivorship, or it is apparent from the whole will that the testator intended to make the estate dependent on the event of his own death.

Hilliard v. Kearney, Bus. Eq., 221, commented upon and distinguished.

THIS was a civil action, which was tried before *Gilmer, J.*, at Fall Term, 1886, of ANSON Superior Court.

The action involves the construction of the seventh clause of the will of Henry Buchanan, under whom both parties to the action claim, and which is as follows:

"I, Henry Buchanan, of the county of Anson and State of North Carolina, being of sound mind and memory, but considering the uncertainty of life, and my earthly existence, do make and declare this my last will and testament, in manner and form following, that is to say:

First. That my executor hereinafter named shall provide for my body a decent burial, suitable to the wishes of my children and friends, and pay the expenses of the same, together with my just debts that may be owing at my death, out of the moneys that may be on hand or that may first come into his hands as a part or parcel of estate. And should no moneys be on hand at my death, it is my will and desire that my executors sell crops or any part of my perishable property to (309) raise money for the purpose of paying debts according to this clause.

"1st Item. I give and devise to my son Francis five negroes, viz.: Boston, Rose, Tamer, Lem, Ann.

"2nd Item. I give and devise to my son Andrew, in cash, fifty dollars.

"3rd Item. I give and devise to my son Horacio one hundred dollars in cash.

"4th Item. I give and devise to Jane Riley two negroes, viz.: Jinny and Lucy, one cow and calf, one bed.

"5th Item. I give and devise to Alexander Riley one tract of land on which I now live, known as the Dickson tract of land, for him and his mother and the rest of the children to live on until the youngest become of age; also a negro boy named Alfred, one named Charles, one named Ned, one named Franky, and a mule named Jersey, one cow and calf, and one bed, and one girl Beck.

"6th Item. I give and devise to Mary Ellen Riley one negro girl Easter, one negro girl Margaret.

"7th Item. I give and bequeath to my son Richmond all the remaining part of my property, or all my property not otherwise disposed of, and should Richmond die without a bodily heir, it is my will and desire that my son Andrew should have it all.

"It is my will and desire, that should it become necessary to sell any part of my estate to meet the payment of moneys herein above by me given away, then and in that case my executor shall sell first perishable property and any part of my personal property to raise the same on a credit of twelve months. And should any residue remain after the payment and delivery of all the general and specific legacies herein set out and named, to be given or returned to my son Richmond.

"It is also my will and desire that my executor be paid for (310) his trouble such compensation or commissions as the County Court of Anson may deem just and right.

"And lastly, I do hereby constitute and appoint my trusty friend," etc.

The will, with attesting witnesses, bears date in August, 1843, and was admitted to probate in the County Court of Anson, at its January session in 1845. The devisee, the testator's son Richmond, made his will in July, 1869, which was proved in the proper court in June, 1876, and therein he gives to the plaintiff "all his (my) estate, both real and personal," "absolutely and in fee simple."

The defendants are the children and heirs at law of the devisee, Andrew, named in the same clause, who died intestate in 1847, some twenty-two years previous to the death of his brother Richmond, in 1869.

Upon the trial and after hearing the evidence, the presiding judge being of opinion that the title depended upon the interpretation of the will of said Buchanan, and the effect of the words of limitation, reserved the point and submitted to the jury an inquiry into the amount of damages, and they being found, ruled in favor of the plaintiff as to the title, and gave judgment accordingly, from which the defendants appealed.

J. A. Lockhart for plaintiff.
E. C. Smith for defendants.

SMITH, C. J., after stating the case: The ruling brought up for review proceeds upon a construction of the clause of the will in controversy, which requires the death of the devisee Richmond to take place in the lifetime of the testator, as the contingency on which the limitation over to Andrew was to take effect, and defeating it if the testator was the survivor.

(311) The devise is of an estate in fee to Richmond, terminable at his decease without issue; and in such event passing over and vesting in Andrew. No time is fixed for the executory devise over to take effect, except that it must be at the death of his brother, whenever this shall occur under the specified condition of his being "without a bodily heir," or childless, and to this the act of 1827 adds, "living at the time of his death." The Code, sec. 1327.

Without the aid of the statute, the concurrent rulings of the courts are that such a limitation, being upon an indefinite failure of issue, that is, whenever such issue ceases to exist, is void for remoteness, to prevent which the enactment, alike applicable to wills and deeds, was made when no contrary effect is manifest. Thereby the limitation over is made effectual or fails at the death of the first taker, and the result is then determined.

"The series of cases in the English law," in the language of *Chancellor Kent,* "have been uniform from the time of the Year Books down to the

present day in recognition of the rule of law that a devise in fee with a remainder over if the devisee dies with issue, or heirs of the body, is a fee cut down to an estate tail and the limitation over is void by way of executory devise, as being too remote, and being founded on an indefinite failure of issue." 4 Kent Com., 276, citing numerous cases; see, also, 3 Greenl. Cruise Real Prop., 461; 2 Wash. Real Prop., 355, to the same effect.

The rulings in this State have been explicit and to the same effect, as will be seen by referring to the following cases: *Sutton v. Wood,* Conf. Rep., 202 and 312; *Bryan v. DeBerry,* 2 Hay., 356, 546; *Jones v. Speight,* 1 Car. L. Repos., 544, 157; *Sanders v. Hyatt,* 1 Hawks, 247; *Beasley v. Whitehurst,* 2 Hawks, 437; *Ross v. Farris,* 4 Dev., 376; *Brown v. Brown,* 3 Ired., 134; *Hollowell v. Kornegay,* 7 Ired., 261; *Gibson v. Gibson,* 4 Jones, 425.

In *Brown v. Brown, supra,* it is declared that a devise before (312) the act of 1827, in the words "if my son should die without lawful issue," unexplained, imparted in a legal sense, the failure of issue at any indefinite time, whenever it might happen, and a remainder limited upon such contingency was void."

The remoteness of the limitation, not allowed by the common law, is obviated by the annexing of the statutory words which confine the contingency to the state of things existing at the death of the previous owner.

Now, it is apparent that if the testator intended in the use of such general terms to provide for the happening of the contingency on which the limitation depends during his own life, there would be no antecedent estate to support a remainder, or to admit of a transfer of a preceding estate by way of executory devise, since, in consequence of the lapse, the devise would be of an immediate and present estate; and, as the effect of the superadded legislative words is to fix the vesting at the death of the preceding tenant, so as to obviate the objection of remoteness, so it would seem that they must also determine the time when the limitation over, in cases like the present, must take effect.

There are, however, numerous cases in which it has been held that where no specific period is pointed out for the limitation over to vest, other than the death of the first tenant, the testator must be understood to have used the words to prevent a lapse, and to provide against such a result.

The principle is thus enunciated in Theobald's Law of Wills, 483: "If there is an immediate gift to A., and a gift over in case of his death, or any similar expression, implying *death to be a contingent event,* the gift over will take effect only in the event of A.'s death before that of the testator," and numerous cases are cited in support of the proposition.

Here the death, an event certain in itself, is deemed to be contingent in respect to its occurring before or after the testator's own death, (313) and the event resolves the contingency and determines the ulterior devise. *Rogers v. Rogers,* 7 W. R., 541, cited at page 541.

The same author proceeds to say, page 486, "If there is an immediate gift to A., and *if he dies without issue over,* the gift over takes effect upon the death of A., without issue, at any time, whether before or after the testator," referring to many cases in support of the proposition. The contingency contemplated by the testator, in thus expressing himself, is not connected with or involved in the death, but is referable to the devisee's having or not having issue then living, and the death, when it occurs, alone ascertains the efficacy of the ulterior devise.

The distinction in the mind of the author seems to be that when the testator speaks of the death as an uncertain event, he is understood as referring to an uncertainty in the time of its occurrence, whether before or after his own decease, but when the uncertainty is apparent in the form of the expression used, and is referable to the presence or absence of issue at the time of the death, the contingency is determined solely by the event of the death, whenever it may happen.

"Possibly," he continues, in further elucidation of the rule, "when there is a gift over, if any members of a class die without issue to the survivors, the gift over must take effect, if at all, before the time when the survivors are to be ascertained."

To this class belong the cases in our own reports. *Biddle v. Hoyt,* 1 Ired. Eq., 159; *Webb v. Weeks,* 3 Jo., 279; *Vass v. Freeman,* 3 Jo. Eq., 321; *Hilliard v. Kearney,* Bus. Eq., 221; *Murchison v. Whitted,* 87 N. C., 455, while to the former class belong *Davis v. Parker,* 69 N. C., 271; *Burton v. Conigland,* 82 N. C., 99; *Price v. Johnson,* 90 N. C., 572.

The first of the three last mentioned is summarily disposed of as coming within the principle decided in *Hilliard v. Kearney,* without adverting to the differences between them. It is, moreover, opposed to (314) the ruling in *Jones v. Spaight,* 1 Car. Law Rep., *supra,* where the words following a devise of land to the testator's nephew, George M. Leach, and the male heirs of his body, were: "If the said George M. Leach dies without leaving lawful issue, as aforesaid, in such case I give the said lands to the eldest son of my niece, Mary Spaight and Colonel Spaight, deceased."

It was decided that "the devisor intended on the death of G. M. Leach without leaving issue, then living, that William Spaight should have the land." *Henderson, J.,* who delivers the opinion, adding: "In other words, to give this clause the same construction as if applied to personal estate, for certainly the reason for giving it a different construction

when applied to real, from that which it receives when applied to personal estate, fails in this country." This will was made, as well as the decision upon it, before the act of 1827.

The other two cases, while recognizing the principle of interpretation developed in *Hilliard v. Kearney,* do not fix upon the death of the person who takes the prior estate as the time when, if ever, the ulterior estate is to vest, but the one leaving the point undetermined, and not necessary in determining the appeal; and the other ascertaining the time of vesting to be at an intermediate period.

It is difficult to reconcile the various adjudications upon the subject, and to lay down, in definite terms, a rule of construction which will have the effect of rendering them consistent with each other. But in an able and exhaustive discussion in *Cox v. Hogg,* 2 Dev. Eq., 121, *Hall, J.,* in a separate opinion, from which the same extract is taken in the dissenting opinion in the case of *Galloway v. Carter,* at this term, thus announces the conclusion reached: "However, the doctrine seems so well established that words of survivorship added to a tenancy in common are so construed as to prevent a lapse and become inoperative at the death of the testator, that questions of that description may be considered as put to rest."

So remarks *Battle, J.,* delivering the opinion of the Court in (315) *Vass v. Freeman,* 3 Jones Eq., 221: "When slaves or other personal chattels are bequeathed to two or more persons immediately as tenants in common, with a limitation over to the survivors or survivor if, or in case that one or more of them die, it is settled that unless a contrary intent appears from other parts of the will, those who survive the testator will take absolutely," and in support he quotes from *Jarman v. Wills,* as follows: "If there be any time subsequent to the death of the testator to which the period of survivorship can be referrred, as for instance, the death of a tenant for life, or the time when the property is to be divided, that will be adopted instead of the death of the testator, unless a special intent to the contrary can be found in the will."

And again, "Yet when there is another point of time to which such dying may be referred, as is *obviously* the case when the bequest is to take effect in possession at a period subsequent to the testator's decease, the words in question are considered as extending to the event of the legatee dying in the interval between the testator's death and the period of vesting in possession."

In *Cambridge v. Rent,* 8 Ves., 12, cited in the opinion in *Hilliard v. Kearney,* the testator bequeathed a sum of money to his sister Martha, which was, "in case of her death, to devolve upon her sister Cornelia, and in the same clause a like sum to Cornelia, which was limited over in the same words to the first named legatee. *Sir William Grant,* Master

of the Rolls, thus expresses himself in reference to the construction of the will: "The words in which the bequest over is expressed have not in themselves, nor have they by construction received a precise and definite meaning in which they must be uniformly understood.

(316) "The expression itself is incorrect, as it applies words of contingency to an event which is certain. . . . The testator may have had some contingency in his mind; as that the legatee was dead at the time he was making the will, or might be dead before his own death, or before the legacy should be payable, and then the inaccuracy consists in not specifying the period to which the death was to be referred. He might have meant to speak generally of the death, whenever it might happen, and then the contingent or conditional words must be rejected. . . . And accordingly in every instance in which these words have been used, the courts have endeavored to collect from the nature and circumstances of the bequest, or the context of the will, in which of these two senses it is most likely this doubtful and ambiguous expression was employed."

In *Ommaney v. Beran,* 18 Ves., 291, a gift of the residue of both real and personal estate to trustees for the use and benefit of Mrs. Ann Popplewell, and *in case of her death* to be equally divided between the children of William Whitehall, was held to have become absolute in her, she having survived the testator. There is here, as in the preceding case, a contingency annexed to an event certain to take place, but uncertain as to the time when it shall occur.

In *Clark v. Gould,* 7 Simons, 197, a bequest of personal estate to the wife for life, and after her death to a trustee, in trust to apply the profits for the support of six nephews and nieces, superadding that *"in case of the death of any of them,* for the support of the survivors," was declared to have reference to a death occurring during the life of the wife, and at her death to become absolute.

There is reason for referring to the testator's death as the period at or before which a gift over to the survivors of a class, who take after a preceding estate, shall take effect since such as then come within the descriptive words, only become entitled, and the share of any dying within the interval, even if leaving issue would, but for our

(317) statute which prevents a lapse, be cut off. The Code, sec. 2144. Hence, if there were such issue, survivorship would not obtain in their behalf, for the contingency of a *dying without issue* does not occur on which the limitation over is dependent.

Under the act a lapse in case of the death of the issue of a child who dies before the testator, leaving issue who survives the testator, cannot take place, for the latter is put in place of the devisee or legatee, and succeeds to the devise or bequest, so that it becomes unnecessary to insert

in such a clause the usual provision found in it, that if the party dying leaves issue, such issue shall take the estate and share of the deceased.

Unless, then, the gift be to two tenants in common, with a clause of survivorship, which, for the forcible reasons given in *Hilliard v. Kearney,* confines the limitation over to a death occurring in the testator's lifetime; or there is an intent apparent in the will or inferable from its other provisions, to restrict the contingent event to the testator's life, we see no sufficient reasons for qualifying the words "dying without issue," by adding what he does not say, that the *"dying"* must be before he dies himself. As suggested by the late *Chief Justice,* in *Hilliard v. Kearney,* he may provide for the event of the death of a devisee or legatee in his lifetime, by making a new will or a codicil to the other, and if he fails to do so, the statute comes in and makes such provision, when the devisee is his child and leaves issue living at the testator's death who succeeds to the parent's place in the will. In such case, no lapse is possible, and the reason for a construction adopted to prevent its consequences fails.

The true principle which runs through all the cases, is to ascertain the intent of the testator, gathered from the will itself and all its provisions, and to give the instrument an interpretation which will effectuate that intent.

The testator, in the will before us, limits the property to one (318) son upon the death of the other without issue, and with no other qualifying restrictions. How then, by construction, can such a restriction as requires the death to occur before the death of the testator be introduced into the clause and it be made to speak what the testator has not said? Does not the testator intend that Andrew shall have all if Richmond dies, and whenever he dies with no child to succeed him? Why should his estate become absolute if he dies just before, and be defeasible if he dies just after the testator's death, and in each case childless?

Annex the explanatory words of the statute (and the will construed in *Hilliard v. Kearney* was made in 1775, long before the enactment), so that it will read: Should Richmond die without a bodily heir, "not having such heir living at the time of his death"; can there be any serious doubt as to the meaning of the clause, and especially when the act declares that the ulterior limitation shall then take effect? If it ties up the contingency to the death, as an independent fact, so as to avoid too remote a limitation under former rulings, why should it not equally exclude an interpretation which refers to an earlier period for the vesting?

Without disturbing the ruling in *Hilliard v. Kearney,* the cogent reasons for which are presented in the able opinion as applicable to a

tenancy in common, we are of opinion that the limitation over is valid, and the judgment below must be reversed for error, and a new trial be granted.

Cited: Williams v. Lewis, 100 N. C., 145; *Trexler v. Holler,* 107 N. C., 622; *Kornegay v. Morris,* 122 N. C., 202; *S. c.,* 124 N. C., 425; *Sain v. Baker,* 128 N. C., 258; *Sullivan v. Jones,* 129 N. C., 445; *Whitfield v. Garris,* 134 N. C., 29; *Harrell v. Hagan,* 147 N. C., 113; *Dawson v. Ennett,* 151 N. C., 545; *Perrett v. Bird,* 152 N. C., 222; *Smith v. Lumber Co.,* 155 N. C., 391; *Vinson v. Wise,* 159 N. C., 656; *Rees v. Williams,* 164 N. C., 131; *S. c.,* 165 N. C., 207; *Burden v. Lipsitz,* 166 N. C., 526; *Hobgood v. Hobgood,* 169 N. C., 490; *Springs v. Hopkins,* 171 N. C., 491; *Bowden v. Lynch,* 173 N. C., 207; *Kirkman v. Smith,* 175 N. C., 582; *Patterson v. McCormick,* 177 N. C., 455; *Willis v. Trust Co.,* 183 N. C., 271; *Ziegler v. Love,* 185 N. C., 42; *Pratt v. Mills,* 186 N. C., 398; *Dupree v. Daughtridge,* 188 N. C., 195; *Alexander v. Fleming,* 190 N. C., 817.

(319)

BENJAMIN F. BRADDY AND WIFE v. R. T. HODGES.

Arrest—Resistance to Officer—Force in Defense of Property—Trespass—False Imprisonment.

1. The rule that one may rightfully use such force as may be necessary for the protection of his person or property is subject to the modification that he shall not, except in extreme cases, do great bodily harm or endanger human life.
2. This general rule is much more restricted when the force is attempted to be employed in the protection of property which is sought to be seized by an officer armed with legal process.
3. Where an officer having in his hand a requisition duly issued commanding him to seize certain property was violently assaulted with a deadly weapon by a person not a party to the action who was in possession and claimed the property in controversy, took the property described in the requisition, arrested the assailant, carried her forthwith to the jail and confined her therein until he could procure a warrant for her arrest, using no more force than was necessary therefor: *Held,* that he had not exceeded his authority.

THIS is a civil action, which was tried before *Avery, J.,* at February Term, 1887, of BEAUFORT Superior Court.

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

The plaintiffs, Benjamin F. Braddy and wife Wealthy, bring their action against the defendant Robert F. Hodges, sheriff of Beaufort County, to recover compensation in damages for an alleged unlawful arrest and imprisonment of the *feme* plaintiff by one M. J. Fowler, his deputy, in which the defendant after the arrest personally participated. The defendant denies the cause of action set out in the complaint and avers that the arrest and temporary detention were in the exercise of lawful authority.

Upon issues elminated from the pleadings and submitted to the jury, they find in substance that both the arrest by the deputy and the imprisonment in the county jail were lawful, and that the deputy (320) did not purposely or maliciously use more force than was necessary in making the arrest or detaining the said Wealthy in custody. Judgment being rendered upon the verdict the plaintiffs appealed.

Upon the trial it appeared that one Mary Singleton, in a civil action instituted against John H. Archbell on 5 April, 1886, and supported by her affidavit in the required form, sued out a requisition directed to the sheriff and commanding him to take from said Archbell a certain hog and deliver it to the plaintiff, Mary Singleton, and in the execution of this order, placed in the hands of the deputy, the arrest was made.

It is only necessary to state such of the testimony as relates to the arrest and detention, and that of the *feme* plaintiff was to this effect: "Fowler came to the door, pulled out some papers, pushed them at Archbell and asked where was that hog." Witness told him it was not Archbell's but hers; he then went to the pen and witness followed with the pistol; he ordered a darkey to take the hog; he pushed witness and witness pushed him; he ordered Gordon to take hold of witness who held up the pistol in her left hand to shoot the hog, then being lifted up; he ordered Gordon to take hold of witness, but did not get the pistol away until Fowler helped him; Fowler took witness by one hand and pulled witness with the other to the gate; he took witness to jail; Hodges came and witness was carried to jail and he kept her locked up in a room up stairs for about an hour, when she was removed to the courthouse; her arm was bruised and she rendered nervous, from which she has not yet recovered.

The deputy Fowler testified, that having the warrant he called at the house and told Archbell he had come after the hog, who answered "you can't get him." Thereupon Mrs. Braddy came out and swore that witness should not have him. She was very angry. (321) Witness went to pen, and she drew a pistol and presented it at witness cocked, loaded and capped. She presented it at him, but did not

advance. Witness grabbed her and wrenched the pistol out of her hand, and told her she would have to go before Justice Wilkinson. She pulled back and cursed violently. Then he brought her to jail and delivered her to the sheriff, who locked her up in the debtor's room for about a half hour. He acted in good faith, employing no more force than was necessary in overcoming her resistance, in doing which and in wresting the weapon from her hand, which had to be quickly done, he may have sprained her wrist. That morning Archbell had claimed the hog, and was advised by witness to give him up.

W. B. Rodman, Jr., for plaintiff.
Geo. H. Brown, Jr., and J. H. Small for defendant.

SMITH, C. J., after stating the case: We cite from the evidence given by the parties as to what occurred and omit that of others, which is mainly corroborative, so that it may be seen how, upon its different aspects, the jury were instructed, and the pertinency and correctness of the law given in the charge.

After the seizure of the hog under the warrant, the exhibits accompanying the proceeding show an affidavit made by Archbell disclaiming property in the hog, and another made by the *feme* plaintiff asserting her right thereto, upon the submission of which, at her instance, she was substituted and made defendant in place of said Archbell, and the action thereafter proceeded against her. This is adverted to for the purpose of showing a method of redress open to her, if wrong, without a resort to a violent resistance to the officer, carried so far as to put his life in
(322) apparent peril. We do not find it necessary to inquire whether, in a precept directing the seizure of a specific article of property, the title to which is in dispute, and which is taken into custody under judicial mandate for its preservation pending litigation, and for surrender to the party who shall thereafter be shown to have the title, can be lawfully resisted by one upon his assertion of ownership, and who may turn out to be the owner, since, if this right did exist, it has limits which have been greatly exceeded by the *feme* plaintiff's conduct, and she has made herself an aggressor.

Assuming that the hog belonged to the *feme* plaintiff, and that she, and not Archbell, were in legal possession at the time, it was under a claim of property, asserted under the law by the said Mary Singleton, and the deputy was doing what the writ commanded him to do in making the seizure, when the *feme* plaintiff encountered him at the pen, and, as the deputy testifies, in great anger swore that he should not get the hog, and at the same time presented a pistol, cocked, loaded and capped, at him, thus endangering his life; and then it was that her person was

seized, she resisting, and carried to jail, and a warrant of arrest obtained. The officer could not do less, under the circumstances, nor can he be held civilly liable for doing thus?

It is not an attempt to take the property from her person, but in her presence and in obedience to the process in his hands, and there are reasonable limits within which force may be exercised in defense of property, even when one with no authority attempts to get possession, and they must be narrower in case of an officer armed with legal process, and certainly life cannot be taken or put in great peril in resisting the seizure.

The law is very clearly stated by *Gaston, J.*, in these words: "When it is said that a man may rightfully use as much force as is necessary for the protection of his person or property, it should be recollected that this rule is subject to this most important modification, that (323) he shall not, except in extreme cases, *endanger human life or do great bodily harm.*"

And again: "So it is clear that if one man deliberately kills another to prevent a mere trespass on his property—whether that trespass could or could not be otherwise prevented—he is guilty of murder." *S. v. Morgan,* 3 Ired., 186-193.

Our statute regulates proceedings to be had upon an arrest of one engaged in committing a breach of the peace, and this seems to have been strictly preserved, and without unreasonable delay. The Code, sec. 1130.

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

Affirmed.

Cited: S. v. Dula, 100 N. C., 428; *S. v. McMahon,* 103 N. C., 382; *S. v. Black,* 109 N. C., 859.

GEORGE M. ROSE, RECEIVER, v. W. B. BAKER ET AL.

Appeal—Motion to Dismiss—Proceedings Supplemental to Execution.

1. A motion to dismiss an appeal because the appellant has not complied with the requirements of the statute and the Rules of Court in respect to the manner of perfecting an appeal, must be made at or before entering upon the hearing of the cause.
2. If the judgment from which the appeal is taken be in favor of a codefendant of the appellant, the latter should serve the required notices and case upon such codefendant, as he thereby becomes the adverse party.

3. The legal effect of granting a restraining order, or the appointment of a receiver in proceedings supplemental to execution, is to vest the receiver with the property and effects of the judgment debtor from the time of the filing of the orders, and disables the debtors from transferring the title thereto.

(324) THIS is a civil action which was tried before *Boykin, J.*, at May Term, 1886, of CUMBERLAND Superior Court.

In the course of proceedings supplementary to execution, the court appointed a receiver and made an order forbidding the defendants' judgment debtors, respectively, to make any transfer or other disposition of their property not exempt from execution, as homestead or personal property exemption, and all interference therewith as allowed by the statute (The Code, sec. 494). Nevertheless, pending this action of the receiver to subject certain assets of the defendants to the satisfaction of the judgment, the *feme* defendant, who was a "freeholder," and her husband, who is also a defendant, undertook and purported, in disregard of this order, to surrender to the defendant Buie certain notes due from him to the *feme* defendant and to discharge a mortgage of land securing these notes.

The court gave judgment in favor of the plaintiff, directing a sale of the mortgaged property to satisfy and discharge the notes so secured by it, and directed that, of the proceeds of the sale, the receiver should pay to the *feme* defendant four hundred and forty-five dollars as part and balance of her personal property exemption.

The defendant Buie excepted to and appealed from so much of the judgment as directed such payment to be made to the *feme* defendant, claiming that this part of the fund should be directed to be paid to him, inasmuch as the *feme* defendant had transferred and surrendered the notes to him and discharged the mortgage of the land, as above indicated.

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

MERRIMON, J., after stating the case: The exception cannot be sustained. The defendants undertook, in disregard of the express order of the court, forbidding them to make any transfer of the property (325) or in any way to interfere with it, to discharge the debts and mortgage mentioned, while the plaintiff was seeking to subject the notes to the payment of the judgment of the plaintiff in the proceedings supplementary to the execution. The defendants could not thus discharge the notes and mortgage—their action in this respect was

wholly ineffectual, because the statute (The Code, secs. 494, 495), coupled with the order of the court, had the effect to prevent them from transferring the title to the land and discharging the notes or changing the condition of the same.

It was competent for the court to order a sale of the land to pay the notes, and to apply the fund arising therefrom without regard to what the defendants had so undertaken to do. The very purpose of the statute is to disable the judgment debtor as to his property, and thus prevent him from making a sale, transfer or other disposition thereof. It would be to a great extent nugatory, if it had not such effect. The remedy by attachment for contempt against the defendant for failure to observe the order of the court would, at most, only be partial, and might fail to afford the creditor just protection. Indeed, the statute vests the receiver in this and like cases with the property and effects of the judgment debtor from the time of the service of the restraining order, and if there be no such order, then from the time of the filing and recording of the order for the appointment of the receiver.

The appellant, therefore, did not have any estate or interest in the land, or any interest in the fund arising therefrom, not subject to be applied to the payment of the notes secured by the mortgage; nor, so far as appears from any pleading or other proceeding, was he entitled to have the part of the fund devoted by the judgment to the payment of the balance of the personal property exemption of the *feme* defendant.

It is suggested, in the case stated on appeal, that after the judgment appealed from was entered, and after the appeal was (326) taken, the *feme* defendant "transferred" so much of the judgment as is in her favor to the defendant, but of this mere suggestion we can take no notice, because such assignment is not made to appear by any proper motion or proceeding.

It seems, from the case stated on appeal, that the appellee plaintiff objected and excepted to the judgment in favor of the *feme* defendant, but he did not appeal, and his exception is not, therefore, before us and we cannot consider or take notice of it. It has no proper place in the transcript of the record of this appeal.

The appellant, in effect, appealed only from so much of the judgment as was in favor of his codefendant *feme sole,* but he failed to give her notice of his appeal, nor did he serve his statement of the case on appeal on her as, regularly, he should have done.

As to the judgment complained of, she was the adverse party and entitled to notice. As such notice was not given, she might have moved in apt time to dismiss the appeal as to herself, upon the ground that no notice of it was given. Indeed, she did move to dismiss it after the

argument on the merits had begun, but it was then too late. The rule of practice of this Court (Rule 2, sec. 6), prescribes that "A motion to dismiss an appeal for noncompliance with the requirements of the statute in perfecting an appeal, must be made at or before entering upon the trial of the appeal upon its merits, and such motion will be allowed, unless such compliance be shown in the record, or a waiver thereof appear therein, or such compliance is dispensed with by a writing signed by the appellee or his counsel to that effect."

The statutory provisions to which this rule applies are modified to some extent, but not so as to affect this case, by the statute (Acts 1887, ch. 121).

Affirmed.

Cited: Wilson v. Chichester, 107 N. C., 389.

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(327)

L. SIMON ET AL. v. S. H. MANNING.

Evidence—Res Gestæ.

1. When act is competent evidence, what the actor says while doing it, qualifying or explanatory of it is admissible as part of the *res gestæ;* but where the declarations are merely narrative of a past occurrence they are not admissible.
2. The admissions made by one in possession of property, in respect to his ownership thereof, to an officer who is about to seize it under execution are competent against him upon the trial of an issue involving the title.
3. But such admissions cannot be proved by the unsworn declarations of the person to whom they were made.

THIS is a civil action, which was tried before *Connor, J.,* at January Term, 1887, of NEW HANOVER Superior Court.

The defendant, sheriff of New Hanover County, having in his hands an execution against L. G. Cherry, seized and sold a stock of goods as his property, for which the plaintiffs claiming title bring this action to recover damages. The only question made at the trial was as to the ownership of the goods.

The said L. G. Cherry, examined as a witness for the plaintiffs, testified among other things, that one C. H. Strode, then a deputy of the defendant and since deceased, came to the store to make a levy when he was informed by the witness, who forbade his levying, that the goods

were not his, but belonged to his wife, one of the plaintiffs under whom the others claim; that the deputy left and consulted with the attorney of the plaintiffs in the execution, by whom he was directed to return and seize the goods, which he did, closing up the store in which they were. This evidence was introduced without objection from the defendant.

To meet this testimony the defendant, among other witnesses, introduced one W. H. Shaw, the deputy sheriff who had charge of the office in the defendant's absence, and who had placed the execu- (328) tion in the hands of Strode and instructed him to levy upon the stock then in possession of L. G. Cherry. The witness having in answer to an inquiry, if he had delivered the writ to the other deputy to be executed, said that he did. Defendant's counsel proposed to ask this further question: "What did Strode state to you touching the execution when he returned it?" To this question the plaintiff objected, because Strode was dead, and the defendant proposed to introduce a statement of his, in evidence, made in the absence of the plaintiffs. His Honor asked the object of this question, and the defendant's counsel replied, that he proposed to show by the witness that Strode in making his return to the execution came direct from Cherry to witness and said that L. G. Cherry did not state that the property was his wife's, the said Mrs. Mary P. Cherry, but asked that his exemption should be laid off, thus exercising a right of ownership over, and claiming the property to be his own. And the defendant claimed that this return or declaration of Strode's was admissible upon four grounds:

1. Because the plaintiffs had opened the door to its admission by introducing the transaction and statement made by and between L. G. Cherry and the said Strode, above stated, in evidence and that this was but a continuance of the same transaction.

2. To contradict the said statements of L. G. Cherry so made as above stated.

3. To corroborate the witness, W. H. Shaw, then on the stand, in his statement as to what he did in consequence of the return made to him by Strode.

4. That they were admissible as a part of the *"res gestæ."*

His Honor then asked the witness how far it was from Cherry's store to where witness was, and upon witness replying that it was about two blocks and a half, his Honor said that the declarations were not a part of the *"res gestæ,"* and ruled out the answer to the said question. To which the defendant excepted. The witness then stated that (329) in consequence of what Strode said to him he summoned three appraisers to lay off Cherry's personal property exemption; but the said exemption was never laid off, because L. G. Cherry approached him

about two hours after he had summoned the appraisers and told the witness that he had concluded not to claim his exemption.

The jury returned a verdict for the plaintiffs, and, from the judgment rendered thereon the defendant appealed.

Jno. D. Bellamy for plaintiffs.
Thos. W. Strange for defendant.

SMITH, C. J., after stating the case: The offer was to prove that L. G. Cherry did not, as he himself testified, deny that he owned the goods in his charge and assert that they belonged to his wife, but, on the contrary, demanded that his exemptions should be laid off, thus exercising a right of ownership of them. The testimony itself was perfectly competent in contradiction of the statement of L. G. Cherry, for it was but a different version of what passed between him and the officer when the latter came to make levy under the writ. Had any one else been present and heard the conversation that passed between the parties, he would have been permitted to testify to it. But the proposal was to prove it by the unsworn declaration of the deputy, made to the other deputy, after his return from the store. This was clearly inadmissible, since testimony comes to the jury under the sanction of an oath, and this assurance of the verity of the testimony is wanting, and the law imperatively demands it when witnesses give their evidence. The cases cited in the brief of defendant's counsel are mostly to the effect that when part of a conversation is given in, the party against whom it operates has a right to have all of it heard.

Its admissibility is defended upon the further ground that the
(330) words spoken accompany the official act of levying the execution and form part of the *res gestæ*, and for this is cited the case of *Grandy v. McPherson*, 7 Jones, 347.

It is undoubtedly a rule, that what one says while doing an act, receivable in evidence, qualifying and explaining the act, becomes a part of it and may be shown, and such is the principle of this decision, and the ruling goes no further. The point in the case was the alleged levy upon a store, and a witness swore that he saw the defendant go to the cabin where the store was, about that time, and that he came thence to witness in the field and engaged him to take the custody of the store. This testimony was given after the endorsed levy upon the writ had been shown. The court declared the exception to the testimony untenable, and says: "The visit to the cabin and the contract with the witness for the future care of the store 'were *facts* fit and proper to be proved.'" "The latter," continues the opinion, "could only be proved by the words used between the parties, and the former would be shorn of much of its significance and weight, *unless accompanied by the declarations explanatory of its*

object. The whole conversation, therefore, between defendant and witness McCoy was competent as part of the *res gestæ.* The declarations received were an essential part of the proceeding in making the levy under the writ, and were admissible for the same reason that the act itself was, and to give it meaning and character."

The rule is stated with great clearness by Greenleaf in the first volume of his excellent treatise on the law of evidence, section 108, thus: "His declarations made *at the time of the transaction and expressive of its character, motive, or object, are regarded as verbal acts indicating a present purpose and intention,* and are therefore admitted in proof like any other material facts."

Again, in section 10, he further observes, "that where declara- (331) tions offered in evidence are merely *narrative* of a past occurrence (the italics are the author's) they cannot be received as proof of such occurrence."

So, when the declarations of one in possession of land were offered to show the extent of his title under a deed, and that a fee passed were refused, the Court upon a review of the exception to the exclusion, said: "The acts and declarations accompanying possession in disparagement of the declarant's title, or otherwise qualifying his possession, are received as part of the *res gestæ,*" and the citation from Greenleaf, as to the declarations that are subsequent and narrative merely, are reiterated in *Roberts v. Roberts,* 82 N. C., 29.

Brought to the test of the rule thus established, the *declaration* of the deceased deputy, as to what occurred at the store and what was said by the witness Cherry, were properly rejected, inasmuch as it was but a statement or narrative of what had passed, and cannot be received as evidence of the fact, except it reaches the jury through *sworn* witnesses. Undoubtedly the deceased could have testified upon the matter because it had been given in evidence by the plaintiff, but not what the deceased said it was, no more since his death than if he were living. The words are not associated with the *act of the officer* and explanatory of it, for the levy is not disputed and as such needs no explanation.

There is no error, and the judgment is

Affirmed.

Cited: Bumgardner v. R. R., 132 N. C., 442; *Hamrick v. Tel. Co.,* 140 N. C., 153; *S. v. Peebles,* 170 N. C., 764.

(332)

PRESTON CUMMING & E. J. LILLY, PARTNERS, ETC., v. D. D. BARBER.

Contract—Evidence—Issues—Insurance—Assignment.

1. Where parties reduce their entire agreement to writing, whether under seal or not, parol evidence will not be admitted to alter it unless for fraud or mistake; but if the whole contract is not put in writing, or if the instrument is ambiguous in meaning, parol evidence is admissible, not to contradict, but to make plain the agreement of the parties.
2. A declaration of a party to such agreement, expressive of his understanding of it, is competent against his assignee, though made prior to the assignment.
3. It appearing that the written contract is uncertain in its terms, it is proper to submit to the jury an issue as to the agreement between the parties.
4. The submission of irrelevant or immaterial issues to the jury is not, will not, warrant a new trial, where it cannot be seen that the appellant was prejudiced thereby.
5. Where, in a lease of a mill and fixtures, it was stipulated that the lessee should insure the property for a fixed sum in the name and for the benefit of the lessor, and that upon the destruction of the property by fire the lessee had the option to rebuild—in which event be entitled to the insurance money—or pay a certain sum as the value of the property, and the property was destroyed, and the lessee offered to rebuild if the insurance money was paid to him, but the lessor refused to do so until the rebuilding was complete: *Held*, that the lessee was discharged from liability on his contract.

CIVIL ACTION, tried before *Clark, J.*, at Fall Term, 1886, of the Superior Court of NEW HANOVER.

The plaintiffs claimed as assignees of W. F. Monroe, and alleged that on 27 December, 1882, the said Monroe and the defendant Barber entered into a written contract as follows:

"That I, the said W. F. Monroe, of the first part, for and in consideration of the sum of $1,000 to me in hand paid by the said D. D.
(333) Barber, of the second part, the receipt of which is hereby acknowledged, do rent or lease unto the said Barber my saw mill, grist mill and shingle machine . . . for a term of twelve months. . . . Said Barber is to have full right to use this property to saw lumber, etc. . . . but must keep all in good order, must put up the grist mill, etc., . . . and furnish a new 8-inch 4-ply belt (and other things, naming them), at the expiration of the lease. Said Barber is to have mill and fixtures insured in Monroe's favor for at least $1,500 in some good and reliable company, and the said Barber is to pay for this insurance, and give the policy to Monroe or his agent. (Interlined as

follows: Mill is valued at $5,000; should a total loss occur, Barber makes good the difference or replaces mill as good.)

"We, the said Monroe and Barber, do agree to each select one man, and those to select the third, to examine this property and to ascertain its true present condition; and the said Barber does hereby covenant and agree to return this property and machinery in as good repair and condition as he receives it, or make good the deficiency in money of legal tender. The said D. D. Barber is to bear all losses by fire or other accidents which may occur, and the said W. F. Monroe takes no risk whatever, nor in any event is he to sustain any losses. . . . Value of mill $5,000."

Signed by the parties.

It was alleged, in substance, that it was agreed that the true value of the mill property was $5,000, and in case of fire Barber should either replace the property in as good condition as before, or else pay the difference between the sum insured ($1,500) and the agreed value ($5,000).

There was a second cause of action, not material to be stated, as there is no exception relating thereto.

The defendant admitted that there was a written contract on 27 December, 1882, but denied that it was as set out by the plaintiff, and says, in substance, that the interlineation has been made since the contract was entered into, and without the knowledge, consent or (334) ratification of the defendant; that the property was not worth more than $4,000, and that its real value was to be ascertained by parties to be selected; that he was to insure it in the sum of $1,500, and turn the policy over to Monroe, and that the property was to be returned to Monroe in as good condition as when received, or that he was to make good the difference, and in the event of destruction by fire, he was to replace it in as good condition as before, using the insurance money for that purpose, or else pay the difference between the value of the property and the insurance, but denied that the stipulated value was $5,000, or in the event of the loss by fire it was to be rebuilt at $5,000, or that it was ever intended by the parties, or either of them, to put an agreed value upon the property, altogether fictitious and far above its real value.

That the defendant did insure the property in the sum of $1,500, and delivered the policy to Monroe; that after the fire the said Monroe assigned the policy to D. C. Baum & Co., of Savannah, who have collected it; that no part of it has been paid to him; that Monroe has left the State, and is insolvent, and that he has no remedy against him; that he has always been ready and willing to have the property valued by

the arbitrators, and on delivery to him of the insurance money to replace it in as good condition as it was before, and he repeatedly offered so to do.

There were other matters presented by the answer and the replication, not material to the questions involved in the appeal, which are substantially:

1. Whether by the contract the value of the property was fixed by the parties at $5,000, as insisted by the plaintiffs, or whether it was to be ascertained by the parties to be selected, as insisted by the defendant?

2. Whether (the property having been destroyed by fire) the defendant elected to replace it, and if so, whether he was entitled to the
(335) insurance money to be used in replacing it as he insists, or whether he was to have the insurance money only after the property was replaced, as insisted by the plaintiffs.

3. If the defendant was entitled to have the insurance money to be used in replacing the property, did the plaintiffs or their assignor put it out of the power of the defendant to get it to be so used, by causing delay in the collection of it and the application of it to the use of the assignor after it was collected?

There is much presented in the record which need not be considered, and only so much of the evidence as relates to the exceptions taken by the plaintiff is referred to.

Upon the verdict the court gave judgment on the first cause of action against the plaintiff, from which he appealed.

D. L. Russell for plaintiffs.
Geo. V. Strong and Thos. Strange for defendant.

DAVIS, J., after stating the case: The plaintiff testified in his own behalf, his evidence tending to show that the contract was as alleged by him.

The defendant was then examined as a witness, the tendency of his evidence being to show that the contract was as alleged by him.

1. In the course of the examination of this witness it was proposed to show by him "that as a part of the agreement then made between the parties, but not reduced to writing, it was agreed that if Barber should take the option to replace the mill as agreed on, he was to have the insurance money for the purpose of doing so.

This evidence was objected to by the plaintiff, but received by the court, and constitutes the first exception.

It is a well established general rule, that if the parties reduce their entire contract or agreement to writing, whether under seal or not,
(336) the court will not hear parol evidence to vary or change it

unless for fraud, mistake or the like; but if it appear that the entire agreement was not reduced to writing, or if the writing itself leaves it doubtful or uncertain as to what the agreement was, parol evidence is competent, not to contradict, but to show and make certain what was the real agreement of the parties, and, in such a case, what was meant is for the jury under proper instructions from the court.

In the case before us, it is conceded that if the defendant should elect to replace the property he was to have the insurance money—the only question is as to when? Whether before, to be used in replacing it, as the defendant says, or after it should be replaced, as the plaintiff says, and upon this question the written instrument is silent. There is nothing said as to what disposition is to be made of the insurance money if the defendant shall elect to replace the mill.

We think there was no error in admitting the testimony. The ruling of the Court is sustained alike by "the reason of the thing," and by abundant authority. *Johnston v. McRary,* 5 Jones, 369; *Twiedy v. Sanderson,* 9 Ired., 5; *Manning v. Jones,* Busbee, 368; *Sherrill v. Hagan,* 92 N. C., 345, and the cases cited therein.

2. The defendant offered the deposition of R. D. Paddison to show that contemporaneously with the written agreement, and as a part of it not reduced to writing, the defendant and Monroe agreed that if the former should choose to replace the mill, he was to have the use of the insurance money to do it with. This was admitted, under objection, by plaintiff, and is the second exception.

This objection was properly overruled for the same reason as the first.

3. The defendant then offered in evidence the following letter written by Monroe, as assignor of the plaintiffs, to the defendant:

"GLENNAN, GA., 17 May, 1883. (337)

DEAR SIR: Yours received; facts noted.

I am truly sorry to hear of the burning of the mill, and would advise you to rebuild at once. I would put in a new engine and fit it up all right. You can use the insurance money of course. I have the policies, and will send them in a few days. Yours truly,

W. T. MONROE."

It appears from the record that this letter was written before the assignment by Monroe to the plaintiffs, which was in December, 1883, and it was clearly competent as tending to show that Monroe understood the agreement to be that the defendant, if he should rebuild, was to have the insurance money.

5. For the same reason Monroe's letters of 8 August, 1883, and 14 September, 1883, in regard to the delay in getting the insurance money, were

admissible. These letters were also admissible as tending to show the cause of delay in collecting the insurance money.

6. The plaintiffs excepted to the sixth issue (by mistake number 5 in the case on appeal). That issue is: "Was it agreed between Monroe and the defendant, before Monroe's assignment to the plaintiffs, that defendant should have the use of the insurance money to replace the property with if he should take the option to do so?"

The ground of exception, as stated in the case, is "because it presented no question of fact, but one of law only, which the Court must decide, the entire contract, as alleged by either or both parties, being in writing, and because it sought to set up a contract subsequent to the contract declared on in modification of the latter, and amounting to a release of it, the plaintiff not having any notice of such defense, and such subsequent contract not having been set up or referred to in the answer,
(338) and because, generally, in the pleading and evidence the issue should not be submitted."

This exception is founded upon the triple misapprehension—first, in supposing that the entire contract, as understood by both parties (or either of them, as to that) was in writing; second, that the written agreement itself determined, or could determine, whether the defendant would elect, in the contingency contemplated, to replace the property; and third, that it modified or released the original contract. It was of the very essence of the controversy, and it is impossible to see how the plaintiffs could reasonably be misled by it.

6. The case stated that "on the argument of the admissibility of the letters and other evidence to show past agreement, defendant's counsel contended that if the agreement between Monroe and Barber had been that if the mill should be replaced, the assured should also keep the insurance money, it would have been a wager policy, and opposed to good morals and void; whereupon plaintiff's counsel admitted that it was not the intention of the parties, Monroe and Barber, that if Barber saw fit to replace the mill, and did so, that Monroe should keep the insurance money, but in that event their intention was that whenever Barber should replace the mill Monroe was to turn over to him the insurance money, and therefore the sixth (seventh) issue was submitted as follows:

"Was the agreement that the defendant should have the insurance money after he should replace the mill and property, and did the said Monroe receive the money and use it, and put it out of his power to comply with his agreement, and did he mislead the defendant so as to delay the execution of his option?"

The defendant had alleged, by way of defense and counterclaim for damages, among other things, that by reason of neglect and misrepre-

sentations on the part of Monroe, there was a controversy with the insurance company and delay, whereby he was deprived of the use of the insurance money in refitting the property for use, and that (339) he thereby lost the benefit of his lease, by which he was damaged. This was denied by the replication.

As bearing upon the seventh issue there was evidence tending to show that after the fire Monroe sent the insurance policy to one of the plaintiffs with "instructions to hold it until Barber replaced the burned mill and then to give it to him." And Barber "insisted that he was entitled to the policy or the proceeds of it before he began to rebuild," and that he was ready and always had been to rebuild as soon as the money was collected and paid to him. There was also evidence tending to show that Monroe had assigned the policy to Bacon & Co., of Savannah, Georgia.

Ten issues were submitted to the jury, involving questions controverted by the parties.

In response to two of these, the second and third, the jury had found as facts that the defendant offered "to rebuild the mill and replace the property in as good condition as he had received it if Monroe, the plaintiff, would allow him the $1,500 insurance money," and that they refused or placed it out of their power to do so, and in respect to the sixth issue, already cited, they responded "yes."

The responses to these issues were sufficient to determine the controversy in favor of the defendant, but it is insisted by the plaintiff that the seventh issue was improperly submitted because inconsistent with and contradictory of the sixth issue.

The first part of the issue "was the agreement that the defendant should have the insurance money after he should replace the mill and property," is not raised by the complaint, answer and replication, but from the statement of the case seems to have been framed to meet a phase presented upon the argument by the counsel for the plaintiffs.

The remaining part of it is fairly raised by the allegations and denials, and is substantially met by the third issue, in reponse to which the jury found that the plaintiffs refused or placed it out of their (340) power to allow the defendant the use of the insurance money to replace the mill. So no part of the issue was needed to determine the controversy. Was it in any way prejudicial to the plaintiff?

The first part of it, as responded to by the jury, seems but an affirmation of the admission of plaintiffs, made by counsel on the trial, and the second part of it a declaration, that taking the agreement as so admitted, Monroe had received the money, used it, and put it out of his power to comply with the agreement, and we are unable to see how the apparent

conflict between the sixth and seventh issues can prejudice the plaintiff. There is no view in which the discrepancy in the issues and the finding of the jury can affect the result.

This Court has several times held that the submissions of unnecessary or immaterial issues is not assignable as error, where it cannot be seen how the appellant is prejudiced thereby. *Perry v. Jackson,* 88 N. C., 103; *McDonald v. Carson,* 94 N. C., 497; *Cuthbertson v. The Insurance Company,* 96 N. C., 480.

Upon a review of his Honor's rulings, and the errors assigned in the record, we can see no error of which the plaintiffs can complain.

Affirmed.

Cited: Gatling v. Boone, 101 N. C., 66; *Mace v. Life Asso., ibid.,* 132; *Moffitt v. Maness,* 102 N. C., 461, 2; *Nissen v. Mining Co.,* 104 N. C., 310; *Vestal v. Wicker,* 108 N. C., 23; *White v. McMillan,* 114 N. C., 352; *Colgate v. Latta,* 115 N. C., 134; *Simmons v. Allison,* 118 N. C., 777, 8; *Doubleday v. Ice Co.,* 122 N. C., 677; *Log Co. v. Coffin Co.,* 130 N. C., 436; *Wright v. Cotten,* 140 N. C., 4; *Evans v. Freeman,* 142 N. C., 65; *Ivey v. Cotton Mills,* 143 N. C., 194; *Adams v. Joyner,* 147 N. C., 77; *Walker v. Walker,* 151 N. C., 167; *Audit Co. v. Taylor,* 152 N. C., 274; *Henderson v. Forrest; Forrest v. Haygood,* 184 N. C., 234; *Hite v. Aydlett,* 192 N. C., 170.

(341)

A. M. RIGSBEE v. THE BOARD OF COMMISSIONERS OF THE TOWN OF DURHAM.

Elections—Voters—Evidence—Jurisdiction—Constitution—Statute—Canvassing Boards.

1. While the General Assembly may not have the authority to authorize a municipal corporation to impose a tax upon *a majority of the votes cast* at an election, held for the purpose of ascertaining the will of the people, yet, if in fact *a majority of the qualified voters,* as provided by the Constitution, Art. VII, sec. 7, do vote in favor of the tax, its collection will not be enjoined.

2. It is incumbent upon those who are charged with the duty of holding and ascertaining the results of an election, where a majority of the qualified votes is necessary to authorize the imposition of a tax, to scrutinize the registration books and eliminate from them the names of all persons who do not possess the requisite qualifications.

3. In the exercise of this duty they may act upon their own knowledge, and they may administer oaths and examine witnesses.

4. The result of the election thus declared is prima facie evidence of its correctness, and the burden is upon him who asserts the contrary to prove it.

5. In an action to declare an election void, and restrain the imposition of a tax thereunder, upon the ground of fatal irregularities or other defects, the complaint should set forth specifically the facts which it is insisted avoided the election—a general allegation that a majority of the qualified voters did not vote for the proposition is too vague.

6. In an action to declare an election void upon the ground of irregularities, the courts have jurisdiction, and it is their duty to ascertain and declare the true result; and if it shall be thus ascertained that a majority of the qualified voters cast their ballots for the proposition submitted, as a general rule the result will be enforced, though there appear to be irregularities in the manner of conducting the election and canvass.

7. The registration books are prima facie evidence of the number of qualified voters, but without other support it is not sufficient to overcome the evidence of the legal declaration of the persons authorized to hold the election, that a different number was the true one.

THIS is a civil action, which was tried before *Merrimon, J.*, at (342) January Term, 1888, of DURHAM Superior Court.

The plaintiff, a taxpayer of the town of Durham, brought this action in behalf of himself and all other taxpayers, etc., to contest the validity of the election held under and in pursuance of the statute (Acts 1887, ch. 86) which, among other things, provides as follows: "Section 1. The board of commissioners of the town of Durham shall, and they are hereby authorized, to submit to the qualified voters of the said town, under such rules and regulations, and at such time, within six months of the ratification of this act, as the said commissioners may prescribe, whether a tax shall be annually levied therein for the support of the schools in said town provided for by this act." At the election held under the provisions of this act, those who favor the levying of such tax shall vote on written or printed ballots, without device, the words: "For school"; and those who are opposed to levying of such tax, shall vote on written or printed ballots, without device, the words: "Against school," etc. . . .

"Sec. 2. The inspectors of said election shall, on the day following the election, certify the number of votes cast and counted for and against 'school' to the commissioners of said town, who shall proceed to declare at once the result of the election, 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.

In the complaint, among other things, it is alleged:

"3. That by section 2 of said act, it is provided that if a majority of the votes cast be in favor of the tax therein provided for, 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, and plaintiff is advised and believes, and so alleges, that said act is void and unconstitutional on its face, because it provides that a municipal
(343) corporation shall levy a tax, not for the necessary expenses thereof, by a vote of a majority of those voting, and not by a majority of the qualified voters therein, as provided by Art. VII, sec. 7, of the Constitution of North Carolina.

"4. Notwithstanding it appeared upon the face of the said act that the same was void and unconstitutional, the commissioners of the town of Durham ordered an election to be held in pursuance of its terms, at which election, as plaintiff is informed and believes, *a majority of the qualified voters of the said town of Durham did not vote* in favor of said tax. Notwithstanding a majority of the qualified voters of the town of Durham did not vote in favor of levying said tax, and establishing the graded school provided for in said act, the defendants, the commissioners of the town of Durham, acting as board of commissioners, by virtue of powers contained in said act, proceeded to appoint a committee, who, after refusing to hear any evidence to the contrary, and also refusing the plaintiff, and others in like case with him, who were present with counsel and demanded it, any opportunity to be heard, and without having any evidence from any source, reported that one hundred and eighty voters, whose names appeared upon the registration books, were not qualified voters of the town of Durham, and that the vote cast in favor of said tax and school was a majority of the qualified voters of the town of Durham, whereupon the said commissioners proceeded to declare, against the protest of the plaintiff, that the said act had been ratified by a majority of the votes cast, and also by a majority of the qualified voters of the town of Durham, whereas the plaintiff alleges that the registration books showed that there were on the day of said election nine hundred and eighty-three registrations in the town of Durham, and the plaintiff offered to prove to the board, before the result had been declared, that said act had not been ratified by a majority of the qualified voters; but the said board refused to allow the
(344) plaintiff opportunity to do so, and refused to allow him to see a list of the names of the persons whom the committee declared were not qualified voters of the town of Durham; and plaintiff now alleges, upon information and belief, that the said act was not ratified by a majority of the qualified voters of the town of Durham, because the registration books show that there were nine hundred and eighty-three registered in the town of Durham on the day of said election, of whom four hundred and ten voted for the ratification of said act, which is not a majority of said qualified voters.

"6. That the plaintiff is advised and believes that the said board had no authority to declare that the said act had been ratified by a majority of the qualified voters, for if the act be not entirely void, it only provides that the commissioners shall declare that it was ratified by a majority of those voting."

The defendants in their answer denied that the statute in question is void; admitted that an election was held in pursuance of the same, and alleged that such election was conducted and the result thereof ascertained and reported fairly and regularly; and that the defendants, the commissioners of the town of Durham, duly reported that a majority of the votes cast at that election, and a majority of the qualified voters of that town voted at it and voted "For School"; and they denied the irregularities alleged in the complaint, and that the commissioners named refused to allow the plaintiff or any other person to be present and see the result of the election ascertained, etc.

The report of the commissioners states, in substance, that at the election named, 410 votes were cast "For School," and 151 votes "Against School," and that there were 800 qualified voters in the town of Durham on the day of the election.

The following is a copy of so much of the case settled on (345) appeal as need be set forth here:

"When the case was called for trial the plaintiff tendered the following as the only issue necessary to be submitted to the jury, to wit: Was 410 a majority of the qualified voters of the town of Durham on 4 April, 1887?

"While the plaintiff Riggsbee was being examined as a witness in his own behalf, the court suggested that his testimony did not seem to be relevant. Whereupon plaintiff's counsel stated that they would prepare other issues, which they did, and tendered the following in addition to the above set forth:

"Did the board of commissioners legally and fairly strike out 180 names from the registration books?

"Did the committee, appointed by the board of commissioners, base their report on any evidence?

"Did the committee refuse a hearing to the plaintiff?

"Did the board base their action on anything except the report of the committee?

"Was the said report accompanied by any evidence?

"At the close of the testimony for the plaintiff the court stated that, as it appeared from the complaint, the proper authorities of the town of Durham had ascertained that 410 votes was a majority of the qualified voters of the town on 4 April, 1887, and had so declared, pursuant to

the authority vested in them by the act of the General Assembly under which the election was held, this declaration was to be taken as true until the plaintiff should make the contrary appear by testimony, and that the testimony offered by the plaintiff did not tend to prove that any one of the 180 voters whose names the board of commissioners of the town had stricken from the registration books was a qualified voter on the day of election.

"Upon this intimation of the court that the plaintiff had failed to make any case against the defendants he submitted to a nonsuit (346) and appealed to the Supreme Court, but before he took this course the court stated that he might take his choice of a verdict against him or a nonsuit.

"The court being of the opinion that the plaintiff could not recover unless the first issue should be found in his favor, and that there was no evidence in support of the negative of that issue did not deem it necessary to submit the other issue to the jury. The plaintiff excepted."

On the trial "the plaintiff introduced the registration books of the town of Durham, which were admitted to be genuine.

"The plaintiff then introduced W. H. Proctor, who testified that he was the registrar of the town of Durham, during the years 1886 and 1887, and on 4 April, 1887 (the date of the election in question), there were 981 names on the registration book, but that two of these had been registered twice."

Several other witnesses were examined on the trial for the plaintiff, including himself, but their testimony went to show what was said and done by the commissioners and others, while the former were engaged in ascertaining the result of the election; there was no evidence of them that went to prove that any person whose name appeared on the registration books as a qualified voter, who was ascertained and decided by the commissioners not to be such voter, was such in fact.

J. B. Batchelor, Jno. Devereux, Jr., and R. C. Strudwick for plaintiff.
Jno. W. Graham and W. W. Fuller for defendants.

MERRIMON, J., after stating the case: The purpose of the Leglislature in enacting the statute (Acts 1887, ch. 86), to allow the town of Durham to have authority to levy an annual tax, as prescribed, for the support of public schools therein, if a majority of the qualified voters of that (347) town should vote in favor of a proposition to that effect in an election directed to be held, is too apparent to admit of question.

That statute plainly declares the purpose and makes large provision, much in detail, for carrying it into practical effect. It provides that

if a majority of the votes cast at such election shall be in favor of such tax, it shall be levied. It may be conceded for the present purpose that such a vote could not authorize the levy of such tax, but when, under the statute containing this provision, a majority of *all the qualified voters* of the town vote in favor of it, such vote is sufficient to give the authority. When the Legislature declares that a majority of the votes cast at the election shall give the authority, this certainly, in the nature of the matter, includes and implies its willingness and purpose, for the same and like considerations, to give it, if a majority of all the qualified voters of the town shall vote in favor of it. The nature of the statute—its purpose and provisions—all clearly indicate such intent, and we can see nothing in the Constitution or sound public policy that forbids or prevents it. The chief and leading purpose is to give the authority to levy the tax if at least a majority of the votes cast shall be in favor of it, and the Constitution (Art. VII, sec. 7), declares that "a vote of the majority of the qualified voters" of the town shall be necessary to give it. If the statute had omitted, as it might have done, to prescribe the necessary vote, the Constitution would have determined it. This intepretation harmonizes the statute with the Constitution, and gives effect to the legislative intent. *Wood v. Oxford,* 97 N. C., 227.

As the statute was thus operative, the defendants, commissioners, had authority to hold the election, and it was their duty to ascertain, determine, declare and report whether or not a majority of all the qualified voters of the town voted "For School." They did so, and their action was official and authoritative. The presumption, therefore, is that they ascertained and reported the result of the election correctly and truly. *Omnia presumuntur solemniter esse acta.* Their report (348) was evidence, and evidence sufficient to prove *prima facie* what the result of the election was. Hence, the plaintiff having alleged in the complaint that the defendant commissioners made their report that a majority of the qualified voters of the town voted "For School," the burden was on him to prove the contrary.

It is settled, that the qualified voters of the town were only such persons whose names were registered as such, and that the registration books of voters were evidence *prima facie* of who such voters were, and the number of them. *Southerland v. Goldsboro,* 96 N. C., 49; *Duke v. Brown, ibid.,* 127; *McDowell v. The Construction Company, ibid.,* 514; *Smith v. Wilmington,* 98 N. C., 343.

It was the duty of the commissioners, in ascertaining the result of the election, to have reference to such registration books for the purpose of ascertaining the whole number of registered voters, but it was likewise their duty to scrutinize those books and ascertain what number of per-

sons whose names were registered as voters had, for any cause, ceased to be such. *Duke v. Brown, supra.*

How such scrutiny of the registration books shall be made is not prescribed by any statute. In the absence of any prescribed method it must be summary—in some way intelligible. The commissioners in determining that a person, whose name is registered as a voter, had ceased to be such on or before the day of election, should act with care and caution and not upon mere conjecture. Being sworn officers, they might act upon their own knowledge; if witnesses are examined, they should be sworn; they are not confined to hearing only evidence that would be strictly competent on the trial of an issue before a jury, but the evidence should be pertinent, and such as satisfies them of the existence of the fact as they find it to be. While such scrutiny of the registration
(349) books should be just and as thorough as practicable, as to every voter named in them who is ascertained not to be such in fact, less strictness as to the proof of facts is allowable, because of the imperfect summary method of procedure, the expedition that must be observed, and because the ascertainment of the facts is only evidence prima facie of what they really are, including the result of the election. The result of the election, as determined, may be questioned by action, as the plaintiff seeks to do in this case. The commissioners should carefully note and file with the returns and papers of the election a list of the names of such persons as they determine are not qualified voters, so that fair opportunity may be afforded to contest the declared result of the election.

It is alleged in the complaint, in general terms, that a majority of the qualified voters did not vote "For School" at the election in question, and that the defendants commissioners improperly declared that one hundred and eighty voters, whose names appeared on the registration books, were not such, and did not count them in ascertaining the whole number of the qualified voters of the town. The defendants likewise allege in the answer that they, by mistake, counted as voters fifteen persons whose names appeared on the registration books, who, as it now appears, were not such. These allegations, in a case like this, are too general and indefinite. The plaintiff should have alleged specifically and particularly the ground of complaint against the validity or sufficiency of the election; if he intended to allege that qualified voters were denied the right to vote, he should have named them and the number of them; if the ground of complaint was that the registration books were not opened for the registration of voters next before the election, this should have been alleged particularly; if he intended to allege that qualified voters were not properly counted in a connection and for a

purpose, as they should have been, the number of such voters and their names should have been specified; and so, also, the defend- (350) ants should have alleged particularly the names and number of the persons who were and ought not to have been counted as voters. Such precision in the pleadings in this, and like respects, should be observed in order to give the opposing party reasonable notice, to give greater point to and facilitate the trial, and avoid confusion as to the evidence. The court might *ex mero motu,* or upon application, direct the pleadings to be made thus precise. *Ex parte Dougherty,* 6 Ired., 155.

The pleadings in this case raised directly the material issue: "Did a majority of the qualified voters of the town of Durham vote 'For School?' " and, strictly, this issue should have been submitted. It seems, however, to have been assumed, in view of the constituent and evidential facts alleged, that the issue submitted was sufficient to determine the material matter of inquiry, and perhaps it was. The other issues tendered by the plaintiff were immaterial. If the irregularities suggested by them did in fact exist, they could not render void and defeat the election. The question to be settled by this action was not, whether the commissioners proceeded regularly and properly to ascertain the result of the election, but what was the true result—did a majority of the qualified voters of the town of Durham vote "For School?" This was the material inquiry to be considered and determined *de novo* by the court, and finally.

The report of the commissioners of their action in ascertaining the result of the election, was only evidence on the trial in this action, and sufficient to prove, prima facie, that the result of the election was what and as they declared it to be. They could not, by their irregular action, whether done by inadvertence or on purpose, destroy the election or change, conclusively, the just result of it. They had authority to ascertain regularly and truly the result—their action, though irregular, was prima facie correct, and stood effectual, unless the result, (351) as ascertained by them, should be questioned by action, in which case it was for the court to determine the result. This does not imply that there may not be irregularities in the conduct of an election that would render it void, nor that the report of the commissioners of their action might not, in possible cases, be so imperfect as not to be evidence for any purpose.

On the trial, the evidence of the witnesses tended only to prove such irregularities as are suggested by the issues just adverted to, tendered by the plaintiffs in addition to the first one submitted. The court properly suggested that all this evidence was irrelevant, because it did not tend to prove what was the result of the election in question.

It is alleged in the complaint that the defendant commissioners ascertained, declared and certified the result of the election. The court might, therefore, on the trial, accept the fact as true, and the result as ascertained by the commissioners as prima facie correct, and it might have instructed the jury that the fact so appeared.

The result of the election, as ascertained by the commissioners, thus appearing, the burden was on the plaintiff to prove, by competent evidence, that a majority of the qualified voters of the town did not vote "For School." The only evidence produced by him for that purpose was the registration books of voters. These, as we have seen, were evidence, prima facie, of the number of the qualified voters in the town of Durham, on the day of the election, and they, taken in connection with the report of the commissioners, upon their face showed that a majority of the qualified voters did not vote "For School."

The plaintiff therefore contended that these books were evidence, and sufficient evidence to disprove the result of the election appearing prima facie from the result thereof as certified by the commissioners. The court thought and suggested otherwise, and we think correctly;
(352) because, the ascertainment of the number of qualified voters in the town by the commissioners was authorized and official, and based upon the registration books corrected and purged for the purpose by the commissioners of the names of such persons as had on the day of the election ceased, for some cause, to be qualified voters.

It was the official duty of the commissioners to thus ascertain the whole number of the qualified voters in the town, and hence, their certificate as to the number was better and higher evidence prima facie in that respect than the registration books.

The latter were corrected by the commissioners, and such correction was presumed to be correct; and the registration books alone were not evidence sufficient to rebut or destroy that presumption.

There is therefore no error, and the judgment must be

Affirmed.

Cited: Gatling v. Boone, 101 N. C., 66; *Bynum v. Commissioners, ibid.,* 414; *S. v. Cooper, ibid.,* 688; *Hampton v. Waldrop,* 104 N. C., 454; *Boyer v. Teague,* 106 N. C., 618; *Jones v. Commissioners,* 107 N. C., 251; *R. R. v. Commissioners,* 109 N. C., 162; *Young v. Henderson,* 129 N. C., 424; *Pace v. Raleigh,* 140 N. C., 70; *Hill v. Skinner,* 169 N. C., 410; *Woodall v. Highway Commission,* 176 N. C., 391; *Hammond v. McRae,* 182 N. C., 752.

S. H. THREADGILL ET AL. v. THE BOARD OF COMMISSIONERS OF ANSON COUNTY.

Counties—Municipal Corporations—Torts—Nuisance—Pleading.

1. Counties are not liable for torts unless such liability is imposed by statute.
2. The authorities of municipal corporations must provide the means and employ the agencies to perform the duties imposed upon them, and for neglect to do so may be liable in damages; but they are not required to perform such duties by their own labor.
3. In an action against the board of commissioners of a county for injuries resulting from the erection and permission of a nuisance, the complaint containing no allegation that the commissioners had failed to use the means at their disposal to prevent the nuisance: *Held*, that the plaintiff could not recover.

THIS is a civil action, which was tried before *Clark, J.*, at May (353) Term, 1887, of ANSON Superior Court.

The plaintiffs, on 1 October, 1883, instituted the present action against the board of commissioners of Anson County to recover damages for the erection and maintenance of an alleged nuisance, on the courthouse square, and to have the same abated, and state their cause of action thus:

1. That the defendants are a body politic and corporate, with power to sue and be sued, implead and be impleaded, expressly so declared by law.

2. That the defendants before this action was commenced, and at the time it was commenced, had kept and allowed upon a lot in the town of Wadesboro, known and designated as the courthouse and jail lots, subject to and under control of defendants, bounded, etc. . . . a public privy, which was before and at the time of the commencement of this action, and since the cause was commenced, used by the public, as well those living in the town of Wadesboro, as those who came into the town, but are not residents therein.

3. That the plaintiffs are the owners of the following lands, lots and tenements in said town, to wit: The square adjacent to the courthouse and jail lots, immediately north of said lots, bounded, etc., and live in one of the houses situate, standing and being on this said lot; that the privy, hereinbefore designated and complained of, is about fifty yards from the dwelling-house occupied by the plaintiffs.

4. That by reason of the erection and location of said privy and the condition in which the same has been kept, and allowed to remain for a long time before this action was commenced, and at the time it

(354) was commenced, and by reason of the noisome smells arising therefrom, and by the escape of filthy matter therefrom and the deposit of human excrement therein, and the accumulation of the same therein and thereat, the plaintiffs have been for a long time before this action was commenced, and were at the time the same was commenced, annoyed in the proper enjoyment of their property, injured in their health and prejudiced and hurt in their rights, and damaged in their persons, and have been particularly and especially damaged by the matter aforesaid.

. . . . . .

6. That by reason of the said privy and the smells therefrom, the excrement therein and thereat accumulated and remaining there, these plaintiffs have all suffered in their health, and the family of the said Stephen H. Threadgill has sickened, suffered, been hurt and damaged, and all of said plaintiffs have thereby been specially damaged in their person and property.

7. That the value of their said property, outside of that occupied by the plaintiffs as their residence, has been injured in its rental value by reason of said privy and its surroundings and condition aforesaid.

8. That the plaintiffs, oftentimes before bringing this action, demanded of the defendants the abatement of the nuisance aforesaid, but the same was not done. Wherefore plaintiffs demand that the nuisance and privy be abated; that they have and recover damages from the wrong and injury and loss done to them, to wit: one thousand dollars; that the defendants be enjoined against maintaining, keeping or allowing said privy and nuisance on their said property; and for such other and further relief as is meet and proper, and for costs of this action.

The commissioners answer and say that the privy complained of is necessary for the public, and has been enclosed and used at its present location since the year 1858 by the county officials and others, and (355) that upon information and belief, the filthy deposits have been removed from time to time, and the place kept in a good and cleanly condition, and that they have appropriated and paid out moneys as required to keep the place cleanly and in proper state, etc. When the cause came on to be tried upon issues, the defendants moved to dismiss the action because no cause of action against the defendants was set out in the complaint. The court being of this opinion, adjudged that said action be dismissed, and that the defendants recover the costs of action, from which plaintiffs appealed.

J. A. Lockhart for plaintiffs.

W. L. Parsons for defendants.

SMITH, C. J., after stating the case: The complaint imputes to the board of county commissioners, charged not as individuals in office but as a corporation representing the county, dereliction in public duty in permitting the privy to remain in a filthy and offensive condition to the hurt and annoyance of the plaintiffs and other near residents. It assumes the obligation to keep it in a cleanly manner to rest upon the board by virtue of vesting of the title to the premises in the board as a trustee for the public. The Code, sec. 707; subsecs. 5, 7, 8.

But the duty in reference to the public property is defined in subsection 5, which authorizes it "to make such orders respecting the corporate property of the county as may be deemed expedient," and this requires the employment of such agents and the raising and appropriating such moneys as may be sufficient to keep the public buildings in repair, and to maintain them in such condition as to prevent any noxious and offensive exhalations to proceed from any of them put to the private use of the people. A privy is not only a convenience but a necessity, and the only fault attributable to any one is in suffering an accumulation of night-soil, until, for want of cleansing, the (356) emanating effluvia becomes a nuisance to the public. It is nowhere charged that the board has failed to use the means at their disposal to prevent such consequences, and this is the measure and extent of official responsibility.

In *S. v. Fishblate,* 83 N. C., 654, the mayor and aldermen of Wilmington were charged with the neglect of official duty in permitting obstructions in some of the streets, and the streets themselves to become ruinous and in decay, and, on motion, the indictment was quashed for failing to point out the particular duty enjoined and neglected and in what manner imposed, following the rulings in the antecedent cases therein recited. The same principle is again asserted in language quite as strong and explicit by *Merrimon, J.,* speaking for the Court in *S. v. Hall,* 97 N. C., 474.

In the excellent work of Judge Dillon on Municipal Corporations, sec. 963, the author says: "According to the prevailing rule, counties are under no liabilities for torts except as imposed (expressly or by necessary implication) by statute"; and in a note where numerous references are made to adjudged cases, he adds: "A county is not liable for a nuisance to a citizen in the erection of a jail in the immediate vicinity of his residence, nor for suffering it to become so filthy and disorderly as to be a nuisance to him and his family." The doctrine is, that while these corporate agencies must provide the means and employ the men to perform such duties, they are not personally and by their own labor to perform such menial services, and the default to make them liable must be in neglecting to exercise their authority in the use of labor and money

for that purpose, and so must it be charged to make a cause of action against them. The court, therefore, properly arrested the proceedings when attention was called to the infirmities in the complaint and dismissed the action.

Affirmed.

Cited: Moffitt v. Asheville, 103 N. C., 258; *Coley v. Statesville,* 121 N. C., 317; *Bell v. Commissioners,* 127 N. C., 91; *Moody v. State Prison,* 128 N. C., 16; *Hull v. Roxboro,* 142 N. C., 460; *Jenkins v. Griffith,* 189 N. C., 634; *Mabe v. Winston-Salem,* 190 N. C., 489.

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DANIEL GATEWOOD ET AL. v. C. M. BURNS ET AL.

Jurisdiction of Supreme Court in Issues of Fact—Principal and Surety—Injunction—Sale Under Execution.

1. The Supreme Court has jurisdiction, in actions purely equitable, to review the evidence and findings of facts in the court below, where the entire testimony, as it was offered and received on the trial, is transmitted and can be considered upon the appeal; but it will not exercise this jurisdiction upon a fragmentary or summary statement of the evidence.

2. In the application of this jurisdiction the Supreme Court may in certain cases direct further testimony to be taken, or direct an issue of fact to be framed and remanded for trial by jury.

3. All defendants in judgments for the payment of money are, as to the judgment creditor, principal debtors, and the creditor may proceed to enforce his judgment by execution against one or all, unless the verdict or judgment shows that the relation of surety existed, and this is endorsed upon the execution. In that event the officer must first proceed against the principal as directed by The Code, secs. 2100 and 2101.

4. Where it was alleged by one seeking an injunction against execution in which he represented that he was only surety (but that fact did not appear in the judgment), that a contest was pending between the judgment creditors and the principal debtor as to the allotment of the latter's homestead: *Held,* that this was not sufficient to authorize the court to grant an injunction to restrain the enforcement of the execution against the surety.

5. An injunction will not be granted to stay an execution regularly issued upon a judgment, because the judgment creditor threatens, or has had it levied upon property not subject to execution, or upon real property belonging to another. A sale under such circumstances would not pass title, and the true owner of the land would not thereby be exposed to irreparable injury.

GATEWOOD *v.* BURNS.

THIS was a motion for an injunction, made in an action pending in ANSON County, heard and granted by *Clark, J.*, at Chambers, in Lumberton, on 27 May, 1887.

The defendant Burns alone appealed.

The facts necessary to an understanding of the points decided (358) are stated in the opinion.

R. H. Battle for plaintiffs.
J. A. Lockhart for defendants.

MERRIMON, J. This was a motion of the plaintiffs for an injunction to restrain the defendants' judgment creditors from selling lands of the plaintiffs under executions in their favor respectively, in the hands of the sheriff, until alleged equities could be adjusted and settled by a proper decree of the court in this action, etc.

The motion was heard at Chambers, upon the sworn complaint and answers used as affidavits, other affidavits, and other evidence taken orally by the court, the *substance* only of which is sent to this Court.

The defendant Burns only opposed the granting of the injunction which was issued, and he alone having excepted, appealed to this Court, from the order in that respect.

In matters purely equitable in their nature, such as applications for injunctions and receivers, in the course of the action coming to this Court by appeal, it has jurisdiction to review the evidence and the findings of fact by the court below, and to reverse or modify such findings in whole or in part, when the same evidence, just as taken and heard below, is sent to this Court. To that end, not simply the substance or a summary of the evidence, or parts of it, must be sent, but the whole of it, just as so taken and heard, so that this Court can have precisely the like opportunity and facility in reviewing, giving weight and application to the evidence in finding the facts that the court below had. Otherwise, this would not simply be a reviewing Court, but one, to some extent at least, exercising in such appeals original and independent jurisdiction as to the evidence and facts of cases purely equitable in their nature, which, as to such appeals, is not allowed by any (359) statutory provision or regulation.

Generally and ordinarily this Court acts upon the matters and questions embraced by the appeal just as they properly come to it in the course of procedure. In possible cases it might, as allowed by the statute (The Code, sec. 965), allow or direct further testimony to be taken, or, in the exercise of its authority in matters purely equitable, direct issues of fact to be tried by a jury, or remand the case for the same and like purposes, but it would not ordinarily do so.

This Court is almost exclusively a Court of errors, having, except in one or two respects only, appellate jurisdiction. *Worthy v. Shields,* 90 N. C., 192; *Coats v. Wilkes,* 92 N. C., 376; *Runion v. Ramsay,* 93 N. C., 410.

In the case before us the court, in part, heard evidence of witnesses taken orally, and this is sent up "substantially" as heard. This is not sufficient. For the reason stated above, we cannot review the evidence and the findings of fact. The appellant might have insisted in apt time that the whole of the evidence should be reduced to writing, just as the witnesses gave it, but as he did not, we must determine upon the facts as found by the court below, whether or not the injunction was properly granted.

The principal and leading ground of the motion of the plaintiff, Daniel Gatewood, for the injunction granted was, that the defendant Burns had obtained divers judgments for money against one Robinson and himself, he being, as he alleged, only surety in the judgments and the promissory notes on which these were founded; and the sheriff, who had in his hands executions issued upon these judgments, was about to sell his property—land—to satisfy them, before exhausting, by sale, the property of the principal in the judgments, as it was contended he ought to have done.

It did not appear from the judgments or the executions that the plaintiff was such surety. As it did not, he was, as to the appellant, (360) a principal debtor, and so to be treated. The sheriff was not, therefore, bound to sell the property of Robinson first, nor was the appellant bound to direct him to do so. As to the appellant, the judgment debtors were both principals, and he might, through the sheriff charged with proper executions, collect his debt from both or either of them, in his discretion. It is well settled that all defendants, charged by the judgment without distinction, are equally principal debtors, and in legal effect are one debtor as to the judgment creditor. In *Eason v. Petway,* 1 Dev. & Bat., 44, it is said "no difference in the order of their liability is recognized at law in respect to any proceedings upon process on the judgment." *(Ex parte King & Morrison,* 2 Dev., 341; *Buford v. Alston,* 4 *ibid.,* 351). The relation between principal and surety creates rights and duties among the defendants, as between themselves, but it does not affect third persons. The sheriff may levy the debt from either defendant, or in such proportions as he chooses." The cases of *Shaw v. McFarlane,* 1 Ired., 216; *Davis v. Sanderlin,* 1 Ired., 389; *Stewart v. Ray,* 4 Ired., 269; *Shuford v. Cline,* 13 Ired., 463, are all to the same effect.

If the appellee was surety, as he alleges, he might, as allowed by the statute (The Code, sec. 2140), have shown by proper evidence on the trial in the actions in which the judgments were obtained by the appellant, that he was such surety, and the jury in their verdict, or the justice of the peace in his judgment, would have distinguished him as surety, and the executions would have been issued with a proper endorsement to that effect, and in that case the sheriff would have levied the sum required to be collected first out of the property of the principal, if he had sufficient for that purpose.

But, so far as appears, it was not even suggested at the proper time that he was surety. Indeed, the facts show that he was not, as to the appellant; that he induced the latter to lend the money, which was the consideration of the notes to Robinson, and became on purpose, by the express terms of the notes, a principal debtor therein. As (361) to Robinson he was surety, but by express stipulations he was principal with him in the notes as made to the appellant. As he failed to take advantage of the statutory provision just mentioned, nothing appears that in law or equity ought to prevent the appellant from collecting his debts by execution from the appellee, although he may have been surety. He agreed to pay the debt in that case if his principal did not, and the creditor had the right to collect his debt from the surety, if he saw fit to do so. It was the duty of the latter to have paid the debt, without compulsion, as soon as it became due, and if he had done so, he would at once have been entitled to his remedy against his principal. Neither by the terms nor the spirit of the contract of debt did the creditor agree to go against and collect his debt from the principal first, if he could, and nothing has supervened since the maturity of the debts, or the granting of the judgments, so far as appears, that raises an equity in favor of the appellee to compel the appellant to do so.

It is alleged that there are numerous judgments against the said Robinson and this plaintiff, and the homestead of the former in certain of his lands was laid off to him, and one creditor contested the allotment thereof as excessive, and the contest in that respect is not determined. It is insisted that the plaintiff has the right in his own interest, and that of other creditors, to delay the sale of his property until that contest shall be ended, so that Robinson's property may be sold free from cloud, and for a better price, etc. This raises no equity in favor of the plaintiff. As we have seen, it was his duty to pay the appellant's debt, and he should take the burden of his remedy against his principal. The case of *Albright v. Albright,* 88 N. C., 238, cited for the plaintiff, has, in our judgment, no application here. In that case there were conflicting rights and liens of his judgment creditors, that it was neces-

(362) sary to settle in order to enable him to have his homestead, and the court interposed its equitable authority to that end. Here there is no such conflict of right or lien. The rights of the creditors are distinct and clearly stated, and there is nothing that requires the intervention of the Court of Equity, at the instance of the plaintiff, to delay the enforcement of the rights of the appellant.

The plaintiff, Thomas May, alleges that he purchased a tract of land from his co-plaintiff, Daniel Gatewood, in 1882, and paid for the same before the liens of the judgments of the appellant attached to the lands of Gatewood, but he did not obtain a proper deed for the same until the first of January, 1885, after such liens so attached, and he insists that the liens of these judgments did not attach to the land so purchased by him, and he asks the court to so declare and adjudge, and to enjoin the appellant against selling the same. It is very obvious that the plaintiffs in the action, who are the appellees, allege what they deem causes of action, which, if sufficient as such, are distinct in the nature, and cannot be united in the same action, but passing this objection by, the plaintiff May alleges no cause of action at all. He alleges, in substance, that he is in possession of his land, and has a good title for it, but he apprehends that the appellant may attempt to sell it. He asks the court, before his right is invaded, to adjudge that his title is good, and to restrain the appellant by injunction from interfering with it.

It is not the province of the court to thus interpose its authority to prevent the sale of the land. If the plaintiff has title to it, a sale, or attempted sale of it, under the appellant's execution, would pass no title. If, on the other hand, he has no title, and the land belongs to the defendant in the execution, then the creditor would have the right to

(363) sell it, if need be, to pay his debt. *Bristoll v. Hallyburton,* 93 N. C., 384.

We think the plaintiffs showed no right to have their motion for the injunction granted as to the appellant. The order granting the injunction as to him must be reversed. To that end let this opinion be certified to the Superior Court.

Error.

Cited: Roberts v. Lewald, 107 N. C., 309; *Bostic v. Young,* 116 N. C., 769; *Refining Co. v. McKernan,* 178 N. C., 84.

DANIEL GATEWOOD ET AL. v. JAMES A. LEAK, JR., ET AL.

Counterclaim—Nonsuit—Jurisdiction.

1. Where, in term time, one of the plaintiffs in the action moved to be allowed to withdraw from the suit, and this motion was, by consent, continued to be heard with others pending in the cause at a day out of term when it was allowed: *Held*, not to be error.
2. Plaintiffs may submit to a nonsuit at any time before verdict, unless in actions of an equitable nature the adverse party shall have acquired some right which he is entitled to have determined.
3. If the defendant has pleaded a counterclaim, while the plaintiff may be permitted to suffer a nonsuit as to his cause of action, the defendant will, nevertheless, be entitled to prosecute his counterclaim.

THIS was a civil action, heard before *Clark, J.*, on a motion by the plaintiff for restraining order and injunction. The cause was returnable to the May Term, 1887, of ANSON Superior Court.

On the motion of the plaintiffs without notice, a restraining order was issued by Judge Clark on 2 April, 1887, with notice to the defendants to show cause, at Carthage, on Friday, 22 April, 1887, why the injunction prayed for in the complaint should not be granted. (364)

The May Term of Anson Superior Court convened on Monday, the 2d day of May. Before the time for the hearing at Carthage, the counsel for the plaintiffs and the defendant entered into an agreement for the adjournment of said hearing to Wadesboro, in Anson County, on 2 May, 1887.

On the said 2d day of May the matter was called informally to the attention of the court, but, by consent of counsel, the case was not taken up for hearing or consideration until Friday evening, the 6th of May, having been informally passed over until that time under the former agreement made as aforesaid.

At that time the motion for the injunction was taken up by the court and the plaintiff, Samuel Gatewood, moved for a nonsuit. The court heard all of the parties and announced that he would take the case under consideration, and at Lumberton. On 27 May, 1887, the court granted the injunction and allowed Samuel Gatewood's motion for a nonsuit.

At the time of the hearing on the 6th of May, the defendants had filed answers, which was done on the 2d day of May.

From the part of the judgment of the court allowing Samuel Gatewood's motion for a nonsuit, the defendants, except C. M. Burns, appealed.

R. H. Battle and Jas. A. Lockhart for plaintiffs.
W. L. Parsons for defendants.

MERRIMON, J. The appellant contended first, that the court had no authority to hear and determine the motion for nonsuit out of term time. And certainly it could not do so unless by consent of parties, but it is well settled that with such consent it could. *Bynum v. Powe,* 97 N. C., 374, and the cases there cited.

(365) We think it sufficiently appears from the record that the appellant gave such consent. The motions for an injunction and nonsuit were argued in term, and the court, just at the end of the term, signified its purpose to take time to consider them, as was common practice, and the appellant then made no objection. Afterwards, at Chambers, and out of term, it seems from the recital in the judgment, the motions were again argued, and by counsel for the appellant without objection. At all events, it does not appear that objection was made on the account mentioned until it was made in this Court. The fair inference, therefore is, that the appellant consented that the court might determine the motion out of term. If he did not intend to do so, he should have so said to the court in apt time. His very intelligent counsel knew the course of practice in such matters, and, no doubt, would have made objection if there had been any purpose or desire to do so. Moreover, it is not probable that the learned judge would have heard the motion without proper consent. By implication, at least, consent was given, and it was too late after judgment to raise such objection. *Coates v. Wilkes,* 94 N. C., 174; *Anthony v. Estes, post,* 598.

The cause of action alleged in the complaint is wholly equitable in its nature, and there is no reason why, in such a case, one of several parties plaintiff in a proper case shall not abandon, or ask the court to dismiss the action as to himself, and thus pass entirely out of it, and substantially and in effect, under the prevailing method of civil procedure become *nonsuit,* unless some other party to the action shall have acquired some right or advantage, or a defendant shall have pleaded a counterclaim affecting adversely the party seeking to retire, that the party or defendant objecting is entitled to have settled and determined in the action. The party thus retiring from the action in such a

(366) case does not strictly take a *nonsuit,* but the court, at his instance, allows him to abandon, depart, or withdraw from it, giving judgment against him for proper costs. *Lafoon v. Shearin* 95 N. C., 391; *Bynum v. Powe, supra.*

At the time the appellee, "Samuel Gatewood, moved for a *nonsuit,*" the defendants had simply filed their answers, and no one of them pleaded a counterclaim. No order or judgment, interlocutory or other-

wise, had been entered. As to the appellees they insisted that a tract of land mentioned in the complaint and claimed by him, and for which he had a deed of conveyance from his co-plaintiff, Gatewood, was subject to be sold to satisfy their debts, or some of them, but they acquired no right as against him by virtue of anything done in the action.

As no counterclaim had been pleaded affecting the appellants, and no decree or decretal order had been made whereby the appellees, or one or more of them, had acquired rights in the action as against him, he was at liberty to dismiss or abandon the action, as the court allowed him to do. See the cases above cited. *Watt v. Crawford,* 11 Paige, 470; Dar. Ch. Pr., 930. There is

No error.

Cited: Godwin v. Monds, 101 N. C., 356; *Skinner v. Terry,* 107 N. C., 109; *Pass v. Pass,* 109 N. C., 486; *Parker v. McPhail,* 112 N. C., 504; *Henry v. Hilliard,* 120 N. C., 484; *Boyle v. Stallings,* 140 N. C., 527; *R. R. v. R. R.,* 148 N. C., 70; *Webster v. Williams,* 153 N. C., 311; *Campbell v. Power Co.,* 166 N. C., 490; *Haddock v. Stocks,* 167 N. C., 74.

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T. E. LATHAM v. J. O. WILCOX AND JAMES LATHAM, ADMINISTRATORS OF WILLIAM LATHAM.

Guardian and Ward—Interest—Evidence.

1. Where it appeared that L. had qualified as guardian of his infant son before a deputy clerk, and had executed and filed a bond, without security, but there was no record made of the appointment, and it further appeared that he had acted as guardian: *Held*, that neither he nor his personal representatives would be permitted to say that no such appointment had been made.

2. In a settlement of a guardian's accounts he should be charged with compound interest on all moneys collected, or which he might have collected for his ward.

3. Where the ward was also one of the heirs and distributees of the guardian, and it appeared that he was entitled to receive a considerable sum as such, in the absence of any evidence to the contrary, it will be presumed that any sums paid him by the personal representatives of the guardian were on account of his distributive share—particularly where the answer of the personal representatives in an action for a settlement of the guardianship denied the fact of the guardianship.

LATHAM *v.* WILCOX.

CIVIL ACTION, tried before *Boykin, J.*, at Fall Term, 1887, of the Superior Court of ASHE County.

The complaint alleges in substance:

1. That in 1882 William Latham died intestate and the defendants were duly appointed his administrators.

2. That in 1864 Caroline Latham, mother of the plaintiff, died intestate, leaving the plaintiff her only heir at law.

3. That in 1876 William Latham, the intestate of the defendants, qualified as guardian of plaintiff.

4. That in 1874 said guardian took into his possession one horse of the value of $130.

5. That in 1873 the plaintiff acquired by descent from his grandfather, Alfred Sutherland, a tract of land of the rental value of
(368) $60 per annum, which his guardian, William Latham, took into his possession.

6. That in 1876 the said guardian received other property in land and money, or its equivalent, belonging to the plaintiff, derived from the estate of his grandfather, Alfred Sutherland.

7. That the said guardian in his lifetime never accounted to the plaintiff for any of said property, and that the defendant administrators are liable to him therefor.

He demands judgment for the amounts alleged to be due from the estate of the deceased guardian.

The answer admits the first allegation and denies all the others; and for further answer it is alleged that the defendants have fully paid off and discharged all claims and demands which the plaintiff held or now holds against their intestate; and by way of counterclaim they allege that the plaintiff is indebted to them as administrators in the sum of $500 for money advanced to him out of the estate, "and for money and effects of said estate seized and appropriated by plaintiff to his own use," for which they demand judgment.

At Spring Term, 1887, of the Superior Court, MacRae, J., made the following order:

"1. The above entitled cause is referred to J. W. Todd, Esq., to ascertain and report what sum of money, property or effects have come to the hands of the intestate, William Latham, if any, and the date at which the same was received of him.

2. The referee will also inquire and report whether the said William Latham qualified as the statutory guardian of plaintiff, or whether he only took possession of said property, if any, as parent and guardian by nature, and in this connection he will report the age of plaintiff at the time the said property came into the hands of the said William.

3. He will also report what payments have been made, if any, by defendants upon said demand.

4. And to prevent the necessity of taking an account of the estate of the said William, which has come to the hands of the (369) defendants, it is admitted that they have in their hands assets sufficient to satisfy said demand. Said referee will report the facts, and also his conclusions of law."

At the following term, 188...., the referee made the following report:

William Latham, the father of plaintiff, married Caroline Sutherland in the year 1861, and plaintiff, the only issue of that marriage, was born 5 March, 1862.

Caroline Latham, plaintiff's mother, died in 1863.

In 1871 Alfred Sutherland gave to the plaintiff a three-year-old colt, and soon thereafter died.

In 1875 William Latham sold the colt for a gold watch and fifty dollars, rating the watch at ninety dollars, and never collected the fifty dollars and gave the watch to the plaintiff. In the spring of 1876 William Latham received a tract of land valued at eight hundred and fifty dollars, from the estate of the said Alfred Sutherland, belonging to the plaintiff, and kept it up to the time of his death, which occurred on 29 September, 1882.

William Latham, on 19 June, 1876, qualified as statutory guardian of the plaintiff, but no security on his bond was given, and no letters of guardianship issued to him; he qualified before the deputy clerk of the Superior Court, and gave the bond to him, but no record of his appointment was made other than the filing of the bond.

The annual rental value of the land was sixty dollars.

There went into the hands of William Latham, on 12 February, 1877, six hundred and fifty dollars in notes on D. T. Sutherland and J. H. Hardin; they were given to the said William as guardian of the plaintiff, which were funds arising from the estate of the said Alfred Sutherland and belonging to the plaintiff.

The estate of William Latham is worth thirty thousand dollars; he left a widow (of second marriage) and three children by her, (370) all of whom are living. On 9 June, 1883, defendant paid to plaintiff two hundred dollars, and gave receipt for the same, and on 13 July, 1883, they paid to him sixty-five dollars, and he gave to them his receipt for the same, and on 13 August, 1883, they paid an order from plaintiff to Zachariah Johnson, twenty dollars. On 13 March, 1884, defendant paid plaintiff forty-one dollars and forty-five cents; on 25 April, 1887, defendants paid plaintiff one hundred and fifty dollars; on 23 June, 1883, defendants paid to N. G. Wagner, for plaintiff, and by plaintiff's direction, the sum of one thousand and forty-four dollars

and seventy-five cents, and plaintiff owed the same and was of full age when plaintiff paid the same and when they were last directed to pay it.

Plaintiff arrived at full age 5 March, 1883.

Since the death of William Latham the plaintiff has, by a decree of court, obtained title and possession of the said tract of land, and has sold the same for twelve hundred and fifty dollars.

The defendants collected the note given by D. T. Sutherland for three hundred and fifty dollars, with simple interest only, on 25 June, 1883.

From the foregoing facts I conclude as matters of law:

1. That defendants are liable to plaintiff for fifty dollars, the difference between the horse and watch, with compound interest thereon from 19 June, 1876, until 5 March, 1883; that the watch was a payment *pro tanto* to plaintiff for the horse.

2. That defendants are liable to plaintiff for the rents of the said land at the rate of sixty dollars per year, the first payment being due 15 April, 1877, with compound interest on the same till 5 March, 1883, the time when plaintiff became of full age.

(371) 3. That defendants are liable to plaintiff for the sum of six hundred and fifty dollars, the amount of the notes on D. T. Sutherland and J. H. Hardin, with compound interest from 12 February, 1877, until 3 March, 1883.

4. That all these sums bear simple interest from 5 March, 1883, until paid.

5. That only Exhibit "B" is a payment on this demand, to wit: one hundred and fifty dollars paid 25 April, 1887, long since this action was commenced. I am led to this last conclusion by the pleadings and the testimony, it appearing from the answer that defendants denied any liability of their intestate as a guardian, and denied that their intestate received any funds from the estate of Alfred Sutherland, and I conclude they did not intend to apply any payment to a debt they denied. I conclude that the payments set forth in the receipts filed were intended to be paid to plaintiff as heir and next of kin of his father, William Latham.

6. I conclude that defendants will be entitled to credit for all the other vouchers filed; and also for the sum paid Wagner in their settlement with plaintiff as next of kin of his father, William Latham, to wit, $1,044.75.

To this report the defendant filed the following exceptions:

1. That said referee erred in finding as a fact that their intestate, William Latham, was statutory guardian of the plaintiff.

2. That he erred in his conclusions of law that defendants are liable to plaintiff for compound interest in the several amounts mentioned in said report, as due to plaintiff.

3. That said referee erred in estimating the three-year-old colt at one hundred and forty dollars, and charging defendants fifty dollars thereon, which their intestate never received.

4. That the referee erred in not applying the receipts as payments to the claim of plaintiff in this action, especially as no evidence was given that the estate of William Latham was settled up, or what amount was due from said estate to the plaintiff, or how much of (372) said estate had already been received by the plaintiff, or what advancements had been made to plaintiff out of said estate.

5. That said referee erred in not allowing $1,044.75, paid by defendants for plaintiff to Wagner, as a credit on this claim, for the reasons above given, and for the further reason that plaintiff had refused to allow this indebtedness of his to be credited to defendants upon the estate.

6. The referee erred in finding as a fact that the estate of William Latham is worth thirty thousand dollars.

7. That the referee erred in not allowing some compensation to defendants for the services of William Latham, as agent of plaintiff.

The action being heard upon the report and exceptions, the court rendered judgment, overruling all the exceptions except the seventh.

The defendants excepted to the ruling of the court as to the first, second, fourth and fifth exceptions, and from the judgment rendered against them thereon, appealed.

E. R. Stamps for plaintiff.
S. F. Mordecai for defendants.

DAVIS, J., after stating the case: The case is before us on appeal from the rulings of his Honor on the first, second, fourth and fifth exceptions, and can be considered upon those exceptions alone.

1. The first exception cannot be maintained. There was some evidence that William Latham had been appointed guardian to the plaintiff. Though there were no sureties to the bond given, there was evidence that he acted as guardian; he took notes as guardian, and he, if living, would not be heard to say that, because he had not complied with all the requirements of the law, he was therefore not accountable as guardian for the property and fund received by him as guardian, (373) and being dead, his administrators cannot avail themselves of such a defense for his estate. Having acted as guardian, he could not, if living, nor can his administrators say, that because the provisions of the laws were not complied with he was not guardian. There was evidence and proper evidence to support the finding of the referee in the court below. *Usry v. Suit,* 91 N. C., 406; *Barnes v. Lewis,* 73 N. C.,

138; *Lemley v. Atwood,* 65 N. C., 46; *Sain v. Bailey,* 90 N. C., 566; *Humble v. Mebane,* 89 N. C., 411; *Topping v. Windley,* 99 N. C., 4.

In these cases the liabilities of guardians and of persons acting as or dealing with guardians are discussed, and fully sustain the ruling in this case.

2. The second exception is to the charge of compound interest. The notes received by the defendant's intestate, as guardian, were properly charged with compound interest, and so with regard to the money with which he ought to have charged himself for the rent of said lands which he used; but with regard to the price of the horse, it does not appear that any money was collected. The referee finds that the fifty dollars were not collected. He does not find whether it could have been collected or not, or under what circumstances the horse was sold, and the guardian should only be charged with the unpaid portion of the price of the horse with simple interest. With this modification the ruling upon the second exception is affirmed.

3. The fourth exception was to the refusal to apply the sum paid to the plaintiff (the receipts for which are referred to) to the credit of the defendants on the sums due from the estate of their intestate as guardian of the plaintiff. The plaintiff is a son of the deceased guardian and one of his heirs and distributees. The estate is a large one, and by the finding of the referee and the court below, the items excepted to were paid

(374) to the plaintiff, not on the sum due to him from the intestate's estate on the guardian account (for the defendants denied that their intestate was guardian, or that he received for, or owed to, the plaintiff anything on that account), but on what was due to him as one of the next of kin, and it was in that character that it was paid to and received by him. It was not a case in which the defendants had a right, after having denied the existence of the liability of their intestate as guardian, to say that they would apply sums paid to the plaintiff as one of the distributees to what may be found to be due to him as a debt from their intestate, and we think the case of *Jenkins v. Smith,* 72 N. C., 296, and others cited by counsel for defendants, have no application to this case. The exception cannot be maintained.

4. The fifth exception is to the refusal to credit the defendants with the sum paid to Wagner. For the same reason given in regard to the fourth exception this cannot be maintained. These sums were paid to the plaintiff as one of the next of kin of William Latham, who it appears, left a large estate, and in the settlement of the estate the defendants will be credited with them on the distributive share of the plaintiff and so much paid to him on that account.

Modified and affirmed.

(375)

JAMES W. GRANT, ADMINISTRATOR OF E. J. DREWITT, v. WILLIAM H. HUGHES, EXECUTOR OF WILLIAM T. STEPHENSON.

Administrator's Purchase at his own Sale—Fraud—Judicial Sale.

Where an administrator, through the agency of another, became the purchaser of lands sold by himself under a license, at the sum of $500, and afterwards sold it upon a long credit for $1,000, which was well secured, but it was ascertained that the value of the land was $750: *Held*, that the first sale was collusive and fraudulent, and that the administrator should be charged with the price for which he resold the land—overruling the opinion of the Court upon this point, in *Grant v. Hughes*, 96 N. C., 177.

THIS was a petition filed at October Term, 1887, to rehear this cause, decided at Spring Term, 1887. (96 N. C., 177.)

The facts are stated in the case reported, and by reference thereto, it will be seen that W. T. Stephenson, administrator of E. J. Drewitt, under proceedings instituted for that purpose, sold certain lands belonging to the estate of his intestate, to make assets to pay debts, when one R. T. Stephenson became the last bidder at the price of $500, bidding for the benefit of the said W. T. Stephenson, administrator, etc., who directed the bid to be assigned to one J. D. Vincent, to whom soon thereafter the deed was made, and who on the same day conveyed to the said W. T. Stephenson for the named consideration of $600, though in fact no money passed, and about the same time the said W. T. Stephenson sold said land to one Lawrence Lassiter for the sum of $1,000, payable in five equal annual installments, with interest at 8 per cent, reserving the title to secure the purchase money. The first three installments (except $30) were paid by Lassiter to said Stephenson, and the last two installments and the said $30, amounting with interest to about $750, remain unpaid.

The land, as found by the referee, was in fact worth $750.

The sale by the administrator, he becoming indirectly the pur- (376) chaser, was adjudged to be fraudulent, and the court held that as "about $750 of the purchase money is still unpaid, and it may be, cannot be collected," the estate of the defendant's testator, the said W. T. Stephenson, should be charged with the actual value of the land, found by the referee to be $750, instead of $500, the price at which it was bid off.

John Devereux, Jr., for plaintiff.
Thos. N. Hill for defendant.

DAVIS, J., after stating the case: Clearly the estate of the defendant's testator would have been charged with the $1,000, for which the land was sold to Lassiter, if all the purchase money had been paid to him, and the former decision was predicated upon the fact that it had not all been collected and perhaps could not be.

Adverting to the fact found by the referee, as appears in the report, that the land, the title to which was retained as security for the purchase money, is ample security for the balance of the purchase money due from Lassiter, and that the whole of it can therefore, with reasonable certainty, be collected, upon reconsideration, we think there was error in the former decision and that the estate of the defendant's testator, instead of being charged with $750, found to be the actual value of the land, should have been charged with the amount actually received from the sale of the land, with interest thereon at 6 per cent, and that the defendant executor should have been required to surrender to the plaintiff administrator, or to some one to be appointed by the court, the notes or bonds for the uncollected balance of the purchase money, with the security retained therefor, with directions for the collection of the same for the benefit of the estate of plaintiff's intestate, and with such further directions in relation thereto as will secure the title to
(377) Lassiter, upon the payment by him of the balance of the purchase money, or the protection of his rights in the excess above the balance due, if it shall be found necessary to resell the land for the purpose of collection. This will protect the estate of the defendant's testator against any possibility of loss, and at the same time prevent, as a well settled principle of law and equity requires should be done, any benefit from accruing hereto by reason of the collusive sale of the land.

The result will be the same as if the estate of the defendant's testator had been charged with the $1,000, for which he sold the land to Lassiter, to be discharged upon the payment of the money and interest thereon, received by him and a surrender of the notes or bonds and the security held for the balance.

There was error in the former decision as herein indicated, and it will be corrected and made to conform to this.

Error.

JOHN G. SMITH, ADMINISTRATOR OF R. KING, v. W. J. BROWN ET AL.

Administration—Sale of Land for Assets—Statute of Limitations—Judgment—Merger.

1. An administrator *de bonis non* is not entitled to a license to sell real estate for assets where the original administrator has committed a *devastavit* until he shall have exhausted his remedies against the first administrator, or unless it appears that an action against him and his sureties would be unavailing.
2. A license to sell lands for assets should not be granted until all controversies about the validity of the debts, for the payment of which the land is sought to be subjected, are settled.
3. Where the statute of limitations would be available to the personal representative of a deceased person against the demand of a creditor, it is also available to the heir in protecting the real estate.
4. The statute of limitations for the protection of estates of deceased persons from judgments rendered against the personal representatives begin to run from the date of the judgment, irrespective of the time of the accruing of the original cause of action, such cause of action being merged in the judgment.
5. The various statutes directing the manner in which estates of deceased persons shall be *administered and settled*—discriminating between those where administration was granted prior and subsequent to 1 July, 1869—do not affect the operations of the statutes of limitations, but only apply to the *mode of procedure* of settlement.
6. Where the period of two years elapsed from the death, or removal, of an administrator and the appointment of his successor, and the latter began his action within one year after his qualification: *Held*, that this was within the spirit of section 164 of The Code, and the time intervening between the two administrations should not be computed.
7. The requirement that to avail himself of the seven years statute, the personal representative must show that he has made due advertisement, is confined to the original administration, and does not apply to administration *de bonis non*.

THIS is a special proceeding to sell lands to make assets. Issues (378) of fact being joined, a trial by jury was waived, and the cause was heard before *Connor, J.*, at October Term, 1887, of ROBESON Superior Court.

Reuben King died early in 1869, leaving a will, which was admitted to probate in the county of Robeson, wherein he resided, and William J. Brown, the sole executor therein named, qualified as such. He proceeded with his administration until, for cause shown, and without having completed it, he was, on 21 November, 1878, removed from office and

the letters testamentary issued to him recalled. On 23 December, 1880, the plaintiff was duly appointed administrator *de bonis non,* with the will annexed, on the estate of the testator, who has realized out of the assets delivered over to him some $1,700; and on 2 December,
(379) 1881, instituted before the clerk the present special proceeding against the removed executor and the devisees in the will, to obtain license and an order to sell the numerous lots and tracts of land mentioned in the complaint, for their conversion into assets, to be applied in the discharge of an indebtedness of the testator to an amount estimated to be ten thousand dollars. Before answering, a particular and detailed statement of the claims was ordered, on application of the defendants, and rendered by the plaintiff. The answers, which are voluminous, controvert the validity of the demands, and set up as a defense to them, as also to the present suit, the bar of the statute of limitations. Out of these conflicting averments springs the defense arising out of the lapse of time, and waiving a jury trial, it was agreed that the judge should find the facts. Accordingly, in addition to those above stated, he finds the following facts in regard to each of the debts set out in the plaintiff's bill of particulars:

1. Claim of Eli Bumble. This is a suit now pending in the Superior Court of Robeson County, which was brought by Eli Bumble against W. J. Brown, executor of R. King, on 14 February, 1870, upon receipts given by R. King, as sheriff, for claims within a magistrate's jurisdiction, placed in his hands for collection by Bumble, after a demand made for payment of amounts collected on same by the said Bumble on the said W. J. Brown, executor, a short time before the commencement of said action.

2. Judgment of R. M. Norment for $2,817.91. This judgment was obtained at May Term, 1887, of the Superior Court of Robeson County, on a bond executed by R. King to W. R. Bryan, dated 14 February, 1857, for $1,000, due one day after date, and endorsed by the said W. R. Bryan to Norment; and the action was commenced 16 September, 1873.

(380) 3. Judgment of James A. Phillips against W. J. Brown, executor of R. King. This was a judgment obtained at March Term, 1873, of the Superior Court of ..... County, for the sum of $128.10, with interest from 20 February, 1871, and costs, $4.13.

4. Judgment of D. F. Edmund, administrator of A. J. Butt, against W. J. Brown, executor of R. King. This judgment was obtained at January Term, 1873, of the Superior Court of Robeson County, for the sum of $481.54 and interest on $261 until paid, and cost. The suit in which this judgment was obtained was brought upon a guardian bond

executed by Zela Butt, guardian of A. J. Butt, on which R. King was surety. The suit was commenced 14 February, 1870, and the said guardian bond was dated 30 November, 1858.

5. Judgment of Augustus Smith, administrator of Augustus Smith, against W. J. Brown, executor of R. King. This judgment was obtained at January Term, 1873, of Superior Court of Robeson County, for the sum of $100, and costs; and the action in which it was obtained was commenced on 14 February, 1870, and was brought upon receipts given by R. King, sheriff of Robeson County, to Augustus Smith, for claims within a magistrate's jurisdiction put in King's hands for collection, and upon a demand made upon said Brown, executor of King, by said Smith a short time before said action was commenced.

6. Judgment of D. Cromartie against W. J. Brown, executor of R. King. This judgment was obtained at January Term, 1873, of the Superior Court of Robeson County, and the action, in which it was obtained, commenced on 10 February, 1870, and the cause of action in said suit was on claims within a magistrate's jurisdiction, placed in the hands of the said R. King, sheriff of Robeson County, by said Cromartie, and upon a demand made on W. J. Brown, executor (381) of R. King, by said Cromartie a short time before the commencement of said action.

7. Judgment of Mary A. Barnes against W. J. Brown, executor of Reuben King. This judgment was obtained at March Term, 1875, of the Superior Court of Robeson County, for $127.99 and cost. This suit was brought on a note executed by said King to Barnes.

8. Judgment of Wiley B. Fort, administrator of John Cooley, against W. J. Brown, executor of R. King.

That at January Special Term, 1874, of Robeson Superior Court, the following entries were made:

WILEY B. FORT, administrator of John Cooley, deceased,

vs.

W. J. BROWN, executor of Reuben King, deceased.

The following jurors, to wit: Bryant Leggett, Robert Council, Thomas A. Norment, J. T. Phillips, Ebb Jones, J. C. Freeman, Alva Lawson, James A. Lawson, Willis Lawson, Joshua Phillips, Caleb Butt and Henry Pitman, being chosen, tried and sworn to try the issues between the parties, say: That they find all of said issues in favor of the plaintiff, and assess his damages at $555.49, with interest thereon from 1 January, 1870, until paid, and cost of suit.

Thereupon it is considered by the Court that the plaintiff do recover from the defendant his said damages and cost of suit.

Rule for new trial. Rule discharged.

Appeal craved and granted. Notice waived.

And that at Fall Term, 1875, of Robeson Superior Court, the following entries were made:

STATE *ex rel.* WILEY B. FORT, administrator of John Cooley,

vs.

W. J. BROWN, executor of R. King.

SUIT ON SHERIFF'S BOND.

Judgment of January Term, 1874, affirmed and made the judgment of this term. Judgment for cost. Let execution issue.

(382) The above action was brought on a receipt given by R. King to said Cooley for claims within a magistrate's jurisdiction, placed by Cooley in King's hands, as sheriff, to collect, and upon a demand made upon W. J. Brown, executor of Reuben King, by Fort, administrator of Cooley, a short time before said action was commenced.

9. Judgment of John Smith against W. J. Brown, executor of Reuben King, deceased. This judgment was obtained at August Term, 1870, of the Superior Court of Robeson County, for $2,687.74 and interest on $1,638.74, principal money, and cost of suit, and that there was a payment made on said judgment 10 January, 1873, of $980.40 by said Brown, executor of Reuben King; that the suit in which this judgment was obtained was commenced 28 January, 1869, before the death of Reuben King, and upon a bond executed by the said Reuben King to said John Smith, 19 December, 1859, for $1,638.76.

10. Judgment of John Smith against W. J. Brown, executor of Reuben King. This judgment was obtained at the August Term, 1870, of the Superior Court of Robeson County, for $257.46 and interest on $150, principal money, until paid, and cost. The suit in which this judgment was obtained was commenced 28 January, 1869, before the death of said Reuben King. The cause of action on which said suit was brought was on a bond executed by said Reuben King to John Smith, 18 September, 1858, and due one day after date, and none of said judgments have been paid.

11. Judgment of James McHargue against W. J. Brown, executor of R. King. Judgment in Superior Court of Robeson County for $1,458.01, 10 December, 1877.

His Honor further finds, as a fact, that the said W. J. Brown, executor of Reuben King, immediately after his qualification,
(383) made advertisement, as required by law, for creditors of the estate of R. King to present their claims.

The devisees pleaded statute of limitations—ten years bar and seven years bar.

On the foregoing facts his Honor—being of the opinion that the plaintiff's cause of action was barred by the statute of limitations—adjudged that the defendants go without day, and recover of the plaintiff the cost of action.

Plaintiff appealed.

W. F. French for plaintiff.
T. A. McNeill for defendants.

SMITH, C. J., after stating the case: The right to bring this action accrued to the plaintiff on his appointment to office, on 23 December, 1880, and the action was begun on 2 December, 1881, less than a year afterwards; so it is not barred by the statute of limitations as against the removed executor, according to the rulings in *Lawrence v. Norfleet,* 90 N. C., 533, and *Worthy v. McIntosh, ibid.,* 536.

As, however, this defendant has no property out of which a recovery against him for waste and mismanagement of the trust estate could be satisfied, the recourse to the devised land is the sole remedy open to the creditors. That the law does allow access to the real estate of the deceased debtor under such circumstances, is decided in *Badger v. Jones,* 66 N. C., 305; *Latham v. Bell,* 69 N. C., 135; and *Blount v. Pritchard,* 88 N. C., 445.

If, however, the statutory bar interposes to obstruct the successful prosecution of these claims, and this defense to the action is open to the devisees and owners of the real estate, then in the absence of any definite ascertained indebtedness requiring a sale of the land, a license to make the sale ought not to be granted to the administrator, at least until the controversy about the debts shall be settled and decided. The defendants insist that the claims, if otherwise capable of being enforced, are barred by the lapse of time and long delay, and the (384) judge, concurring in the sufficiency of the defense, rendered judgment against the plaintiff, and he appealed.

1. The first of the disputed claims, that of Eli Bumble, may be left out of view in this inquiry, since it is depending, undetermined and resisted. As it may not be established, it cannot be the basis of a proceeding against the land, at least until it is recovered.

2. The judgment rendered in favor of R. M. Norment, at May Term, 1887, although upon a cause of action accruing on 15 February, 1857, and prosecuted first against the executor and then against the administrator, conclusively settles an indebtedness existing before this action was begun, and its validity established after a protracted litigation.

This debt must be paid for aught shown in the record, and is entitled to satisfaction out of the real estate. This alone is sufficient to reverse the judgment and dispose of the appeal, and we should pause to proceed further but that the different claims will, under the ruling, have to be decided when the fund is to be distributed, and should be before the sale, in order that the sum to be raised may be definitely ascertained.

3—6. The next four, belonging respectively to James A. Phillips, D. F. Edmunds, Augustus Smith and D. Cromartie, were reduced to judgments against the executor in the first two months of the year 1873, and in their demands against the real estate are essentially the same.

The causes of action are merged in the judgments, and hence come under the new statute of limitations, and the seven years elapsing since, before the beginning of the present suit, would effectually obstruct a recovery alone considered, according to the cases already cited. *Lawrence v. Norfleet, Worthy v. McIntosh, supra,* and *Bevers v. Park,* 88 N. C., 456.

(385) The last decides that a judgment recovered against an administrator upon a cause of action, which, but for such judgment, would be barred, cannot be maintained against the statutory bar set up by the heirs to a proceeding instituted to sell the descended lands. The ruling is somewhat restricted in the subsequent case of *Speer v. James,* 94 N. C., 417, so far as it affects the force and effect of the judgment rendered against the personal respresentative; but it supports the proposition that where the statutory bar would be available to him in protecting the personal, so it will be to the heir in protecting the real estate, against the demand of a creditor. *Syme v. Badger,* 96 N. C., 197; *Andres v. Powell,* 97 N. C., 155. *Bevers v. Park* differs only in this particular, that in it the administration was granted after 1 July, 1869, while in that before us, the letters testamentary issued before that date, and this brings us to an examination of what is supposed to be conflicting legislation, found in the Code of Civil Procedure and in the acts subsequently passed regulating the administration and settlement of the estates of deceased persons, which are now associated in The Code, chapter 33, under the title "Executors and Administrators."

The first enactment introducing radical changes in the law, which took effect in July, 1869, was passed and ratified on 6 April preceding, and was followed by an amendment, ratified on 1 March of the next year, confining its operation to estates whereof original administration shall have been granted since 1 July, 1869. It further declares, that "all estates whereon administration was granted prior to the said first day of July, one thousand eight hundred and sixty-nine, shall be *dealt*

with, administered and settled according to the law as it existed just prior to the said date, and it is hereby declared that such was the true intent and meaning of said act" (the act of 1869), with a proviso, "that nothing herein contained shall be construed to prevent the application of said act, so far as it relates only to the courts having jurisdiction of any action or proceeding for the settlement of an ad- (386) ministration, or to the practice or *procedure* therein." The Code, sec. 1433.

Again, at the session of 1871-'72, was passed "An act to prescribe the practice and procedure in actions by creditors of deceased persons against their personal representatives," chapter 213, which, as the title imports, undertakes to regulate the proceeding to be pursued by creditors in bringing about a settlement of the estate and of their claims against it, of which section 29 declares, that the "act shall apply only to cases where the grant of letters of collection, or of probate, or of administration, shall have issued on or after the first day of July, one thousand eight hundred and sixty-nine."

An amendment was made to this section by the act of 3 March, 1873, chapter 179, by adding the words, "except in cases of administration *de bonis non* upon estates where the former letters of administration or letters testamentary were granted prior to the first day of July, one thousand eight hundred and sixty-nine, in all which cases estates shall be *administered, closed up and settled* according to the law as it existed just prior to the first of July, one thousand eight hundred and sixty-nine."

These provisions will be found in The Code, secs. 1433 and 1476 and connecting sections. It will be noticed that this new legislation has reference solely to matters connected with the *administration* and *settlement* of deceased persons' estates, and is not inconsistent with the provision in the superseding statute of limitations, which governs only in cases where the right of action accrues subsequent to the specified date, and was intended to harmonize the new legislation with the new practice. It does not profess to interfere with the statute, which discriminates between actions the right to bring which existed anterior to the adoption of the Code of Procedure, and those that arose afterwards; and to render the enactments consistent with each other, and give effect to both, we must except from the operation of those which relate to the (387) subject of administration so much of that declaring the application of the superseding limitations to the kind of actions mentioned. Such has been the interpretation in cases heretofore adjudged, and such we are constrained to accept as a just exposition of the law, in the absence of any intimation of an intention to interfere with the opera-

tion of the act of limitations. Moreover, the time in which creditors are allowed to bring suit does not enter into the mode of administering the estates of deceased property owners by representatives, which it was the purpose of the legislation to regulate by the displacing statutes, the scope and operation of which will be plainly seen in examining their provisions. But while the bar would be in the way if there had been one continuous administration of the same person, it has been broken by the removal of the executor, and interrupted in its course for more than two years, during which the judgment could not be enforced by action of the creditor, and in less than one year after the appointment of the plaintiff as administrator this action was brought, and arrests the running of the statute.

It is declared in section 164 of The Code, that "if a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his personal representative after the expiration of that time, and within one year after the issuing of letters testamentary or of administration."

This clause uses language appropriate to actions against a debtor *personally* and not barred by the statute at the time of his death, and not verbally to a case where one representative dies, or is removed, and another succeeds to his place and carries on the work of administration left unfinished, yet the analogy is so complete, and the spirit, if not the letter of the act, reasonably interpreted, so closely applicable to the present facts, that we feel constrained to bring them under its (388) provisions, so as to embrace them. The year prolonging the period within which the action may be brought, to wit, from the plaintiff's appointment on 23 December, 1880, to 2 December, 1881, the time of beginning the suit, had not expired by twenty-one days, and thus these judgments escaped the bar, and may be enforced against the debtor's lands in the hands of the heirs, unless alienated in pursuance of section 1442 of The Code, in which case the proceeds of the sale are in place of the land sold.

The same disposition must be made of the several judgments in favor of Mary A. Barnes, Wiley B. Fort and James McHargue.

The judgments recovered by John Smith must be excluded, as they were rendered at August Term, 1870, of the Superior Court of Robeson, and the seven, and even ten years, had passed before this suit, and the shorter period even before the removal of the executor; so they are not protected by the proviso mentioned.

While the seven years limitation is dependent upon a compliance with the condition that due advertisement is made as required by law,

this prerequisite must be confined to cases of *original administration granted,* and cannot apply to administrations *de bonis non* where the former administrator or executor (as found in this case) has complied with all the requirements of the law then in force, for such administrator *de bonis non* but takes up the broken thread and carries out an interrupted and incomplete administration. The two constitute a single administration of the estate.

We must therefore overrule the decision in the court below, and reverse the judgment for the error assigned, to the end that the cause may proceed in the court below in accordance with this opinion.

Error.

Cited: S. c., 101 N. C., 347; *Lee v. Beaman, ibid.,* 298; *Brittain v. Dickson,* 104 N. C., 553; *Clement v. Cozart,* 107 N. C., 700; *Dickson v. Crawley,* 112 N. C., 633; *Mann v. Baker,* 142 N. C., 237; *Best v. Best,* 161 N. C., 516; *Fisher v. Ballard,* 164 N. C., 328; *Barnes v. Fort,* 169 N. C., 435; *McNair v. Cooper,* 174 N. C., 568.

(389)

E. C. KNIGHT, ADMINISTRATOR OF ROBERT S. PITT, v. M. ROUNTREE ET AL.

Lien—Mortgage—Surety.

1. J. executed to P. a mortgage on real and personal property, to secure an existing debt, and also to secure and save harmless the mortgagee from loss by reason of being surety for J. upon a debt due other parties. Subsequently J. executed another mortgage to R., to secure other indebtedness. P. paid off the debt for which he was surety after the execution of the second mortgage: *Held,* that this payment did not discharge his lien, and that it took precedence of the mortgage to R.

2. To constitute an agricultural lien it is essential that the supplies advanced must be furnished *after* the execution of the agreement, or at the time of making it, so that the agreement and advances shall constitute one transaction.

CIVIL ACTION, tried before *Avery, J.,* at Fall Term, 1887, of EDGECOMBE Superior Court.

The plaintiff is the administrator of Robert L. Pitt, who died intestate in the month of May, 1884.

On 28 December, 1881, John H. Pitt executed to the intestate a mortgage of a tract of land therein specified, and the crops produced thereon

during that year, to secure the payment of a promissory note due to the mortgagee for $1,853, dated 1 January, 1878, and payable on demand, with interest at eight per cent, and to indemnify the mortgagee against loss as surety for the mortgagor for a debt—note—for $250, due 1 January, 1878, to John Norfleet; and also a note to Atkinson, Cobb & Co. for $778.87, dated 28 December, 1881, and due at 60 days, with interest at eight per cent. This mortgage contained a power of sale, to be exercised in case of default made by the mortgagor.

Afterwards, on 6 December, 1882, the said John H. Pitt executed to the said intestate his other mortgage of the same land and the
(390) crops of cotton produced thereon for that year, which mortgage was duly proven and registered on the 7th day of the same month. The following is a copy of the material part of this mortgage necessary to be set forth here:

"The condition of the above deed is such, that whereas the said Robert S. Pitt has become surety for the said John H. Pitt on a promissory note for four hundred and thirty dollars and seventy-two cents, payable to John Hutchinson, cashier of First National Bank of Wilson, bearing date 6 December, 1882, and payable thirty days after date: Now, therefore, if the said John H. Pitt shall well and truly pay said note when due, and shall save the said Robert S. Pitt harmless by reason of his said suretyship, then this deed shall be void, otherwise it shall be lawful for the said Robert S. Pitt, upon failure of said J. H. Pitt to pay said note, to first seize said crops of cotton and sell the same for cash to the highest bidder, and apply the proceeds of the sale of said cotton to the payment of said note, and if the proceeds of said sale shall be insufficient to pay said note, then the said Robert S. Pitt is hereby authorized to sell said tract of land for cash, and apply the proceeds of sale to the payment of said note, or to such amount as the said Robert S. Pitt may have to pay by reason of his suretyship, and the balance, if any, pay to the order of the said John Henry Pitt."

It was agreed by the parties that the debt so secured is the balance of the debt mentioned in the first above mentioned mortgage as due to Atkinson, Cobb & Co., the mortgagor having reduced this debt by sundry payments to that sum. It was likewise agreed, "that on 9 January, 1883, plaintiff's intestate paid off and discharged the note with principal and interest described in the mortgage," the condition of which is set forth above.

Afterwards, on said 6 December, 1882, the said John H. Pitt executed to the defendants his other mortgage of the crops produced on the
(391) same land during the year 1882, which was duly proven and registered on the 8th of the same month, and the following is a copy of the material parts thereof:

"Whereas, the party of the first part is now engaged or about to engage in the cultivation of various crops upon the following lands, his home tract in Nash, Whitaker's Township, adjoining the lands of H. B. S. Pitt and others; and, whereas, the party of the first part is now indebted to the parties of the second part in the sum of twelve hundred and thirty-nine dollars and six cents, in the form of account for supplies; and whereas, the parties of the second part have agreed to make advances in money, merchandise and supplies to the party of the first part during the year 1882, to the amount of one hundred dollars; in consideration of one dollar and for the further consideration herein set forth, the party of the first part hereby conveys to the parties of the second part and their heirs the following real estate and personal property: all cotton, corn and other products now harvested or to be harvested from crops of 1882; also all crops to be cultivated and made upon the above described land during the said year 1882, and upon any other land the party of the first part may cultivate during the said year. The party of the first part further represents that he is the owner in fee simple of all the property above described, and that the same is not encumbered, except by mortgage of $430 to R. S. Pitt. Now, if the said party of the first part shall, on or before the first day of November, 1883, pay the said note and the advances herein agreed to be made, and shall also pay any other amount that the parties of the second part may advance to the party of the first part in addition to the amount herein specified to be advanced, and shall also pay all other debts that the said party of the first part may be owing to the parties of the second part, then this deed and lien is to be null and void."

"On 6 December, 1882, there was on the plantation described (392) in said mortgages, grown and harvested thereon in the year 1882, seed cotton of the value of six hundred dollars, which on 5 January, 1883, the defendants seized, sold, and applied to their mortgage debt. The amount secured in the mortgage to Rountree, Barnes & Co. was then due, and was for supplies, money and merchandise furnished the said J. H. Pitt during the year 1882, to enable him to cultivate and harvest said crop. On 3 March, 1884, the said R. S. Pitt sold the land described in the mortgage of 28 December, 1881, under the powers contained therein, to J. H. Cutchin, for the sum of $2,500, and applied the same to the payment of the note for $1,853 and to the Norfleet note. On 3 March, 1884, the indebtedness secured in the mortgage of 28 December, 1881, was as follows: R. S. Pitt note, principal and interest, $2,767.15; balance on the Norfleet note, $252.36; balance on the Atkinson, Cobb & Co. note, $461.30, aggregating $3,480.81.

This action was brought by the plaintiff to recover the cotton so seized and sold by the defendants.

Upon the facts admitted as above stated, it was agreed that, if the court was of opinion with the plaintiff, judgment should be entered for $430.72, with interest from 9 January, 1883; and if the court should be of opinion with the defendants, then judgment to be entered for the plaintiff for the sum of $101.26, with interest from 3 March, 1884."

The court gave judgment "that the plaintiff recover of the defendants the sum of $101.26, with interest from 3 March, 1884, together with the costs of this action, to be taxed by the clerk."

The plaintiff excepted and appealed.

John Devereux, Jr., for plaintiff.
A. W. Haywood for defendants.

(393) MERRIMON, J., after stating the case: The case as stated in the record fails to designate with precision, as it should do, the questions which the parties intended to have settled by the appeal, and we are left in large measure to find them, if we can. The record is obscure, and if we fail to discover all of them, such failure must be attributed to the negligence of the parties in presenting their case intelligibly, and as the statute directs.

It seems that the appellees contended, first, that as the intestate of the plaintiff paid the debt of Hutchinson, cashier, etc., specified in the second mortgage executed to him on the second day of December, 1882, which embraced the cotton in controversy, such payment discharged this mortgage absolutely, and therefore their title to the same cotton acquired by the subsequent mortgage to them of 2 December, 1882, was unaffected by the mortgage to the intestate.

This contention is unfounded. The chief and leading purpose of the mortgage was to indemnify—to save the mortgagee "harmless by reason of his said suretyship." The deed of mortgage passed the title to the cotton to the intestate of the plaintiff, and, by its terms and spirit, contemplated and intended that he might, in the contingency provided against, sell it to pay the debt mentioned, or, if he paid it, as he was bound to do, then sell it to repay himself the money he so laid out. The intent was not simply to secure the payment of the debt to him to whom it was payable, but as well and as certainly to save himself, the surety—the intestate, harmless—and the mortgage continued operative and in full force for that purpose until this should be done, unless he should sooner see fit to discharge it.

The mere fact that the last mentioned debt was a balance of the debt due to Atkinson, Cobb & Co., specified in the first mortgage to the intestate, could not affect adversely the second mortgage to him. It seems

that it came about that such balance became the debt to Hutchinson, cashier, etc., with the intestate as surety. The latter plainly had the right to take the second mortgage mentioned, embracing the (394) land and cotton, to indemnify himself. We cannot conceive of a reason why he might not.

It seems, also, that the appellees contended, secondly, that the mortgage so executed to them was not simply a mortgage, but that it was as well and in addition a *lien* upon the crops embraced by it, as allowed and created by the statute (The Code, sec. 1799) to secure to them money advanced by them to cultivate the land and produce the cotton in question, which lien, as to the crops produced, is superior to the mortgage of the intestate and like mortgages. *Wooten v. Hill,* 98 N. C., 48.

The mortgage of the appellees cannot be upheld as a *lien,* under the statute just cited, for advancements of money to the mortgagor, to be expended in the production of the crops, if the same were advanced for that purpose *prior* to its execution. It is settled that such advancements of money and of supplies for such purpose must be advanced *after* the making of the agreement in writing in that respect, in order to create such lien. *Clark v. Farrar,* 74 N. C., 686; *Patapsco v. Magee,* 86 N. C., 350; *Reese v. Cole,* 93 N. C., 87; *Townsend v. McKinnon,* 98 N. C., 103.

Now, the crop year of 1882 was nearly if not quite over when the mortgage to the appellees was executed, and it appears, from the recitals in the deed, that the advancements of money were made mainly, if not altogether, before it was executed. It does not appear that they advanced to the mortgagor any money after that time, and if they did, this should have been made to appear.

It was suggested on the argument here, that the appellant ought to be required to apply a part of the money realized for the land, which was a security embraced by both the appellants' mortgages, to the payment of the debt secured by his second mortgage, and thus leave the cotton in question to the appellees to pay their debt, they having a lien only on that to secure their debt. This cannot be allowed, because the (395) money realized from the land, as appears, was insufficient to pay the debts secured by the first mortgage mentioned.

The parties agreed that the court should enter judgment for one of two sums of money specified, accordingly as it might be of opinion with the plaintiff or defendants.

What particular questions the court decided adversely to the plaintiff—the appellant—we cannot clearly learn; we can only infer, with tolerable confidence, that it decided the questions to which we have adverted above, adversely to him, and therefore gave him judgment for the

smaller amount. There is, therefore, error. The judgment must be reversed, and judgment entered in the court below in favor of the plaintiff for the sum of four hundred and thirty dollars and seventy-two cents, with interest thereon from the ninth day of January, 1883, according to the terms agreed upon by the parties.

Error.

JOHN CASEY AND WIFE, MINERVA, v. R. W. COOPER.

Betterments—Married Women—Judgment—Contract.

If a party in an action to recover land sets up in his pleadings a demand for compensation for improvements, he should have that question passed on at the trial with the other issues; he will not be permitted to raise it thereafter, as the judgment rendered upon the trial will be deemed conclusive of all matters put in issue by the pleadings.

THIS was a petition by the defendant for an inquiry and allowance for improvements, heard before *MacRae, J.*, at March Term, 1888, of BUNCOMBE Superior Court.

(396) The complaint in this action, which was begun 6 September, 1882, contains the usual averments of the plaintiffs' ownership and the defendant's wrongful withholding of the land mentioned therein, the possession of which is sought to be recovered.

The answer admits the defendant to be in the occupation of about three and one-half acres near the center of one tract whereon he resides, and of about five acres at its western border, which he claims as his own property.

As a further defense, the answer alleges that the *feme* plaintiff being largely indebted to the defendant for medical services rendered to her and necessary in her condition, in order to pay the same, contracted, with her husband's consent, to convey to him the parcels of land mentioned, and in consideration thereof the defendant surrendered his claims, which were largely in excess of their value; that believing he had title, with the knowledge and consent of the plaintiffs, he entered into possession, and remaining there ever since, has made valuable and permanent improvements in building and otherwise, of the value of at least five hundred dollars. Wherefore he demands that said parcels of land be conveyed to him, and such further relief as he may be entitled to in the case.

"The cause coming on to be heard, on motion of the plaintiff Minerva for judgment upon the pleadings, and the admission of the defendant

that she was a married woman at the time of the alleged agreement set up in the answer, and that it was in parol," the court adjudged, "that the *feme* plaintiff Minerva is entitled to the possession of the land described in her amended complaint, and which the defendant admits himself to be in possession of, and that a writ in her favor against the defendant be issued at her instance for possession," and the court further adjudged, that the defendant pay the costs of the action, to be taxed against him and the surety to his defense bond.

This final disposition of the case was made at December Term, (397) 1887, of the Superior Court of Buncombe, and at March Term next ensuing, the defendant applied by petition to the succeeding judge for relief, upon the following condensed allegations of fact:

That the petitioner was in possession of the two parcels of land for about eight years under a contract with the *feme* plaintiff, her husband having theretofore abandoned her, in pursuance of which he paid her the purchase money, and she agreed as soon as she could get a deed from the administrator of one James Cooper, to convey the title to him; that while in possession he made certain improvements upon the property, in building a dwelling and other houses, of the value of eight hundred dollars, in planting fruit trees and in other ways, costing more than one hundred dollars additional, and this expenditure was in faith that the title would be made him, as stipulated at the time of purchase.

In view of all this, the petitioner asks that a jury may be empaneled to inquire into the enhanced value thus imparted to the premises, to the end that he be allowed therefor, and meanwhile that the writ of possession be stayed.

"This petition coming on to be heard before MacRae, Judge, and it being made to appear to the court that the defendant in his answer set up his claim for betterments, to be assessed upon the trial of the action, and judgment having been rendered against the defendant and in favor of plaintiff on the pleadings and admissions of defendant, it is considered that the defendant is not now entitled to the relief demanded in his petition; no appeal having been taken from the judgment of the court heretofore rendered. Prayer of petition denied. From which order the defendant appealed to the Supreme Court."

C. A. Moore for plaintiffs.
Theo. F. Davidson for defendant.

SMITH, C. J., after stating the case: The rule has long been (398) recognized and enforced in equity, that forbids one who by parol has entered into contract with another to sell and convey him land, upon faith in which the latter is permitted to improve the premises, to

reclaim the land without compensation for the increased value thereof. It has been extended by statute to cases where there is no privity or contract relations between the parties, and where the expenditure in labor and money has been made in the *bona fides* and reasonable belief of ownership; and this claim for remuneration may be made and the damages assessed at or after the trial of the action to recover the premises. The Code, sec. 473.

The defendant has in this case elected to demand that the allowance be ascertained when the action is tried, and the court in giving judgment denies, or at least does not recognize, the defendant's right to such remuneration, for the assigned reason that the alleged agreement was made by a woman under coverture and not in writing. This ruling is predicated upon the proposition that the agreement is an absolute nullity, not calculated to mislead any reasonable person and induce a belief that he has any right, legal or equitable, to enforce a claim for remuneration for what he voluntarily and with such knowledge spends in improving the property. In this the judge was acting in accordance with what is said by *Ruffin, J.*, delivering the opinion in *Scott v. Battle,* 85 N. C., 184, who, in pointing out the difference between a contract made by one *sui juris* and one under the disability of marriage, uses this language: "In no case will the law imply a promise on her part, and every one who deals with her is held to do so with a knowledge of her disability. It is this disability of a married woman to make any contract, which, we think, distinguished her case from those in which a purchaser under a parol contract, void under the statute, has been allowed his claim for a restoration of the purchase money paid and *compensation* for his betterments." Then referring to the grounds
(399) upon which relief is granted, he asks: "Can this reasoning hold good when there exists, as in the case of a *feme covert,* no power to contract, and when, indeed, the law itself declares she shall not do so?" We reproduce these remarks of the very learned judge who spoke, not so much with a view of recognizing their correctness as a statement of the law, as to show that the ruling upon the trial, in ignoring altogether the claim for betterments, was intended to be as in legal effect the judgment is, a denial, direct, of the defendant's right to compensation, as set out and demanded in the answer, and not a decision merely upon other points, leaving this open for presentation afterwards. The effect of a final judgment concludes every matter in controversy in the pleadings, in which legal and equitable remedies are blended, unless, as in this case, by statute a future opportunity is allowed to assert a claim and it is not put forward to be passed on at the trial. But, in fact, it is asserted in the answer and refused by the court, and being an adjudged

matter, whether correctly or erroneously, and no appeal taken to review the ruling upon assigned error at the time, the judgment must stand.

Such was the view entertained by the judge to whom the subsequent application for allowance for improvements was addressed, and in his adjudication we find no error. The rules of practice as established must be maintained, and cannot give way to cases of hardship growing out of a mistake as to their operation, however, in particular cases, their operation may be severe and harsh.

There is no error, and the judgment is affirmed.

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(400)

E. T. CLEMMONS v. E. H. C. FIELD.

Excusable Neglect—Vacating Judgment—Appeal.

1. The power conferred upon the judge to set aside and vacate a judgment rendered against a party through his mistake, surprise or excusable negligence, does not extend to those judgments which necessarily follow a verdict.

2. In judgments founded upon verdicts the relief should be by motion for a new trial, made at the term when rendered, and being addressed to the discretion of the trial judge, his ruling thereon is conclusive, unless it is based on a want of power, in which event it is reviewable on appeal.

THIS was a motion made by the defendant after notice, at March Term, 1888, of BUNCOMBE Superior Court, to set aside a judgment rendered at the term preceding for excusable neglect under section 274 of The Code, heard and denied upon the following facts found by *MacRae, J.:*

The action was placed upon the calendar for trial on a day certain, or as soon thereafter as it could be reached.

Several days previous to that for which this case was set upon the calendar, defendant wrote to his attorney in Asheville to wire him as soon as there was any possibility of the case being reached.

Defendant's attorney, believing that the case would not be reached at all, failed to respond by telegraph to defendant's letter, and defendant did not attend that term of the court.

The case was tried by a jury on the last day for the trial of jury cases, in the afternoon. On the morning of the same day, or on the afternoon of the day before the trial, defendant's counsel asked the presiding judge what disposition had been made of the trial docket; the judge replied,

"that the whole of it had been continued, exceept two little cases to be tried by consent." Counsel for defendant gave the matter no further attention, until he was sent for and notified that the case was
(401) called for trial, whereupon he went into court and moved for a continuance, which the presiding judge, after hearing counsel, declined to grant. And the case was tried by a jury.

Defendant has a meritorious defense, if true. On the foregoing facts found, I think, that defendant's negligence was inexcusable; it was his duty to be present at the court on the day set for the trial upon the calendar, and if the case was not reached on that day, to wait its call, or act as advised.

This case having been tried by a jury, the defendant is not entitled to relief under the 274th section of The Code. His remedy was by appeal.

The motion is denied."

Defendant appealed.

C. A. Moore for plaintiff.

M. E. Carter (and W. R. Whitson, by brief) for defendant.

SMITH, C. J. Under the former practice, a final judgment rendered in a proceeding at law was beyond the control of the court after the expiration of the term. *Moore v. Hinnant,* 90 N. C., 163; and the rule is now established by law, which declares that no motion "to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages," shall be heard, except at the term when the trial takes place. The Code, sec. 412, par. 4; *England v. Duckworth,* 75 N. C., 309. But the power to vacate and set aside a judgment and relieve a party therefrom when "taken against him through his mistake, inadvertence, surprise or excusable neglect," within one year after notice, is expressly conferred by law (The Code, sec. 274), and thus far, under the conditions mentioned, only authority over its rulings is prolonged for the specified period. There is no obligation to exercise it even
(402) when the application comes within the terms of the statute, though some of the earlier decisions look that way; but it is discretionary with the judge even then to allow or refuse the relief, and his action in refusing the relief, except for a supposed want of power, is not reviewable on appeal. *Austin v. Clarke,* 70 N. C., 458.

In *Beck v. Bellamy,* 93 N. C., 129, a similar effort was made, after a verdict and judgment rendered at a former term, to obtain relief, as is proposed in this case, under the same provision of The Code, and this Court said: "The statute, in conferring power, confines its exercise to judgments rendered under the specified conditions, and *does not embrace*

such as necessarily follow the verdict, and the setting aside of which, without at the same time disturbing the verdict, would be of no advantage to the party, for it must again be entered in conformity to the jury findings. To vacate both is necessary to afford the desired relief, and this would be to grant a new trial, which can only be done at the term when it took place." To the same effect are the cases of *Foley v. Blank,* 92 N. C., 476; *Winborne v. Johnson,* 95 N. C., 46, and *Twitty v. Logan,* 86 N. C., 712.

If, however, the judge refuses to grant the motion for a supposed want of power, when, upon a proper construction of the statute, he has it, the error may be corrected on appeal, and an opportunity afforded him to determine whether he will exercise it. *Hudgins v. White,* 65 N. C., 393; *Gilchrist v. Kitchen,* 86 N. C., 20. So a refusal to amend, for want of power to allow the amendment asked, in the case when it is possessed, this is error in law and can be corrected in the appellate court. *Henderson v. Graham,* 84 N. C., 496, citing *Freeman v. Morris,* Busb., 287, where a motion for permission to supply, in the record, a copy of a lost will which had been sustained by the verdict of the jury, was refused, upon the ground of a supposed absence of power to allow it, and the error was corrected on appeal, and the application remitted for the exercise of the judge's discretion. (403)

These cases all stand upon the ground that the refusal to act proceeded from an alleged want of power, and in this consisted an error in law.

The wrong complained of by the defendant in this case consists in being forced into a trial unexpectedly and unprepared, when this was in consequence of what was said to his counsel by the judge himself, about the cause being continued, or in other words, not allowing a continuance, under the circumstances, to another term. However forcible was this application, it could only be made to the judge who tried the cause, and not to the judge who presided at the succeeding term, and we cannot see how these considerations can enter into and qualify a judgment of necessity following the verdict, as one obtained "through his (the defendant's) mistake, inadvertence, surprise or excusable neglect," and come within the operative provisions of the law.

It is true, the judge holds the defendant's negligence, in reference to being unprepared for the trial, to be inexcusable, and the inference may possibly be thence drawn that he deemed himself not however invested with power to act in the premises; the record does not so state, nor is there any intimation as to what he would do if possessed of the necessary authority, and to be a reviewable case, the refusal should affirmatively appear to have proceeded from the adjudged want of it. As we interpret the case the judge simply ruled irrespective of the question of power;

even if he possessed it, it would not be exercised in favor of the defendant on the facts shown in evidence.

If the record be construed as denying the motion because of the absence of authority to allow it, it does not follow that this was based upon a construction of the statute, whether erroneous or not; but it should more reasonably be ascribed to the ruling in *Beck v. Bellamy, supra,* that the case was not within the statute. However this (404) may be, the act of refusal cannot be assigned for error unless it results from an erroneous ruling. So that he has not exercised a discretion committed to him, and this the case must show.

There is no error, and the judgment is affirmed.

Cited: Flowers v. Alford, 111 N. C., 250; *Brown v. Rhinehart,* 112 N. C., 777.

ISAAC FLEMING v. T. J. PATTERSON.

Contempt—Injunction—Jurisdiction—When Action is Commenced—Summons.

1. The jurisdiction to issue injunctions and restraining orders may be exercised at any time after the commencement of the action and before judgment.
2. The issuing of the summons is the commencement of the action; and it is not necessary that it shall be served before the injunction or restraining order is made.
3. One, who wilfully disobeys an injunction or restraining order, is guilty of contempt, though the summons in the action may not have been served upon him.

THIS was an appeal from an order of *Graves, J.,* adjudging the defendant to be in contempt, for disobedience of a restraining order made in this cause, pending in the Superior Court of BURKE County. The facts are stated in the opinion.

Perkins and C. H. Armfield for plaintiff.
Isaac T. Avery (by brief) for defendant.

MERRIMON, J. The following is a copy of the order appealed from, and as to which error is assigned:

"The plaintiff having issued a summons, which had not been (405) served at the time, obtained an order restraining the defendant

from closing a certain alleged way, over which the plaintiff claims the right to pass. The plaintiff moved, on notice, at Burnsville, to attach the defendant. The motion was then continued to Marion, to be heard on 11 May, and was on that day continued to Morganton; and now at Chambers at Morganton, the parties appear and the motion to attach the defendant for contempt of court, in refusing to obey the restraining order heretofore made, is heard. The defendant objects, that as no summons has yet been served on him, he is not before the court so as to be attached. The objection was overruled; and the matter being now heard on the affidavits of the plaintiff and defendant, it appears that the defendant has, in disobedience to the order of the court, closed up the said way in the restraining order described.

It is therefore considered that defendant is guilty of a contempt in such disobedience, and that he pay a fine of fifty dollars."

Regularly, every civil action must be begun by a summons, and such an action is begun when a summons is issued as original process. The Code, section 199; *Patrick v. Joyner,* 63 N. C., 573; *McArthur v. McEachin,* 64 N. C., 72. A party may, however, waive the original process, by appearing in the action and making defense, as if he had been served with such process. *Moore v. R. R.,* 67 N. C., 209; *Middleton v. Duffy,* 73 N. C., 72; *Etheridge v. Woodley,* 83 N. C., 11.

The statute (The Code, sec. 335) provides that "the judges of the Superior Courts of this State shall have jurisdiction to grant injunctions and issue restraining orders in all civil actions and proceedings which are authorized by law." The jurisdiction thus conferred is very general and comprehensive, and may be exercised at any time after the action or proceeding is begun, as above indicated, in the course of the action, or summarily at Chambers, as occasion may require. (406) The statute (The Code, sec. 339) further provides, that "the injunction may be granted *at the time of commencing the action,* or at any time afterwards before judgment," etc.—that is, *at the time the summons is issued.* The purpose of this provision is to require that such jurisdiction shall be exercised in an action or proceeding certainly begun, but not to delay the exercise of such authority until the defendant in the action shall be served with original process. It is sometimes very important, in order to meet the ends of justice, that a restraining order shall be issued, or an injunction granted, without notice to the opposite party, at the time the summons is issued and before it is or can be served. The nature of the relief sought by injunction in many cases implies such exercise of authority, the statute plainly contemplates and allows it, and it is common practice to grant such relief.

It is not the *service* of original process that gives force and effect to the injunction—these spring out of and are founded in the authority of

the judge to grant it, and the party against whom it is directed is bound to observe its commands—he disregards them at his peril. The injunction is itself process, and notice of it to the defendant is sufficient to give it efficacy.

The summons having been issued in this case, the action was begun and the judge had authority to grant the injunction by order. The objection of the appellant, that the summons had not been served upon him, and therefore he was not before the judge, has no force whatever. The injunction and notice of it to him gave the judge jurisdiction of him, as to it and its purposes in the action begun. He was bound to observe its commands while it continued in force; he ventured to disregard and disobey them, and was therefore guilty of contempt of court.

The judge clearly had authority to so declare and enforce his (407) order by the process of attachment.

The court had jurisdiction of the appellant and the subject-matter of the action as the same appeared from the affidavits. Therefore the order granting the injunction, though it may have been erroneous, was not void, and continued in force until it should be dissolved, unless it should be corrected by appeal to this Court, and such appeal would not have the effect to dissolve it or impair its force pending the appeal. *Green v. Griffin,* 95 N. C., 50.

There is no error and the judgment must be

Affirmed.

Cited: McClure v. Fellows, 131 N. C., 510; *R. R. v. Lumber Co.,* 132 N. C., 650; *Wilson v. Bryan,* 195 N. C., 362.

IN THE MATTER OF A. C. PATTERSON AND W. H. DEAVER.

Contempt—Punishment—Habeas Corpus.

1. While a court may by imprisonment, reasonable in its duration, compel obedience to any of its proper mandates, its power to *punish* for contempt in disregarding its orders is restricted to the penalties prescribed in section 649 of The Code.

2. Where an agent of another State, having the custody of an alleged fugitive under an extradition warrant, apprehending an attempt at rescue, had procured two citizens of this State to accompany him as protection against violence, and being served with a writ of *habeas corpus,* commanding him to take the prisoner before a judge, refused to obey the writ and escaped with him from the jurisdiction of the court, and there was no evidence

that the persons acting as guards had actual custody of the prisoner, though they were present when the writ was read and knew its contents, nor that they aided or counseled the agent to resist or evade the process: *Held*, that the persons acting as such guard did not have the custody of the fugitive, and were not guilty of contempt for failure to surrender him to the officer charged with the execution of the writ.

3. It is the duty of the judge, to whom an application for the writ of *habeas corpus* is made, to issue it, if the petition is made in conformity to the statute; and it is likewise the duty of all persons to respect and obey it. If it has been obtained upon false statements, or by the suppression of facts which would prevent its issue, it will be dismissed upon the hearing. Until this is done every person who wilfully disobeys its commands or unlawfully resists or counsels resistance to its execution, is in contempt. and may be summarily punished therefor.

THIS was a rule served upon the respondents to show cause (408) why they should not be punished for contempt, heard before *Graves, J.*, at Spring Term, 1887, of BUNCOMBE Superior Court.

One Charles W. Goodlake was charged in the affidavit of J. E. Conner, a citizen of Tennessee and sheriff of Hamilton County therein, with having made in that State an assault upon J. E. Burlington, with intent to commit murder, a crime punishable there by law with confinement in the State prison for a term not less than two years, and as a fugitive from justice, found in the county of Buncombe, was arrested under a warrant issued by A. T. Summey, a justice of the peace therein, and on 24 December, 1886, committed to the custody of the sheriff of Buncombe, to be held under the provisions of section 1165 of The Code. The prisoner, on 6 January next ensuing, sued out a writ of *habeas corpus*, issued by Hon. James H. Merrimon, a judge of the Superior Court, against the keeper of the common jail of Buncombe, wherein the prisoner was detained, requiring him immediately to produce his body and make return to the writ before Hon. A. C. Avery, judge, at Morganton.

Upon the hearing, it was adjudged that the arrest and commitment were in accordance with law, and, as the agent commissioned by the Governor of Tennessee to demand and receive the prisoner for removal to that State was not present, that he be recommitted to the sheriff, in whose custody he was, to await the action of the Governor of this State upon the requisition of the Governor of Tennessee, if made within the time limited by law. A second application for the writ of (409) habeas corpus was presented to the same judge on 19 February, 1887, in which among other necessary averments, it was alleged that the prisoner had been surrendered to the agent of Tennessee, by virtue of an order so directing the sheriff from the Governor of this State, for the purpose of removal, after which he had been suffered by said agent to go

at large, and had been rearrested and held by said sheriff without further lawful authority. The writ was returned before Hon. J. C. MacRae, judge, at Hendersonville, and he, overruling all the grounds upon which the claim to be discharged was based, recommitted the prisoner to the custody of the sheriff, to be held under the orders before made.

Pending these proceedings, the said J. E. Conner was charged, upon the oath of the prisoner, with having committed perjury, in swearing out the warrant under which the original arrest was made, and he being carried before Charles W. Malone, another justice of the peace, for examination, on 6 March, was discharged.

Again, for the third time, a similar writ was sued out upon a petition containing the required averments under section 1627, and among them, that the "illegality of the imprisonment in this behalf has not already been adjudicated upon by a prior writ of *habeas corpus,*" before Hon. J. F. Graves, J., then at Marshall, in Madison County, returnable before himself *instanter,* directed to said J. E. Conner, who, at the time of making the affidavit, did not have the custody of the prisoner, and to whom the prisoner was not delivered until the next day, commanding the said Conner to bring the body of the prisoner before him at Marshall, with his return thereto. The writ was awarded on 6 March, and at once placed in the hands of M. A. Chandley, sheriff of Madison County, for service. On the night of that day the prisoner was
(410) delivered to the agent, who, with several others accompanying him for the purpose of preventing an apprehended forcible attempt to rescue the prisoner, entered the cars at Asheville, and proceeded without interruption until the train reached the town of Marshall There several persons, among them the sheriff with the writ, attempted to enter the car where the prisoner was sitting by the side of one of the assistants, when the respondent Patterson forbade him, until he was told that the person was the sheriff, and then made no resistance, and the sheriff came in, and not finding the agent, Conner, read the writ in the hearing of the four assistants present, and demanded the body of said Goodlake, which, the sheriff says in his return, was met with armed resistance. However, he subsequently found the agent in the apartment appropriated to the mails, and served the process on him, disregarding which mandate the agent proceeded on his way and conveyed the prisoner out of the State.

Thereupon an attachment was awarded against the said Patterson and others, to wit: W. H. Deaver, J. D. Croft and T. J. Howard, the judge finding that they had the custody of the prisoner and were in contempt, by virtue of which the said Chandley, sheriff, arrested the said

Patterson and Deaver, who alone were accessible to service, and brought them before the judge to answer therefor.

The said Patterson made answer to the charge under oath, and in substance (for the answer is too extended to be reported in detail) disclaimed any intent to disobey the mandate of the court, or obstruct the sheriff in his efforts to serve it, and stated that his presence with the agent was only to aid the agent in resisting any lawless and forcible efforts that it was feared would be made to wrest the prisoner from his custody, and prevent his removal from the State; and that as soon as advised of the official character of the sheriff, and the authority conferred upon him, no opposition of any kind was offered to its exercise, and that in all this he acted simply in the protection of the agent against lawless violence, if attempted, to obstruct him in (411) carrying out the order of the Governor of the State.

The court refused the request made by respondents to have the matters of fact submitted to a jury. Respondents excepted.

The respondents offered to show, that the matters alleged in the petition for writ of *habeas corpus* had been theretofore adjudicated; that this writ ought not to have been issued. The court held that the writ was issued upon the statements of the petition. Respondents excepted.

Thereupon a large number of witnesses were orally examined *pro* and *con.*

After hearing all the evidence and the argument of counsel, the court announced its findings of fact, and pronounced judgment.

The facts found are as follows:

That there is a sufficient statement in the petition filed by Charles W. Goodlake to authorize and compel the court to issue the writ of *habeas corpus.*

That Charles W. Goodlake had been imprisoned in the common jail of Buncombe County charged, upon a warrant issued by one A. T. Summey, a justice of the peace of said county, with having committed an assault with intent to kill, in the State of Tennessee, and under that charge was held by the sheriff of said county of Buncombe.

That a writ of *habeas corpus* had been heretofore sued out on the petition of the said Goodlake, and heard before A. C. Avery, one of the judges of the Superior Court of the State, in which it was alleged that said Goodlake was in the custody of the sheriff of Buncombe County, and upon the hearing, Goodlake had been remanded, to await the requisition of the Governor of Tennessee.

Another writ had been applied for and granted, but had not been served, and no further action was taken under it.

Another writ had been applied for by Goodlake, alleging that (412) he was detained by the sheriff of Buncombe County, which was

heard before J. C. MacRae, one of the judges of the Superior Court of this State, and upon the hearing of that writ Goodlake was again remanded to the custody of the sheriff of Buncombe County.

The fact that these proceedings had been had was not known to me at the time the writ was issued. The petition on which I granted the writ alleged that the petitioner was in the custody of one J. E. Conner.

J. E. Conner, representing himself to be the agent of the State of Tennessee, on Saturday, 5 March, 1887, demanded Goodlake from the sheriff of the county, and Goodlake, having obtained a pistol, resisted, and refused to allow Conner then to take him. A warrant, issued by a justice of the peace of the county of Buncombe, charging Conner with perjury, in suing out the warrant on which Goodlake was arrested, was then and there served on Conner, and the next day he had a hearing before the justice of the peace and was discharged.

There had been on Saturday night some disturbances about the jail, and a brother of Goodlake being near the jail about midnight, there being some twenty or thirty persons near him, said, "do not fear, Charlie," and added, "we will tear the jail down, if you say so."

The pistol was obtained from Charles W. Goodlake on Sunday.

One of the brothers of Goodlake tried to borrow a pistol.

There was some excitement in Asheville on Sunday evening about six o'clock. The sheriff of Buncombe County again went to the jail to deliver Goodlake to Conner. Conner requested that the sheriff of Buncombe County would deliver said Goodlake to him privately, and that the respondent A. C. Patterson should accompany him to the Tennessee line, to prevent a rescue, as he said.

(413) Patterson is a deputy of the sheriff of Buncombe County, and the said sheriff consented that he should accompany Conner, to assist him, to the Tennessee line.

The respondent W. H. Deaver was the chief of the Pinion Detective Agency for Western Division of North Carolina, and Conner requested him to go with him to the Tennessee line, to prevent a rescue, as he said, and the sheriff of Buncombe County also summoned him to assist in guarding Goodlake to the train and to the switch below the depot.

Conner and the sheriff of Buncombe County and the respondents did have some apprehension that an attempt would be made to take Goodlake from the custody of Conner by force.

There was no real danger of such an attempt.

The respondents, at the request of Conner and sheriff Worley, went to the jail and Goodlake was taken from the jail by the sheriff of the county of Buncombe and placed in a covered vehicle, the respondents, with the sheriff and some other deputies, got into the same vehicle and drove to a hotel near the railroad depot, and got out and went into the

depot, and a few minutes later went into the first-class passenger car where Goodlake was formally delivered by Patterson, as deputy sheriff, to Conner, and at the request of the conductor, Conner, Goodlake, Patterson, Deaver, Croft and Howard went into the second-class passenger car, Goodlake being handcuffed.

When the train moved off, Conner, the respondents and T. J. Howard and T. D. Croft were in the second-class car without pistols upon their persons.

It was expected by Conner that an application for a writ of *habeas corpus* had been or would be made.

It was known to some of the deputies of Sheriff Worley who went to the depot, and to other parties, that a petition for a writ of *habeas corpus* had been sworn to in the jail Saturday night about midnight, but it was not communicated by any one to Patterson and Deaver.

Conner, soon after leaving the railway station at Asheville, (414) claimed to be sick, and left the second-class car and was not seen in the car again; Howard, Croft and the respondents did remain in the second-class car with Goodlake in their custody.

When the railway train arrived at the station at Marshall, it first went on a side-track, where people do not usually get off, when the sheriff of Madison County, with duplicate writs of *habeas corpus* issued by me, sought to enter the train. He was, at first, forbidden by the respondent Patterson, who did not know his official station, to enter, but as soon as he made his official character known, Patterson opened the door of the car and told him to come in. Conner was not then in that car. The sheriff of Madison made known his business and exhibited his writs of *habeas corpus*. The respondent Deaver read the writ aloud, and the respondent Patterson said, "Read your writ, sheriff, and that will tell you what to do." He had experience as a deputy sheriff, and said it must be served on Conner, to whom it was directed, and the respondent Deaver contended the same way. One of counsel for petitioner Goodlake said, "Howard is Conner's agent, and he is Conner," and after the writ had been read in Howard's hearing, the sheriff handed to him the duplicate, which he would not take, and the sheriff then put the duplicate in the lap of Howard. About that time the train moved off, with the sheriff and his deputies still on the train. Search was made through the train for Conner and he could not be found.

The sheriff then returned into the second-class car and told each of the respondents and Croft and Howard that he served the writ on each of them. The respondents replied, "He is not in our custody." The sheriff responded, "Goodlake is here in handcuffs. He is in somebody's custody, and I serve this writ on each one of you."

As the train moved on, the sheriff of Madison County, with his
(415) assistants, continued the search for Conner, and finally he was found, disguised as a fireman in the mail car, covered over with mail bags, and the writ was served on him; and the sheriff of Madison County handed to him the writ and petition on which it was issued, for him to read, expecting him to obey it. Conner took the writ and the petition and carried them off with him. This was in the State of North Carolina. The respondents were informed that the writ had also been served on Conner, but with this information they, with the said Croft, Howard and Conner, went on, and carried the said Goodlake beyond the limits of this State, into the State of Tennessee.

The defendants now swear that they had no control over the said Goodlake, and that it is beyond their power now to produce him before the court; and I find as a fact that the said Charles W. Goodlake is now out of their control, and that they cannot produce him.

I further find that at the time the writ of *habeas corpus* was served upon the respondents he was then in their custody.

I further find that the said respondents wilfully disregarded and disobeyed the said writ.

And I further find that the said respondents wilfully assisted the said J. E. Conner in his attempt to evade the service of said writ.

It is considered by the Court, that when a petition for a writ of *habeas corpus* states matters of fact sufficient to authorize the Court to issue such writ, the Court cannot refuse to issue the writ, although facts subsequently developed may show that the statements in the petition are not true; and although one upon whom such writ is served may believe the writ was obtained upon false statement in the petition, he cannot, for that reason, be excused for disobeying it.

It is further considered by the Court, that when a return is made and the body is not produced, except in case of the sickness of the person in whose behalf the petition is filed, the Court will not inquire
(416) into the matter as to whether the capture and detention is lawful or not.

It is further considered by this Court, that when upon the return and the proofs to support it, that in fact the respondents cannot produce the body, because it is beyond their power and control, the Court will not imprison until the body is produced, because the Court will not require an impossible thing to be done.

It is further considered by the court, that where the writ of *habeas corpus* had been duly served upon the respondents, as in this case, and at the time of such service, the petitioner, as in this case, Charles W. Goodlake, was in the actual custody of these respondents, they cannot be heard to say that the petitioner Goodlake was in the custody of a

superior officer, when said superior officer, as in this case, J. E. Conner, was hiding and disguising himself, to evade the service of the writ, and thereby excuse themselves.

It is further considered by the court, that these respondents have wilfully disobeyed the writ of *habeas corpus* served upon them, while the petitioner Goodlake was in their custody, and thereby were guilty of a gross contempt of court, and cannot now purge themselves by saying they did not intend the necessary consequences of their own act, by now denying that they intended any contempt of court.

It is therefore considered and adjudged, that the said respondents are in contempt of the court; and it is ordered and adjudged that the said respondents, A. C. Patterson and W. H. Deaver, be each of them imprisoned in the common jail of the county of Buncombe for the term of sixty days, and that they be each amerced and fined the several sums of two thousand dollars. And the said A. C. Patterson and W. H. Deaver being now here before me, and the sheriff of the said county of Buncombe being now here present, it is ordered that the said sheriff do forthwith take into his custody the said A. C. Patterson and the said W. H. Deaver and hold them in close confinement in the said common jail of Buncombe County until the end of the sixty days (417) imprisonment, and that he hold in person each one of them thereafter until he shall have paid the fine imposed on him.

It is further ordered, that the respondents pay the costs of this proceeding, to be taxed by the clerk of the Superior Court of Buncombe County."

To these findings of fact and the judgment thereon pronounced, the respondents excepted and appealed.

C. A. Moore (and P. A. Cummings, by brief), for respondents.
No counsel, contra.

SMITH, C. J., after stating the case: The judge finds as a fact that the prisoner Goodlake is out of the State and beyond the control of said Patterson, who, with the correspondent Deaver, against whom the proceedings are directed, *"cannot produce him."* The action now taken is not, therefore, to compel obedience to any mandate of the court, for this has become impracticable, but as punitory only in its aims and operation. The parties still remain exposed to a criminal prosecution for the offense, in which, upon conviction by a jury, ample punishment can be awarded. Neither is it a means of coercing obedience, in the power of the party to render, to an order of the court properly entered in a proceeding before the court, in furtherance of its object. If it were, the power to imprison, reasonable in duration, would be commensurate with

the attainment of its purpose, as is decided in *Cromartie v. Commissioners of Bladen,* 85 N. C., 211. But as a means of punishment merely, in addition to that which may be inflicted upon an indictment, and this upon facts found by the judge without a jury, *Baker v. Cordon,* 86 N. C., 116, limits have been fixed by law upon the exercise of the power. The Code, sec. 649.

(418) In declaring what *acts, omissions and neglects* may be punished for contempt, and excluding all others, are enumerated, section 648, paragraphs 4 and 5, "wilful disobedience of any process or order lawfully issued by any court"; "resistance wilfully offered by any person to the lawful order or process of any court"; and in section 651, the power is declared to belong to "every justice of the peace, referee, commissioner, clerk of a Superior, inferior and criminal court," as well as to the Justices of the Supreme and judges of the Superior Court, "while sitting for the trial of causes or engaged in official duties." *In re Brinson,* 73 N. C., 278.

As the authority is conferred upon so large a class of officers, while exercising judicial functions, and when the guilt of the offender is to be ascertained without the intervention of a jury, as the right and at the instance of the accused; *Baker v. Cordon, supra,* there have been limits assigned as well as the kinds of punishment allowed, and it is declared in section 649, that it "shall be by fine or imprisonment, or both, in the discretion of the court; the fine not to exceed two hundred and fifty dollars and the imprisonment not to exceed thirty days." *In re Walker,* 82 N. C., 95.

The present case falls directly within the terms of the statute, and we are at a loss to find upon what grounds the able and learned judge, who imposed the sentence of imprisonment for sixty days and a fine of two thousand dollars, on each of the offending parties, felt warranted in doing so, unless he overlooked the distinction we have pointed out, in the cases referred to in this opinion. We have no hesitancy in recognizing the right of the General Assembly to pass the act defining and punishing contempts, as is done in the provisions we have cited, inasmuch as they do not undertake to deprive the court, nor could they do so, of any of its inherent and essential functions, without which their duties, as judicial tribunals, could not be performed.

This renders necessary the reversal of the judgment entered (419) by the judge below, and disposes of the appeal, without further examination of the case in reference to numerous other exceptions; but as it may facilitate the final settlement of the controversy, we will notice one of them, and that is to the effect that there is no evidence of a *wilful disobedience* of the mandate, nor of a *wilful resistance* to its enforcement, the first of which is found by the judge *as a fact.*

It is quite apparent that the legal custody of Goodlake was with the agent Conner, and the execution of the writ consisted in making it known to the party detaining the prisoner, and this is done by leaving him a copy. It was thus served upon the agent, and the respondent could not legally take the control and possession of the prisoner from him, for whose defense against lawless and overpowering force if required, he was on the train. There is no evidence of his having the custody, so as to be able to produce the body without invading the rightful authority of the agent, conferred by the writ of extradition, that was being exercised in conveying the fugitive to the State wherein his alleged offense was committed. If he had counseled, or in any way aided in, the disobedience of the writ, so that the agent was induced or enabled to evade the requisition made upon him, he might, perhaps, have been responsible for the nonproduction of the body, or for resisting the order, a result wilfully brought about by such participation in the conduct of the agent, by which the purposes of the writ were frustrated. But we see no evidence of this in the proofs offered, nor of opposition to the service of the order, unless it be in the objection to the sheriff's entering the cars, and this plainly proceeded from the belief that he was not an officer armed with authority, for as soon as the sheriff announced his official character, no resistance was made to his entering and executing the order. It is true, the agent had secreted himself in another part of the train, leaving his prisoner in the seat by the side of his assistant Howard, upon whom service was made, as it was afterwards made upon the (420) agent himself; but it is not shown that the respondent, by act or word, interposed any obstacle in the sheriff's way or hindrance to his executing the writ. We do not, therefore, find any testimony to support or to warrant an inference of a wilful disobedience of the order of the court, upon which the respondent was adjudged to be in contempt. This is the finding, and not that of resistance to the officer, upon which the penalty has been adjudged, and we must sustain this exception to the ruling.

While implicit submission to judicial authority, lawfully used, is an inexorable requirement of every one, and the judge acted rightly in awarding the writ upon the verified statements in the application, the process of the court had been grossly abused by the prisoner, in his repeated efforts to thwart the proceeding for extradition required by the Constitution of the United States, and enforced by the statute in this State, in the three different suings out of the writ in each of which he was required, in order to obtain it, to swear "that the legality of his imprisonment or restraint has not been already adjudged," and imposing upon the judge, from whom it was last sued out. It was his duty to issue it and enforce obedience, notwithstanding he would have

dismissed the proceeding when regularly brought before him, and it was seen that the prisoner was in lawful custody of the agent under the highest authority, which had already been twice before adjudged to be lawful, yet it was rightly ruled that this defense was only available when the case was before the judge, and formed no execuse for the conduct of the agent in carrying away the prisoner in defiance of the order, and he would, doubtless, have been held amenable to the heaviest penalties of a violated law. And so would have been his associate, who had charge of the prisoner, in fact was a confederate, as we understand his relations to the cause, in the criminal misbehavior of his prin-
(421) cipal. But the testimony does not establish the finding of his participation in it, and for this reason, also, as well as for the excess in the punishment, the judgment must be reversed, and the error corrected. It is so adjudged.

Error.

Cited: Bristol v. Pearson, 109 N. C., 721; *In re Brown,* 168 N. C., 423; *In re Parker,* 177 N. C., 468; *Keyes v. Alligood,* 178 N. C., 21.

DAVIS EDWARDS v. G. V. COWPER.

Jurisdiction of Justices of the Peace—Pleading—Statute—Constitution—Waiver of Tort.

1. Whenever it appears upon the trial of a civil action in a justice's court, or upon the hearing of any appeal therefrom, that the title to real estate is in controversy, the action must be dismissed for want of jurisdiction, notwithstanding that defense may not have been made in writing, as required by the statute—The Code, sec. 836.

2. When the action is based upon the tortious act of the defendant, and the damages are ascertained to be greater than fifty dollars; or where the right to recover involves a question of title, the question of jurisdiction is determined, and the plaintiff cannot avoid it by waiving the tort, and declaring for the value of the property alleged to have been converted.

THIS was a civil action, tried upon an appeal from a justice's court, before *Avery, J.,* at Spring Term, 1887, of HERTFORD Superior Court.

The plaintiff offered testimony tending to show that the defendant, without authority, had cut, removed and sold a number of trees from lands claimed by him.

The defendant offered testimony tending to show that the trees were not on lands belonging to plaintiff, and denied orally his title to the *locus*. It appeared that the lands of plaintiff and defendant adjoined, and there was a controversy as to the location of the (422) dividing line.

There were no written pleadings. The plaintiff had declared *ore tenus* that he waived the tort and declared for money received to his use. The defendant at close of testimony moved the court to dismiss the action for want of jurisdiction in the justice of the peace, on the ground that under section 29, Article IV, of the Constitution, justices of the peace are prohibited from trying actions involving the title of land, and that prohibition cannot be avoided on account of a failure by defendant to plead the jurisdiction in the justice's court.

The plaintiff insisted, first, that the tort had been waived and he had sued on contract. Secondly, that the defendant could only have availed himself of the objection that the title of the land was in controversy, by putting his objection in writing.

There was a verdict in favor of the plaintiff, assessing his damages at $54, and finding that defendant sold the trees for $60.75. After verdict, on motion of the defendant's counsel, the court held that the action should be dismissed for want of jurisdiction, and gave judgment accordingly.

The plaintiff had also moved the court for judgment in his favor, in accordance with the verdict, for the amount received by the defendant for the lumber, and for costs. The motion was refused. The plaintiff excepted to the refusal of the court to grant his motion and also to the judgment rendered, and appealed.

E. C. Smith for plaintiff.
No counsel for defendant.

SMITH, C. J. Justices of the peace shall have exclusive jurisdiction of all civil actions founded on contract except: (1) wherein the sum demanded, exclusive of interest, exceeds two hundred dollars; and (2) wherein the title to real estate is in controversy.

The General Assembly may give to justices of the peace juris- (423) diction of other civil actions wherein the value of the property in controversy does not exceed fifty dollars. Cons., Art. IV, sec. 27.

This power has been exercised, and it has been enacted that such justices shall have concurrent jurisdiction with the Superior Court, "of civil actions not founded on contract wherein the value of the property in controversy does not exceed fifty dollars." The Code, sec. 887.

The statute further provides that the defendant, when sued in a justice's court, may set up in defense any matter showing that the title to real estate will come in question, and this must be in the form of a written answer, signed by himself or his attorney, and delivered to the justice. Section 836. If it appears on the trial that the title to real estate is in controversy, "the justice shall dismiss the action" at the plaintiff's cost. Section 837.

If the latter section, in connection with that preceding, be construed to require the defense to be made in writing, and the action only to be dismissed when this is done, and the justice to proceed with the trial when the prerequisite is not observed, even when at the hearing it appears that such title must be proved in order to a recovery, it would seem to be an assertion and exercise of a jurisdiction expressly denied by the Constitution.

Indeed, the last section expressly declares, that when at the trial it appears that the title to real estate is drawn in controversy the action shall be dismissed, and if, on appeal, the defect of jurisdiction is apparent to the court, even after the empaneling of the jury, the judge must do what the justice is required to do, refuse to proceed, and dismiss the action. *Parker v. Allen,* 84 N. C., 466; *Foster v. Penry,* 77 N. C., 160.

(424) These propositions relate, however, to jurisdiction over contracts, and here the action is for a trespass in cutting timber upon lands alleged to belong to the plaintiff and converting them to the defendant's use, an action essentially in tort, and where the value of them is in excess of the constitutional limit of fifty dollars—the damages claimed and ascertained in the verdict being sixty dollars and seventy-five cents.

The jurisdiction is attempted to be supported upon the ground of a waiver of the trespass, and as a ratification of the defendant's agency in selling the trees, a claim to the moneys for which they were sold. If the wrongful act was a trespass upon personal property, the owner may waive the tort and sue for money received to his use; and the value of the trees when felled may be the measure of the plaintiff's damages, when the action is for an injury to the plaintiff's land; but this is a rule appertaining to the form of the action under the old practice, and cannot have the effect of conferring a jurisdiction not given over the subject-matter of the claim. The discrimination is made in the Constitution, and when the action originates in a tortious act, the jurisdiction is determined. The defendant, unauthorized, cut, removed and sold growing trees claimed by the plaintiff to be on his land and within his boundaries. This the defendant disputes, and the result of the suit involved an inquiry into title, the committing of the trespass on the plaintiff's side of

the dividing boundary line; and the damages are stated in the warrant issued by the justice to be and so found to be, both in his court and by the jury in the Superior Court, above the maximum allowed for torts under the statute authorized by, and in pursuance of, the constitutional amendment of 1875.

We are of opinion that the jurisdiction did not exist, and there was no error in the dismissal of the action.

Affirmed.

Cited: Bowers v. R. R., 107 N. C., 722; *Land Co. v. Brooks*, 109 N. C., 700; *Malloy v. Fayetteville*, 122 N. C., 485; *White v. Eley*, 145 N. C., 36.

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(425)

J. N. REAVES v. H. DAVIS AND G. D. ROBERSON.

Administration—Final Account—Statute of Limitations—Liability of Surety—Reference—Evidence.

1. Until the final accounts of administrators and executors are properly filed, made and audited, the statute of limitations prescribed in The Code, sec. 154, will not begin to run.
2. Where there is any evidence, the finding of facts by a referee upon an issue submitted to him is conclusive.
3. The measure of the liability of a surety upon an administrator's bond is the amount of assets shown to have been or which should have been received by his principal; a general allegation and finding that the administrator mismanaged the estate, will not extend the liability of the surety.
4. The conditions of an administration bond include responsibility for proceeds of real estate sold for the payment of debts.
5. Where the administration was granted and bond filed in November, 1870, and suit was brought against the administrator upon a debt due from his intestate in 1876, which resulted in judgment for the creditor in 1879, and this not being paid, suit was instituted on the administration bond in June, 1881, to recover the amount due on said judgment: *Held*, that the action was not barred as against either the administrator or the sureties.

THIS was a civil action, tried before *Avery, J.*, at Fall Term, 1886, of MADISON Superior Court, upon report of referee and exceptions.

This action is on the administration bond executed by the defendants, H. Davis, as principal, and G. D. Roberson, as surety, on the issue of letters of administration to the former, on the estate of Philip Ingle, by

the plaintiff, a creditor, who had before recovered judgment for his debt, against the administrator. The complaint charges that there are, or ought to be, assets in his hands applicable to and sufficient in amount for the discharge of said debt. The answer denies all and singular the allegations made in the complaint, and avers as a defense, that the
(426) estate has been fully administered and a final account filed in the clerk's office; that the fund has been exhausted in payment of costs incurred and debts against the intestate of prior or greater dignity, and that the action is barred by the statute of limitations, and especially as to the surety.

The case was referred to P. A. Cummings, in general terms to inquire into and report an account of the administration, and, as understood by him, to pass upon all the issues arising upon the pleadings. This order he has performed, and made his report, finding as follows:

1. The debts due by the intestate when the administrator entered upon his trust, were, in amount, two hundred and fifty-two dollars and thirty-six cents.

2. Personal assets of the value of thirty-two dollars and fifty-five cents, and moneys derived from his sale of land, in amount five hundred sixty-nine dollars and twenty-five cents, passed into his hands.

3. The action is not obstructed by the statutory bar as to either defendant.

4. Of the sum of one hundred dollars paid into the clerk's office by the administrator, all has been applied to a bill of costs incurred in the case of *Reaves v. Davis,* administrator, except the sum of thirty dollars, which remains there.

The referee finds, as conclusions of law, as follows:

1. The administrator is entitled to credits, supported by vouchers, except a small sum admitted, in the aggregate sum of three hundred and fifty-eight dollars and twenty-four cents, besides his commissions, which increase the sum to four hundred fifteen dollars and twenty-five cents.

2. Certain enumerated vouchers exhibited were disallowed, to wit: (1) A claim for costs paid in a suit brought by said intestate guardian against King, as not a proper charge in the administration account, inasmuch as it was on behalf of the minor children of the intestate;
(427) (2) the charge for mileage and attendance at court where the land was sold; (3) for an amount purporting to have been paid to attorneys for professional services, in the sum of one hundred dollars, for the reason that the claim was not made in the account rendered; the services so rendered were in part by other counsel; some of it since the commencement of this suit; and that as sixty-five dollars for fees of counsel has already been allowed, this further sum was unreasonable and exorbitant in so small an estate.

3. The administrator has mismanaged the estate—has paid demands for which it was not liable—has not rendered any account, as the law requires, and has not performed the conditions of his bond.

4. The debt due the plaintiff after applying thereto the moneys in the hands of the clerk, and with interest to 2 August, 1886, is ($377.07) three hundred seventy-seven dollars and seven cents, which sum, with interest on ($266.02) two hundred sixty-six dollars and two cents, the plaintiff is entitled to recover on the bond, as damages for the breach of its conditions.

The defendant filed exceptions thereto, which, upon the hearing, were overruled, the report confirmed, and judgment rendered, from which the defendants appealed. The exceptions are as follows:

1. That the referee found as a fact that the said George D. Roberson was surety on said bond, without any evidence.

2. That the referee found as a fact, that defendant H. Davis had not made a final settlement as administrator, but that it was a pretended settlement.

3. That the referee found as a fact, that at the time the administrator entered upon the duties of said administration, the indebtedness amounted to only $252.36, and that there was no pending litigation, without any evidence.

4. That said referee found as a fact, that the administrator had vouchers for money paid out on said estate to the amount of $415.25, and that he only returned a balance in his hands of (428) $191.55, and at the same time that plaintiff is entitled to the payment of his debt, to the amount of $377.07.

5. That said referee found as a fact, that the receipt filed by J. M. Gudger, Jr., and J. M. Gudger, Sr., was only for services rendered in the case of J. W. Reaves against H. Davis, without any evidence.

6. That said referee compounded the interest on the debt of J. W. Reaves.

7. That the referee found as a fact, that said administrator was not entitled to any mileage, or days allowed in attending on days of sale of personal property, or time even in attending trials. That there is no evidence to support his finding that the plaintiff's debts were not barred by the statute of limitations.

8. That the referee allowed the said administrator commissions to the amount only of $43.89, when he was entitled, as by his own report, to fees $60 to $75, and also the allowance of days and mileage.

9. That said bond was given to secure the administrator's property of the personal estate, and that the real estate being valued more than the bond, the law requires a larger bond before said sale could be ordered.

10. That there is no evidence to show that plaintiff has an actual debt against the estate of Philip Ingle, deceased, or the amount of said debt or judgment, or the date thereof, or the time it was presented for payment.

C. A. Moore for plaintiff.
Theo. F. Davidson for defendants.

SMITH, C. J., after stating the case: 1 Exception. The administration bond on exhibit shows the suretyship of the defendant Roberson.

2 Ex. What purports to be the final account rendered does not
(429) come up to the requirements of the statute, The Code, secs. 1402 and 154, and is fatally defective, in putting in operation the limitation in the last mentioned section in favor of the obligees, upon an inspection of the exhibit.

3 Ex. There was evidence of the amount of the indebtedness of the intestate furnished in the documents produced before the referee, and the finding of the fact is conclusive. These exceptions are properly overruled.

4 Ex. The first and second findings of the referee's conclusions of law sustain this exception, for the difference between the credits allowed and the debt charged, to wit, one hundred and ninety-one dollars and fifty-five cents ($191.55), is the sum "that should be in the hands of the administrator," and this is the measure of the liability upon the bond. The general finding of mismanaging the fund is too indefinite to extend the liability further.

5 Ex. The receipt for services rendered by counsel shows upon its face what they were for; and the reasons, at least some of them, in the absence of any proof of their extent and value, given for not allowing the charge in the report, warrant the rejection of the claim.

6 Ex. This exception is put out of the way by the ruling upon exception four, which limits the recovery to the value of the assets with which the defendants are chargeable upon the bond.

7 Ex. The ruling upon this exception is sustained and it is disallowed.

8 Ex. The same disposition is made of this exception.

9 Ex. The administration bond, in express terms, includes "*proceeds of his real estate* that may be sold for the payment of the debts of the deceased, which shall at any time come into the possession of the said administrator," etc., and the security furnished in this land is
(430) in no way impaired by a neglect in requiring an additional bond for a further security.

10 Ex. This exception is wholly without support.

The judgment must be reformed so that the recovery shall be confined to the value of the assets, as ascertained by the referee and already mentioned, which is the measure of damages sustained by reason of the breach of the conditions of the bond, and judgment will be entered for the penalty, to be discharged by the payment of such damages, and interest may be allowed from the time when it might have been paid.

DAVIS, J. The foregoing opinion was prepared by the Chief Justice at the last term of this Court, but at the request of counsel for the defendant, who did not argue the case upon its merits at that term, it was withheld, that we might have the benefit of further argument on behalf of the defendant. At the present term we have had an interesting and able argument from Mr. Davidson, chiefly upon the defense interposed by the statute of limitations, but, after a careful review, we adhere to the conclusion at which we first arrived.

It having been found that the alleged final account was not such as the statute contemplated (and, in fact, it appears from the record that it was never audited or passed upon at all), it is clearly not within section 154, subsection 2, of The Code, which limits the time "within six years after the auditing of his final account by the proper officer," etc. As no account had been audited, that section could not protect the defendant.

But it is insisted that if the administrator himself is not protected, the defendant Roberson, the surety, is protected by the three years bar contained in section 155, subsection 6, of The Code, and "that there is no evidence to support the referee's finding that the plaintiff's debts were not barred by the statute." Though the dates are not given by the referee in his report, it appears from the record, upon which his finding was based, that the alleged breach was the failure to pay (431) the judgment finally rendered at the January Term, 1879, of this Court, and that the summons in this action was issued on 18 June, 1881, which was within the three years.

With the modification in regard to the fourth exception, as contained in the foregoing opinion, the judgment is affirmed.

Judgment modified and affirmed.

Cited: Battle v. Mayo, 102 N. C., 435; *Lanning v. Commissioners,* 106 N. C., 511; *Gill v. Cooper,* 111 N. C., 313.

W. E. WEAVER ET AL. v. A. F. CHUNN.

Registration—Deeds in Trust—Mortgages—Purchasers—Domicile.

1. Deeds in trust and mortgages, conveying personal property, must be registered in the county where the maker resides, except where he is a nonresident, in which case they must be registered in the county where the property, or some part thereof is situate, otherwise they are void as against creditors and purchasers for value.

2. The vendees in a conveyance to secure creditors are purchasers for valuable consideration.

THIS was a civil action, tried before *Graves, J.*, at March Term, 1887, of BUNCOMBE Superior Court.

The material facts of the case are these: M. W. Robertson was, on and prior to 3 December, 1884, and ever afterwards, indebted to Wallace Bros. in the sum of $1,265.79, due by note of that date, and on that day he executed to the defendant a deed in trust, to secure the payment of note mentioned, whereby he purported to convey to the defendant, for the purpose mentioned, his certain stock of goods, situate in his store-
house, in the town of Burnsville, in the county of Yancey. This
(432) deed was registered in the last named county on the 21st day of the same month, and afterwards in the county of Buncombe, on 2 February, 1885.

Afterwards on 27 January, 1885, the said M. W. Robertson, being largely indebted to divers persons, his creditors, in order to secure and provide for the payment of their debts respectively, executed to the plaintiffs his other deed of trust, whereby he conveyed and assigned to them in trust, for the purpose last mentioned, real and personal property including rights and credits, situate in the county of Buncombe, and also the stock of goods situate in the county of Yancey, embraced in, and which he purported to convey by, the deed of trust first above mentioned, to the defendant. The deed to the plaintiffs was duly proven and registered in the county of Buncombe on the same day it was executed.

This action was brought to recover the property embraced in the deed of trust executed to the defendant. On the trial, M. W. Robertson, who executed the deeds mentioned above, testified that he resided and did business in Weaverville, in the county of Buncombe, from 20 October, 1883, until 27 January, 1885; that he "had a branch stock of goods in Burnsville," in Yancey County, and did "a general mercantile business" there from 1 June, 1884, until 27 January, 1885, when he executed the deed of trust named by plaintiffs.

Among other things, the court instructed the jury that:

"In deeds in trust for personal property the deed in trust must be registered in the county in which the person making the deed in trust resides, if he be a resident of the State. This makes it necessary to determine where Robertson, the alleged grantor, resided. If he lived at the time the alleged deeds in trust were made in Buncombe County, then Buncombe County was the proper county, and a registration in Yancey County would not be a legal registration. If Robertson (433) lived in Buncombe County, then the next question to be determined is, which of the deeds in trust was first registered in Buncombe County? This question is material, for deeds in trust have effect as to creditors only from registration. If plaintiffs' deed was first legally registered in Buncombe County, then they would become the legal owners of the property, although the defendant's deed in trust may have been written first, and first recorded in Yancey County."

To this charge the defendant excepted.

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

W. W. Jones for plaintiff.
C. A. Moore for defendant.

MERRIMON, J., after stating the case: All the evidence produced on the trial, bearing upon that point, tended to prove that the maker of both the deeds of trust in question resided in the county of Buncombe, and that he conducted his principal business in that county, while he conducted a branch of it in the county of Yancey. Under appropriate instructions from the court, the jury found the fact so to be, and it must be so accepted for the purposes of this action.

The statute (The Code, sec. 1254) provides that, "no deed of trust, or mortgage for real or personal estate, shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor, or mortgagor, but from the registration of such deed of trust, or mortgage, in the county where the land lieth; or in case of *personal estate,* where the donor, bargainor, or mortgagor *resides;* or in case the donor, bargainor, or mortgagor shall reside out of the State, then in the county where the said personal estate or some part of same is situate; or in cases of choses in action, where the donee, bargainee, or mortgagee resides." Applying this statutory pro- (434) vision to the case before us, we are of opinion that the plaintiffs had title to the property in question and were entitled to recover.

It appears that the bargainor in both the deeds of trust mentioned, at and before the time he executed the same, resided in this State and in the

county of Buncombe. The first of the two deeds was executed to the appellant and purported to convey personal estate of the bargainor, situate in the county of Yancey. Under the statute just cited, it could operate at all and be valid "as against creditors and purchasers for a valuable consideration," only from the time of its registration in the county of Buncombe. Its registration in the county of Yancey went for naught and served no purpose, because the bargainor resided in the county of Buncombe, and the deed purported to convey personal estate; to give it the effect intended, registration in the latter county was essential. Before it was registered in the last mentioned county, the bargainor, by his second deed of trust, conveyed the same and other property to the appellees, and this deed was duly registered on the day of its execution in the county of Buncombe. The appellees, as has been decided in like cases, were purchasers for a valuable consideration, and as their deed was registered in the proper county before that of the defendant, they got the title to the property in controversy. *Fleming v. Burgin,* 2 Ired. Eq., 584; *Robinson v. Willoughby,* 70 N. C., 358; *Todd v. Outlaw,* 79 N. C., 235; *Bank v. Manufacturing Co.,* 96 N. C., 305.

It was suggested on the argument by the counsel of the appellant that, as the bargainor in the deed of trust to the appellant, conducted a branch of his business in the county of Yancey, he had such a residence there was sufficient to render a registration of the deed there valid. It may be that a person can have residence in two or more counties in the State, and that the registration of a deed of trust or mort-
(435) gage executed by him would be sufficient in any one of the counties where he resided, but we need not decide that this is so, because there was no evidence that the bargainor resided in Yancey County at all; he conducted a branch of his business there, and the evidence went to prove that he prosecuted it through an agent. The mere fact that he had personal property there did not constitute residence. The purpose of the statute is to have the deed of trust or mortgage registered in the county where the donor, bargainor, or mortgagor has actual personal residence; and the reason is, that persons interested, to have knowledge in such respect, would go to the county where a person resides to see what disposition he had made of his personal property by deeds and other instruments required to be registered; they would not ordinarily look elsewhere. The statutory requirement is too plain to be mistaken.

The counsel for the appellant contended, also, that as the latter got actual possession of the property under the deed to him, such possession rendered his title good and effectual. This is a misapprehension. The deed as against the appellees was absolutely void, and passed no title

to the appellant—he had the simple possession of the property without any right or title thereto as against creditors and purchasers for a valuable consideration—the title did not pass out of the bargainor to the appellant—the former, notwithstanding his deed to the latter, had capacity to convey and did convey the property to the appellees by the deed of trust executed to them. The statute rendered the deed of trust to the appellant wholly nugatory as to the appellees.

Judgment affirmed.

Cited: Harris v. Allen, 104 N. C., 90; *Bank v. Cox,* 171 N. C., 79.

(436)

WILLIAM Mc. HEMPHILL v. J. H. HEMPHILL.

Evidence—Mistake—Correction of Deed—Trust—Trial—Lapse of Time—Possession.

1. While a mistake in a deed cannot be corrected, or a deed absolute upon its face converted into a trust upon a mere preponderance of the evidence, or without proof of some fact *dehors* the deed inconsistent with the idea of absolute ownership, yet if issues are submitted to a jury without objection, and no exceptions are taken to the testimony and no instructions requested, the finding of fact by the jury cannot be reversed by the trial court, sitting as a chancellor, or by the Supreme Court, on appeal.

2. A Court of Equity will never refuse to lend its aid to relieve a party where he has been in continuous possession of the estate to which the equity is incident.

THIS was a civil action, tried before *Montgomery, J.,* at August Term, 1887, of BUNCOMBE Superior Court.

The plaintiff alleges in substance:

1. That prior to 14 April, 1877, he was the owner in fee of the tract of land described in the complaint, containing about 725 acres, and of the value of $5,000 or $6,000.

2. That he had mortgaged a portion of said land, and there was a judgment against him as one of the sureties of J. M. Young, sheriff, and under the mortgage and execution on the judgment, the land was sold.

3. That the defendant, who is the son of the plaintiff, became the purchaser of the land at both sales, and paid for the same about $966, under an agreement between the plaintiff and defendant that the latter should purchase the land, take the deed therefor, and hold the same for the plaintiff, and convey to him when he should reimburse him the

money paid, with interest therefor, "and in case he should fail to do so, his other children should have the right to do so, to such an extent as to make them equal owners in the said land with the defendant."

(437) 4. That relying upon this agreement and believing he was still the owner of the land, subject to the said incumbrance of $966, and interest, he had remained in possession since the sales, treating it as his own, listing it for taxation, paying taxes, etc., the defendant cultivating a portion of it the last year with plaintiff's consent.

5. That shortly prior to the beginning of this action he learned that it was the purpose of the defendant to ignore and refuse compliance with said agreement, and claim the land as his own, by virtue of the deed made to him as purchaser, etc., and turn the plaintiff out of possession. Thereupon the plaintiff applied to the defendant, to know if he would receive the money, and interest, and convey to the plaintiff, offering at once to procure the money, and interest, if he would accept the same and convey the land to the plaintiff, but he declared that he would not accept the said money or convey the lands to the plaintiff, but that he claimed the land as his own.

6. That the defendant has cut and removed from the land, and used and sold large quantities of valuable timber, the value of which he is entitled to have credited on the amount due from him to the defendant for the money paid on the land.

7. That the plaintiff is an old man, and anxious to save his land from sacrifice for the benefit of his children, and that he has delayed to reimburse the defendant, because he was not able to support himself and raise so large a sum, without incumbering his property, and because he knew that the defendant was in no great need of it, and it was abundantly secure, but now he is ready to do whatever may be necessary, to compel the defendant to perform his agreement, etc.

He asks judgment that the defendant may be declared a trustee, etc., and that, upon the payment of such sum as shall be found to be due to him, by the plaintiff, he shall convey, etc. He also asks for an account, etc.

(438) The defendant, in his answer, admits the plaintiff owned the land prior to 14 April, 1877; that the plaintiff was indebted and the land was sold, as alleged, and purchased by defendant, but he says that the land was not worth more than $3,000 or $3,500, and he denies that it was purchased under any agreement or understanding whatever with the plaintiff in reference thereto; that he purchased it in good faith as an investment, and there was no agreement with the plaintiff or any other person as to any right of redemption, and denies in detail every fact stated by the plaintiff, to the effect that the land was purchased for the plaintiff.

He admits that the plaintiff remained in possession, etc., but says that it was not by virtue of any agreement or understanding, but as a matter of gratuity, the plaintiff being his father, and that he intended to take care of him and allow him to use and enjoy the benefits of the land during his life, while it should be in his power to do so; that his father was insolvent, and that he himself derived no material benefit from the said property, but on the contrary he had made improvements thereon, his father having allowed it to become dilapidated, etc.

He further says that he never knew of or suspected any purpose, on the part of the plaintiff, to assert any claim to the said land until the fall of 1884, more than seven years after the purchase, during all which time the plaintiff recognized the title of the defendant to said land, and that he never mentioned the matter or offered to pay, or suggested payment for said land, until just before the beginning of this action, when, to the defendant's surprise, this claim was made by the plaintiff.

The defendant further says, that, at the time of the purchase and alleged agreement, the plaintiff was in debt and insolvent, and such promise and agreement, if made, would have been a fraud, etc. He further relies upon the lapse of time and the bar of the statute.

By consent of parties the issues were not settled until after (439) the evidence was all introduced. There was much evidence offered on both sides; that on behalf of the plaintiff tending to show the agreement, as alleged by him, and that on behalf of the defendant, tending to disprove the same. The evidence, in full and at great length, is sent up with the record, but for reasons presently to be stated need not be recited.

The defendant tendered an issue as follows:

"Did the plaintiff, within a reasonable time, offer to repay the defendant the price he, defendant, had paid for the land?"

The court said: "There seems to be no controversy as to the time when the money was offered to defendant by the plaintiff, to reimburse him for the price he had paid for the land, to wit, on the day, or a day or two before, suit began, and whether or not it was reasonable time, would be a question of law."

To this both parties assented, and the following issues were submitted by consent of both parties:

1. Did the defendant, before the sale, agree with plaintiff to buy the land and reconvey to the plaintiff, on being reimbursed the purchase money?

2. What amount has the defendant received from the land?

There was no exception to the charge of the court, and the jury, in response to the first issue, said "Yes," and to the second, "$600."

The defendant then moved for judgment *non obstante veredicto,* upon the following grounds:

1st. For that it appeared upon the whole evidence and from the complaint, that the alleged parol agreement, attempted to be set up by the plaintiff, was a bare, naked parol promise, without consideration to support it, or any element of fraud or equity, to supply the place of a written agreement, and that the alleged parol agreement should have been shown by other testimony, than proof of the mere declara-
(440) tions of the defendant, and there should have been shown facts and circumstances *dehors* the deed, inconsistent with the idea of an absolute purchase by the defendant for himself.

2d. That plaintiff's demand was a stale demand.

3d. That it was barred by statute of limitations.

4th. That there was not only a variance between the allegations and proofs, but a failure of proof.

The court declined to grant defendant's motion, and rendered judgment for the plaintiff, and defendant appealed.

W. W. Jones for plaintiff.
M. E. Carter and C. A. Moore for defendant.

DAVIS, J., after stating the case: The judge accompanies the case sent to this Court with the remark: "I have stated the evidence in full, at the request of the parties and because of the defendant's motion for judgment *non obstante veredicto*," and the learned counsel for the defendant say, with candor, that the request was made with the view and purpose to ask this Court to review the evidence and declare it insufficient to disturb the defendant's deed, as they insist a judge sitting as a chancellor would have done under the old practice.

We are referred by counsel to *Ely v. Early,* 94 N. C., 1, and numerous other cases, in which it is held that a mistake in a deed, or any other instrument solemnly reduced to writing, ought not to be corrected upon slight evidence or upon a mere preponderance of evidence, and that a purchaser taking to himself a deed absolute on its face, as in *Clement v. Clement,* 1 Jones Equity, 184; *Briggs v. Morris, ibid.,* 193; *Campbell v. Campbell,* 2 Jones Eq., 364, and numerous other cases, ought not to be converted into a trustee except upon clear and full proof, supported by facts and circumstances *dehors* the deed, inconsistent with the idea of an absolute purchase for himself.

(441) In *Ely v. Early,* in which, among things, it was sought to correct a mistake in a deed, it was held to be error in the court to charge the jury, that it was sufficient to show the mistake "by a preponderance of evidence," but neither in that nor in any other case, we apprehend, has it been held under our present system, when issues of

fact have been submitted, without objection, to a jury, that this Court can review and reverse or modify the finding of fact by the jury.

The contrary was here expressly held in *Shield v. Whitaker,* 82 N. C., 516, in which case the *Chief Justice* said: "The verdict of the jury may be set aside in a proper case, but it cannot be reformed or amended," and following this case is *Leggett v. Leggett,* 88 N. C., 108, in which *Ruffin, J.,* says: "But however these questions—(the right of parties to have their causes, when purely of an equitable nature, tried by the Court without the intervention of a jury, and the effect of the constitutional amendment of 1875, Art. IV, sec. 8, upon the jurisdiction of this Court)—may be ultimately decided, it will never, we surmise, be held to be law that a party who has, of his own accord, accepted a trial by jury, can insist upon having the same facts passed upon by the Court."

Assuming, and such we think is the law, that a mistake in a deed cannot be corrected, or that a deed absolute on its face ought not to be converted into a trust, upon a mere preponderance of evidence, or without some fact *dehors* the deed, inconsistent with the idea of absolute ownership, but only upon such full proof as in the old Court of Equity would satisfy a judge, yet when issues are submitted to a jury, and on the trial no exceptions are taken to the evidence or to the charge of the court, and no instructions in relation thereto asked, the finding of fact by the jury cannot be reversed by the court. The court may be asked to instruct the jury as to the degree of evidence necessary to show the mistake or establish the trust, and it is the duty of the (442) court to give such instructions. Such instructions were given in regard to the existence of a lost deed in *Loftin v. Loftin,* 96 N. C., 94, and if improper instructions are given, this Court may review and correct them, as was done in *Ely v. Early, supra;* but we cannot review the evidence and reverse the finding of the jury. The candid and able counsel for the defendant could refer us to no precedent for this, and hence we have not deemed it necessary to set out the evidence which we were asked to review. *McMillan v. Baker,* 85 N. C., 291.

It is proper to say, in regard to the position taken by counsel, that the alleged parol agreement should have been shown by other testimony than the mere declaration of the defendant, aside from the facts of possession, payment of taxes, etc., of which there was evidence. It was said in *Smiley v. Pearce,* 98 N. C., 185: "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."

The defense, that the plaintiff's demand was stale and barred by the statute of limitations cannot be maintained; as to the latter, there was

no issue, and it is not insisted upon in this Court, and the former is met by the relations of the parties, and the fact not controverted, that the plaintiff has been all the time in possession. *Stith v. McKee,* 87 N. C., 389; *Mask v. Tiller,* 89 N. C., 423.

The fourth exception cannot be sustained. The alleged variance is not pointed out, and there was evidence, upon the sufficiency of which, for the reasons already stated, we do not pass.

There is no error.

Cited: Holler v. Richards, 102 N. C., 548; *Harding v. Long,* 103 N. C., 7; *Bergeron v. Ins. Co.,* 111 N. C., 50; *Cobb v. Edwards,* 117 N. C., 253; *Lehew v. Hewett,* 130 N. C., 23; *S. c.,* 138 N. C., 10; *Taylor v. Wahab,* 154 N. C., 223; *Ellett v. Ellett,* 157 N. C., 163; *Rankin v. Oates,* 183 N. C., 518; *Mica Co. v. Mining Co.,* 184 N. C., 491; *Roberts v. Massey,* 185 N. C., 166; *Bartholomew v. Parrish,* 186 N. C., 85; *Cunningham v. Long, ibid.,* 531; *Randolph v. Roberts, ibid.,* 622; *Montgomery v. Lewis,* 187 N. C., 579; *Tire Co. v. Lester,* 190 N. C., 417.

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(443)

NATHAN COWARD v. J. G. CHASTAIN ET AL.

Injunction—Vacating Judgments—Execution Sale.

1. If a party, who has obtained a temporary restraining order, does not appear and ask for its continuance at the time fixed for the hearing, the application may be dismissed without going into the merits.
2. The proper remedy against the enforcement of a judgment, by a party thereto, is not by injunction, but by a proceeding in the cause, where the relief may be administered by recalling or modifying the process, and in the meanwhile issuing a *supersedeas.*
3. A sale under execution issuing upon a judgment barred by the lapse of time will not pass title.

THIS was a proceeding to obtain an injunction, heard before *Montgomery, J.,* at Fall Term, 1887, of JACKSON Superior Court.

The defendants obtained from the judge holding the courts of the district of which Jackson County forms a part, on 25 August, 1887, at Chambers, in Asheville, an order restraining the plaintiff from proceeding under an execution sued out and in the hands of the sheriff of that county, and appointing Monday, 12 September, as the time, and Waynesville as the place, when he would allow the plaintiff to show cause, why the order should not be continued. This was upon an allega-

tion of the defendants, duly verified, that the writ, while falsely professing to have been issued upon a judgment rendered at Spring Term, 1885, was in fact issued upon a judgment of November Term, 1874, which was barred by the statute of limitations. The hearing being continued, by consent, from the time and place designated until Monday, the 26th of the same month, and then to be had at Webster, in the county of Jackson, and the defendants being present neither in person nor by counsel, at the time and place last named, and no cause being shown for the continuing the restraining order in force, and more than (444) twenty days having expired since it was made, the judge vacated the restraining order and left the plaintiff free to pursue his remedy by execution, but reserved the application for an injunction, to be heard upon affidavits on 11 October, at Hayesville, in Clay County. From this judgment the defendants were allowed to appeal, alleging error in so much of it as allows the plaintiff to proceed with his execution.

E. R. Stamps for plaintiff.
E. C. Smith for defendants.

SMITH, C. J., after stating the case: From the copy of the judgment sent up in the case on appeal, it appears to have been rendered at the October Term, 1872, of the Superior Court of Clay County, and had this evidence been before the judge, as it seems not to have been, and the defendants had asked for, an injunction, it would doubtless have been granted, since a sale under such a judgment, unrenewed, would be inoperative to pass the title, as declared in *Lyon v. Russ,* 84 N. C., 588; *Lytle v. Lytle,* 94 N. C., 683.

This is of course upon the assumption that the vitality of the judgment has not been preserved by a continued issue of executions, under section 440 of The Code.

If the judgment be not only dormant, but barred by the lapse of time, and this the execution, if truly speaking the time of the rendering of the judgment would, show upon its face, its issue would confer no right to sell, and the sale, if made, would be ineffectual to pass title. In such case, no harm could come from the refusal to grant the order of injunction.

But, however this may be, as it was not asked, nor any reason shown why a restraining order should be made, it was not error to refuse, or rather to fail to make it when not demanded.

We again call attention to the irregularity in the mode of pro- (445) ceeding adopted, in that, while the right to process to enforce the judgment by appropriate remedies remains unimpaired, its exercise is restrained. This, of necessity, was the proper course of procedure under

the former divided jurisdictions, in which a Court of Equity, without a direct inference with the action of a court of law, exercised authority over the *person* of the suitor, and restrained his oppressive and wrongful use of a legal right. No interference in a separate suit was permissible in a pending suit between the parties in a Court of Equity, and now, when there is but one tribunal, the redress is by a direct interposition, recalling and modifying the process in a proper case, and meanwhile issuing a *supersedeas* order to the officer in possession of it. *Chambers v. Penland*, 78 N. C., 53; *Parker v. Bledsoe*, 87 N. C., 221. There is no error, and the judgment is

Affirmed.

THE SILVER VALLEY MINING COMPANY v. THE BALTIMORE GOLD AND SILVER MINING AND SMELTING COMPANY ET AL.

Parties—Trial by Court—Reference—Issues—Corporations—Fraud—Exceptions—Waiver.

1. An objection, because there is a defect of parties, should be taken advantage of by demurrer or answer in apt time, otherwise it will be deemed to have been waived.

2. After the filing of a referee's report, it was agreed that the cause should be tried by the court, without a jury, upon the evidence taken and returned by the referee, and it was so tried and determined, the court adopting some of the referee's findings: *Held*, that it was then too late to object, for that the referee had exceeded the scope of his authority under the order of reference; nor could the objections taken to the reception and rejection of evidence before the referee be insisted upon, unless they had been made again on the hearing before the court.

3. Where, a trial by jury having been waived, the court adopted the findings of facts and conclusions of law of a referee to whom the case had been referred by consent, and also responded to issues framed by itself: *Held*, that while this was not a formal compliance with the statute—The Code, sec. 417—yet, if from the record it can be seen what facts were found, and what conclusions the court made thereon, the judgment will be affirmed.

4. If a party desires an issue submitted, he should tender it before the trial begins—it is too late after verdict for him to object that such issue was not submitted.

5. In an action against a corporation, founded upon alleged fraudulent practices perpetrated by the officers of the defendant, it is not necessary to make such officers parties, if no relief is demanded against them personally.

6. The plaintiff brought suit against one corporation, as the assignee of another corporation, to have a deed, alleged to have been fraudulently procured

by the assignor, set aside, and also to recover moneys alleged to be due from the assignor. The complaint alleged, and the facts were so found to be, that the defendant took the assignment with full knowledge of all the facts; that it received all the property and effects and assumed all the liabilities of the assignor; that the stockholders in both corporations were identical, and the assignor was a nonresident, and had, in fact, ceased to exercise its corporate functions: *Held*, that the assignor was not a necessary party.

THIS was a civil action, tried before *MacRae, J.*, at Spring (446) Term, 1886, of DAVIDSON Superior Court.

The plaintiff and the defendant corporations were created by and organized respectively under the statutes (Private Acts 1860-'61, ch. 107; Private Acts 1883, ch. 41), of this State. "The Baltimore Gold and Silver Mining and Smelting Company, of Baltimore City," mentioned in the pleadings in important connections, is a corporation created by and organized under the laws of the State of Maryland, and has the same corporate name as the defendant corporation, omitting the words "of Baltimore City."

This action is brought to have declared void, for fraud, a deed (447) of trust executed on 27 April, 1882, by the plaintiff through the contrivance and fraudulent conduct of its principal officers and agents, and the like of the principal officers and agents of the said "The Baltimore Gold and Silver Mining and Smelting Company of Baltimore City," to the defendant trustees, to secure a large debt therein mentioned as due to the last mentioned corporation, and which debt and the security therefor the last named corporation sold and assigned to the defendant corporation, the latter having knowledge of the fraud alleged and the plaintiff's right in respect thereto; and likewise, to recover $75,000, the balance of the proceeds of the sale of sixty thousand shares of the capital stock of the plaintiff, which it is alleged the said "The Baltimore Gold and Silver Mining and Smelting Company, of Baltimore City," through the like contrivance and fraud of its principal officers and agents and the same of the officers and agents of the plaintiff, got possession of, and sold for $90,000. It is contended for the plaintiff, that it is entitled to the relief demanded as to the deed of trust mentioned, against the defendant corporation and the defendant trustees of said deed, upon the ground that the said "The Baltimore Gold and Silver Mining and Smelting Company, of Baltimore City," for whose benefit this deed was made, sold and assigned its debt mentioned in the deed, and all its right and interest in the latter, to the defendant corporation, with notice of the plaintiff's right as to the alleged debt, and the deed, and likewise to recover the money mentioned, because the deed of assignment conveyed to the defendant corporation the same and all its prop-

erty, both real and personal, of every kind and nature whatever, with like notice of the plaintiff's right in respect thereto. And it is further contended, that the defendant corporation, in this deed of assign-
(448) ment, assumed liability to the plaintiff in the several respects mentioned, and covenanted to and with the said "The Baltimore Gold and Silver Mining and Smelting Company of Baltimore City," to discharge the liability of the latter to the plaintiff. So much of this deed of assignment as need be set forth here is as follows:

"This deed, made this 19th day of June, in the year eighteen hundred and eighty-three, between 'The Baltimore Gold and Silver Mining and Smelting Company, of Baltimore City,' a corporation incorporated under the laws of Maryland, of the first part, and 'The Baltimore Gold and Silver Mining and Smelting Company,' a corporation duly incorporated by the General Assembly of North Carolina, by an act entitled, 'An act to incorporate the Baltimore Gold and Silver Mining and Smelting Company,' ratified 21 February, A. D. 1883, of the second part: *Whereas,* the party hereto of the first part, at a general meeting of its stockholders, held in the city of Baltimore, on 31 May, 1883, agreed to transfer and convey to the party hereto of the second part, all its *property, affairs, rights, credits and business: Provided,* that, in consideration thereof, the six hundred thousand shares of the capital stock of the said party of the first part shall be held and taken as if issued by the said party of the second part, as and for its capital stock, at the par value of five dollars a share, a share full paid, that all the proceedings held and done, by the party hereto of the first part, shall be held and taken as if done under the charter of the said party of the second part, and in this assumption by the said party of the second part of all its debts and obligations and liabilities of the said party hereto of the first part, so that the party hereto of the second part shall succeed to all its interests and purposes, to the affairs, rights, obligations, interests and business of said party hereto of the first part: *Now, therefore,* in consideration of the premises and of the sum of five dollars, etc., ... the party hereto of the first part, hath granted, bargained, and sold,
(449) aliened and enfeoffed, released and confirmed, and by these presents doth grant, etc., ... to the party hereto of the second part, its successors and assigns, etc. (sundry tracts of land described), and *all the property, affairs, rights, credits, chattels, interests and business,* wherever situated, to it, the said party of the first part, belonging, or to which it may have any right, title, interest or demand whatever, in law or equity, to have and to hold, etc., ... to the party hereto of the second part, its successors and assigns, forever; and the said party of the first part covenants to and with, etc., ..., and the said party hereto of the

second part unite herein for the purpose of assenting, contracting and agreeing to perfect and carry into execution the contract, agreement and consideration hereinbefore recited," etc.

The pleadings are very voluminous. The complaint demands judgment, that the deed of trust be decreed to be null and void; that an account be taken; that a perpetual injunction be granted; that the plaintiff have judgment for the money, the proceeds of the sale of shares of the capital stock of the plaintiff, for general relief, and for costs.

At the appearance term, the court granted an injunction, pending the action, until the final hearing thereof, restraining the defendant as to the deed of trust, etc., and, by consent of parties, it "further ordered that it be referred to John C. King, of the city of Baltimore, and State of Maryland, to take and state an account of the *dealings and transactions* between the said plaintiff and defendant companies, and report the result thereof to the next term of this court; and this reference is made under The Code, with the right of each party to have issues arising on the pleadings tried by a jury."

Afterwards the referee named made his *report,* of which the following is a copy:

To the Honorable the Judge of the Superior Court of Davidson County, North Carolina:

The undersigned, John C. King, referee, would respectfully report: That under the order of this honorable court, passed in (450) the above-entitled cause, wherein I am directed to "take and state an account of the dealings and transactions between the said plaintiff and defendant companies, and report the result thereof to this court," I notified the respective parties plaintiff and defendant to appear at my office, at the city of Baltimore, and State of Maryland, on 18 August, A. D. 1885, at which time and place the respective parties and their respective counsel did appear, and I proceeded, under the said "order," to hear the said parties, take the deposition of witnesses, who were first duly sworn according to law, to examine all vouchers produced, all books of accounts and documents and exhibits, and the stated account marked "X" and the stated account marked "Y," and I continued the proceedings, under said order, from day to day till the close of the same, 18 February, A. D. 1886, when the respective counsel of the parties, both plaintiff and defendants, were heard. I hereby return the court papers in the cause, the deposition of the witnesses, the books of accounts, the minute book, the cash book of the Silver Valley Mining Company, the cash book of the Baltimore Gold and Silver Mining and Smelting Company of Baltimore City, the stock, certificates and shares of the

Silver Valley Mining Company, the vouchers of the Silver Valley Mining Company, the "checks," the accounts "X" and "Y," and all other papers and accounts produced before me, and, in compliance with the said "order," report as follows:

As a matter of fact, there were no dealings between the plaintiff and defendant companies prior to 19 June, 1883, on which day a deed was executed, wherein the Baltimore Gold and Silver Mining and Smelting Company, of Baltimore City (a corporation chartered under the laws of Maryland), is grantor, and the Baltimore Gold and Silver Min-
(451) ing and Smelting Company (a corporation chartered by the laws of North Carolina) is grantee, in which deed I find it recited, "that the said party of the second part assumes all the debts and obligations and liabilities of the party of the first part, so that the party of the second part shall succeed, to all intents and purposes, to the affairs, rights, interest and business of the party of the first part."

I find, that under the above assignment, the Baltimore Gold and Silver Mining and Smelting Company claim the sum of $53,010.17, with interest from 2 May, 1882, as a debt due by the Silver Valley Mining Company, the plaintiff in this case, for and on account of that money advanced by the Baltimore Gold and Silver Mining and Smelting Company of Baltimore City, to the said Silver Valley Mining Company, from 1 November, 1880, down to 2 April, 1882. (See account "X" and account "Y.") I find this to be the debt specified in the 9th paragraph of the plaintiff's bill and the last paragraph of the defendant's answer, and it purports to be a stated account between the Silver Valley Company and the Baltimore Company, grantor of the defendant.

I find that the books of the two companies, to wit, the cash book of the Silver Valley and the cash book of the Baltimore Company do not contain—either of them—the above accounts in the form as stated in the said accounts "X" and "Y"; I mean the said account is not extended on the books of either company.

I find that the Silver Valley Company was reorganized 8 January, 1879, and was controlled and managed from that date to 2 May, 1882, by Joseph Wilkins, president and treasurer, and Samuel Street and John M. McElroy, as directors, from 18 February, 1879, to 1 November, 1880. Jno. M. Dennison was treasurer of the same.

I find that during 1879, 1880, 1881 and 1882 the said Joseph
(452) Wilkins was president and treasurer, and John M. McElroy and Samuel Street were directors of the Baltimore Company. The said Wilkins, McElroy and Street were a majority of the board of directors of both the said companies, and managed and controlled the business of both companies during the period indicated in the two preceding paragraphs.

I find the property and assets of the Silver Valley Company, on 5 August, 1879, consisted of its mining property situate in Davidson County, North Carolina, $570.20 in cash, and 154,010 shares of its capital stock, which had become forfeited to the company for non-payment of assessments levied thereon, which, at that date, was registered in the name of Joseph Wilkins, its president. I find in the treasury of said company 14 July, 1880, cash $3,336.62; 13 September, 1880, cash $917.13; 1 November, 1880, Wilkins treasurer, cash $421.20.

I find the property and assets of the Baltimore Company, 13 September, 1880, consisted of $200 in cash; a donation, hereinafter considered, of $5,000; a lease of land in Harford County; and a caveat for a patent, which I do not find to be of any definite value. Up to which date the said company credits itself with a purchase of land, $2,925. 1 January, 1881, I find cash $1,949.74; donation, hereinafter considered, $30,000; cash paid to that date, $20,093.63. At this date, 1 January, 1881, began to deal in Silver Valley Company's stock.

I find that account "X" begins 1 November, 1880, and closes 1 May, 1882; that account "Y" begins 16 December, 1880, and closes 11 July, 1882.

I find one entry in the cash book of the Silver Valley Company, to wit: "The Baltimore Gold and Silver Mining and Smelting Company, 22 April, 1882; amount received by the Silver Valley Company, from time to time, commencing from 1 November, 1880, to present date, $52,127.77." This entry was made about 11 July, 1882, after 22 April, 1882, when the books of both companies were (453) closed.

I find on the cash book of the Baltimore Company an entry: "Silver Valley Mining Company; 11 July, 1882, advanced the Silver Valley Mining Company, from time to time, to pay pay-rolls, wood, lumber, machinery and store, $53,606.35." I find these entries were made by the witness James McElroy, secretary. There are no other entries in the books of either company which embrace those items or accounts.

I find that the Silver Valley Company, during the running of the above accounts, expended over and above its cash receipts, the sum of $32,082.93; that Joseph Wilkins, during that time, to wit, from 1 November, 1880, to 22 April, 1882, was president and treasurer of said Silver Valley Company, and received its funds, and paid its current expenses. The vouchers of the said Silver Valley Company, under which the same were paid, are returned with this report.

I find that Joseph Wilkins was, during the running of the above account, president and treasurer of the Baltimore Gold and Silver Min-

ing and Smelting Company of Baltimore City, received its funds, and paid its current expenses from 18 October, 1878, the date of the deed of assignment, to 19 June, A. D. 1883.

I find that Joseph Wilkins kept the funds of the Baltimore Gold and Silver Mining and Smelting Company of Baltimore City, the funds of the Silver Valley Mining Company, his individual funds, a part of the time the funds of the North State Company—in one account; that he did not keep a treasurer's account; "that he did not keep a set of books; that he was not familiar with accounts"; that these funds were paid out from the same account indiscriminately, sometimes in cash, sometimes by checks, signed "Joseph Wilkins, treasurer," and sometimes (454) "Joseph Wilkins." Therefore I do not find in what proportions the common funds were distributed or paid out by the said Joseph Wilkins, either as funds of any of the said companies, or as his individual funds; nor can I find in what proportion or sums he received the same as treasurer of the said respective companies, or as his individual funds. I find that during the running of the said account from 10 January, A. D. 1881, to 1 April, 1882, The Baltimore Gold and Silver Mining and Smelting Company of Baltimore City dealt principally in Silver Valley Mining stock, purchasing 114,400 shares and selling 114,400 shares, from which I find it realized a profit of about $26,000. The ore account of the said Baltimore Gold and Silver Mining and Smelting Company of Baltimore City does not alter its cash account. It is charged on one side and credited on the other.

From the above sum of $26,000 must be drawn the salary of Joseph Wilkins, president, during the said term ($500 a month), and the sum of $8,420, paid for the land. It had no other funds that can be called "cash funds."

I find that the said Baltimore Gold and Silver Mining and Smelting Company of Baltimore City had not the funds to advance to the Silver Valley Company the sum of $32,082.93 and pay the further sum of $20,000 cash for ore, and that The Baltimore Gold and Silver Mining and Smelting Company of Baltimore City did not make the said advances, and did not pay the sum of $20,000, cash, for 2,000 tons of ore bought from the plaintiff at $10 per ton.

I find on the "cash book" of The Baltimore Gold and Silver Mining and Smelting Company of Baltimore City the following entries:

WORKING CAPITAL.

Gold and Silver Mining and Smelting Company.

18 April, 1880. Received donation from Joseph Wilkins.....$ 5,000.00

WORKING CAPITAL. (455)

16 Sept., 1880. Received donation from Joseph Wilkins.....$25,000.00

WORKING CAPITAL.

16 Dec., 1880. Received donation from Joseph Wilkins $10,000.00

The above donations and $200 for sale of capital stock were, and constituted at the said dates, the working capital of the said Baltimore Company of Baltimore City.

I find that no cash passed from the donor to the donee at the date of said entries; that the said donor was in the same position in relation to the donee, after, as before, the same were entered in the cash book; that the entries were made by the direction of the donor, who was, in a pecuniary view, unable to make such donations.

I find, as a matter of law, that the said donations and each of them were inoperative and void.

I find that on 6 May, A. D. 1882, a deed or agreement, under seal, was executed between the Silver Valley Company, defendant, and the Baltimore Company, plaintiff, which recites "that certain propositions had been made at a meeting of the stockholders of the party of the first part, for an ascertainment, security and settlement of the indebtedness by the party of the first part to the party of the second part, were submitted and accepted, and which were to be embodied in an agreement, to be duly executed by both of said companies, in consideration of which and five dollars, the amount of indebtedness of the Silver Valley Company to the Baltimore Company of Baltimore City shall be referred to the boards of directors of the respective companies for ascertainment, and if they cannot agree upon said amount, each company shall select one disinterested person, which two shall, before taking upon them the arbitration, choose an umpire, to determine all matters in dispute in case of their disagreement; and the decision as to the amount of (456) said indebtedness in all accounts, including the $20,000 alleged to have been paid or credited the Silver Valley Company for ore, under the contract of 10 January, A. D. 1881, shall be final and conclusive under both companies." It provides that the contract between the two companies, dated 10 January, 1881, shall be rescinded, and the "ore" on the property of the Baltimore Company of Baltimore City, under the said contract, shall be returned and be redelivered to the said Silver Valley Company, and that the sum of $20,000, the value of the said ore, shall be considered as part of the indebtedness of the Silver Valley Company, to the said party of the second part secured, to be paid as hereinafter mentioned. It provides that all vouchers and proofs for the establish-

ment of said indebtedness shall be submitted without delay, etc. In case the respective boards shall fail to agree upon the same, the arbitrators thereinbefore provided for shall be selected, and proofs, vouchers, books, etc., relating to said indebtedness shall be submitted to them for decision, according to the very right of the matter. It provides that when said indebtedness shall have been ascertained and determined, as aforesaid the deed of trust of record in Davidson County to be released and a deed of trust or mortgage shall be executed by the Silver Valley Company to the party of the second part, to secure the payment of the amount so ascertained to be due, payable in twenty-four months from 2 May, 1882. It provides that in the meantime a judgment confessed by the Silver Valley Company for $20,000 (the alleged ore debt) in favor of the Baltimore Company shall be stricken out. I find that under this agreement the board of the respective companies met on 5 or 6 of May, 1882, the vouchers of the Silver Valley Company were produced, and the cash book of the Silver Valley Company was also produced; the vouchers were compared with the entries in the (457) said cash book and authenticated as correct. I find that no vouchers of the Baltimore Company, nor cash book, or book of accounts, nor the accounts "X" or "Y," of the said Baltimore Company, were produced at that meeting by said Baltimore Company. I find that no vouchers or books of accounts of said Baltimore Company were then demanded or called for by the Silver Valley Company.

I find that the ore on the property of the Baltimore Company was returned, and the said judgment was stricken out, under the said agreement. I find that the return of this said ore released the Baltimore Company from any obligation to pay or account for the same. The Silver Valley Company, on the other hand, from whom the ore was purchased, would be bound to account for the purchase money of the ore to the Baltimore Company. I find no vouchers whatever for the payment of the purchase money of the said ore, and that the purchase money for the same ($20,000) was never paid in cash by the Baltimore Company to the Silver Valley Company. I find, on the credit side of the Silver Valley Company, the following entry: "Ore account, 22 April, 1882. Amount agreed upon to relinquish 2,000 tons of ore from Baltimore Company, purchased by it at sundry times, $20,000." I find there was no cash transaction. It was transferred from the agreement above recited.

I find that said agreement provides for the ascertainment, security and payment of any indebtedness due and owing from the Silver Valley Company to the Baltimore Company, and it is not conclusive of the amount of such indebtedness, nor does it estop either party from ascertaining what, if any, indebtedness may exist.

I find, as a matter of fact, that no debt was due and owing from the Silver Valley Company to the Baltimore Company on 19 June, 1883, the date of the deed of assignment from the said company to the defendant, and that the said deed did not operate as a transfer of any valid or subsisting debt from the Silver Valley Company to (458) the Baltimore Company.

As to the forfeited stock sold to John M. Dennison, I find that on 5 August, 1879, Joseph Wilkins, as president of the Silver Valley Company, entered into the contract with John M. Dennison, the then treasurer of the Silver Valley Company, which is set out on page 18 of the minute book of said company; and that of the forfeited stock in said contract mentioned, 60,000 shares were, on 10 January, 1881, given by Dennison to Wilkins in exchange for 60,000 shares of the stock of the Baltimore Company, and that Wilkins, on said day, gave said 60,000 shares of the complainant's stock to the Baltimore Company, without consideration, and that said last named company thereafter sold said 60,000 shares at the average price of $1.50 per share, and of the proceeds paid Joseph Wilkins $57,000, and retained the balance of $33,000 as profit.

I find that said Baltimore Company took said stock with notice of whence it came, and how it had been acquired, and of the fact that in the hands of Wilkins it was held in trust for complainant, and that complainant is entitled, as against the Baltimore Company, the defendant, as assignee of the same with notice, to the amount of $33,000, which the Baltimore Company retained, as profit, from the sale of said 60,000 shares of plaintiff's stock, less the sum of $15,000, which the plaintiff had received for the same from Dennison, which makes the sum due to the plaintiff from the defendant company, $18,000.

(Signed) JOHN C. KING, *Referee.*

In the course of the examination of the witnesses (whose testimony was taken in writing) and the reception of other evidence by the referee, the defendants made numerous exceptions, some based upon the ground, that the evidence was not competent, and others upon the ground, that competent evidence offered was not received. The plaintiff (459) filed one exception, and the defendants filed numerous exceptions, to the report of the referee; but they are not necessary to an understanding of the opinion of the Court.

At the trial term the parties agreed in writing, as follows: "It is agreed that this cause shall be tried before the court, without a jury, upon the evidence taken and returned by Hon. John C. King, referee, upon law and fact."

Before entering upon the merits of the action, the defendants moved to dismiss the action, because a corporation styled "The Baltimore Gold and Silver Mining and Smelting Company of Baltimore City (John M. Dennison, Samuel Street, John M. McElroy and Joseph Wilkins) were not made parties thereto." The court "denied the motion, the failure to join necessary parties being upon a ground of demurrer only, and the defendants excepted thereto."

At the trial before the court, the plaintiff proposed numerous issues of fact, which the court rejected, and it adopted the following, as raised by the pleadings, which were, in substance, proposed by the defendants, and responded to by it on the trial as indicated at the end of each:

1. Is plaintiff company indebted to defendant company, and in what amount? Answer: "No."

2. Is the deed of trust of 27 April, 1882, fraudulent and void, by reason of its having been procured in pursuance of a conspiracy upon the part of Wilkins, McElroy, Street and Dennison, to obtain all plaintiff's valuable property? Answer: "Yes."

3. Is plaintiff entitled to recover of this defendant any sum of money in consequence of the sale of plaintiff's stock to Dennison or Wilkins in 1879, alleged to have been sold in pursuance of said conspiracy to defraud, upon the part of said Wilkins, McElroy, Street and Dennison? Answer: "Yes," $18,000, with interest from 10 January, 1881.

(460) 4. Is defendant company a purchaser of said property from the Baltimore Company of "Baltimore City" for value, and without notice of any fraud committed in the procurement of the deed of trust? Answer: "No."

The case settled upon appeal states that, "upon consideration, all the exceptions (those to the report of the referee) were overruled, and the report confirmed. The findings of fact of the court are the same as the facts found by the referee, as appears in his report.

The issues were tried by the judge, jury trial having been waived, and judgment was rendered upon the confirmation of the report and findings of fact upon response to issues.

The court, among other things, adjudged and decreed, "that all of defendant's exceptions be overruled upon the findings of fact by the referee, the same being adopted as the findings of the court. Those exceptions, which are to the effect that the referee has exceeded the powers granted him in respect to the scope of the reference, are overruled because the whole case is now, by agreement, submitted to the court for trial without a jury, upon the evidence taken before the referee. The plaintiff's exception is also overruled, upon the facts found by the referee and adopted by the court."

It was further adjudged and decreed, that "the deed of trust mentioned is fraudulent and void, and that the defendants, the trustees therein named, be perpetually enjoined against executing the trusts therein provided; and that the plaintiff recover from the defendant corporation the sum of eighteen thousand dollars, with interest thereon from the tenth day of January, 1881, and for costs."

From this judgment both the plaintiff and defendant appealed to this Court.

The court refused to give judgment upon the facts found as to the sale of the shares of capital stock of the plaintiff in favor of the latter, for the sum of seventy-five thousand dollars and interest (461) thereon, and this it assigns as error.

The defendants assign thirty-four distinct grounds of error. Twenty-five of these have reference to exceptions to the referee's report, in various aspects of it, but, for reasons stated in the opinion of the court, these need not be repeated; those material are as follows:

"27th. The defendants further excepted to the ruling and judgment of his Honor, because he failed to render and file a statement of the facts found, and his conclusions of law thereon, separately.

28th. The defendant company also excepted to that much of the judgment as orders the payment of interest from the 10th day of January, 1881, as under no circumstances could any principal indebtedness have fallen due until some time thereafter.

29th. The defendants excepted to the finding in response to the third issue—

First. Upon the ground that by reason of a lack of statement of his Honor's findings of facts and law separately, it cannot be ascertained whether such response was predicated of a fraud in fact, or a construction; and if the latter, because there is no evidence of any constructive fraud.

Second. Because if such response was predicated of a fraud in fact, the finding is contrary to the weight of the testimony, and is erroneous.

Third. Because if his Honor did not intend to find actual fraud in this behalf, even if there was evidence of constructive fraud, the same is not alleged in the complaint, but it is framed *diverso intuitu.*

31st. The defendants excepted to the judgment, because it fails to pass upon the question of ratification and acquiescence in the sale of the stock to John M. Dennison.

33d. The defendants excepted to the failure of the court to pass upon the various exceptions taken by them to the admissibility of evidence before the referee, as well as for the adoption presum- (462) ably by the court of the rulings of the referee in this behalf, and

which are to be found in the testimony and exhibits, all of which form a part of this statement," etc.

The court states, in this connection, in the case settled on appeal, as follows:

"But no objection was made, upon the trial of the action, to the admission of any testimony before the referee, and the presiding judge was not called upon to pass upon any exceptions to evidence admitted by the referee."

Nicholas P. Bond (Robbins & Raper and M. H. Pinnix filed briefs) for plaintiff.

D. G. Fowle and Geo. V. Strong (Alexander & Applegarth filed briefs) for defendants.

MERRIMON, J., after stating the case: The motion to dismiss the action, upon the ground that certain persons named had not been made parties to it, was properly disallowed. If the objection had been a valid one, taken properly, and in apt time, it came too late—just before entering upon the trial—to be insisted upon as of right. The statute (The Code, secs. 239, par. 4, 242, 243) provides, that the defendant may demur, when it appears, upon the face of the complaint, "that there is a defect of parties plaintiff or defendant," and that "when any of the matters enumerated as grounds of demurrer do not appear on the face of the complaint, the objection may be taken by answer," and further, that if the objection shall not be so taken, "the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

The objection was not taken by demurrer or answer, and so the defendants waived their right to take it at all. The court might,
(463) for good cause shown, have allowed additional necessary parties to be made, and in some cases, it would, *ex mero motu,* require them to be made, but it seems that in this case it properly, as we shall see, did not deem them necessary. *Lewis v. McNatt,* 65 N. C., 63; *Durham v. Bostick,* 72 N. C., 353; *Burns v. Ashworth, ibid.,* 496; *Finley v. Hayes,* 81 N. C., 368; *Lunn v. Shermer,* 93 N. C., 164.

The objection that the *referee* exceeded the scope of his authority, under the order of reference, is without force. If it be granted that he did, in some respects (and we do not stop to see that this is so or not so), after he made his careful and elaborate report of the large volume of evidence taken before him, and his findings of fact and law, and the defendants had filed numerous exceptions to the same, it was expressly

agreed by the parties, "that this cause shall be tried before the court, without a jury, upon the evidence taken and returned by Hon. John C. King, referee, upon the law and facts." This was plainly a waiver of a trial by jury, as allowed by the statute (The Code, sec. 415), and placed the whole case before the court broadly upon its whole merits. Any inquiry as to the scope of the order of reference could not therefore serve any useful purpose. It was the province of the court to exclude from its consideration of the case, in any aspect of it, every thing immaterial and improper, and, in the absence of objection, it must be taken that it did so.

The assignment of error, in that the court failed to pass upon numerous exceptions to the admission of evidence objected to, and the refusal to admit other evidence offered by the defendants before the *referee,* cannot be sustained. It was agreed by the parties that the court should try the case "upon the evidence taken and returned by" the referee. There was no reservation in respect to it—the court was to receive and consider it as it was "taken and returned." Besides, such exceptions were not insisted upon on the trial, nor was the (464) court requested by the defendants to pass upon them. If they intended to insist upon them, they should have reserved the right in the stipulation to do so—at all events, in fairness they should have requested the court to decide the questions raised by them. It seems to us clear that they intended to waive them, and it must be held that they did so. It would savor of trifling, to do otherwise.

It is further assigned as error, that the court "failed to render and file a statement of facts found, and his conclusions of law thereon, separately." The statute (The Code, sec. 417), provides, that "upon the trial of a question of fact by the court, its decision shall be given in writing, and shall contain a *statement of the facts found* and the conclusions of law separately," etc., so that it may be seen to what statement of facts, and how, the court applied the law applicable arising upon them. The purpose is to have the facts of the case and the law, as applied, appear permanently, to the end that any proper motion or steps may be taken in the action to correct errors or irregularities, and likewise so that errors may be corrected here, in case the same shall be assigned and appeal taken to this Court. *Clegg v. Soapstone Company,* 66 N. C., 391; *Foushee v. Pattershall,* 67 N. C., 453; *Straus v. Beardsley,* 79 N. C., 59; *Chastain v. Coward, ibid.,* 543.

The case settled on appeal states that the court found the facts, and it appears that it did, and much in detail, from the evidence taken and returned by the referee, which, by agreement, as we have seen, was the evidence in the case. It is true the court says that it found the facts as

the referee found them, and adopted his findings as those of the court. There is no reason why this might not be done. It was only important and necessary that the court should find and state the facts and its conclusions of law arising upon them, so that the whole might be distinctly seen. The material facts are found and stated—not very formally—and the conclusions of law are stated with such distinctness as plainly
(465) to be seen. In addition to the general findings of fact, distinct issues of fact were drawn up, and the court responded to them severally. These issues, and the responses to them, were not inconsistent with the facts as found and stated, but in harmony with them, and though somewhat irregular and unusual, we cannot see that any harm grew or could grow out of them, to the prejudice of the parties. They served, and it seems they were intended, to give the leading constituent facts greater point and distinctness. The defendant cannot be heard to complain that such issues were acted upon, because they consented to and proposed them. We are of opinion, therefore, that the findings of fact and the conclusions of law appear with sufficient distinctness to serve every just and useful purpose, and substantially as the statute requires in such cases.

It is unnecessary to consider the numerous exceptions to the order of the court overruling the defendant's exceptions to the report of the referee, because under and in pursuance of the stipulation waiving a trial by jury, the whole case, upon its merits, was before the court, to be tried by it in all respects according to law. Accordingly it found the facts, and applied the law just as if there had been no reference and no report made by the referee. This appears from the record—the findings of the facts, the rulings, orders and final judgment of the court, and, as well, the nature of the matter. No doubt the report facilitated the labors and action of the court, but it was not bound or governed, so far as appears, by anything contained in it as such report. It cannot be taken that the court adopted the findings of facts by the referee without examination itself—it was its duty to scrutinize and consider the evidence, and to find the facts itself; and, the presumption is, it did so. That it found them to be just as the referee found them, is no valid objection; indeed, it goes to show the more strongly that the findings were correct.

The defendant's twenty-ninth exception, which applies to the
(466) third issue submitted to the court, and its response to the same seem to us to be entirely groundless. The pleadings and the findings of fact suggest and give point to this third issue, and the issue itself, by its terms and purpose, plainly implies an inquiry as to positive fraud. The "conspiracy," referred to, is alleged, in the complaint, to be a combination to cheat and defraud the plaintiff, and the sale is alleged to

have been a positively fraudulent transaction, and this is denied in the answer, thus raising the issue.

Moreover, the general findings of the facts sufficiently raised any questions as to constructive fraud, and if the issue had reference to that, then it was nugatory. Besides, there was evidence and facts found, from which the court might find positive fraud. It is very certain that it did so in response to the issue.

Nor is the assignment of error, that the court failed "to pass upon the question of ratification and acquiescence in the sale of the stock to John M. Dennison," well founded. The defendants did not tender any issue, or request the court to make any special finding in that respect. They might have done so in apt time; as they did not, the omission was not error, of which he could complain after judgment. *Kidder v. McIlhenny,* 81 N. C., 132; *Curtis v. Cash,* 84 N. C., 42; *Bryant v. Fisher,* 85 N. C., 69; *Simmons v. Mann,* 92 N. C., 12; and cases there cited.

Besides, the defendant corporation had opportunity, and probably availed itself of it, to insist upon such alleged ratification and acquiescence, on the trial of the first issue submitted.

The learned counsel of the defendant, on the argument, laid much stress upon the suggested necessity of having Dennison, Street, McElroy and Wilkins before the court, as parties. They were not necessary parties—they were simply officers and agents of the plaintiff and the Maryland corporation, and no relief is asked as to them. It appears that Wilkins was, at first, made a party, and answered, but afterwards, by consent, the action was abandoned as to him. These (467) persons might have been examined, as witnesses for the plaintiff, or defendants; some, if not all of them, indeed, were examined for the defendants.

It was insisted, particularly, that the Maryland corporation was a necessary party, as it was alleged in the complaint, and the whole pleadings and the evidence went to show, that the deed of trust in question was made to secure a large debt, therein specified, due from the plaintiff to it, and also that it fraudulently got the shares of the capital stock mentioned, sold the same, and realized therefor the sum of ninety thousand dollars, etc. As to the deed of trust, the trustees therein, having the legal title to the land, are parties defendant, and make defense, and, in a measure and in an important sense, represent the *cestui que trust.* This corporation is a nonresident, and not within the jurisdiction of the court. Besides, it appears that its stockholders have dissolved and abandoned it, as far as they could do so, without a formal surrender of its charter—that it has assigned all of its property, rights, credits and

effects of every kind whatsoever, to the defendant corporation, and has, as far as it could, merged itself in the defendant corporation, which latter has assumed to represent it, and likewise all its liabilities. This fully appears from the deed of assignment, which the answer of the defendant corporation admits, and the answer so, in effect, declares. The defendant's trustees admit the facts so to be, and they say in their answer, that they have recognized the rights of their codefendant corporation, and have agreed with it, and intend, unless prevented, to execute the trust in its favor and for its benefit. Moreover, it appears that the stockholders of the defendant corporation are mainly, if not altogether, the stockholders of the Maryland corporation, and their stock in the latter corporation was transferred to and became the (468) stock of the defendant corporation. All this, in effect, appears from the answers of the defendants, and from the findings of fact, so that, so far as the defendants are concerned in this action, the defendant corporation represents and must be treated as the Maryland corporation. It has the latter's property, has assumed all its liabilities, and has agreed and assumed to stand in its place and stead, and it must be treated as so doing, for the purpose of the action. All the parties thereto, necessary to a determination of the action, are before the court.

The thirty-first exception, as to the time for which interest is allowed in the judgment, must be sustained. The plaintiff recovers money realized for the stock sold by the Maryland corporation. When it received the money, does not appear, but it certainly, as appears, did not get it or have it on 10 January, 1881, but after that time. It certainly had it before the time it executed the deed of assignment to the defendant corporation, which was 31 September, 1883. The judgment must, therefore, be so amended as to allow interest on the principal sum of money from that date, and the whole judgment, so amended, affirmed. To that end, let this opinion be certified to the Superior Court.

Modified and affirmed.

Cited: S. c., 101 N. C., 679; *Morisey v. Swinson,* 104 N. C., 561; *Walker v. Scott,* 106 N. C., 62; *Taylor v. Pope, ibid.,* 270; *Kornegay v. Steamboat Co.,* 107 N. C., 117; *Friedenwald v. Tobacco Co.,* 117 N. C., 557; *Hocutt v. R. R.,* 124 N. C., 216; *Howe v. Harper,* 127 N. C., 357; *Godwin v. Jernigan,* 174 N. C., 76; *Lanier v. Pullman Co.,* 180 N. C., 410.

(469)

I. V. AND E. BAIRD, ADMINISTRATORS OF W. R. BAIRD, v. W. T. REYNOLDS, ADMINISTRATOR OF DANIEL REYNOLDS.*

Questions of fact for the Court and for the Jury—Evidence—Statute of Limitations—Presumptions—Seal.

1. Whether a scroll affixed to a bond is a seal, is a question of law for the court; but whether there was a scroll, and whether the obligor placed it there, or adopted it as his seal, are questions of fact for the jury.
2. The period elapsing between the death of the *maker* of a bond and the qualification of his personal representative, must be excluded in computing the time when the statute of presumptions is relied upon as a defense; but the rule is different with respect to the time elapsing between the death of the *payee* and the appointment of his administrator.

CIVIL ACTION, tried before *MacRae, J.*, at March Term, 1888, of BUNCOMBE Superior Court.

The plaintiff sought to recover the balance alleged to be due upon a note, under seal, made by the defendant's intestate to J. S. T. Baird in 1863, for $1,500, which was assigned to plaintiff's intestate.

Defendant denied all the allegations of the complaint, pleaded counterclaims, scale of Confederate currency, "that more than ten years have elapsed since the plaintiff's alleged cause of action accrued, and before the commencement of this action, and the same is barred by the statute of limitations in such case provided."

And the same as to three years.

This action was begun on 5 January, 1880.

The plaintiff offered a paper, much mutilated and worn, and in several pieces.

W. E. Weaver, a witness for plaintiff, testified that he knew the handwriting of Dan'l Reynolds. The writing was very dim, but he thought that it was Dan'l Reynold's signature. His best impres- (470) sion was, that he had seen the note before; that it was, at that time, all in one piece, and he recognized the credit endorsed as in W. R. Baird's handwriting.

This witness further testified, that in 1877 or 1878, he saw Dan'l Reynolds, a short time previous to his death, and mentioned to him something about his indebtedness to W. R. Baird, but witness does not know that he mentioned this note.

Dan'l Reynolds replied, it was true Uncle Billy (meaning W. R. Baird) did claim that he owed him something, but if J. S. T. Baird

*MERRIMON, J., did not sit upon the hearing of his cause.

would come forward and do what was right, he (Reynolds) would not owe him a cent.

It was in evidence that W. R. Baird died November, 1883, and the plaintiffs qualified as his administrators 1 January, 1884; that Dan'l Reynolds died 21 January, 1878, and the defendant qualified as his administrator 2 April, 1878; and that the note was dated in 1863, with a credit endorsed 1 November, 1863, of $1,100.

Dr. Reagan testified for the plaintiffs, that during the war he had possession of W. R. Baird's papers, and that among them "there was a note given by Dan'l Reynolds to J. S. T. Baird for $1,500, and that this part (meaning that piece of the paper produced) looks exactly like it; that it was all in one piece then, the balance, or other pieces, is so dim that witness cannot swear to it. Witness does not recollect the endorsement, but he knows that the note was transferred to W. R. Baird.

Much testimony was offered by the defendant, in support of his counterclaim, but it, and the issues relating thereto, are immaterial for the purpose of this appeal. Dr. Reagan was recalled for the plaintiffs, and testified, "that he was pretty well satisfied that the note was under seal."

The plaintiffs asked the presiding judge to inspect the paper
(471) offered, and declare whether there was a seal affixed to the signature of the maker.

The judge examined the note, and stated that he could not determine, by inspection, whether there was a seal or not, and left it to the jury, as a question of fact, to determine. Plaintiffs excepted.

W. E. Weaver, was recalled by the plaintiff, and testified, that upon examination of the note there seemed to be a seal there, with the name written over it.

The issues material to this appeal were:

1. Is the defendant indebted to the plaintiffs as alleged in the complaint? If so, in what amount?

2. Is said indebtedness barred by the statute of limitations?

The plaintiffs, on the trial, insisted that the evidence of W. E. Weaver, as to the declaration of Dan'l Reynolds a short time before his death, was some evidence to go to the jury, to rebut the statutory presumption of payment of said note; and further, that the time between the death of defendant's intestate and the appointment of defendant as his administrator, should be excluded in counting the time during which the statute of presumption was running, and that the time between the death of plaintiff and the appointment of his administrators, should be excluded in counting said time.

The judge instructed the jury:

"I am unable to decide by inspection whether there is a seal to that note or not. If you have been satisfied that the paper presented is a note made by Dan'l Reynolds to J. S. T. Baird, you must ascertain whether there is a seal. If there is a seal, you will respond to the first issue, No; for upon the testimony the presumption of payment has arisen. Plaintiffs excepted.

If there is no seal, you must find that it is barred by the statute of limitations."

The jury responded to the first issue, No, and to the last (472) issue, Yes.

Judgment was rendered in favor of the defendant, and plaintiffs appealed.

W. W. Jones for plaintiffs.
C. A. Moore for defendant.

DAVIS, J., after stating the case: 1. The first question presented is: Was there error in leaving it to the jury to say whether there was a seal or not?

In *Yarborough v. Monday,* 3 Dev., 420, there were two signatures to a contract and one seal, and the question was, whether both parties adopted one and the same seal.

It was said: "Whether the scroll affixed was in this State a seal, certainly was a question of law, to be determined by the court, but whether the defendant placed it there, or adopted it as his seal, if placed there by the plaintiff or any other person, were questions for the jury."

The same was held in *Pickens v. Rymer,* 90 N. C., 282. If there was a scroll, the court should have determined whether it was a seal or not; but whether there was a scroll or seal on the paper, was a question of fact, and in the worn and mutilated condition of the paper that could not easily be determined by inspection, and there was some evidence in relation to it, and the fair construction of his Honor's charge, when he told the jury, "You must ascertain whether there is a seal," is, you must ascertain the fact whether there was a scroll or seal attached to the name; and in this view we think there was no error.

2. Whether the testimony of Weaver as to the declaration of Reynolds was of much or little weight, it went to the jury for what it was worth, and without objection, and presents no question for our review.

3. Should the time between the death of the defendant's intestate and the appointment of the defendant as his adminis- (473) trator, be excluded in computing the time in which the statute of presumptions was running?

The question has been several times before this Court. It was presented and discussed in *Tucker v. Baker,* 94 N. C., 162, but not decided as the case was disposed of on another ground, but it was directly before the court at the same term in *Long v. Clegg,* 94 N. C., 763. It was there held by the Court, after a very full and deliberate consideration, that the time during which there was no administration, must be excluded in the computation of the time. We content ourselves with referring to that case and the authorities there cited, as setting the question at rest in this State.

4. Should the time between the death of the plaintiff's intestate and the appointment of his administrators be excluded?

In *Hall v. Gibbs,* 87 N. C., 4, the Court said, that the death of the plaintiff's intestate would not obstruct the running of the statute, and this we also take to be settled in this State. In explaining what, at first view, seems to be a want of harmony between *Hall v. Gibbs,* and *Long v. Clegg,* the *Chief Justice* said: "The same remissness in not suing out letters of administration by those entitled to the personal estate, may stand as rebutting evidence upon somewhat the same ground as the remissness of the creditor in not asserting his demand by action, and hence the explanatory inference is drawn, that the debt has been discharged. But the case is different where the debtor remains the whole time accessible to process, and none is sued out to enforce his liability. The distinction in the cases may be maintained upon the principle that there can be no forbearance, the admitted foundation of the presumption, when there is no one to forbear."

The time between 20 May, 1861, and 1 January, 1870, is not to be counted, and the time during which there was no administration
(474) on the estate of defendant's intestate is not to be counted. There was evidence tending to show that he died on 21 January, 1878, and that administration on his estate was taken out on 2 April, 1878, and this action was commenced on 5 January, 1880.

There was error in charging the jury, that if there was a seal, "upon the testimony, the presumption of payment has arisen."

The plaintiff is entitled to a new trial.

Error.

Cited: Coppersmith v. Wilson, 107 N. C., 35; *Brawley v. Brawley,* 109 N. C., 527; *Dickson v. Crawley,* 112 N. C., 633.

MARY F. ANDERSON v. G. W. LOGAN AND CARTER BURNETT.

Deed—Probate—Registration—Evidence—Handwriting.

1. No legal estate in lands will pass until the deed of conveyance has been duly proved and registered.
2. Where it appears that the evidence upon which the probate was taken, is essentially defective, a registration thereon is void.
3. It is not now necessary that the witnesses to prove the signatures of dead or nonresident witnesses to, or makers of, a deed, shall state the grounds upon which their opinion of the genuineness of the signatures is formed; but it is necessary that they shall depose that they are well acquainted with the handwriting of the subscribing persons, and that their signatures are genuine.

THIS is a civil action, and was tried before *MacRae, J.*, at Fall Term, 1887, of RUTHERFORD Superior Court.

The plaintiffs, in the necessary deduction of title to land, claimed in the action, and denied by the defendants, offered in evidence upon the trial before the jury a deed, purporting to have been executed by Vaney McBee, D. Reinhart and R. G. Twitty—the latter as executor of Joseph Bowen—to Mildren Bowen, with Jacob Michael and (475) B. F. Long as attesting witnesses, conveying the lot, and which had been registered upon the following certificate of probate:

STATE OF NORTH CAROLINA—Rutherford County.

This 19 March, 1868, came before me, W. M. Shipp, one of the judges of the Superior Court of Law and Equity, A. G. Logan, who swore that he was well acquainted with the handwriting of Jacob Michael and B. F. Logan, the subscribing witnesses to the within deed, having frequently seen each of the witnesses; that Jacob Michael is dead, and B. F. Logan has been a nonresident of the State for many years. Let this deed and certificate be registered.

W. M. SHIPP, *J. S. C. L. and Equity.*

The defendants objected to the admission of the deed, on the ground of an insufficient proof of execution, not warranting registration. The objection was overruled, the deed received and read in evidence, and exception taken thereto.

J. C. L. Harris for plaintiff.
D. G. Fowle for defendants.

SMITH, C. J., after stating the case: The correctness of the ruling alone need be considered in disposing of the defendants' appeal from the final judgment rendered for the plaintiff.

A deed cannot be used to support title to land until it is proved and registered, and only when this is done does the legal estate pass. This has been repeatedly ruled. *Hare v. Jernigan,* 76 N. C., 471; *Triplett v. Witherspoon,* 74 N. C., 475; *Rollins v. Henry,* 78 N. C., 342.

(476) In *Carrier v. Hampton,* 11 Ired., 307, it was held, that proof of the death of the subscribing witness, and that the signature is in his handwriting, was insufficient, in not stating on what ground his opinion was formed, nor by what means a knowledge of the deceased's handwriting had been acquired. This was overruled in *Barwick v. Wood,* 3 Jones, 306, and it was declared to be sufficient if the probate shows that the witness declared, in general terms, that he was "well acquainted with the handwriting," without showing how this knowledge was obtained; and this ruling is followed in *Davis v. Higgins,* 91 N. C., 382.

Where the evidence upon which the probate is adjudged is set out, and it appears to be essentially defective, the registration is void as such. *Howell v. Ray,* 92 N. C., 510.

Now, it is manifest that there has been not merely an insufficient probate, but no *probate at all,* of the signature of the subscribing witnesses, an indispensable prerequisite.

The witness proves his competency to testify to the genuiness of the signatures, and by supplying the evident ellipsis "write," after the words, "having frequently seen each of the witnesses," the means by which he became qualified so to testify, but he does not testify at all to the fact that the *signatures* to the deed are in the handwriting of the parties.

There is, therefore, a total failure to prove the execution of the deed, and the registration was unauthorized and void, and the admission of the deed as evidence is error.

The judgment must therefore be reversed, and a *venire de novo* awarded.

Error.

Cited: McClure v. Crow, 196 N. C., 660.

(477)

DAVID HARMON ET AL. v. J. F. HERNDON, ADMINISTRATOR OF J. F. FALL, ET AL.

Appeal—Undertaking—Presumption.

1. Nothing to the contrary appearing, it will be presumed that an undertaking on appeal was filed at the date of the justification. It is, however, competent to show that it was filed at another time.
2. The failure to give an undertaking on appeal within the prescribed time, is not such an irregularity as contemplated by the statute, Laws 1887, ch. 121.

AT THE Fall Term, 1886, of the Superior Court of the county of CLEVELAND, held in the month of October, of that year, *Graves, J.*, presiding, the plaintiffs, appellees, obtained judgment in that court against the defendants, from which the latter appealed to this Court.

The court made on the minutes of its proceedings in the case, this entry: "Defendants allowed thirty days to tender case and file appeal bond." The undertaking on appeal is filed without date, except that it was justified—just under it on the same paper—on 7 February, 1887.

When the appeal was called for argument, the appellees moved to dismiss it upon the ground that the undertaking on appeal was not filed within the time allowed by law, nor within the time allowed by the court.

Platt D. Walker for plaintiffs.
W. P. Bynum for defendants.

MERRIMON, J. We are constrained to allow the motion. It must be taken, nothing to the contrary appearing, that the undertaking on appeal was filed on the day it was justified, and this was quite three months next after the lapse of the time within which the court directed that it might be filed. It was held in *Boyden v. Williams,* 92 N. C., 546, that if the undertaking on appeal is without date, and the justification thereof has a date, the latter date must be taken as the date of the (478) filing thereof. The appellants might, however, have shown that the undertaking was, in fact, filed within the time allowed by the court. They did not offer to do so, and the inference is they could not.

This case does not come within the statute (Acts 1887, ch. 121, sec. 1). The failure to give the undertaking on appeal is not an "irregularity" within the meaning of that statute. *Bowen v. Fox,* 98 N. C., 396.

The appellees are entitled to have their motion allowed.

Appeal dismissed.

L. D. GARRISON AND WIFE v. CAROLINE COX ET AL.

Partition—Sale of Land for Assets—Parties—Joinder of Actions—Special Proceedings—Administration.

1. In a special proceeding for partition, it is erroneous to permit the personal representative of the ancestor of the tenants in common to interplead and apply for a license to sell the lands for assets.
2. The same principle which forbids the improper joinder of causes in civil actions, applies to special proceedings.
3. Where it appears to the court in a proceeding for partition, that it may become necessary to sell the lands for assets, it should stay the partition until the personal representative can have reasonable opportunity to apply for a license.

THIS is a special proceeding, heard before *Boykin, J.,* upon appeal from the clerk of BURKE Superior Court, at Chambers, on the Fall Circuit of 1887.

The plaintiffs, husband and wife, brought this special proceed-
(479) ing to obtain partition of the land specified in the petition. They allege therein that Wesley Cox died intestate on 16 September, 1883, in the county of Burke, leaving the *feme* plaintiff and the defendants surviving him, as his only heirs at law, and that the land mentioned descended to them from their said ancestor as tenants in common, subject to the dower of the surviving widow of the said intestate, etc.

The defendants admit some of the material allegations of the complaint and deny others; and allege that at the time of the death of their ancestor, he owed numerous debts for considerable amounts, which have not been paid, and particularly, the defendant Julius A. Cox, alleges that he is the administrator of the intestate—his father—that the estate is largely indebted—that there are no personal assets to pay these debts—that there is no real estate of his intestate, except that mentioned, and that it is necessary to sell the same, to make assets to pay debts, etc.

The following is a copy of so much of the case stated on appeal, as need be set forth here: "The clerk, upon motion, made the administrator of Wesley Cox a party defendant to the proceeding, and upon his filing answer, ordered a sale of the land for assets, instead of for partition, as prayed in the petition. Plaintiffs excepted to the said administrator being made a party, and to the order of sale for assets, and, upon appeal, Judge Avery reversed the order or judgment of the clerk, and ordered an account to be taken, to which plaintiffs excepted. And the account having been taken, and the case coming on again to be heard before the clerk, the plaintiffs again insisted that the administrator of Wesley Cox

was not a necessary or proper party, and that the land be sold for partition. The clerk having ordered a sale of the land for assets, plaintiffs appealed, and thereupon his Honor, Boykin, J., having heard said case, and being of opinion that the administrator of Wesley Cox was not a necessary or proper party to this proceeding, and that there was, therefore, error in the order of the clerk, reversed the same, and (480) gave judgment that said administrator be notified to proceed no further in making sale of said land for assets, and that the clerk proceed in the partition of said land according to law." To which judgment J. A. Cox, administrator of Wesley Cox, excepted and appealed.

No counsel for plaintiffs.
S. J. Ervin for defendants.

MERRIMON, J., after stating the case: The distinct and sole purpose of this special proceeding is to have partition made of the tract of land, mentioned in the petition, among the *feme* plaintiff and the defendants, who are tenants in common thereof, according to their several and respective rights as such. The right of these tenants in common to have partition of the land among themselves, is distinct in its nature from, and cannot affect the right of, the appellant administrator in the case allowed by law to apply by special proceedings for a license to sell the land of his intestate to make assets to pay debts. The special proceeding to compel partition is entirely different, in its nature and purpose, from that to sell land to make assets; and there is no statutory provision that requires, or allows, the two diverse purposes or causes of proceedings to be united and effectuated in one and the same special proceeding. Nor is there any general principle of the law of procedure applicable that requires such causes of special proceeding to be united in the same special proceeding.

The appellant seeks to bring into this special proceeding a cause of such proceeding foreign to, and not connected with its purpose; his cause of such proceeding, and his remedy in respect thereto, as to the land which the tenants in common seek to have partitioned, does not affect their rights *as such tenants among and* between themselves; his remedy is not with the defendant, as against the plaintiff, (481) nor with the latter, against the former, but against both the plaintiffs and defendants, in a distinct special proceeding brought by him. There is the same objection to uniting distinct causes of special proceedings in one and the same special proceeding that there is to uniting two or more distinct causes of action in the same action between the same parties, which the statute does not allow to be so united. The reason of the objection applies with equal force in both cases. The Code, sec. 278.

It seems to us very clear that the causes of special proceeding, which the appellant seeks to have united in this special proceeding, do not at all come within the provisions of the statute (The Code, sec. 267) which allows several causes of action to be united in the same action. They do not both, in any reasonable or proper sense, arise out of:

1. "The same transaction or transactions connected with the same subject of action; 2, Contract, express or implied; or 3, Injuries, with or without force, to person and property, or to either; or 4, Injuries to character; or 5, Claims to recover real property, with or without damages for the withholding thereof, and the rents of the same; or 6, Claims to recover personal property, with or without damages for the withholding thereof; or 7, Claims against a trustee, by virtue of a contract or by operation of law."

The two causes of special proceeding under consideration do not arise under any of the heads thus enumerated. They do not arise out of "the same *transaction,*" etc., nor out of *"claims* to recover real property," etc., in any reasonable interpretation of these clauses of the statute.

The rights of the tenants in common are incident to their estate in the land as among and between themselves; the right of the appellant affects them collectively and adversely, and arises out of a particular statutory provision.

It was contended on the argument that the appellant might be (482) made a party *defendant,* as allowed by the statute (The Code, sec. 184). We cannot think so, because he does not claim "an interest in the *controversy* adverse to the plaintiff," nor is he "a necessary party to a complete determination or settlement of the question involved therein"; he has no connection with, or interest in, the controversy as to the *partition* demanded, nor is he a party necessary to a determination of the rights of the parties involved therein. And, for the like reason, he could not be made a party, as allowed by the statute (The Code, sec. 189), as contended by his counsel. *Colgrove v. Koonce,* 76 N. C., 363; *Wade v. Sanders,* 70 N. C., 277; *McDonald v. Morris,* 89 N. C., 99.

As we have suggested, the cause of special proceeding of the appellant is exceptional and peculiar, given by the statute (The Code, sec. 1436), for a particular purpose, that may arise in the course of settling and closing the estate of his intestate, and *he* must pursue the remedy given by the statute. He could not have his remedy in this special proceeding, unless by consent of all the parties, with the sanction of the court. Such a course of practice as that insisted upon, if the court could allow it at all, would in many—most—cases, lead to delay, increase of costs and give rise to, inextricable confusion.

In this case, the plaintiffs seek to have partition made of the land; the surviving widow is introduced, to the same end. She may have her dower assigned to her, and the appellant asks leave to come in and have a license to sell the land to make assets to pay debts, and all the accounts taken incident thereto and in the litigation involved! Three diverse, disconnected causes of special proceedings in one! *Carlton v. Byers,* 93 N. C., 302; *Clendenin v. Turner,* 96 N. C., 416.

It may be that the appellant, if he had brought his own special proceeding to sell the land to make assets, etc., could, for good causes shown, have restrained, by injunction, the tenants in common in this case from proceeding to have partition thereof, until he could obtain a license to sell the land for the purpose mentioned.

So, the court properly held, that the appellant administrator (483) was not a proper party. We think, however, that the court should have *stayed* the proceeding, until the appellant administrator could have reasonable opportunity to apply, properly, for a license to sell the land to make assets, etc. The defendants allege that partition ought not now to be made, because the land is chargeable to make assets, and this sufficiently appeared to warrant such order. It should be made, to prevent possible confusion among the parties, finally, and to the end that the land may be sold, if need be, for a better price, all embarrassment being out of the way. The judgment, modified as thus indicated, must be affirmed.

To that end let this opinion be certified to the Superior Court.

Modified and affirmed.

Cited: Turner v. Shuffler, 108 N. C., 645.

ARA BRITTAIN v. S. E. MULL ET AL.

Parties—Judgment—Jurisdiction.

1. Where the record shows that a person was a party, and the court had jurisdiction of the subject of the action, a judgment therein cannot be collaterally attacked, on the ground that the person was not in fact a party. The proper remedy is by a direct proceeding to correct the record and vacate the judgment. The fact that the party complaining was at the rendition of the judgment a lunatic or infant, constitutes no exception to this rule.

(Vide, S. c., 91 N. C., 498, and 94 N. C., 595.)

BRITTAIN *v.* MULL.

THIS was a special proceeding, heard by *MacRae, J.*, on the Spring Circuit, 1887, upon an appeal from the clerk of the Superior Court of BURKE County.

(484) This action was commenced in the Superior Court of Burke, before the clerk, in February, 1880, by the plaintiff, who is the widow of James Brittain, who died intestate in 1876, possessed of the lands described in the petition, against the administrator and heirs at law of her deceased husband, and Sarah Mull, as the purchaser of the land of the deceased husband, at a sale thereof made, to make assets to pay the debts of the deceased, there being a balance due from the estate of said deceased of the purchase money for said land.

On the hearing before the clerk, 30 August, 1886, the following facts, as appears from the statement of the case, were found by him:

That plaintiff filed her petition for dower in said land in January, 1877, and afterwards had said action dismissed, and, in said action, waived her right of dower in said land.

That subsequently, to wit, on 24 February, 1877, the plaintiff, Ara Brittain, joined with S. E. Mull, the administrator of her deceased husband, and the heirs at law of her said husband, and filed a petition against Marcus Brittain, an infant heir, asking for a sale of said land, for the purpose of creating assets in the hands of the administrator to pay debts.

The said Ara Brittain, being a plaintiff in said action, and stating that "said land was subject to her dower," "but which right has been heretofore and is hereby waived," agreed to take a child's part in lieu of dower.

That said land was duly sold, and Sarah Mull became the purchaser, and paid the sum of $815 for said land, and the title was duly executed to her.

That on 26 February, 1880, plaintiff began this action of dower against the administrator and heirs at law of her deceased husband and Sarah Mull, the purchaser of the land.

(485) That at Fall Term, 1881, of Burke Superior Court, the following and only issues were submitted to a jury without exceptions, and found as follows:

1. Did plaintiff, by her agreement in the clerk's office in 1877, waive her right of dower in said land? Answer: Yes.

2. Was such waiver void by reason of plaintiff's mental incapacity? Answer: Yes.

That on said verdict no judgment or order was entered, and no motion made by plaintiff, until Spring Term, 1883.

That at Fall Term, 1882, the original answer of defendants having been lost, the court ordered, by consent of parties, that the defendants have leave to supply the answer so lost or mislaid.

That at Spring Term, 1883, the plaintiff moved:

1. To strike papers from the files, with the answers filed by leave of the court, at Fall Term, 1882, to supply the place of the original answer.
2. To remand cause to probate judge.
3. To have dower assigned to the plaintiff.

Which three motions were refused by the court, and the plaintiff appealed.

And on return of certificate from Supreme Court, plaintiff moved, before the clerk, for dower, which motion he refused, and plaintiff appealed.

And this cause coming on now to be heard, the court is of opinion, and finds, as matters and conclusions of law, that as the jury found by the issues that the waiver by plaintiff of her dower was void, by reason of plaintiff's incapacity, said waiver does not operate as a bar to her right of dower, but the court is of opinion that the waiver and judgment could not be attacked collaterally in this proceeding, but should be attacked by a direct proceeding.

The court is of opinion, and finds as a conclusion of law, that the plaintiff also waived her dower in the proceeding entitled S. E. Mull, administrator, *et al.*, *v.* Marcus Brittain, wherein the (486) plaintiff joined with the administrator and heirs against Marcus Brittain, an infant heir, in a petition asking for a sale of the lands to create assets, to pay debts, plaintiff alleging "that her right to dower had been heretofore, and is hereby waived," at which sale Sarah Mull became the purchaser. These facts are set up, and the estoppel pleaded in the amended answer filed, by leave of the court, at Fall Term, 1882, and plaintiff excepts to the court considering said answer as being filed. This, the Court finds, operates as a bar to plaintiff's dower, and she is estopped, certainly, until the waiver and judgment in the proceeding entitled S. E. Mull, administrator, *et al.*, *v.* Marcus Brittain, is reversed by a direct proceeding for that purpose, if not estopped, until the waiver and judgment in the proceeding entitled Ara Brittain *v.* Robert Brittain, is reversed by a direct proceeding for that purpose.

Whereupon it is adjudged by the court, that plaintiff's motion be overruled, and the action be dismissed, and judgment entered against the plaintiff for costs.

From the above order the plaintiff appealed.

The following are the plaintiff's exceptions to the findings of fact, and conclusions of law, by the clerk:

1. That the clerk has found, without any evidence, that plaintiff waived her right of dower in the action pending in the Superior Court of Burke County, entitled Ara Brittain *v.* Robert Brittain and others, and plaintiff asks that the record in said action (being the evidence upon which said finding is based) be set out in the clerk's statement on appeal.

2. That the clerk finds that the petitioner was a party plaintiff, and waived her dower, in the case of S. E. Mull, administrator, *et al.*, *v.* Marcus Brittain, and that she agreed to take a child's part in lieu thereof. Whereas, her name does not appear in the summons in
(487) said action, and in the petition, where her name does appear, there is nothing said about taking a child's part; plaintiff, therefore, asks that the clerk amend his findings so as to state the record as it is, and that he further find, whether or not there is any mention in the order of sale, in said action, as to any waiver or dower, or said land being sold free of dower.

3. That the name of plaintiff not appearing in the summons in said case of S. E. Mull, *et al.*, *v.* Marcus Brittain, she is not estopped thereby, and the order of sale (or judgment, socalled), does not estop her, because there is no mention of dower being waived in said order (or judgment).

4. That there is no need of any direct proceeding to set aside a judgment which does not mention plaintiff, and where the plaintiff's name does not appear in the summons, either as plaintiff or defendant.

5. That there is no estoppel as to plaintiff in the case of Ara Brittain *v.* Marcus Brittain and others, for the reason that the jury (in this case) only find (and the verdict of the jury is the only evidence of any estoppel), that there was an agreement in the clerk's office, in 1887, to waive her dower, but whether said agreement was a matter of record, does not appear, and as no estoppel of record was, at that time, pleaded by the defendants, it must be held to embrace only a verbal agreement. (See original answers of defendants, and verdict of the jury.)

6. The defendant Sarah Mull cannot claim as an innocent purchaser, for the reason, that no order was made that said land be sold free and discharged of plaintiff's right of dower; there is no record in the case of Ara Brittain *v.* Robert Brittain and others, of any waiver of dower by plaintiff, and the order of sale in the case of S. E. Mull and others *v.* Marcus Brittain, makes no mention of plaintiff's dower, or any waiver thereof.

7. For that the verdict of the jury embraces only a verbal
(488) agreement, and the defendants, having failed to suggest any other issues at the time said issues were tried, have waived their right to do so now, and though no formal order or judgment was then made

or rendered on said verdict, the law prescribes that the judgment is the one that should have been rendered at that time.

8. The jury having found that the plaintiff was insane at the time of the alleged waiver by plaintiff, said waiver is void as to her.

9. The judge of the Superior Court only ordered that defendants be allowed to supply their answers, not to amend, or set up any new defense, the plaintiff insists, that if said order could be so construed as to allow her to set up a new defense, there was no jurisdiction in the court to make said order, especially after verdict.

Upon the hearing of this appeal, the following judgment was rendered:

This cause coming on to be heard before MacRae, J., on 19 March, 1887, and being heard, now it is considered, on the facts found by the clerk, and adopted as the findings of the judge, that the motion be denied, and the judgment of the clerk be affirmed.

From which the plaintiff appealed.

No counsel for plaintiff.
S. J. Ervin for defendants.

DAVIS, J., after stating the case: This is the third time that this case has been before this Court.

The first appeal (91 N. C., 498) was from the refusal of the court below to grant the three motions made at Spring Term, 1883, as set out in this case.

The second (94 N. C., 595) was from the refusal to grant the motions of the plaintiff on the return of the certificate from the Supreme Court in the first appeal.

When the second appeal was before this Court, it was said (489) "that the clerk, acting as and for the court," ought to have decided any question properly presented by the pleadings, and "from his decision either party, if dissatisfied, could appeal."

The Court said: "Among the questions we can see, the jury having found that the appellant was insane at the time the alleged *'waiver'* was given in the proceeding collateral to the present one, that he ought to have decided, first, whether or not the alleged 'waiver' operates as a bar to the appellant's right of dower; and secondly, could the 'waiver' and judgment in the proceeding, other than this referred to, be attacked collaterally in this proceeding, and whether or not, as the petitioner was insane at the time the 'waiver' was given, it and the judgment were absolutely void as to her. He ought to have decided these, and perhaps other questions presented, and either party would have had a right to

appeal from his decision to the judge, at Chambers, and the decision of the judge in that case would have prevailed as the judgment of the court, unless an appeal should have been taken from his decision to this Court, which might be done."

Upon the last trial before the clerk, the several questions presented were passed upon by him, and judgment rendered, dismissing the plaintiff's action. Upon exception and appeal, his judgment was affirmed by the judge below, and the assignment of errors of law in those exceptions is now the subject of our review.

The plaintiff says there was "no evidence" to support the finding of the clerk in regard to the "waiver" of right to dower, and asks that the record be set out in the statement on appeal. This is done, and, upon an inspection, we think there was evidence to support the findings.

The record shows that the petition for dower was filed 9 January, 1877; there was an answer and replication, and on 23 January
(490) an agreement was filed, to the effect that the heirs at law of James Brittain would pay the costs of the application for dower, if the widow would dismiss the same and agree that the land should be sold, and after paying "the judgment against it," the balance of the money should be divided "between the widow and all the heirs, she to take a child's part of the money in lieu of her dower," etc.

The plaintiff's name is not signed to this agreement, but no further action was had upon the petition for dower; and soon thereafter a summons was issued, in the name of "S. E. Mull, administrator of James Brittain, and others, against Marcus Brittain, infant heir of James Brittain," etc., and a petition for a sale of the land in question was filed in the name of "Sidney E. Mull, administrator of James Brittain, and others," naming them, and among them "Ara Brittain, widow," against "Marcus Brittain, infant," etc.

In said petition it is, among other things, alleged "that the whole of the personal estate was allotted to Ara Brittain, widow of the intestate, as a year's allowance," etc.

There was the further statement, that "said land was subject, however, to the dower of the plaintiff, Ara Brittain, the widow of the said intestate, which right has heretofore and is hereby waived."

The plaintiff says that "her name does not appear in the summons in said action, and in the petition, where her name does appear, nothing is said about taking a child's part," etc.

It is true that her name does not appear in the summons, nor does the name of any of the petitioners except that of S. E. Mull, administrator, etc. The summons is issued in the name of "S. E. Mull, administrator of James Brittain, and others, against Marcus Brittain," etc., but

in the petition, the names of all the petitioners, including that of the plaintiff, are set out. She was a petitioner, or plaintiff, in that action, not a defendant.

"A plaintiff need not be *brought* into court, he *comes* in. A (491) judgment is of no force against a person as plaintiff, unless the record shows him to be plaintiff. If the record shows him to be plaintiff, when, in fact, he was not, then it stands as where the record shows one to be defendant when he is not. In both cases, the record is *conclusive* until corrected by a direct proceeding for that purpose." *Doyle v. Brown,* 72 N. C., 393.

It is true, that, in the order of sale, the case is stated by its title, "S. E. Mull, administrator, etc., plaintiffs, against Mark Brittain, etc., defendants," but it refers to the petition, recites the necessity of the sale, etc., and adjudges that the land specified in the petition be sold, without any reservation or exception whatever, and it was so sold, the sale confirmed, and title made.

There was no error in the court below in holding that "the waiver and judgment could not be attacked collaterally in this proceeding." This disposes of the 1st, 2d, 3d, 4th, 5th, 6th and 7th exceptions of the plaintiff, all of which are based upon alleged irregularities or defects, affecting the proceeding, orders and judgments sought to be thus collaterally attacked, and also of the eighth; for the finding of the jury in this action, that the plaintiff waived her right of dower, but that such waiver was void, by reason of plaintiff's mental incapacity, is not, in any proceedings directly instituted, to vacate or annul the proceedings under which the land was sold, but is a collateral attack, and cannot be made in this action. If she was insane when the order or judgment was made, however, irregular, or erroneous the judgment may have been, it cannot be *collaterally* brought in question. In a direct proceeding to vacate the judgment, the court can see, and will see, that no injustice is done.

While the judgment stands, the fact that the plaintiff was insane, does not protect her. *Fanshaw v. Fanshaw,* Bus., 166; *Armfield v. Moore, ibid.,* 157; *Skinner v. Moore,* 2 D. & B., 138; *Pigot v. Davis,* 3 Hawks, 25; *Williams v. Harrington,* 11 Ired., 616; *Marshall v. Fisher,* 1 Jones, 111; *Bender v. Askew,* 3 Dev., 149; *Riggan v. Green,* (492) 80 N. C., 236; *Grantham v. Kennedy,* 91 N. C., 148; *Hare v. Hollomon,* 94 N. C., 14; *Sumner v. Sessoms, ibid.,* 371; *Burgess v. Kirby, ibid.,* 575; *Ward v. Lowndes,* 96 N. C., 367; and numerous cases cited in these, all going, with one accord, to show that where there is jurisdiction in the court, its action cannot be attacked except by direct proceedings, and that infancy, lunacy, etc., constitute no exception.

The ninth exception cannot be sustained. The amendment was a matter of discretion in the court below, and it was the judge as to whether the amendment or the supplied answers for those that were lost, were such as were authorized.

No error.

Cited: Williams v. Johnson, 112 N. C., 437; *Chamblee v. Broughton,* 120 N. C., 176; *Creekmore v. Baxter,* 121 N. C., 32; *Henderson v. Moore,* 125 N. C., 384; *Weeks v. McPhail,* 138 N. C., 133; *Earp v. Minton,* 138 N. C., 204; *Rackley v. Roberts,* 147 N. C., 205; *Reynolds v. Cotton Mills,* 177 N. C., 424.

J. N. GREER AND H. C. MARKS v. A. L. HERREN.

Pleading—Trial.

It is required of parties to actions to set forth in their pleadings their causes of action or matters of defense; and the court should not admit evidence or instruct the jury upon any contention not properly made in the record.

THIS is a civil action, which was tried before *Montgomery, J.,* at Fall Term, 1887, of HAYWOOD Superior Court.

The complaint alleges, in substance, that on 24 September, 1874, the plaintiffs became sureties of the defendant, to his single bond executed to Hewlit Sullivan, for the sum of $1,500, due six months from date, with interest from date at a stipulated rate; that afterwards, they were, as such sureties, compelled to pay this debt and interest; that
(493) afterwards, the defendant was duly adjudged a bankrupt, and received a discharge in bankruptcy; that after the defendant received such discharge, within three years next before the commencement of this action, the defendant promised to pay to them the sum of money, and the interest thereon, that they had so been compelled to pay for him, as his said sureties, etc.

The defendant, in his answer, denied the material allegations of the complaint, and pleaded the statute of limitations.

On the trial, the parties agreed upon the following, as the issues of fact raised by the pleadings, and the jury responded thereto, as stated at the end of each:

1. What amount, if any, did plaintiffs pay as sureties of defendant? Answer: Whole note, except $50 and interest, as stated in note.

2. Has the defendant, since his discharge in bankruptcy, promised to pay the plaintiffs the amount so paid by them? Answer: Yes.

3. Has plaintiffs' cause of action accrued within three years before commencement of action? Answer: Yes.

The following is so much of the case settled on appeal as need be set forth here:

"It was admitted by the defendant, that there was no evidence to go to the jury, that the plaintiffs' cause of action did not accrue within three years of the commencement of the action, or that it was barred by the statute of limitations.

The plaintiffs introduced evidence tending to prove the truth of their allegations, and the defendant offered evidence tending to prove they were not true.

The defendant also offered in evidence copies of an alleged agreement between himself and the plaintiffs, and of a mortgage which he had executed to them. There was evidence that the mortgage was worthless, and that plaintiffs never realized anything from it. (494)

The defendant's counsel asked the court to instruct the jury, that if they should find, "that the plaintiffs agreed to withdraw their objections to defendant's obtaining his discharge in bankruptcy, then that plaintiffs could not recover in this action, though the defendant, after his final discharge in bankruptcy, made an express promise to pay them the amount they had paid for him as his sureties on the note." This the court declined to give, and the defendant excepted, and this was the only exception in the case."

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

W. W. Jones for plaintiffs.
R. D. Gilmer for defendant.

MERRIMON, J., after stating the case: It must be taken that there was evidence given on the trial to prove that the promise to pay the debt, as alleged, was made within three years next before the action began. A material part of the plaintiffs' alleged cause of action was, that the promise was so made. The case settled on appeal states, that they produced "evidence tending to prove the truth of their allegations"—this statement is general, and, fairly intepreted, applies to all the material allegations. Moreover, so far as appears, no objection was made that there was no such evidence.

The answer simply denies the material allegations of the complaint, and pleads, as further defenses, the defendant's discharge in bankruptcy

and the statute of limitations. There is no allegation that the consideration of the alleged promise was fraudulent, or otherwise than as alleged in the complaint. Nor, particularly, was it alleged by the defendant, in his answer, that he had paid the debt, which was the con-
(495) sideration of the promise, or secured the payment of the same by a mortgage of property, or other valuable thing.

Therefore, the evidence offered by the defendant, as to a suggested agreement and mortgage, was not pertinent or material to any alleged defense, and should have been excluded. The defendant must not only have a defense—he must plead it, else the court will not take notice of it. There must be *allegata et probata*. *McLaurin v. Conly*, 90 N. C., 50, and cases there cited.

As to the special instruction asked for by the defendant, there was no alleged defense to which it was applicable, and if there had been, so far as appears, there was no evidence produced that warranted it. The court therefore properly refused to give it.

Judgment affirmed.

Cited: Faulk v. Thornton, 108 N. C., 320; *Smith v. B. and L. Asso.*, 116 N. C., 109.

J. E. R. CARPENTER AND W. J. EMBRY v. LEBO MEDFORD ET AL.

Description in Deed—Sale of Trees—Statute of Frauds—Parol Evidence—Contract.

1. While standing trees so far partake of the realty that a contract for their sale is within the Statute of Frauds, if the contract is in contemplation of their severance from the land, whereby they would become personalty, the rules in respect to identity of personal property become applicable.
2. The sale of a portion of a larger number of articles of personal property, not identified upon the face of the contract, is valid, if at the time they are separated and understood by the parties.
3. By a contract in writing, and duly registered, the vendor sold "nine walnut trees on my premises, on the waters of Pigeon River, Haywood County (Township No. 4), N. C." At the time of the sale the trees were selected, measured and marked, but were not identified in the contract: *Held*, that parol evidence was competent to identify them, and if identified, the title passed under the sale.

(496) THIS was a civil action tried before *Graves, J.*, at Spring Term, 1887, of HAYWOOD Superior Court.

One W. L. Massey, being the owner of the tract of land whereof the boundaries are given in the complaint, as well as its location in Haywood County, entered into the following contract:

"Received of Carpenter, Rhodes & Co., by J. F. Waddell, $45, for nine walnut trees on my premises, on the waters of Pigeon River, Haywood County (Township No. 4), N. C. I hereby give the said Carpenter, Rhodes & Co. permission to haul the logs through my premises when they want to move them. This 27th day of August, 1881.

W. L. MASSEY. (Seal.)

Privilege to deaden said timber if I want to clear said ground."

The instrument was duly proved and registered on 21 December of the same year. On 2 January, 1882, the land on which the trees were standing was sold, and by deed, executed by Massey and wife, conveyed to the defendant, Lebo Medford, without reservation, and their deed, after being proved, was registered on 31 December, 1885.

The firm of Carpenter, Rhodes & Co. consisted of J. E. R. Carpenter and W. J. Embry, who bring the action, in their own names, against the defendants for cutting the trees claimed by them, under the contract of sale of the said Massey to them. There was evidence of the cutting down and removal of several of the walnut trees by the defendant John Terrell, acting under the authority of the defendant Medford, who undertook to dispose of them to the other.

The testimony of the witnesses, offered by the plaintiffs, was to this effect:

W. L. Massey swore that before executing the writing of 27 August, 1881, himself and J. F. Waddell, agent of the purchasers, went on the land, and he selected, measured, priced and marked the trees, (497) making a cross-mark with his knife upon each; that they then went to the house, where the agent paid the price agreed on for the trees, nine of which only could be found after search, of the required dimensions, to wit: of a circumference of not less than six feet; that when the land was sold to Medford, witness communicated to him the fact of the sale of the nine trees, marked and branded, and pointed out two of them; that some of the removed trees bore a cross-mark, and were those selected and marked by himself and Waddell.

There was other testimony in corroboration, and again, in opposition to the statement, that any of the trees removed and converted to defendants' use bore marks of identification; and the defendant Terrell swore that they had no knowledge of the previous sale to plaintiffs or to any other person.

The plaintiffs' counsel asked an instruction, in writing, to the effect, that "if, at the time of making sale to the plaintiffs, the trees, referred to in the contract, were selected and branded, or marked, and the contract registered, and thereafter the defendants converted all, or some of them, the plaintiffs would be entitled to recover," meaning, as we suppose, to have an affirmative issue, as to the title to so many. This was refused, and the jury charged as follows:

"Trees growing on land are a part of the land, and are so much a part of the land, that any contract to convey them must be in writing, signed by the party to be charged therewith, or by some one authorized by the party to be charged. The written contract to convey land, or trees growing on land, must be sufficiently definite to point out the particular trees intended to be conveyed. The description is sufficiently definite, if it can be fitted to the particular trees by parol evidence. Now, in this case, the description, in the alleged contract set out in the plaintiff's complaint, is such a description that may possibly be fitted by
(498) parol evidence. If Massey owned but one premises in Haywood County, on Pigeon River, in Township No. 4, and there was, at the time of the contract, growing, or standing on that premises, nine walnut trees, and only nine walnut trees, then the description would be fitted to the description in the contract, and if such contract was duly proven, it would pass the title to the nine walnut trees. But if there were more than nine walnut trees on the premises of Massey, in Haywood County, on Pigeon River, in Township No. 4, then the description could not be fitted to any particular nine trees out of a greater number, and the contract would be void, for uncertainty. And this would be so, although, before the contract was written, certain trees had been marked, for the contract does not describe the walnut trees as marked trees, and parol evidence cannot be heard to add to, or vary, the written agreement. The words used in contracts are usually to be taken in their ordinary signification, unless the words are used in a technical sense. The words *walnut trees* are used, and the jury are to judge from the evidence in what sense, or signification, they are used in this contract. If the evidence satisfies you that the words, walnut trees, were intended by both the parties to the contract to mean walnut trees of a particular size or kind, then if there were only nine walnut trees, of the kind described in the contract, the description would be sufficient, but if there were more than nine walnut trees, of the kind described in the contract, then the description cannot be fitted to any particular nine out of a greater number."

Plaintiffs excepted to the foregoing charge. Verdict and judgment for defendants. Appeal by plaintiffs.

R. D. Gilmer (W. L. Norwood filed a brief) for plaintiffs.
W. W. Jones for defendants.

SMITH, C. J., after stating the case: The controversy is thus (499) narrowed to a single proposition, involving the competency of the evidence to identify the trees, as the subject-matter of the contract, and give it efficiency as an instrument conveying title to the plaintiffs. It was in form and effect a deed, with all the requirements necessary in passing title, and if the imperfect designation of the trees, upon which it is to operate, can be aided by parol proof, they are ascertained.

Although so partaking of the realty as to come under the statute of frauds, as held in *Mizell v. Burnett,* 4 Jones, 249, and other cases, the contract is in contemplation of a severance of the trees from the land, whereby they would become personalty, and the same rule in respect to certainty of description be applicable.

It is very clear that the selection and marking of the trees, accompanying the sale, separates and distinguishes the subject-matter of the contract from all other trees of the same kind upon the premises, so as to transfer the property therein.

In *Dunkart v. Rineheart,* 89 N. C., 354, it was decided, that "any of my black walnut trees, not exceeding 15 in number, that will girth 8 feet 6 inches in circumference, and under 10 feet," there being less than that number on the land, was a sufficient description, with the aid of parol evidence, while it would have been otherwise, if there had been more such trees of the required size.

The cases cited in the brief of appellants' counsel, and other references, sustain the general proposition, that a sale of part of a larger number of articles of personal property, not distinguishable upon the face of the contract, will be operative to pass title, if, at the time, they are separated, and understood by the parties. *Goff v. Pope,* 83 N. C., 123; *Harris v. Woodard,* 96 N. C., 232; 1 Greenl. Ev., secs. 287 and 288. The author last mentioned lays down the general doctrine in these words: "If the language of the instrument is applicable to several persons, to several parcels of land, to several species of goods," etc., parol (500) evidence is admissible of *any extrinsic circumstances* tending to show what person or persons, or *what things* were intended by the party, or to ascertain his meaning in any other respect," etc. The language is, of course, not intended to apply to an indefinite description that fits no property, but where its uncertainty arises from the fact that it fits more than one article of property—and there it is admitted to show which was meant. *Richards v. Schlegelmich,* 65 N. C., 150. But the ruling in *Blakeley v. Patrick,* 67 N. C., 40, followed in *Spivey v. Grant,* 96 N. C., 214, is directly and decisively in point. The deed in trust in this case

purported to convey ten new buggies out of a larger number on hand, and upon the question of title, *Pearson, C. J.*, near the close of the opinion, sums up thus: "To vest the title or ownership in any particular buggies, it was necessary *to set them apart*, so as to make a constructive delivery, and effect an executed contract; in the absence of such identification, the agreement, as we have seen, was executory only." Now, the trees were designated, after examination, by marks of identification, the only way in which it could be done.

There is error in the ruling, and the judgment is reversed, in order to a new trial.

Error.

Cited: Morris v. Connor, 108 N. C., 323; *Lumber Co. v. Carey,* 140 N. C., 467; *Pitts v. Curtis,* 152 N. C., 616.

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(501)

THE MARSHALL FOUNDRY COMPANY v. S. E. KILLIAN.

Corporations—Liability of Stockholders—Parol Evidence.

1. One, who participates in the irregular or fraudulent organization or operation of a corporation, will not be permitted to shelter himself from responsibility to its creditors by showing the invalidity of the organization. As to creditors and others dealing with them, the stockholders in such organization are a corporation *de facto*, and liable, at least, to the extent of the capital stock subscribed by them.

2. The capital stock—including unpaid subscriptions therefor—of a corporation constitute a trust fund, for the benefit of creditors of the corporation, and the creditors have a right to examine into the affairs of the corporation, to ascertain if the subscriptions of stock have been paid, and how.

3. Each subscriber for stock in a corporation thereby becomes liable for the amount of stock subscribed by him, and he can only be discharged by paying money or money's worth, in the manner provided by the charter and by-laws.

4. A subscriber cannot discharge his liability as against creditors, for his subscription, by substituting shares paid up by another subscriber.

5. Parol evidence will not be received to vary the terms of subscription, or to show a discharge from liability on the part of a stockholder, in any other way than that prescribed by the charter and by-laws.

CIVIL ACTION, originally commenced before a justice of the peace for CATAWBA County, to recover the sum of $200, alleged to be due by subscription to The Marshall Foundry Company, and carried, by appeal, to

the Superior Court of said county, and tried before *Boykin, J.*, at January Term, 1888.

It was in evidence, that A. W. Marshall, W. R. Self and others, by articles of agreement under the statute, were incorporated before the clerk on 7 February, 1884, under the corporate name of the "Marshall Foundry Company."

It was admitted that J. F. Murrill had been duly appointed (502) receiver, to take charge of the property of the company and collect debts due it, in a certain proceeding, instituted, among other purposes, to set aside a mortgage executed by the company to secure a debt due one Alexander, wherein fraud was alleged, etc.

The defendant became an incorporator on 11 February, 1884, in the following manner: The above named W. R. Self, one of the original incorporators, had subscribed for twenty shares, of the value of one hundred dollars each, and had paid in cash for fourteen of them.

He had sold two of the shares to one Miller, who paid him cash therefor. Miller sold the two shares to the defendant Killian, who paid him the cash therefor. Upon the organization of the company, the defendant was elected its president, and issued certificates of stock to all the then subscribers, himself among the number, all of which were duly countersigned by the secretary and treasurer, in the manner prescribed by the rules and regulations. The certificate of two hundred dollars issued to himself, represented the two hundred dollars of the fourteen hundred dollars subscription of Self, and by him transferred to Miller, and by the latter to defendant, and is the debt sued on in this action.

No certificate had been issued, up to the date of the election of the defendant, president of the company. Prior to the issuing of the stock, the company was notified of his purchase by the defendant, and it was admitted that Self had paid the subscription price of fourteen shares, in which are included the two shares of defendant. It was in evidence, that the said company had duly accepted and ratified the defendant's purchase of stock, and had permitted him to become a member and enjoy the benefits thereof.

The defendant had agreed to subscribe two hundred dollars to the capital stock, when the company was established, and was permitted to substitute these two shares, represented by said certificate, in lieu thereof, when organization was perfected.

It does not appear that defendant's subscription has been (503) marked satisfied on the books, but it does appear that the certificate was issued, as aforesaid.

The plaintiff objected to the evidence, showing the manner in which the defendant sought to relieve himself of liability to the plaintiff,

because oral evidence could not be introduced to contradict the articles of subscription, and the stock could only be paid for in cash to the company, and because it did not appear that the company had authorized such substitution of stock, and because such would be a fraud on the creditors. Overruled, and plaintiff excepted.

The subscription list and by-laws were put in evidence, and from the former, it appears that the defendant subscribed for two shares ($100 each), and from the latter, among other provisions, that the stock shall be paid for in cash, "unless such payment shall be otherwise provided for by special contract with the company ....."

There is also a requirement, that "all transfers of stock shall be made upon the books of the company, duly attested by the secretary and treasurer."

The plaintiff proposed to prove that the company was now greatly indebted and was insolvent. Objected to by the defendant. Objection sustained, and exception by plaintiff.

The court instructed the jury, that the plaintiff could not recover, if they believed the evidence. The plaintiff excepted. Verdict and judgment for defendant. Appeal by plaintiff.

L. L. Witherspoon for plaintiff.
No counsel for defendant.

DAVIS, J., after stating the case: This action was commenced before a justice of the peace, and the allegations of fraud, or other
(504) grounds upon which the plaintiff Murrill was appointed receiver, do not distinctly appear, but it appears to have been done at the instance of a creditor, and we assume that it was done under the provision of section 668 of The Code, authorizing the appointment of receivers, for the causes there stated.

By the "articles of agreement" filed with the clerk, under which, "letters declaring" the incorporation were issued, it is stated: "The capital stock of the incorporation shall be $10,000, divided into 100 shares of $100 each," but in fact, as appears from the subscription list, only 70 shares ($7,000) were subscribed, and in other respects the provisions of the statute seem not to have been complied with, in the formation of the corporation; but of this the defendant, who became the president of the company upon its organization under the charter, can take no advantage, for the company was organized, and by participating in the organization, and acting as its president, all objection to the validity of its constitution or organization was waived, and, as to him, the provisions of the charter and by-laws of the company were binding. Cook on the Law of Stock and Stockholders, sec. 181 and sec. 233.

When a number of persons associate themselves together for the purpose of carrying on any business, a partnership is constituted, by which each member becomes liable to any person who may give it credit, and the creditor has a right to be paid, if any one of the firm is able to pay; but when a corporation is formed under the authority of the State, the capital subscribed becomes the basis of credit, and the members of the company are not individually liable for its debts, except, and only to the extent, that the charter or letters of incorporation may make them so.

It is said in Cook on the Law of Stock and Stockholders, sec. 199, "The capital, or capital stock of a corporation, is the aggregate of the par value of all the shares into which the capital is divided upon the incorporation; it is the fund or resource with which the cor- (505) poration is enabled to act, and transact its business, and upon the faith of which, persons give credit to the corporation, and become corporate creditors. The public, in dealing with a corporation, has the right to assume that its actual capital, in money or money's worth, is equal to the capital stock which it purports to have, unless it has been impaired by business losses. The public has a right also to assume that the capital stock has been or will be fully paid up if it be necessary, in order to meet corporate liabilities. Accordingly the American courts go very far to protect corporate creditors; and in this country it is a well settled doctrine, that capital stock, and especially unpaid subscriptions to the capital stock, constitute a trust fund, for the benefit of the creditors of the corporation." He then enumerates some of the methods by which stockholders seek to avoid their liability to corporate creditors, one of which is, "by a transfer of the stock," another is, by "a cancellation or withdrawal from the contract," and another, by "a release from the obligation to pay the full par value of the stock."

It is said, that, for the protection of corporate creditors, courts will look with rigid scrutiny into every such transaction. "The reason why the capital stock of a corporation is deemed to embrace all the stock for which the members have subscribed, whether paid in or not, is, that since the members are not, in general, personally liable for the debts of the corporation, this fund is the stake held out to the public, upon the faith of which the company gains credit." Thompson's Liability of Stockholders, sec. 11, and the authorities cited in the note. So far as creditors are concerned, the capital stock is regarded as a trust fund, pledged for the payment of the debts of the corporation, and this is as true of the unpaid shares subscribed as of those paid up. *Adler v. Milwaukee Brick Co.*, 13 Wis., 60.

In *Sawyer v. Hoag*, 17 Wall., at page 620, *Mr. Justice Miller* (506) says: "Though it be doctrine of modern date, we think it now well

established, that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund, for the benefit of the general creditors of the corporation. And when we consider the rapid development of corporations as instrumentalities of the commercial and business world, in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern, for the occasion for it could not sooner have arisen." It was there held, that creditors of a corporation had a right to examine into the action of the corporation and see how the subscriptions to the stock had been paid; and citing *Burke v. Smith,* 16 Wall., 390, and *New Albany v. Burke,* 11 *ibid.,* 96, he says: "The governing officers of a corporation cannot, by agreement, or other transaction, with the stockholders, release the latter from their obligation to pay, to the prejudice of creditors, except by fair and honest dealing, and for a valuable consideration." Such conduct is characterized as a "fraud upon the public, who were expected to deal with them."

Upon a review of the authorities, we take the overwhelming weight to be, that after stock is subscribed and the company is organized, each subscriber becomes liable for the amount of stock subscribed by him, and he can only discharge this liability by paying it in money or money's worth, in the manner indicated by the subscription, and the charter or by-laws of the company; and neither the officers of the company nor the stockholders can release him from this liability without the consent of every stockholder. Each subscription, when made, becomes a conditional contract with every other person who may subscribe, that the amount subscribed shall, upon the formation of the company, be paid in accordance with the terms of subscription, and when the requi-
(507) site stock is subscribed, and the company is duly organized, it becomes the offer or basis of credit to the public, or to all who may deal with it, and every subscriber participating in the organization, thereby makes his subscription absolute, and is bound to pay it, according to the terms of the charter and by-laws of the company, and he can discharge his liability in no other way.

As between the corporators themselves, it may be that certificates of stock, by the consent of all the members, may be issued as if paid up, without any actual payment in full, or even in part; but however this may be, no device or arrangement among the corporators themselves, not made known to the public, by which the stock subscribed, instead of being paid, as the safe foundation of the credit and confidence which the company invites the public to give it, can be permitted to avail against the claims of persons who may deal with, and trust, the company upon the faith of its capital stock and corporate liability. By

incorporation a privilege is conferred, which exempts the individual members from all liability except that incurred by membership, and good faith to the public requires a strict compliance with all the obligations imposed by that membership.

It has been held in England, under what is known as the "Companies Act," which is in some respects like ours, that if a person signs the memorandum of association—that is, subscribes for stock—he is bound to take the shares from the company, and does not satisfy the obligations by taking them from some one else; and, in a proceeding to wind up a company, a subscriber will not be permitted, as against creditors, to discharge himself from liability to pay for the stock for which he has subscribed, by showing an understanding and agreement with the other subscribers, by which, instead of paying to the company for the stock subscribed by him, he should take a portion of the stock subscribed by another in lieu of that subscribed by himself. *Forbes and Judd's case,* L. R., 5 ch., 207; 39 L. J., ch. 422; *Migattis' case,* 4 Equity (508) Cases (L. R.), 238.

If this were not so, an association of individuals, availing themselves of the privilege conferred by the State, might, without paying a dollar, if by their subscriptions alone they could get credit, rig out this artificial being called a corporation, and embark it upon the sea of trade and speculation, and safely take the profits of the voyage, if it shall prove successful, and easily escape the result of wreck and misfortune, if such shall be its fate. This, the authorities, English and American, concur in saying the law will not allow. Cook on the Law of Stock, etc., ch. 11, sec. 208; Field on Corporations, sec. 403; Thompson's Liability of Stockholders, secs. 11, 105, 124 and 139; *Hager v. Cluelland,* 36 Maryland, 490; *Sagory v. Dubois,* 3 Sandford's Chan. Rep., 509; *Sawyer v. Hoag, supra; Forbes* and *Judd's case, supra; Migattis' case, supra,* and the many authorities cited in them.

If it be said, in the case before us, that the defendant Killian was permitted to substitute the stock purchased by him from Miller (who had purchased it from Self) for the stock subscribed for by himself, and that there were no creditors and no liability to any one when this was done, the answer is, that the substitution was not warranted by the terms of the subscription, or by the charter and by-laws, and the fact is made to appear, not from the books of the company, but by parol, and the defendant could not discharge his liability in this way. "The creditors of the company, and all who may be interested in its safety or solvency, may well ask that the fund upon which they rely (the capital stock subscribed) shall really exist, not on paper, but in money, and be

held sacred to discharge corporate liabilities." *Wood v. Pearce,* 2 Dis. (Ohio), 411; An. & Ames on Corp., secs. 146 and 531.

(509) Parol evidence cannot be received to vary the terms of the subscription, or to show a discharge in any way other than that required by the terms of subscription and the charter and by-laws. *Bank v. Littlejohn,* 1 Dev. & Bat., 563; *R. R. v. Leach,* 4 Jones, 340; Cook on Stock and Stockholders, secs. 137, *et seq.*

Ordinarily, persons who give credit to the corporation have no knowledge or concern as to how, or the manner in which, the subscriptions to the capital stock are paid, but they have a right to demand that the stock and the payments be not fictitious. Here is a company formed, with a chartered capital of $10,000, and, as the record shows, a number of persons, the defendant among them, organize and enter upon the business indicated in the charter, with only $7,000 subscribed, and of that, only the sum of $890 was actually paid in cash, and the balance in machinery, lumber, work, etc., or not at all. It does not appear what the real value of the property taken in payment of subscriptions was, and the company seems only to have had a fictitious existence, and it is not a matter for wonder that it should so soon be found in the hands of a receiver and charged with fraud; but this does not help the defendant, who participated in the organization. Cook on the Law of Stock, etc., secs. 185, 186, 200, 210, *et seq.;* Field on Corp., sec. 403; Thompson's Liability of Stockholders, secs. 12, 15, 124, 125, 126, *et seq.;* Morawetz's Private Corporations, sec. 589, *et seq.*

It may be, by the reason of the failure to subscribe and pay up the capital stock and by organizing or pretending to organize a company with a capital of $10,000, when, in fact, it was neither subscribed nor paid up, the stockholders, who participated in the spurious organization, became individually liable to persons who dealt with them upon the faith of the spurious organization, as was held in *Hauser v. Tate,* 85 N. C., 81. See, also, *Dobson v. Simonton,* 86 N. C., 492, and Cook on Stock and Stockholders, secs. 233, *et seq.*

(510) However this may be, the persons who subscribed to stock and participated in the organization, under the guise of the authority conferred by statute, constituted a corporation *de facto,* if not *de jure,* and, having held out inducements to the public to deal with and credit it upon the faith of its chartered capital, they are liable, at least to the extent of the capital stock subscribed by them, and they cannot evade that liability by any private or secret arrangement that may have been entered into among themselves, or by a "simulated payment" of the stock subscribed, and if not actually paid, it may be reached by a credi-

tor of the corporation, should it become necessary. *Sawyer v. Hoag, supra; Wood v. Pearce, supra.*

It is said that the right of corporate creditors to object to certain transactions which may be binding between the corporators themselves "is an essentially American doctrine, based upon the principle first enunciated by *Judge Story,* that the capital stock of a corporation is a trust fund, to be preserved for the benefit of corporate creditors"; and it has been held that creditors may have the manner, in which the subscriptions have been paid, inquired into, and if fictitious, or if they have been paid for in "overvalued or unreasonably overvalued property," the subscribers may be held accountable. Cook on the Law of Stock and Stockholders, secs. 42, 43, and authorities cited.

The defendant was a subscriber to the capital stock—an original certificate for two shares of the stock was issued to him, for which he paid nothing to the company. It will not do to say that the two shares of stock were paid for by Self, for he only paid his own subscription, and that, as the record shows, not in cash, as the terms of subscription required, but in property, rated, it may be, greatly above its value.

The defendant was president of the company, was cognizant of all that was done, issued the stock. Can it be said that the capital stock was faithfully preserved, for the benefit of those who might (511) become creditors of the corporation?

We think not, and his Honor erred in permitting parol evidence to vary, and virtually annul, the terms of subscription, and in the charge given

There is error.

Cited: Heggie v. B. & L. Assn., 107 N. C., 591; *Clayton v. Ore Knob Co.,* 109 N. C., 389; *Bain v. B. & L. Assn.,* 112 N. C., 253; *Hill v. Lumber Co.,* 113 N. C., 176; *Cotton Mills v. Burns,* 114 N. C., 355; *Bank v. Cotton Mills,* 115 N. C., 513, 514, 515; *Cooper v. Security Co.,* 122 N. C., 464; *Smathers v. Bank,* 135 N. C., 413; *McIver v. Hardware Co.,* 144 N. C., 484; *Whitlock v. Alexander,* 160 N. C., 468; *Boushall v. Myatt,* 167 N. C., 329; *Gilmore v. Smathers, ibid.,* 443; *Drug Co. v. Drug Co.,* 173 N. C., 508; *Way v. Sea Food Co.,* 184 N. C., 174; *Fuller v. Service Co.,* 190 N. C., 658; *Redrying Company v. Gurley,* 197 N. C., 61.

FIELDING KNOTT ET AL. v. JOHN R. TAYLOR ET AL.

Judgments void and voidable, relief against—Jurisdiction—Parties—Presumption—Injunction.

1. A judgment rendered against a person then dead—that fact being unknown to the court or the other parties—is not void, but is irregular and voidable; and on the application of the proper representatives of the deceased, or by any person having acquired interest in the subject-matter of the suit, *after it was begun*, under him, made in apt time, it will be vacated. The remedy in such case must be sought by a motion in the cause, and not by a separate action.

2. As a general rule, only the party against whom an irregular judgment is rendered can complain of it.

3. In an action begun under the former practice, in which the judgment was rendered, since the adoption of the present system: *Held*, that an application, to set aside the judgment as irregular, should be made in the same manner as if the action had been commenced since the adoption of the Code of Civil Procedure.

THIS was a civil action, tried before *Clark, J.*, at January Term, 1886, of the Superior Court of GRANVILLE County.

It appears from the pleadings, the orders and judgments in this action, that in 1852, the defendants Taylor and wife brought their action of ejectment, under the method of procedure then prevailing, against Joseph H. Gooch, in the Superior Court of the county of Gran-
(512) ville, to recover the possession of the land described in the pleadings therein. That action, in its course, was removed to the Superior Court of the county of Warren, for trial, and was continued from term to term for many years, and was, at the instance of the plaintiffs therein, transferred, as allowed by the statute, to the Superior Court of the last named county, as established under, and in pursuance of, the present Constitution of this State.

The defendant in that action removed to the State of Texas, and died there on 24 June, 1876. The action, as appears, was never abandoned, but continued from term to term until the Fall Term of 1878, when it was tried "by a jury, and verdict and judgment were rendered for plaintiffs, they having no actual knowledge of Gooch's death." This judgment was "for an undivided ninth part or share of said land." No notice issued to any of the heirs at law or real representatives of said Gooch after his death, nor were they, or any of them, ever made parties to said suit; nor was any notice given to the present plaintiffs, or any of them.

Pending the action named and referred to, the defendant Gooch therein sold the land embraced by it, and put the purchasers in possession thereof, and the plaintiffs in the present action are in possession of about six hundred acres of that land, "holding the same by title acquired through the purchasers from said Joseph H. Gooch."

A writ of possession issued upon the judgment mentioned, commanding the present defendant sheriff to eject the said Gooch and "any person who, since the commencement of said action, has come into possession of said premises, or any part thereof," and to put the plaintiffs in that action, the present defendants, Taylor and wife, in complete exclusive possession of the whole thereof, although the judgment was in their favor for "one undivided ninth part only of said land," etc., and it is alleged that the present defendant sheriff is about to execute the said writ, etc. The plaintiffs allege further, that they have (513) placed valuable improvements on the land since they have had possession thereof; that part of them own a grist mill, etc. They ask for relief specially, by injunction, and for general relief.

A judge, at Chambers, granted a restraining order, and, afterwards, upon notice, an injunction was granted, restraining the sheriff from executing the writ of possession mentioned, further than to place the other defendants, as owners of an undivided one-ninth of the land, in possession thereof with the plaintiffs.

The defendants, in their answer, deny the alleged irregularities in the action of ejectment mentioned, and insist that the judgment therein in their favor is effectual; they admit that under that judgment they are entitled to only one undivided ninth part of the land, and they only ask to be put in possession, as such owners, with the plaintiffs. They further insist, as such owners, with the plaintiffs. They further insist, that the plaintiffs' remedy for the grievances complained of is by motion, or other proper proceeding in the action of ejectment, and not by this separate and independent action.

In an amendment to their answer, the defendants allege that the plaintiffs, and those under whom they claim, have been in possession of the lands for fifty years, receiving the rents and profits thereof, that they are entitled to part thereof, etc., and demand an account. They further ask for an order directing partition of the lands, etc.

Afterwards, in the course of the action, the court allowed the plaintiffs to amend their complaint, so as to allege irregularities in the action of ejectment mentioned, and the judgment therein, in favor of the defendants husband and wife, and also that the latter are not the owners of one undivided ninth part of the land, as adjudged in the action of ejectment; that they, the plaintiffs, are the exclusive owners of the fee

therein. They allege facts putting in question the title of de-
(514) fendants, and title, specifically set forth as to the evidence thereof, in themselves, etc.

The defendants objected, and excepted to the order allowing such amendments to the complaint.

The defendants then denied, in their amended answer, the material allegations of the complaint as amended.

Afterwards, by consent, the court tried the action as to the law and facts, and gave judgment for the plaintiffs, from which the defendants appealed.

John W. Hays for plaintiffs.
J. B. Batchelor and Jno. Devereux, Jr., for defendants.

MERRIMON, J., after stating the case: We are of opinion that this action should have been dismissed, upon the ground that the remedy of the plaintiffs was by a proper motion in the action of ejectment referred to, in which the judgment complained of was entered. In that action, notice was given, as we must assume, in the orderly course of procedure in such cases, and Gooch, the defendant therein, appeared and pleaded. At the time of the trial thereof, there was no suggestion and proper proof of the fact that he had, before that time, died. The plaintiffs in that action could not make such suggestion, because, as appears, they had no knowledge of the fact of his death. In the absence of such suggestion, the presumption was, that he was then living. The court had obtained jurisdiction of him in the action, and apparently it continued to have it, in all respects, at the time of the trial and the entry of the judgment. The latter was, therefore, not void. It was, on such account, irregular and voidable, and might, under the present method of civil procedure, be declared void by the court, upon a proper application, by motion, in the action. That might be made by any person having right under, or derived from, the deceased defendant therein, after the
(515) action began. This, as to the party who may make the motion, is allowable, because, the defendant in the action having died before the judgment was entered, he could not make it, and, in such case, no presumption arises, that he assented to and was satisfied with it. Ordinarily, only the defendant, against whom an irregular judgment is given, can complain of it. If he does not, the presumption is, that he is satisfied with it. It is otherwise, where he was dead at the time the judgment was given. *Shelton v. Fels,* Phil., 178; *Jacobs v. Burgwyn,* 63 N. C., 196; *Burke v. Stokely,* 65 N. C., 569; *Hervey v. Edmunds,* 68 N. C., 243; *Rollins v. Henry,* 78 N. C., 342; *Hinsdale v. Hawley,* 89 N. C., 87.

It was not according to the course of the court, to try an action regularly at issue, and give judgment against a party thereto, of which it had regularly obtained jurisdiction and apparently continued to have the same, which, in fact, it had ceased to have, by reason of that party's death. A judgment thus granted is not simply erroneous, as it certainly is, but it is as well irregular, and may be set aside upon proper application in the action. All irregular judgments are in a sense erroneous, but they may be set aside in a proper case for such irregularity, if application be made within a reasonable period of time. *Lynn v. Lowe,* 88 N. C., 478, and numerous cases there cited; *Williamson v. Hartman,* 92 N. C., 236; *Fowler v. Poor,* 93 N. C., 466.

It is well settled by many decisions of this Court, that a judgment cannot be attacked collaterally, or by an independent action, for mere irregularity. The remedy in such case is, as we have indicated above, by motion in the action in which the irregularity complained of appears.

The plaintiffs contend, however, that they seek relief by injunction against the execution in the hands of the defendant sheriff, and as the action of ejectment, in which it issued, was brought *before* the Code of Civil Procedure was enacted, the latter does not apply to it, and the court cannot grant such relief in that action. This is a mis- (516) apprehension of the provisions of the statute (Bat. Rev., ch. 17, sec. 402), applicable. It is true that it provides that such "suits shall be proceeded in and tried under the existing laws and rules applicable thereto," at and before the time the Code of Civil Procedure took effect, but it further provides, that *"after* final judgment shall be rendered therein, the clerk shall enter such judgment on the execution docket required to be kept by him, and *the subsequent* proceedings shall be as provided for actions hereafter to be commenced." The judgment in question had been rendered in the action of ejectment, and the relief, sought after judgment, might—ought—to have been applied for, just as if the action had been brought subsequent to the enactment of the Code of Civil Procedure. The court could grant all appropriate relief in equity in that action after judgment, upon proper application, and in it as well as in an independent action, as the Superior Courts administer the principles of law and equity, under the prevailing method of civil procedure, in the same action. An independent action was unnecessary; indeed, it was improper. Such action will not be allowed when the relief or remedy demanded may be had in an existing action. *Long v. Jarratt,* 94 N. C., 443, and the cases there cited.

The plaintiffs might, therefore, have obtained all the relief they demanded by their complaint, as at first filed in the action of ejectment

referred to, which was pending and is still pending, for all proper purposes contemplated by it. Their present action must, therefore, be dismissed without prejudice to them.

Error.

Cited: Walton v. McKesson, 101 N. C., 442; *Wood v. Watson,* 107 N. C., 54; *Herman v. Watts, ibid.,* 652; *Taylor v. Gooch,* 110 N. C., 391; *Everett v. Reynolds,* 114 N. C., 368; *Carraway v. Lassiter,* 139 N. C., 152.

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THE CHARLOTTE PLANING MILLS v. F. A. MCNINCH AND WIFE, SARAH A. MCNINCH.

Jurisdiction—Amendment—Consent Order.

1. Where the complaint, in an action brought in the Superior Court, against a husband and wife, merely alleged a debt less than $200, and a lien in connection therewith, but afterwards, by consent, a second cause of action was added, in which it was alleged that said debt was chargeable upon the separate estate of the wife, and judgment was demanded that the debt be enforced by a sale of her real property, if necessary: *Held,* that the court had jurisdiction, though it would not have had without the amendment.
2. While consent may not give jurisdiction generally, when a complaint does not show jurisdiction as to parties and subject-matter, the parties can consent to an amendment whereby such jurisdiction does appear.
3. It seems that the court has power to allow such amendment without consent of defendants.

CIVIL ACTION, tried before *MacRae, J.,* at September Term, 1887, of the Superior Court of MECKLENBURG.

The action was brought to recover a balance of $91.66, alleged to be due to the plaintiff for certain building materials furnished to the *feme* defendant, to be placed upon, and for the improvement of, her separate real estate. The complaint, as to the first cause of action therein alleged, demands judgment for the debt, and the enforcement of a mechanic's lien in respect to the materials supplied; as to the second cause of action, it demands judgment for the debt, and the enforcement of it against the estate of the *feme* defendant.

The following is a copy of the material parts of the case stated on appeal:

"The plaintiff, at first, filed a complaint, setting forth but one cause of action, which was identical with the first cause of action contained in the amended complaint. The defendants filed a joint answer to the complaint first filed, denying the several allegations (518) thereof.

At Spring Term, 1887, the plaintiff, by leave of the court and consent of counsel for defendants, amended the said complaint, by adding thereto a second cause of action, and the defendants answered, denying the allegations thereof.

At the trial of the action, and after the jury had been empaneled, and without withdrawing their answer, the defendants demurred *ore tenus* to the complaint as amended, upon the ground that the court had not jurisdiction of either of the causes of action therein set forth.

The court sustained the demurrer as to the first cause of action, and overruled it as to the second cause of action, and the defendants excepted."

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

P. D. Walker for plaintiff.
C. N. Tillett for defendants.

MERRIMON, J., after stating the case: The court had not jurisdiction of the subject-matter of the first cause of action, as alleged in the complaint, because it simply alleged a debt due the plaintiff, and a lien in connection therewith, of which a justice of the peace had jurisdiction.

The second cause of action alleged the same debt, and that it was chargeable upon the separate estate of the *feme defendant,* and as to it, judgment was demanded, that the payment of the debt be enforced by a proper judgment, directing a sale of the real estate, if need be. The court had jurisdiction of the cause of action thus alleged. The purpose was to enforce the payment of the debt, by a resort to the separate estate of the *feme covert* defendant. It is expressly decided that the Superior Courts have jurisdiction in such cases. *Dougherty v. Sprinkle,* 88 N. C., 300; *Webster v. Laws,* 89 N. C., 224; *Smaw v. Cohen,* 95 N. C., 85; *Neville v. Pope, ibid.,* 346.

But the appellants insist that, inasmuch as the complaint, was (519) at first filed, alleged but a single cause of action, of which the court had not jurisdiction, it could not obtain it by an amendment of the complaint, alleging a cause of action of which it had jurisdiction. This may or may not be so ordinarily, but, in this case, the defendants consented to the amendment, and thus consented to constitute an action

before the court, of which it had jurisdiction as to the parties and the subject-matter of the action. The parties could thus consent to come or remain before the court, and the appellants, having once consented to the amendment, could not afterwards, in the course of the action, withdraw such consent, unless with the assent of the appellees. The parties, in effect, consented to remain before the court and litigate a cause of action not at first alleged, but which was afterwards formally alleged on one side and denied on the other, and the court took notice of the agreement thus appearing, and allowed them to do so. It was competent thus to confer jurisdiction.

It was contended on the argument, that the parties could not, by consent, confer jurisdiction. This is true in some cases, but the rule invoked does not apply in cases like the present one. Parties may consent to submit to the jurisdiction of the court, if they and the cause of action be such as the court may lawfully take jurisdiction of; but if the court cannot, in law, take jurisdiction of the parties for, any reason, or of the cause of action, consent or agreement of parties cannot confer it, because, in that case, the law does not give or allow it; on the contrary, it forbids it. The law prescribes the jurisdiction of courts. If the court may take jurisdiction—that is, if the law gives and allows it, then the consent of parties may confer it, in a particular case coming within the law allowing it, not otherwise.

(520) It is not at all certain that the court could not, without the consent of the appellants, have allowed the amendment alleging the same cause of action, in a different way developing the jurisdiction of the court. The cause of action of which the court, in fact, had jurisdiction, was imperfectly alleged in the complaint, as at first filed. What prevented the court from allowing the appropriate amendment? But we need not pass upon this view of the case, and we mention it to exclude a conclusion, that the court had not authority to allow such amendment. *Johnson v. Finch,* 93 N. C., 205; *Singer Mfg. Co. v. Barrett,* 95 N. C., 36.

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

Judgment affirmed.

Cited: Berry v. Henderson, 102 N. C., 527; *Elliott v. Tyson,* 117 N. C., 116; *Smith v. Newberry,* 140 N. C., 387; *Wilson v. Batchelor,* 182 N. C., 94.

W. C. ABERNATHY, GUARDIAN, v. B. F. WITHERS ET AL.

Report of Referee—Judgment in absence of Exceptions—Practice.

The referee, in an action on an administrator's bond, having filed his report, with the evidence, finding a balance due the plaintiff, and no exceptions being filed thereto, within the time given for exceptions, the Superior Court properly gave judgment according to the report; and upon appeal this Court will not review the findings of the referee upon the evidence, for some alleged error first suggested here, but will affirm the judgment.

CIVIL ACTION, heard before *MacRae, J.*, at Fall Term, 1887, of the Superior Court of MECKLENBURG.

This action was brought in the Superior Court by W. C. Abernathy, guardian of M. L. Abernathy, against the defendant B. F. Withers, administrator of M. J. Abernathy, deceased, and the sureties on his administration bond, for an account and settlement of the estate of his intestate.

At the Fall Term, 1886, of said court, Graves, J., made the fol- (521) lowing order:

"This cause is referred to John R. Erwin, clerk, to take and state an account of the estate of S. J. Abernathy, that has come to the hand of the defendant Withers as administrator of her estate.

He will make his report to the next term of this court."

The referee made his report to the following term, accompanied by the evidence and an account stated, in which a balance of $1,424.45 was found to be due from the administrator, when the following order was made by Montgomery, J.:

"In this cause, it is ordered that the defendant have thirty days to file exceptions to the report of the referee, as of this term."

No exceptions were filed, and at Fall Term, 1887, the following judgment was rendered by MacRae, J.:

"This cause coming on to be heard, upon the report of J. R. Erwin, referee, to which no exception has been filed by the defendants:

It is now adjudged that the said report be, in all respects, confirmed, and that the plaintiff guardian as aforesaid, do recover of the defendant B. F. Withers, as principal, and of J. S. Miller and Jas. H. Elms, the sureties on his bond, the sum of fourteen hundred and sixty-seven dollars and seventeen cents ($1,467.17), of which sum $1,424.45 is principal, and $42.72 is interest accrued since the report, and also the costs of this action, to be taxed by the clerk, and to include an allowance of twenty-five ($25) dollars for the referee, J. R. Erwin."

There was no exception taken before the referee to any finding of fact or conclusion of law. He made his report, and the defendants were allowed thirty days within which to file exceptions. No exception was filed, nor had any been taken before the referee. No error in the report was alleged or suggested, or pointed out in the court below, nor was the court asked to pass upon any ruling of the referee.

(522) The report was confirmed and judgment rendered thereon, and there was no exception to that. There was no case on appeal stated, and the only indication of any dissatisfaction, on the part of the appellant, is to be found in the simple entry: "Defendants appeal to Supreme Court. Notice waived. Bond in $50 adjudged sufficient." And we are now asked to review the findings of the referee upon the report and evidence sent with the transcript, as if it had come by appeal directly to this Court from the referee, and upon some alleged error, for the first time assigned or suggested here.

P. D. Walker for plaintiff.
C. N. Tillett for defendants.

DAVIS, J., after stating the case as above: We are unable to see the remotest analogy between this case and that of *Allen v. Griffin,* 98 N. C., 120, relied on by counsel for appellant. There, the case on appeal was settled by the court, and presented, concisely and clearly, the matter in controversy, and the alleged ground of error—it was apparent in that case, and upon the face of the case, stated by the court, and did not have to be pointed out in this Court for the first time; but here, it is sought, for the first time, to assign some error in the finding of the referee, which was not excepted to, and about which, so far as we can see, there was never any dispute or controversy, and which was never brought to the attention of the referee, or passed upon by the court below.

This will not do. *Whissenhunt v. Jones,* 80 N. C., 348; *Neal v. Mace,* 89 N. C., 171; The Code, sec. 550; *Manufacturing Co. v. Simmons,* 97 N. C., 89, and the many cases cited.

There is no error.

Judgment affirmed.

(523)

WILSON P. COVINGTON v. MORRIS NEWBERGER.

Practice in Supreme Court—Amending Case on Appeal—Principal and Agent—Verdict—Evidence—Inkeeper's Lien.

1. This Court cannot permit the case on appeal, appearing in the record, to be varied or amended by adding thereto matters suggested to the Court upon affidavit. Only questions presented in the record can be considered.
2. In the absence of an express agreement the principal is not responsible for the hotel bill of his agent or drummer, where the hotel-keeper allows the agent to run up a bill without notice to the principal, and it is proven to be a general custom for such agents to pay their hotel bills in cash.
3. An innkeeper has a lien even upon the goods of a third person held by a guest, and brought within the inn, unless he knew they were not the property of the guest.
4. When there is no evidence, or only a *scintilla* of evidence, or the evidence is not sufficient, in a just and reasonable view of it, to warrant an inference of any fact in issue, the court should not leave the issue to be passed upon by the jury, but should direct a verdict against the party upon whom the burden of proof rests.

CIVIL ACTION, originally commenced before a justice of the peace, and carried, by appeal, to the Superior Court of ANSON County, and tried before *Clark, J.*, at May Term, 1887, of said court.

At the time of issuing the summons, and as ancillary to the action, a *warrant of attachment* was issued, under which certain trunks and packages of samples, in possession of Lindsay Davis, were seized, and afterwards replevied by the defendant.

The pleadings were oral.

During the years 1881 and 1882, the plaintiff was the proprietor of a hotel in the town of Wadesboro, and he alleged that during that time the defendant became indebted to him in the sum of $47, (524) for the board and lodging of his agent, Lindsay Davis. The defendant answered, denying the debt and denying that he owed the plaintiff anything.

The plaintiff, in his own behalf, testified, in substance, that "Davis was traveling over the country as a salesman of the defendant, soliciting orders and selling goods for him," and was so engaged at the time the alleged debt was contracted. Witness knew that Davis was the agent of the defendant, "and on every occasion when he stopped with witness, he was engaged in prosecuting the defendant's business. Witness extended credit to defendant in the first instance, and thought that he was responsible for his agent's board bill. . . . It was the habit of said agent

to come to Wadesboro several times during the year, and, while making plaintiff's hotel headquarters, to visit the surrounding country, by private conveyance, returning to Wadesboro from time to time, to receive communications and orders from his house, and to send orders for goods which he had sold. Witness received payments from time to time from said agent, on the account, and the sum of forty-seven dollars is the balance due after deducting all payments.

Cross-examined.—Said Davis always registered on the hotel register as "Lindsay Davis," without making any reference to the defendant. Said Davis was carrying with him large trunks and cases of samples of clothing, all of which were brought to plaintiff's hotel and there kept and exhibited. Davis was a transient patron at plaintiff's hotel. It was the general custom that such patrons were expected to pay cash for their bills, though witness thought there were exceptions. Where the drummer was engaged in "working up" the surrounding country, he was not expected to settle until he had finished. Some time since the commencement of the action the witness drew off his account from (525) his hotel register, which is as follows, to wit:

LINDSAY DAVIS WITH M. NEWBERGER—

1881.

April 1, To board	$ 0.50
April 6, To board	8.50
April 12, To board	12.00
April 13, To board	1.50
July 29, To board	7.50
Aug. 1, To board	.50
Aug. 7, To board	.50
Aug. 11, To board	8.50
	$ 39.50
Aug. 11, By cash	20.00
	$ 19.50
Oct. 17, To board	9.00
Oct. 24, To board	1.00
	$ 29.50
Oct. 24, By cash	8.00
Amount brought forward	$ 21.50

March 2, To board	$ 2.50
April 5, To board	1.50
April 18, To board	7.00
Aug. 28, To board	11.00
	$ 43.50
Aug. 11, By cash	3.50
	$ 40.00
Nov. 8, To board	4.50
Nov. 27, To board	2.50
	$ 47.00

Which account witness has since kept on a small pocket (526) memorandum.

Witness extended the credit and allowed the account to run, because he thought the trunks and cases of samples were liable and responsible for the board bills of Davis, and also because he thought the defendant was liable for the board bills of his said drummer. Witness never had, at any time prior to the commencement of this action, any conversation or communication with the defendant concerning the account—never notified him that he was extending credit on account of his said drummer; never presented the account to defendant, or made any demand on him before bringing the action."

The plaintiff then put in evidence the return of the sheriff endorsed on the *warrants of attachment* and the undertaking entered into by the defendant, which showed that the property levied on (the trunks and samples) was the property of the defendant, and claimed by him.

George W. Huntley, witness for plaintiff, testified that during the years 1881 and 1882 Davis was traveling as the drummer or agent of the defendant, selling clothing for him. "Witness gave him (Davis) orders for goods; the goods were shipped and received by witness, and witness paid the draft drawn by the defendant for the price of the goods."

Dr. Covington also testified that Davis was the traveling salesman of the defendant.

The defendant introduced no evidence.

The court charged the jury, in substance, as follows, to wit:

That they must first be satisfied from the evidence that Lindsay Davis was the agent of the defendant, Morris Newberger, and if they were not so satisfied, they should find the issue in favor of the defendant. But

if, from the evidence, they were satisfied that Lindsay Davis was the agent of the defendant at the time the account was made, that then the liability of the defendant would depend upon the character of the
(527) agency, and whether the agent had authority to bind his principal for his board bill; that plaintiff must satisfy the jury that, by the contract of agency, the agent had such authority from his principal when engaged in the prosecution of the agency; and if the defendant (principal) did authorize his agent to bind him for the price of the agent's board, and the board bill was contracted by the agent in the course of the business, that then the defendant would be liable in this action, and they should find in favor of the plaintiff; that if Lindsay Davis was the drummer of the defendant, and stopped at the hotel of the plaintiff in the prosecution of his business as the drummer of defendant, and such stopping and boarding was necessary to the prosecution of the agency, and the jury find from the evidence that the contracting of the board bills was necessary in the prosecution of the work of the agency, the defendant was liable to plaintiff for such of his account as has been proved to the satisfaction of the jury. That the burden was on the plaintiff to satisfy them of the truth of these propositions.

The court submitted to the jury the following issues:

"Is defendant indebted to plaintiff? If so, how much?"

The jury responded, "Yes; forty-seven dollars."

The defendant moved for a new trial, for error of the court in refusing instructions asked, in submitting issue to the jury, and for error in the charge of the court.

Motion overruled. Judgment. Appeal by the defendant to the Supreme Court.

W. L. Parsons for plaintiff.

J. A. Lockhart and P. D. Walker for defendant.

DAVIS, J., after stating the facts: Upon disagreement of counsel, the case on appeal was settled by the judge, as appears from the certificate, and the instructions asked for by the defendant, and the refusal of which constitutes one of the grounds of exception, as appears in
(528) the statement of the case, do not appear in the record. Counsel for the appellant proposed to show by affidavits what the instructions asked for and refused were; but this court cannot permit the case stated to be varied or amended in any such way, and we can only consider the questions presented in the record.

The plaintiff was a hotel keeper in the town of Wadesboro. One Lindsay Davis was the traveling salesman or "drummer" for the defend-

ant Newberger, and in the course of his business as such, "was a transient patron at plaintiff's hotel" at divers times, from 1 April, 1881, to 27 November, 1882, generally leaving without paying his board, but making occasional payments, as appears by the credits on the account. It was during this time, extending over a period of nearly twenty months, that the credit was given and the debt incurred, which it is sought by this action to recover. There is no evidence of any express agreement or promise on the part of the defendant to pay the debt, and there is no evidence that he knew of its existence till this action was instituted. On the contrary, the plaintiff himself testifies (and this was the only evidence on this point) that he "never had, at any time prior to the commencement of this action, any conversation or communication with the defendant concerning the account; never notified him that he was extending credit on account of his said drummer; never presented the account to defendant, or made any *demand* on him before bringing the action."

Is there any evidence of an implied promise on the part of the defendant to pay this debt? Is there any evidence of authority from him to the plaintiff to give this extended credit for the board of the "drummer?" Is there any evidence, from which it might be reasonably inferred or implied, that he would be liable therefor? Is there any evidence whatever, that the "agent" Davis "had authority to bind his principal (the defendant) for his board bill," extending over (529) a period of many months?

The plaintiff says that there was some evidence in the fact that the defendant Newberger sent Davis, as his agent, through the country to sell goods for him, and that this carried with it the incidental, or implied, authority in Davis to bind the principal for liabilities incurred by the agent, and rendered necessary in the discharge of the duties pertaining to his agency; and for this he refers us to Story on Agency, secs. 73, 78, 98, 119 and 127; *Huntley v. Mathias,* 90 N. C., 101, and *Bentley v. Doggett,* 37 Am. Reps., 827. These authorities go to the full extent of declaring, that the principal is liable for any necessary expenses, or for anything that it may be necessary for the agent to do in and about the business of his agency, and when the principal sends the agent out, he sends him with the implied authority to do what is necessary and proper, in order to transact the business for which he is employed. The principal is bound, in such cases, by whatever the agent may do within the scope of his authority.

Conceding this doctrine as well settled, can it be reasonably assumed that it is within the scope of the agent's authority to make debts and charge his principal therewith, as is done in this case? He was em-

ployed to sell goods, and it may be, all reasonable and necessary expenses (whether he is furnished with the money by his principal to pay them or not), as he travels through the country, may be an implied charge against his principal, as a necessary incident to the business of the agency; but this must be within the limits, and subordinate to well known custom. The plaintiff in this case testifies that "it was the general custom, that such patrons (transient patrons) were expected to pay cash for their bills." It is true, he adds, that he "thought there were exceptions." There is nothing stated by him to show, nor does he say, that this case is an exception.

If he intended to hold the defendant answerable for the board
(530) bill of Davis, it was manifestly his duty, in the absence of any agreement, to notify him of the failure of Davis "to pay cash," in accordance with custom. Wharton on Agency and Agents, secs. 134 and 137. The long and continued failure of Davis to pay cash, according to the general custom, ought to have put the plaintiff on inquiry, and it is well said by Wharton, sec. 139, "when there is any good reason to put the third party (the party dealing with the agent) on his inquiry, he is bound to go to the principal for this purpose, or otherwise, he will open himself to the charge of collusion with the agent against the principal."

But counsel for the plaintiff insist, that the innkeeper has a lien, even upon the goods of a third person, held by a guest and brought within the inn, and when the defendant replevied the goods, he became liable. The landlord or innkeeper's lien is well recognized, and the case of *Cook v. Kane,* 57 Am. Reps., 28, cited by counsel, is authority for the position taken by counsel, but it has the qualification, "unless he knew it was not the property of the guest."

Assuming, that upon a notification of the failure of the drummer, in the first instance to pay cash, according to the general custom, the defendants would have been liable for his hotel bill (when the amount of the account was insignificant), and assuming that the plaintiff would then have had a lien upon the trunks and samples in the possession of the drummer, to secure the *cash,* then due from his customer, and, instead of availing himself of it, had permitted the drummer to carry them away, and extended the credit from time to time, in the manner indicated in the account, and for which, we think, there is no evidence of authority, then he would have had no lien upon defendant's property for the amount of the unauthorized credit, and the fact that the defendant replevied the goods, cannot help the plaintiff.

When there is no evidence, or only a *scintilla* of evidence, or the evidence is not sufficient, in a just and reasonable view of it, to war-

rant an inference of any fact in issue, the court should not (531) leave the issue to be passed upon by the jury, but should direct a verdict against the party upon whom the burden of proof rests. *Brown v. Kinsey,* 81 N. C., 245; *Best v. Frederick,* 84 N. C., 176; *S. v. White,* 89 N. C., 462; *S. v. Powell,* 94 N. C., 965, and cases cited.

There is error, and the defendant is entitled to a new trial.

Error. *Venire de novo.*

Cited: Nash v. Southwick, 120 N. C., 460; *Epps v. Smith,* 121 N. C., 165; *S. v. Wheeler,* 185 N. C., 672; *S. v. Palmore,* 189 N. C., 540.

THE FIRST NATIONAL BANK OF CHARLOTTE v. A. R. HOMESLEY AND OTHERS.

Surety and Principal—Indulging Judgment against Principal—Notice by Sureties to Creditor.

1. A creditor having obtained judgment against principal and sureties to a debt, and there being some real property of the principal in excess of the homestead, after the same was allotted, the neglect of the creditor to proceed to sell such excess, though orally requested so to do by the sureties, does not exonerate the sureties to the amount the land would have brought if sold.
2. Where the creditor merely remains passive, doing nothing detrimental to the surety, who can pay the debt and have the judgment assigned to a trustee, so as to place it under his control, the surety is not exonerated.
3. To get the benefit provided for sureties by section 2097 of The Code, they must give the creditor notice in writing to bring suit, etc., and only he who gives the notice can claim the benefit, when there are more than one.

CIVIL ACTION, tried before *MacRae, J.,* at Fall Term, 1887, of the Superior Court of MECKLENBURG.

The First National Bank of Charlotte, organized and acting under the laws of the United States, at Fall Term, 1875, recovered judgment in the Superior Court of Mecklenburg against the de- (532) fendants, for the sum of $2,638.60, on their promissory note in general terms, while, in fact, the defendant, A. R. Homesley was a principal, and the others sureties to the debt. A transcript of the judgment was sent to Gaston County, and docketed in the Superior Court of that county on 27 February, 1876. At that time, the principal debtor owned land therein situated, estimated to be worth from twelve to fifteen

hundred dollars, for which he had deeds, that had not then been registered, though they have been since. His exempt property, real and personal was laid off and allotted to him on 6 September, 1876, in another county, and he has become insolvent.

After the docketing the judgment, the sureties, Rudisill and Gidney, requested the plaintiff to sue out execution and satisfy the debt by sale of said land, which it failed to do.

The defendants, who are sureties, insist that, by reason of the plaintiff's refusal, after being so required, to sue out execution and sell the land of their principal, thus subjected to the statutory lien, they are exonerated from liability to the extent of the sum which the sale of the land would have produced, and that in the present action to enforce the judgment, the plaintiff's recovery against them should be only for the residue of the debt.

The court ruled against the claim for reduction, and upon the agreed facts entered judgment for the entire debt demanded, from which the sureties appealed.

W. P. Bynum for plaintiff.
J. B. Batchelor for defendants.

SMITH, C. J., after stating the case: The only question before us, though other defenses are set up in the answer, is as to the asserted equitable right to an abatement in the plaintiff's demand to the extent claimed, in favor of the appellants.

(533) It is a well settled rule in equity, aside from special legislation in this State for the protection of sureties, that while "forbearance or delay in collecting from the principal debtor, furnishes no ground on which the surety can ask for exoneration," yet "if the creditor do any act for the ease of the principal, without the privity of the surety, by which act the surety is injured or exposed to injury, that act may be laid hold of for the surety's relief." *Gaston, J.*, in *Cooper v. Wilcox*, 2 D. & B. Eq., 90.

The same principle is stated by *Ruffin, C. J.*, in the opinion in a case decided at the next term, in these words:

"The surety is entitled to the benefit of every additional or collateral security, which the creditor gets into his hands, for the debt for which the surety is bound. As soon as such a security is created, and by whatever means, the surety's interest in it arises, and the creditor cannot, himself, nor by any collusion with the debtor, do any act to impair the security or destroy the surety's interest." *Nelson v. Williams, ibid.*, 118. To like effect, *Smith v. McLeod*, 3 Ired. Eq., 390. In *Forbes v.*

Smith, 5 Ired. Eq., 369. A surety had, on application to the clerk, caused an execution to issue on a judgment recovered against the principal and himself, which was levied upon certain slaves, that had belonged to the principal debtor, and were liable to be thus seized and sold, although they had been included in a conveyance, by way of marriage settlement, to the plaintiff, as trustee, which had not been registered, and was ineffectual against the writ. The plaintiff withdrew the process, returned it to the office, and directed that none other should issue without plaintiff's order. The right to do this, without impairing the liability of the surety, was declared, *Pearson, J.,* saying, that "all that the plaintiff (in the bill in equity), as surety, had a right to ask, under the circumstances, was the benefit of having control of the judgment, provided he paid up the debt, and this he failed (534) to do."

In *Thornton v. Thornton,* 63 N. C., 211, cited for the plaintiff, judgment was rendered in Cumberland County Court, against the principal debtor and his surety, their relations as such being therein distinguished, and the principal had property in other counties, to which the plaintiff himself would not direct execution to issue, nor allow the surety to have it done, for his relief. In the opinion, delivered by *Rodman, J.,* he uses this language: "The creditor is not bound to sue, or to use active diligence in collecting his debt out of the principal debtor. But if the creditor gives time to the principal debtor, that is, if by any valid contract he debars himself from the immediate prosecution of his remedy, or if he releases any security, which may have been acquired from the principal debtor, he thereby discharges the surety."

The doctrine extracted from these cases, where the creditor merely remains passive, doing nothing himself detrimental to the sureties, while the opportunity is afforded them, by paying the debt and having the judgment assigned to a trustee, so as to place it under their control, cannot be invoked for the relief of the sureties in this case. *Hanner v. Douglas,* 4 Jones Eq., 262; *Towe v. Newbold, ibid.,* 212.

The General Assembly has come to the relief of sureties, in cases not provided for in the preëxisting law, by requiring the creditor, at the instance of the surety who considers himself in danger of loss from his contingent liability, to bring suit and use reasonable diligence in making his money from the principal, and saving harmless the surety, at the hazard of losing his claim upon the latter, if negligent in doing so. The Code, sec. 2097.

To have the benefit of this enactment, and that there may be no controversy as to whether the demand is sufficient to have this effect, it must be a notice in writing, given to the creditor, and its benefits

(535) are secured to such only as give the notice, if there be more than one surety. The Code, sec. 2098.

But official bonds, or securities held as collateral, are excepted from the operation of the act; nor does it reach the present case, since the requirement of the sureties was verbal only, if in other aspects applicable to the present case.

There is no error, and the judgment is affirmed.

Judgment affirmed.

Cited: Taylor v. Bridger, 185 N. C., 86.

JOHN DICKERSON v. W. K. WILCOXON AND W. H. PERKINS, EXECUTORS OF ALLEN PERKINS.

Executors and Administrators—Judgment.

Where a judgment is obtained against executors upon a debt due by their testator, and upon a reference, ordered in the cause, to state an account of the administration, it is ascertained that the executors have not enough assets derived from the personalty to satisfy the judgment, but that they have sufficient funds in hand derived from the sale of the real estate of their testator—the real estate having been sold by the devisees and the proceeds turned over by them to the executors: *Held,* that it was not error to order the payment of the judgment out of the proceeds of the realty in the hands of the executors, although the devisees were not parties to the action, and no special proceeding to make real estate assets had been brought against such devisees by the executors.

THIS was a civil action, heard on exceptions, by *MacRae, J.,* at May Term, 1887, of ASHE Superior Court, final judgment being rendered by *Boykin, J.,* at Fall Term, 1887, on the filing of the opinion of the Supreme Court, rendered at February Term, 1887, in this cause.

Defendants appealed.

This action, commenced on 6 November, 1869, is prosecuted for the purpose of settling a partnership, formed in 1855, of the plaintiff,

(536) one Jackson B. Hash (whose interest in the business the plaintiff claims as assignee), and Allen Perkins, the defendants' testator, and to recover the plaintiff's share of the proceeds. The complaint alleges that the funds of the mercantile firm went into the hands of the said Allen Perkins, and no account thereof has been rendered and adjusted, either by the deceased member in his lifetime, or by his execu-

tors since. The defendants admit the constitution of the partnership firm of Hash, Perkins & Co. in 1855, and its dissolution in 1857, deny the alleged contribution to the capital stock, alleged in the complaint, and the testator's taking the effects into his possession, and undertaking to close up the business; aver that one Timothy Perkins, a clerk in their employ, and since deceased, undertook this duty, and the books and accounts were placed in his charge, with the consent of all the members, and that his efforts in that direction were interrupted by the Civil War, into which he entered and was killed—and while having no assets of the testator, submit to the taking the proposed account.

Such proceedings were had in the cause, that at Spring Term, 1883, of the Superior Court of Ashe County, judgment was recovered upon an ascertained balance due, the plaintiff from the partnership resources, of $623.70, with interest from Fall Term, 1882, but without the institution of any inquiry into the condition of the testator's estate, and the value of the assets, with which the defendants are chargeable to make payment.

Upon an appeal to this Court, from the ruling of the judge in the cause, whereby the issue of an execution against the defendants, to be satisfied *de bonis propriis,* was stayed until the sufficiency of the assets could be ascertained to meet the debt, the cause was remanded for that purpose, and meanwhile action under execution suspended. See the case reported in 97 N. C., 309.

The cause being resumed in the Superior Court, an order of (537) reference was made to the clerk, to take and state an account of the administration of the testator's estate by the executors, which order was executed, and report returned to the succeeding term.

The referee finds that there were in the defendants' hands on 19 April, 1879, as appears by record of settlement in the clerk's office, $417.78, which, with interest since accrued, to wit, $152.58, makes an aggregate of $570.36.

He further reports proceeds of land sold by the executors, with which they are chargeable as assets, which, with the moneys already mentioned, swell the whole sum to $7,990.47. To the report the defendants file the following exceptions:

The defendants except to the report filed by Commissioner Dickson at this term of the court, for the following reasons:

1st. The commissioner erred in finding as a fact that there went into the hands of the defendant from the sale of the 460-acre tract on Hilton, owned by Allen Perkins at the time of his death, the sum, with interest, of $4,123.21, when there was no evidence before him showing that any sum whatever went into their hands from this source; but on the con-

trary, the evidence shows that the land was sold as the lands belonging to the estate of Riley Perkins, for partition among his heirs, instead of the heirs of Allen Perkins.

2d. The commissioner erred in finding that there did or should have gone into the hands of the defendants, from the sale of the Naked Creek lands, the sum of $3,036.00, contrary to the evidence and against the weight thereof.

3d. The commissioner erred in finding, as a conclusion of law, that the defendants are estopped from claiming the title for the 460-acre tract on Hilton, and claiming under the deed from Allen Perkins to Riley Perkins in 1858, by claiming under the will of Allen Perkins,
(538) without finding the fact that they did claim said lands under the will of Allen Perkins, and when the weight of the testimony shows that what claim, if any at all, they set up to said lands, was under Riley Perkins.

4th. The commissioner finds that the sum of $7,990.47 is now in the hands of the defendants, liable for the payment of the just claims against the estate of their testator, but failed to find what portion of said sum is in the hands of the defendants separately.

5th. The commissioner fails to find what amount of legal claims against the estate of Allen Perkins have been paid by defendants.

6th. The commissioner failed to find what amount of legal claims against the estate of Allen Perkins is still outstanding.

7th. The commissioner fails to find what portion of the assets that he finds in the defendant's hands are liable to the plaintiff's debt.

8th. The report of the commissioner is conflicting and erroneous upon its face, in that, in fixing the amount received from the several sources, he reports one amount, and in the aggregate reports another.

9th. The commissioner erred in finding that there went into the hands of defendant, W. K. Wilcoxon, $125 for lands bid off by him on Hilton, when the weight of the testimony shows that neither the lands nor the money for the same went, or could have gone, into his hands.

His Honor, Judge MacRae, after hearing the argument in the case, filed the following order:

This cause coming on to be heard upon the report of the referee filed and exceptions thereto, it is considered by the court that the first and third exceptions be sustained. It appearing from the evidence, that the 460 acres, known as the Hilton land, or part of the Hilton land, devised by the testator, with other lands, to his children, had been con-
(539) veyed by the testator in his lifetime to his son, Riley Perkins, who was killed in the war, leaving no issue, and that said land was sold for partition among the heirs of Riley Perkins, who were also devisees under the will of Allen Perkins.

The court is of opinion, that the parties claiming under the will of Allen Perkins are not precluded from enjoying an interest or estate in this tract, derived from the legal owner of the land, Riley Perkins, and in opposition to the will.

Second exception is overruled, upon the 6th and 7th findings of fact of the referee, which are adopted as the findings of the court.

Fourth exception is sustained, first, as to the amount found in the hands of the executors, which is to be modified in accordance with the rulings herein had; (2) the referee ought to state the amount with which both the executors ought to be charged, and the sum with which each executor should be charged separately.

Fifth exception is overruled. The referee has given the defendants credit for the sum claimed to have been paid out by them in his third finding of facts, wherein he charges the executors with the balance against them on their return, or record of settlements, made 19 April, 1879, *i. e.*, $417.98 and interest.

Sixth exception is overruled. It is not necessary for the purpose of the reference, that an account should be taken of claims outstanding against the estate of Allen Perkins, and it is not alleged that there are any other outstanding claims, except that of plaintiff.

Seventh exception is overruled. It was not required of the referee, to report what portion of the assets were liable to the plaintiff's debt, but simply to state the account of the executors with the estate of Allen Perkins.

Eighth exception is sustained, in so far as to require a reforma- (540) tion of the report.

Ninth exception is sustained, it appearing that defendant Wilcoxon bought a small tract of land at a sale for division among Elizabeth, Sarah Ann, George and H., devisees under the will, for about $125, but that said land was recovered from said Wilcoxon, by superior title to that of the testator, and therefore he ought not to be charged with said land, or the proceeds of sale of it, as assets of the estate of his testator.

And it is ordered that it be referred to J. M. Dickson, Esq., to reform his report and account, in accordance with the foregoing directions, and make report to the next term of this court.

To which the defendant excepted, and assigned as error that his Honor erred in overruling exceptions No. 2, 5, 6, 7 and 9.

Upon the reformed report to Fall Term, 1887, judgment was rendered for plaintiff, and defendant appealed. Notice waived, etc.

E. R. Stamps for plaintiff.

C. H. Armfield for defendants.

SMITH, C. J., after stating the facts: It will be seen that the object of the reference is not so much to find what sum remains in the executors' hands, after payment of debts and expenses of administration, to be paid over to the legatees of the testator, for they are not suing for a settlement, and are not parties to the action, nor will be bound by its results, as it is to ascertain the *sufficiency* of the assets to satisfy the plaintiff's judgment and the costs incurred in recovering it. The residuary balance, shown in their own return, as reported by the referee, with the interest since accruing, approximates nearly the whole debt, and the difference only is to be made out of the proceeds of the sales of the lands. The personal estate has been exhausted, and the un-
(541) paid residuum must be provided for out of the land, upon which the liability now rests. Had the land remained as such, so much as was necessary would have to be sold to discharge the debt, and the conversion of the real estate into assets, accompanied by a special proceeding against those to whom, by descent or devise, the real estate has come. As the sale has been effected by the action of the devisees, and the money is in the hands of the executors, why may not the fund be thus applied at once, since this is all that a special proceeding could do, and this without disturbing existing interests, except by a small diminution of the fund? The testator gives the remainder of his estate, real and personal, to four named children, and the deduction is, an equal apportionment among them of the moneys thus used. No reason occurs to us why this summary method of reaching the same result may not be adopted.

The series of exceptions proceed upon the erroneous idea, that the action settles the liabilities of the executors, generally, towards the legatees and devisees, as if it were binding upon all. Only exceptions 2, 5, 6 and 7 are overruled, the reasons for which, as assigned by the court, are sufficient and satisfactory, and we find no error in those rulings open to correction on the appeal.

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

No error. Judgment affirmed.

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(542)

WILLIAM J. CADELL AND WIFE v. WILLIAM ALLEN.

Power of Attorney—Seal—Deeds—Form and Execution of Deeds by Attorneys in Fact—Correction of Written Instruments.

1. A power of attorney, to authorize an attorney to execute a deed for real estate, must be under the seal of the principal.

2. Such an instrument, concluding "In witness whereof, I (the principal) have hereunto set my hand and seal," and signed, but having no seal after the name, or anything in or about or affixed to it to represent a seal, is invalid.

3. When a deed is executed by an attorney in fact, it must purport on its face and in its terms to be the deed of the principal, and the name of the principal should be signed and his seal affixed *by* the attorney; although the *signing* will be sufficient if it be by the attorney *for* the principal. *Therefore*, a deed purporting in its terms to be made by "D. C., attorney of S. L.," etc., and signed "D. C., attorney for S. L.," is not the deed of the principal.

4. The courts will, in the construction of a deed, interpret the phraseology in such a way as to effectuate the intention of the makers, but cannot supply and interpolate words essential to its validity, although satisfied that the makers of the instrument failed to make it what they intended.

5. In an action brought for that purpose, instruments may be reformed and corrected by the courts; but this cannot be done where the alleged mistake appears incidentally in the trial of an action purely legal in its character, and to which all the persons whose rights would be affected by the proposed correction are not parties.

EJECTMENT, tried before *Graves, J.*, at September Term, 1886, of UNION Superior Court.

In the course of the trial of this action, the plaintiff—the defendant objecting—was allowed to put in evidence a paper-writing, purporting to be a *power of attorney*, from Stephen Lacy and Thomas Lacy to David Cuthbertson, empowering the latter to sell and convey the title to the lands therein mentioned and described. This paper-writing concluded as follows: (543)

"In witness whereof, we, the said Stephen and Thomas Lacy, have hereunto set our hands and seals, 26 October, 1816.

(Signed) STEPHEN LACY,
THOMAS LACY."

But no seal, nor any mark or scroll, purporting to be a seal, is affixed to, or set opposite, these signatures, or elsewhere in the writing.

The plaintiff likewise—the defendant objecting—was allowed to put in evidence a deed from David Cuthbertson, attorney, which purported to convey the title to the lands therein mentioned and described, of Stephen Lacy, one of the parties signing and making the power of attorney, to Aaron Stegall. The following is a copy of so much of this deed as need be set forth here:

"This indenture, made this 23 February, 1828, between D. Cuthbertson, of the State of North Carolina, and county of Anson, attorney for

Stephen Lacy, of the one part, and Aaron Stegall, of the State and county, of the other part: Witnesseth, that for and in consideration of one hundred and fifty dollars, to him in hand paid by the said Stegall, the receipt whereof is hereby acknowledged, hath granted, bargained and sold, four certain tracts of land lying," etc. (describing them), "and the said D. Cuthbertson, in the name, and by virtue of his power of attorney from the said Stephen Lacy, warrants and forever defends the said tracts, containing six hundred acres of land, and premises, free and clear of all manner of incumbrances to the said Stegall, his heirs and assigns, forever, in as full and ample a manner as the most learned in the law can devise. In witness whereof, the said D. Cuthbertson,
(544) attorney as aforesaid, hath hereunto assigned this instrument, and sealed the same.

(Signed) D. CUTHBERTSON,
Attorney for Stephen Lacy."

The defendant, among other things, requested the court to charge the jury as follows:

"1. That the power of attorney from Stephen and Thomas Lacy to D. Cuthbertson is void, for uncertainty in the description of the land, which the said D. Cuthbertson is authorized to sell and convey. That the said power does not authorize said Cuthbertson to convey the land said to be embraced in the Lacy grant.

2. That the deed from D. Cuthbertson, the alleged attorney and agent of said Stephen and Thomas Lacy, passes no title to the land therein attempted to be conveyed, the conveyance being in the name of Cuthbertson, and not in that of the said Lacy.

3. That if said deed by Cuthbertson, attorney, passes any title at all, at most it is only a life estate, which has ceased, the said Cuthbertson, Stephen and Thomas Lacy, and Stegall being all dead when this suit was brought."

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

P. D. Walker for plaintiffs.
E. C. Smith for defendant.

MERRIMON, J., after stating the facts: It is the settled law of this State, that an agent, or attorney in fact, cannot execute a deed of conveyance of land, binding upon his principal, unless he be authorized thereunto by a power of attorney, under seal. The ancient rule of law, in this respect, has not been modified or trenched upon by this Court, and we are not at liberty or inclined to do so now. If the hurry and

convenience of business transactions, in the present state of society, require easier and less solemn methods of conveyance of (545) land than formerly, it is the province of the Legislature, and not that of courts, to modify and change settled rules of law to that end.

In *Davenport v. Sleight,* 2 Dev. & Bat., 381, the late *Chief Justice Ruffin* said: "The ancient rule is certain, that authority to make a deed cannot be verbally conferred, but must be created by an instrument of equal dignity. It is owned, that there are modern cases, in which it seems to have been relaxed with respect to bonds. This began with the case of *Texia v. Evans,* 1 Anst., 299, note, on which all the subsequent cases profess to be founded. The Court is not satisfied with reasons assigned for those opinions, but entertains a strong impression that they lead to dangerous consequences."

Likewise, in *Graham v. Holt,* 3 Ired., 300, *Daniel, J.,* said: "The notion, with us, has always been what we learned from Co. Lit., 52(a), and the Touchstone, 57, that he who executes a deed, as agent for another, be it for money or other property, must be armed with authority under seal."

The rule, as thus stated, is recognized in many cases, and must be treated as settled, and of governing authority. *Blacknall v. Parish,* 6 Jones Eq., 70; *Bland v. O'Hagan,* 64 N. C., 471; *Humphreys v. Finch,* 97 N. C., 303.

The power of attorney in question, and relied upon by the appellees, was not sealed at all. It seems that the makers of it intended that it should be, but they failed to seal it, and thus it was left incomplete. A seal was an essential requisite to the completeness of the instrument, and its efficacy to authorize the attorney to execute a deed. Nothing appears to supply it—nothing in or about, or affixed to, the instrument, or the signatures thereto of the makers, that can be interpreted to represent a seal. We have no authority to complete an imperfect instrument, by supplying omitted requisites. To do so, would be, not to construe, but to make it effectual—that is the province of the parties, not (546) of courts.

But if the power of attorney were sufficient, the deed in question was not executed in pursuance of and in the proper exercise of the power. It everywhere in the body of it purported in terms to be that of "D. Cuthbertson ..... Attorney of Stephen Lacy," etc., he—not his principal—purported to convey the title, and, as a consequence, no title passed, for he had none to convey. The deed should, by its effective terms of conveyance, be and purport to be that of the principal, executed by his attorney, and to convey the estate of the principal. It is not sufficient that the attorney intended to convey his principal's estate, he must have

done so, by apt words, however informally expressed, to effectuate that purpose. The distinct purpose of the principal to convey, and the necessary form and operative words to convey, his estate, must appear in the body of the deed in all essential connections. His name should be signed, and purport to be signed, and his seal affixed *by* the attorney, but the signing will be sufficient, if it be by the attorney *for* the principal. In *Oliver v. Dix,* 1 Dev. & Bat. Eq., 159, the deed in question, very much like the one before us, ran throughout in the name of "Thomas Dix, attorney in fact for James Dix," and was signed and sealed in the same way. *Chief Justice Ruffin,* delivering the opinion of the Court, said: "It is clear, that the deed offered to the plaintiff is altogether insufficient. No doubt the defendant intended to comply with the contract, and both he and the plaintiff thought he was doing so. But the deed does not purport to be the deed of James Dix, the owner, but of Thomas, as the attorney; allusion is not had to the method of signing only. It may not be material whether it be signed J. D. by T. D., or T. D., for J. D. But the instrument must profess, in its terms, to be the act of the principal."

To the same effect are *Scott v. McAlpin,* Term Rep., 587 (155); (547) *Locke v. Alexander,* 1 Hawks, 412; *Redmond v. Coffin,* 2 Dev. Eq., 437; *Duval v. Craig,* 2 Wheaton, 45, and note on page 56; *Appleton v. Brinks,* 5 East., 148.

So that the power of attorney and the deed were both insufficient, and the court should have rejected them when objected to in the course of the trial, and failing in this, it should have given the special instructions asked for in such respect to the jury.

It was suggested that the court could see upon the face of them the purpose of the power of attorney, and the deed, to convey the title of the principal, and they should receive such interpretation as will effectuate the purpose. Courts will interpret pertinent words and phraseology in deeds, and like instruments, in such way as to effectuate the intention of the makers thereof, appearing from the whole instrument, when this can reasonably be done; but there must be proper, pertinent and necessary words and phraseology in them, to interpret; the court cannot supply and interpolate these; that would be to make them, and this is not the province of the court, but only that of the parties to them. The court can only construe what appears, however informally; it cannot supply the substance, or change or modify that appearing, although it may be satisfied that the parties to the instrument failed to make it what they intended; they are bound by what they have, in effect, under the rules of law, done, whatever may have been the intention.

It was further suggested, that inasmuch as the court can, in the same action, try, hear and determine both legal and equitable causes of action,

in appropriate cases, it seeing the intention of the parties, as to the power of attorney and the deed before us, could, and ought, to require them to be reformed, and the plain mistake corrected. It may be, that, in appropriate cases, this could and ought to be done. But here the action and the cause of action are simply at law. No equitable cause of action is alleged, nor is such relief demanded. When equitable rights are to be litigated, and relief sought, there must be proper (548) allegations and pleadings to such end, and all parties, to be affected by the relief demanded, must be made parties to the action. It may be, that those interested adversely to the plaintiff, will not consent to the making of the desired corrections; and they are entitled to have their day in court, and to contest the claim of the plaintiff, in the ordinary course of procedure.

It is a mistaken notion, that to some extent prevails, that under the present method of civil procedure, the courts can try, hear and determine civil actions and causes of action anyhow, and in any way, however summary. It has character and integrity—it has purpose, principles and forms, that are necessary in the safe and orderly administration of public justice, that must be observed, and that the courts must uphold and enforce.

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

Error. *Venire de novo.*

Cited: Bank v. McElwee, 104 N. C., 308; *Rollins v. Ebbs,* 137 N. C., 359; *S. c.,* 138 N. C., 149; *Bank v. Wimbish,* 192 N. C., 555; *Ramsey v. Davis,* 193 N. C., 396; *Pick v. Hotel Co.,* 197 N. C., 112.

R. McCASKILL v. D. McCORMAC.

Tenant by the Curtesy—His Interest liable to Execution.

The interest of a tenant by the curtesy consummate, in land of which his wife died seized, is liable to sale under execution.

Action of ejectment, tried before *Clark, J.,* at May Term, 1887, of the Superior Court of Robeson County.

The plaintiff offered in evidence a judgment in favor of R. McCaskill, executor of Malcolm Powell, against the defendant, an execution issued

on such judgment, a levy on the lands described in the complaint,
(549) sale of the same by the sheriff, and sheriff's deed (deeds) conveying said lands to plaintiff, as purchaser at said sale, and dated 1 June, 1885—one conveying all the lands of the said defendant, outside of his homestead, and the other conveying homestead of the defendant. The plaintiff also offered in evidence the allotment of homestead under said execution.

It was also in evidence, that the debt upon which said judgment was obtained, was contracted prior to 1858; . . . that the land and interest sold under said execution was the interest of, and estate of, the defendant, Dugald McCormac, in the same.

There was evidence tending to show that the land set out in the complaint was devised in fee to ..... McCormac, wife of the defendant, Dugald McCormac, about 1862, and was the residence land (maiden land) of said wife. The said Dugald McCormac and wife, ... McCormac, intermarried in 1859, and had issue born of this marriage; . . . that the said ..... McCormac, wife of said Dugald McCormac, died in November, 1878, leaving children now living, and under twenty-one years of age.

"There was also evidence tending to show that the defendant was in possession of the land described in the complaint.

"The defendant requested his Honor to charge that the defendant had only a title as tenant by curtesy in said land, that the same was not liable to sale under execution, and that the plaintiff could not recover; which instruction his Honor refused to give, and instructed the jury, that if they believed the evidence, they should find for the plaintiff."

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

T. A. McNeill for plaintiff.
W. F. French for defendant.

(550) Davis, J., after stating the facts as above: The single, and only question before us, is as to whether his Honor was correct in refusing to give the charge asked for by the defendant.

It is insisted for the defendant, that under the act of 1848 (Code, sec. 1840), the sale made by the sheriff, under which the plaintiff purchased, was void. Under the provisions of that act, no real estate belonging to a married woman "shall be subject to be sold or leased by the husband, for the term of his own life, or any less term of years, except by and with the consent of the wife, first had and obtained, to be ascertained and effectuated by deed and privy examination, according to the rules re-

quired by law for the sale of lands belonging to *femes covert*. And no interest of the husband whatever in such real estate shall be subject to sale to satisfy any execution obtained against him, and every such sale is hereby declared null and void."

The only authority cited by the learned counsel for the defendant, to sustain the construction contended for by him, is *Jones v. Carter*, 73 N. C., 148. Whether or not the effect of the act of 1848-49, "is to deprive the husband of his right to acquire an estate for life as tenant by the curtesy *initiate*," which is all that was involved in the case of *Jones v. Carter*, it has never been claimed or held, that the act deprived him of his right to the estate for life, in the lands of the wife after her death, as tenant by the curtesy *consummate*.

It is well settled to the contrary. The act (Acts 1848-49, ch. 41) is entitled: "An act making better and more suitable provisions for *femes covert*," and the clear and manifest purpose of it was to protect and preserve the rights of the wife during her life, and prevent any disposition of her lands, by reason of the husband's rights as tenant by the curtesy *initiate*, without her assent, evidenced by her privy examination.

We understand it to be conceded that this is so as to the first (551) sentence in the act, which relates to the sale or lease by the husband, because the privy examination of the wife can only be had during her life, but it is insisted that it does not apply to the following sentence, which prohibits the sale under execution. Aside from the language of the sentence, "no interest of the husband whatever in *such real estate*"—clearly meaning such interest only as is embraced in the first sentence—the "reason of the thing" is against the construction insisted upon by the defendant.

But we think it is settled, by abundant authority, that the purpose of the act was to protect the wife, leaving the right of the husband, and of course his liabilities, unimpaired and unrestricted after her death. This construction is too well settled to be disturbed now. *Houston v. Brown*, 7 Jones, 161; *Long v. Graeber*, 64 N. C., 431; *Teague v. Downs*, 69 N. C., 280; *Wilson v. Arentz*, 70 N. C., 670; *S. v. Mills*, 91 N. C., 581; *Morris v. Morris*, 94 N. C., 613, and the cases cited.

There is no error. Affirmed.

Cited: Thompson v. Wiggins, 109 N. C., 509; *Jones v. Coffey, ibid.*, 518.

(552)

H. G. SPRINGS v. JOHN T. SCHENCK AND GRAY TOOLE.

Submitting to Nonsuit—Landlord and Tenant—Writ of Possession—Ejectment.

1. When a judge, at the close of the testimony, intimates that in no reasonable view of the evidence can the plaintiff recover, in deference to which the plaintiff submits to a nonsuit, and appeals, the evidence must be accepted as true in this Court, and taken in the most favorable light for the appellant, because the jury might have taken that view of it.
2. A tenant cannot be heard to deny the title of his landlord, nor can he rid himself of this relation, without a complete surrender of the possession of the land.
3. To allow a tenant to agree, and profess to hold possession under one, and at the same time to hold covertly for himself, or for another's advantage, would be to encourage and uphold a gross fraud, which the law will never do.
4. Where S. was tenant of the plaintiff, and during such tenancy T. took a deed for the *locus in quo* from a third party, for the benefit of himself and S., and entered into possession with S., but no notice was given to plaintiff of any claim of title by either S. or T.; and the deed under which S. and T. claim title was not recorded until fourteen years after its date, and not until after plaintiff had brought an action to recover the land: *Held*, that, the above facts appearing in evidence, the jury would be warranted, in the absence of any satisfactory explanation of such conduct, in finding that there was collusion, and a fraudulent purpose on the part of S. and T. to ripen a title to the land in T., to the prejudice of plaintiff.
5. When a tenant, sued for possession, denies his tenancy, the landlord is not required to prove a demand for possession, or that the term has expired.
6. An adverse claimant, who gets into possession by collusion with the tenant of another, becomes identified with the tenant, shares and stands in his place, and cannot resist the landlord's title in any case in which the tenant would be estopped to do so. His possession is fraudulent—he takes under the tenant—and he may be evicted just as the faithless tenant may be.
7. If one enters upon land by the permission, sufferance, or consent of the tenant of another, he is at once charged, by the law, with the allegiance due from the tenant to his lessor.
8. The fact that one having title is in joint possession with the tenant of the plaintiff, will not prevent plaintiff from having judgment against his tenant, although plaintiff would be at his peril in ejecting the real owner of the title under a writ of possession, issued on such judgment.
9. A writ of possession does not warrant a plaintiff in dispossessing one who is rightfully in possession.
10. Under the present practice, a writ of possession may be stayed or enjoined, upon a proper application, by one rightfully in possession, although not a party to the action in which the writ is issued.

(Davis v. Higgins, 87 N. C., 298, distinguished.)

CIVIL ACTION, tried before *MacRae, J.*, and a jury, at Fall (553) Term, 1887, of MECKLENBURG Superior Court.

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

The plaintiff brought his action to recover the land described in the complaint, and, in order to establish his title and right of possession, he introduced a deed made in 1868, by one Phelps to S. & F. Rothchild, and then a deed made in 1883, by S. & F. Rothchild, to himself. He introduced witnesses, who testified that each of these deeds covers the land in dispute.

He then introduced other witnesses, whose evidence tended to show, that the defendant Schenck had leased the land in dispute, from an agent of Phelps', prior to the date of Phelps' deed to Rothchild, and, between that date and 1883, had rented the land from the agents of the Rothchilds, and that after the Rothchilds had made the deed to plaintiff, the defendant Schenck had attorned to the plaintiff, agreeing to pay to him the rent for the land. All of the evidence introduced by the plaintiff, except the deeds above mentioned, and that which related to the annual value of the land, was directed to establishing such conduct on the part of the defendant *Schenck,* as would estop him from denying the title of the plaintiff, which he had acquired by the deed from S. & F. Rothchild.

It was then admitted that the defendant Toole was in the possession of the land in dispute, and plaintiff rested his case.

The defendants introduced a deed from R. F. Davidson to Gray Toole, dated 7 October, 1869, covering the land in dispute. This deed was duly proven upon the acknowledgment of the grantor, in April, 1884, and was then duly registered.

The defendant Schenck then introduced a deed from R. F. Davidson to himself, for an undivided half of the land, dated 7 October, 1869, and registered in April, 1883, and then denied that he had (554) ever leased the land in dispute, or any part thereof, from Phelps, or the Rothchilds, or the plaintiff, or from the agents of any of these parties.

He further testified, that he and Toole bought the land in dispute in 1869, from R. F. Davidson, and that then Davidson executed the deed to Toole, which had been introduced in evidence, and thereupon he and Toole had taken possession of the land, and had held it ever since that time; that the deed was made by Davidson to Toole alone, at his (Schenck's) suggestion, though a part of the purchase money was paid by him, and afterwards, he and Toole, having had some disagreement, Davidson, at his request, and in the presence of Toole, and with his assent, had executed a deed to him for one undivided half of the land,

which deed had also been introduced in evidence; that this deed was dated 7 October, 1869, because that was the day of the purchase of the land by him and Toole; that the deed to Toole was made for them both, and he had paid half of the purchase money to Davidson.

Upon the close of the testimony, the presiding judge intimated an opinion, that, it having been admitted that the defendant Toole was in possession of the land when the suit was brought, the plaintiff was not entitled to recover upon the evidence against him, and, if not against him, then not against his codefendant Schenck. The plaintiff, in deference to this opinion, submitted to a nonsuit, and appealed to the Supreme Court.

C. N. Tillett for plaintiff.
P. D. Walker for defendants.

MERRIMON, J., after stating the facts: As the court, in effect, intimated on the trial, that in no reasonable view of the evidence produced, could the appellant recover, it must, for the present purpose, be (555) accepted as true, and taken in the most favorable light for him, because the jury might have taken that view of it, if it had been submitted to them. *Abernathy v. Stowe,* 92 N. C., 213; *Gibbs v. Lyon,* 95 N. C., 146.

Then, accepting the evidence of the appellant as true, the appellee Schenck was, at the time this action was brought, and, for several years next before that time, had been, the tenant of the appellant of the land in question; and for many years next before he so became such tenant, he had been the like tenant of those persons from and through whom the appellant claimed to derive title; indeed, the last mentioned tenancy antedated in its beginning the deeds under which the appellees claim title. If this be true, and there was evidence from which the jury might have so found by their verdict—very clearly Schenck could not be heard to deny the title of his landlord; nor could he rid himself of his relation as tenant to the appellant, without a complete surrender to him of the possession of the land. To allow him to agree and profess to hold possession under the landlord, and at the same time hold covertly for himself, or for another's advantage, would be to encourage and uphold a gross fraud, which the law will never do; on the contrary, the rules of law, founded in good faith and sound public policy, render such a thing impossible. *Davis v. Davis,* 83 N. C., 71; *Farmer v. Pickens, ibid.,* 549; *Abbott v. Cromartie,* 72 N. C., 292; *Pate v. Turner,* 94 N. C., 47.

It was not necessary that the appellant should prove that the lease to Schenck was over, or that he made demand upon him for the possession because the latter denied that he was such tenant, and thus put himself

broadly in hostility to the right of the landlord. *Vincent v. Corbin,* 85 N. C., 108; *Waddell v. Swann,* 91 N. C., 108.

If it be granted that Toole was in possession of the land, with his codefendant, at the time this action was brought, and that he had title thereto, this fact alone could not prevent the appellant from having judgment against his tenant Schenck, because he had a suffi- (556) cient cause of action against his tenant, and was entitled to his remedy as against him. But if the appellant had thus obtained judgment against Schenck, and had taken out his writ of possession, he would, at his peril, finding Toole in possession of the land, have turned him out. The exigency of the writ would not warrant the appellant in turning out of possession one who was in, and had a right to be in, possession. In a possible case, upon proper application, the court might, under the present method of Civil Procedure, stay the writ of possession as to a person rightfully in possession, and not a party to the action, or the latter might have his remedy by action and injunction. *Judge v. Houston,* 12 Ired., 108; *McKay v. Glover,* 7 Jones, 41; *Cowles v. Ferguson,* 90 N. C., 308. This is not at all in conflict with what is decided in *Davis v. Higgins,* 87 N. C., 298. That case has reference to the matter in litigation in that action between the parties thereto, and not to persons who are not parties, who may be in possession of the land, claiming under a valid title.

What we have thus said rests, to some extent, upon the supposition that the appellant properly suffered a judgment of nonsuit as to the appellee Toole. We are of opinion, however, that there was some evidence before the jury, that they might have considered, tending to prove and from which they might have inferred collusion and a fraudulent purpose on the part of the appellees, inconsistent with the duty and obligations of the appellee Schenck to his landlord, the appellant. The former was tenant of the land, taking the strongest view of the evidence for the appellant, continuously from 1868—first under Phelps, then Rothchilds, then the appellant—until after 1883. The jury might not unreasonably have inferred, from all the evidence, that Toole saw Schenck in possession of the land and knew that he was such tenant; he was, at least, put on inquiry in this respect. Nevertheless, he and Schenck, on 7 October, 1869, pending the tenancy, took a (557) deed purporting to convey the land from R. F. Davidson to Toole, which was not registered until April of 1884, after this action began, in February of the same year. So far as appears, the appellant never heard of this deed until it was registered, nor does it appear that there was anything said or done by the appellees, or either of them, at any time, that put him on notice, that they, or either of them, claimed title to the land, or were holding possession thereof adversely to him.

It does not appear, that Davidson had any title to the land—his deed to Toole seems only to have served the purpose of color of title. During all the time mentioned, Schenck was the tenant of the appellant. The evidence, thus appearing and unexplained, *might* have led the jury to infer a collusive and fraudulent purpose, on the part of the appellees, to ripen and perfect a title to the land in Toole, by his color of title and his continuous possession under it—not clear and free from doubt as to its character—for more than seven years, and thus defeat and destroy the good title of the appellant, if he had one. The evidence, unexplained, does not place the appellees in a favorable light, and it implies more than mere suspicion against them. Why did they not openly claim and assert their rights under the deed from Davidson? Why did they keep it secret, while they were in possession of the land, Schenck being tenant, in fact and law, of the appellant? Why did they, pending the tenancy, forbear for fourteen years to register this deed, and thus fail to give even constructive notice of their claim? Why did Davidson first make the deed to Toole for the whole land, and afterwards a second deed to Schenck for one-half of it? The evidence, unexplained, suggests these and like questions, that it is not easy to answer, consistently with fair dealing, on the part of the appellees towards the appellant; and, in our judgment, it was such as from it the jury *might* not unreasonably
(558) have found collusion and a fraudulent purpose, such as that suggested.

An adverse claimant of the land cannot thus surreptitiously, and collusively with the tenant, get possession of, and hold the land, to the prejudice of the title of the landlord. He has, in such case, no just possession—has only such as is fraudulent—he takes under the tenant—is in possession by virtue of the latter's possession, subject to all the rights of the landlord, and he may be evicted, just as the faithless tenant may be; indeed, without reference to the tenant. When he gets possession, by collusive concert with the tenant, he at once becomes identified with him—shares and stands in his place, and he cannot resist the landlord's title, where the tenant cannot do so.

And so, also, if one enters upon the land by sufferance, permission or consent of the tenant of another, he will, himself, at once be charged, by the law, with that relation to the lessor, and he will not be allowed to act and assume relations in hostility to the title under which he went into possession. As he goes into possession with and under the tenant, he is bound by the allegiance the lessee owes the lessor, and he cannot throw it off at his will and pleasure. The rules of law that thus establish, secure and govern the relations between landlord and tenant, and those who get possession of the land directly under the tenant, are founded in justice, fair dealing and sound public policy. *Callender v. Sherman,*

5 Ired., 711; *Kluge v. Lachenour,* 12 Ired., 180; *Melvin v. Waddell,* 75 N. C., 361; *Pate v. Turner,* 94 N. C., 47; *Jackson v. Houser,* 7 Cowen, 323; *Stewart v. Roderick,* 4 Watts & Lerg., 188; *Dikeman v. Parish,* 6 Pa. St., 210; Tay. on L. & L., sec. 705.

So that, whether the appellee Toole got possession of the land by collusion with, or by permission of, the appellee Schenck, the appellant might have recovered as against him. And as there was evidence from which the jury might have found, not unreasonably, that he did get possession in the one way or the other, the court should have (559) submitted the issues to the jury, with appropriate instructions.

There is error. The judgment of nonsuit must be reversed, and the case tried according to law. To that end, let this opinion be certified to the Superior Court.

It is so ordered.

Error. Reversed.

Cited: Bonds v. Smith, 106 N. C., 563; *S. v. Howell,* 107 N. C., 839; *Asbury v. Fair,* 111 N. C., 258; *Ferguson v. Wright,* 115 N. C., 570; *Waterworks Co. v. Tillinghast,* 119 N. C., 347; *Collins v. Swanson,* 121 N. C., 69; *Cable v. R. R.,* 122 N. C., 895; *Thomas v. Shooting Club,* 123 N. C., 288; *Cox v. R. R., ibid.,* 607; *Printing Co. v. Raleigh,* 126 N. C., 521; *Hendon v. R. R.,* 127 N. C., 113; *Pool v. Lamb,* 128 N. C., 2; *Coley v. R. R.,* 129 N. C., 413; *Smith v. R. R.,* 130 N. C., 310; *Bessent v. R. R.,* 132 N. C., 936; *Craft v. R. R.,* 136 N. C., 51; *Kearns v. R. R.,* 139 N. C., 482; *Campbell v. Everhart, ibid.,* 515; *Millhiser v. Leatherwood,* 140 N. C., 235; *Sipe v. Herman,* 161 N. C., 111; *Nance v. Rourk, ibid.,* 649; *LeRoy v. Steamboat Co.,* 165 N. C., 113; *Brock v. Wells, ibid.,* 172; *Lawrence v. Eller,* 169 N. C., 213; *Timber Co. v. Yarbrough,* 179 N. C., 340; *Freeman v. Ramsey,* 189 N. C., 796.

ANN C. LEAK, EXECUTRIX OF J. W. LEAK, v. E. P. COVINGTON AND ALEX. A. COVINGTON, EXECUTORS OF W. L. COVINGTON ET AL.

Record Evidence—Finding of facts by Judge—Insolvency; General reputation of—Statute of Limitations—Judge's Charge; Exceptions to—Assignment of Error—Action against Cosurety—Parties; Objection for want of.

1. The record in a suit upon an administration bond against a surety and the personal representatives of another surety in which a *nol. pros.* was

entered as to them, and judgment rendered against their intestate's cosurety, is evidence and prima facie proof, in a suit by him, for contribution, against said personal representatives, as to the damages.

2. The finding by a judge below of the facts of the loss of a record, upon which secondary evidence of its contents is offered, is conclusive, and not subject of review in the Supreme Court.

3. A surety seeking contribution from a cosurety can offer evidence of the general reputation for insolvency of their principal, even after direct evidence of such insolvency, such as unsatisfied executions against him, etc.

4. The statute of limitations begins to run against a surety paying a debt only from the time of payment.

5. Under the practice in this State, where the record shows a motion for a new trial for certain alleged errors, only such errors will be considered in the Supreme Court, all other exceptions taken at the trial being treated as abandoned.

6. Where the judge's charge involves a series of distinct propositions, the errors alleged must be distinctly pointed out, or they will not be noticed.

7. The credit to be given to evidence is a question exclusively in the province of a jury.

8. It is not proper for a judge to give an instruction upon a speculative proposition not bearing on any of the issues in the case.

9. The statute giving an action to a surety who has paid the debt against a cosurety, when the principal shall be insolvent or out of the State, has reference to the time when action is brought, and not to the time of payment by the surety.

10. When the relations of one not a party to an action, who, it is claimed, should have been made a party, appear in the complaint, the defendant has his remedy by demurrer; and if they do not so appear, he should set out the facts, and insist on the objection in his answer.

(560) CIVIL ACTION, tried before *Clark, J.*, at June Term, 1887, of the Superior Court of RICHMOND County.

The facts sufficiently appear in the opinion.

P. D. Walker for plaintiff.
John D. Shaw for defendants.

SMITH, C. J. Edwin P. Covington, guardian of the infant children of John P. Covington, in an action upon the administration bond executed by James A. Covington, on his appointment as administrator of the intestate, John P., against him, as principal, and the two sureties thereto, John W. Leak and William L. Covington, the other surety, Bethune B. McKenzie, being insolvent, recovered judgment in the sum of $5,453.69 damages at Fall Term, 1876, of the Superior Court of

Richmond County. The plaintiff, Ann C. Leak, appointed in the will of the said John W. his executrix, and, upon his death, pending the action, made a defendant in his stead, out of the testator's assets satisfied the judgment, having, on 3 February, 1887, paid thereon $3,797.58, and on 5 April, following, $1,899.39 in full of the debt and interest and the further sum of $371.06 for costs incurred in the action.

The form of the judgment was afterwards so amended as to (561) make it for the penalty of the bond, dischargeable on payment of the damages assessed, and the right to do this was affirmed on an appeal to this Court. *Wall v. Covington,* 83 N. C., 144.

The present action was instituted by the plaintiff, who has discharged the debt recovered upon the bond to which her testator was a surety, against the executors of William L. Covington, a cosurety, and the other defendants named, to whom, under his will, the bonds whereof he died seized and possessed have come, to the end that they be applied to his debts, and especially to reimburse to the plaintiff one moiety of the sum she has been compelled to pay. This brief statement will suffice to a proper understanding of the exceptions taken during the course of the trial of the issues before the jury.

These issues, five in number, are, with the responses to each, as follows:

1. Is the estate of B. B. McKenzie insolvent? Answer: Yes.
2. Is James A. Covington insolvent? Answer: Yes.
3. Are the defendants executors of William L., as such executors, indebted to plaintiff on account of the payment made by her, as set forth in the complaint, and if so, in what amount? Answer: Yes, $3,034, with interest from 5 April, 1887.
4. Did the defendants executors of W. L. Covington, or either of them, have notice of the payment mentioned in the complaint? Answer: Yes.
5. Is the plaintiff's action barred by the statute of limitations? Answer: No.

The plaintiff offered in evidence the record of the action of H. C. Wall and T. C. Leak, executors of Mial Wall, against James A. Covington and the sureties to his administration bond, executed (562) when letters on the estate of his intestate, John P. Covington, issued to him, to which objection was made, on the ground that the executors of the said William L. Covington, though originally in the action, ceased to be parties upon the entering of the *nol. pros.* as to them.

The objection was overruled, and the transcript received as evidence.

As we understand the objection, it is, that as to them the judgment is not only not binding, but inadmissible, to fix any liability upon the

estate of their testator to the plaintiff, and still less in determining the amount. It is not pretended that the recovery was not resisted fully and in good faith, nor is any collusion between the opposing parties suggested. We must therefore consider the recovery as rightful and proper. Under such circumstances, cannot the surety, upon proof of what he has been compelled to pay under an adjudication he could not successfully resist, make his cosurety share in the loss, and that without being required to again go over the account, and to establish the claim which the common creditor had against both, and successfully asserted against one? We concur in the ruling, that the record is evidence of the extent of the damage, and *prima facie proof* of it.

In *Armistead v. Harramond,* 4 Hawks, 339, *Hall, J.,* delivering the opinion of the Court, declares that a judgment recovered against an administrator, in an action upon a judgment rendered the intestate in his lifetime, is, as to the former and his sureties, evidence of a debt due by the deceased, but not of the possession of assets with which to meet it.

The same principle is announced by *Battle, J.,* in *Strickland v. Murphy,* 7 Jones, 242, and by *Rodman, J.,* in *Lewis v. Fort,* 75 N. C., 251, in which he uses this language: "In our opinion, independently of the circumstance that the principal had notice of the present (563) action against his sureties, and either did defend it, or might have defended it, the record of a payment against the sureties would be evidence that they were *compelled* to pay *on the note recovered on,* and of the *amount* they were compelled to pay," citing 1st Greenleaf Ev., sec. 537.

And so, more explicitly, it is declared in *Hare v. Grant,* 77 N. C., 203, that, in the absence of fraud and collusion, where the surety is sued with his principal, or alone, and notifies his principal, so as to enable him to defend, or to furnish him with a defense, the recovery against the surety is the measure of his damages against his principal, and the record is conclusive evidence.

The principle must be the same between the sureties, and for the like reason, more especially in view of the statute which, when the principal is insolvent or out of the State, allows a surety, who had paid the debt, to recover contribution from a cosurety of the latter, a ratable part. The Code, sec. 2094. All the elements entering into and constituting civil responsibility are found in the facts of this case. The executors were for a time in the action, and were cognizant of its aims, and they retired from it, not for anything done by the present plaintiff, but solely because the money could more readily be made out of a solvent estate, without the delay of an inquiry into the condition of the surety represented by the executors, and the resources in their hands.

II. The plaintiff proposed to show, by the oath of the clerk and of one of her attorneys, that, after diligent search in the office, the papers relating to the amendment made in the form of the judgment, the papers showing it to have been done, could not be found, and that the docket only contained this memorandum at Fall Term, 1879: "Motion to amend judgment granted," with the view of letting in secondary evidence of the action of the court.

This being deemed sufficient proof of the loss, she was allowed (564) to introduce a certified copy of the record of the Supreme Court, to which a transcript had been sent on the appeal from the Superior Court. The defendant objected to the introduction of secondary evidence, for that, the loss of the original, in the motion to amend, had not been sufficiently shown. The objection was overruled, the court finding that the loss, after so diligent a search, had been established.

It is only necessary to say of this exception, that if there was evidence of the loss before the judge, his finding the fact is not the subject of review in this Court, but is conclusive of the matter. Thus when the question is, whether a confession was voluntarily made, or superinduced by fear or hope held out, the finding by the judge is the determination of a fact, not examinable on appeal, but the ruling as to what such fear or hope is, which shall exclude, is a matter of law, an error in regard to which is open to review and correction. *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.

In like manner, the presiding judge must, himself, determine the fact upon which the competency of a witness to testify depends, upon a preliminary inquiry, as whether a person is an expert, so as to give an opinion to the jury. *S. v. Secrest,* 80 N. C., 450; *Flynt v. Bodenhamer, ibid.,* 205; or whether the witness was of mixed blood, when, under the former law, he would not be competent to give evidence against a white person. *S. v. Norton,* 1 Winst., 303; or the search for a lost paper, was sufficient to admit proof of its contents. *Kidder v. McIlhenny,* 81 N. C., 123; *Jones v. Call,* 93 N. C., 170; *Stith v. Lockabill,* 68 N. C., 227.

The plaintiff was then, after objection, which was not sustained, allowed, after offering direct evidence of the insolvency of James A. Covington, by producing judgments and unsatisfied executions issued and returned, to prove the general repute of his insolvency, and that of D. B. McKenzie, where they were known, for some years before the bringing of this suit.

There is no error in admitting the testimony as to insolvency, (565) which, in the words of *Henderson, J.,* in *S. v. Cochran,* 2 Dev., 63, is, in his opinion, "the best, and almost the only, proof by which such facts can be established." They exist, he continues, "in reputation,

for although proof may be had that a person had much property in possession, yet, when the question arises, collaterally, recourse must be had to common reputation as to his being the owner, and not to the title deeds, and especially, whether he is a moneyed man." . . . "Besides, it is of such a character that it is almost impossible for it to become reputation, unless the fact be so." *Smith v. N. C. R. R. Co.,* 68 N. C., 107.

4. In further proof of the inability to make the money out of the principal debtor, James A. Covington, it was shown, upon oral testimony from H. C. Wall, that his exemptions were laid off not long after obtaining the judgment, and the excess, a mule and fifty acres of land, sold and bought by witness; that subsequently, in 1878, the land allotted as a homestead was also sold under execution, and purchased by a son of the debtor, bearing the same name, and paid for with money ($350) loaned him by the witness.

After diligent search in the office of the clerk, by the present clerk, who had been sheriff, and made the sale, assisted by J. W. Cole, no record or papers relating to the allotment of the exemptions could be found. There was, however, shown an entry on the judgment docket, showing that execution had issued on a judgment in favor of H. C. Wall against the debtor, returnable to Spring Term, 1886.

The witness Long, acting as sheriff at the time, testified to the fact that an execution did come into his hands as described in the entry, under which, after an assignment of property exempt, he sold the excess.

Witnesses were also introduced and permitted, after objection,
(566) from defendants, overruled, to testify to the facts, and that there was such a setting apart of exempt property in the manner prescribed by law. The error assigned is, that the proceeding is required to be in writing and filed in the clerk's office, and no sufficient proof had been given of its loss.

What has already been said upon this point disposes of the exception without further remark.

There was also evidence of the sale of the homestead itself, by the sheriff, under executions issued at the instance of H. C. Wall and others, on judgments recovered by the several parties, and its conveyance to the same persons that bought the excess, one of said judgments being upon a debt contracted in 1865—and the disposition of what estate was left at his death by the cosurety McKenzie. The plaintiff further offered the report of the referee, in the present case, to show that the executor had some assets. The objection to this latter is based upon the fact, that exceptions to the report had not been passed on, and as this is directed not so much to its *competency* as to its *effect,* we forbear further comment.

The defendants then proposed to sustain their defense under the statute of limitations, by proof of advertisement for creditors of the estate of E. P. Covington, which was ruled out as immaterial, and to which they excepted.

In this there is no error, for the statute begins to run against a surety paying a debt only from the time of his sustaining damage, as has been repeatedly decided. *Sherrod v. Woodward,* 4 Dev., 360; *Reynolds v. Magness,* 2 Ired., 26; *Ponder v. Carter,* 12 Ired., 242; *Parham v. Green,* 64 N. C., 436.

The plaintiffs asks that certain instructions be given to the jury:

1. If, by the exercise of reasonable diligence, plaintiff could not, at the time the cause of action accrued, have collected any (567) part of the debt out of J. A. Covington, the jury will respond to the second issue, Yes.

2. If the property of said Covington, at the time the cause of action accrued, was insufficient to pay any part of his debt, the jury will respond to the second issue, Yes.

3. If the jury believe, that if the plaintiff paid the amounts set forth in the complaint, on a judgment obtained against her in the action on the bond of James A. Covington, as administrator of John P. Covington, and that the amounts were paid on or before 5 April, 1877, and further, that James A. Covington is wholly insolvent, then the jury will respond to the third issue, "Yes, in the sum of $3,034." Given.

4th. That if plaintiff paid the said amounts on said judgments, then, even if plaintiff could have made part of her claim out of him, but not all, the plaintiff would be entitled to recover one-half of the amount paid (McKenzie's estate being admitted insolvent), less the amount that could be recovered out of James A. Covington, and the plaintiff would be entitled to recover one-half of what would remain after deducting from the amount of payments, the amount that could have been collected from James A. Covington. Given.

5th. That James A. Covington was, and is, entitled to his homestead and personal property exemptions, as against plaintiff's claim, and under any execution issued on a judgment recovered on said claim against him. Given.

6th. That if the jury finds that James A. Covington's homestead was laid off to him in 1876, prior to the time plaintiff paid the money, and the excess was sold under the Wall execution, and all that time there was a judgment against James A. Covington, recovered upon a debt contracted prior to 1868, and that under an execution, issued upon that judgment from the Superior Court, the homestead was sold, and James A. Covington had no real estate but that so sold, and has (568)

now no personal or real property over and above that allowed him by law, as an exemption, then they will respond to the second issue, "Yes." Given.

7th. That if E. P. Covington was a party to the action on the administration bond of James A. Covington, and knew of the judgment against the plaintiff before this action was brought, he was put on inquiry as to the payment made by this plaintiff, and, in law, is presumed to have known that plaintiff had paid the judgment. Given.

The defendant asked for the following instructions, which were given or refused, as herein set forth:

1st. That the homestead and personal property exemptions are not good against plaintiff's claim. Not given.

2d. That if the jury believe James A. Covington had any property at the commencement of this action, which could be sold under execution, jury will respond to second issue, "No." Given.

3d. That if the jury believe James A. Covington has any property now, which can be reached by an execution, jury will respond to second issue, "No." Given.

4th. That the burden of proof is on the plaintiff, to show that James A. Covington had no property at the commencement of this action, or at this time, which can be reached by execution, he not being a party to this action. Given.

5th. That insolvency in this case means that plaintiff could not, at the commencement of this action, and cannot now, find any property of James A. Covington, which could be reached by an execution. Given.

6th. That if the jury believe the evidence, they will respond to the second issue, "No." Not given.

Instructions were asked by the plaintiff with reference to the insolvency of B. B. McKenzie's estate, but the defendants admitting that it was insolvent, and consenting that the first issue should be answered affirmatively, the instructions were withdrawn.

(569) It was contended in argument by the defendants, that James A. Covington was a necessary party to this action, and that plaintiff could not recover without his presence as a party.

The court was of the opinion, and so held, that the objection of defendants, now for the first time made, should have been by demurrer.

The jury rendered the verdict set forth in the record.

In the application by the defendants for a new trial, the errors are assigned, in the reception of incompetent evidence, in the instructions given at plaintiff's request, and in refusing such of those asked for defendants as were not given, which being denied, and judgment rendered, the defendants appealed.

Under the rule of practice, we consider only such errors as are set out in the record of the motion for a new trial, understanding all others, in the form of exceptions, taken during the hearing of the trial, upon a more deliberate examination to have been abandoned. Moreover, we do not admit an assignment of errors in an entire charge, consisting, as here, of a series of distinct propositions, seven in number, but a specific pointing out of the alleged errors is required, or they will not be noticed. *Bost v. Bost,* 87 N. C., 477; *McDonald v. Carson,* 94 N. C., 497; *Williams v. Johnson, ibid.,* 633, and other cases.

None such as are pointed out in the series of instructions of the plaintiff, and the general terms in which reference is made to them, as a body, in the application for a new trial, come under the rule.

Of the defendants' refused instructions, that numbered 6 relates to the credit to be given to the evidence, and this is exclusively the province of the jury to determine.

The first of these, involving the liability of the exempted estate, real and personal, to the plaintiff's debt, seems not to be (570) pertinent to any issue between the parties. That land has also been sold under execution, upon a debt contracted in 1865, and has passed beyond the reach of any process to be sued out by this plaintiff. If, but for this, it could have been sold in this action, it is no longer so liable, and hence the instruction expresses but a speculative proposition. The creditor, who sued and recovered of this plaintiff, has forced payment from the assets of her testator, and upon every principle she may seek contribution from one equally liable for the debt, and this in an action at law. Fell's Guar. and Surety, 260, 297; *Powell v. Matthis,* 4 Ired., 83.

The statute gives the action against a cosurety whenever "the principal shall be insolvent or out of the State"—That is, when this state of things exist at the time when the action is prosecuted—not when the creditor prosecuted his action against the surety, for he could compel payment by suing the surety alone, whatever property the principal debtor might then have. Code, sec. 2094.

While, then, these exemptions may not prevail against a surety whose right of action springs out of an implied contract between sureties, as it does out of the relation of the principal to each, though the right to sue upon it begins at the time of payment, it can have no bearing in the present case, as it is no hindrance to the plaintiff's action.

The remaining objection, that James A. Covington is a necessary party, if possessing any force, when made in apt time, finds its answer in the fact, that his relations to the controversy appearing in the complaint, the remedy was by demurrer, and, if they did not so appear, by

answer, bringing out the facts and insisting upon the objection. Code, sec. 239, par. 4, secs. 241 and 242.

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

No error. Judgment affirmed.

Cited: Pegram v. Tel. Co., 100 N. C., 37; *McKinnon v. Morrison*, 104 N. C., 362; *Kornegay v. Steamboat Co.*, 107 N. C., 117; *Miller v. Shoaf*, 110 N. C., 322; *S. v. McDuffie, ibid.*, 887; *Blue v. R. R.*, 117 N. C., 648; *Styers v. Alspaugh*, 118 N. C., 634; *Webb v. Atkinson*, 124 N. C., 454; *McAfee v. Gregg*, 140 N. C., 449; *Miller v. Pitts*, 152 N. C., 632; *Mills v. McDaniel*, 155 N. C., 250; *Hendricks v. Ireland*, 162 N. C., 525; *Shuford v. Cook*, 164 N. C., 48; *Mesker v. West*, 192 N. C., 231.

(571)

W. W. GWATHNEY, C. G. ELLIOTT AND TEMPLE GWATHNEY, PARTNERS AS GWATHNEY & COMPANY, v. A. E. ETHERIDGE AND E. C. BROOKS, TRADING AS ETHERIDGE & BROOKS.

Agricultural Liens—Chattel Mortgages—Description of Property in Conveyances, etc.

1. An agreement in writing, whereby a farmer professes to give a lien for supplies upon the crops to be raised on certain lands *described*, and upon *any other land he may cultivate in the county*, is effectual as to the crops on the land described, but void as to those raised on any other land.
2. Mortgages or liens under the statute of this State, on crops to be produced, are to be upheld only where the land on which they are to be raised is identified at the time the lien is created.
3. It is sufficient to describe the land as *a field or farm in the possession of* the mortgagor or seller, or lands *owned or rented* by him during the present year—the then possession fixing the identity.

CIVIL ACTION, tried before *Avery, J.*, at Fall Term, 1887, of the Superior Court of HALIFAX County.

It appears that on 28 January, 1884, the plaintiffs commission merchants agreed to supply to R. W. Carter, A. J. Wood and W. W. Carter, from time to time, "supplies" and money during the year 1884, to an amount not exceeding $1,000, to be by them expended in the cultivation of a crop to be produced during that year; and they executed to the plaintiffs, on that day, an agreement in writing, creating a lien in their

favor, upon the crop so to be cultivated, to secure the payment of the "supplies" and money so to be supplied, as allowed by the statute (The Code, sec. 1799). This agreement provided, among other things, in respect to such "supplies" and money, that the same were to be used and expended in the cultivation of a crop during that year, upon "the lands of D. B. Bell, situated in the county of Halifax, adjoining the lands of T. J. Ryan and others, *and upon any other lands we may cultivate in said county.*" It further provided as follows: "And (572) we do hereby give to the said W. W. Gwathney & Co. a lien upon all the crops which may be made by us upon said lands during said year." . . . And for the further securing of said advances to be made to us, we do hereby sell and convey to W. W. Gwathney & Co., and their assigns, the following described property, to wit: "All our interest in the rents or shares of all the crops that may be made on said lands, *or any other* lands we *may* cultivate in said county of Halifax," etc.

The plaintiffs allege in their complaint, that the contemplated crop was produced, but their debt, so created and secured, was not paid, and that the makers of the agreement and lien mentioned, shipped to the defendants commission merchants "fifty bales of cotton of the crops, rents and shares of crops aforesaid, on which the plaintiffs had a lien as aforesaid, and the same were, by said defendants, sold and converted to their own use," etc.

The following is a copy of so much of the case settled on appeal as need be set forth here:

"It is agreed, as a fact, that the cotton in controversy was made by W. W. Carter, on his home tract of land, not on the D. B. Bell land, and shipped by him to Etheridge & Brooks; and also, that R. H. Carter and A. J. Wood raised a crop for the year 1884, on the D. B. Bell land; that they had no interest in the said crop raised by W. W. Carter, and W. W. Carter was not interested in the crop raised on the Bell land; the advances made by plaintiffs were not, in fact, used on the W. W. Carter land, while he did use the advances made by Etheridge & Brooks on the crop raised on his own land.

"It was agreed, that the cotton was worth $298.16. It is agreed, that if the plaintiffs are entitled to judgment at all, they are entitled to interest from 22 January, 1885, on that amount.

"Upon the facts admitted, the court instructed the jury, that (573) the title to the cotton in controversy passed to plaintiffs by the mortgage deed, and they were entitled to the value of it."

There was a verdict and judgment for the plaintiffs, and the defendants, having excepted, appealed to this Court.

T. M. Hill for plaintiffs.
J. M. Grizzard (by brief) for defendants.

MERRIMON, J., after stating the case as above: It appears that the cotton in question was not produced on the land, described in the written agreement creating the lien as "the land of D. B. Bell," etc., and in our judgment, the lien, relied upon by the plaintiffs was operative and effectual only as to the cotton produced on that land, which was specially designated and specified as the particular land, upon which a crop was to be cultivated and produced, to which the lien should attach. As to it, there was present certainty that gave point and direction to the lien, and identified, in an important sense, that property to which it should attach, and upon which it should operate and be effectual. It is essential to an operative sale of property in existence, or yet to be produced—as crops from land—that there shall be, *at the time of the contract of sale,* something that specifies, separates and identifies the property sold, so that it may be distinguished from other and like property, presently, or when it comes into existence. There can be no sale of property where the seller cannot know what he sells, and the buyer cannot know what he buys, as to its identity.

Hence, we think that so much of the agreement, in writing, in respect to the lands to be cultivated, and crops to be produced thereon, as is embraced in the clause, "and upon any other lands we *may* cultivate in said county," is inoperative and void, for uncertainty. The clause did not presently, at the time of the contract of sale, designate any (574) particular land to be cultivated, and the crops to be produced on them; and the plaintiffs could not then know what crops, if any, they were buying, or what they would get at the end of the year, nor did the sellers know what they were selling; there was then nothing certain, to give point and direction to the lien sought to be created, as there would have been, if the description had been the "crops to be produced on W. W. Carter's home place—his own land," or the like description. It is not sufficient that the crop will be certain, and have identity, when it shall be produced on any lands in Halifax County, by the parties undertaking to give the lien. The nature of a sale requires, that the thing sold shall have distinctive identity at the time it is sold, whether it is then capable of actual delivery, or it will become so at a future time, as the product of something presently identified.

The sale or mortgage of prospective crops, yet to be produced from the soil, is of modern origin and growth. How to sell something that yet has no existence, but is to be produced out of something in existence, and pass the title to it, is not free from embarrassment, but the multiplying wants and necessities of society render such sales necessary.

Legislatures have, in some measure, provided for them, and the courts uphold them, as far as they can, consistently with settled principles of law. But it seems that the courts have not gone further—certainly this Court has not—than to decide that mortgages or liens on crops to be produced, as allowed by the statute, will be upheld, when the land on which the crop is to be produced is designated—identified in some way, at the time the lien shall be created. To go beyond this, would strike down some of the essential elements of a sale, of a mortgage and liens created by a simple agreement in writing, as allowed by the statute in certain cases, and establish a new sort of floating conveyance, that could be applied at the convenience of the party taking benefit by it, and pass the title to, and create liens upon, property not in (575) existence, or even contemplated at the time of the sale, when and as soon as it might come into existence. This could not, it seems to us, fail to give rise to great uncertainty, confusion and injustice in important classes of business transactions.

Judge Story, writing on this subject, in his work on Sales, sec. 185, says: that if the "thing sold or mortgaged be the natural product, or expected increase, of something to which the seller or mortgagor has a present valid right, the sale or mortgage will be good." Another writer says, that "whatever has a potential existence, is the subject of sale or mortgage; for example, an unplanted crop or future products of a farm, to be raised by one in possession of land, as owner or lessee, is the subject of a sale or mortgage." Jones on Chat. Mort., sec. 143. So, the wine to be made from a certain vineyard, or the wool that shall be grown upon a *certain flock* of sheep. Such things have no actual existence, but as they are naturally expected to spring from something in which the owner *has a present right,* they have what is considered a potential existence, and are held to be the subject of sale or mortgage. Benjamin on Sales, 63, 103; *Robinson v. Ezzell,* 72 N. C., 231; *Cotton v. Willoughby,* 83 N. C., 75; *Harriss v. Jones, ibid.,* 317; *Rawlings v. Hunt,* 90 N. C., 270; *Wooten v. Hill,* 98 N. C., 48.

In *Atkinson v. Graves, supra, Mr. Justice Ashe* said: "A mortgage or sale of a crop, to be raised on a *certain field or farm in the possession* of the mortgagor or seller, is as far as the principle has been carried in respect to planted crops; but it has never, as we are aware, been extended to the products of the soil to be raised, without designating the place where they are to be produced."

The learned counsel for the appellees cited and relied much upon *Woodlief v. Harris,* 95 N. C., 211, in which the *Chief Justice* said: "The other objection, that no place is described on which the crop is to be made, is not sustained. It gives a lien on all crops raised on (576)

lands *owned or rented by me during the present year.*" We think this case does not contravene what we have here said, or the authority cited. The words "lands *owned or rented* by me during the present year," described property that the mortgagor then owned or had leased for that year—not *"any other* lands he *may* (might) *cultivate"* that year, as, in the present case, the agreement in question provides. In that case, *Atkinson v. Graves, supra*, is cited with approval, and the argument is in effect the same in both cases.

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

Error. *Venire de novo.*

Cited: Brown v. Miller, 108 N. C., 398; *Weil v. Flowers,* 109 N. C., 216; *Crinkley v. Egerton,* 113 N. C., 146; *Hurley v. Ray,* 160 N. C., 379.

WILLIAM M. MEREDITH v. CRANBERRY COAL AND IRON COMPANY.

Issues—Judge's charge—Contributory Negligence.

1. Though the issues tendered by a defendant eliminated more distinctly the matters controverted in the pleadings than those adopted by the court, he has no ground of complaint if the instructions to the jury raised every defense available to him under those he tendered.
2. Where the defense to an action for damages resulting from an accident to the plaintiff, an employee of defendant's railway, was a want of care and prudence on the part of the plaintiff and those identified with him, and there was evidence tending to sustain the defense: *Held*, that a charge, ignoring the plaintiff's negligence, or coöperating agency in the accident, or that of those identified with him, is erroneous.
3. Though the defendant has been negligent, yet, if plaintiff, by reasonable care and prudence, could have averted the accident, he is not entitled to recover.

(577) CIVIL ACTION, tried before *MacRae, J.*, at Spring Term, 1887, of the Superior Court of MITCHELL County.

The facts sufficiently appear in the opinion.

G. N. Folk, D. Schenck, J. F. Morphew and W. B. Council for plaintiff.

Hoke & Hoke and W. H. Malone for defendants.

SMITH, C. J. The plaintiff, an employee of the defendant company, at per diem wages, while engaged in transporting wood, to be converted into coal, from the forest to the woodyard over a tramway constructed for that purpose, was struck with a stick of wood, protruding from a loaded car, and thrown from the platform on which he was standing, and suffered the injury for which compensation is demanded in the present action. The complaint alleges, that this was brought about by the cording or packing of the wood too near the tramway, and on either side of it, as directed by one Allen Nimson, a manager and middle man, representing the company in the operation of this department of the work, by reason of which proximity, a loose stick, slipping from the load on a passing car, came in contact with that packed, and in its rebound knocked the plaintiff off, and caused the injuries complained of.

The answer denies the charge of negligence, in placing the wood where it was stacked, denies that Nimson was such representative of the company, and insists that the primary and direct cause of the accident, was the negligent packing of the wood on the car and its too rapid running, causing the load to jostle and some of the sticks to slip out of place, to prevent which, the plaintiff imprudently seized one of them; and that in all this packing and transporting, the plaintiff participated with his associate fellow-workmen.

The issues deduced from the conflicting allegations contained in the pleadings and submitted by the court to the jury, were:

1. Was the plaintiff's injury caused by the negligence of the (578) defendant? To which the response was, Yes.

2. Did the plaintiff contribute to his own injury by negligence on his part? Answer: No.

3. What damage has plaintiff sustained by reason of defendant's negligence? Answer: $5,000.

The defendant, besides a similar issue as to the amount of damages, in place of the two first, proposed the three following, which were refused:

1. Did the defendant cause the wood to be so negligently packed on the side of the track of the tramroad as to make it hazardous for the loaded tram car to pass?

2. Was the plaintiff guilty of negligence, in not using ordinary care and prudence in running the tram car so as to avoid danger?

3. Was the plaintiff a fellow-servant with Allen Nimson?

The facts disclosed in the testimony, heard at the trial, so far as they are necessary to elucidate the matter on which the determination of the defendant's appeal rests, are, in substance, the following:

The wood was cut and brought from the forest, a mile distant from the place of deposit in the yard, on flat cars, each carrying a cord, pass-

ing over a tram or railway, on an inclined plane, and descending by force of gravitation, the speed being controlled by brakes on each. At the time of the accident, the train consisted of two loaded cars, upon the rear platform of the foremost of which, the plaintiff was standing. The train was moving with unusual rapidity, and several sticks of the wood on a car were jostled and began to slide, to prevent which, the plaintiff being called on to do so by one Bass, a fellow-servant, at the lower end of the nearest car, stepped on the adjoining platform of that car, and seized a loose stick, with the intention of replacing it, and in doing so, the stick came in contact with the stacked wood, and the other end struck the plaintiff with great violence and threw him to the ground.
(579) While prostrated, he sustained the injury mentioned. The placing and stacking the wood so near the tramway was done by the express order of said Nimson, to whose charge and management the business was confided by the defendant, and his colaborers in the work of transportation, as was the loading of the cars and accompanying them to the place of unloading, but it does not appear that any instructions were given as to the manner of putting up the wood, or supervision exercised over the work as it progressed.

It was no uncommon thing, as the plaintiff himself testifies, for the wood on the car to be so disturbed by jarring of the car in motion, and if not going too fast, it was not hazardous to arrest it, and retain it in place, in the manner attempted in this case. It was, if the car was going rapidly. A witness for the defendant, John Ellis, who graded the track, and had been connected with the road for 33 years, after describing the declivity of it, and its passing between the stacks on either side of the yard, testified to having cautioned the plaintiff, perhaps as many as twenty times, about running too fast, and told him that some of the men would be killed if they came down so rapidly, and that sometimes, when himself riding on the cars, he would enjoin it on the employees to run slowly.

They were expected to make eight trips a day, and lacked one of completing the number at the hour 3 p.m., on Saturday, when the plaintiff was hurt.

Allen Nimson, examined for the defendant, also testified to his warning repeatedly when riding on the cars, and when passing them in motion cautioned the hands in charge, the plaintiff among them, against fast running, and that the plaintiff had been in this employment from one and a half to two years.

There was a general concurrence of opinion among the witnesses, and especially among those of skill and experience, in the defendant's
(580) service, who were introduced by it, that cars could, when so loaded, be run with safety, if run slowly, and little, if any, hazard

would be incurred in restoring slipping pieces to their proper place by hand; but it would be otherwise, if the cars were moving at a rapid rate. Whether the cars were moving at an increased speed on this occasion, the evidence was somewhat in conflict, but none that they moved slowly.

There was much testimony as to the powers conferred upon Nimson, and exercised by him for, and in place of, the company, and whether the legal effect was to lift him above the sphere of coservant, to the place of their common principal, in his relation to them, which we do not reproduce, as our decision of the case rests upon other grounds.

The issues tendered for the defendant eliminate more distinctly, in our opinion, the subject-matter of controversy presented in the pleadings, than do those adopted by the court; but the instructions to the jury, upon them, raised every defense available to the defendant under the others. Its responsibility was made to depend upon actual negligence of its own, the distinction pointed out when it proceeds from a fellow-servant, and when it proceeds from one who, as a middle man, assumes the relation of his principal towards subordinate employees, the absence of contributory negligence on the part of the plaintiff, all which enter into the question of the defendant's liability for damages.

But we do not think that the concurring agency of the plaintiff, as involving a want of care and prudence on his part, was, upon the evidence, with sufficient distinctness presented to the jury.

The culpability imputed to the company was not in the insecure manner of packing the wood, nor did the injury arise from a want of care in this particular, for the wood remained steadfast in its place; but, in causing it to be packed in such close proximity to that on the passing car. Even in this packing the plaintiff himself took part.

The accident was directly brought about by what took place on (581) the car, and the question of the want of due care in those managing it, in avoidance, was not clearly presented in the charge, as a contingency upon which the company's responsibility depended.

A portion of the charge, to which exception was taken, is in these words: "It is not now contended, that the wood was so placed as to strike the car, or the plaintiff upon the car, in the discharge of his duties. It is said to have been caused by a stick falling and striking the wood rack and rebounding against the plaintiff. In order to make the injury the result of the negligence of the defendant, it must have been produced by this negligence concurring with some other act. *If a stick of wood, dipping from the car, struck the wood so negligently placed, and was hurled against plaintiff, and so caused the injury, the injury would be the result of negligence of defendant.* If all these matters concur, then you are to answer the first issue, 'Yes.'"

It will be observed that this instruction ignores, or leaves out of view, the direct coöperating agency of the plaintiff, and those with whom he is identified, in running the cars, to which the accident is primarily attributable, and omits to submit to the jury the question of the plaintiff's own negligence, in bringing it about. If the piling the wood so near the track of the cars was improvident and careless, so as to expose those on and operating them, to needless peril, it was not less their duty to use reasonable care and vigilance in avoiding the consequences of the defendant's negligence, as would suggest themselves to a person of ordinary prudence for his own protection. If there was in this a failure to use such precaution, and harm followed, the plaintiff, as the author of his own damage, would be barred of redress upon the defendant, notwithstanding the prior negligence in the packing.

(582) The true rule for determining the civil responsibility in cases where each party has been negligent, is set out in *Gunter v. Wicker,* 85 N. C., 310, and in *Farmer v. R. R.,* 88 N. C., 569, where the plaintiff's negligence preceded that of the defendant, and was a *remote,* but not *proximate cause,* of the injury, thus: "If the act (of the plaintiff) is directly connected, so as to be concurrent, with that of the defendant, then his negligence is *proximate,* and will bar his recovery; but when the negligent act of the plaintiff precedes, in point of time, that of the defendant, then it is held to be a *remote* cause of the injury, and will not bar a recovery, if the injury could have been prevented by the exercise of reasonable care and prudence on the part of the defendant."

The correlative proposition is equally supported by authority, that when the defendant has been negligent, yet if the plaintiff neglected those reasonable precautions, by which the injury could have been averted, and which he is expected to use, he cannot have compensation for damages caused by his own want of care and prudence. *Owens v. R. R.,* 88 N. C., 502.

Now, there was much evidence upon this point. Testimony was offered to show that the plaintiff assisted in placing the wood where Nimson had pointed out, and in loading the cars and transporting to the yard, and had been in the defendant's employ from one and a half to two years previously. He had been repeatedly warned, by superior officers, of the danger of running the cars too fast; by one of them, fifteen or twenty times, and had been told that some of the men would be killed, if the rapid running was persisted in. He knew, for he says, it was no uncommon thing for the wood to be jarred and displaced when the cars were in motion, and more so when running fast. Thus warned of danger, greater circumspection and vigilance were required of him, and this aspect of the case, on the evidence, was not, as we think, fully

called to the attention of the jury, in passing upon the question of the plaintiff's right of action against the company. We have (583) assumed, though we by no means intend to decide the fact so to be, for the present only, that Nimson was, in a legal sense, as his oversight and functions described by any of the witnesses who understood what they were, a *"middle man,"* in substitution of the principal, in his relations to subordinate servants, so that his orders in regard to stacking the wood, would be the same as if emanating directly from the company, so as to raise an inquiry into the imputed coöperative agency of the plaintiff in causing his own injury.

Passing by the other exceptions, with the general remark, that most of them are obnoxious to the criticism of the plaintiff's counsel, as wanting in specific and distinct statement of assigned error, we award a new trial, to be granted in the court below, for the error discussed in the opinion.

Error. *Venire de novo.*

Cited: Mace v. Life Assn., 101 N. C., 126; *McAdoo v. R. R.,* 105 N. C., 151; *Braswell v. Johnston,* 108 N. C., 152; *Blackwell v. R. R.,* 111 N. C., 153; *Pickett v. R. R.,* 117 N. C., 630; *Purnell v. R. R.,* 122 N. C., 851; *Penny v. R. R.,* 153 N. C., 305; *S. v. Kincaid,* 183 N. C., 718.

MARY C. KING ET AL. v. SUSAN MILLER ET AL.

Dower—Waste.

1. In an action of waste, it is not error to permit the defendant, life tenant, to prove that the usage, in that part of the country in which the premises are situate, was to treat and manage lands of the character of that in controversy in the manner in which defendant had treated the *locus in quo.* (2) Nor is it error to permit a farmer of the vicinity to testify that, in his opinion, the defendant had done no more (in the nature of waste) than was necessary to make a living out of the land, such evidence being competent to repel a charge of reckless and wanton misuse of the premises.

2. A dowress may use, and also *sell,* fallen or dead trees, as the use of such belongs to her, and does not, in law, impair the inheritance. She may clear for cultivation as much of the land as a prudent owner of the fee would do, and sell the timber cut in doing so. In clearing land, she must have due regard to the proportion of wooded and cleared land on the dower.

3. While, in its essential elements, waste is the same in this country and in England, being a spoil or destruction of houses, trees, etc., to the permanent injury of the inheritance; yet, in respect to *acts which constitute waste*, the rules are not the same. Here, an act is not *waste in law* which is not *waste in fact*. The real and important inquiry, in such cases, is, has the land been abused, during the life tenant's occupancy, by a spoliation unwarranted by the usage of prudent husbandmen in respect to their own property, to the impairment of it, as a whole, in value?

(584) CIVIL ACTION, tried before *MacRae, J.*, and a jury, at Fall Term, 1887, of MECKLENBURG Superior Court.

Judgment for defendants; plaintiffs appealed.

A. C. Miller died, intestate, in the year 1865, possessed of an estate in fee of lands, out of which the defendant Susan Miller has, by proper proceedings, caused a portion, consisting of a tract of 250 acres, and a small lot of 2½ acres, as described in the complaint, to be assigned to her as dower. The reversion in the lands, so set apart, has descended to the plaintiffs, and the defendants, associated with the said Susan because they refused to join in the action, as tenants in common. The plaintiff, M. C. King, added to her share by taking a conveyance of the share of A. C. Elwood, one of the heirs to whom the inheritance descended.

The complaint alleges the commission of waste upon the premises, by the life tenant, in cutting down, for the purpose of sale and selling, large numbers of valuable trees, oak, hickory, pine and other wood, for timber and firewood, and in other ways, specified therein, greatly damaging the inheritance, and concludes by demanding the possession of the land wasted, and $500 for the damage done thereto.

(585) The defendant Susan, admitting the title to be, as alleged by the plaintiffs, in them, and in the other defendants, in undivided parts, denies the charge of waste, and the owners, made defendants, make no answer to the complaint.

Two issues were submitted to the jury:

1. Did the defendant Susan Miller commit waste upon the lands described in the complaint?

2. What damage, if any, have the plaintiffs sustained by reason thereof?

To the first inquiry, the jury responded in the negative, and no answer was returned to the other.

The testimony of the witnesses is set out in full in the case on appeal, and we deem it necessary to reproduce, in condensed form, so much of it as tends to show the acts of the tenant in dower, in which the waste is alleged to have been committed, and illustrative of the charge complained of, and to present the exceptions to the rulings upon questions of evidence.

One McLure, for the plaintiffs, testified that, at the intestate's death, in 1865, he had from 80 to 100 acres in cultivation, and since, from 20 to 30 acres had been cleared; that there was considerable wood—pine, oak and hickory—on the tract; that some of the open land was in good farming condition, other parts pretty well worn-out and thin; that John Hunter and John Deaton cut saw-logs, most of them from dead wood; that witness had seen several persons hauling wood to town; that the woodland adjoining that belonging to witness, was pretty heavily timbered, but most of the saw-logs were taken off by Hunter; that a small piece of meadow, laid off for dower, of three or four acres, two acres of which had timber on it, has been ditched and planted in corn, and is now in very good condition; that the intestate had a large body of land, besides that assigned in dower, much of which was thin and began to wear out, and some he had turned into pasture; that the land, abandoned by the defendant as worn out, has grown up in timber and improved; that she has turned out land as it became im- (586) poverished, and has cleared other land, and done no more in this direction than was necessary to make her a comfortable living; that considerable improvement, requiring the use of timber, has been put on the place; that the saw-logs cut were of scattering pine, and the oak timber is there yet; that the meadow was very wet—kept for mowing by the deceased—and witness cannot say that it is not worth as much now as before the clearing; that it is a custom among farmers to clear more land, as that in cultivation was worn out, but this depends upon the amount of timbered land on a farm, and that cutting out timber trees gave the young timber greater facilities for growth.

The defendant objected to the testimony, as to the usage in that part of the country, to turn out worn out and impoverished lands, and replace them with new clearings; but it was admitted, and to this ruling the first exception is taken.

John Henderson swore that good crops were made by the deceased on the land where his widow now lives; that part of the place was very good—part broken—farm on an average in good condition; fences in repair; a forest in oak, hickory, and old field pine, over 100 acres, and about 60 acres of it kept in forest; that stock timber has been cut on both north and south ends of the tract; that some 30 acres have been cleared since A. C. Miller died, and this generally yields 30 cords to the acre.

The witness thinks the removal of the timber trees from the meadow has lessened its value by ten dollars, but it brings as fine corn as any land in that country, and says that the deceased had the farm in possession some seventeen years, and had, himself, thrown out, as unfit to cultivate, 7 or 8 acres, some of it having been tended apparently fifty

years; that the defendant has kept up the premises, not, however, in the state in which her husband kept them; has moved old houses,
(587) but built no new ones, and these are getting old and in decay, and the fences have all gone down under the stock law.

Other witnesses were examined by the plaintiffs, and gave substantially similar testimony, one of whom stated, that the prevalent custom was to get firewood where it was found; that it was good husbandry to cut out dead wood, and that farmers were in the habit of throwing out land when worn out, and taking in more, but that the practice "has gradually passed off since the war."

The defendant then proposed to show, that this witness was a farmer, living in that vicinity, and that, in his opinion, the defendant had done no more than was necessary to make a living out of the land.

Objection thereto was overruled, the evidence admitted, and to this the second exception was taken.

The testimony for the defendant, in substance, was to this effect:

One Henderson, who lives near the land, and has long known it, testified to the intestate's manner of farming, and his habit of abandoning land when reduced to sterility and unfit to tend, and clearing and opening fresh land, and such is the general custom; that when turned out, such exhausted fields grow up in pines, and recuperate materially, as is the case here; that this was necessary to make a subsistence, and that the work done on the meadow has rendered it more valuable.

Captain Orr, a farmer and cropper for 21 years, went upon the land in 1866, and found some of it very good upland; same tract, bottom of no account; fair crops could be made by manuring; and when the land was too impoverished to pay, it was left out and other taken in; cleared the plantation as far as needed, and what was not needed, hauled to town and sold; about 30 acres taken in, and from 40 to 60 acres left out. The clearing was necessary for a support to defendant and her tenants,
(588) and to carry on farming operations. Of the part thus abandoned, the growth of pines on it has improved it very much, and increased its value, and such has been the effect of work upon the meadow; good stocks never hauled away by her and Hunter, who sawed and hauled; hauled defendant's part back, and when needed, we would borrow from him, and repay by letting him get saw stocks; one-fourth taken for the timber, and none of it sold; firewood in summer obtained by picking up poles and dry wood; in winter, solid wood was used, and trees would be felled when the tops were dying.

He further testified, that some firewood has every year been sent to town for sale; that is, once in awhile, and sometimes wood from cleared land, not used on the premises, was sold by tenants.

The defendant testified for herself similarly, about the abandoned and cleared parts of the farm, and that it was necessary for her to get a support; that she never sold any stocks of her lot, but used them on the premises for house, farm, paling, etc.

Upon her examination, her counsel proposed to prove that she sold the meadow tract some four or five years ago to one Hunter, but made no deed, nor was there any writing about it.

The plaintiff objected on the ground that title would not pass, nor could a deed be spoken of, without its being produced. The evidence was received, and the exception to the ruling is the third in the series.

It is not necessary to recite the additional testimony, to present the erroneous rulings assigned, as it is of the same kind as that set out, and concurrent in general tenor with it, and we proceed to state them:

Among other instructions, prayed by plaintiffs, were the following:

1. That if the jury believe the evidence in the case, they will respond to the first issue, "Yes."

2. That if she (the defendant) allowed any firewood to be cut (589) on the place for market, and solely for the purpose of profit, she committed waste, and the jury will answer the first issue, "Yes," and assess as damages such amount as will be a fair and reasonable compensation for the injury to the inheritance.

3. That if defendant Susan Miller converted meadow into arable land, or cultivated land, she was guilty of waste, and the jury will respond to the first issue, "Yes," and assess the damages in an amount sufficient to cover the injury done to the inheritance thereby.

The court declined to give the instructions as prayed, but gave the following instructions:

The plaintiffs, who are some of those who are the owners of the inheritance, sue Mrs. Miller, the defendant who has had her dower in this tract of land laid off to her, and others of the heirs, who refuse to join in this action against the dowress, are made defendants. The charge is, that she has cut saw-logs, a quantity of timber, oak, hickory, pine and other wood, for timber and firewood, and sold it; that she has cleared a large amount of woodland and turned it into cultivated fields, when there was already a sufficient quantity of arable land open to support her; that she has caused meadow land to be converted into cultivated fields, and that she has permitted other land, that was in cultivation, to grow up in shrubs, bushes and trees, and become wasted.

The first inquiry for you is, whether she has committed waste.

That is, has she unnecessarily cut down, or destroyed the timber, when there is already sufficient cleared land for her to cultivate; or has she permitted the cultivated land to be injured, by growing up in bushes,

trees, etc.; or has she changed, or permitted to be changed, meadow lands into cultivated fields, to the injury of the inheritance?

(590) The tenant in dower is entitled to take off from the land such timber as may be necessary to keep the houses and fences, the wagons and other farming implements such as plows in good repair, and to make such things as may be necessary for the use of the farm; and she would be entitled to make such a bargain with the sawmill men as was the usual and customary terms, upon which one can deliver so many saw-logs and get so much lumber in return. She is entitled to clear land for cultivation, if necessary to the enjoyment of the estate and a sufficient proportion of woodland is left, and if, in clearing such land, there is more firewood than she needs, she may sell it; she may not, however, sell that wood and cut other wood for her own use. It is not waste to permit cleared land to grow up in secondary growth, unless it works an injury to the inheritance. It is not waste to change a meadow into a cultivated field, provided it works no injury that is lasting damage to the inheritance. It is not waste to take all necessary wood for the use of the farm.

What is waste in cases like this, is a question which must be largely left to the discretion of the jury, upon the evidence. Did she take any more timber off the land than was necessary? Did she clear up more land than was necessary for her enjoyment of the life tenancy, and if she did, did she do lasting damage to the inheritance thereby? If the turning out of cultivated land, and allowing it to grow up in secondary growth, has the effect to make the land more valuable than it was before, it was no injury to the inheritance, and was not waste. If the meadow land was made more valuable by turning it into a corn and cotton field, it was not waste.

(591) If she took no more timber than was necessary for the use of the place, she had a right to use the tops of the trees, and she need not let them lie there and rot, but may sell them.

She might take the dead wood and the dying trees for firewood, and if there was not enough of that kind of wood for her own use, she had a right to cut green wood suitable for firewood. She might sell the dead wood, or if she cut down a dying tree, she might sell it. But she had no right to cut down trees for firewood or for timber and sell them; and if you find that she cut timber which was not necessary for the repairs of the houses, fences, wagons, and other farm stock, or if she cut green wood, not necessary for use, as firewood, or other farm purposes, it is waste, whether she sold it or not. If she caused timber trees to be cut down, and, by a miscalculation, there was a small amount over what was necessary for her use, and she received pay in money for it, this would not be waste.

Now, you are to consider all the testimony, and say, upon these instructions, whether she has committed waste. If you say no, you need not consider the other issue. If you say yes, you will proceed to inquire, what damages they have sustained. The damages would be the value of the wood or timber sold, or of the injury done to the inheritance, by turning out land, or by clearing land. You will ascertain the amount of the injury in money.

The plaintiffs assign the following errors:

1. That his Honor instructed the jury, "That if the meadow land was made more valuable by turning it into a corn and cotton field, it was not waste."

2. That his Honor instructed the jury, that the widow had the right to sell the tops of the trees, cut for timber for the use of the premises.

3. That his Honor instructed the jury, that the widow had the right to cut the dead wood, or dying trees, into firewood and sell the same.

4. That his Honor instructed the jury, that if the widow caused timber trees to be cut down, and, by a miscalculation, more was (592) cut than was necessary for her use, she might sell the excess, and use the proceeds of the sale.

5. That his Honor charged the jury, that the widow would have the right, in law, to sell the wood cut from the land, not for the purpose of clearing, in excess of what was needed as house-bote, or fire-bote, or other farm purposes.

6. That his Honor charged the jury, that the widow would be entitled to use for her own gain and profit, the wood cut from the land in clearing.

7. That his Honor charged the jury, that the widow would be entitled to make such a bargain with the sawmill man as was the usual and customary terms, upon which one can deliver so many saw-logs and get so much lumber in return; in other words, that the widow could pay for cutting, hauling and sawing, or any such services needed by her, by giving a part of the stock so cut, hauled and sawed.

8. That the charge of his Honor, with reference to the right of the widow to sell wood cut from the land not for the purpose of clearing, is inconsistent, and was calculated to mislead the jury, as to the law governing the case.

9. That his Honor refused the instructions which the plaintiffs requested him to give the jury.

10. That his Honor admitted testimony over the objection of plaintiffs, which was incompetent or irrelevant, as appears from plaintiffs' exceptions already noted.

P. D. Walker for plaintiffs.
C. N. Tillett for defendants.

SMITH, C. J., after stating the facts: 1st Exception. We do not see the force of an objection to an inquiry into the use made of the life estate in an issue as to waste, and in showing that the method of cultivation follows the practice and has the sanction of good farmers, and
(593) hence there has been no mismanagement or needless injury to the land, for which the defendant is accountable to the successors to the estate for actionable spoliation of the premises.

2d Ex. The exception next taken, and alike untenable, is, to evidence offered to repel the charge of a wanton and reckless misuse of the premises, and that the tenant only derived her support from the land, the very purpose for which the law gave it to her, to be enjoyed while living. This will find a fuller explanation in the examination of the law defining the limits to which the law permits the tenant in dower to go in the use of her estate. If there were grounds of objection to the evidence, it is rendered harmless, by the instructions given to the jury, for their guidance, afterwards.

3d Ex. The pertinency of the proof of a verbal disposition made of the three acres specified, some few years previous to the matter in controversy, is not apparent, and the reasons for opposing its reception are still less so. The attempted sale amounts to nothing, and proves nothing of injury or advantage, so far as we can see, to either party.

And what force is there in the objection, that a writing was necessary to give any efficacy to the transaction, and itself was the best evidence of its existence and terms, when there was no writing or deed to produce? We presume the exception is not properly set out in the transcript.

These exceptions disposed of, we come to the consideration of those that grow out of the instructions asked and refused, and such as are entered to the charge of the court.

1st Instruction asked: This could not be given without invading the province of the jury, to pass upon the testimony and ascertain what is proved by it, thus withdrawing the case altogether from their consideration and action.

2d Instruction asked: This involves an erroneous statement of the law, for the life tenant may use, and dispose of as well, fallen or
(594) dead trees on her dower, for firewood, or other purpose, as the use of such belongs to the dowress, and does not in law impair the inheritance.

3d Instruction asked: The negation of the proposition in law, contained in the third exception, was proper for the same reason, the tenant

not being absolutely under such instructions, such an act not being *waste in law,* when not *waste in fact,* as applied to the condition of the country, unless attended with injury and damage to the estate in remainder or reversion belonging to others. While, in its essential elements, waste is the same in this country and in England, being a spoil or destruction in houses, trees, and the like, to the permanent injury of the inheritance, yet in respect to *acts which constitute* waste, the rule that governs in a new and opening land, covered largely with primeval growth, must be very different. Where the proportions of arable and woodland are adjusted to give the greatest value to the farm in its present condition, a conversion of one kind into another may be in itself a waste committed, while here the clearing of the forest growth and fitting the virgin soil, which it covers, for cultivation, which is ordinarily an improvement, most valuable to the property, and is not, nor can it be, injurious to the succeeding estate in fee. In the full and clear exposition of the law, as applied to limited estates (and the cases decided are mostly cases of dower), held in this State in general, we give our approval, as warranted by previous adjudications, in adjusting the relative rights subsisting between the tenant for life and the tenant in remainder or reversion.

In an early case, *Ballentine v. Poyner,* 2 Hay., 110, *Haywood, J.,* says: "I would define waste thus—an unnecessary cutting down and disposing of timber, or destruction thereof, upon woodlands, where there is already sufficient cleared land for the widow to cultivate, and over and above what is necessary to be used for fuel, fences, plantation utensils, and the like," adding, however, that if the lands are covered with trees, such as juniper swamps, and can be put to no other use, and have value only in the growth upon them, then "the widow shall (595) not be liable for waste for using such timber, according to the ordinary use made of the same in that part of the country." To which it may be proper to fix a limit to the denudation, that it do not exceed the annual increase from natural growth, which replaces that portion of the trees removed.

In *Ward v. Sheppard,* in the same volume, at page 283 (461), *Johnston, J.,* says: "that waste in this country is not to be defined by the rules of the English law in all respects, for cutting timber trees for the purpose of clearing the lands was not waste here, though it was so in England," but if the trees were cut for sale, this would be waste, and that "what shall be deemed waste, must be, in a considerable degree, in the discretion of the jury, upon evidence."

In *Parkins v. Coxe,* reported in same volume, 339 (517), *Taylor, J.,* announces the same rule as to cutting timber for other uses than repairs,

and extends it to collecting and burning lightwood to make tar for sale, as a permanent injury, that would take several years to replace.

In *Sheppard v. Sheppard,* reported in same book, 382 (580), *Hall, J.,* after examining numerous authorities cited by counsel, declares the law to be, that where "waste of insignificant value is *done scatteredly* through a whole tract," the proposition, that the widow must lose the place wasted, is "too heavy a penalty, when the damage is to the amount only of a small sum," and that should be deemed to be waste only, "which is *substantially an injury to the inheritance.*"

These rulings, early made, have laid the foundations of the law on the subject of waste, as it declares and regulates the relations between the owners of the separate estates, and it has been developed in the same direction in subsequent cases. Thus it is declared by the Court, *Gaston, J.,* delivering the opinion, in *Shine v. Wilcox,* 1 D. & B. Eq., 631, that "the cutting down of timber is not waste, unless it does (596) a lasting damage to the inheritance, and *deteriorates its value;* and *not then, if no more was cut down than was necessary for the ordinary enjoyment of the land, by the tenant for life.*"

In the further discussion, after repudiating the adaptability of the common law to this country, which is covered with forest, that clearing of it for cultivation, which is highly beneficial to the land, can be itself waste, he proceeds to say: "Whether it has been beneficial or injurious to him (the owner of the succeeding estate in fee), is a question of fact, which must depend on the relative proportion of the cleared to the woodland, on the comparative value or worthlessness of the trees destroyed, and on the ordinary use made of the trees in the part of the country where the land is situated."

Referring to the provision for the widow's support in the assignment of dower, he says, "such an use of the land as was necessary for that support, and as prudent proprietors were accustomed to make of their own, was deemed to have been intended in the provision, although the value of the estate might be somewhat impaired thereby. We also hold," he continues, "that the turning out of exhausted lands is not waste."

In *Carr v. Carr,* 4 D. & B., 179, it was decided, that the widow might make turpentine from trees which her husband had opened in his lifetime, and might box new pines, to make a crop not exceeding that he had made in his lifetime upon the land. So the widow may clear for cultivation as much of the land as a prudent owner of the fee would, and sell the timber cut in doing so. *Davis v. Gilliam,* 5 Ired. Eq., 308.

If done with a due regard to the proportion of wood and cleared land, she may clear what is necessary for the enjoyment of the estate. *Nash, C. J.,* in *Lambeth v. Warner,* 2 Jones Eq., 165.

It will be seen, from these citations and references, that the (597) charge of the court pursues the course of the adjudications upon the law of waste, and adapts it to the different aspects of the facts as shown in the evidence. It thus becomes us to abide by the law as declared and reiterated by the courts since the beginning of the present century, and ruled substantially in the charge we are now considering.

The real and important inquiry is, has the land been abused during the defendant's occupancy by a spoliation unwarranted by the usage of prudent husbandmen in respect to their own property, to the impairment of it as a whole, in value; and to this point, no information seems to have been elicited, and no instruction to have been asked.

Those instructions and exceptions to the charge which are before us, relate to specific acts alleged to be waste, which, as the cases show, are not recognized as *per se* waste, and not applicable to the condition of this State.

We find no error in the directions given to the jury, and made the ground of exception in the appeal, which, without noticing each specifically, are all disposed of in what has been already said.

The case of *Dorsey v. Moore,* 100 N. C., 41, decides that trees severed by a life tenant, or by a stranger, from the land, unauthorized by law, and being waste, in its proper sense, by the act of separation becomes personal property, the title to which at once vests in the owner of the inheritance, and is not at variance with this opinion.

There is no error, and the judgment is affirmed.

No error. Affirmed.

Cited: Sherrill v. Connor, 107 N. C., 633; *Norris v. Laws,* 150 N. C., 605; *Thomas v. Thomas,* 166 N. C., 629.

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PHILIP ANTHONY v. J. C. ESTES ET AL.

Appeal—Practice—Assignment of Error—Judgment out of Term—Statement of Case on Appeal.

1. Unless the error complained of is assigned in the record, the judgment will be affirmed, if it be one the court could give, consistently with the record.
2. When a motion was heard at Chambers, *by consent,* it cannot be objected in the Supreme Court that it should have been heard in term.
3. It is bad practice to send up the pleadings, motions, affidavits, orders, etc., as the *Case on Appeal,* by agreement.

His Honor, *Avery, J.,* in November, 1887, at Chambers, heard a motion to set aside and vacate a judgment in BURKE Superior Court, in favor of the appellant and against the appellee.

The motion was granted, and the plaintiff in the action appealed to this Court. The objections made sufficiently appear in the opinion.

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

MERRIMON, J. No error is assigned in the record, in terms, or by reasonable implication. Nothing appears that suggests any particular objection to the judgment or dissatisfaction with it, except simply the appeal. This is not sufficient. Error must be assigned, unless, from an examination of the whole record, it appears that the judgment is one that could not be given by the court, consistently with the record. Although the judgment appealed from may be erroneous, or irregular, it is, nevertheless, one that might be given, and it stands, and is effectual, until reversed or modified for errors assigned, or set aside for some irregularity.

(599) The counsel for the appellants here suggested, on the argument, that the motion was one that ought, regularly, to have been heard in term time, and at Chambers. This may be so, but no objection was made on the ground, that it was heard out of term; indeed, the record shows that it was heard by consent, and all objections as to irregularity were waived, and certainly it might be so heard. *Coates v. Wilkes,* 94 N. C., 174; *Bynum v. Powe,* 97 N. C., 374; *S. v. Ray, ibid.,* 510.

It is settled by many decisions that in such a case the judgment will be affirmed.

We note that no case is *stated or settled* on appeal—it is simply said by the judge that "it is agreed" that the pleadings, motions, affidavits, orders, etc., shall constitute the case on appeal.

Manifestly, this is not a compliance with the letter or spirit of the statute applicable—it does not serve the purpose of the assignment of errors. Our brethren of the Superior Courts should not tolerate, much less encourage, such bad practice. It might result in serious detriment to appellants, and cause a failure of justice.

Judgment affirmed.

Cited: Gatewood v. Leak, 99 N. C., 365; *Bank v. Gilmer,* 118 N. C., 670; *Henry v. Hilliard,* 120 N. C., 484.

DEDICATION OF NEW SUPREME COURT BUILDING

The new Supreme Court building having been completed and turned over by the architect as ready for use, and the records, books, etc., having been removed to it from the old Court rooms in the Capitol, it was deemed proper that appropriate ceremonies should be observed for the dedication of the building to its permanent uses as a Temple of Justice; and such ceremonies were observed on Monday, 5 March, 1888, in accordance with the following programme:

1. Opening of the Court.
2. Prayer by Rev. Dr. Atkinson.
3. Formal assignment of the building to the Supreme Court, by his Excellency, Governor Alfred M. Scales.
4. Acceptance of the same by Chief Justice William N. H. Smith.
5. Presentation of portraits of Judges.
6. Remarks by members of the Bar.

AMENDMENTS TO RULES

Contained in 92 N. C. Rep., p. 837.

ADOPTED FEBRUARY TERM, 1888.

The first sentence of Rule 1 shall read as follows: Applicants for license to practice law will be examined on Friday and Saturday of the week next preceding the first week of each term.

Lines one and two of section 3 of Rule 2 are amended so as to read as follows: "Causes from the first district will be called on Monday of the first week of each term of the Court."

Section 8 of Rule 2 is amended by adding at the end thereof a sentence in the following words: "Nevertheless, if an appellant shall fail to file the transcript of the record of his appeal within the time he might do so, so that the appeal shall stand for argument at the term to which it is taken, the appellee may move, during the week assigned to the district, to dismiss the same as above provided, and his motion shall be allowed, unless reasonable excuse for such failure shall be shown, within such time as the Court may direct; in which case the Court may deny the motion and allow a continuance."

Rule 14 is amended by adding to the end thereof the following sentence: "And the Court, at the instance of a party to a cause that directly involves the right to a public office, may make the like assignment in respect to it."

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