ANNOTATIONS INCLUDE VOL. 195

NORTH CAROLINA REPORTS

VOL. 102

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FEBRUARY TERM, 1889.

REPORTED BY
THEODORE F. DAVIDSON

ANNOTATED BY
WALTER CLARK
(FURTHER ANNOTATIONS ADDED, 1928)

(3D EDITION, ANNO.)

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FEBRUARY TERM, 1889.

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REPORTER:

THEODORE F. DAVIDSON.

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ROBERT H. BRADLEY

*Elected by virtue of amendment to Constitution at the general election in November, 1888.

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Benjamin R. Moore, Solicitor	New Hanover.
John E. Brown, Solicitor	Mecklenburg.

*Appointed by Governor Scales to fill vacancy.

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FEBRUARY TERM, 1889.

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CASES REPORTED

CASES CITED

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FEBRUARY TERM, 1889

W. B. RODMAN, JR., ET AL. v. W. A. HARVEY ET AL.*

Appeal—Supplemental Proceedings—Receiver—Husband and Wife—Married Women.

1. In proceedings supplemental to execution a receiver will not be appointed except where it is made to appear that one is necessary to the preservation of the property sought to be subjected, and its application to the payment of the judgment, if such payment shall be directed.
2. Where the land of the wife was sold and the purchase money secured by bonds and mortgages executed to the husband, without the knowledge or consent of the wife and by the mistake and ignorance of the husband: *Held*, that the title of the wife to the purchase money was not thereby divested, and the securities therefor could not be subjected to the payment of the husband's debts.
3. The Supreme Court will not consider any assignments of error except those appearing in the record proper and in the case settled on appeal.

THIS was a motion for the appointment of a receiver in pro- (2) ceedings supplemental to execution, in the Superior Court of BEAUFORT County, heard before *Avery, J.*, at Chambers, on 10 June, 1887.

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*AVERY, J., did not sit in this case.

The case settled on appeal states that the facts were "admitted," and such of them as are material here were as follows:

"On 22 September, 1885, defendant W. A. Harvey and wife, Caroline, conveyed to Thomas Coffee a tract of land containing sixty-eight acres. This land was the separate estate of said Caroline. The consideration of the conveyance was $2,700. Upon the same day the said Coffee executed a mortgage to secure the sum of $2,200, a part of the purchase money due by Coffee for the land, payable in three notes for $733.33 each, on 1 January, 1887, 1888 and 1889; the mortgage was executed to William A. Harvey individually, and the notes were payable to him individually, and not to his wife. The said Caroline intrusted to her husband the management of her business, and the notes were taken in the name of her husband without the knowledge and consent of the said Caroline, but through the mistake and ignorance of the husband, William A. Harvey. These notes were deposited with defendant George H. Brown, Jr., with her (Caroline's) consent, as collateral security for money lent, amounting, with interest added to 1 May, 1887, to $562.37.

"These are the notes for which plaintiff moves for the appointment of a receiver to collect and apply to the judgment debts.

"The said Caroline filed her interplea in this cause, claiming the notes as her separate estate.

"The amount due the defendant, Brown, and for which the notes were pledged, has not been paid."

(3) The motion was denied, and the plaintiff having excepted, appealed to this Court.

J. H. Small for plaintiffs.
Chas. F. Warren for defendants.

MERRIMON, J., after having stated the case as above: The appellant suggested that the court should have found the facts of the proceedings, but this suggestion must go for naught, because it is stated in the case settled on appeal that they were admitted. This Court must act upon the case settled. Accepting the facts as they appear, obviously the motion was properly denied. It did not appear probable that the judgment debtor had any property, rights or credits as to which a receiver was required. The notes mentioned were not his, but belonged to his wife. The mere fact that they were made payable to the husband did not make them his, if in fact they were the property of the wife, and that they were, was admitted. The case so states. *Cunningham v. Bell,* 83 N. C., 328; *Williams v. Green,* 68 N. C., 183.

A receiver will not be appointed as of course in such proceedings, but only when it appears probable that one is necessary to do something in

respect to the property of the judgment debtor, to the end it may be properly applied to the payment of the judgment of his creditor. *Coates v. Wilkes,* 92 N. C., 376.

At the end of the case settled on appeal appears a "supplemental statement" of suggested assignments of error. These we cannot consider, because, although they were brought to the attention of the court, it declined to make them a part of the case settled for this Court. It was not bound to do so nor to send up a statement thereof. In settling the case as required by the statute (The Code, sec. 550), the judge will consider the statement of the case made by the appellant and the specified amendments proposed and objections made thereto by the appellee, but is not bound to accept such statement or the amendments proposed as true, or to make the same a part of the case settled. (4) From them and data and facts within the knowledge of the judge, he must settle the exceptions and assignments of error. Such settlement imports absolute verity, while it remains of record, and this Court considers and decides the questions of law presented by it, and none others, except such as may arise upon the face of the record proper.

The very purpose of the statute, when the parties differ as to the exceptions and assignments of error, is to require the presiding judge to determine—settle—what they are, with reasonable certainty and fulness. Only the facts necessary to an intelligent understanding of the questions of law intended to be presented should be stated in the proper connection. Of course "the written instructions signed by the judge, and written requests for instructions signed by the counsel, and the written exceptions, shall be deemed conclusive as to what such instructions, requests and exceptions were"; because the statute so declares, and these, when they exist, should be made a part of the case settled. They constitute certain evidence. The statement of the case settled should state fairly every question raised by the appellant at the proper time. This the law requires, and otherwise injustice might be done. But, on the other hand, the judge should not allow exceptions and assignments of error not made in the orderly course of the action. In appeals the rights of the appellee must be observed and protected as well as those of the appellant. *S. v. Gooch,* 94 N. C., 982; *Tayloe v. Steamship Co.,* 88 N. C., 15.

Affirmed.

Cited: Barber v. Buffaloe, 122 N. C., 131.

(5)

JAMES T. RESPASS v. JOHN G. JONES.

Deed—Execution—Registration—Cancellation and Reëxecution—Fraud—Trust.

1. Registration is necessary to perfect the title intended to be conveyed by deeds.

2. After the delivery of a deed, as between the vendor and vendee, the contract is executed; and if it should be lost or destroyed before registration without any fraudulent purpose, the courts will enforce it either by decreeing a reëxecution and a registration of a copy, or declaring the vendor a trustee of the legal title, and directing him to make a conveyance.

3. Before registration the deed may be surrendered, cancelled or changed in any way that may be agreed upon between the parties thereto, so far as it affects them.

4. Where the vendee, before registration, erased his name and inserted that of his wife, with the purpose of putting the title beyond the reach of his creditors, but this was not known to the vendor until after the registration, when he assented: *Held*, that no title passed thereby, and the courts would not lend their aid to correct the instrument by restoring it to its original form.

5. Where the purchaser of lands, having himself paid the consideration, procured the deed to be made to a third party for the purpose of defeating the demands of his creditors, or other persons who may have rights therein, the Court will not aid him by declaring and enforcing a resulting trust in the grantee for his benefit.

CIVIL ACTION, for the recovery of land, tried before *Montgomery, J.*, at February Term, 1888, of the Superior Court of BEAUFORT County.

The plaintiff claims title to two-thirds of the land in controversy by virtue of two deeds—one from Alice Jordan, dated 5 September, 1883, and the other from Emma Beacham, dated 3 August, 1883, conveying their respective interests in said land.

The defendant claims title:

First, under a deed executed to him on 21 March, 1867, and which was afterwards changed by erasing the name of the defendant wherever it occurred and substituting that of his wife, Ann M. Jones, and
(6) which change, he says, was made "ignorantly, without any design or intent of defeating said deed, or of injuring any one," and he asks that the deed "be restored to its original form as a deed to the defendant." This deed was registered 26 November, 1878.

Second, in an amended answer, he claims title by virtue of a deed executed by W. O. Respass, conveying the land in question to his daughters Laura, Alice and Emma, the consideration for which was the land

conveyed by him to said Respass; and he insists that this deed to Laura, Alice and Emma was never delivered to them, but was intended "to place the title in said land in the said children to hold in trust for himself," and he asks that the plaintiff "be decreed to convey to him all such interest as plaintiff may have acquired from said Alice and Emma Jones." This deed was registered 25 February, 1882.

By agreement, a jury trial was waived and the facts were found by the court.

The following is so much of the case on appeal as is necessary for a proper understanding of the questions presented for our adjudication:

On 21 March, 1867, W. O. Respass was the owner of the land in dispute, and the defendant Jones was the owner of a tract of land in Beaufort County. It was at the time agreed between W. O. Respass and the defendant to exchange land, and in pursuance of the agreement the defendant executed a deed to said Respass, and the said Respass executed a deed to the defendant Jones. The defendant Jones afterwards altered the deed made to him by erasing his own name wherever it appeared and inserting that of A. M. Jones, his wife, and, in this altered form, the deed was proved and registered. Ann M. Jones, the wife of the defendant, died intestate in 1880, leaving as her heirs at law Jas. T. Respass, Josiah Respass, Jas. J. Respass and Martha E. Respass by her first husband, and Henry J. B. Adams and J. F. Adams by a (7) second husband, and Alice, Laura and Emma Jones by her last husband.

The defendant owned no other land in 1867 or since, and but little property besides.

The plaintiffs offered in evidence:

First, a deed from W. O. Respass, conveying the land in question to Emma, Alice and Laura Jones, children of the defendant. This deed was dated 21 March, 1867, but was in fact executed about 1875, and was delivered to the defendant and acknowledged by the grantor and registered 25 February, 1882.

Second, a deed from Alice (who had intermarried with one Jordan) to the plaintiff, dated 5 September, 1883, conveying to him her interest in the land in dispute.

Third, a deed from Emma (who had intermarried with one Beacham) to the plaintiff, dated 3 August, 1883, conveying to him her interest in said land.

Fourth, a deed from Laura (who had intermarried with one Topping) to the defendant, Jones, conveying to him her interest in said land.

The defendant offered in evidence a note from plaintiff to Emma Beacham for the payment of $100, for the purchase of the land men-

tioned in the deed of 3 August, 1883, with an endorsement in the handwriting of J. T. Respass as follows: "The within note is to be paid, provided a good title is perfected for the same land, otherwise this note is to be returned to J. T. Respass, and is not to be collected."

There was no evidence other than that contained in the defendant's examination (presently referred to) that he owed any debts in 1867. There was no evidence of an actual delivery of the deed from W. O. Respass to Laura, Alice and Emma Jones, or that it was ever in their possession.

The defendant offered in evidence his own examination, taken by the clerk, under an order in the cause, in which he testified, so far as is material, that the two deeds—one made to the defendant and
(8) altered by substituting the name of his wife for his own, and the other to Alice, Laura and Emma Jones, both dated 21 March, 1867—conveyed the same land; that the latter was executed and delivered six or eight years after the former; that it was delivered to the defendant and not to his children, and that he had it proved and registered.

In answer to the question, "If both the deeds from W. O. Respass, dated 21 March, 1867, convey the same land, what reason or motive had you for procuring the execution and delivery of the last deed?" he said: "As the land which I gave W. O. Respass in exchange for this land was in my own name, and the deed from W. O. Respass had been made to me and changed to my wife, and I believing that a transfer from me to her without a valuable consideration might be attacked by some old creditor, I had a deed made from W. O. Respass to my children."

In answer to the question, "Was it your intention, in having the latter deed executed to your own children, to preclude the children by former marriages?" he said: "It was."

He also testified that the alterations in the deed made to him, by erasing his own name and inserting that of his wife, was to "put it (the land) out of the reach of my (his) creditors." The altered deed was not seen by W. O. Respass till after it was registered, and it was altered, proved and registered without his knowledge, but after the registration he assented to it, and said "it made no difference to him how many times it had been changed." This was after the registration of the deed to the children. The consideration of the deed to Ann M. Jones was the exchange of the land with W. O. Respass, and the children had no interest in that land.

(9) The defendant further testified, in answer to questions in regard to the execution of the deed to his children: "I thought the title would be in W. O. Respass, supposing the deed to Ann M. Jones

had been destroyed or never appeared; at the time the second deed was executed I had not made up my mind which one to place of record." That he had no intention of destroying the first deed, and in answer to the question why he had both deeds recorded, said that after having the deed to his wife registered, J. T. Respass claimed that he "had an interest in the land, as an heir to his mother" (wife of defendant), and he concluded to record, and did have recorded, the second deed. In answer to the question, "Why, after having the same placed of record, do you propose to avoid the second deed?" he said: "It is my intention to avoid both deeds and procure a fee-simple title for the land. . . . I did not intend to destroy either of said deeds; the one not placed of record I would have placed about the house."

Questions, in the progress of the examination of the defendant, Jones, were asked and objected to, but no exceptions were taken and no point in relation thereto made in this Court.

The defendant requested the judge to find as a fact, whether or not, when Jones procured the deed from W. O. Respass to his children, to be registered and executed, he (Jones) intended an advancement to his children to take effect at once, or whether he intended the title to be in the children in fee, in trust for himself during his life and then to themselves.

The judge was of opinion that the effect of the conveyance was a matter of law, and declined to do so. Defendant excepted.

Defendant then offered to show evidence of intention. Court refused to hear the same. Defendant excepted.

Upon the testimony the court found the following facts:

1. That the deed from W. O. Respass to John G. Jones was altered by defendant Jones with intent to put the title to the (10) land in controversy out of reach of his creditors.

2. That W. O. Respass did not assent to or ratify the alteration of the deed to Jones before the registration thereof.

3. That Jones procured the execution of the deed from W. O. Respass to Laura, Alice and Emma Jones (defendant's children) and himself, and had the deed proved and registered. That the children paid nothing of value therefor, and the consideration was paid by Jones.

4. That the defendant, Jones, was in possession of the land in controversy at the time he took deeds from Alice and Emma, and at the time of the execution of the deed from Laura Jones to defendant.

Upon the facts so found and admitted the court was of opinion that plaintiff was entitled to recover, and gave judgment as set out in the record, from which the defendant appealed.

J. B. Batchelor and Jno. Devereux, Jr., for plaintiff.
W. B. Rodman, Jr., for defendant.

DAVIS, J., after stating the case as above: In addition to the fact that the defendant, Jones, was in possession of the land when the deeds from Alice and Emma to the plaintiff were executed, which fixed him with notice of any equity which the defendant might have, it appears from the endorsement on the note for $100, given by him to Emma, that he had actual knowledge of an adverse claim to the land, and that even the sum of $100, which appears to have been much less than the value of the land, was not to be paid if he failed to get a good title, and if his claim rested solely upon its merits he would, perhaps, not be entitled to recover; yet, if the legal title is in him, the defendant, if guilty
(11) of any fraud, cannot recover, upon the well settled principle that the courts will not give aid in such cases, and the legal title must prevail. We can hardly conceive of a more forcible illustration of the unyielding nature of this rule than is to be found in the decision which the Court felt "compelled to make in *York v. Merritt,* 80 N. C., 285.

Conceding it to be settled in this State that a recovery of land may be had upon an equitable title *(Condry v. Cheshire,* 88 N. C., 375), let us ascertain, first, whether the legal title is in the plaintiff; and if so, second, whether the defendant, who is asking the equitable assistance of the Court, has so soiled his own hands that equity will not touch them, to aid.

In determining the first question, we are to consider the effect of the deed from W. O. Respass to the defendant, and of its alteration, for if, as altered and registered, it passed a good title to Ann M. Jones, the defendant would, at least, be entitled as tenant by the curtesy to hold during his life, and the plaintiff could not in the present action recover the interest acquired from his vendors, as two of the heirs at law of the said Ann M. Jones.

After the execution and delivery of a deed the estate passes out of the grantor and vests in the grantee, to be legally perfected by registration. If, before registration, the deed is lost or destroyed, such loss or destruction does not restore the estate to the grantor. *Dugger v. McKesson,* 100 N. C., 1.

As between the grantor and grantee the contract has been executed, and if the loss or destruction has been the result of accident, or without any fraudulent or illegal act or intent on the part of the grantee, the Court will aid in perfecting his title by one of two modes, as was said in *Triplett v. Witherspoon,* 74 N. C., 475: either by setting up the lost deed and registering a copy, or by declaring the grantor a trustee and compelling a conveyance of the legal title; but the legal title is not

perfected till registration, though when registered it relates back (12) to the date of its execution. *McMillan v. Edwards,* 75 N. C., 81; *Morris v. Ford,* 2 Dev. Eq., 412; *Walker v. Coltraine,* 6 Ired. Eq., 79; *Phifer v. Barnhart,* 88 N. C., 333.

We take it as settled that while, by execution and delivery of the deed, the vendor parts with all power and control over the land conveyed, yet before probate and registration and before any intervening rights, legal or equitable, have accrued, as between the grantor and grantee, the deed may be surrendered to the grantor or cancelled or changed in any way that may be agreed upon by them. *Davis v. Inscoe,* 84 N. C., 396, and cases there cited.

This being so, the deed from W. O. Respass to the defendant, though passing an inchoate title which was never perfected by registration, and which, by reason of the alterations made by the defendant, could not be registered in the form as executed and delivered, never became operative, and when, at the instance of the defendant, and by his rquest, the deed was executed by W. O. Respass to Alice, Emma and Laura Jones, and proved and registered, it passed a perfect legal title. *Hare v. Jernigan,* 76 N. C., 471, and cases cited.

The deed first executed to the defendant having been altered by him, as found by the court, for the purpose of putting the land beyond the reach of his creditors, he could not now invoke the equitable aid of the Court to have it restored to its original form and registered. *Davis v. Davis,* 6 Ired. Eq., 418; *York v. Merritt, supra.*

The counsel for the defendant, in his well considered and elaborate brief, contends "that the alteration by Jones was neither in fact, nor in the view of the law, fraudulent; that it was essentially, and in equity must be regarded as an accident, and must be relieved against, as any other accident would be, according to admitted principles of courts of equity."

He insists, in support of this view, that "it is in evidence that in fact he (the defendant) owed nothing," and that it is not made to appear that there were any creditors to be defrauded. So far from its appearing from any evidence that the defendant owed nothing, (13) it clearly appears from his own evidence that he had the deed altered to put the land beyond the reach of his creditors, and his own statement sustains the finding of the court. He further insists that the deed could not be fraudulent as to creditors, because "the land was worth only the value of a homestead, and the defendant had a right to convey his homestead even against his creditors."

It does not appear when the alteration in the deed was made; but it was executed 21 March, 1867, anterior to the homestead, and if the

alteration was made with a fraudulent intent, he cannot get relief against the legal consequences of his own act. Having for a fraudulent purpose lost the legal title, the court will not aid in its restoration, and the authorities cited do not apply.

But it is insisted, that when the purchase money for a tract of land is paid by one, and a deed therefor is taken in the name of another, a resulting trust arises in favor of him who paid the purchase money, and, therefore, if the Court will not decree a restoration of the deed made to the defendant, as it was before the alteration, yet, inasmuch as the consideration for the land was paid by the defendant, he should be allowed to show that the land was conveyed to his children, not as an advancement, but to be held in trust for him. The general rule is as insisted upon by counsel for the defendant, but his misfortune is that the fraudulent device by which he lost the legal title pervades his whole case. Having rendered the original deed to himself inoperative by erasing his own name and inserting that of his wife, with a purpose to put the property "out of the reach of his creditors," he afterwards procures a deed to be made to his own children, as he himself testifies, for the purpose of precluding the other children of his wife by former marriages from participating as heirs at law in the inheritance from her;

(14) and the arguments in the able and learned brief of counsel are rendered nugatory by the fatal facts which come from the defendant himself.

Affirmed.

Cited: Perry v. Hackney, 142 N. C., 370; *Brown v. Hutchinson,* 155 N. C., 207; *Wicker v. Jones,* 159 N. C., 111.

W. P. MIDGETT AND WIFE v. R. W. WHARTON ET AL.

Action to Recover Land—Exceptions in Deeds.

1. An answer of defendants asserting title in them to land claimed by plaintiff, involves a denial of plaintiff's title, and plaintiff must prove his title, even though it appear the defendants have none.
2. When land sued for by plaintiff was included in the general boundaries of a tract described in the deeds under which he claimed, but there was a reservation in one of the deeds constituting his chain of title excepting *the land heretofore conveyed by T. H. S. to other parties, and by B. J. M. to S. M. M., and by J. S. M.,* and the *locus* in defendants' possession, and

to which their answer averred ownership in them, was identified as described in a deed from T. H. S. to a son, which was produced: *Held*, that the reservation was good against plaintiff, though the deed from T. H. S. was fraudulent and void as to creditors.

CIVIL ACTION, for the recovery of land, tried before *Graves, J.*, at Fall Term, 1887, of the Superior Court of HYDE County.

The land, whose recovery is sought in the action, belonged to one Talbot Selby, and the plaintiffs derive their claim of title thereto by virtue of a sale under execution by the Marshal of the United States, made on 30 November, 1868, issued upon a judgment rendered in the Circuit Court of the United States in favor of Carly, Howe & Co. against the said Talbot Selby, and a deed pursuant thereto to David M. Carter, the purchaser. In January, 1871, Carter conveyed the land to Benjamin J. Midgett, and the latter and wife, on 1 May, 1876, conveyed to Nancy J., wife of W. P. Midgett, who as plaintiffs (15) prosecute the action, by a deed in which, after designating boundaries, the premises are further described as "the lands conveyed by E. H. Saunderson to Talbot H. Selby, and sold under execution by D. R. Goodloe, United States Marshal, and conveyed to D. M. Carter, and by said D. M. Carter conveyed to Benj. J. Midgett by deed dated 1 January, 1887, all of which deeds of conveyance are duly registered in the register's office of Hyde County." Then follows this clause of reservation: "The lands heretofore conveyed by Talbot H. Selby to other parties, and by said Benj. J. Midgett to Samuel M. Mann, and by Joseph S. Mann, are excepted from the operation of this deed."

It further appears from the finding of the court, to this end a jury trial having been dispensed with by consent of parties, that Talbot Selby, about 1 May, 1868, made to his son, Dixon Selby, a deed falsely dated in March, 1861, executed, in fact, after the levy and before the sale under execution by the Marshal, purporting to pass the land in dispute, with intent to defraud the creditors of the grantor. In November, 1875, Dixon Selby "made a mortgage deed for the land to George W. Credle to secure money due him, and the latter, being indebted to D. M. Carter, deceased, assigned the secured debt and delivered possession, which had been surrendered by Dixon to the defendant, R. W. Wharton, administrator of Carter.

The answer of the defendants asserts the title to so much of the land embraced in the complaint as is described in the two deeds from Talbot Selby to his son Dixon Selby, and from the latter to George Credle, to be vested in the heirs at law of the said Carter, and disclaims any property in or possession of any portion outside of those boundaries.

There was judgment for defendants, from which plaintiffs appealed.

(16) *C. F. Warren and J. H. Small for plaintiffs.*
F. H. Whitaker for defendants.

SMITH, C. J., after stating the case: There seems to be but one defense. That is manifestly untenable, since the ancestor parted with all his estate and interest in the lands acquired under the Marshal's deed in his deed made thereafter to Benjamin J. Midgett; and, if comprised within the boundaries of his deed to the *feme* plaintiff, the title has been transmitted to her. The claim of the defendants is thus without support, and if this were the only issue arising under the pleadings, it would terminate the controversy. But the assertion of title in the defendants involves a denial of title in the plaintiffs, and this must be established in order to a recovery of the land so adversely claimed. It becomes necessary, therefore, to inquire into the sufficiency of the descriptive words contained in the deed to the *feme* plaintiff, as affected by the clause of reservation, for if this be inoperative to restrain the preceding description of boundaries, the land in dispute is conveyed to her. This is the only point presented in the record for our determination.

The cases which have been decided in this Court in which the effect of such an exception in limiting the import of words that define a boundary within which it is contained, cited in the argument and reviewed in *Gudger v. Hensley,* 82 N. C., 481, do not sustain the contention that such an exception as the present is inoperative and void.

In *McCormick v. Monroe,* 1 Jones, 13, the exception was, "including two hundred and fifty acres previously granted, which is excepted in this grant," and it was held to be ineffectual to restrain the grant and exclude any portion of the territory from the defined boundaries, the exception being too vague and uncertain, in that there is nothing in the grant to show to whom the land had been previously granted, nor in what part of the land within the boundaries it was located.

(17) In an opinion delivered by *Pearson, J.,* in the case, he deems even this general expression sufficient to admit of identification of the reserved part by the aid of external proofs, the production of which rested upon the defendant, upon the principle *"id certum est quod certum reddi potest."* The language of the present deed in designating the excluded parts is much more definite and plain in its purpose, for it mentions the name of the grantor, and the deed was produced at the trial, and is among the findings of fact upon which the ruling complained of is based. So, as it was capable of being identified, and has been identified by the reference, the conditions necessary to withdraw the part intended to be excepted are met, and the deed, in legal effect, only conveys the residue.

The plaintiff not, therefore, obtaining title to the land mentioned in the deed of Talbot Selby, cannot recover it of the defendants, because, irrespective of the alleged fraudulent intent that pervades the conveyance, the title thereto does not vest in the plaintiffs. There is no error, and the judgment must be

Affirmed.

Cited: Lumber Co. v. Cedar Co., 142 N. C., 422; *Bowser v. Wescott*, 145 N. C., 66.

ALFRED ALEXANDER v. L. B. DAVIS AND WIFE, ANN E. DAVIS, AND JOSHUA B. DAVENPORT.

Married Woman—Power of Appointment—Mortgage.

When land has been conveyed by A. to a trustee, in trust, to be held to the sole and separate use of A.'s wife and her heirs, free from any debts or contract of A., and to "such other uses as she may at any time appoint by writing signed with her hand, whether by deed attested by one or more witnesses, or by will," etc.: *Held*, that a mortgage, with power of sale to secure a debt, made by A. and wife, attested by a witness, properly proved, with private examination of wife, and registered, was valid, and that the purchaser at a sale by the mortgagee could recover possession from A. and his wife, and require the trustee to convey his legal estate.

CIVIL ACTION to recover land, tried before *Graves, J.*, at Fall (18) Term, 1887, of the Superior Court of WASHINGTON County.

The following are the facts agreed:

1. In August, 1868, the land in controversy belonged to L. B. Davis.

2. At that time Davis conveyed the said land to the defendant, Davenport, trustee, by deed hereto attached and made part of this case, marked "A."

3. Davis and wife remained in possession of said land from August, 1868, up to the present time.

4. On 20 May, 1886, L. B. Davis and his wife, to secure a bond due by them to Alexander & Woodley, conveyed the said land to Alexander & Woodley by the mortgage deed hereto attached and made part of this case, and marked "B."

5. On 19 March, 1887, Alexander & Woodley, in accordance with the provisions of said mortgage deed, sold the said lands at public biddings to the plaintiff, Alfred Alexander, and executed to him the deed hereto attached, marked "C."

6. Joshua B. Davenport had no notice whatever of the execution by Davis and wife of the mortgage deed aforesaid, and Alexander & Woodley had no actual notice of the existence of the deed to Davenport.

7. The rental value of the said land is fifty dollars per annum.

8. Davis and wife have refused to give possession after demand, and now withhold the same, and Davenport has refused to convey the legal title to the plaintiff.

If upon these facts the opinion of the court be with the plaintiff, judgment is to be rendered in his favor against Davis and wife for the possession of the land, and the sum of fifty dollars rent due, and the cost of this action, and against Davenport that he convey the legal title to the plaintiff; otherwise, judgment shall be rendered that the defendants go without day and recover their costs.

(19) The defendant Ann E. Davis is the wife of the defendant, L. B. Davis, and the deed referred to and marked "A" contains following:

"In trust, that the said Joshua B. Davenport will hold the said Cool Spring tract to the sole and separate use of my wife, the said Ann Elizabeth Davis, and her heirs free and discharged from any debts, control or liability of me her said husband, and also to any such use or uses as she may at any time appoint by writing signed with her hand, whether by deed attested by one or more witnesses or by will executed in the manner required for the execution of wills."

The mortgage deed marked "B" was executed by L. B. Davis and Ann E. Davis, his wife, to M. M. Alexander and T. M. Woodley, to secure the payment of the sum of $500, with power of sale in default of payment upon the terms mentioned in the deed. This deed was witnessed by A. Armstrong. The private examination of the *feme* defendant was properly taken and the deed properly proved and registered. The land was sold by the mortgagees in accordance with the power of sale contained in the mortgage deed, and the plaintiff became the purchaser and the land was duly conveyed to him by the mortgagees.

There was judgment for the plaintiff and appeal by defendants.

W. D. Pruden and C. L. Pettigrew for plaintiff.

J. E. Moore (by brief) and C. F. Warren for defendants.

DAVIS, J., after stating the case: It is insisted for the defendants that "the power of the wife was to appoint to a use or uses by deed or will" executed in the manner directed by the deed from L. B. Davis to the trustee, Davenport, and that the mortgage is not such an execution of the power as was contemplated and authorized, and that it is inopera-

tive to convey the land. It is also objected that the trustee did not join in the deed.

The trustee held the naked legal title for the purposes set out (20) in the deed, and upon the conveyance by the wife in conformity with the requirements of the deed the legal title should follow.

Conceding, as was held in *Hardy v. Holly,* 84 N. C., 661, that the power of disposition by the wife is not absolute, but is limited to the mode and manner pointed out in the deed made for her benefit, in the case before us there was a compliance with every requisite of the deed and every requirement of law necessary to give effect to the disposition of the use made by her. *Newhart v. Peters,* 80 N. C., 166, and cases there cited; *Frazier v. Brownlow,* 3 Ired. Eq., 237; *Miller v. Bingham,* 1 Ired. Eq., 423; *Newlin v. Freeman,* 4 Ired. Eq., 312.

It is said by counsel for defendants that "the power to sell does not convey ordinarily a power to mortgage." Admit this to be so in conveyances to trustees for purposes of sale only, the deed to Davenport is very different; it conveys to him the mere legal title, to be held for the *feme* defendant and to such "use or uses as she may at any time appoint" in the mode designated. The absolute power of disposal is in her limited only by the mode pointed out, and by it the trustee is not required to join in the deed.

The husband and wife can by deed of mortgage, executed, proved and registered as required by law, convey the wife's lands and subject them to the payment of debts or other liabilities. *Newhart v. Peters, supra; Norris v. Luther,* 101 N. C., 196, and cases cited. This is also sustained by *Hardy v. Holly,* and the authorities there cited. No question was made in the ruling in that case as to the *power* of the wife to make a mortgage, but there was a failure to comply with the provisions of the instrument creating the separate estate of the wife. That is not so here. There is no error.

Affirmed.

Cited: Zimmerman v. Robinson, 114 N. C., 49; *Smith v. Ingram,* 130 N. C., 110.

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(21)

JOHN S. McKOY, Administrator, Etc., v. GUIRKIN & COMPANY.

Legacy—Assent to—Parties.

1. Where a testator living in another State left a will which was admitted to probate in that State and also in this, gave a sum of money to A., in trust for the benefit of B., both of this State, the interest to be paid to B. during

her life, and at her death the trustee to distribute the principal, according to her judgment, for the benefit of the poor of the county where A. and B. lived, and the executor who qualified in the State of testator's domicile paid over the amount of the legacy to the trustee, who deposited a part of it with the defendant's brokers, who lived in this State, and A. having died without disposing of the sum so deposited, and B. having never died: *Held*, that an administrator *cum testamento annexo* in this State could not sustain an action for that sum against the brokers. If entitled to the possession of the fund at all, his remedy would have been against the personal representative of the trustee, and not against the defendants, who were his agents.

2. With the parties then before the court, it was error to adjudge a final disposition of the fund, and the action should have been dismissed.

3. When an executor assents to a legacy given for life, with a remainder over, the assent extends to the remainder, and the executor bcomes *functus* in respect to the legacy; though the rule is otherwise if, by the terms of the will, the executor is required to execute trusts attached to the ulterior disposition, when the executor may sue for and recover the fund after the expiration of the life estate.

Civil action, tried before *Montgomery, J.*, at Spring Term, 1888, of the Superior Court of Pasquotank.

John A. Gambrill, having his domicile in the city of Baltimore, Maryland, died on 1 October, 1878, having made a will in form to pass his estate, and appointing Robert Johnson his executor, which was proved in the proper court in that State, and the executor accepted its trust and proceeded to carry into effect the dispositions of property contained in the will and settle the estate. Among many pecuniary bequests therein made, is one in these words:

(22) "I give in trust to Mrs. Mary A. Morgan, for the benefit of Mrs. Mary Scott, daughter of Mrs. Elizabeth Cartwright, deceased, all of Pasquotank County, North Carolina, the sum of one thousand dollars ($1,000), the interest to be paid her during her life, and at her decease Mrs. Morgan to distribute the principal, as her judgment may determine, for the benefit of the poor of said county."

The executor paid over the legacy to the trustee, Mary A., who, up to the time of her death in 1885, paid over to Mary Scott, the beneficiary, and the latter has since received, up to her own death, on 26 February, 1887, the accrued interest on the fund. The defendant firm, as the depositary of the fund, now holds the sum of eight hundred and seventy-five dollars, with interest at the rate of eight per cent per annum thereon, for which it is ready to account to the person legally entitled thereto. Mary A. Morgan made no disposition of the fund during her lifetime, nor could she appropriate it until the death of the beneficiary for whom it was held in trust, and who was entitled to the interest accruing during her life.

The will, properly authenticated, has been before the Probate Judge, admitted to probate in the county of Pasquotank, and letters of administration *cum testamento annexo* issued to the plaintiff, who seeks in this action to recover the moneys for the estate of the testator from the defendants, with whom it was deposited by the trustee, on the ground that the ulterior disposition cannot now be made, and the bequest over has become void.

Upon these facts the court ruled that the plaintiff could not maintain the action, and proceeded to appoint the board of commissioners of Pasquotank as trustee, in place of the deceased Mary, vesting it with authority to collect the moneys and appropriate them according to the directions of the testator.

From this judgment the plaintiff appeals.

E. F. Aydlett for plaintiff. (23)
No counsel for defendants.

Smith, C. J., after stating the case: It is plain, if the plaintiff in his representative capacity is entitled to the possession of the fund, his remedy is against the personal representative of the deceased trustee, for whom, under the contract of deposit with the defendants, Guirkin & Co., as agents, they hold, and not against the agents themselves, the latter's possession being, in legal effect, that of their principal, to whose right such personal representative succeeds.

Affirming the ruling against the plaintiff, the action properly terminated, and it was error, with the parties then before the court, to proceed to make a final disposition of the fund.

But can the plaintiff recover the fund for the testator's estate from the personal representative of the deceased trustee? This question must, in our opinion, be answered in the negative.

It has been settled by repeated adjudications in this Court, supported by sound reasoning, that when an executor assents to a legacy given for life with remainder over, the assent extends also to such remainder, and his control over it ceases, and having nothing further to do he becomes so far *functus officio,* and the successive legatees must adjust their respective claims among themselves. *James v. Masters,* 3 Murph., 110; *Ingrams v. Terry,* 2 Hawks, 122; *Alston v. Foster,* 1 Dev. Eq., 337; *Smith v. Barham,* 2 Dev. Eq., 420; *Burnett v. Roberts,* 4 Dev., 81; *Saunders v. Gatlin,* 1 D. & B. Eq., 86; *Conner v. Satchwell,* 4 D. & B., 72; *Lewis v. Smith, ibid.,* 326.

If, however, the specific thing bequeathed for life, with a remainder, which in terms requires the restoration of the property to the executor to enable him to execute the trusts attached to the ulterior disposition,

the executor may sue and recover, the assent in such case being limited to the vesting of the life estate only. *Dinwiddie v. Carrington,* 2 Car. Law Rep., 469 (Bat. Ed.), 355.

(24) Thus, where the bequest was of slaves and other personal property to the wife for life, to be sold after her death and the proceeds divided among the testator's children, the executor may sue and recover them, and if they have been converted by the life tenant to her use, may recover the value thereof. *Allen v. Watson,* 1 Murph., 189.

This is necessary to the full execution of the trusts assumed by the executor, and the assent inures only to the possession and use of the property for the tenant's life. *James v. Masters,* 3 Murph., 110.

The facts of the present case bring it under the present rule, which leaves the fund at the absolute disposal of the trustee for the poor of the county, and no trusts abide upon the executor after the payment over of the money, for the discharge of which he can demand its restitution. Where the cause is properly constituted in court, and the parties claiming the fund are present in the action, so that a determination of the controversy will bind all, it may be decided whether the bequest for the benefit of the poor is valid, or must return to legatees under the will or to the testator's next of kin, and it would be premature in us to anticipate its solution.

The action must be dismissed, and it is so adjudged.

Dismissed.

Cited: Temple v. Pasquotank, 111 N. C., 42; *Cox v. Bank,* 119 N. C., 305.

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(25)

H. W. HARRISON, GUARDIAN, v. J. H. HOFF.

Appeal—Undertaking—Practice in Supreme Court.

While the statute passed at the recent (1889) session of the General Assembly provides that the Supreme Court may allow an undertaking on appeal to be filed in that Court, the power thus conferred will not be exercised unless the appellant shows a reasonable excuse for his failure to give the undertaking within the time prescribed by The Code, secs. 549, 552.

THIS was a motion by appellee to dismiss the appeal, and a counter motion by appellant to be allowed to file undertaking in this Court.

At the present term, appellee therein moved to dismiss this appeal upon the ground that the undertaking on appeal was not filed within

ten days next after the rendition of the judgment appealed from at the last Fall Term of the Court wherein it was given, which ended on 23 October, 1888.

It appears that such undertaking was not given within that time, but was filed on 12 November next thereafter, and the appellant insists that he has shown reasonable excuse for such delay in filing the same, and asks this Court to allow and treat it as sufficient.

The substance of the affidavit filed by the plaintiff appellant, which is the basis of the opinion of this Court, is as follows:

That as soon as the appeal was taken from the judgment rendered against him in the Court below, he "tried to give his bond constantly before the adjournment of the court, but his attorneys were continuously engaged; that the clerk was also very much engaged, and left his office immediately after adjournment." On Wednesday thereafter the affiant came to the county-seat prepared to give the required appeal bond, and was informed by the brother of the clerk that the latter (26) was not in town, and would not return until after the election day, which was the tenth day after the adjournment of court; that the clerk was not at his office on that day, and that he (clerk) lives twelve miles from the courthouse. The affiant came back again on the following Saturday and Tuesday, and, the clerk being absent, could not get into the office. Both of his attorneys were absent, and he used every means in his power and in his knowledge to perfect the appeal by filing the undertaking in time. The appeal bond was actually given to the clerk, with good and sufficient security, and duly approved by the clerk, on Wednesday thereafter, being the eleventh day after the adjournment of court, though he does not know at what time the clerk put the bond among the papers in the case and marked it "filed."

Counter affidavits were also filed by defendant.

C. L. Pettigrew and A. W. Haywood for plaintiff.

A. O. Gaylord for defendant.

MERRIMON, J., after stating the case: Under the strict statutory provision applicable (The Code, secs. 549, 552), the appellee would be entitled to have his motion allowed for the cause assigned, as has been decided by many cases, and the appellant would lose his appeal, unless, for good cause shown, he should be allowed to bring it into this Court by the writ of *certiorari*.

But the General Assembly has modified the rigor of the statute by an act passed at its present session, ratified on 16 February, 1889, which, among other things, provides as follows: "And when no undertaking on appeal has been filed, or deposit made, before the record of the case is

transmitted to the Supreme Court, the Supreme Court may, in its discretion, thereafter allow, on such terms as may seem best (just),
(27) the appellant to file an undertaking on appeal, or make the deposit. The provisions of this act shall apply to cases now pending in the Supreme Court." The authority thus conferred upon this Court is remedial in its nature, broad and comprehensive, and embraces pending cases, and it is to be exercised in the just discretion of the Court. The purpose is to give it power to relieve an appellant chargeable with excusable laches, not gross neglect.

Whether the power will or will not be exercised must depend largely upon the facts and circumstances of each case. It may be said, however, that in all cases the appellant must show reasonable excuse for his failure to give the undertaking promptly, as required by law, else relief will not be granted. It is no part of the purpose of the statute to excuse or encourage gross neglect.

It appears sufficiently in this case that the appellant took his appeal in good faith; that he made diligent effort, from time to time, to give the undertaking on appeal, but was prevented by causes that need not be adverted to here; that he did give the same without serious delay or prejudice to the appellee. In our judgment, reasonable excuse is shown for the delay, and the undertaking filed must be accepted and deemed sufficient, and the appeal disposed of as if the undertaking had been filed within the time prescribed by law.

Motion to dismiss refused, and appellant allowed to file undertaking.

Cited: Jones v. Wilson, 103 N. C., 14; *Jones v. Asheville,* 114 N. C., 620; *Vivian v. Mitchell,* 144 N. C., 474; *Hawkins v. Tel. Co.,* 166 N. C., 213; *Transportation Co. v. Lumber Co.,* 168 N. C., 61.

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(28)

JOHN L. HINTON v. E. A. LEIGH ET AL.

Mortgage—Deed—Trust—Registration—Notice—Creditors—Purchasers for Value.

L. being indebted to H., conveyed to him lands as security, and subsequently conveyed the same lands to a trustee to secure other creditors, under which there was a sale, and one of the last secured creditors became purchaser. The mortgage to H. was not registered until the day after the deed in trust; the latter, however, recited the fact of the conveyance (mortgage) to H., and in the *tenendum* clause contained a statement that the lands conveyed, "and as they are herein described," should be held, etc.: *Held,*

1. That the mortgage to H., not being registered until after the deed in trust, was inoperative as to the latter.
2. That the legal effect of the recitals and provisions in the deed in trust was to create a charge upon the lands for the payment of the debt intended to be secured by the mortgage, which the court would enforce by requiring the purchaser to pay the debt or by directing a resale for that purpose.
3. No actual notice, however clear, of an unregistered mortgage or deed in trust, will operate to the prejudice of creditors or purchasers for value.

THIS is a civil action, which was tried before *MacRae, J.*, a trial by jury being waived, at Fall Term, 1888, of PERQUIMANS Superior Court.

It appears that on 19 August, 1878, the defendant, A. E. Leigh, as was said, was indebted to the plaintiff in the sum of $7,500, and on that day executed to him a deed of mortgage to secure that indebtedness, whereby he conveyed sundry tracts of land, designated as the "Stephenson Point farm," the "Barclift tract," and the "Mullen tract," and this deed was proven and registered on 5 March, 1879, the day next after the deed of trust, presently to be mentioned, was registered. The plaintiff abated $1,500 of the debt secured by this mortgage, this sum being usurious.

Afterwards, the defendant, Leigh, being indebted as *receiver* to James Leigh in the sum of $11,500, executed his deed of trust (29) to secure the same and a debt to another person, to S. B. Harrell, trustee, on 3 March, 1879, and the same was proven and registered on the 4th of the same month, one day before the mortgage mentioned above was registered. This deed of trust contained a power of sale, and embraced the same tracts of land embraced by the mortgage above mentioned, and sundry other tracts, and the part thereof material here is as follows:

"Be it known, that the several tracts of land described herein, designated herein as numbers one, two and three, and known as the Stephenson Point, the Mullen and the Barclift tracts, have been heretofore conveyed by deed in trust to secure the payment of a debt due to John L. Hinton, for the sum of $7,500, or about that sum. That the tract herein described and designated as number four, known as the Sutton tract, has been heretofore conveyed by deed in trust to secure a debt to B. W. Thach, for the sum of $3,000, and some interest due thereon, the same a part of the purchase money or consideration for the purchase thereof, and the same is further encumbered and subject to a deed in trust executed to secure a debt due to Willie Riddick for about the sum of $4,000; and the tracts numbered herein as numbers five and seven, and known and designated as the Layden tract, the Sumner tract and the Charles Sumner tract, having been conveyed to secure the payment of two notes due to C. W. Grandy & Sons, of Norfolk, Va., dated 21 June, 1878, one

for the sum of $3,315, payable 14 October, 1878, and the other for the sum of $5,351, both drawing interest from their dates at the rate of eight per cent per annum—the said deed in trust mentioned having been proved and registered in the county of Perquimans, and reference is made to the said deed for further particulars. To have and to hold each and every of the tracts and parcels of land (eight in num-
(30) ber) herein described and as they are herein described, together with all and singular the improvements, privileges and appurtenances thereto belonging, or in anywise appertaining to the same or either of them, to him the said S. B. Harrell, his heirs and assigns, in fee forever.

"In special trust and confidence nevertheless, and for the uses and purposes herein expressed and no others, that is to say," etc.

Afterwards, on 20 November, 1884, the said Harrell, trustee, sold the lands embraced by the mortgage mentioned, and designated as one, two and three, according to the terms of the trust therein, to satisfy the debt mentioned due to James Leigh (who had before that time died), and the defendant, Mary E. Robinson, who is his sole next of kin and heir at law, became the purchaser thereof, at the price of $9,905, which, it seems, was not enough to pay the debt last above mentioned.

This action is brought by the plaintiff to obtain judgment for $6,000 of the debt secured by the deed of mortgage first above mentioned, and to have the tracts of land mentioned in the deed of mortgage sold by order of the court to pay his debt, and for general relief. The defendant, Robinson, contends that the deed of mortgage is void as to the debt due to the administrator of James Leigh, and as to herself as purchaser.

Upon the material facts above stated substantially, the court gave judgment, whereof the following is a copy:

"1. That the plaintiff recover of the defendant, E. A. Leigh, the sum of $6,000.

"2. For the cost of this action, to be taxed by the clerk of this court.

"3. That the mortgage of E. A. Leigh to John L. Hinton, dated 19 August, 1878, and registered 5 March, 1879, is not a prior lien to the mortgage of E. A. Leigh to L. B. Harrell, trustee, dated 3 March, 1879, and registered 4 March, 1879, on the property therein conveyed; and

(31) "4. The plaintiff is not entitled to the relief demanded against the defendants, C. H. Robinson and wife, Mary E. Robinson."

From this judgment the plaintiff, having excepted, appealed to this Court.

W. D. Pruden for plaintiff.
E. F. Aydlett for defendants.

MERRIMON, J., after stating the case: The statute (The Code, sec. 1254) declares 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," etc. Hence it is the registration of deeds of trust and mortgages that gives them operative effect as against creditors, to be affected adversely by them and purchasers for a valuable consideration, and registration is necessary for that purpose.

The mortgage of the plaintiff was prior in date of its execution to that of the deed of trust in question, but it was registered subsequently to the registration of the deed of trust. It is clear, therefore, that the mortgage was invalid and inoperative as against the deed of trust and those claiming under and by virtue of it. The mere fact that the trustee of the deed of trust, and the purchasers for a valuable consideration claiming under it, and creditors, may, at the time of its registration, have had notice, however clear, of the prior unregistered mortgage, could not at all prejudice them. This is well settled by numerous adjudications of this Court. It would be otherwise, however, as to such creditors or purchasers who should *fraudulently* prevent or delay the registration of the prior mortgage or deed of trust. The law will not tolerate or give effect to such fraud. *Fleming v. Burgin,* (32) 2 Ired. Eq., 584; *Robinson v. Willoughby,* 70 N. C., 358; *Todd v. Outlaw,* 79 N. C., 235.

It is not alleged by the plaintiff, nor was there evidence to prove, that any person—creditor or purchaser—by any fraud circumvented, hindered or delayed the registration of the plaintiff's mortgage until after that of the deed of trust. So that the plaintiff cannot have benefit of his mortgage against the defendant, Robinson, and it may be put entirely out of view as a valid instrument as to her.

We are, however, of opinion that, giving the deed of trust in question a proper interpretation, the plaintiff is entitled to take benefit under it and have his debt paid out of the proceeds of the sale of the land therein specially designated, and which, it appears, the *feme* defendant purchased.

The deed of trust so operated as to pass such title to the lands therein described as the maker thereof had at the time he executed the same, unaffected, as we have seen, by the prior unregistered mortgage mentioned, to the trustee, and the latter had power to sell and convey the land, passing such title as he so received. This deed of trust expressly conveyed the three tracts of land embraced by the mortgage for the principal and expressed purpose of the deed, but coupled with a trust in favor of the plaintiff, and charged first with the payment of the debt

for which he obtained judgment in this action, and which he seeks to have paid out of the proceeds of the sale of the land. It is true that the trust in his favor is not created by express provision and terms of the deed, but the intention to create it clearly appears by strong implication from certain of its provisions, and there are words sufficient to give it effect.

The deed, after specifically describing the three tracts of land referred to in the proper connection in the conveying part of it, further mentions them, not to describe their boundaries or the quantity of
(33) each, but for the purpose of explaining their condition; that they were charged with the burden of the plaintiff's debt, and were conveyed subject to that burden.

The explanatory words of the deed are: "Be it known, that the several tracts of land described herein, designated as numbers one, two and three, . . . have been heretofore conveyed by deed in trust to secure the payment of a debt due to John L. Hinton (the plaintiff) for the sum of $7,500, or about that sum." And there are these further explanatory words in the *tenendum* clause: "To have and to hold each and every of the tracts and parcels of land (eight in number) herein described, *and as they are herein described,* together with," etc. Each of the tracts was first specifically described as to its boundary, and afterwards as subject to certain particular burdens mentioned. These explanations, and in effect exceptional and limiting provisions, suggest and imply the purpose of the maker of the deed to pay the plaintiff's debt first out of the proceeds of the sale of the three tracts of land mentioned in connection with his debt referred to. He obviously thought he had conveyed the three tracts by a former deed of trust for the plaintiff's benefit, and he referred to such deed in order to make manifest his intention to convey them by the deed in question, subject to and charged with the payment of the plaintiff's debt. This he could and intended to do, and there is no reason why his purpose thus appearing shall not be effectuated in this action.

It appears that the *feme* defendant was the sole next of kin and heir at law of James Leigh, deceased, and it may be that she purchased the land with the understanding and expectation that she would be entitled to the proceeds of the sale thereof, and that she bid a price for it she would not have given if she had known of the plaintiff's rights. If so, she may be allowed to surrender her bid and have the sale set
(34) aside. In that case, if need be, she will account for rents and profits. The Court will in that case order the trustee to be made a party to the action, and direct him to resell the land and apply so much of the proceeds of the sale thereof as may be necessary to the payment of the plaintiff's judgment. Otherwise, the *feme* defendant must

pay into court so much of the price she bid for the land as will pay the plaintiff's debt, and the court will so direct and require.

There is error. To the end that further proceedings may be had in the action in accordance with this opinion, let the same be certified to the Superior Court.

Error.

Cited: Ward v. Anderson, 111 N. C., 119; *Brassfield v. Powell,* 117 N. C., 141; *Bank v. Vass,* 130 N. C., 593; *Wood v. Tinsley,* 138 N. C., 510; *Wood v. Lewey,* 153 N. C., 403; *Buchanan v. Clark,* 164 N. C., 71; *Allen v. R. R.,* 171 N. C., 341; *Bank v. Redwine,* 171 N. C., 569; *Hooper v. Power Co.,* 180 N. C., 652; *Blacknall v. Hancock,* 182 N. C., 373; *In re Will of Gulley,* 186 N. C., 78; *Bank v. Smith, ibid.,* 642; *Cowan v. Dale,* 189 N. C., 687; *Hardy v. Abdallah,* 192 N. C., 47; *Hardy v. Fryer,* 194 N. C., 422.

JOHN BRANCH AND SARAH, HIS WIFE, AND CAMBRIDGE BUD AND JANE, HIS WIFE, v. SUKEY WALKER, ALBERT WALKER ET AL.

Husband and Wife—Colored Persons Cohabiting as—Descent—Judge's Charge.

1. The act of 10 March, 1866, and that of 27 February, 1879 (The Code, sec. 1281), in reference to colored persons cohabiting as husband and wife, etc., at times mentioned in said acts, were intended to apply for the benefit of those who occupied such relations to each other *exclusively*, and not to others at the same time.

2. Therefore, when the evidence tended to show that a former slave cohabited with a woman belonging to another owner as her husband until her death, just before the act of March, 1866, and that at the same time he lived with another woman, the slave of his owner, as her husband, and he and the latter acknowledged themselves husband and wife, according to the terms of said act, in an action about the title to his real property after his death between his children by those women respectively, born during the time he cohabited with them both, it was *error* to charge the jury to find in favor of one and against the other party (not because of any infirmity in the evidence of either, but because there could but one such state of things exist, to which legal sanction could be given), and to direct the jury to decide between claims equally supported by proof, instead of telling them that the statute did not in such cases apply.

CIVIL ACTION, to recover land, tried before *Gudger, J.,* at Fall (35) Term, 1886, of the Superior Court of BERTIE.

The land in dispute had belonged to Oscar Walker, formerly a slave, who died intestate in the year 1879. The *femes* plaintiff were his daughters by Sarah Branch, a slave, who died in February, 1866. The defendant, Sukey Walker, had been a slave of Oscar's owner, and lived with him as his wife until his death. The other defendants are his children by her. The other facts sufficiently appear in the opinion.

The verdict and judgment were in favor of the plaintiffs, and the defendants appealed.

R. B. Peebles for plaintiffs.
James E. Moore (by brief) for defendants.

SMITH, C. J. Soon after the late civil war, which conferred freedom upon a large class of our population, who had been slaves without capacity to enter into legal and valid marital relations, it became necessary to provide by legislation, retroactive as well as prospective, for the results of emancipation in regard to this relation, and give it the sanction of law.

To this end was passed the act of 10 March, 1866, Acts 1866, ch. 40, the fifth section of which, so far as material to the present inquiry, is in these words:

"In all cases when a man and woman, both or one of whom were lately slaves and are now emancipated, now cohabit together in the relation of husband and wife, the parties shall be deemed to have been lawfully married as man and wife, *at the time* of the commence-
(36) ment of such cohabitation, although they may not have been married in due form of law. And all persons whose cohabitation is hereby ratified into a state of marriage shall go before the clerk of the Court of Pleas and Quarter Sessions of the county in which they reside, at his office, or before some justice of the peace, and acknowledge the fact of such cohabitation and the time of its commencement, and the clerk shall enter the same in a book kept for that purpose; and if the acknowledgment be made before a justice of the peace, such justice shall report the same in writing to the clerk of the Court of Pleas and Quarter Sessions, and the clerk shall enter the same as though the acknowledgment had been made before him, and such entry shall be deemed prima facie evidence of the allegations therein contained."

The next section makes it a misdemeanor for the persons coming within its provisions, and whose continued and past cohabitation may thus secure the sanction of law, to disregard its requirements and fail to go before the clerk or justice to have the entries made up to the first day of September of the same year.

In the present case, the mother of the plaintiffs who sue for the land in dispute, died in February, 1866, and herself and alleged husband did not *"now,"* to use the word in the statute to designate the time when it went into operation, "cohabit together in the relation of husband and wife." The parents of the defendants, who, with their mother, are defending the action, did go before the clerk and comply with these requirements, in order to legalize the marital relations subsisting between them.

Another statute looking to the same end was passed on 27 February, 1879, found in The Code, sec. 1281, being the last of the rules of descent of real estate. It provides that "the children of colored parents, born at any time before 1 January, 1868, of persons living together as man and wife, are hereby declared legitimate children of such parents, or either one of them, with all the rights of heirs at law and next (37) of kin, with respect to the estate or estates of any such parents, or either one of them."

The construction and efficacy of the validating enactment of 1866 have been before this Court several times, and both interpreted and upheld.

In *S. v. Harris,* 63 N. C., 1, *Reade, J.,* speaking for the Court, declares "that by force of the original consent of the parties while they were slaves, renewed after they became free, and by the performance of *what was required by the statute,* they became, *to all intents and purposes, man and wife."*

The same proposition is reiterated by *Boyden, J.,* in *S. v. Adams,* 65 N. C., 537, and recognized in *S. v. Whitford,* 86 N. C., 636, and in *Long v. Barnes,* 87 N. C., 329, where it is held that the acknowledgment of record, while not essential to the operation of the act, but directory only, yet a compliance furnishes prima facie evidence of the facts upon which its efficacy depends.

The case on appeal thus states the evidence given to the jury, upon their inquiry as to which of the two women, mothers of the contesting claimants, is, under the statute, the lawful wife of Oscar Walker, a former slave and common father of all.

There was evidence tending to show that before, and at the time of, and after the birth of the *femes* plaintiff, the said Oscar Walker and Sarah Branch lived and cohabited together as man and wife after the manner of slaves, in Bertie County; that after 1853 and before 1860 the owner of Sarah removed to Enfield, in Halifax County, conveying Sarah with her; that Oscar visited her about twice a year until the close of the war, his last visit being at Christmas, 1865, and continued about a week, which was the usual duration of his semiannual visits. There was other evidence tending to show cohabitation between them, as husband and wife, in a state of slavery.

(38) On the other hand, there was evidence tending to show that Walker lived and cohabited with the defendant, Sukey, a slave woman, as man and wife; that six children were born to them before the Civil War, and one during the war, who is dead, and that Albert, a defendant was at the trial about 34 years of age; that Oscar and Sukey lived together on his master's plantation, in a house with their children, and that he called her wife and she him husband; that cohabiting began some two years before the birth of their first child and continued up to and during the war; that in 1865 they so lived with their children in a separate house; that in 1866 he built a house of his own on land he had bought, and removed into it with his family; that after the enactment in 1866, and during the year, Oscar and Sukey went before the clerk of Bertie and made the acknowledgment required, fixing the commencement of their cohabiting at twelve or fifteen years before; that thus they lived as husband and wife, their children with them, until Oscar's death, in 1869, and that the others remained, claiming possession as his widow and heirs at law.

It was admitted that Sukey, as such widow, had sued for and had her dower assigned in the land.

The controversy involved the conflicting claims of the issue of the woman Sarah, and of Sukey and her issue, to the property left by the deceased Oscar, and upon issues the jury find in favor of the former.

The court charged the jury, that if the cohabiting of Oscar and Sarah, while slaves, was as man and wife, and this continued up to the latter's death (explaining the removal to Enfield and its attending circumstances), and the plaintiffs were born to them during it, then, under the act of 1879 they would be the heirs of the intestate and entitled to the land. It would be otherwise unless such cohabiting did (39) exist. That, on the other hand, if the jury believe that Oscar and Sukey lived and cohabited together, while slaves, as man and wife, and such cohabitation continued up to 10 March, 1866, and afterwards, and the defendants, other than Sukey, were the offspring thereof, then the act ratified such cohabitation into a marriage from its commencement, and the defendants would be entitled to the land—adding, in his own words, "that there was *no middle ground;* that Oscar could have lived and cohabited with only one of them as man and wife; that a man could not live and cohabit as man and wife with two women at the same time, and that if so living with Sarah he could not so live with Sukey."

The exceptions are to the denial of instructions asked and *seriatim* to those given. We do not find it needful to set them out in detail. The substance of the directions to the jury was to find for the plaintiffs, if the cohabitation of their parents was maintained up to the death of the

mother, as the testimony tended to show, or, on the other hand, for the defendant, if the cohabitation of Oscar with the defendant Sukey was kept up and maintained until his death, as the testimony tended to show; but that such relation could not at the same time subsist between a man and two women.

This was not the case of a conflict of evidence about the same fact when the jury is called on to determine the matter in dispute, and to say which is entitled to credit and which is not, and when in the nature of things some of the testimony must be false and be rejected. Hence the testimony is not necessarily in conflict; for the deceased Oscar may, in dividing time, have kept up the same relations with each woman, so that separately considered they would have come within the terms of the legalizing statute, and in either case, but for the other, ripened into a valid marriage. This state of things might exist with slaves, whose intercourse with those selected as wives was generally broken and interrupted, from their being owned by different persons and residing on separate plantations during the week of work, and some- (40) times a separation being for longer intervals. Such appears to have been the condition of the parties in the present case, at least in reference to Sarah, who was removed to another county some distance from her home in Bertie. It was, in one view, then, to put the case to the jury with the superadded qualification of the improbability of keeping up marital relations with both women, during the same interval, and compelling the jury, by this inexorable rule, to find in favor of one and against the other, as in case of irreconcilable evidence, when it is self-consistent, and what was testified as to each might be true. The instruction as to each contestant was not in itself erroneous, if all the proofs had been confined to the cohabitation with one woman only, and would not have misled, but when the proof covers similar relations with another woman, the direction should have been qualified by requiring the cohabitation to have been *exclusive,* a condition necessary to the operation of the curative power of the act. Its purpose and its effect are to legalize and give validity to a *single relation,* formed and maintained among the late slave population and possessing the features and conditions of marriage, the sanction of law, which it did not before have, and thus render the offspring legitimate. When it goes beyond this and assumes a polygamous form, no relief was intended to be afforded, nor could be, with justice to both.

It was misleading to tell the jury virtually, if not in words, to find in favor of one and against the other party, not because of any infirmity in the evidence as to either, but because there could but one such state of things exist, to which legal sanction could be given, and instead of directing the jury that the statute did not in such case apply, direct

them to decide between claims equally supported by proof and without reference to its credibility.

(41) Again, the jury are not advised, in passing upon the controversy, of the effect of going before the clerk and making the acknowledgment as presenting a prima facie case for the parties thus acting, nor to the renewed assertion of its consequences, in a validated marriage relation, in the proceedings instituted and consummated in the allotment of dower.

On the other hand, if these be cured by the charge, finally rendered at the defendants' suggestion, as to the effect of what was done under the statutory direction in creating the legal status of marriage, these being undisputed facts, the charge should have concluded by directing the jury, if they so accept them, to find the issue of title for the defendants. But the instruction was so general as to leave the matter at large without the guidance that the jurors, under the circumstances, were entitled to look for.

The chief purpose, quite as appropriate to the proved antecedent relations of both women with Oscar, was to establish and render issue thus born legitimate *inter sese,* as the offspring of the same parent, and invest them with distributive and inheriting qualities, as if born in lawful wedlock; but it does not interfere with rights acquired under the provisions of the other enactment. For the errors pointed out it is apparent the verdict cannot be allowed to stand and must be reversed, to the end that a new trial be awarded. It is so adjudged.

Venire de novo.

Cited: Nelson v. Hunter, 140 N. C., 600, 603; *Spaugh v. Hartman,* 150 N. C., 455; *Croom v. Whitehead,* 174 N. C., 310.

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(42)

TIMOTHY ELY v. NORFOLK SOUTHERN R. R. CO.

Evidence—Estoppel—Proceeding to Condemn a Right of Way for a Railroad Company.

Where, in an action for damages against a railroad company for negligence in setting fire to brush, etc., on the land condemned for its right of way, by which it was communicated to land adjoining, alleged to be plaintiff's, the records of the proceeding of condemnation were in evidence, from which it appeared that the plaintiff and two others were made parties defendant to the proceeding, and that the condemnation money was paid into court by the petitioner, the railroad company, to await the termination of a

controversy as to title to the land, and it being in proof that the land injured by the fire was the same over which the right of way had been condemned: *Held*, that said proceedings were not conclusive evidence that the land belonged to the plaintiff, rather than one of the other defendants in the proceedings to condemn.

THIS was a civil action, tried at Fall Term, 1887, of the Superior Court of PASQUOTANK County, before *Graves, J.*

The plaintiff alleged in his complaint:

1. That the defendant company, the Norfolk Southern Railroad Company, has laid a railroad track through the lands of the plaintiff for the distance of about two miles, and has cleared away the trees, bushes and other growth upon both sides of said track for a distance of fifty feet from the center of said track.

2. That on or about 1 October, 1885, the said defendant company entered upon the land of the plaintiff and cut the briers, reeds and undergrowth along said railroad track running through plaintiff's land, heaped the said rubbish in large piles of very inflammable matter, and carelessly directed the same to be set on fire in a very dry season, and negligently left the said fires to burn without necessary attendance.

3. That in consequence of such carelessness and negligent attention to and management of said fires along a line of a mile or (43) more, the fire escaped from the line of said track into the adjoining woodland of the plaintiff, and burned over a large area of the same, destroying and burning up large quantities of wood and timber, and burning, in many places, large holes in the soil, destroying the value of the land, and causing sinks, in which water accumulates, rendering the surrounding land a morass unfit for pasturage or any use, to the damage of the plaintiff two thousand dollars.

The complaint contained a *second* and a *third cause of action,* alleging the same matter in nearly the same language, except that in the second it was alleged that the defendant's conduct was contrary to the statute in such case made and provided, and in the third that contrary to the statute two days notice was not given the plaintiff in writing before the firing of the woods.

Judgment was demanded against said defendant company for the sum of two thousand dollars, etc.

The answer denied each of the allegations in the complaint.

The plaintiff tendered issues not material to be set out.

The defendant tendered the following issues:

"1. Did the defendant enter upon plaintiff's land, cut and carelessly burn the undergrowth thereon, and negligently leave the fires burning, as alleged in paragraph two of the first cause of action in plaintiff's complaint?

"2. Was any injury done plaintiff in consequence of such alleged carelessness and negligent conduct, as claimed in paragraph three of plaintiff's first cause of action, as set out in his complaint?

"3. What damage, if any, was sustained by the plaintiff, by reason of the defendant's carelessness and negligence?"

First Exception. These issues were refused, and the defendant excepted.

(44) *Second Exception.* The court settled the issues as set out in the record, and the defendant excepted.

Testimony was then offered by plaintiff, tending to show that he owned the land; that it was woods or woodland, and tending to show that it had been set fire to negligently by defendant and burned over; that he had sustained damage.

Harvey Terry, a witness for plaintiff, testified: He knew the tract; it was the land of plaintiff—belonged to plaintiff; it was a tract of woodland, through which defendant's railroad ran. About 1 October, 1885, he saw defendant's hands set fire to the reeds and underbrush that had been cut down on the line of the railroad; it was a very dry time; the fire got across from the railroad right of way into plaintiff's woodland that adjoined it, and burned over an area of some 250 acres of land; it destroyed about 1,000 cords of wood, worth 50 cents a cord, standing; it damaged the land itself $6 an acre by burning holes in the soil, rendering it unfit for cultivation or pasturage; he had been offered $6 an acre for the land before and since the fire.

On cross-examination, witness stated that there was no wood growing on the railroad right of way, only underbrush, and that he did not see the railroad hands put any fire on plaintiff's lands; that condemnation proceedings had been instituted to condemn a right of way through these lands, but he did not regard them as lawful; that there was some litigation pending touching the title to these lands through which the railroad ran, but that plaintiff was the owner of them.

On redirect examination witness stated that he had been offered $6 an acre for the land before and since the burning.

This witness was afterwards permitted to explain his testimony, and said he was mistaken in saying he was offered $6 per acre since the burning.

Other witnesses testified for plaintiff that they had seen the land after the fire, and that trees were burnt down and holes were burnt in the land, etc.

(45) John Whitehead, a witness for the defendant, testified: That he was section master of the section of defendant's railroad where the burning occurred; he had four hands; the railroad right of way was

cleared off every year; it had been cleared off the year before the burning in question; about 1 October, 1885, he took his working force and cut down the briers, reeds and underbrush on the defendant's right of way, that had grown up within the year preceding, and had them set on fire; he discovered that the fire was eating its way towards the adjoining woodland, and he directed a trench to be dug around it on defendant's right of way, and earth thrown upon it, which was done; he supposed the fire was extinguished, and only saw smoke ascending as from an extinguished fire; there was no wood upon the right of way, except now and then a pile of old decayed logs that had been cut down when the road was built; Mr. Harvey Terry was not present at any time while witness was there, and witness was there all the time while the hands were there; in the evening, when he left, he had no suspicion of danger—thought he had taken every necessary precaution to suppress and extinguish the fire, and that that end was fully accomplished; the next morning, when he returned to his work, he found that the fire had burned its way under the ground and under the trench, and beyond the defendant's right of way into the woodland adjoining, and had gotten beyond his control; a heavy rain the next night extinguished the fire.

Other witnesses testified for the defendant that the land was nearly worthless before the fire, and that it had been damaged but little by the fire.

Defendant also put in evidence the record of proceedings instituted before the clerk of the Superior Court of Pasquotank County, on 14 January, 1885, to condemn the right of way for defendant's road through the lands on which the burning complained of occurred, by which proceedings it appeared that Timothy Ely, Harvey Terry and J. F. Davis were made defendants as claimants of the said (46) land, and also that the said right of way had been duly condemned.

The following is an official endorsement, made upon the commissioner's report condemning the land by the clerk of the Superior Court of Pasquotank County:

"Condemnation money paid into court by petitioner, and the same held by me to await termination of controversy as to the title of the property, the same being in litigation in the court.

J. R. OVERMAN, C. S. C."

The defendant asked the court to give the following instruction:

"The court instructs the jury that the plaintiff, having shown no title to the land on which the damage is alleged to have been done, is not entitled to recover any damages in this action."

The court refused to give the instruction, but charged the jury:

"The inquiry is as to the plaintiff's right or title to the land alleged to have been injured; for, unless the plaintiff has some interest in the land alleged to have been injured, he will not be entitled to maintain his action. Upon this question the plaintiff was allowed to testify, without objection, that it was his land; and the defendant has offered in evidence the record of a proceeding to condemn the right of way for its use over the lands of plaintiff and others. So there is some evidence to go to the jury that the plaintiff has title to the land; and if the land described in that proceeding is the same land described in the complaint, the defendant is estopped to deny the plaintiff's title. The proceeding of the court offered in evidence did not divest the title out of the plaintiff, but the title remained in the plaintiff, and by that proceeding the
(47) defendant acquired an easement, or a right to use the land of the plaintiff for the purpose of constructing and operating a railroad over it."

Third Exception. The defendant excepted to the ruling of the court in refusing the instructions asked, and also excepted to the instructions given.

The defendant further asked the court to instruct the jury as follows:

"The court instructs the jury that plaintiff, not having alleged in his complaint that the defendant set fire to any woods, the said plaintiff is not entitled to claim or recover any damages in this action under the second or third causes of action in his complaint."

Fourth Exception. This was refused, and defendant excepted.

The defendant further asked the following instructions:

"The court instructs the jury, that if they believe that the defendant set fire to the underbrush and rubbish on its own land, and if they believe said lands of the defendant were not forest lands in their natural state, . . . the fire escaped to and damaged the woods and lands of the defendant, that that is not such a setting on fire of woods as is meant by section 52 of The Code, and the defendant would not be answerable in damages in this action, under that section."

This instruction was refused, and the court charged the jury:

"That defendant's roadway ran through the woodland of the plaintiff. Such land as had been described by the witnesses was woods, in the purview of the statute; and if the defendant often cleaned its right of way—permitted reeds and briers and underbrush to grow up for a year, and then cut them down on its right of way, and set fire to it, it was a setting fire to the woods, in the meaning of the statute; and if the defendant did not give the notice required, and the fire so set out escaped
(48) to the woodland of the plaintiff adjoining the right of way of

defendant, and did damage to the plaintiff, the defendant would be answerable in damages in this action, if the defendant carelessly set fire to such briers and brush at a time when it was so dry that the earth itself would burn."

And, at the request of the defendant, the court gave this further instruction:

"The court charges the jury that the defendant had a right to burn off the undergrowth and rubbish from its own land; and if they believed it used reasonable care in doing so, and in suppressing the fire before it reached the lands of the plaintiff, by digging a trench around it and throwing fresh earth upon it until it supposed the fire was extinguished, or by other reasonable means, and that the fire burned under and through the ground of the defendant to that of the adjoining landowner and damaged it, such burning would not be imputed as negligence to the defendant."

And the court added: "But if it was so dry that the land would burn, and the defendant's servants knew that it would burn and communicate to the lands of adjoining landowners, notwithstanding such ditching, it would be negligence."

Fifth Exception. To the refusal to give the instruction asked and to instruction given the defendant excepted.

Verdict was rendered in favor of the plaintiff. Motion for new trial overruled, and appeal by defendant.

Harvey Terry and W. D. Pruden for plaintiff.
L. D. Starke and E. C. Smith for defendant.

AVERY, J., after stating the case: The court did not err in refusing to instruct the jury that the plaintiff could not recover because he had shown no title to the land on which the trespass was alleged to have been committed, nor in explaining to the jury that the testi- (49) mony of the witness, Terry, admitted without objection, was some evidence of title. But his Honor did not stop there. He added, that "if the land described in that proceeding, referring to the proceeding to condemn the right of way) is the same land described in the complaint, the defendant is estopped to deny the plaintiff's title." If the record shows that the order of condemnation applied to the land upon which the plaintiff alleges that the fire originated, then the instruction given left the jury no option or discretion. Even if the jury had discredited the testimony of the witness Terry (and we have no right to assume that they did not), still the fact is stated, as admitted, that the proceeding was instituted "to condemn a right of way *through the lands on which the burning complained of occurred.*" If, therefore, the jury

adopted the view of the law applicable to the case that was enunciated by the judge, they were bound to decide that the defendant company was concluded as to the question of title by said record. If the language quoted from the charge is not unequivocal and clearly susceptible only of the construction given, the fact that the court, in the next sentence, assumed that the proceeding covered the same land as that described in the complaint, and explained to the jury that the effect of the order of condemnation was to give the defendant an easement and not to divest the title out of the plaintiff, leaves no doubt that the language of the court has been interpreted according to its true import.

The third exception extends not only to the instruction refused, but to that given as a substitute. Conceding, then, that the defendant must clearly point out the error complained of, the record, as amended by consent of parties in this Court, shows that Timothy Ely, Harvey Terry and J. F. Davis were made defendants in said proceeding as claimants of the land, that the right of way has been condemned and the
(50) amount of the damage paid into court "to await termination of controversy as to title of the property, the same being in litigation in this court."

Under the provisions of the general law (The Code, sec. 1944), the petitioner in cases of this kind (whether it be a claimant or owner of the land, or the company) is required to set forth in the petition "the names and places of residence of the parties, so far as the same can, by reasonable diligence, be ascertained, *who own or have or claim to own or have estates or interests in said real estate.*" The same section requires that the petition must be served on all persons whose interests are affected by the proceeding. Section 1947 of The Code provides, that when there are "adverse and conflicting claimants," the court may direct the money to be paid into court, and proceed to determine who is entitled to receive it. In the absence of any evidence as to the provisions of the charter of the defendant company, we may assume that the petition was filed and the subsequent orders made under the provisions of the general law, as it would have been certainly proper to do so if there was no course of procedure in such cases provided for in the charter, or none that conflicted with the section referred to.

If we conclude, after a careful review of the testimony, that the plaintiff Ely and the witness Harvey Terry are not adverse claimants of the title and condemnation money, but represent one claimant under two names, there can be no doubt that, according to the record, J. F. Davis is litigating with the other two, and it has not been determined by the courts who is the owner. Suppose, then, that Davis should begin an action precisely the same in form as that brought by the plaintiff Ely, should offer the same record of the proceedings to condemn, and the

same admissions should be made as to the identity of the land described in the complaint and in the petition, would not the defendant company be estopped to deny the title of Davis, if the law has been correctly stated by the judge in this case? But, we suppose, if it (51) is admitted that we have properly construed the language quoted from his Honor's charge, it will not be contended that a record which shows certainly that Davis and Ely both claim title to a tract of land, and the litigation between them is not yet determined, shuts the mouth of the defendant company, a party to the same record, to deny that Ely is the owner. It is not necessary to cite authority upon this point, because the only question raised on the argument was whether the interpretation that we have given to the judge's charge is correct. Indeed, the record shows conclusively that the title was not adjudged to be in the plaintiff.

The defendant's counsel contended, too, that there was error in the refusal of the court to submit any other issue than that passed upon by the jury, and which, with the answer, was as follows:

"Has the plaintiff sustained damage by the default and negligence of the defendant? Yes."

Without deciding or even discussing the point, we may suggest that an objection may be obviated on the next trial by framing, under each separate cause of action as to which conflicting testimony may be offered by the parties, an appropriate issue.

For the error pointed out the judgment must be reversed and a new trial had in the court below.

Error.

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(52)

STATE OF NORTH CAROLINA EX REL. THE COUNTY BOARD OF EDUCATION OF CHOWAN v. A. J. BATEMAN ET AL.

County Officers—Official Bonds.

When a law is passed imposing a duty of receiving and disbursing a new fund on certain county officers, and no provision is made in the statute for an additional bond to cover the new duty, any bond given by the officer after the law is in force, though in terms providing only for the securing the faithful discharge of official duty and accounting for money received by virtue of his office, will be held to be a security for the performance of the new duty; but when such law in terms requires an additional bond for the performance of the new duty, a bond theretofore required of the officer and conditioned for the faithful discharge of the duties of his office, will not embrace the new duty for which the additional bond was required;

Therefore, when a County Treasurer at the same time filed two official bonds, with same conditions, but in different penal sums and with different sureties, the conditions being that he "shall well and truly account for all moneys that may come into his hands by virtue of his office, and shall faithfully perform all things pertaining to his office required of him by the laws of North Carolina, or any other authority by virtue of said laws," otherwise, etc.: *Held*, that neither of said bonds covered the duties imposed upon the county treasurer by section 2554 of The Code, requiring him to receive and disburse all public school funds, and to execute a "justified treasurer's bond," etc., "conditioned for the faithful performance of his duties as treasurer of the county board of education," etc., "for any breach of which said bond, action shall be brought by the county board of education."

THIS was a civil action, heard at the Fall Term, 1887, of the Superior Court of CHOWAN County, before *Graves, J.*

The material portions of the complaint are as follows:

"1. That on the .... day of November, 1884, the defendant, A. J. Bateman, was duly elected treasurer of Chowan County, and shortly thereafter qualified according to law as treasurer aforesaid, and at the same time, as treasurer, executed two bonds, payable to the State of
(53) North Carolina, one in the sum of six thousand seven hundred and fifty dollars, and the other in the sum of seven thousand five hundred dollars, each of which to be void upon condition that the said A. J. Bateman 'shall well and truly account for all moneys that may come into his hands by virtue of his office, and shall faithfully perform all things pertaining to his office required of him by the laws of North Carolina, or any other authority by virtue of said laws,' otherwise to remain in full force and virtue.

"2. That W. J. Webb, T. G. Skinner, Harry Skinner, James Parker and J. J. Farmer signed the first of said bonds as sureties, and the other defendants, Wozelka, Elliott and White, signed the second as sureties.

"3. That by virtue of his office as treasurer the said Bateman received from the sheriff of said county, and from other sources for and on account of the school fund of the said county, a large sum of money, and has utterly failed to account for and pay over according to law, of the amount so collected and received, the sum of one hundred and seventy and sixty-four one-hundredths dollars."

The defendants demurred as follows:

"The defendants demur to the complaint in this action, because it does not state facts sufficient to constitute a cause of action against them, for the following reasons:

"1. This action is brought to recover an alleged balance due on the school fund by said Bateman as treasurer of the county board of education, and it is not alleged in complaint that Bateman ever qualified as

treasurer of said board, or that these defendants ever executed any bond to cover a discharge of his duties as treasurer of said county board of education.

"2. That the conditions of said bonds set out in complaint show they were executed to cover only the duties of Bateman as general county treasurer, and were not executed to cover any duties of Bateman as treasurer of the said board of education, and no breach of his (54) duty as general county treasurer is assigned in the complaint.

"3. For that it appears from said bonds that they were cumulative bonds to secure a safe handling of the general county fund, and no failure to pay over any part thereof is alleged. Wherefore, they pray," etc.

The judgment was as follows:

"This cause coming on to be heard on complaint and demurrer filed and argued, upon motion of Pruden & Vann for the plaintiff, it is adjudged that the defendants' demurrer be and it is overruled, and that the defendants be allowed to answer.

"It is further adjudged that the plaintiff recover of the defendants the costs of this term, to be taxed by the clerk."

The defendants appealed.

W. D. Pruden for plaintiff.
W. M. Bond (by brief) for defendants.

AVERY, J., after stating the case: By a series of adjudications, extending over more than fifty years, we think that the principles governing this case have been clearly settled.

When a law is enacted that imposes the duty of receiving and disbursing a new fund upon the sheriffs or treasurers or other officers of counties, and the statute fails to provide that an additional bond, conditioned for securing the faithful application of such fund, shall be required, any bond given by the officer after the law is in force, though in terms it may provide only for securing the faithful discharge of official duty and accounting for money received by virtue of his office, will be construed to embrace the new duty, and to constitute a security for its performance. *S. v. Bradshaw,* 10 Ired., 229.

In that case the facts were that the sheriff of Rowan County (55) and his sureties were sued on his official bond, executed in the year 1847, and conditioned that "he shall pay all money by him received, by virtue of any process, to the person or persons to whom the same shall be due, and in all other things will truly and faithfully execute the said office of sheriff during his continuance therein." The defendants, his sureties, were held to be liable for a tax levied by the proper authori-

ties of the town of Salisbury, because an act passed in the year 1827 required the sheriff of Rowan County "to collect, pay over and account for the taxes imposed by the commissioners of the town of Salisbury, on citizens and property therein," etc. (but did not require a new bond), and the sheriff had failed to account for tax collected for the town in 1847.

In the case of *Lindsay v. Dozier et al.*, Busbee's Law, 275, the Court held, in effect, that where an officer had given a bond for the faithful discharge of his duties, after the enactment of the law intrusting him with the collection and disbursement of an additional fund, such bond would be deemed a security for the performance of the new duty, *unless the statute imposing it in express terms required a separate bond* for the performance of that new duty. The act of 1844 required each county to levy a tax for the common school fund, and the sheriff was directed to collect it "in the same manner that other county taxes are now levied for other county purposes," and in the same section it was provided that the bond given by the sheriff to secure the county taxes "shall contain a condition for the faithful collection and payment of the school taxes to the person authorized to receive the same." The sheriff, Dozier, filed a bond, conditioned only for the collection of all county taxes, and the action brought against him and his sureties on that bond for the school fund, collected by him and not accounted for, was sustained by the court.

(56) On the other hand, where a law charging an officer with a new duty, requires in express terms an additional bond for its faithful performance, or one embodying conditions different from those necessary in that already required, an official default in misapplying funds received by virtue of such statute is not held to be a breach of the bond conditioned for the faithful discharge of the duties of the office, even when it embraces the new duties only in general and not in specific terms. *Crumpler v. Governor,* 1 Dev., 52; *Governor v. Barr, ibid.,* 65, and *Governor v. Matlock,* 1 Dev., 214.

Chief Justice Ruffin cited these cases in *S. v. Bradshaw* as establishing the rule, "that the general words in the conclusion of the general bond of the sheriff did not extend to the public and county taxes." As a reason for the rule he says: "The construction was that those words were, upon the intention, not cumulative but special securities, for the revenue of each kind, inasmuch as if it were not so, the interest of the public and private persons would often come in conflict; and indeed the penalty of the bond would often be exhausted by the public leaving nothing, or but little, as a security to individuals." If we apply the principles stated in and deduced from the opinions referred to, there

will be little trouble in reaching a conclusion as to the correctness of his Honor's ruling. We are of the opinion that the demurrer should have been sustained.

Two bonds were filed by the defendant, Bateman, on the same day, and containing precisely the same conditions, but different penal sums, and signed by different sureties. The conditions in both bonds were that the said A. J. Bateman "shall well and truly account for all moneys that may come into his hands by virtue of his office, and shall faithfully perform all things pertaining to his office required of him by the laws of North Carolina, or any other authority by virtue of said laws," otherwise to remain in full force and virtue.

The Code of North Carolina, Vol. 1, ch. 19, sec. 766, provides (57) that the county treasurer shall give bond, "conditioned that he will *faithfully execute the duties of his office,* and pay, according to law and on warrant of the chairman of the board of commissioners, all moneys which shall *come into his hands as treasurer,* and *render a true account thereof to the board,* when required by law or the board of county commissioners."

Section 2554 of The Code provides that "the county treasurer of each county shall receive and disburse all public school funds," and he is further required to execute a "justified treasurer's bond," etc., "conditioned for the *faithful performance of his duties as treasurer of the county board of education,* and for the payment over to his successor of any balance of school money that may be in his hands unexpended, etc., . . . and for any breach of said bond action shall be brought by the county board of education."

It is almost needless to state that neither of the bonds declared on in this action purports to have been executed by Bateman and the other obligors to provide for the misapplication of the school fund, received by him in the capacity of treasurer of the county board of education, and the condition of both are widely variant in form and substance from those prescribed in section 2554. Whether both are so drawn as to substantially meet the requirements of section 766, is a question that we are not called upon to decide now; but if they are sufficient in form to bind the obligors as to any default of Bateman, acting generally in the capacity of county treasurer, we must, according to the authorities cited, hold that they are cumulative obligations, and that the sureties, who executed both, are liable only for some default of Bateman as relating to his office as county treasurer proper, and not as treasurer of the board of education.

Indeed, section 2554 requires that the bond mentioned in that (58) section shall be executed before entering upon the duties of his office, and the board of education has the right, if necessary, to require

the treasurer to strengthen it on notice. The plaintiff might have critically examined the obligations filed by Bateman, and have refused to intrust him with the disbursement of school funds until the law had been complied with.

The case of *Commissioners v. Magnin,* 86 N. C., 285, sustains the view we have taken of this case. The county treasurer was, by the law then in force (Bat. Rev., secs. 32, 34 and 35, ch. 68), made *ex-officio* county treasurer, and as such required to give a bond conditioned for the faithful performance of his duty as treasurer of the county board of education. The bond, for an alleged breach of which the action was brought, recited the fact that Magnin had "become disburser of the school money" by virtue of his appointment as county treasurer, and the question discussed by the *Chief Justice* in that case was, whether the loosely drawn condition, "to well and truly disburse the money coming into his hands under the requirement of law" (referring to Magnin as "disburser of the school money"), could be construed to cover the alleged defalcation in the failure of Magnin to account for and pay over to his successor school funds received by virtue of his office, and the Court held that Magnin was liable. The discussion as to the form of that bond probably suggested the changes in the law as now enbodied in section 2554.

For the reasons stated, the judgment is reversed, and the court below will proceed in accordance with this opinion.

Error.

Cited: Speight v. Staton, 104 N. C., 48; *Koonce v. Commissioners,* 106 N. C., 199; *Boothe v. Upchurch,* 110 N. C., 64; *Smith v. Patton,* 131 N. C., 397; *Marshall v. Kemp,* 190 N. C., 493; *S. v. Bank,* 194 N. C., 440.

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ROBERT L. KNOWLES v. NORFOLK SOUTHERN RAILROAD COMPANY.

Pleading—Statement of Cause of Action—Motion to Dismiss—Aider—Damages.

1. Where it is apparent from the allegations in the complaint that the plaintiff has no cause of action, a motion to dismiss at any stage of the action will prevail; but where the complaint fails to set forth a sufficient cause of action by reason of the omission of some substantial averment, or for any other defect which might be remedied by amendment, the objection must be made by demurrer or answer, or the defendant will be deemed to have waived it.

2. If the answer contains, by fair construction, an admission of the material averments which should have been made in the complaint, or if it is framed upon the assumption that such averments have been sufficiently made, and denies them, the complaint will be aided by the answer and the defects thereby cured.

3. The plaintiff may recover punitive damages where he proves that the acts which caused the injury were accompanied by the fraud, malice, reckless negligence, rudeness, oppression, or other wilful aggravation of the defendant.

THIS was a civil action, tried at the Fall Term, 1888, of the Superior Court of PERQUIMANS County, before *MacRae, J.*, for damages for an alleged unlawful expulsion of plaintiff from defendant's cars.

The complaint and answer and issues were as follows:

The plaintiff alleges:

"1. That the defendants are a railroad corporation, doing business in, and under a charter of the General Assembly of this State.

"2. That the plaintiff, on the ..... day of ....., 1887, purchased of the defendant's agent at Winfall, a station on their road, a return ticket to Elizabeth City, also a station on said road.

"3. That on his return the day following, he was put off the (60) train by the conductor, one Poindexter, because he had no ticket, which fact he, plaintiff, had not discovered until the same was called for.

"4. That the plaintiff explained the case to the said conductor, telling him that he knew where his ticket was; that he could and would get it as soon as he reached Winfall, and there deliver it to him, or that he would deposit with him, the said Poindexter, money of the value of the ticket, to be returned if he should produce the misplaced ticket at Winfall, as agreed; that the money was tendered the said conductor, but he refused to receive the same, and forced the plaintiff off the train several miles from his destination.

"5. That it is the custom of the defendants to accept money in lieu of tickets when the latter cannot be had.

"6. That by said wrongful act of ejecting the plaintiff from said train he has sustained serious damage."

Wherefore, he prays judgment, etc.

The defendant's answer was as follows:

"1. That section 1 thereof is true.

"2. That section 2 thereof is true.

"3. That on the day named the plaintiff was a passenger on the defendant's train going from Elizabeth City south, and the conductor of said train called on him for his ticket, but was informed by the plaintiff that the same had been left by him in the pockets of another suit of clothes, and could not then produce it, but would do so the next day.

The conductor then demanded of him the usual fare between Elizabeth City and Winfall, where he wanted to go, but this the plaintiff refused to pay, but did offer to deposit with the conductor enough money to pay the fare, provided the conductor would agree to return the same if the plaintiff would next day produce the ticket. The conductor refused to do this, and informed the plaintiff that he was ordered in all cases to collect from passengers a ticket or the fare in money, and that
(61) unless the plaintiff presented his ticket or paid the fare he would be put off the train; and upon the plaintiff's refusing to do either, the conductor, at the next station, stopped the train and told the plaintiff he must get off, which he did.

"4. That the conductor was carrying out in this matter the general orders of the defendant company; that he committed no violence whatever towards the plaintiff, but acted considerately and carefully towards him, and the plaintiff left, upon the demand of the conductor, and without being ejected by him. . . .

"Wherefore, defendant demands judgment, that it go without day and recover its costs."

There was evidence on the part of the plaintiff tending to show that before the plaintiff was put off the train he offered to pay the conductor his fare, but that the same was refused; that the conductor was rude in his manner, and pushed the plaintiff as he got off the train.

Evidence denying this, and showing that the conductor had acted discreetly and kindly in ejecting the plaintiff, and that the plaintiff refused to pay his fare or exhibit a ticket, was introduced by defendant.

The following issues were submitted to the jury:

"1. Did the defendant's agent wrongfully eject plaintiff from defendant's train?

"2. What damage has plaintiff sustained?"

The court charged the jury as follows:

"1. If the plaintiff was on the train from Elizabeth City to Winfall without his ticket, the conductor had the right to collect fare or put him off at the next station. Plaintiff could not require of the conductor to agree with him to return the money if he gave him the ticket in the morning. But if plaintiff offered to pay his fare without conditions, and the conductor refused to receive it, he had no right to put him off. If he did put him off under these circumstances, it was wrongful, and your response should be 'Yes.'

(62) "2. If, however, the plaintiff refused to pay his fare and the conductor put him off in a rude or insulting manner, such as to show malice on the part of the conductor, the plaintiff would be entitled to such damage as you deem proper—punitive. If he did offer to pay his fare and the conductor put him off without using force or acting to-

wards him in a rude or insulting manner, the damages would be the actual expense which he incurred, and compensation for the trouble to which he was put by reason of being wrongfully ejected."

The defendant excepted to this charge, and assigned as error that the court instructed the jury that they might assess punitive damages, when, under the pleadings as they are, the plaintiff was not entitled, in any aspect of the case, to punitive damages.

The jury answered the first issue "Yes," and the second "$250," and the court rendered the judgment set out in the record, from which the defendants appealed.

The appellant moved in this Court for the first time to dismiss the action because the complaint did not state facts sufficient to constitute a cause of action.

B. C. Beckwith for plaintiff.
W. D. Pruden for defendant.

AVERY, J., after stating the case: It seems that the Court of Appeals of New York, giving effect to precisely the same language as section 98 of the Code of Civil Procedure, and substantially the same as section 242 of The Code of North Carolina, have construed it to mean that the motion to dismiss on the ground relied on in this case would not be entertained when made for the first time in the Appellate Court. Bliss' Code, sec. 499, p. 533, note z. We must stand to our repeated decisions that this Court will, on motion, or *ex mero motu,* dismiss an action on this ground, just as would be done when it appeared upon the face of the record that the action had been brought in a court (63) that did not have original jurisdiction. *Tucker v. Baker,* 86 N. C., 1; *Hunter v. Yarborough,* 92 N. C., 68; *Rogers v. Jenkins,* 98 N. C., 129; *Johnson v. Finch,* 93 N. C., 205; *Halstead v. Mullen, ibid.,* 252.

But, if the complaint *does state facts that constitute a cause of action,* by a fair construction of the language, the motion must be denied. If the language used in the fourth paragraph of the complaint is susceptible of the interpretation, that the plaintiff tendered to the conductor the usual fare from Elizabeth City to Winfall, and that the conductor put him off the train notwithstanding the amount usually paid for passage between those points was offered, there is a statement of facts sufficient to constitute a cause of action *(Nance v. R. R.,* 94 N. C., 624); though, nothing more appearing, the recovery of the plaintiff might be restricted on trial to an almost nominal sum. The original jurisdiction must depend entirely on the amount demanded in good faith as damages. *Fell v. Porter,* 69 N. C., 140.

The paragraph mentioned is divided into two parts, separated by a semicolon, as it appears in the record, but might have been divided into two paragraphs. The first paragraph, if it had been so arranged, would have been as follows: "That the plaintiff explained the case to said conductor, telling him that he knew where his ticket was; that he would get it as soon as he reached Winfall, and there deliver it to him, or he would deposit with him, Poindexter, the value of the ticket, to be returned, if he should produce the misplaced ticket at Winfall, as agreed." The second portion of the section, as a distinct paragraph, would be as follows: "That the money was tendered to the said conductor, but he refused to receive the same, and forced the plaintiff off the train several miles from his destination."

These are two propositions, in no way dependent upon or qualifying each other, and not necessarily inconsistent, and no matter what punctuation may be adopted, can be construed only as distinct offers.

(64) First, the plaintiff proposes to deposit the value of the ticket, which, in the absence of any proof to the contrary, we must assume to be the usual fare between the two points named, but upon condition that he is to take it as a pledge and return it if the ticket should be produced.

When the conductor refused to accede to that proposal, *"the money* (meaning the usual fare or value of the ticket) *was tendered to the said conductor and he refused to receive the same, and forced the plaintiff off the train."* This is clearly susceptible of the interpretation, that the tender at last was unconditional, but the conductor impatiently declined it and ejected plaintiff. There can be no doubt that the language so construed is a statement of a good cause of action. In considering a motion of this kind we cannot look beyond the language of the complaint to the fact that the parties tried the case without objection, and apparently acted upon the idea that the pleadings put in issue the question, whether the regular fare had been tendered, because, as already stated, the motion might have been purposely reserved for this Court.

There was testimony on the part of the plaintiff tending to show that he offered to pay his fare before he was put off the train, and that the conductor, after refusing the money tendered, rudely pushed him as he was getting off. On the other hand, there was evidence on behalf of the defendant that the plaintiff refused either to pay the fare or exhibit a ticket, and that the conductor acted kindly and discreetly in ejecting him.

The defendant excepted to the charge, assigning as error that the court instructed the jury that they might assess punitive damages, when, under the proceedings, as they are, the plaintiff was not entitled, in any

aspect of the case, to punitive damages. Conceding that there must be sufficient allegations in the complaint, as well as corresponding proof to sustain them, and that testimony, otherwise sufficient, (65) would not support a verdict without *allegata* in accord with the *probata,* the question arises whether the complaint does not contain a statement of a cause of action in support of which the plaintiff may prove himself entitled to exemplary damages. Few, if any, of the ancient rules of pleading are now applicable; all that is required of the plaintiff is a plain and concise statement of the facts constituting a cause of action. *Gorman v. Bellamy,* 82 N. C., 496; *Moore v. Edmiston,* 70 N. C., 510; *Jones v. Mial,* 82 N. C., 252. The words, *"forced the plaintiff off the train,"* and that he was "put off," together with the further allegation that by said wrongful act of *"ejecting plaintiff from said train,"* etc., *ex vi termini,* convey the idea that *actual violence* was used, because a demonstration of power would have compelled him "to get off" the train, and the word "ejecting" in this connection implies more than a mere command to leave the train, with power to enforce obedience. This view of the case is strengthened by the fact that the defendant in the answer is careful to aver that the conductor "stopped the train and told plaintiff he must get off, which he did, and that the former committed *no violence* whatever towards him, and that the plaintiff left upon the demand of the conductor and *without being ejected by him."* The complaint charges, *actual,* if not *more than ordinary, violence,* and the words "put him off" imply rudeness, however informal the expression may be. If the words do not import all that we have held that they mean, a sufficient cause of action being alleged, there would not be such a variance from the proof as would be deemed material, if any at all. *Willis v. Branch,* 94 N. C., 142; *Usry v. Suit,* 91 N. C., 406. But in fact the proof offered, of rudeness to the plaintiff on the part of the conductor, in the very act of expelling him, accords with the true interpretation of the allegations mentioned, and such rude expulsion will entitle the plaintiff to recover more (66) than ordinary damages. Woods Railway Law, sec. 317, pages 1242-45, with notes.

Justice Ashe, delivering the opinion in *Holmes v. R. R.,* 94 N. C., 318, adopts the rule which must control the Court, and which is decisive of the point we have discussed: "When there is an element either of fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, *rudeness,* caprice, wilfulness, or other causes of aggravation, in the act or omission causing the injury, punitive damages may be awarded by the jury." Conceding that our interpretation of the language of the complaint is correct, there was an allegation, as there was evidence, of rudeness. It is apparent,

too, from the careful denial of the answer, that the defendant was not misled, but understood what was meant by the plaintiff, and not only carefully avoided admitting the force as alleged, but set up an affirmative averment as to the force used, which draws the line very nicely between rudeness and a courteous discharge of a trying duty. *Usry v. Suit, supra;* The Code, secs. 269, 270 and 271; *Garrett v. Trotter,* 65 N. C., 430.

On the argument there was some discussion of the point, whether the objection that there was a variance between the allegation and the evidence offered by the plaintiff, if it had been well founded, could have been made for the first time after the defendant had introduced testimony to rebut the evidence offered by the plaintiff without objection on the part of the former. It would seem that the practice of the courts in New York differs from ours, also, in this respect, 18 N. Y., 515; 20 N. Y., 62.

The practice there permitted must be made consistent with the sections of The Code cited above, on the ground that a party, by failing to object to evidence introduced by his adversary, and offering rebutting testimony, waives his right to take advantage of the defect in the
(67) pleadings at a later stage in the trial. While the holding of this Court as to variance differs widely from that of the Appellate Court of New York, our Court has repeatedly drawn the distinction between a defective statement of a cause of action and a statement of defective cause of action.

In the case of *Garrett v. Trotter* (65 N. C., 430), *Chief Justice Pearson* says for the Court: "The defect is aided by the answer, which *shows that the defendant understood* the complaint to charge an illegal withholding of the possession."

When, therefore, we have reached the conclusion that the complaint stated a cause of action upon which the plaintiff could recover actual damages, if there was some doubt or room for discussion as to the true meaning of the complaint considered alone, but the denial was so expressed in the answer as to prove that the allegations of the complaint were construed by the defendant to imply a charge of rudeness, and, therefore, denied, the doctrine of aider would apply, and the right to recover punitive damages for the rudeness, if proven, would be established. The judgment must be

Affirmed.

Cited: Peacock v. Stott, 104 N. C., 156; *Harris v. Sneeden, ibid.,* 375; *Blow v. Vaughan,* 105 N. C., 209; *Jackson v. Jackson, ibid.,* 440; *Rose v. R. R.,* 106 N. C., 169; *Bonds v. Smith, ibid.,* 562; *Tomlinson v. R. R.,* 107 N. C., 330; *Allen v. Sallinger,* 108 N. C., 160; *Conley v.*

R. R., 109 N. C., 697; *Wiggins v. Kirkpatrick*, 114 N. C., 301; *Brooks v. R. R.*, 115 N. C., 625; *Mizell v. Ruffin*, 118 N. C., 71; *Whitley v. R. R.*, 119 N. C., 727; *Ladd v. Ladd*, 121 N. C., 120; *Printing Co. v. McAden*, 131 N. C., 184; *Hutchinson v. R. R.*, 140 N. C., 127; *Ammons v. R. R., ibid.*, 198; *Hayes v. R. R.*, 141 N. C., 199; *Knights of Honor v. Selby*, 153 N. C., 206; *McLeod v. Gooch*, 162 N. C., 122; *Griffin v. Cupp*, 167 N. C., 96; *Webb v. Telegraph Co., ibid.*, 487; *McNairy v. R. R.*, 172 N. C., 509; *Palmer v. Latham*, 173 N. C., 60; *King v. R. R.*, 176 N. C., 304; *Baker v. Winslow*, 184 N. C., 5; *Hunt v. Eure*, 189 N. C., 487; *Power Co. v. Casualty Co.*, 193 N. C., 618.

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MARY L. SPENCER ET AL. v. GEO. CREDLE, ADMINISTRATOR OF S. R. SADLER ET AL.

Estoppel—Notice—Lis Pendens—Judicial Sales—Clerks of Superior Courts—Irregularities in Special Proceedings—Judgments, When Void—Purchasers—Parties.

1. All persons who have been duly made parties to an action will be presumed to have notice of all orders, decrees, etc., therein subsequently made, and will be estopped thereby, notwithstanding any irregularities which may appear in the proceedings, until they shall have been reversed or vacated on appeal, in some action instituted for that purpose.

2. An order made by the clerk appointing himself a commissioner to sell land, and subsequently to pay out the moneys arising from such sale, is not void.

3. The statutory provisions requiring judgments, decrees, etc., to be signed by judges and clerks are not mandatory, and a failure to observe them will not, *per se*, render such orders ineffectual.

4. Where, in a proceeding for sale and partition, the answer raised issues of law and fact, which should have been transferred to the Superior Court docket "in term," for trial, but there was no evidence this had been done, and it did appear that the clerk made an order for sale, that a sale was made, and the proceeds partitioned, that the parties were all before the court, and no appeal was taken, nor any proceeding instituted to vacate the action of the clerk, until several years after the cause was disposed of: *Held*, that the parties will be presumed to have abandoned the defenses embraced in the issues, and to have acquiesced in the subsequent orders, etc.

5. Strangers to an action are not affected with constructive notice of an action involving the title to lands situate in a county other than that in

which the action is pending, unless the notice, *lis pendens*, is given under section 229, The Code; but even purchasers for value, although not parties, are affected by such notice if the lands are in the county where the action is pending, and the pleadings describe them with reasonable certainty.

CIVIL ACTION, tried before *Graves, J.*, at Fall Term, 1887, of HYDE Superior Court.

This action is brought by Mary L. Spencer and her five chil-
(69) dren—Emma E. Worthy (wife of J. A. Worthy), E. A. Spencer, H. J. Spencer, A. L. Spencer and F. J. Spencer—against George Credle, as administrator of Samuel R. Sadler, former clerk of the Superior Court of Hyde County, and the other defendants as sureties upon his official bonds for the years 1868, 1869, 1870, 1871, 1872 and 1873.

The plaintiffs allege that in a proceeding wherein Lancaster *et al.* were plaintiffs and the said Mary L. Spencer *et al.* were defendants, a sale of the lands of Henry S. Spencer, deceased, was *ordered* and *made*, and the proceeds of said sale, amounting to thirty-nine hundred and eighty dollars, were paid to and received by said Samuel R. Sadler, as commissioner of the court, and that after deducting all costs and expenses the share due each of the heirs of Henry S. Spencer was $637.31, and that the interest of John N. Spencer, one of the heirs, was the property of the plaintiffs.

The plaintiffs further allege, in substance, that on 2 March, 1872, said Sadler, acting as commissioner aforesaid, paid to N. Beckwith, attorney for J. & S. Gibbs, $310.02, and that on 8 March, 1873, said Sadler paid to said N. Beckwith $327.29, and both payments were made after protest on the part of plaintiffs. The plaintiffs demanded judgment for the sum of ..... dollars (the penalties of the bonds), to be discharged upon the payment of $637.31, with interest on $310.02 from 2 March, 1872, and on $327.29 from 8 March, 1873, and costs.

The several answers admit the execution of the bonds declared on, the sale of the lands by virtue of the special proceedings as the property of Henry S. Spencer, and the receipt by Sadler of the proceeds of sale, amounting to $3,980, as commissioner, and the payment by Sadler to N. Beckwith of the sums mentioned, and at the times mentioned in the complaint.

(70) The defendants, on the argument, did not rely on the release pleaded in the answer, nor on the averment in the answer, that the deeds offered by plaintiffs in support of their claim to the fund were fraudulent.

Henry S. Gibbs was a party to the said proceeding of Lancaster *et al. v.* Mary L. Spencer *et al.* He recovered judgment against John W. Spencer, about the year 1870, for $310.02, under which judgment he bought the individual sixth interest of John W. Spencer in the said lands of Henry S. Spencer, and on 6 January, 1872, John Boleman, coroner of Hyde County, executed a deed to said Gibbs for the interest sold by the former under the judgment and attachment levied on said interest of John W. Spencer.

The facts material to this controversy, appearing in the record of the special proceeding for sale and partition, were as follows:

On 12 August, 1871, James W. Lancaster and wife Margaret, Robert P. Wahab and wife Susan, and Annie E. Wynne (by her guardian, N. Beckwith), commenced a special proceeding in the Superior Court of Hyde County, by the issuance of a summons, returnable before the clerk, against Peter P. Spencer and wife Mary, Samuel Blackwell and wife Elizabeth, W. H. Spencer, John W. Spencer and Henry S. Gibbs, for the sale and partition of certain lands derived under the will of Henry S. Spencer, deceased. W. H. Spencer, John W. Spencer, and Blackwell and wife, being nonresidents, were brought in by publication. The complaint filed—the date thereof not appearing—after setting out the source of title, the respective interests of the parties and the necessity for a sale, stated "that the defendant Henry S. Gibbs holds a judgment for about $400 against the defendant, John W. Spencer, and has his interest in said lands levied on under an original attachment issuing from the Superior Court of Hyde County, on or about the ..... day of ....., 1870, and levied on said lands the ..... day of ....., 1870."

The defendants, Peter P. Spencer and wife Mary, only filed (71) answer, in which, among other matters, they alleged that their codefendant Gibbs had no interest in the lands in controversy, the share of John W. Spencer which he, Gibbs, claimed, having been, before the levying of the attachment, conveyed to Peter Spencer, and by him to W. H. Spencer, who conveyed to the defendant Mary and her children (who are the plaintiffs in the action now being considered). To this answer a replication was filed, in which Gibbs joined, and wherein he asserted his title to the share of John W. Spencer, and attacked that set up by Mary and her children upon the ground that it was based upon conveyances made for the purpose of defrauding creditors.

On 14 October, 1871, the following order was made:

"This cause coming on to be heard upon the summons, complaint and affidavit of plaintiffs, and the answer and replication, and being heard, the court doth declare that the petitioner and defendants are entitled as

set forth in the complaint. The court doth further declare that actual partition cannot be made without serious injury to the parties. It is therefore ordered and decreed that the clerk of this court be appointed commissioner to sell the lands mentioned in the complaint. . . . One-half cash, balance on twelve months credit, and retain title until purchase money is paid.

"Cause continued to try issues made up by answer and replication.

"Approved. J. C. C."

Pursuant to this order, the commissioner sold the lands on 3 February, 1872, the report of sale stating, "a part of the parties interested, to wit, J. W. Lancaster, R. P. Wahab, Peter P. Spencer, and N. Beckwith, guardian of Annie E. Wynne, being present." The sale was confirmed, the order of confirmation stating "that all the plaintiffs,
(72) and the defendant, P. P. Spencer, were present and assented to the bids as full and sufficient consideration"; and proceeding to a distribution of the proceeds, it further decreed: "On the hearing of the issues made by the pleadings, it is adjudged that the original distributive share of John W. Spencer be paid to Henry S. Gibbs." Acting under this authority the clerk, or commissioner, paid the share of John W. Spencer to Mr. Beckwith, the attorney for Gibbs.

The plaintiffs in the present action introduced evidence tending to show that the order of sale in the case of *Lancaster v. Spencer* was made by and in the handwriting of S. R. Sadler, clerk, etc., and there was no entry upon the Civil Issue Docket of Hyde County from Spring Term, 1871, to Fall Term, 1872, of the case of *J. W. Lancaster et al. v. Spencer et al.* They also offered the docket marked "Civil Issue Docket," and the case did not appear therein. The plaintiffs, upon these facts, asked the judge to charge the jury, that if they believed the evidence the plaintiffs were entitled to recover, which request was refused and the plaintiffs excepted.

His Honor intimated that he would charge the jury that, upon the evidence introduced, the plaintiffs were not entitled to recover.

In submission to this intimation the plaintiffs submitted to a nonsuit and appealed.

J. H. Small and W. B. Rodman, Jr., for plaintiffs.
Charles F. Warren for defendants.

AVERY, J., after stating the case: We concur with his Honor in the opinion that the plaintiffs were not entitled to recover, in any view of the testimony offered and the facts admitted, and the timely intimation

given by him was calculated to expedite the transaction of business, without peril to the rights of the parties. The plaintiffs contend in this Court:

1. That the decree in the special proceedings was void and must (73) be treated as a nullity for the reason that Article IV, sec. 17, of the Constitution of North Carolina, then required that "all issues of facts joined before them" (referring to the clerks of Superior Courts) "shall be transferred to the Superior Courts for trial, and appeals shall be to the Superior Courts from their judgments in all matters of law," and that, therefore, a final judgment rendered by the clerk, without docketing the cause and awaiting the verdict upon the issues framed, was made, when by law the case was not pending before him and within his jurisdiction.

2. That the order of sale was not signed, and if that objection did not lie, it was void upon its face, because the clerk had no power to appoint himself commissioner.

3. That in any view of the case an order made by the clerk that he, himself, pay over the funds in controversy to Beckwith for Gibbs, was void, and would not protect him against the rightful claimants of the money.

The plaintiffs might have instituted a new proceeding before the clerk to vacate, for irregularity, the decree in *Lancaster et al. v. Mary L. Spencer et al.*, but they have chosen rather to bring an action upon the official bond of the deceased clerk, Sadler, against his administrator and the sureties, and have elected to treat the sale as valid and regular.

If the order of sale was void, not simply voidable, for irregularities in the proceeding, then the sale was a nullity; and if the title to the interest of John W. Spencer, one undivided sixth, were still in the plaintiffs, they would have the right (after reasonable notice to be let into possession with tenants in common, who may have ousted them) to recover possession in an action brought against such tenants. If the order was simply voidable for irregularities, it cannot be (74) impeached collaterally; but could be vacated by a proceeding begun before the clerk for the purpose.

We do not think that the failure of the clerk to frame the issues raised by the pleadings, and to enter the case for trial on the docket of the Superior Court, or the fact that such issues do not appear to have been tried by jury at all, affects the validity of the judgment, in the absence of any record showing that the parties before the court appealed from the order at the time, or attempted afterwards to have it set aside by motion in that proceeding, or vacated by a new action. It is not necessary for us to determine which was the proper course. The au-

thorities cited by counsel do not sustain the view that the order of sale and subsequent decree were void because made in violation of Article IV, section 17, of the Constitution of 1868. In the case of *McBryde v. Patterson,* 73 N. C., 478, and *Jones v. Hemphill,* 77 N. C., 42, there was an appeal under section 116 of The Code (brought forward from Code of Civil Procedure), which provided that in case of transfer or appeal a party should not be required to give bond for cost, but that an appeal could be taken by "a party aggrieved, who appeared and moved for or opposed the order or judgment appealed from, or who, being entitled to be heard thereon, had no opportunity of being heard, which fact may be shown by affidavit or other proof."

If the parties were before the court, then the "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." *Brickhouse v. Sutton,* 99 N. C., 103.

We think that the parties, including the plaintiffs, Mary L. Spencer and John W. Spencer, P. P. Spencer and W. H. Spencer, through whom she claims, were all before the court. At any rate, they cannot raise the objection that the service of summons by publication was irregular, and they cannot attack collaterally any part of the record made before
(75) the parties answered, or were all brought into court, in the manner adopted, and not subject to be questioned in this action. *Sumner v. Sessoms,* 94 N. C., 371.

The parties, then, having been brought before the court, were charged with notice of any order subsequently made by the court while the action was pending. *University v. Lassiter,* 83 N. C., 38.

We think that if the parties were in court, as the law presumes that they were, when the order of sale was made, and did not object or appeal, as any one of them could have done, without even filing an appeal bond, and being still before the court they made no objection to the final decree, dated 8 March, 1872, nor any motion in the cause at any time to impeach any order for irregularity, until after summons issued in this action, 27 May, 1881, it would be fair to presume that the defenses raised by the pleadings were abandoned at the hearing, and the transmission of pleadings and trial of issues were then waived by the parties. In that view of the matter, it would not be necessary to decide whether the Constitution made the duty of docketing for trial mandatory, for even if it were *not merely directory,* under all the circumstances, after the long lapse of time, the courts would presume that the clerk acted rightly, and that the parties waived the trial of the issues by failing to insist upon the ground of defense set up.

The objection, that the order of sale was not actually signed by the clerk, would be covered by the principle laid down in *Sumner v. Sessoms,*

supra; but if that were not true, and the question of the validity of the order for want of the signature of the clerk were an open one, the Court has declared that the statute requiring such signature is merely directory. *Keener v. Goodson,* 89 N. C., 273; *Rollins v. Henry,* 78 N. C., 342.

It has been too long the custom for clerks to make orders ap- (76) pointing themselves commissioners to sell land, in such proceedings, and to order an account to be taken by themselves, and the validity of such orders has been too often acquiesced in or approved by the courts, to allow the judgment to be now declared void because a clerk appoints himself commissioner. Whatever objections may be urged to the custom, it has often proven a positive benefit to litigants in subjecting the clerk's bond to liability for the proceeds of sales made by virtue of such orders; whereas, the appointment of an insolvent commissioner would have left the parties without remedy, in case of default in paying over the proceeds of land sold under a judicial decree. *S. v. Blair,* 76 N. C., 78. Besides, it has long since been settled that where there are adversary parties in a special proceeding, the approval of the judge of the Superior Court is not requisite to the validity of any order made in it, but the clerk has full power to make all orders up to the final confirmation, *except in cases where an ex parte petition is filed, and some of the petitioners are infants. Stafford v. Harris,* 72 N. C., 198; *Mauney v. Pemberton,* 75 N. C., 219. This was not an *ex-parte* proceeding, and Sadler had the power to render the final decree.

In the petition first filed in Lancaster *v.* Spencer, it was alleged that Henry S. Gibbs had a lien to secure about $400 on the interest of John W. Spencer in the lands of Henry S. Spencer, described in the petition. Subsequently, as appears from the record, Gibbs was made a party, and at a still later period, but during the pendency of the proceeding, he recovered a judgment on attachment against John W. Spencer for $310.02; and in the final decree Gibbs was adjudged, "on the hearing of the issues made by the pleadings," to be the owner of the interest of John W. Spencer in the lands. As between the parties, that adjudication is conclusive, whatever irregularities may appear in the orders connected with the attachment, and it is needless to go behind the final decree to discuss the partial record of the allotment and the (77) agreement of counsel relating to it.

The petition was filed in September, 1871, and the final decree of confirmation was made on 8 March, 1872. P. P. Spencer, and his wife Mary L. Spencer (the present plaintiff), were made parties, and set up in their answer the defense that John W. Spencer, also a party to the

action, had conveyed his interest in the land to them (by deed dated 31 December, 1866, and recorded 21 January, 1867), and that Henry S. Gibbs was not the owner of said interest.

The defendant, W. H. Spencer, and those claiming under him, are estopped to deny, upon the principles already stated, that he was also a party; yet the plaintiffs seek to establish their right to the share of John W. Spencer in the proceeds of sale under the deed from P. P. Spencer, set up in their answer (as to the validity of which deed Mary L. Spencer, John W. Spencer and W. H. Spencer are concluded by the decree, and by the two other deeds of conveyance, for the undivided interest of John W. Spencer, the one from P. P. Spencer to W. H. Spencer, dated 31 December, 1866, and the other from W. H. Spencer to the plaintiffs, dated 1 January, 1872).

If W. H. Spencer relied on the conveyance from P. P. Spencer to himself, he might have pleaded his title, but, instead of doing so, he permitted the latter to set up a claim in himself, and afterwards, as we must assume, to abandon the issue. After the petition had been filed for four months, and two months before the final decree, W. H. Spencer attempted to convey the interest in controversy by deed dated 1 January, 1872, to the plaintiffs, Mary L. Spencer and her four children. Mary L. Spencer filed an answer, but if she had not been bound by the decree of 8 March, 1872, as a party, she and the other plaintiffs must be deemed to have had constructive notice of the pendency of the action, when W. H. Spencer conveyed to them, and, therefore, to be bound by

(78) the final judgment in that suit. There can be no doubt that the lands were described with sufficient certainty in the petition, to give notice to the plaintiffs, even if they are to be treated as purchasers for a valuable consideration, and it also appears from the pleadings that the land was located in Hyde County. While strangers to the record are not affected with constructive notice, of the pendency of an action involving the title to land lying in a county other than that in which the action is pending, unless the notice required under section 229 of The Code has been given, even purchasers for a valuable consideration are affected with notice of an action brought in the county where the land lies, if the pleadings describe it with reasonable certainty, and take title, subject to the final decree rendered in the action. A different rule has been adopted in some other States, where the same statute has been passed, but the law has been settled in this State by the cases of *Todd v. Outlaw,* 79 N. C., 235, and *Badger v. Daniel,* 77 N. C., 251.

There was, therefore, no view of the testimony in which the plaintiffs were entitled to recover, and the judgment must be

Affirmed.

Cited: R. R. v. Parker, 105 N. C., 249; *Collingwood v. Brown,* 106 N. C., 365; *White v. Morris,* 107 N. C., 101; *Bond v. Wool,* 113 N. C., 21; *Driller Co. v. Worth,* 117 N. C., 521; *Range Co. v. Carver,* 118 N. C., 338; *Stith v. Jones,* 119 N. C., 430; *Morgan v. Bostic,* 132 N. C., 751; *Smathers v. Sprouse,* 144 N. C., 638; *Timber Co. v. Wilson,* 151 N. C., 157; *School v. Peirce,* 163 N. C., 426; *McDonald v. Howe,* 178 N. C., 258.

(79)

J. HAYWOOD SAWYER, TRUSTEE, v. WILLIAM H. BRAY.

Execution—Levy—Officer—Lien—Purchasers.

1. As against *junior execution creditors,* it is necessary to the validity of a levy of a senior execution upon personal property that the officer should actually take into his possession and retain, either in person or by an agent for that purpose, the property seized, until a sale.

2. As against other persons, including purchasers for value, a levy on personal property, by going to it, so as to have power to take it into his possession if the officer chooses, and endorsing it on his process, will be good, though actual possession may not have been acquired, or having been acquired, the property is left in possession of the debtor.

3. The statute—The Code, sec. 447—does not alter the former law as to what is and what is not a levy; it only relates to the period when the lien of the execution attaches.

CIVIL ACTION, tried before *MacRae, J.,* at Fall Term, 1888, of CURRITUCK Superior Court.

It appeared that one Griggs, being indebted to divers persons, on 22 January, 1886, conveyed a stock of goods in store to the plaintiff in trust to pay the indebtedness therein named. This deed was registered at 4 a.m. on the next day. The plaintiff alleged that he at once took possession and was proceeding to execute the trust, having employed one Snowden as clerk, to assist him, in whose charge he put the property, when the defendant, the sheriff of Currituck County, in plaintiff's absence, went to Snowden and represented that he had several executions which had been levied before the conveyance to plaintiff, and that he was entitled thereby to the proceeds which had been received from the sale. Snowden paid him the amounts due on the executions, and this action was brought to recover the amount so paid.

The defendant alleged that one Frost, his deputy, had gone (80) with the executions to the store of Griggs, before the conveyance, had then made levies on the goods, and had put them in possession of

Snowden, who had theretofore acted as clerk for Griggs, as his (the deputy's) agent, for preservation.

Whether the deputy made such levy, and whether Snowden was constituted his agent, as he alleged, were the principal matters contested on the trial, and as to them there was much conflicting evidence, it being insisted by the plaintiff that the deputy only came to the store, looked around and announced his purpose to make a levy if Griggs, who was then absent, did not make a satisfactory arrangement when he returned; and that if the deputy did endorse a levy on the executions, and had made a levy, he went off, leaving the property in Griggs' possession, and that it was abandoned, or at any rate inoperative against him as a purchaser.

The following issues were submitted to the jury:

"1. Was the plaintiff the owner and entitled to the possession of the goods and money described in the complaint, at the time of the alleged wrongful taking of the same by defendant?

"2. Did the defendant wrongfully take possession and convert the money and goods as alleged in the complaint?

"3. What damages has the plaintiff sustained by reason of such wrongful taking and conversion?"

That portion of the charge of the court to the jury, material to the questions argued and determined on the appeal, is:

"3. It requires something more than mere declaration to make a levy on personal property. If the deputy sheriff went to the storehouse and actually took possession of the same or of the goods in it, this was a valid levy, and if he held possession, a deed subsequently registered would be of no effect, as far as his property in the goods was
(81) concerned, and he might hold this possession by an agent appointed by him to take charge and hold for him—of course there could be no such agency and holding for him unless Snowden agreed to take and hold as agent; and even if the deputy did levy, unless he retained the possession either by himself or his agent, the lien of the levy was lost, and the deed of assignment, if made and registered when there was no levy on the property, conveyed a good title to the goods to the plaintiff.

"The testimony on this part is conflicting. Sheriff Bray says that when he went there on the morning of the 23d Snowden was in possession, and declared to him that he was holding under the levy for deputy sheriff.

"Snowden testified that the deputy came in and told him that he had executions, walked behind the counter, counted the money, but, according to his testimony, did not take possession, and he, Snowden, never agreed to hold for him.

"Frost, however, testifies that he did go there on the night of the 22d, and took possession and levied and made Snowden his agent, and Snowden agreed to hold for him under the levy.

"4. If there was an actual levy and Snowden was in possession on the morning of the 23d, at the time the agreement was registered, and was holding for the sheriff, your answer to the first issue should be, No.

"5. Unless a levy was made upon the stock of goods and the money in the drawer, and afterwards, before advertisement and sale, the sheriff or his deputy or agent in charge of the same allowed the plaintiff to take quiet possession of them, it was an abandonment of the levy, and the plaintiff was the owner, and the response should be, Yes.

"If there was no levy upon the goods and money at the time of the registration of the deed, your response should be, Yes.

"6. It was not necessary that the deputy sheriff should take into his hands the goods in the store. If he went into the store and declared that he levied certain executions then in his hands upon that stock of goods and the money in the drawer, and went and opened the (82) money drawer, and counted the money, and left the goods and money in charge of Snowden, Snowden agreeing to hold under him, this was a levy. But if he simply went in and said he had executions which he wanted to levy, or wanted to see Griggs about, or anything of that kind; or even if he said he did levy, and went away without leaving Snowden in possession as his agent to hold the goods, it was no levy, and his simply telling Snowden to hold for him, if he did so tell him, Snowden not agreeing to so hold them, would not make it a levy."

There was a verdict for plaintiff, and from the judgment thereon the defendant appealed, his motion for a new trial for errors in the charge of the court having been overruled.

E. F. Aydlett for plaintiff.
W. B. Shaw for defendant.

SHEPHERD, J. Several exceptions were taken to the charge of his Honor, but the one which was chiefly relied upon in this Court, and which is sufficient to dispose of this appeal, is embraced in the instruction that "even if the deputy did levy, unless he retained possession, either by himself or his agent, the lien of the levy was lost, and the deed of assignment, if made and registered when there was no levy on the property, conveyed a good title to the goods to the plaintiff."

The ruling of the Court finds apparent support in the language of *Ruffin, C. J.*, in *Roberts v. Scales*, 1 Ired., 88. He says "that the true principle, therefore, is, as we think, that the property of a debtor, as against creditors, ought not by operation of law to be divested and

vested in the sheriff, but by some act as obvious and notorious as the nature and state of the property will permit. That, in the case of ordinary personal chattels like the present, is effected by taking and
(83) keeping possession, and by that only, and therefore it is required. . . . The execution only creates a lien; the taking possession carries the property. Then *e converso* the property which was gained by possession also goes with it." It will be observed that the foregoing case was one where the debtor was permitted to remain in possession after the levy, and it was held that the levy and actual seizure of the goods under a junior execution prevailed. We cannot believe that the *Chief Justice* meant to decide that there could be no levy, or that the levy was in law abandoned, unless the goods were retained in the actual possession of the officer or his agent; for he is careful to restrict his general expressions as to what shall constitute a levy by using the significant words *"as against creditors."* This view is sustained by his opinion in *Mangum v. Hamlet,* 8 Ired., 44, where he recognizes the validity of such a levy, by holding that although the sheriff leaves the property in the possession of the debtor, he has such a special property therein as to sustain an action of trover against one who wrongfully converts it. In that case the defendant moved the court to "instruct the jury that by leaving the property in the debtor's possession the plaintiff (a constable) abandoned his levies." The court refused to give the instruction, and the ruling was sustained upon appeal. All doubt upon this point, however, is removed by *Pearson, J.,* in *Bland v. Whitfield,* 1 Jones, 122. He says that "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. It is safest for him to do so and carry it away, for then he can hold it against all persons, but it is not necessary for him to do it or for him to touch the property; the levy is perfected by his making the endorsements upon the execution. He may leave the property in the possession of the debtor and take a forthcoming bond, or he may leave it there without any bond, and the effect of the levy is to give him such an interest and possession, in
(84) contemplation of law, as will enable him to bring trespass against any one who interferes with it, except another officer."

So, it clearly appears that what was said in *Roberts v. Scales, supra,* referred only to cases where the rights of junior execution creditors were involved. Notwithstanding the plain and emphatic words in the latter part of the above quotations, to the effect that the exception is only applicable to *"another officer,"* the plaintiff insists that he stands upon the same footing as a junior execution creditor who seizes the property while in the possession of the debtor. The distinction between the two in this respect runs through all of our decisions, and we cannot con-

ceive how section 447, subsection 1, of The Code, relied upon by the plaintiff, affects it.

Ruffin, C. J., in *Harding v. Spivey,* 8 Ired., 63, in speaking of the preference given a junior execution creditor, where the senior execution creditor prevents his execution from being acted on, says: "That this reasoning has no application to an alienation by the debtor himself, for that, on the other hand, is considered a fraud by the debtor as tending to defeat the process of the law for the recovery of judgment debts, because, from necessity, the rule as to him is *caveat emptor.* And in *Finlay v. Smith,* 2 Ired., 225, he says: "Indeed, the law decrees the alienation of property subsequent to the *teste* of a *fieri facias* to be itself fraudulent, since it tends to defeat the process of the law." At common law a *fieri facias* bound the property of the debtor so as to avoid any alienation by him, and this law prevailed in our State until the adoption of the Code of Civil Procedure. Up to that time the simple *issuing* of a writ of *fieri facias* bound the property from its *teste,* and if followed by a levy, it was held sufficient to defeat the rights of innocent purchasers, who bought before the levy. *Grant v. Hughes,* 82 N. C., 216; *Harding v. Spivey, supra.*

In England the law was changed by 29 Charles II, so that the (85) lien only commenced from the *delivery* of the writ to the sheriff.

Of this act the *Chief Justice,* in *Harding v. Spivey, supra,* says: "But it may be remembered that that only changes the period to which the lien relates from the *teste* to the delivery of the writ, still creating a lien before the seizure of the property, and therefore still applying the maxim *caveat emptor.*"

In this State we have advanced a step further, and for the purpose of protecting bona fide purchasers for value and other execution creditors, we have provided (The Code, sec. 447, subsec. 1) that the lien as to them shall operate only from the levy. This act does not profess to change the existing law as to what shall constitute a levy, nor does it alter in any respect the *character and effect* of the lien acquired by it, as already determined by a long series of decisions in our reports. This rule may work hardship in some cases, and may be a proper subject for additional legislation. So far, it has only been deemed necessary to change the *time* when the lien shall *commence.*

This is an improvement upon the old law, for there is no notoriety in the mere *issuing* of the writ of *fieri facias,* while the actual presence of the sheriff, his seizure of the property, the making of the endorsement and other attending circumstances are generally sufficient to put purchasers upon their guard.

We are of opinion that his Honor erred in giving the instruction complained of, and that a new trial should be awarded the defendant.

Error.

(86)

W. K. BRIDGERS v. J. H. TAYLOR ET AL.*

Arrest and Bail—Property—Construction of Statutes—Sections 291 and 3765 of The Code.

1. The provision in section 291(1) of The Code, for the arrest of a defendant, "for injuring or for wrongfully taking, detaining or converting property," has reference to *personal* and not to *real property*, notwithstanding the definition of the word *property* in section 3765.

2. Where the terms of a statute, which has received judicial construction, are used in a later statute, that construction is to be given to those terms in the later statute.

(MERRIMON, J., dissented.)

THIS was a motion to vacate an order of arrest, heard before *Avery, J.*, at the Fall Term, 1887, of the Superior Court of NORTHAMPTON County.

The order was granted by the clerk in an action for an alleged trespass of the defendants upon the land of the plaintiff, the affidavit stating that the defendants "have on divers times . . . injured and damaged said tract of land wilfully, and, as affiant believes, maliciously, by entering thereon after being forbidden so to do, and treading down the grass, tearing down affiant's fences, cutting down the trees, and by divers other means. That said defendants aided and encouraged each other in said trespass, and that by said wrongful acts and doings the affiant has been greatly damaged, and has brought an action against said defendants to recover damages for the same."

The affidavit was answered under oath by the defendants, who denied the title of the plaintiff, and stated, with much particularity, the nature of their own claim to the land mentioned in the complaint. They denied that the acts complained of were done wantonly or maliciously, and alleged that what they did was only incidental to the assertion of their rights.

(87) Their answer was supported by several affidavits, of persons apparently disinterested, all tending to show title in the defendants, and that the acts complained of were done in good faith.

The plaintiff introduced other affidavits in support of his contention.

His Honor discharged the defendants, and the plaintiff appealed.

R. B. Peebles for plaintiff.

Thos. W. Mason for defendants.

*AVERY, J., did not sit in this case.

SHEPHERD, J., after stating the case as above: It may be, that upon the whole testimony his Honor was of the opinion that the case presented by the plaintiff was fully rebutted, but as he failed to find the facts, we are not at liberty to put our decision upon that ground. The question, therefore, is, whether paragraph 1, section 291, of The Code is applicable to injuries to real property. The paragraph is as follows: "The defendant may be arrested, as hereinafter prescribed, in the following cases: (1) In an action for the recovery of damages . . . where the action is for an injury to person or character, *or for injuring, or for wrongfully taking, detaining or converting property.*"

It is urged, that there is no more reason why one should be arrested for injuring a horse, or other personal property, than for burning a house, cutting down trees, and committing other injuries to real estate. To this it may be said, that personal property is more perishable in its character, and that injuries to it may be sufficient to wholly impair its value, before the courts can stay the hand of the destroyer, while no considerable damage can be done to real property before the preventive power of the law can be invoked. It may also be said that real estate is peculiarly protected by the criminal law, and that the Legislature could not have intended to subject to arrest and imprisonment one who, honestly mistaking his boundary, commits some slight injury to the land of (88) his neighbor; which could be done if the construction contended for prevails. But the most *conclusive* answer to such suggestions is that it is not our province to speculate as to what the law should be, but to *construe it as it is made.* The inquiry then is, whether, by the ordinary rules of construction, the statute under consideration warrants an arrest for injuries to real property. Section 3765, paragraph 6, of The Code, provides that the word "property" shall include all property, both real and personal, and that this construction shall be observed unless it would be inconsistent with the manifest intention of the General Assembly, or repugnant to the context of the same statute. The foregoing definition of "property," and section 291 of The Code, are exact copies of the New York Code upon the subject. The construction of this language, therefore, by the Court of Appeals of that State, is entitled to great weight with us, and we cannot do better than to quote the words of *Hunt, J.,* in delivering the opinion of the Court in *Merritt v. Carpenter,* reported in 3 Keys, 142, overruling the decision of the Supreme Court in that case. It is true that that case was an action for the possession of land and for damages for withholding the same, but the learned judge carefully considers the whole section, and concludes that *none* of its provisions are applicable to real property. He says: "The following words, *'taking'* and *'converting,'* would neither of them be appropriate in speaking of real property; one may be readily understood when he

says that an action may be sustained for taking personal property, or for converting it, or for taking and converting it, but the words would convey no legal idea when applied to real estate.

"There is a broad sense in which the word 'detaining' might be applied to real estate, of which the expression, 'forcible entry and detainer,' is an illustration.

(89) "Such was not, I apprehend, the meaning of the codifiers in its present connection. The expressions, injuring, taking, detaining and converting, are well used in the same sentence, and, apparently, as applying to the same subject-matter. Three of these words I have endeavored to show are not applicable to real property, and if the fourth was so intended, the use of the language was singularly unfortunate. I think the words (the italics are ours) *were all intended to be applied to personal property only.*"

We adopt the reasoning of this able judge in the interpretation he has given us; but if we were doubtful as to the correctness of his conclusions, there is a well settled rule of construction, which, when applied to this case, relieves us from all difficulty. It is conceded that the section under consideration was taken from the New York Code of Civil Procedure. Its language, as we have seen, was construed in *Merritt v. Carpenter, supra,* in 1866, and it was enacted by the General Assembly of North Carolina in 1868.

Dwarris on Statutes, 274, says: "That words and phrases, the meaning of which, in a statute, has been ascertained, are when read in a subsequent statute, to be understood in the same sense."

In the note of Judge Potter on the same page, it is said that "where the terms of a statute which has received judicial construction are used in a later statute, whether passed by the Legislature of the same State or country or by that of another, that construction is to be given to the later statute. *Conn v. Hartwell,* 3 Gray, 450; *Ruchmabaye v. Mottichmed,* Eng. L. & Eng., 84; *Bogardus v. Trinity Church,* 4 Sand. Chan., 633; *Riggs v. Wilton,* 13 Ill., 15; *Adams v. Field,* 21 Vt., 256. It is presumed that the Legislature which passed the later statute knew the judicial construction which had been placed on the former one, and such construction becomes a part of the law."

(90) That the opinion in *Merritt v. Carpenter, supra,* was regarded as a construction of the entire section, is already shown by the fact, that in consequence of that decision the paragraph was amended by the Legislature in New York, so as to include injuries to real estate in certain cases, and in *Welch v. Winter,* 14 Hun., 518, which was an action for injury to real estate, *Ingalls, P. J.,* says: "We think the change was intentional, to avoid the construction given to section 179 in the case referred to *(Merritt v. Carpenter).*"

This decision was made in 1878, and we find our Legislature in 1883 reënacting the Code of Civil Procedure, containing the original language, with these *two* constructions put upon it by the courts of New York. We cannot conceive of a case to which the rule we have mentioned is more applicable.

It was said on the argument, that the word "personal," in paragraph 3, would have been unnecessary if paragraph 1 referred only to personal property. The answer is, that the final paragraph is confined to actions for the recovery of damages only, and not for the recovery of specific property.

For the reasons we have given, we think the order of arrest should have been vacated.

No error.

MERRIMON, J., dissenting: I do not concur in the opinion of the Court, and will briefly state some of the grounds of my dissent:

That part of the statute (The Code, sec. 291) material to be here recited prescribes that "the defendant may be arrested as hereinafter prescribed, in the following (among other) cases: . . . for injuring or for wrongfully taking, detaining, or converting property." It is said that the word *property,* thus employed, is used in a restricted sense—that it embraces only *personal* property. It seems to me clearly otherwise. In the ordinary legal acceptation of that term it implies and embraces both real and personal property, and the one (91) kind as certainly as the other, in the absence of qualification in some way reasonably appearing. Here such qualification does not appear. The term "injuring" applies to real as readily and as reasonably as to personal property, and there exists the same reason why a person injuring real property should be subject to arrest as in case he had done injury to personal property. Why should a man, if he injures a horse, an ox, a machine, a vehicle, or other thing personal, be subject to arrest, and be free from it if he burns one's house, his barn, his stable, or cuts down his fruit trees, or pulls down his fences, or cuts the roots of and thus kills his vines, digs dangerous pits in his land, sows thistle seed on it, or cuts his turf? He is in both cases chargeable with *injuring* property, and as certainly in one case as the other. I cannot conceive of any substantial or just reason for such distinction.

And so, also, a person may, in a not unreasonable sense, be chargeable with "wrongfully taking" part of the real property, as when he unlawfully takes marl, muck, coal, minerals and the like, before the same shall be severed or taken out of or from the land. And so, also, he may be chargeable with detaining or converting real property, as when he detains the possession of a field, a house, a mill, or the like. In the strict

technical sense of some of the words mentioned as used in the common law method of procedure, they might not be aptly applied as suggested, but it is otherwise in the untechnical use of such words in The Code method of procedure. But, granting that the words "wrongfully taking, detaining or converting" property, do not well apply to real property, the term "injuring" certainly does, in the way already indicated.

It cannot be said properly that the words "for injuring, or for wrongfully taking, detaining or converting," apply to but one particular cause of action or one class of actions. It will be observed that the words are used disjunctively, and they designate four distinct causes of
(92) action, for which the person chargeable therewith may be arrested; he may be arrested, first, for *injuring* property, real or personal; secondly, for wrongfully taking property; thirdly, for detaining it; fourthly, for converting it. There is a total absence of words or provisions in the section of the statute cited, or elsewhere, showing that the word "property" is used in a limited sense. On the contrary, paragraph 3 of this section prescribes that, "in an action to recover the *possession of personal* property," under circumstances prescribed, a person may be arrested. If the word "property," as used in the clause recited, was intended to embrace only "personal" property, why was the term "personal" used in the connection last mentioned? It was useless and misleading in that case.

But if there could be any reasonable doubt as to the meaning of the word "property," as used in the clause of the statute under consideration, it would seem that the statute (The Code, sec. 3765, par. 6), would remove all question and dispel all such doubt. It, among other things, prescribes that "in the construction of *all statutes*, the following rules shall be observed, unless such construction would be inconsistent with the *manifest* intent of the General Assembly," repugnant to the context of the same statute—that is to say . . . . "the word 'property' shall include all property, both real and personal."

It seems to me very clear, that it is not inconsistent with the manifest intent of the General Assembly, nor repugnant to the context of the statute, to say that the word "property," as used in the clause of the statute recited, embraces both real and personal property. I can discover nothing that gives the term a restricted meaning. It embraces real property, and the clause of the statute embraces all actions for injuries to such property, but not all kinds of actions concerning it.

It is said, however, that the statute cited above is an exact copy of a like statute that at one time prevailed in the State of New York, and that the Court of Appeals in that State held, in *Merritt v.*
(93) *Carpenter*, 3 Keys, 142, that the word "property" did not embrace *real* property. This, I am sure, is a misapprehension of

that case. It simply decided that an action to *recover possession* of real property and damages for the unlawful detention of the same, was not an action for *injuring* or for unlawfully taking, detaining or converting property, within the meaning of the statute. It did not decide that an action for *injuring* real property did not come within its meaning. It might well be that an action to *recover possession* of land did not. The Court of Appeals said that such an action could not fairly be deemed an action for *injuring* land. Moreover, the case just cited was decided by a Court divided in opinion, and it reversed the unanimous decision in that case, directly to the contrary, of the Supreme Court. *Merritt v. Carpenter,* 80 Barb., 61.

What the Court of Appeals would have decided, if an action for *injuries* to real estate had come before it, cannot certainly be known, but it seems to me that it would have been compelled to hold that it came within the meaning of the statute. *James v. Beasley,* 14 Hun., 520.

There is, perhaps another ground on which the judgment of this Court properly rests, but I need not advert to its merits.

Cited: Redmond v. Commissioners, 106 N. C., 135; *Harper v. Pinkston,* 112 N. C., 301; *Fertilizer Co. v. Little,* 118 N. C., 818.

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(94)

E. V. HINTON v. GRIFFIN PRITCHARD.

Action to Recover Land—Pleading.

In an action for the possession of land, if the defendant relies upon a defense that is purely equitable, he must set it up in the answer, instead of merely denying that the plaintiff is the owner and entitled to possession, and that he unlawfully withholds the same.

CIVIL ACTION, for the recovery of land, tried before *Montgomery, J.,* at Spring Term, 1888, of the Superior Court of PASQUOTANK County.

The land was bid off by the plaintiff, at a sale made by his father as trustee, in a deed of trust executed to him by the defendant. The other facts sufficiently appear in the opinion.

W. D. Pruden for plaintiff.
E. F. Adylett for defendant.

SHEPHERD, J. The complaint alleges that the plaintiff is the owner and entitled to the possession of the land, and that the defendant wrong-

fully withholds the same. The answer is a simple denial of these allegations. The only question here, therefore, is whether the plaintiff acquired the *legal* title by virtue of the sale and deed of the trustee. We are clearly of the opinion, and indeed the counsel for the appellant virtually admitted, that the legal title passed to the plaintiff.

It is contended, however, that there was testimony tending to show that the plaintiff purchased as the agent of his father, the trustee; that the land was sold for a price greatly below its value, and that the court should have submitted such testimony to the jury. The reply to
(95) this is that such a defense is purely equitable, and, not having been set up in the answer, is irrelevant to the issues raised by the pleadings. It is needless to cite authority for such a plain and generally accepted proposition. There is no error.

Affirmed.

Cited: Wilson v. Wilson, 117 N. C., 352; *Patterson v. Galliher,* 122 N. C., 515; *Alley v. Howell,* 141 N. C., 115; *Davenport v. Vaughn,* 193 N. C., 650.

JAS. T. PUCKETT ET AL. v. ABNER ALEXANDER, ADMINISTRATOR OF W. C. PUCKETT ET AL.

Contract, Void and Voidable—Physicians—Practice of Medicine—Statutes—Consideration.

A physician received a diploma from a regular medical college in 1867, but had not been licensed to practice as prescribed by the statute (The Code, Vol. 2, ch. 34); he rendered professional services in 1883 to one P., for which he presented a bill, which P. promised to pay, but died before doing so; the physician administered on the estate and retained from the assets the amount of his account: *Held,*

1. The contract under which the services were rendered, being absolutely prohibited by sections 3122 and 3132, The Code, was void in its inception.

2. That chapter 261, Laws 1885, did not infuse any vitality into the contract because, (1) that act was prospective only in its operations; and (2), if it had been retroactive it could not have created a liability which, theretofore, did not exist; had the contract been *voidable* only, the consequence would have been different.

3. The promise, by the intestate, to pay, was without sufficient consideration, and no enforcible contract could be based thereon.

4. Where the contract is *void*, no subsequent express promise will operate to charge the promisor, even though he has received a benefit from the contract, or there is a moral obligation to support it.

PUCKETT *v.* ALEXANDER.

CIVIL ACTION, heard by *Graves, J.*, at Fall Term, 1887, of TYRRELL Superior Court.

The action was begun by the plaintiffs, distributees of W. C. (96) Puckett, against the defendants, his administrator, and the sureties of his administration bond, for an account and settlement of that estate. The matter was referred to the clerk, who filed his report and credited the defendant with the sum of $325 for medical services to the deceased for the year 1883. To this allowance the plaintiffs duly excepted and appealed, and this exception was the only matter heard and determined by the court. A jury trial was waived and the case submitted to the judge on the following facts:

Abner Alexander, the defendant administrator, held a diploma, obtained in 1876 from a regular medical college, and had been practicing medicine constantly since then. He was never licensed by the Board of Medical Examiners for the State of North Carolina, as required by the laws of North Carolina, chapter 34, Volume 2, The Code, nor had he ever applied for license. He was employed by the intestate, Puckett, to attend him as a physician during the year 1883, and his bill for medical services was presented to Puckett during his life, and he promised Alexander to pay the same. Alexander retained his said bill, $325, out of this intestate's estate, and to the report of the clerk allowing it the exceptions were taken.

Upon the facts agreed the court sustained the plaintiffs' exceptions, and pronounced judgment accordingly. From this ruling and judgment defendants appealed.

W. D. Pruden for plaintiffs.
E. F. Aydlett for defendants.

SHEPHERD, J. The act of Assembly of 1852, ch. 258, sec. 2, reënacted by section 3122 of The Code, provides that "no person shall practice medicine or surgery, nor any of the branches thereof, nor in any case prescribe for the cure of diseases, for fee or reward, unless (97) he shall be at first licensed to do so in the manner hereinafter provided: *Provided,* that no person who shall practice in violation of this chapter shall be guilty of a misdemeanor." Section 2 of the same act, reënacted by section 3132 of The Code, provides that such persons shall not be entitled to sue for or recover before any court for such services. The defendant has been constantly practicing medicine since he received a diploma from a regular medical college in 1867, and "for fee or reward" rendered the services in 1883 which constitutes the basis of his claim in this action. The performance of such services for fee or reward was absolutely prohibited by the statute, and the contract was,

therefore, void in its inception. It is immaterial whether the act of the defendant was *malum in se* or one merely *malum prohibitum.*

Ruffin, C. J., in *Sharp v. Farmer,* 4 D. & B., 122, says, that the distinction between these "was never sound, and is entirely disregarded; for the law would be false to itself if it allowed a party, through its tribunals, to derive advantage from a contract made against the intent and express provisions of the law."

The defendant, however, insists that vitality is given to this void contract by chapter 261, acts 1885, which provides that section 3132 of The Code be amended "by adding after the last word of said section the words: *Provided,* that this section shall not apply to physicians who have a diploma from a regular medical college prior to 1 January, 1880."

What effect this proviso has upon section 3122 by way of repealing its prohibitory features as to such cases, we are not now called upon to decide, as the amendatory act is clearly prospective, and does not affect the case before us. *Richardson v. Dorman, Executrix,* 28 Ala., 681; Dwarris on Statutes, 162 *et seq.* Even if the statute were in
(98) terms retroactive, and repealed section 3122, it could not have the effect of *creating* a liability. "A contract, void at the time of its inception, cannot be validated by subsequent legislation, and if it violates, when made, a statute, the repeal of that statute does not make it operative." Wharton's Law of Contracts, Vol. 1, sec. 368. If the contract had not been *void* by reason of section 3122, the defendant would have been entitled to enforce his claim after the passage of the amendatory act, the effect of which was to remove the disability to sue imposed by section 3132, that section not affecting the right, but the remedy only. *Hewit v. Wilcox,* 1 Metcalf, 154.

It is further contended that, notwithstanding this construction of the several acts of Assembly, the defendant is entitled to enforce his claim, by reason of the express promise of his intestate to pay for the services. The date of this promise does not appear from the case prepared by the court below.

The record shows that administration was granted before the passage of the act of 1885. However this may be, we are of the opinion that, the contract being void in its inception, there was no consideration to support the promise, and it is, therefore, ineffectual to sustain the defendant's demand. The doctrine of a purely moral consideration being sufficient to support an express promise, attributed to *Lord Mansfield,* was, as is said by Mr. Wharton in his work on Contracts, *supra,* sec. 512, "soon abandoned in his own Court, and it is now settled, both in England and the United States, that no merely moral obligation, no

matter how strong, can support a promise unless the benefit from which the obligation arises was conditioned on the promise."

In the elaborate note to the case of *Wenall v. Adney,* 3 Bos. & Pul., 252, the true rule, it seems to us, is laid down: "That if a contract between two persons be void and not merely voidable, no subsequent express promise will operate to charge the party promising, even though he has derived a benefit from the contract." This view is fully sustained in *Felton v. Reid,* 7 Jones, 269, and in Smith on Con- (99) tracts, 203, where the author quotes, with approval, the language of *Tyndall, C. J.,* that "a subsequent express promise will not convert into a debt that which, of itself, was not a legal debt."

We are of the opinion that there was no error, and that the judgment should be

Affirmed.

Cited: Hughes v. Boone, 102 N. C., 164; *Long v. Rankin,* 108 N. C., 336; *Cansler v. Penland,* 125 N. C., 581; *McNeill v. R. R.,* 135 N. C., 734; *Lloyd v. R. R.,* 151 N. C., 540; *Miller v. Howell,* 184 N. C., 122; *Finance Co. v. Hendry,* 189 N. C., 554; *Respess v. Spinning Co.,* 191 N. C., 812.

D. D. FEREBEE AND WIFE AND LILLIE G. BARRON v. C. L. HINTON AND JOHN L. HINTON.

Deeds—Probate—Registration—Clerk Superior Court—Jurisdiction—Evidence.

1. In an action to impeach a deed and have its probate and registration annulled, evidence that the officer who purported to have adjudged the probate and registration had no authority to do so, is competent.
2. A clerk of the Superior Court cannot exercise his jurisdiction to take proof of deeds, etc., outside of his own county.
3. Where both parties claim title to the land in controversy from the same source, it is not necessary for either to prove title beyond that source.

THIS was a civil action, tried before *MacRae, J.,* at Fall Term, 1888, of CAMDEN Superior Court.

The plaintiffs are the devisees of Sarah Ferebee, who executed a will in 1875, and died in 1886. They allege that the said Sarah, being of unsound mind and incompetent to transact business of any kind, was induced to sign a deed of trust, conveying the devised land to C. L.

Hinton to secure certain debts due by her husband to John L. Hinton; that she was also induced to sign notes representing said indebted-
(100) ness to said John L. Hinton; "that the said indebtedness was not contracted by her for her support, or the improvement of her separate estate," and that said deed is void. Plaintiffs further allege, that at the time of signing the said deed, the said Sarah, with her husband, lived in the town of Berkeley, in the State of Virginia, and that "no *feme covert* examination or acknowledgment was ever taken upon said deed as is required by law, though the same appears upon the record as regular and according to law." They allege that said deed is a cloud upon their title, and ask that it be canceled, and for other and further relief.

The defendants denied that the said will was operative to pass the title to the plaintiffs, and that Sarah was of unsound mind, as alleged. They admit that she was a resident of Virginia when she signed the deed, but deny that the probate of the same was improperly taken. They allege that the debt secured by said deed was in renewal of a "claim and certain indebtedness" made by Sarah and her husband with one Robert Williams, as evidenced by a certain deed of trust executed by them to said Williams on 28 January, 1875, which said indebtedness has been assigned to said John L. Hinton. They further allege that said indebtedness has never been paid.

The following issues were submitted to the jury:

"1. Was Sarah Ferebee of unsound mind when she executed the note and deed of trust described in the complaint?

"2. Was the debt secured by said deed of trust made for the benefit of Sarah Ferebee or her separate estate?

"3. Was the private examination of Sarah Ferebee upon the probate of said deed of trust duly had and taken?

"4. Are the plaintiffs the owners in fee simple of the lands described in the complaint?"

The plaintiffs introduced the will of Jas. G. Barron, executed 20 January, 1859, which gave the land in controversy to Sarah Barron, also the will of Sarah Ferebee, executed in 1875, giving the same land to the *feme* plaintiffs.

(101) The defendants conceded that Sarah Barron and Sarah Ferebee were one and the same person, and that the lands described in the two wills were the same in controversy.

Plaintiffs then introduced a deed of trust, together with the probate of P. G. Morrisett, with certificate of registration, from W. B. Ferebee and wife Sarah Ferebee, to C. L. Hinton, trustee, dated 15 December, 1885, and the defendants conceded that the lands described therein were the same described in the wills already in evidence.

Plaintiffs then introduced P. G. Morrisett, who testified that he is and was on 15 December, 1885, clerk of the Superior Court of Camden County, and that as such he took the private examination of Sarah Ferebee and the acknowledgment of the execution of said deed of trust, as set out in the certificate attached thereto.

The plaintiffs then proposed to show, by this witness, that the proof and examination was not taken in Camden County, N. C., as therein set out, but was in fact taken in the town of Berkeley, Va.

To this the defendants objected. The objection was overruled, and defendants excepted.

Witness then testified that, at the request of W. B. Ferebee and J. L. Hinton, he went to Berkeley, Va., the home of Mrs. Ferebee, and took the acknowledgment and examination of the parties thereto, but did not write it out and sign it until he returned to Camden County, N. C. Witness also stated that he was not a commissioner of affidavits nor a notary public resident in Virginia.

Upon cross-examination, he stated that the deed of trust and note secured by the same was for the renewal of another deed of trust and note for money loaned by one Robert Williams, on 28 January, 1875, and that the parties told him the same was borrowed for W. B. Ferebee's use in business in Norfolk, Va.

Plaintiffs introduced other testimony going to show the mental (102) condition of Mrs. Sarah Ferebee on 15 December, 1885, and also for whose use and benefit the money was borrowed; and after it was conceded that W. B. Ferebee had no estate by the curtesy in the lands described, the plaintiffs rested their case.

2. Defendants then offered testimony tending to controvert the facts shown by plaintiffs, and moved the court for judgment that they go without day, on the ground that plaintiffs had not shown title out of the State. Motion overruled. Defendants excepted.

3. On the second issue the court instructed the jury that this being alleged by the defendants, the burden is upon them (the defendants) to satisfy the jury of the truth of the affirmative. Defendants excepted.

4. The defendants asked the court to charge upon the third issue: "If the jury find P. G. Morrisett is the clerk of the Superior Court of Camden County, he is the proper officer, authorized by law to take and certify the probate of deeds and other instruments requiring registration in said county, and if he went to the State of Virginia, in the town of Berkeley, and took the proof of the deed of trust dated 15 December, 1885, and the private examination of Mrs. Ferebee, the same is valid, and they should find the third issue in the affirmative." The court refused, and defendants excepted.

5. The court charged the jury: "The facts of this transaction are admitted, and it is a question of law for the court. It is in evidence and admitted, that the probate and private examination before the clerk of Superior Court of this county, was not taken in this county, but in the State of Virginia. In my view of the law, the clerk had no jurisdiction outside of his own county, and, therefore, upon the evidence, you will respond to this issue, No." Defendants excepted.

6. Defendants asked the court to charge the jury: "That, to find the plaintiffs are the owners and entitled to the land in dispute, they must show title out of the State, and, to do this, must show title for
(103) twenty-one years under color of title, deducting the time from May, 1861, to January, 1870. Second. That plaintiffs have not shown color of title for twenty-one years, by deducting the time from May, 1861, to January, 1870, and you must find the last issue, No." Refused. Defendants excepted.

7. Upon this issue the court charged the jury: "The plaintiffs claim to be the owners of the land, under the will of Mrs. Ferebee, and they show also a will of Mr. Barron, devising his land to his widow, who is admitted to be the same person as Mrs. Ferebee. The defendants claim title to the same land by the deed which is now sought to be set aside, and as both claim under Mrs. Ferebee there is no need to show title out of the State; therefore, if you believe the evidence on this point, the plaintiffs claim under Mrs. Ferebee, who held under the will of Mr. Barron, and if you have found either the first or third issues in favor of the plaintiffs, you will respond to this issue, Yes." Defendants excepted.

8. "And as I have instructed you to respond to the third issue that Mrs. Ferebee's private examination was never taken according to law, your response to the issue should be, Yes." Defendants excepted.

The jury responded to the first, second and third issues, "No," and to the fourth issue, "Yes."

Judgment for plaintiffs, and defendants appealed.

The judgment of the court was as follows:

"Upon motion of W. B. Shaw, attorney for the plaintiffs, it is considered and adjudged that the note to J. L. Hinton and deed of trust to C. L. Hinton, dated 15 December, 1885, and recorded in Book L L, page 3, in Camden County, be and the same are annulled and canceled; and the defendants are restrained and enjoined from proceeding to
(104) sell the said land under the said deed of trust, or in any way enforcing the collection of said note.

"It is further ordered and adjudged that this decree be enrolled and registered in the office of register of deeds in Camden County."

W. B. Shaw for plaintiffs.
E. F. Aydlett for defendants.

SHEPHERD, J., after stating the case: The first, fourth, fifth and sixth exceptions may be considered together, as they substantially involve the same question, viz.: Whether it was competent to receive testimony to impeach the probate of a deed, and whether the deed was void as to the wife, if the clerk of the Superior Court of Camden County took her privy examination in the State of Virginia. As this was an action brought directly for the purpose of impeaching the probate, there can be no doubt as to the admissibility of the testimony. It is unnecessary to cite authority in support of such a plain proposition. As to the other point, it is equally clear that the clerk had no jurisdiction when he took the privy examination in the State of Virginia. The case of *Young v. Jackson,* 92 N. C., 144, cited by the appellant's counsel, has no application to the facts before us. It simply decides, that "the acts of 1868-'69, requiring the certificate of the probate judge of a county other than the county of registration, to be passed on by the probate judge of the latter county, is directory only."

The second, sixth and seventh exceptions involve the correctness of the principles embraced in the charge, that "the defendants claim title to the same land by the deed which is now sought to be set aside, and as both claim under Mrs. Ferebee there is no need to show title out of the State." This instruction is so manifestly correct that it is needless to cite, in support of it, any of the numerous authorities in our State. The third and remaining exception, as to the burden of (105) proof, like all the others, is clearly untenable. We think, however, that the judgment is erroneous, in that it directs the cancellation of the deed and notes. These remain effective so far as the husband, W. B. Ferebee, is individually concerned.

The judgment should be corrected, so as to declare the notes and deeds inoperative only as to Sarah and her real and personal representatives. *Ware v. Nesbit,* 94 N. C., 664.

Modified and affirmed.

Cited: Long v. Crews, 113 N. C., 257; *Dixon v. Robbins,* 114 N. C., 103; *S. v. Scott,* 182 N. C., 872.

JOHN A. SIMMONS v. JOSEPH L. BALLARD.

Mortgage—Right to Redeem—When Barred—Revised Code, ch. 65, sec. 19—The Code, sec. 152.

1. When mortgaged land is not in the actual possession of either mortgagor or mortgagee, the title remains undisturbed as fixed in the deed of mortgage, and the statutory presumption (Rev. Code, ch. 65, sec. 19) does not arise to the prejudice of either.

2. The mere lapse of time, unaccompanied by any possession, neither obstructs the right to redeem nor the right to foreclose a mortgage. *Therefore*, where a mortgage was made in 1856 to secure a debt falling due in 1858, and no payment was made on the debt after maturity, an action to redeem commenced in 1883 is not barred by chapter 65, section 19, Rev. Code, it being shown that neither mortgagor nor mortgagee had been in possession of the land.

DAVIS, J. (dissenting). The statute, Rev. Code, ch. 65, sec. 19, is plain, and there is no room for construction; it says nothing about an actual possession being essential to the prescribed effect of the lapse of time. Where there is no actual possession the constructive possession follows the legal title, and was in the mortgagee in this case, who held the land, by virtue of such title and possession, for more than ten years after the right to redeem accrued. Under this state of facts the statute barred plaintiff's right of redemption.

CIVIL ACTION, tried before *Merrimon, J.*, at March Term, 1887, (106) of PITT Superior Court.

Plaintiff appealed. The facts are stated in the opinion.

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

SMITH, C. J. This action was begun on 30 August, 1883, and the plaintiff alleges that on 22 November, 1856, he borrowed of the defendant the sum of seventy-five dollars, and to secure the same executed to the defendant a deed of mortgage conveying a tract of land of about 184 acres, therein described, with condition of avoidance upon payment of said debt and interest on or before 1 January, 1858; that previous to the last mentioned day, he made payments which reduced the debt to a sum less than thirty dollars, and in the year 1863 or 1864 tendered the residue and demanded a reconveyance of the premises, which the defendant refused, and that there is a cloud resting upon the title.

The prayer is for an account to be taken, in order to ascertain what is due under the mortgage, and for a reconveyance to the plaintiff upon his payment thereof.

The defendant, answering, admits the borrowing and the making of the mortgage, as alleged, and says further:

That there were other than the secured debts due him, of which he annexed a memorandum, and that sums of money have been paid him without any direction as to their application, and he has appropriated the moneys received to his unsecured debts outside of the mortgage.

That during the late Civil War, and near its close, the plaintiff offered to make payment in Confederate currency, then become well-nigh worthless, which was not accepted, but never tendered money of value.

That when the mortgage was made, there was on the premises a small piece of cleared land, one or two acres of which the defendant took possession and cultivated it for several years, and until the fence fell into decay, and that since 1856 he has listed and paid taxes on (107) the land as his own.

The defendant relies, as a defense to the action, upon the statutory presumption of an abandonment of the right to redeem and in bar of the action; and if this be not available, that the plaintiff be required to pay, besides the residue of the mortgage debt, the taxes paid, with interest, and the entire indebtedness due by the plaintiff.

After many continuances, the cause came on for trial at Spring Term, 1888, of Pitt Superior Court, before a jury, upon these issues:

1. What sum, if any, is due from plaintiff to defendant?
2. Has the plaintiff abandoned his equity of redemption?

The evidence developed at the hearing, on the part of the plaintiff, of which so much only is stated as bears upon the ruling brought up for review, was, in substance, that after the making of the mortgage, which contains no power of sale, he cultivated the cleared field of one or two acres before the war, and was the last one who did so; that he left it and moved upon an adjoining land which his wife's father gave her to reside on, and tended it after his removal.

It does not appear from this testimony that the land has been in possession of either party since.

The only evidence of an appropriated payment on the mortgage debt is the defendant's acknowledgment, bearing date 6 February, 1857, of twenty dollars, "in part payment of a right I hold on his property."

At this stage of the case and upon this showing the court intimated to counsel an opinion, that the facts proved were not sufficient to rebut the presumption of the abandonment of the equity of redemption raised by section 19, chapter 65, of the Revised Code, which governed the case; whereupon, counsel for the plaintiff, in submission thereto, suffered a nonsuit, and appealed.

(108) The sole question presented by the record is, whether the lapse of the statutory period of ten years since the last occupation of the mortgaged land, there being no possession since by the defendant, is a bar, from a presumed abandonment, to the assertion of all equitable right to redeem. The court holds the affirmative, and in this we think there is error.

The parties to a mortgage have each an equitable right therein: the mortgagor to redeem on payment of the debt secured, the mortgagee to foreclose, if the debt, after default, is not paid; and these respective interests may be lost by inaction and delay. When the land is in the possession of neither, the title remains undisturbed as fixed in the deed of mortgage, and the statutory presumption does not arise to the prejudice of either. The mere lapse of time, unaccompanied by any possession, neither obstructs the right to redeem nor the right to foreclose, and if a bar to one, so would it be to the other, and the neutralizing effect would be to leave the mortgage in its original force, with the legal incidents attaching thereto. Any other construction of the act would take away its efficiency as a measure of repose, if it did not render it meaningless and inoperative. Such is not its interpretation by the courts. Its true operation is to quiet a possession held by the mortgagee, for the prescribed period of time adversely and as his own, from the mortgagor's right to redeem, and in like manner a possession held by the mortgagor against the right of the mortgagee to foreclose. In either case the statute comes in aid of the possession, and frees the title from the claim of the other party. The accompanying possession thus becomes an essential element in giving force to the statute and exempting the estate from interference under the mortgage deed. The rule is thus laid down by *Mr. Justice Story* in his work on Equity, Vol. 2, sec. 1520: "If the mortgagee has been in possession of the mortgaged estate for twenty years (reduced to ten under our statute) without acknowledging (109) the existence of the mortgage, it will be presumed that the mortgage is foreclosed, and that he holds by *an absolute title.* If the mortgagor has been in possession of the mortgaged estate for the like space of time, without acknowledging the mortgage debt, it will be presumed to be paid." The obvious deduction from which is, that no presumption, either in favor of the mortgagee or mortgagor, arises when neither has had such possession. Adams' Eq., 115; 1 Maddock Ch., 519; 2 Daniel Ch. Pr., 741-742; Cooper Eq. Pl., 254. The doctrine is recognized by this Court in cases that have come before it. In *Roberts v. Welch,* 8 Ired. Eq., 287, *Ruffin, C. J.,* referring to the rule in England, which denies redemption to the mortgagor after an adverse holding of possession for the prescribed period by the mortgagee, and the occasion of the enactment in this State, says: "As the mortgagor is shut out of

redemption by the mortgagee's possession for twenty years, it was thought reasonable and convenient that the bar should be reciprocal on the mortgagee, who did not act on his debt or mortgage until the debt was was presumed to be satisfied by the lapse of twenty years." Following this exposition of the statute in requiring a possession to quiet the title, are the cases of *Ray v. Pearce,* 84 N. C., 485; *Brown v. Becknall,* 5 Jo. Eq., 423; *Barnes v. Brown,* 71 N. C., 507; *Edwards v. Tipton,* 85 N. C., 479. In the last case this language is used in the opinion: "The *possession of the mortgagee* and his exercise of full ownership over the land for ten years after default, and without payment of any part of the secured debt or claim to the land, raises, under the statutory rule, a presumption *of the abandonment or release in some way of the right of redemption, as would a similar possession in the mortgagor presume the discharge of the debt and a reconveyance.*" The same principle is embodied, as before declared, in applying the presumption raised by the former statute in the superseding statute of limitations (The Code, sec. 152, subsecs. 3, 4), which restricts to ten years after forfeiture the bringing an action to foreclose the mortgage against the (110) mortgagor who has "been in possession," and the like period to an action to redeem when the mortgagee "shall have been in possession." And there is no limitation fixed, as before there was none, when there was no supporting possession. Without further elaboration, it must be declared that there is error in the record, and the judgment must be reversed and a new trial awarded. Error.

Reversed.

DAVIS, J., dissenting: I think the ruling of his Honor below was correct, and do not concur in the opinion reversing it.

The right of the plaintiff to recover, both in the case stated and in this Court, was put upon the ground that the statute of presumptions had been rebutted by his offer to pay and the refusal of the defendant to accept payment, and when, as the case states, "it was submitted (admitted) by the plaintiff that he made no offer to redeem after the first of January, 1870, up to the bringing this action," I think his Honor was correct in holding that the statute was not rebutted.

It is conceded that the present action is governed by chapter 65, section 19, of the Revised Code. That section is as follows: "The presumption of payment, or abandonment of the right of redemption of mortgages and of other equitable interests, shall arise within ten years after the forfeiture of said mortgage, or last payment on the same, or the right of action shall have accrued on any equitable interest or claim, under the like rules as aforesaid."

The *forfeiture* was more than ten years before the action was brought, the *last payment* was more than ten years before the action was brought, and the *right of action* had accrued more than ten years before the action was brought. The language of the statute seems to me plain, and to leave nothing to construction. "The law adjudges the posses-
(111) sion to be constructively with the title. . . . When there is no actual occupation shown the law carries the possession to the real title." *Williams v. Wallace,* 78 N. C., 354. "The constructive possession was in the mortgagee." *Parker v. Banks,* 79 N. C., 480. In the absence of *actual* possession the title draws to it the possession. *Deming v. Gainey,* 95 N. C., 528.

It will be conceded that, in the present case, the legal title was in the defendant, and I have been unable to find any case in our Reports (and we are considering our own statute), in which it has been held, that the fact that no one was in actual possession rebutted the statute, and I cannot see how it can be so held, without disregarding its language. The statute of presumptions now gives place to the statute of limitations, and the action must be brought "within ten years after the right of action accrued." Where the mortgagee has been in possession (the statute does not say *actual* possession) under section 152, subsection 4, of The Code, and if, where no one is in the actual possession, the legal title does not draw to it the possession, as I think it does, then it clearly comes under section 156 of The Code, and the action must "be commenced within ten years after the cause of action shall have accrued," and I can see no legislative intimation in conflict with the opinion above expressed; and as the language of the statute seems to me free from doubt, I feel constrained to dissent.

Cited: Royster v. Farrell, 115 N. C., 310; *Menzel v. Hinton,* 132 N. C., 663; *Woodlief v. Wester,* 136 N. C., 167; *Mfg. Co. v. Moore,* 144 N. C., 527; *Cauley v. Sutton,* 150 N. C., 330; *Crews v. Crews,* 192 N. C., 683.

(112)

R. A. TYSON ET AL. v. MARTHA BELCHER ET AL.*

Practice—Motion in the Cause—Judgment, Irregular or Fraudulent, How Attacked—Infants—Next Friend of Infant.

1. A judgment of the Superior Court, directing a sale of lands upon the *ex parte* petition of those interested, cannot be attacked collaterally for irregularity where the record is apparently regular on its face.

*Avery, J., did not sit.

2. A judgment may be set aside for irregularity by motion in the cause. After a case is ended, the judgment may be attacked and vacated for fraud by an independent action.

3. Where the lands of infants are sold under an order of the Superior Court upon an *ex parte* petition, in which the infants are represented by next friends, it is presumed that the court protected their interests, and was careful to see that they suffered no prejudice.

THIS was a civil action, tried at the June Term, 1888, of the Superior Court of PITT County, before *Avery, J.*

It appears that Sherrod Tyson died in 1866, leaving a last will and testament, which was duly proven. The plaintiffs are his heirs at law and the devisees of his will, including the executrix thereof, and bring this action to recover the land described in the complaint, and presently to be again mentioned. By his will, the testator bequeathed and devised all his property, both real and personal, including the land in controversy, to the plaintiffs, to be owned, used and enjoyed as by the will provided.

Afterwards, at Spring Term, 1875, of the Superior Court of the county of Pitt, the present plaintiffs filed their *ex parte petition* in that court, describing the land now in controversy, and, for causes and purposes therein alleged and specified, prayed the court to order and direct a sale of the land and the application of the money arising from such sale, in lieu of it, for the benefit of the plaintiffs, not inconsistent with the provisions of the will, etc. Some of the petitioners (113) were infants and sued by their mother, as their next friend, and she also was a petitioner. Before hearing affidavits and inquiry as to the expediency and propriety of a sale of the land, etc., the court granted the prayer of the petitioners, and entered an order directing a sale of the land.

This order was expressly approved by the judge of the court.

Afterwards, the land was sold in pursuance of such order, and William Belcher, under whom the defendants claim, became the purchaser thereof. This sale was confirmed by proper order, made by the presiding judge in term time; this order directed the application of the purchase money, and that the commissioner appointed to sell the land make title to the purchaser, which he did by his deed executed on 20 December, 1878.

On the trial, the defendants offered in evidence a transcript of the record of the proceeding, the substance of which is set forth above. The plaintiffs objected to its admission, upon the ground—first, that such record was void upon its face for irregularities; and, secondly, because

the order of sale therein set forth, and the sale of the land in pursuance of it, were contrary to the provisions of the will mentioned above.

The court overruled the objection and admitted the evidence, and the plaintiffs excepted.

"The court intimated a purpose to instruct the jury, that by virtue of the proceeding to sell the land in controversy, the legal title to the land in controversy passed to William Belcher, and that the validity of the decree and sale in that proceeding could not be attacked in this action, and that the jury must find the issue submitted for defendant."

In deference to this intimation of the court, the plaintiffs suffered a judgment of nonsuit, and, having excepted, appealed to this Court.

(114) *A. W. Haywood for plaintiffs.*
C. M. Bernard for defendants.

MERRIMON, J., after stating the facts: From an examination of the transcript of the record of the *ex parte* special proceeding, objected to as evidence, it appears that the court could properly have, and did take, in an orderly way, jurisdiction of the parties to and the subject-matter of, the proceeding. The petitioners were represented by counsel and the petition was filed as allowed by the statute (The Code, sec. 286). If there were irregularities at all in the course of the proceeding they certainly were not such as rendered it, or the orders and judgment therein entered, absolutely void; at most they were only voidable, and could not, therefore, be attacked collaterally. In such case the remedy would be by a proper motion in the proceeding itself. If it were affected by fraud, then, as it is ended the remedy would be by an independent action, for the purpose of having the judgment, or the whole proceeding, accordingly as the case might be, adjudged void for fraud.

Nor has the second ground of exception any force. By the will mentioned, the land in question was devised to the present plaintiffs, who were parties to the special proceeding referred to; it belonged to them and they had the right to petition the court to sell the same as they did. Those of them who were of age could sell and dispose of their interest in and title to the same, and bind themselves effectually in a judicial proceeding. As to the infants, they could sue by their next friend, as they did, and the court had jurisdiction of them and as well of their lands embraced by the proceedings. The court had jurisdiction of them and their land, and in contemplation of law it was careful to see that they suffered no prejudice. These authorities fully sustain what we have thus said: *Williams v. Harrington,* 11 Ired., 616; *Sutton v. Schon-*

wald, 86 N. C., 198; *Fowler v. Poor,* 93 N. C., 466; *Tate v. Mott,* 96 N. C., 19; *Ward v. Lowndes, ibid.,* 367; *Edwards v.* (115) *Moore,* 99 N. C., 1; *Brickhouse v. Sutton, ibid.,* 103. No error Affirmed.

Cited: Coffin v. Cook, 106 N. C., 378; *Ferrell v. Broadway,* 127 N. C., 406; *Settle v. Settle,* 141 N. C., 562; *Rackley v. Roberts,* 147 N. C., 205; *Haddock v. Stocks,* 167 N. C., 70.

JOHN F. HOOKER AND WIFE v. JOHN SUGG, ADMINISTRATOR.

Life Insurance Policy, Rules of Construction of—Constitution, Art. X, Sec. 7.

1. A. insured his life for the benefit of "his wife and children," having, at the time the policy was issued, a wife and two children living. His wife died before he did: *Held,* that upon A.'s death the share that would have been his wife's went to her administrator, and the surplus of such share, after paying her debts, went to the administrator of A., and became liable to A.'s debts.

2. When A. insured his life for the benefit of "his wife and children," and at the time the policy was issued he had no wife, but did have two children, one of whom died before A.: *Held,* that upon A.'s death the money due on the policy should be divided between the surviving child and the administrator of the dead child. The insertion of "his wife" as a beneficiary, when he had no wife living, was a nullity.

3. A life policy creates a vested interest in the beneficiaries named in it. The contract may be annulled by the company for cause, but the disposal of the fund while the policy remains in force is not under the control of the insured. So far as it concedes a right of revocation in the party insuring, *Conigland v. Smith* is overruled.

4. The rules for interpreting a will may guide, as far as they are applicable, in ascertaining the legal effect of the clause in an insurance policy by which the beneficiaries are designated. The difference in the cases consists in the fact that the interest vests under the policy at once, upon its issue, while under a will the interest vests only at the death of the testator.

5. The Constitution, Art. X, sec. 7, clearly looks to the provision for the wife and children, so that they may not be left destitute by the death of an insolvent husband and father, and is personal to them when they survive.

6. A. had a life policy for the benefit of "his wife and children;" he surrendered it and took a paid-up policy for the benefit of the beneficiaries. After this he took out another policy in the same company for the benefit

of "his wife and children," but when the last policy was issued his wife was dead: *Held*, that each policy was a complete contract in itself, and the last policy could not be construed as substituted for the surrendered policy, and the amount collected on it be divided accordingly.

(116) CIVIL ACTION, tried before *Graves, J.*, at October Term, 1888, of GREENE Superior Court, upon a case agreed.

From the judgment rendered below, which is set out in the opinion, the defendant appealed.

The *feme* plaintiff is the daughter of J. T. Freeman. The defendant is the administrator of J. T. Freeman, of Leora Freeman, who was the wife of J. T. Freeman, and also of John H. Freeman, who was the son of J. T. Freeman.

The facts are stated in the opinion.

J. I. Jackson and Geo. V. Strong for plaintiffs.
Theo. Edwards and G. M. Lindsey for defendant.

SMITH, C. J. J. T. Freeman, in the year 1867, obtained from the Ætna Life Insurance Company, of Hartford, in the State of Connecticut, a policy of insurance upon his life for the sum of five thousand dollars, to be paid at his death to "his wife and children," the premiums on which were to be paid annually, one-half in money and the other half secured by his note. At the time of the issue of the policy he had a wife, Leora, then living, and two children, their offspring, John H. Freeman, and E. Hokie Freeman, who intermarried with John F. Hooker.

(117) After the death of the said Leora, some time in 1873, under an arrangement between the company and J. T. Freeman, the policy was surrendered to the company and a paid-up policy for the sum of three hundred and twenty dollars issued in its place, and in consideration of the premium theretofore paid, which sum was in like manner made payable to "his wife and children," without, as in the previous one, designating any one by name.

At the same time a second life policy was taken out, for the same sum and essentially in the same terms, payable, without naming them, to "his wife and children," differing from the former in requiring the annual premiums all to be paid in cash, the company having made this change, as to the payment of premiums, in the form of their life policies.

The son, John H., died during the lifetime of his father, leaving a will, in which he disposed of his whole estate, and the defendant, John Sugg, has taken out letters of administration with the will annexed on the testator's estate.

The *feme* plaintiff and her brother paid the premiums on the last policy up to the death of her brother, and herself alone the premiums thereafter to her father's death, in the sum of $297, and it was agreed that she shall be reimbursed out of the funds derived under that policy.

J. T. Freeman died in 1888, intestate, and letters of administration on his estate, as well as on his wife's, have also issued to the defendant. The company has paid both the sum agreed on in the paid-up policy and the entire amount due on the last policy, to the defendant, to be held subject to the rights of the parties therein. J. T. Freeman died largely indebted and insolvent, but there are no debts outstanding against the estate of his deceased wife, Leora.

The foregoing facts are submitted to the judge for his decision of the conflicting claims, asserted in the pleadings, to the fund, and it is agreed that if he shall sustain the plaintiffs' contention he shall enter judgment for one-half of the $5,000, after deducting $297 due for premiums paid by her, which shall be added to the *feme* (118) plaintiff's moiety of the residue; if he shall rule in favor of the defendant, he shall enter judgment for the plaintiffs for one-third of the $5,000, reduced by the amount of the premiums so paid by the *feme* plaintiff.

Upon the hearing of the cause, was entered the following judgment:

"From the facts agreed upon and submitted by the parties in this action, the court is of opinion, and so adjudges, that the plaintiffs are entitled to recover one-third of the three hundred and twenty dollars received by the defendant from the paid-up policy, and the defendant, as administrator of Leora Freeman, deceased, and as administrator with the will annexed of J. H. Freeman, deceased, is entitled to the other two-thirds of that sum.

"And the court is further of the opinion, and so adjudges, that the plaintiffs, as agreed upon by the parties, are entitled: First, to be paid out of the five thousand dollars received by the defendant from the five-thousand-dollar policy, one-half of the amount of the premiums paid by the *feme* plaintiff on said policy, with interest on same from the time such premiums were paid; second, are entitled to recover one-half of the remainder of said five thousand dollars.

"And the defendant, as administrator with the will annexed of J. H. Freeman, deceased, is entitled to the balance of said five thousand dollars.

"These plaintiffs will recover their costs in this action, to be taxed by the clerk."

The premiums having been paid in equal parts by the daughter and son, up to his death, and by her alone since, in the several sums and at the several dates set out in the complaint, for which she is to be reim-

bursed those several sums, and not the half of each, as ruled by the judge under a misapprehension of the terms of the concession, with interest on separate portions, which make the aggregate of $297,
(119) must be allowed the *feme* plaintiff, and deducted from the full amount of the insurance. With this correction, there is no error in that part of the ruling.

The question as to the distribution of the sums paid upon the surrendered policy is not submitted to the judge, and we suppose is not a subject of controversy, and consequently the ruling is confined to the distribution of the other fund. If the contention be sustained, that will entitle the wife to a share of it, as she would be if living at the time when that insurance was effected, it would go to her administrator, and the defendant being both her and her husband's representative, there being no debts of hers to be provided for, it would be held by the defendant in his latter capacity, and become liable to his debts.

The provision in the Constitution, Article X, section 7, which authorizes such an insurance for the benefit of the wife and children, not as yet regulated by statute, clearly looks to a provision for them, so that they may not be left destitute by the death of an insolvent husband and father, and is personal to them when they survive.

The defendant's counsel maintain the proposition that the substituted policy takes the place of the other, and inures to the advantage of the same beneficiaries as would the first have done if it had been kept up according to its terms, the effect of which would be to subject the wife's share, as suggested, to her husband's debts, a result which it was his intention to guard against, and yet this would have followed but for the renewal. The terms of the policy constitute a contract of the company to pay the specified amount to the beneficiaries designated, and create direct legal relations between them.

How could this be in regard to the wife, no longer living, and how can it be supposed that he intended to provide for her? The new policy supersedes, but does not continue in force, that whose place it
(120) takes, and must be construed in accordance with the then existing conditions. Inadevertently, perhaps, but if inserted intentionally, the insertion of the wife as a beneficiary is a nullity, so far as it may have reference to the deceased, and could only have operation as a reference to one whom he might afterwards marry, and thus bring within the terms of the policy.

It is unnecessary to consider the possible effect of a future marriage upon the interests of the children, since the event did not take place.

There are but two aspects presented in the case before us, in the one of which the one-third lapses and returns to the husband as undisposed

of, and in the other the entire sum belongs to the children, and we concur with the court in the ruling in their favor.

In *Coningland v. Smith,* 79 N. C., 303, the relations of a parent, who insures his own life for the benefit of his children, to them, are deemed analogous to those assumed when providing for them by a testamentary disposition of his property, both being posthumous benefits secured, and hence the rules for interpreting the will of a testator may guide, as far as they are applicable, in ascertaining the legal effect of this clause in the policy. The difference in the cases consists in the fact that the interest vests under the policy at once upon its execution, while it does not under the will until the death of its maker, and hence we do not concur in the opinion delivered by *Rodman, J.,* so far as it concedes a power of revocation to reside in the party insuring. The contract may be annulled by the company in case of the failure of the other party to fulfil his contract stipulations, but the disposal of the fund while the policy remains in force is not under his control. Bliss Life Ins., 2 Ed., 517; *Fortescue v. Barnett,* 3 Myl. & R., 36; *Otis v. Beckwith,* 49th Ill., 121, and cases cited.

As the attempted securing a share to the deceased wife is nuga- (121) tory and unavailing, there seems to be no alternative but to give the entire fund to the living daughter and administrator of the deceased son; for it is evident the entire sum was intended for none other, and being void as to one, the provision inures wholly to the others.

In case a legacy is given to a class of persons, as to tenants in common or to children, in the case of the death of one before the vesting, it inures to the survivors of the class. 2 William Ex'rs, 882; Toller Ex'rs, 303.

So, if *children* be designated in a life policy as beneficiaries, the interest *vesting at once* is in such as then meet the description, and is not divested in favor of survivors by a death afterwards.

We have not been able to find an adjudged case shedding light upon the construction of the like or similar words found in defining the parties for whose benefit a life policy has been taken out, but our conclusions seem to be a fair and reasonable interpretation of the clause before us, as it certainly subserves the ends that the father had in view in securing this fund to *his family,* constituted, in this case, of his son and daughter.

Subject to the correction which makes the advances of the daughter to be paid in full, and not a moiety only, the judgment is affirmed.

Modified and affirmed.

Cited: Sydnor v. Boyd, 119 N. C., 486; *Pippen v. Ins. Co.,* 130 N. C., 25; *Scull v. Ins. Co.,* 132 N. C., 82; *Lanier v. Ins. Co.,* 142 N. C., 18; *Walser v. Ins. Co.,* 175 N. C., 352.

(122)

ALFRED HODGES ET AL. v. HENRY FLEETWOOD ET AL.

Deed, Construction of—Rule in Shelley's Case.

1. Where the premises of a deed were "unto M., wife of P., during her natural life, then to descend to her heirs, the children of the said P., after her demise"; and the *habendum* was to "the party of the second part and their heirs forever": *Held*, that the deed created a life estate only in M., with a contingent remainder in fee to the children of herself and her husband P.

2. Such a deed does not create a fee-tail special which would be converted into a fee-simple estate under our statute.

THIS was a civil action, heard before *Montgomery, J.*, at the February Term, 1888, of the Superior Court of BEAUFORT County, on a case agreed.

The plaintiffs sued to recover a tract of land in the possession of the defendants. Both parties derived title under the deed from Samuel Boomer to Mahatabel Pate, *post*.

The plaintiffs claimed the land as children of Mahatabel Pate, by her husband, Isaiah Pate; the defendants claimed it under a deed from said Mahatabel Pate and her husband, Isaiah Pate.

The only questions presented by the appeal arise upon the construction of the deed from Samuel Boomer to Mahatabel Pate, which is as follows:

"This indenture, made the 4th day of April, in the year of our Lord one thousand eight hundred and fifty-seven, between Samuel Boomer, of the town of Washington, county and State aforesaid, of the first part, and Mahatabel Pate, wife of Isaiah Pate, of the town of Washington, county and State aforesaid, of the second part, witnesseth, that I, the said party of the first part, for and in consideration of the sum of one hundred dollars, and a further consideration of one house and lot
(123) in the town of Washington—say in Bonner's New Part—reference being had to said Pate's deed to me of the first part, as will more fully appear, and myself therewith fully contented and satisfied, hath bargained and sold, and by these presents do bargain and sell (unto her, the aforesaid Mahatabel Pate, wife of Isaiah Pate, during her natural life, then to descend to her heirs, the children of the said Isaiah Pate, after her demise), a certain tract or parcel of land in the district of Washington, butted and bounded as follows, viz.: (description), containing 16 acres, 3 rods and 8 poles, together with all and singular the hereditaments and appurtenances belonging or in anywise appertaining

thereunto, with all the profits and emoluments, right, title and interest whatever of him, the said party of the first part, to the above-bargained premises: to have and to hold to them, the party of the second part, and their heirs, forever. And I, the party of the first part, for myself, my heirs, executors, administrators and assigns, warrant and forever defend the above-bargained premises unto them, the party of the second part, against the claim or claims of all persons whatsoever laying claim or claims thereunto.

"In witness whereof, I, the party of the first part, hath hereunto set my hand and seal, the day and date first above written.

(Signed) SAMUEL BOOMER." [Seal.]

The court gave judgment for the plaintiffs. The defendants excepted to the judgment, and appealed.

W. B. Rodman, Jr., for plaintiffs.
A. D. Jones for defendants.

AVERY, J., after stating the case: The first question to be settled in this case is, whether the words used in the premises of the deed, "unto her, the aforesaid Mahatabel Pate, wife of Isaiah Pate, during her natural life, then to descend to her heirs, the children of the said Isaiah Pate, after her demise," etc., together with the subsequent (124) words in the *habendum,* "to have and to hold to them, the party of the second part, and their heirs, forever," vested in Mahatabel Pate an estate in fee simple or only a life estate. It seems clear that the word "heirs" should be construed as a word of purchase—not of limitation. The words "the children of the said Isaiah Pate, after her demise," following immediately after "heirs," are evidently intended as a more particular description of the persons who are to take at her death, and that portion of the premises should be interpreted as if it had been written as follows: "Unto the said Mahatabel Pate, wife of Isaiah Pate, during her natural life, and after her death, to her children, the issue of her marriage with Isaiah Pate." The context shows, therefore, in what sense the word "heirs" was used, and that, in fact, it was intended to mean not simply children, but a particular class of children—the issue of that marriage with Isaiah Pate—and must be construed as vesting an estate in the land in those children, at her death, as purchasers. *Leathers v. Gray,* 101 N. C., 162; *Mills v. Thorne,* 95 N. C., 362; *King v. Utley,* 85 N. C., 59. But the defendants' counsel contended, on the argument, that the words in the *habendum,* "to have and to hold to them, the party of the second part, and their heirs, forever," must be interpreted as qualifying the estate given to Mahatabel Pate, and, notwithstanding the

fact that the words "during her natural life" and "after her demise" are used in the premises in reference to her interest, she took an estate in fee simple under the deed. We cannot treat as surplusage, or ignore, the significant words used in the premises in order to reach such a conclusion. The words of the inheritance were intended to vest in the children a remainder in fee after the death of the mother.

While the word "heirs," when plainly constituting a part of the covenant of warranty, will not be transposed and construed as if it were in the premises or *habendum,* it will be construed, when it appears (125) in the *habendum* after the words "to have and to hold," just as if it had been written after the name of the grantor in the premises; and when deeds have been inartistically drawn, so as to locate the *habendum* after the covenant of warranty, they have been interpreted by a transposition of the words of inheritance to the premises. *Waugh v. Miller,* 75 N. C., 127; *Allen v. Bowen,* 74 N. C., 155; *Phillips v. Thompson,* 73 N. C., 543; *Phillips v. Davis,* 69 N. C., 117.

We think that the true meaning of the deed is the same as if the language in the premises had been, "unto the said Mahatabel Pate during her natural life, and after her death, to her children—the issue of her marriage with said Isaiah Pate—and their heirs, forever." We cannot concur with counsel in the view that such a conveyance at common law must be held to have vested in Mahatabel a fee-tail special, which was converted by the statute into a fee-simple estate, and merged with her estate in fee expectant on the determination of the estate tail. At common law, an estate could have been conveyed to Mahatabel for life, with remainder in fee to such children as might be born of the marriage with her then husband. It would have been a contingent remainder, because it might happen that there would be no issue of the marriage, and at all events there would be uncertainty in contemplation of law as to the number who would take as remaindermen; but when the remainder did vest in her children at her death, it would vest in fee simple—not restrained to any particular heirs, but inheritable by all of their heirs alike. We do not think that it is necessary to discuss or construe section 1329 of The Code, in order to decide the questions presented in this case.

We hold that the plaintiffs are entitled to recover, and there was no error in the ruling of the judge below. The judgment must be affirmed. No error.

Affirmed.

Cited: Vickers v. Leigh, 104 N. C., 258; *Dickerson v. Dail,* 159 N. C., 541.

(126)

H. W. HARRISON, GUARDIAN, v. J. H. HOFF.

Plea of Former Judgment—Claim and Delivery—Trover—Trespass for Mesne Profits—Trees Severed from Realty.

1. The defense of former judgment must be set up specifically in the answer, or it will not be considered. *Blackwell v. Dibbrell*, 103 N. C., 270.

2. An action of claim and delivery will not lie to recover logs that had been severed from plaintiff's land, while the defendant was in possession claiming title; nor will trover lie for the conversion of crops by one in adverse possession of land. The remedy in such cases is by action of trespass for mesne profits.

CIVIL ACTION, tried before *MacRae, J.*, at Fall Term, 1888, of WASHINGTON Superior Court.

Plaintiffs appealed.

The following is the case agreed, as settled by the parties:

"This was a civil action, for the recovery of certain timber logs alleged to have been cut and carried by the defendant Hoff from the land of plaintiff."

The following issues were agreed upon:

"1. Are the plaintiffs the owners and entitled to the possession of the personal property described in the complaint?

"2. Does the defendant wrongfully withhold the same from the plaintiffs?

"3. What damage have plaintiffs sustained?"

It was admitted:

"That the land upon which the timber was cut had belonged to the minor plaintiffs, R. M. and Leola Ausborn.

"That a petition for partition of said land was filed, *ex parte*, and an order of sale for partition was made by the clerk, and the land sold by the commissioner appointed for that purpose, and that defendant, J. H. Hoff, as guardian for the other defendants, bid off said land at said sale.

"That the commissioner reported the sale, and the clerk made (127) an order confirming the sale, and directing title to be made to the purchaser, as guardian of the other defendants, upon payment of the purchase money.

"That defendant Hoff paid the purchase money to the commissioner, who made a deed to said Hoff, individually, for said land, and that thereupon said Hoff went into possession of said land, and has been in

possession ever since, and while so in possession cut and carried away the timber decribed in the complaint, which timber was worth $300.

"That the judge of the Superior Court, about four years after the said sale, refused to confirm the same, and said sale has never been confirmed by a judge of the Superior Court.

"That at the present term of this Court an action by plaintiff against defendants for the recovery of said land, and damages for the wrongful withholding of the same, was tried, and the plaintiff recovered judgment for the possession of said land, and one penny as damages from the defendants."

Copies of the partition proceedings and of the record in the action for the recovery of said land, are hereby attached as part of this case.

Upon the foregoing facts agreed, the presiding judge instructed the jury to respond in the negative to the first issue, and gave judgment, from which judgment the plaintiff appealed to the Supreme Court.

C. L. Pettigrew and A. W. Haywood for plaintiff.

B. C. Beckwith and A. O. Gaylord (by brief) for defendants.

AVERY, J. An action between the same parties to recover the same land and damages for detention (including the value of timber cut down or destroyed), was brought to the Fall Term, 1887, of the same court in which this cause was tried, and judgment in favor of the plaintiff, for the recovery of the land and nominal damages, was rendered at (128) the Fall Term, 1888. Therefore, if the defendant had set up the estoppel as a defense in his answer, it would have barred the plaintiff's right of action, as plaintiff contended on the argument. *Yates v. Yates,* 81 N. C., 397; *Tuttle v. Harrill,* 85 N. C., 456; *Gay v. Stancell,* 76 N. C., 369. But his failure to plead the estoppel, specifically, deprives him of the right to avail himself of that defense. *Blackwell v. Dibbrell,* 103 N. C., 270.

But the defendant did plead, by way of new matter, that the action of claim and delivery would not lie to recover logs that had been severed from the land, while the defendant was in possession, and thereby availed himself of the very same principle that made the judgment in the former action a bar. It was held, that fodder which had been severed did not pass to the plaintiff in ejectment, when put into possession under a writ, while growing corn did pass to him with the land, because he could recover the value of the fodder in his action for mesne profits. Moreover, the additional reason for confining the owner to his action of trespass for mesne profits was, that if the action of trover was allowed to be brought for the goods, it would subject to liability any

person who bought a bushel of corn from the trespasser while in possession. *Brothers v. Hurdle,* 10 Ired., 490; *Ray v. Gardner,* 82 N. C., 454.

The motion for new trial was properly refused. The judgment is affirmed. No error.

Affirmed.

Cited: Jones v. Wilson, 103 N. C., 14; *Howland v. Forlaw,* 108 N. C., 570; *Hicks v. Beam,* 112 N. C., 645; *Stancill v. James,* 126 N. C., 195; *Smith v. Lumber Co.,* 140 N. C., 378; *Terrell v. Washington,* 158 N. C., 281; *Williams v. Hutton,* 164 N. C., 223.

(129)

THE STATE EX REL. L. C. LAWRENCE v. W. T. BUXTON ET AL.

Arrest, What Constitutes—False Return by Sheriff.

1. The term "arrest" has a technical meaning, applicable in legal proceedings. It implies that a person is thereby restrained of his liberty by some officer or agent of the law, armed with lawful process, authorizing and requiring the arrest to be made.

2. To constitute an arrest, the person of the party to be arrested must be seized, or be brought within the control of the officer, with power to seize, if necessary; or the person against whom an order of arrest is directed must submit to the control of the officer, and consent to be subject to him. No actual seizure of the person is *essential,* but if there is no seizure the officer must intend to make the arrest and have present power to control the party arrested.

3. A sheriff, having in hand an order of arrest against B., told B. that he "had better come and go with him to Jackson, and fix the matter there;" B. refused to go with him, and the sheriff left, without taking any further action: *Held,* that what passed did not constitute an arrest of B., and the sheriff was not liable for a false return, in that he returned on the order of arrest, "not served."

CIVIL ACTION, tried before *MacRae, J.,* at Fall Term, 1888, of HERTFORD Superior Court.

Plaintiff appealed.

In an action between the relator and one Baugham, he obtained an order for the arrest of the defendant therein, which was placed in the hands of the present defendant, who was sheriff, to be executed by him, and he was legally charged to execute the same, and he made return thereof as follows:

"This order came to hand by mail, 29 August, 1884. No fee paid or tendered.

"W. T. BUXTON, *Sheriff.*"

"I return this writ not served.

"W. T. BUXTON,
"Sheriff Northampton County."

(130) The relator, alleging that this return was false, brought this action to recover from the defendant the penalty of $500, allowed by the statute (The Code, sec. 2079), as against sheriffs for false returns of process in their hands. The defendant denied the alleged false return.

On the trial the defendant produced evidence tending to show that A. A. Spivey, a deputy of the defendant, to whom the defendant delivered the order of arrest to be executed, went to the house of Baugham to execute the same; that he saw Baugham, and, after reading to him the summons, told Baugham that he had an order for his arrest in the cause; that Baugham told the deputy that there was no need to arrest him for that amount of money; to leave the bond with him, and he would fix it up; that the deputy sheriff said at first he could not do it, and that Baugham had better come and go with him to Jackson and fix the matter there; that Baugham said he was too sick to go to Jackson; that he could raise the amount of money, or give security, at any time, and to leave the bond with him and he would go down and see Judge Barnes, the attorney of plaintiff Lawrence, the next day, and compromise it, and if he failed he would see the Jenkins boys and fix it up; that the deputy went back to Jackson and told the sheriff about it, and the sheriff sent him back after Baugham the next day, but Baugham had left. Thereafter the aforesaid return was made.

The plaintiff insisted that the foregoing was evidence sufficient to show, if believed, that the sheriff had in fact executed the order of arrest, and that so much of said return as said, "I return this writ not served," was false.

The court having intimated an opinion against the plaintiff, he submitted to a nonsuit, and appealed.

B. B. Winborne for plaintiff.
R. B. Peebles for defendant.

(131) MERRIMON, J., after stating the case: The plaintiff contends that the return, "I return this writ not served," of the order of arrest mentioned, was false, in that the defendant, as sheriff, before the making thereof, had, in fact and contemplation of law, "served"—executed—the order according to the exigency thereof, through and by

his deputy. The court below, accepting the evidence produced by the plaintiff as true, was of opinion that the return was not false, and we concur in that opinion.

The term "arrest" has a technical meaning, applicable in legal proceedings. It implies that a person is thereby restrained of his liberty by some officer or agent of the law, armed with lawful process, authorizing and requiring the arrest to be made. It is intended to serve, and does serve, the end of bringing the person arrested personally within the custody and control of the law, for the purpose specified in, or contemplated by, the process through and by the officer or agent charged with its execution. The certain and most unequivocal method of making an arrest is by the actual seizure of the person to be arrested, but this is not essential; it is sufficient, if such person be within the control of the officer with power of actual seizure, if necessary. The officer need not touch the person of such party to make the arrest effectual, but he must have and intend to have control of the party's person. This seems to be necessary to constitute a valid arrest. If the officer has process, and intends presently to execute it, and the person against whom it is directed recognizes it and submits to the control of the officer, this would be a sufficient arrest, because thus the officer would get the custody and control of the person of the party. But if there is no actual seizure of the person, the officer must intend to make the arrest and have present power to control the party arrested. Thus, if the officer go into a room and tell the person therein to be arrested, that he arrests him, and locks the door, this has been held to be an arrest.

If, however, the officer has present power, and intends to make (132) the arrest, and the party to be arrested submits to his arrest—consents to be subject to the officer—this is sufficient. Every touching of the party to be arrested, by the officer having process, is not necessarily an arrest. Thus, if the officer meet the party against whom he has process, and they shake hands, nothing being said of the process, nor is it said that an arrest is intended, this would not constitute an arrest, because the officer and the party did not so intend. But if the officer and the party to be arrested meet, and the former notifies the latter that he has process requiring his arrest, and the officer directs the latter to meet him at a particular place and time, this would be a sufficient arrest, if the officer and the party so agreed and intended.

This is so, because the officer intended to make the arrest, and the party consented to be in his custody and within his control. *Jones v. Jones,* 13 Ired., 448; *Baldwin v. Murphy,* 82 Ill., 485; *Bissell v. Gold,* 19 Am. Dec., 485, and notes; *Hawkins v. Commonwealth,* 71 Am. Dec., 151, and notes; Murf. on Sheriffs, secs. 144, 147; Burrill's Law Dic., word "Arrest."

Now, it seems to us that in no reasonable view of all the evidence produced on the trial did it tend to prove an arrest made by the defendant as contended by the appellant. The most that can be said is, that the deputy of the defendant, as sheriff, and the party against whom the order of arrest was directed, talked of the order. The deputy did not seize or touch, or have, or attempt to have, within his control, in any way, the party named in the order of arrest. The deputy did not make, or declare his intention to make, an arrest, nor did the party to be arrested submit, or promise to submit, to the deputy's control.

As we have said above, it was not sufficient for the deputy to make known that he had process—he must have intended to execute it, and have done so by a seizure of the party subject to be arrested, or by having him in his control in some way; or such party must have sub-
(133) mitted to the arrest and consented to be in his custody and control. The mere suggestion of the deputy that the party to be arrested "had better come and go with him to Jackson and fix the matter there," was not sufficient evidence of an arrest, especially as such party refused to go. Indeed, the evidence went to show that there was no arrest made, and that none was intended. The insufficient return was, therefore, true, and the defendant did not incur the penalty as alleged by the plaintiff.

Judgment affirmed.

Cited: Lovick v. R. R., 129 N. C., 436; *Combs v. Commissioners,* 170 N. C., 87; *Stancill v. Underwood,* 188 N. C., 477.

RICHARD WYNNE AND WIFE V. R. H. SMALL ET AL.

Married Women, Private Examination of—Certificates of Probate, Correction of—The Code, sec. 1246—Deeds, Collateral and Direct Impeachment of.

1. Before the private examination of a *feme covert* can be lawfully taken, under section 1246, the deed must be acknowledged by both husband and wife, or its execution by *both* proven by a subscribing witness.

2. If, *in fact,* the execution of the deed by both husband and wife was properly proven before the private examination was taken, but the certificate of the officer does not show it, the certificate may be corrected and made to speak the truth, in a proper proceeding, and, *perhaps,* summarily, by motion. When so corrected, it speaks from its original date.

3. A certificate of probate, made by a proper officer, must be accepted as true when it comes up *collaterally*, and its recitals cannot be disproved nor its omissions supplied by extraneous proof.

4. The rule laid down in *Jones v. Cohen*, 82 N. C., 75, with regard to impeaching deeds of *femes covert*, and certificates of their private examination, affirmed.

CIVIL ACTION, to recover land, heard by *MacRae, J.*, upon a (134) case agreed, at February Term, 1889, of CHOWAN Superior Court.

The land, the title to which is contested in the action, belonged to the plaintiff, Richard Wynne, and he and his wife, the plaintiff, Alice, on 27 February, 1883, united in making a deed therefor to C. W. Cason, by whom it was also executed, to secure a debt due him. It was registered in Chowan County, upon a certificate of probate before the clerk of the Superior Court, on the next day, in the following form:

"NORTH CAROLINA—CHOWAN COUNTY.

"In Probate Court—28 *February*, 1883.

"Personally appears J. R. B. Hathaway, witness to the foregoing deed of trust, and proves the execution thereof by Richard Wynne and C. W. Cason; and the said Alice Wynne, wife of said Richard Wynne, being by me privately examined touching the execution of the same, declares that she executed the same freely of her own accord, without fear, force or undue influence of her said husband, and doth now voluntarily assent thereto. Therefore, let this deed, with this certificate, be registered.

"W. R. SKINNER,
"Probate Judge."

The land was sold under this deed in trust, and bid off by the defendants and their wives, to whom a deed has been made by the trustee.

The sufficiency of the proof of execution by the parties, as shown in the entry of probate and of the registration thereunder, to render the deed effectual in passing the estate in the land, or that the defect can be removed by parol proof of any additional fact, was denied, and it was by consent submitted to the determination of the judge on these terms:

"If the court shall be of opinion that the defendants can offer evidence *aliunde* as to the acknowledgment and taking of the (135) *feme covert's* examination, as set out on the face of the deed, the defendants are allowed to offer the evidence and the court to find the facts it proves.

"If, upon the facts agreed, and so found, the court shall be of opinion in favor of the plaintiffs, judgment shall be so entered; if of a contrary opinion, for the defendants, with the right of appeal by either party."

The court heard the parol proof of the subscribing witness, who testified "that his impression is that he proved, on oath before the clerk, the execution of the deed by Mrs. Wynne as well as by Mr. Wynne and Mr. Cason"; that "he knows nothing of the private examination of Mrs. Wynne, and does not think Mr. and Mrs. Wynne were present when he proved the deed."

Thereupon, thus aided, the court ruled the probate to be effectual to convey the land, and adjudged "that the plaintiffs take nothing, and the defendants go without day."

From this judgment the plaintiffs appeal, and present for our determination two questions: the competency of the testimony received to remove the defects in the certificate, and the legal effect of the additional facts established.

No counsel for plaintiffs.
W. B. Shaw for defendants.

SMITH, C. J., after stating the facts: The imputed imperfection in the form of the probate, as we understand, lies in the want of proof of execution by the *feme* bargainor before the private examination was taken, an alleged essential prerequisite thereto, and necessary to the operation of the deed as to her. But for the intervention of the homestead claim, this omission would only leave unimpaired, in her, the contingent right of dower, but would not affect the right to pos-
(136) session under the deed rightfully executed and proved as the deed of her husband.

The law regulating conveyances of the lands of married women formerly required the execution of the deed by them to be first acknowledged, as also by their husbands, preceding the private examination, to ascertain if it was voluntary and as a free act; and it was held in *Burgess v. Wilson,* 2 Dev., 306, that the acknowledgment was an indispensable condition of its efficacy in passing the *feme's* estate.

The statute was afterwards modified, so as to admit proof also, by a subscribing witness, but still, in whatever mode done, it must precede the private examination. Rev. Code, ch. 37, sec. 8; *Sutton v. Sutton,* 1 D. & B., 582. Such is the present law—The Code, sec. 1246, subsecs. 4, 5, 6 and 7.

If, *in fact,* the *feme covert's* execution of the deed was proved by the witness, when he proved the execution by other parties, the effect of the failure to permit evidence of the omitted fact would be to invalidate a conveyance made and proved as the law requires, because of an inadvertence in the officer who acted in drawing his certificate. It would

be a reflection upon judicial procedure if such results were to follow, and the case admitted of no remedy.

If the records and *quasi* records omit to speak the truth, they should be corrected when they fail to do so, that they may possess, as they import, absolute verity in all their recitals. The cases where such defects are supplied in judicial proceedings are numerous, and scattered through the Reports. *S. v. Bordeaux,* 93 N. C., 560; *Strickland v. Strickland,* 95 N. C., 471; *Perry v. Adams,* 83 N. C., 266.

It is true that the certificate, while it retains its form, from the verity attaching to it as such, must be accepted, when it comes up collaterally, and its recitals cannot be disproved nor its omissions supplied by extraneous proof. It may, and should, be itself amended, and made to conform to the truth, in a proper proceeding, and, perhaps, summarily, by motion when all necessary parties are present, and when so corrected it speaks from the original date. It may be impeached, (137) however, in an independent action, upon the ground of infancy, notwithstanding the private examination, for this is an incurable defect, unless by subsequent ratification, as held in *Jones v. Cohen,* 82 N. C., 75. See, also, *Epps v. Flowers,* 101 N. C., 158; *Hall v. Castleberry,* 101 N. C., 153.

But, as we interpret the terms of the submission to the judge, he was at liberty to hear the testimony and find the facts disclosed by it, and if the certificate was amendable and the imperfections could be thus legally corrected, he should declare the law and proceed to judgment upon the case. Thus understood, there is no error, and the judgment must be

Affirmed.

Cited: Mills v. McDaniel, 161 N. C., 115; *Frisbee v. Cole,* 179 N. C., 473; *Bailey v. Hassell,* 184 N. C., 457.

WM. H. HUGHES, EXECUTOR, v. S. P. BOONE.

Evidence, written admissions; section 590; privileged communications to counsel—Bonds, consideration of can be gone into; when fraud vitiates—Compromise—Motion for reference, apt time—Usury—Money paid under mistake of fact—Dealings between Mortgagor and Mortgagee.

1. An executor brought suit upon certain bonds payable to his testator; it did not appear that the defendant was indebted to testator on any other account than the bonds; it did appear, from a paper in the handwriting

of testator, that the proceeds of certain cotton were to be credited on the bonds. Under these circumstances it is proper to admit in evidence, on behalf of defendant, upon an issue as to payment, memoranda in the handwriting of testator to the effect that he was to give credit for certain amounts derived from sales of cotton, although to what *particular debt* the credit was to be given is not stated in the memoranda.

2. Where the relation of attorney and client exists all communications made to the attorney on the faith of such relation, or in consequence of it, are privileged, and the attorney will not be permitted to disclose them unless the client assent. Without such assent the lips of the attorney are perpetually sealed. To this general rule there are several qualifications: (1) If the attorney becomes a subscribing witness, he must give evidence of all that a subscribing witness can be required to prove; (2) he must tell what occurred in his presence, though his presence was in consequence of his employment; (3) if he was attorney for several parties in the same transaction, he can testify to all that was said and done, *as between them;* (4) the rule does not apply to communications between parties to an agreement made before an attorney, or between such parties and the attorney of one of them, or when made by one party to his counsel in the presence of the other party, or when made by one party to the attorney of the other party; (5) communications made to an attorney employed to prepare a deed are privileged, yet he must testify as to what transpired at the time of the execution, when all the parties were present, and as to any fact which then occurred; (6) the rule does not apply when advice is sought to aid in the violation of the criminal law, when the act is criminal, *per se,* and not merely *malum prohibitum;* (7) by The Code, sec. 1349, communications to counsel, in cases of fraud, where the State is concerned, are not privileged.

3. It is not for the attorney to determine for himself whether a communication is privileged; but it is for the court to determine, and in order to do so, it is competent for the court to make the preliminary inquiry.

4. Under the present system of practice, in which law and equity may be blended in one action, fraud or mistake in the consideration of a bond may be shown.

5. While fraud in the *factum* might avoid a bond altogether, fraud or mistake in the consideration, so far as the consideration is legal, would not have that effect.

6. An unaccepted offer of compromise cannot be proven.

7. Where an executor is the subscribing witness to a receipt given by the defendant to his testator, and proves the execution on the trial: *Held,* that he thereby opens the door, and the defendant can testify as to transactions between himself and deceased connected with the execution of the receipt.

8. A fact in no way involving a transaction or communication does not come within the prohibitions of section 590.

9. It is not error to refuse a compulsory reference, when the motion to refer is not made until after the close of the evidence.

10. Under the act of 1886 (Bat. Rev., ch. 114), the penalty for usury was a forfeiture of all interest. Neither chapter 84, Laws 1874-'75, nor chapter 91, Laws 1876-'77 (The Code, sec. 3835), repealed the act of 1866, as far as the *rate of interest is concerned*, but the act of 1876-'77 relieved against *penalties* incurred under the act of 1866.

11. On 3 January, 1874, defendant borrowed of plaintiff's testator $1,000, and gave his bond for the payment of $1,120, the $120 being one year's interest at 12 per cent. The bond was payable one year after date, with interest after maturity "at the rate of twelve per cent." It was not expressed in the bond that it was for borrowed money: *Held*, that the amount recoverable on the bond in an action brought in 1883 was one thousand dollars and interest at *six per cent*.

12. Interest is the creature of statute, and usury has been unlawful from the days of Moses. There has never been a day in North Carolina since long before it was a State, that it was lawful to take a greater rate of interest than 6 *per cent*, or 8 *per cent* when stipulated; and the law would be treacherous to itself if it were to allow the enforcement of forbidden usurious contracts because no penalty was attached.

13. Although money paid under a mistake of law cannot be recovered, and in the absence of a statute to that effect, usury voluntarily paid, with a full knowledge of the facts, cannot be recovered; yet where an illiterate mortgagor who confided greatly in the mortgagee, delivers cotton to the mortgagee to be sold and the proceeds applied to the mortgage debt, it is the duty of the mortgagee to apply the proceeds to the debt and lawful interest. Such delivery of cotton will not, under the circumstances, be construed a payment of, or applicable to, usurious interest contracted to be paid by the terms of the mortgage; and if the payments thus made exceed the debt and legal interest, the surplus can be recovered by the mortgagor.

14. Where mortgagor delivered cotton to the mortgagee to be sold and proceeds applied to the mortgage debt, mortgagor must be credited with the amount received by the mortgagee from the sales, when that can be shown; if that cannot be shown, the credit must be of the market value of the cotton at the date of delivery.

CIVIL ACTION, tried before *Graves, J.*, at January Term, 1888, (140) of the Superior Court of NORTHAMPTON County.

Wm. T. Stephenson died in 1876, and the plaintiff is his executor. This action was brought 3 March, 1883.

The complaint alleges that on 3 January, 1874, the defendant executed to his testator two bonds, each for the sum of $1,120, payable on 3 January, 1875, with twelve per cent interest thereon from 3 January, 1875, till paid, the consideration being for money lent.

It further alleges that divers payments were made on said bonds, setting them out in detail, leaving a balance due, 1 October, 1885, of $1,727.29, and judgment is demanded for that sum, with interest at the rate of twelve per cent on $893.27 from 1 October, 1885, till paid.

The answer admits the execution of the bond, and alleges that the consideration of each was $1,000, and that twelve per cent interest for one year was added to each, and the bonds given for the aggregate of principal and interest; that the same was usurious and contrary to law, and he pleads the said usury in bar of the recovery of interest; that the payments mentioned in the complaint of "interest up to 3 January, 1876," were paid on the bond, and the said W. T. Stephenson was not authorized, and had no right, to apply it to any interest.

The defendant further alleges, "that he placed in said Stephenson's hands a considerable quantity of cotton and other property, for the purpose of paying the said bond, and being entirely uneducated, and not able to calculate figures, he had to intrust the same entirely to said Stephenson, and he has recently had the same investigated, and he believes and alleges that, by reason thereof, the said Stephenson is largely indebted to the defendant." He then alleges, in detail, payments in addition to those mentioned in the complaint, and that he has overpaid the plaintiff's testator by $1,165.76, for which he demands judgment, with interest.

(141) The plaintiff replies, that he has not sufficient knowledge or information to form a belief as to the averments in the answer as to the consideration of the bonds, or the amounts of payment, and denies the other averments of the answer.

The record of the case on appeal is voluminous, and we consider it, as far as is practicable, consistent with a clear understanding of the numerous exceptions presented.

The first three exceptions contained in the record are abandoned in this Court.

The defendant offered in evidence, one at a time, three papers, marked "No. 2," "No. 3," and "No. 8," which purported upon their faces to be accounts of sales of cotton, rendered to W. T. Stephenson by commission merchants in Norfolk and Petersburg, aggregating $821.49, each containing endorsements in the handwriting of W. T. Stephenson, showing the number of bales, the amounts, and dates when received, indicating that they were received by the person making the endorsement; No. 2 showing "Sales 7 bales cotton, Pete Boone," No. 3, "Sales of 3 bales, S. P. Boone, by Grandy," and No. 8, "Sales of 4 bales cotton, S. P. Boone."

The plaintiff objected to the introduction of each of said papers, as well the endorsement in Stephenson's handwriting as to the contents of the inside of said papers. The court sustained the objections as to the contents of said papers, but admitted the endorsements thereon, in the handwriting of the testator. The plaintiff excepted to each; and this is the first exception relied on.

The defendant then offered in evidence an account of W. T. Stephenson with Hervey, Coke & Co., of Petersburg, in which said Stephenson is credited by net proceeds of four bales of cotton, $163.86, and charged with certain sums named therein. On the back of said paper was the following endorsement:

(142)

"Sales 4 bales cotton, S. P. Boone:

Hervey, Coke & Co.	$ 153.86
Express	.75
	$ 153.11

I am to give credit for above amount, $153.11.
24 April, 1874."

The face of said paper was proven to be in the handwriting of P. E. Hervey, and the endorsement thereon in the handwriting of W. T. Stephenson.

The plaintiff objected to the introduction both of the face of said paper and the endorsement thereon; both objections were overruled, and the contents of said paper and the endorsement thereon were admitted, and the plaintiff excepted.

The defendant then offered in evidence a receipt of the agent of the railroad at Seaboard, for four bales of cotton received from W. T. Stephenson, to Hyman & Dancy, Norfolk, Va., marked "S. T. B.," and on the back of which was the following endorsement in the handwriting of W. T. Stephenson: "Lawrence, agt., receipt, 4 bales of cotton, S. P. Boone."

The plaintiff objected to this evidence; objection overruled, and plaintiff excepted.

The defendant then offered in evidence a receipt of the railroad agent at Garysburg for four bales of cotton received of W. T. Stephenson, to be shipped to Hervey, Coke & Co., Petersburg, 20 February, 1874. On the back of this was the following endorsement in the handwriting of W. T. Stephenson: "4 bales cotton, S. P. Boone, Hervey, Coke & Co."

The plaintiff objected to this evidence; objection overruled, and exception.

The defendant then introduced as a witness W. W. Peebles, one of the counsel of record for plaintiff, and who was then actively engaged in this case as such counsel, and asked the witness to state, if he knew, how much of the amount, to wit, $2,240, stated on the face (143) of the two bonds sued on, was principal, and how much was interest. The plaintiff objected to the question on the ground that the

witness derived his information from Stephenson (plaintiff's testator), in the way of a confidential communication, and as such was privileged, being made to him as an attorney. The defendant insisted that the communication was not a privileged one; that the witness should state the circumstances under which it was made, if any such communication was made, so that the court could determine whether witness was correct in thinking it privileged.

Defendant then offered, for the inspection of the court, a deed of trust from Boone to witness, securing one of the notes sued on (copy marked "Y," and filed as a part of these exceptions). Witness admitted that he had drawn it and that it was in his handwriting.

Plaintiff objected to the court's inspection of the deed.

Objection overruled; plaintiff excepted.

Witness was then examined by plaintiff, and stated, that the deed was drawn by him at the same time the notes were written; that the deed and notes were written under the following circumstances, to wit: The notes and deed were written in the office of the register of deeds. Defendant (Boone), Dr. W. S. Copeland, Stephenson, W. D. Coker, W. T. Buxton, the register of deeds, were all present, and, I think, R. B. Peebles came in, because he was a witness to the bonds. The witness then stated further, that he was the attorney and counselor for Stephenson in the transaction, and that the communications made to him were made in his professional capacity as a lawyer; that he did not advise with Boone; that he could not remember whether the deed of trust was read over to Boone by him; did not remember that he saw him sign it.

(144) The court, after reading the deed in trust, held that the communications, if any were made at the time when the notes and deed were written, were not privileged, and required the witness to answer. Plaintiff excepted.

The plaintiff then objected to inquiring into the consideration of the bonds; overruled; plaintiff excepted.

Witness then testified as follows: I do not know how much of the $1,120, mentioned on the face of each bond, was principal, and how much was interest; all I know is what Stephenson said to me before I wrote the deed of trust. I asked him what should be the amount of the bonds? He asked me if interest was not paid at maturity, how could he get interest on interest? I asked him how long the bond was to run. He said one year. I said, "you can count interest from date of bond for a year, and add it to the principal, and then the principal and interest will draw interest from the time the bond falls due." I knew that the rate of interest the bonds were to draw was twelve per cent. Stephenson then made some figures, and handed me, on a slip of paper,

the amount of bond, $1,120. I then wrote one bond for that sum, drawing twelve per cent interest from the time it was to fall due, and Stephenson then drew the other from it, making an exact copy thereof. Stephenson never told me, nor did Boone, the amount of money borrowed. I do not know how much Boone paid Copeland for the land; Stephenson let him have some and W. D. Coker let him have some. Stephenson told me what rate of interest to make the bond draw. I know the defendant; he makes his mark; I don't think he can read or write. I do not remember that the bond was read over to Boone.

W. J. Rogers is introduced by plaintiff as a witness, and papers marked "B," "C," "D" and "E" are shown him, and he says he signed "B" and "C," as a subscribing witness, and that S. P. Boone signed or acknowledged them before him; that he had never seen Boone to know him before that time; that it was done in the register's office in December, 1874, or January, 1875; that the date was fixed in (145) his mind from the fact that he had just qualified as administrator on his father's estate, and he was in the register's office looking up some land titles and boundaries. Stephenson asked me to look over the account he had. He had another paper besides the ones I witnessed (it was admitted that "D" was that paper). I examined the paper, and found no mistake in it, that I could see; the calculations therein were correct, and I so stated. Boone signed "B" and "C," and Stephenson gave him some papers. I did not know what they were; they seemed to be accounts of sales of cotton. Stephenson then said to me: "That is all right, is it not, Bug?" I replied, that it would be all right if he, Boone, and I lived, but if I should die, it might not be all right; that he had not given Boone anything to show that he had paid the interest on the notes. Stephenson said, "That is so; how shall I fix it?" I replied, that he ought to endorse on the note, "interest paid to 1 January, 1875." He said, "Yes, that would be right"; and took out two papers, which he said were the notes, and endorsed something thereon. So far as I saw, it was fair; it seemed to me that they had talked the matter over. I did not detect any errors; there was no pressure. The statement was made before, and was brought to me for review.

Cross-examined.—Witness stated that no money was paid to Boone; the statement was not read to Boone; none of the papers were read to Boone, nor their contents explained to him. I only know what appeared on the papers that Mr. Stephenson had; I did not see the inside of the two $1,120 notes. The witness was then shown the said notes, and asked if the face of said notes had been shown him by Stephenson, could he not have seen that in statement "D" Stephenson had charged Boone interest on said bonds before it was due? and he answered, "Yes"; that in

(146) statement "D," Boone was charged with interest on said notes up to 1 January, 1875; that upon inspection of exhibit "D," he thought both of the entries of interest was to 1 January, 1875; that both of the endorsements on the $1,120, "Int. paid on this to 3 January, 1876, eighteen hundred and seventy-six, W. T. Stephenson," seem to have been first written 1875, and afterwards altered to 1876; that when Boone signed "B" and "C," he said little or nothing; relied entirely on Stephenson's statement, and whatever Stephenson said seemed to be all right with Boone.

Exhibit "B," referred to in W. J. Rogers' testimony, is as follows, to wit:

"Received of W. T. Stephenson, one thousand and ten dollars and four cents, amount of cotton shipped by him for me to different commission merchants in Norfolk and Petersburg, Va., up to this 11th day of January, 1875.

"S. P. (his X mark) BOONE.

"Witness: W. J. ROGERS."

Exhibit "C" is as follows, to wit:

"Received of W. T. Stephenson, as per credit, one hundred dollars, as per draft given by Lawrence Boone on Kader Biggs & Co. for one hundred dollars.

"S. P. (his X mark) BOONE.

"Witness: W. J. ROGERS."

(147) Exhibit "D," referred to in the testimony of W. J. Rogers, is as follows, to wit:

Amt. note	$1,120.00
Int. 12 mo. to 1st January, 1875	134.00
Amt. note	1,120.00
Int. to 1st January, 1875	134.00
Order	17.00
Note	15.00
Note	21.60
Receipt	70.00
	$2,631.60
	1,010.04
	$1,621.56

Credit by 7 bales	$403.69	
Credit by 4 bales	153.11	
Credit by 3 bales	122.64	
Credit by draft	100.00	
Credit by 4 bales	230.60	
		$1,010.04

On the back of this statement was the following endorsement (admitted to be in the handwriting of W. T. Stephenson), to wit:

"S. P. Boone.
Notes and Statement.
Dec. 24th, 1874."

Exhibit "E" was as follows, to wit:

$ 45.23	$ 17.25	$ 153.11
78.16	15.00	403.69
$ 123.39	21.60	122.64
	70.00	230.60
	$ 123.85	100.00
$ 231.35		$1,010.04
.75		
$ 230.60		

W. H. Hughes, the plaintiff, was examined in his own behalf, (148) and stated that he found exhibits "E" and "D" wrapped up in papers "B" and "C," among W. T. Stephenson's papers. Exhibit "F" was shown to witness. Said exhibit is as follows, to wit:

Sale of 10 bales cotton	$ 455.86	
Expr.	1.75	
		$ 454.11
Paid for horse	$ 112.50	
One note and int.	33.60	
Cash	10.00	
		156.10
		$ 298.01
Amount on note		172.64
		$ 125.37

To give Boone credit on his two notes for $125.31, and all interest is paid to 1 January, 1877.

"Received, 7 February, 1876, of W. T. Stephenson, four hundred and fifty-five dollars and eighty-six cents, in full of ten bales cotton shipped by me in said Stephenson's name to Hervey, Coker & Co., of Petersburg, Va.

$455.86. S. P. (his X mark) BOONE.

Witness. WM. H. HUGHES.

The plaintiff testified that he was asked by Stephenson to witness the above receipt; that Boone was present.

On cross-examination, he said that the paper was not read to Boone; that its contents were not explained; that he saw no money paid, and saw no papers except the one he witnessed; that S. P. Boone could not read nor write.

(149) Plaintiff's counsel proposed to ask plaintiff the following question, to wit:

"Did not the defendant, in W. W. Peebles' office, offer to pay you a certain amount, $370, about two years after Stephenson's death, claiming that that was the amount due on the notes?" The defendant objected, upon the ground that it was offered as a compromise. The witness answered: "I reckon it was offered as a compromise. I claimed more than was offered. The defendant's counsel, who was present at the time, acting for him, said that there was nothing due, and that they were willing to settle the matter upon the basis of allowing all principal, and 8 per cent interest, if Boone was properly credited with the money and cotton furnished. I refused it."

The judge being of the opinion that it was an offer of a compromise, so adjudged, and excluded the evidence. The plaintiff excepted.

Hughes testified that when Boone made payment to him, Boone did not claim that the debt was all paid, and said, if desired by Hughes, he, Boone, would get money from Odom to pay with. Hughes further testified, that he did not know how much money Stephenson lent Boone, and did not know whether or not any interest was included in the face of the bonds.

The plaintiff introduced the pleadings as evidence.

S. N. Buxton, for plaintiff, testified that Boone was a man of good sense, but could not read nor write; and, on the cross-examination, said, that when a man gained his confidence, that he relied upon him implicitly.

Plaintiff here closed, and defendant offered in evidence the deposition of plaintiff, W. H. Hughes, heretofore taken before Edwin Wright, as

commissioner appointed by the clerk of said court, in this cause, and filed with the papers and signed by Hughes, the plaintiff. The plaintiff objected, that the deposition was inadmissible, except to impeach the witness. The defendant stated that it was offered for that purpose, and as a declaration made by plaintiff. Objection over- (150) ruled, and plaintiff excepted.

S. P. Boone was examined in his own behalf, and was asked if the contents of exhibit "F," which was witnessed by the plaintiff, Hughes, were read over to him, or understood by him? The plaintiff objected, under section 590 of The Code.

The court being of the opinion that the plaintiff had opened the door to that transaction, by having himself examined as to the same, overruled the objection, and the plaintiff excepted.

The witness answered: "No one read this paper over to me; I did not know what was in it; I did not know that I was charged therein $112.50 for a horse, $33.60 for note, $10 cash, or $172.64 for interest to 1 January, 1887. From the time I made the deed in trust and mortgage, up to Stephenson's death, I bought only one horse—it was a bay horse, I bought of a horse drover by the name of Bass. I bought him in the hotel lot, in company with W. D. Coker; I had some money in Coker's hands from cotton—cotton I had shipped to Hervey, Coker & Co., in Coker's name, and Coker paid for the horse $110."

The defendant was asked how many bales of cotton he delivered to the Petersburg Railroad Company at Garysburg, between 3 January, 1874, and 1 March, 1876, to be shipped to Hervey, Coker & Co., of Petersburg, in the name of W. T. Stephenson?

Plaintiff objected, under section 590 of The Code; objection overruled, and plaintiff excepted.

Witness answered, 31 bales of average size, 450 pounds to the bale; that in 1874 and 1875, and early part of 1876, cotton was worth from 12 to 13 cents. Witness further testified, that he borrowed the money to pay for land he bought of W. S. Copeland; that he paid Copeland for said land $3,000; that he got $1,000 of it from W. D. Coker, 3 January, 1874; that he paid Copeland on 3 January, 1874. (151) I did not know what rate of interest I was to pay until after the bonds were signed. Mr. George Bowers was the first one who told me what interest I was paying, I never asked any one to look over my account with Stephenson until I consulted R. B. Peebles, about two years after Stephenson died; after he examined my papers, I never paid any more cotton or money on said notes.

To corroborate witness Boone as to the amount he paid Copeland for his land, defendant introduced in evidence the deed from W. S. Cope-

land to S. P. Boone; it was dated 3 January, 1874, admitted to be in the handwriting of W. W. Peebles, and recited $3,000 as the consideration paid for the land.

The defendant did not deny his liability on the bonds executed to Stephenson, for the sum which he actually got.

ONE OF THE BONDS SUED ON.

$1,120.00. On the 3d day of January, 1875, with interest at the rate of twelve per cent from said date, I owe and promise to pay W. T. Stephenson the sum of eleven hundred and twenty dollars, for value received. Witness my hand and seal, this 3d January, 1874.

S. P. (his X mark) BOONE. [Seal.]

Witness: R. B. PEEBLES.

On the back of said bond is endorsed the following payments, in order named, to wit:

January 11th, 1875. Received of S. P. Boone, three hundred and eight dollars and sixty-nine cents, in part of this note.

W. T. STEPHENSON.

(152) Int. paid on this to the 3d day of January, 1876, eighteen hundred and seventy-six. W. T. STEPHENSON.

1877. Jan'y 1st. Received of S. P. Boone, eighty-nine dollars and one cent, in part payment of this note, balance sales of cotton. Statement filed. W. H. H.

1877. December 20. Received of S. P. Boone, four hundred and twenty-one dollars and twenty-nine cents, being net sales of ten bales of cotton, sold by N. E. Brooks, shipped by said Boone in my name.

W. H. HUGHES, *Ex'r.*

From inspection, it appears that the second endorsement was first written 1875, and then changed to 1876, and that the words "eighteen hundred and seventy-six" were written with different ink.

The other bond sued on is identical in terms.

On the back of said bond is endorsed, in the order named, the following, to wit:

January 11, 1875. Received of S. P. Boone, the sum of three hundred and eight dollars and sixty-nine cents, in part of this note.

W. T. STEPHENSON.

Int. paid on this note to the 3d of January, 1876, eighteen hundred and seventy-six. W. T. STEPHENSON.

April 4, 1875. Received one hundred and eighty-three dollars and ninety-two cents. W. T. STEPHENSON.

From inspection of said endorsement, it will appear that the date, 3 January, 1875, was changed to 1876, and that the words "eighteen hundred and seventy-six" were written in different ink from the rest of the endorsements.

After all the evidence was in, the plaintiff handed to the judge (153) a written request to refer the action to a referee, under section 421. This was not made known to the defendant. The court declined to do so, without calling it to the attention of defendant's counsel, or to the attention of plaintiff's counsel, except by not granting the motion.

In plaintiff's statement of the case, he noted an exception to this refusal.

Plaintiff and defendant both tendered issues, which were settled by the judge, and submitted as follows:

1. Have the debts been paid?
2. If not, how much is due?
3. Has the defendant paid more than the debts?
4. If so, how much?

Plaintiff excepted to issues 3 and 4.

The plaintiff prayed the court to instruct the jury as follows:

1. There is no statute of usury applicable to the notes declared on.

This was refused, and plaintiff excepted.

2. There is no evidence that twelve per cent interest on the sum of two thousand dollars for one year was incorporated in the notes, in order to make $2,240 principal sum.

This was refused, and plaintiff excepted.

3. That if Boone paid 12 per cent interest voluntarily, he cannot recover it back.

4. That if Boone paid voluntarily money in excess of the amount he owed, he cannot recover it back, unless paid under a mistake of the fact.

These two instructions were given by the court.

5. There is no evidence that he paid either under a mistake of facts.

This was refused, and plaintiff excepted.

6. There is no evidence that there was any unfairness or duress in the settlement between Boone and Stephenson.

This was refused, and plaintiff excepted.

7. If the settlements between Stephenson and Boone were fair, (154) Boone is bound by them.

Given in substance; plaintiff excepted.

The court instructed the jury as follows:

"The legal rate of interest at the date of these notes was 6 per cent per annum, and no subsequent statute has repealed that law; but there have been statutes enacted which repealed the penalties which were in force at the date of the notes, so that the defendant is liable for the legal rate of interest at 6 per cent, and the plaintiff is relieved from the penalties then in force.

The plaintiff excepted.

"Then the first question presented is to determine how much money the defendant got. If he got $2,240, then he is bound to repay that sum, but if he actually got a less sum, if he got only $2,000, then he is bound to pay only that sum."

Plaintiff excepted.

"If the defendant got $1,120 for each note, he is liable for that sum, with interest at six per cent, unless it has been paid. It is insisted by the defendant that he has paid off the entire debt. It is admitted by the plaintiff that some payments have been made, some at one time and some at another. The rule, then, for computing the interest is by what the school-boys call partial payments. The principle underlying this rule is, that the interest is first due; so when a payment is made on a note the interest is counted to the time of payment and added to the principal, and from this amount the payment is deducted and the balance becomes a new principal, bearing interest until the next payment; and interest is added, and the payment deducted, until all the payments are applied. If any payment is less than the interest due, it is to be applied to the interest, but the principal is not changed (it can never become greater) until it is reduced by payment over and above the
(155) interest due. And payment made before interest begins to accrue must be applied to principal. You have, then, to ascertain what payments have been made and when made."

The plaintiff excepts to so much of this portion of the charge as limits his recovery to six per cent interest.

"If the defendant has paid voluntarily more than the amount he was legally bound to pay, under a mistake of law only, he cannot recover back such excess, but if he has, by mistake of fact, paid more than was due, he has the right to recover such excess.

"If the defendant delivered cotton from time to time, shipped in the name of Stephenson, with the agreement that the proceeds were to be applied to the payment of twelve per cent interest and the principal, the defendant cannot recover back any payment of interest voluntarily made by him, or any money applied by the plaintiff to the payment of such

interest, if such application was made by the direction of the defendant, or by his consent, with full knowledge of the facts.

"If the defendant did not consent that the twelve per cent interest should be paid, and the plaintiff or plaintiff's intestate received money or money's worth from the defendant, then the payment would be applied to the payment of the legal interest, six per cent, and then to the principal. And if the defendant, not intending to pay twelve per cent interest, had, by a mistake in fact—a mistake in calculation may be a mistake in fact—paid more than the debt and six per cent interest, he would be entitled to recover back so much as he had paid in excess of the debt due."

The plaintiff excepted, upon the ground that there was no evidence of such mistake.

"The relation between the plaintiff's intestate and defendant was a confidential relation—the plaintiff's intestate was the mortgagee and the defendant was the mortgagor, and the law requires that dealings between them, concerning the mortgage debt or mortgaged (156) property, shall be viewed more carefully than if the parties were dealing with each other at arm's length."

Plaintiff excepted.

"In order to bind a person, who cannot read and write, by a writing purporting to have been signed by him, it must appear that it was read over to him, or its contents fully stated, before it was signed, unless, after being signed, the contents of the writing were explained, and then, after knowledge of the contents, is consented to."

Plaintiff excepted.

"If the intestate of the plaintiff, Stephenson, was the mortgagee, and Boone was the mortgagor, a confidential relation existed, and if the defendant, reposing confidence in Stephenson, furnished cotton to him, to be sold and applied to the payment of the money borrowed from him, it was the duty of the intestate of plaintiff to have sold the cotton and to have applied it to the payment of his debt, with the legal rate of interest, and only the legal rate of interest, unless the defendant Boone, with a full knowledge of the facts, voluntarily assented to the payment of a greater rate of interest than the legal rate."

Plaintiff excepted.

"If the defendant Boone, with a full knowledge of the facts, voluntarily paid, or assented voluntarily to an application of, a greater rate, then he cannot recover it back.

"In determining whether, in fact, such payment was made voluntarily, the jury must bear in mind the relation of the parties, and consider what influence that relation produced on the mind of the defendant."

Plaintiff excepted to the last sentence.

"In estimating the value of the cotton shipped by the defendant, the jury must allow to the defendant the price obtained by the plaintiff's intestate, Stephenson, when that is made to appear, and when it
(157) does not appear what price was actually obtained, then the jury must ascertain the market value of the cotton at the time it was sold by Stephenson."

Plaintiff excepted.

The jury responded to the issues set forth in the record, and after they had returned their verdict, plaintiff moved to exclude from the judgment $89.01 and $421.29, paid by Boone to plaintiff. (See complaint, answer and endorsements on bonds.) Motion refused. Plaintiff excepted.

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

T. N. Hill for plaintiff.

W. C. Bowen and R. B. Peebles for defendant.

DAVIS, J., after stating the case: The 1st, 2d, 3d and 4th exceptions may be considered together, as they all rest upon the same general ground.

The endorsements upon the papers, in the handwriting of the plaintiff's testator, were offered as declarations or admissions in regard to the cotton, for the proceeds of which the defendant insists he was entitled to credit. That the admissions or declarations of a party to a matter in controversy, in regard to that matter, whether oral or written, are admissible as against such party, is too plain to be questioned; but it is insisted by counsel for the plaintiff, that there is no evidence that the cotton, or the amount of the proceeds of the cotton, to which the endorsements related, was to be applied to the notes upon which this action is brought. The endorsements tend very clearly to show that the cotton and the proceeds of the cotton were received for and on account of the defendant, and that he was to be credited therewith, and it nowhere appears that the plaintiff's testator had any other claims against
(158) the defendant, other than a controverted charge for a change and two other items, aggregating $156.10. In fact, it sufficiently appears from exhibit "D," subsequently offered in evidence by the plaintiff, that the proceeds of the cotton referred to by the endorsements were to be credited by the testator on the notes.

While the exhibit "D" shows that the cotton was to be credited on the notes, it in no way tends to relieve the transaction from the imputation of unfairness, alleged by the defendant, for it then appears that the defendant is wrongfully charged with interest on the two notes ($134+

$134=$268) to 1 January, 1875; and we find that the endorsements on the notes in January, 1875, instead of showing credit for the full amount of cotton, less the sum of $123.85, applied otherwise in exhibit "D," it appears that only the sum of $308.69 was applied to each note, making the entire credit only $617.38; for the endorsement of the credit for interest on the notes is changed by the erasure of 1875 and substituting 1876. It is insisted by the plaintiff that the mistake of writing "3 January, 1875," instead of "1876," is easily accounted for, by the fact that at the beginning of a year such a mistake as writing the preceding date is not uncommon. But this theory is fully met and destroyed by the fact, as appears by the endorsement of the testator, that the cotton was sold in April, November and December, 1874, showing that in this respect exhibit "D" was correct. The money received for cotton in April, 1874, should have been credited at that date. The 1st, 2d, 3d and 4th exceptions of the plaintiff must be overruled.

The 5th, 6th and 7th exceptions relate to the testimony of Mr. W. W. Peebles, and may be considered together. It is insisted that Mr. Peebles, having been counsel for the testator in the matters out of which this litigation springs, is not a competent witness to testify in relation thereto.

Few rules of evidence are better settled, or founded on sounder (159) reason of public policy, than that, whenever the relation of counsel or attorney and client exist, all communications made to the counsel or attorney, on the faith of such relation and in consequence of it, are privileged. And the counsel or attorney, if so disposed, would not be permitted to disclose them. The seal of the law closes his mouth as to them, and can only be removed by the client himself. Without his consent it is perpetual.

This elementary principle is too well established by Greenleaf and other writers upon the law of evidence, and has been sustained by too many adjudications, to need the citation of authorities. In many States of the Union it is regulated by statutory provisions, and in our own State, by statute (The Code, sec. 1349), communications to counsel in cases of fraud, where the State is concerned, are not privileged.

To the general rule, as laid down, there are several qualifications: "As where the attorney, having made himself a *subscribing witness,* and thereby assumed another character for the occasion, adopted the duties which it imposes, and became bound to give evidence of all that a subscribing witness can be required to prove." 1 Greenleaf, sec. 244. So, what occurred in his presence, though his presence was in consequence of his employment as counsel. *Patton v. Moore,* 29 N. H., 163. So where the witness was counsel for both the plaintiff and defendant, as

between them the matter was not, in its nature, private and confidential. *Michael v. Foil,* 100 N. C., 178, and cases cited. So, it has been held by numerous adjudications, the rule does not apply to communications between parties to an agreement made before an attorney, or between such parties and the attorney of one of them, or, when made by one party to his counsel in the presence of the other party, or when made by one party to the attorney of the other party.

(160) So, while communications made to an attorney employed to prepare a deed would be privileged, yet he may be required to testify as to what transpired at the time of the execution, when all the parties were present, and to prove any fact which then occurred, in relation to the transaction, and still more clearly would he be competent if he were a party to the transaction. 1 Greenleaf Ev., sec. 242. So, the rule does not apply where advice is sought to aid in the violation of the law, but the violation must be an act criminal, *per se,* not simply *malum prohibitum.* But it is insisted that the attorney must determine for himself, as to whether the communication is confidential, and that the court had no right to inspect the deed (a copy of which is filed as an exhibit, marked "Y"). This is a mistake. It is for the court to determine whether, under the circumstances, the communication is privileged or not, and in order to do so it is competent for the court to make the preliminary inquiry.

The deed was written by the witness at the same time the notes were written, conveying the property purchased of Copeland to the witness in trust, to secure the payment of the notes, and it refers to a mortgage, executed the same day, and for the same purpose, conveying the land to Stephenson. The notes and deed were written at the same time. The defendant, Dr. Copeland, from whom the land was purchased by the defendant, and to pay whom the money was borrowed, the plaintiff's testator, and others, were present. His Honor "held that the communications, if any were made at the time when the notes and deeds were written, were not privileged," and in this, we think, there was no error. By the clear and explicit ruling of the court, the inquiry was limited to the time when the notes and deed were written, when, as appears from the evidence, the plaintiff's intestate, the defendant and others were present. But when the witness said, "All I know is what Stephen-

(161) son said to me before I wrote the deed of trust," the counsel for the plaintiffs says the judge "ought to have stopped him."

It does not plainly appear, from the record, that what Stephenson said to the witness was "at the time" when the notes and deed were written, but it must be assumed that it was, and that, in the order of events at that *time,* it preceded the writing of the deed, for otherwise it

would not have been within the limit of his Honor's ruling, and it would have been the right and the duty of the plaintiff to have objected, and no objection was made.

But we cannot see how the answer of the witness could prejudice the plaintiff, for the facts stated by him are clearly deducible from the face of the notes.

It is said, however, by counsel, "the evidence of the witness was injurious to the plaintiff, inasmuch as its tendency was to show usury." If lending money at 12 per cent interest be usury, that appears upon the face of the note, and certainly the evidence of the witness cannot show it more plainly.

It is further objected that the consideration of the bonds cannot be inquired into. Under the present system, in which law and equity may be blended in an action, fraud or mistake in the consideration may be shown; and while fraud in the *factum* might have the effect to avoid the bond altogether, fraud or mistake in the consideration, so far as the consideration was legal, would not have that effect.

There was no error in overruling the 5th, 6th and 7th exceptions.

The 8th exception relates to the exclusion of the evidence in regard to the offer of $370 as a compromise. There was no error in this. A proposition to compromise, not acceded to, leaves the rights of the parties precisely as they were before the proposition was made. *Poteat v. Badget,* 4 D. & B., 209; *Sutton v. Robeson,* 9 Ired., (162) 380. But counsel for the plaintiff says this was not an offer of compromise. We think it is manifest, from what occurred, that it could admit of no other construction.

The 9th exception is to the admission of the deposition of the plaintiff. This exception was not pressed before us, and we can see no ground upon which it can be sustained.

The 10th and 11th exceptions relate to the competency of the defendant to testify, under section 590 of The Code, in relation to the matters involved in the question.

As to the 10th, the plaintiff himself had testified in relation to the same transaction, and it is quite clear that the 11th related to no transaction or communication between the witness and the deceased. It was a fact in no way involving such a communication or transaction. *Lockhart v. Bell,* 86 N. C., 443, and cases cited.

The 12th exception is to the refusal of his Honor to refer the action to a referee upon the request of the plaintiff, made after all the evidence was in. Whatever may have been the discretionary power of the court, to order or refuse a compulsory reference, if the application had been made in proper time, there was no error in refusing it after the close of the evidence.

The 3d and 4th issues were clearly presented by the answer and reply, and the exception 12½ cannot be sustained.

The 13th exception is to the refusal of his Honor to instruct the jury, that there is no statute of usury applicable to the notes declared on.

When the notes were executed, chapter 24, Acts 1866 (Battle's Revisal, ch. 114), in regard to usury, was in force. That act fixed the rate of interest at 6 per cent, "and no more," unless for money loaned, for which 8 per cent might be charged, if specified in the contract; "and if any person shall agree to take a greater rate of interest, . . . (163) the interest shall not be recoverable at law." The penalty for usury was a forfeiture of all interest. *Coble v. Shoffner,* 75 N. C., 42.

It is insisted by the plaintiff that the act of 1866 was repealed by the penal statute of 1874-'75, which, in its turn, it is insisted, was repealed by the act of 1876-'77 (Code, secs. 3835, 3836), and the argument of the learned counsel is, that "usury laws are the creatures of statutes, and when there are none the matter is at common law and a question of contract, and the stipulated rate can be recovered. The penal provisions of usury laws are the only prohibition of this, and where they are repealed there is no obstacle. The judge erred when he charged the jury that the plaintiff could only recover 6 per cent interest. The establishment of 6 per cent as the lawful rate, without a penalty for violation of the law, would mean simply that that should be the rate when no other was expressed. It would not prevent the recovery of any amount or rate stipulated to be paid. To prescribe a legal rate without a means of compelling men to observe the law, would be of no avail as a preventive of usury."

It would, perhaps, be as correct to say that interest is the creature of statute, and usury has been unlawful from the days of Moses.

The act of 1875, sec. 4, declares that it shall not apply to existing contracts, and repealed only laws in conflict with it. The act of 1877 is "substituted" for the act of 1875, and, so far as the rate of interest allowed, is the same as that of 1866, and there has never been a repeal of the law limiting the rate of interest. Neither by the language of the acts of 1875 and of 1877, nor by implication, can such effect be given to them. *Jones v. Ins. Co.,* 88 N. C., 499; *Brinkley v. Swicegood,* 65 N. C., 626; *S. v. Woodside,* 9 Ired., 496; *S. v. Melton,* Busb., 49. We believe there has never been a day in North Carolina, since long (164) before it was a State, that it was lawful to take a greater rate of interest than *six per cent,* or *eight per cent* when stipulated, and the law would be treacherous to itself if it were to allow the enforcement of the forbidden usurious contracts because no penalty was attached.

This case is easily distinguished from *Ewell v. Daggs,* 108 U. S., 150, and similar cases. Neither of the statutes in this State authorized a greater rate of interest than that of 1866, whether by contract or otherwise. The numerous cases cited by counsel, in regard to the effect of repealing statutes, have no application to the case before us. When the contract was made it was unlawful to charge a greater rate of interest than six per cent, or eight for money loaned, when stipulated in the contract, and the penalty was a forfeiture of all interest. The effect of the act of 1876-'7 was to relieve against the penalty. It could not have the retroactive effect to make the contract for usury lawful. The money loaned, with legal interest, can be collected, because the penalty (forfeiture of interest) is repealed; but it does not make that lawful and enforceable which was not lawful at the time. It was lawful to take six per cent with or without contract. Such an interpretation of the legislative will would do violence to legislative history upon the subject of usury. The language of the statute gives it no such retroactive effect, and we cannot give it by any fair construction. The repeal of a statute which makes an act unlawful, or forbids a contract in relation thereto, cannot make the act lawful or validate the contract. *Pucket v. Alexander, ante,* 95.

The 14th exception cannot be sustained. There is no evidence tending to show that the defendant paid Dr. Copeland $3,000, and that he borrowed $1,000 from Mr. Coke and balance from plaintiff's testator. It also appears upon the face of the notes that they were payable 3 January, 1875, with interest at twelve per cent from that date. Exhibit "D" shows that twelve per cent was charged on 1 January, 1875, on the whole amount. This also disposes of exception to (165) his Honor's charge, numbered 19.

Exceptions 15, 16, 17, 21, 22, 23, 24 and 25 relate to instructions asked and refused, and to instructions given and excepted to, and may be considered together.

It was in evidence that the defendant is an illiterate man; that he cannot read and write; that he was confiding, relying implicitly on those who gained his confidence; that he delivered a considerable quantity of cotton to, or for, the plaintiff's testator, "and relied entirely on Stephenson's statements." It does not appear that the notes or mortgage and deed of trust were read over to him; in fact it pretty clearly appears that they were not, and it does not appear that their contents were explained to him, or that he had any knowledge of their contents. It appears from the testimony of Mr. Rogers, which bears upon its face evidence of fairness and candor, that he suggested that, in the event of death of the parties, the defendant would have nothing to show for certain credits; whereupon the testator took out two papers, which he

said were the notes, and endorsed something on them. He further said that, if the face of the notes had been shown to him, he would have seen that interest was charged for one year before it was due, as appeared in statement "D." This was in January, 1875.

Upon a review of the evidence, we think there was no error in refusing the instructions asked, or in giving those excepted to.

The 18th and 20th exceptions relate to his Honor's charge in respect to interest. As we have already seen, the defendant was chargeable with interest at 6 *per cent,* and there was no error in his Honor's instructions upon this question.

The 26th exception relates to the instruction in regard to the value of the cotton. We can conceive of no possible objection to the rule for ascertaining the value of the cotton as laid down by his Honor.

(166) The 27th exception is to the refusal of the court to exclude from the verdict the sums named, paid by Boone to plaintiff. The issues were fairly submitted to the jury, and if by mistake the defendant has paid more than the notes and legal interest, we are unable to see why the sums named should not be excluded. There is no error.

Affirmed.

Cited: Carey v. Carey, 108 N. C., 271; *Moore v. Beaman,* 112 N. C., 562; *Williams v. Cooper,* 113 N. C., 287; *Hall v. Holloman,* 136 N. C., 36; *Odom v. Clark,* 146 N. C., 554; *Peyton v. Shoe Co.,* 167 N. C., 282; *Cone v. Fruit Growers Association,* 171 N. C., 530; *Construction Co. v. Ice Co.,* 190 N. C., 580; *Baker v. Hare,* 192 N. C., 789.

JONES, LEE & CO. v. H. S. BRITTON AND R. W. PITTMAN.

Homestead—Waste—Injunction Against.

A judgment is now a lien upon land to which the debtor is entitled as a homestead, and when the land is not worth more than $1,000, and much of its value consists in timber trees, the debtor, or other person to whom he has sold them, may be enjoined from cutting such trees for profit.

DAVIS, J., dissented as to the general doctrine, and as to its application to this case, and AVERY, J., as to the general doctrine.

MOTION, to vacate an injunction in a civil action, heard before *Graves, J.,* at Spring Term, 1888, of the Superior Court of NORTHAMPTON County.

The plaintiff Jones had docketed his judgment against the defendant Britton for $50, with interest from 29 January, 1887, and for costs; and at the time the same was so docketed the said defendant was a citizen of this State and entitled to the right of homestead, and was seized and possessed of the land specified in the complaint. He had no personal property subject to levy, and the land mentioned was all he had, was of value not exceeding $1,000, and he was entitled to (167) have his homestead therein.

The following is a copy of so much of the complaint as it is material to report:

"6. That plaintiffs are further informed and believe that, since the docketing said transcript of said judgment, the defendant Britton has sold and conveyed to defendant R. W. Pittman the timber trees standing on said tract of land; that a good portion of said tract of land is cleared and in a state of cultivation, while the other portion is valuable, chiefly and principally, for its timber trees.

"7. That the defendant Pittman, by virtue of his said purchase, is now cutting and removing from said land the said timber trees.

"8. That defendant Britton is still living in the county aforesaid, and the said judgment is unpaid and in full force.

"9. That if the defendants are allowed to cut and remove said timber trees they will greatly reduce and impair plaintiffs' security for said judgment debt and inflict upon plaintiffs irreparable damage.

"10. That there now exist on said land a mortgage lien and a judgment lien amounting to several hundred dollars, prior to the said lien of plaintiffs, as plaintiffs are informed and believe.

"11. That plaintiffs have commenced an action in the Superior Court of said county to enjoin defendants from cutting and removing said timber trees, and have caused a summons to be issued commanding the defendants to appear at next term of said Superior Court."

A judge at chambers granted an injunction pending the action until the hearing upon the merits. At the final hearing the court dissolved that injunction and "ordered and decreed that the plaintiffs are not entitled to have the defendants enjoined from cutting said timber trees," etc. The plaintiffs having excepted, appealed from that order to this Court.

B. B. Winborne (by brief) for plaintiffs. (168)
W. H. Day for defendants.

MERRIMON, J., after stating the case as above: The Constitution (Article X, sec. 2) gives and secures to every resident of this State the right of homestead. If he has land he is entitled to have a homestead

therein, as allowed, *"exempt from sale* under execution, or other final process obtained on any debt," subject to certain specified exceptions. The several statutory provisions prescribing how it shall be valued and laid off to the owner thereof do not give it. They serve the purpose of ascertaining the value thereof, locating it particularly and defining its limits. Neither the constitutional provision cited, nor any statute, creates, defines, or limits an estate in the owner of the homestead in the land embraced by it—he has, and continues to have, such estate in the lands embraced by it as he may have acquired from any source, unaffected as to its character or extent, save that while the homestead as allowed lasts, it remains "exempt from sale under execution or other final process obtained on any debt," and it lasts during the life of the owner thereof; and, after his death, during the minority of his children, or any one of them, and the widowhood of his widow, unless she be the owner of a homestead in her own right. Constitution, Art. X, secs. 2, 3, 5.

The condition and measure of the estate of the owner of the homestead, in the land, is not changed by, or because of, the homestead—the estate, unchanged, continues—the restriction, the limitation that distinguishes the homestead, is upon the right of the judgment creditor to have the land sold by execution or other proper final process to satisfy his docketed judgment, which constitutes his lien upon the land. So that, when the owner sells his estate, whatever its condition or
(169) measure, in the land constituting his homestead, he sells it subject to his judgment creditor's lien, if there be such creditor; but he also sells the advantage that it shall not be sold at the instance of the creditor, until the exemption "from sale under execution or other final process obtained on any debt" shall be over. It is this exemption from sale that distinguishes the homestead from other lands of its owner. It suspends and prevents the remedy of the creditor by execution, or other final process, as long as it continues. *Markham v. Hicks,* 90 N. C., 204; *Rankin v. Shaw,* 94 N. C., 405.

The rights of the owner of the homestead, as to it, are not abrogated or essentially different from his rights as to other lands he may own, except when there are liens upon it that cannot be enforced while it continues to be the homestead. When such liens exist, he is bound in conscience, and by the principles of justice, to use and care for the homestead prudently and fairly, in the way and manner such property is employed by ordinarily prudent men, in continuously, in the course of living promoting their just advantage and the support, convenience and comfort of their families. What the character and extent of such use shall be, will frequently depend on the nature and condition of the homestead.

The purpose of the law is to allow the debtor to have his homestead—his home—free from sale under final process, as prescribed, for the benefit of himself and his family. It is not contemplated or intended that he shall arbitrarily destroy its value, by unnecessarily cutting the timber trees that may be on it, or by pulling down and destroying the buildings on it, so as to disappoint the just rights and expectations of the creditor having a judgment lien upon it. The latter, when the exemption from sale is over, should find the property—not exhausted and rendered valueless—but substantially as it was when the exemption began, less the loss and depreciation arising from the reasonable use of it, and wear and tear of buildings. The law expressly gives the judgment creditor a lien on the homestead. This lien is not mean- (170) ingless and nugatory; it implies that the creditor shall have the property devoted to the satisfaction of his judgment debt, as far as may be necessary, when and as soon as the exemption of it from sale shall be over. The law is true and sincere—it does not thus create and allow a lien in favor of the creditor, and leave the owner of the homestead at liberty to destroy the property, and thus render such lien worthless. As we have seen, he is allowed to live upon and use it, but not destroy or impair the substance of it, as against the creditor having a lien, nor for the like reason will the person to whom he may sell his homestead be allowed to do so.

Obviously, the creditor having such lien is entitled to have the property, to which it attaches, protected against the destruction or unreasonable impairment of it prejudicial to that lien. As it cannot be enforced while the exemption of the property from sale lasts, the property will be properly protected during that time, so that the creditor may, in the end, have the benefit of his lien. A Court of Equity will not hesitate, in a proper case, to interfere by injunction, or in other proper way, for such purpose. Otherwise, the creditor would have no remedy during the exemption. *Webb v. Boyle,* 63 N. C., 271; *Gordon v. Lowther,* 75 N. C., 193; *Braswell v. Morehead,* Bus. Eq., 26; *Cassup v. Bates,* 11 Conn., 51.

In the case before us, the defendant Britton was entitled to his homestead in the lands described in the complaint. He sold the timber trees standing thereon to his codefendant, to be cut down and carried away. The plaintiff, at the time of such sale, had a docketed judgment against the owner of the homestead, which constituted a lien on the land. The owner had no right to thus sell the timber trees, simply for gain; he could, lawfully, only cut and use such of them as were necessary for the reasonable use of the homestead property—for making repairs, necessary houses, fences and the like. To sell and cut away all (171)

the timber trees, for simple gain, was to substantially impair the homestead property subject to the lien, and this, for the reason stated, is not allowable.

This is not strictly an action to prevent waste, but to prevent an injury in the nature of waste, growing out of the peculiar relations of the parties, brought about by the exemption of the property from sale under final process, until the homestead shall be over. Courts of equity frequently interfere in a great variety of cases, having peculiar characteristics, to prevent injuries to property, when the courts of common law cannot afford adequate relief in the preservation of the same. Story's Eq. Jur., sec. 912, *et seq.*

There is, therefore, error. The order denying the injunction must be reversed, and an order entered granting an injunction restraining the defendants from cutting the timber trees on the land for any purpose other than necessary repairs and improvements thereon.

Error.

DAVIS, J., dissenting: I do not think that his Honor below erred in dissolving the plaintiff's injunction, and I, therefore, do not concur in the opinion of my brethren.

The homestead law has been a fruitful source of litigation in the past, and I think a new and wide gate for additional litigation will be thrown open when it is understood that the creditor has, in any way, the right to overlook and control the extent and manner in which the debtor shall use his homestead in the support and comfort of his family. In the absence of any wanton and malicious waste and destruction of the property, I think he may make any use of it that he may deem most advantageous—not to the creditor—but to himself and family, and when so used the court has no right to molest or interfere with him.

(172) How can he derive any benefit from land only valuable for its timber (and we know that there are many such tracts of land) if he is not allowed to sell a timber tree worth $1, because, forsooth, it will be worth $1 less to the creditor, when the homestead falls in? Such land may be valuable, but it is of no value to him. There is hardly a prudent man to be found, who owns land valuable only or chiefly for its timber, who does not gladly avail himself of a saw-mill to realize some advantage by the sale of timber; and why should the owner of a homestead be denied that right?

It will not do to say that he may use the timber himself, to the extent that it may be necessary for building or repairing, or improving the homestead. Having nothing but the land, which is only valuable for timber, he could sell none of it to buy bread or clothing, or even to buy nails or window-glass to put in his house; and to tell him, under such

circumstances, that he was the owner of, or had any interest in, such land, would seem a cruel and tantalizing mockery.

I confess my inability to understand the nature of the lien of a judgment upon the homestead. It cannot be, I think, a lien upon the land, or any interest in the land, during the life of the owner of the homestead, or that of his widow, or the minority of his youngest child.

In *Markham v. Hicks,* 90 N. C., 204, the *Chief Justice* says: "The estate of the debtor remains after the allotment as before, the same, whether it be in fee, for life, or for years. It is *this estate in its entirety* in the exempt land which the creditor is not allowed to sell under final process by the mandate of the Constitution, and to which no judgment lien now attaches, where the debt was contracted or the cause of action accrued since 1 May, 1877. The Code, sec. 501, subsec. 4.

"It is to be remembered that when the Constitution was framed and adopted, no lien upon the land was created by the rendition of a judgment, and it attached only when the execution issued, running back to its *teste* for a commencement, and therefore the prohibition was a full and ample protection, not only against a sale, but against any (173) lien upon the exempt property, for there could be no lien unless the officer having the final process could sell.

"The General Assembly, in the enactment of The Code, seems to have interpreted the Constitution as putting an interdict upon a sale of the *land set apart,* that is of the debtor's estate therein, whatever it might be, until the expiration of the period of exemption, thus rendering unnecessary the incorporation into The Code of the act of 1870. A glance at some of its sections will make this manifest."

Without expressing any opinion upon the effect of the act of 1885, chapter 359, amending section 501, subsec. 4, of The Code, and as to whether the Legislature can, as against a homestead debtor, give any effect to a judgment which it would not have had when the Constitution was adopted, I am able to see how a lien may *relate back* to the date of its *teste;* but I find some difficulty in understanding how the lien of a *judgment* may reach *forward* to the termination of the homestead interest, and by so doing give it a present validity and effect, to deprive the owner of the homestead of the right to do that which, but for the judgment, he might do. The judgments and liens, as to the rights of the owner of the homestead, it seems to me, can have no force as against the homestead debtor, but are perfectly dormant as to him, being deprived of all vitality by the power of the Constitution, though they may spring into life as soon as the homestead interest expires, and take effect then, in the order of priority. The judgment can give the creditor no vested right to the homestead, nor any right of any kind except in subordination to the absolute and untrammeled right of the

owner of it, to use it in any way he may choose for the support and comfort of himself and family. The judgment creditor is in no sense like a remainderman or reversioner. He cannot bring "the old action of waste," as it was at common law, nor is he embraced in any (174) one of the classes "for and against whom an action of waste lies" under The Code, secs. 625, *et seq.*

If an action of waste would lie, I think neither the old remedy by injunction and sequestration, nor any one of the provisions given by section 338 of The Code, can be invoked.

If it can be said that the cutting and selling the timber by the owner of the homestead, though conducive and perhaps necessary to the support and comfort of himself and family, impairs, *pro tanto,* the security of the creditor, so would the continuous and excessive cultivation of a fertile field or lot exhaust it and render it barren, but it will hardly be insisted that this is a matter with which the creditor could interpose. It would be *damnum absque injuria.* The rights of the debtor are fixed by the Constitution, and are absolute, and cannot be limited by legislation, nor can the homestead, in my opinion, be taken *in custodia legis,* or its use for the support and comfort of the debtor be in any way disturbed by legal process. He can in no way be considered as a mortgagor or tenant for life, any more than the creditor can be likened to a mortgagor or remainderman or reversioner. If he has an estate in fee, it so remains after the allotment of the homestead as before, the only difference being, that as to the homestead the creditor can acquire no rights, and as to the estate after the termination of the homestead the debtor can make no disposition as against the judgment creditor.

If the creditor has the right to enjoin the debtor from cutting down and selling timber, why may he not have a receiver appointed to take and invest the proceeds—first, for the use of the debtor during the continuance of the homestead, and then to be paid to the creditor? No one would entertain such a proposition for a moment, and yet it gives the debtor some benefit, and would be far more just and equitable than to compel him to abstain from reaping any advantage from his (175) forest land, because it may blight the expectations of the creditor, looking forward to the time when the timber shall become valuable to him.

In *Poe v. Hardie,* 65 N. C., 447, it is said "the estate in the homestead as created by the Constitution is a determinable fee, and the tenant was not 'impeachable for waste,' even before the act of 1870. That act was intended to protect the owner of a homestead against any vexatious litigation which might be instituted by the purchaser of a reversionary interest."

Thompson on Homestead and Exemptions, referring to the various questions that have been presented in regard to the nature of "the estate of homestead," says:

"These questions have all under the various phases addressed themselves to the courts. It would seem, upon principle, that they are questions with which the creditor can have nothing to do." Section 165.

Again, it is said, section 635: "Although some courts treat the homestead as an intermediate estate in the land, the creditor cannot seize and sell the reversion. If it were otherwise (quoting the authority of 'a learned Court') . . . by depriving the debtor of all use of the homestead except the mere occupation of it, a creditor might contribute largely to such a state of things that would drive him from the homestead to the poor-house."

In *Markham v. Hicks,* 90 N. C., 204, I can find nothing in conflict with what was said in *Poe v. Hardie,* so far as it relates to the question before us. The *Chief Justice* said: "The correct view of the Constitution and the subsidiary statutes is taken and expressed by *Bynum, J.,* in *Bank v. Green,* 78 N. C., 247: 'Their legal effect is simply to protect the occupant in the enjoyment of the *land set apart as a homestead,* unmolested by creditors.' "

If the law will not allow the reversion to be sold, because, as declared by this Court, its purpose is that the owner of the homestead shall not be harassed or vexed by a purchaser who will become a reversioner, ought the court to allow that purpose to be defeated by (176) permitting him to be harassed and vexed by one, or it may be a dozen, judgment creditors? Ought the court to allow a judgment creditor to do just what it was intended there should be no purchaser to do? Can it invest a creditor with a power denied to a purchaser?

But even conceding that, in a proper case, the plaintiff would be entitled to the extraordinary relief asked, I do not think that the allegations of the complaint are sufficient to entitle him to it.

It is true, that the complaint alleges that the plaintiff has a docketed judgment of $50.30, with interest from January, 1887, and $1.65 costs, against the defendant Britton, and that there exists prior liens "amounting to several hundred dollars"; that the land contains 200 acres, "not worth to exceed $1,000"; that "a good portion of said land is cleared and in a state of cultivation, while the other portion is valuable chiefly and principally for its timber trees"; that the defendant Britton has sold the timber trees to the defendant Pittman, who is cutting and removing them, which, if allowed, "will greatly reduce and impair the plaintiff's security for said judgment debt, and inflict upon plaintiff irreparable damage." The amount of liens on the land is left indefinite, and it does not appear that the timber, if sold, will not leave the land amply suffi-

cient to pay the debts, or that defendant Pittman is insolvent. It does not allege that the value of the land, for its ordinary use, will be impaired, or that all, or how much of the timber, is being cut and sold, or that a sufficiency will not be left for building, repairs, etc.—that is, *for house-bote, plow-bote, fire-bote, hedge-bote,* etc.

Facts should be stated from which the court can see, if true, that the damage is irreparable, and I think this has not been done.

Counsel for the plaintiff refers to chapter 401, Acts of 1885,
(177) which enacts: "That in an application 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 nature, or is the cutting or destruction of timber trees."

Are the defendants such trespassers "on land" as the statute contemplates? There is no allegation that they are trespassers on land at all.

I know of no precedent in this State, or elsewhere, where the constitutional provision is like ours, for such an interference with the right of the owner of a homestead to use it as he may think most conducive to the comfort and support of himself and family, and I do not concur in making one.

In the earlier days of the homestead law in this State, it seems to me that the judicial pendulum lost its equilibrium, and, swayed by a benevolent sentiment prompted by the impoverished condition of the State, it was greatly on the side of the homestead debtor. Having a Constitution which guarantees the unmolested right to a homestead, where its owner is denied the right to use it in any way that may best contribute to his support and comfort without being molested, harassed and vexed by creditors in regard to the manner in which he shall use it, it seems to me that the pendulum is swinging in the other direction.

SHEPHERD, J., concurring: If any question is well settled in this State, it is, that all of the lands of a debtor, the homestead inclusive, are subject to the lien of a docketed judgment. Ch. 358, Acts 1885; *Rankin v. Shaw,* 94 N. C., 405. It is unnecessary that there should be a levy. *Miller v. Miller,* 89 N. C., 402; *Mebane v. Layton, ibid.,* 396.

Whatever may be said as to the effect of the general lien of a docketed judgment in other States, our decisions place it on the same footing, so far as its binding effect upon the land is concerned, as if a levy
(178) had been actually made. *Sawyers v. Sawyers,* 93 N. C., 321; *Lytle v. Lytle,* 94 N. C., 683; *Lee v. Eure,* 93 N. C., 5; *Miller v. Miller, supra.* Such a lien is, therefore, a "charge" upon the lands of the debtor, and "in the same way as if he had charged them in *writing under his hand.*" Rapalje and Lawrence's Law Dict. Its holder is recognized in a court of equity as a proper and necessary party, with a

mortgagee and other incumbrancers in the adjustment of priorities, and the administration of other equities between persons interested in the property. Adams' Eq., 145; *Hinton v. Adrian,* 86 N. C., 61; *Wilson v. Patton,* 87 N. C., 318; *Lockhart v. Bell,* 90 N. C., 499. It is a *vested right.* If, then, the judgment creditor has a charge upon the land, why should he not be entitled, as are others having charges, to the aid of the court, in preventing the impairment of his security by the arbitrary acts of the judgment debtor. But it is said that the extension of such relief to a judgment creditor will be a fruitful source of litigation. This should be addressed to the General Assembly, which has seen fit to *restore* the lien of a docketed judgment. Chapter 359, Acts 1885. Again, it is said, that the act restoring this lien may be unconstitutional. I search in vain to find any authority for such a proposition. The Constitution simply says that the homestead shall "be exempt from sale under execution, or other final process." Article X, section 2. It does not say that it shall be exempt from a lien. The validity of such a lien is recognized in *Wilson v. Patton,* and *Hinson v. Adrian, supra,* and it is not an open question in this State. It is also asked, how can the debtor derive any benefit from land only valuable for timber? This forcible suggestion loses its power when applied to a case like this, "where a good portion of the land is cleared and in a state of cultivation." It is also urged, that in *Markham v. Hicks,* 90 N. C., 204, it is said that "it is this estate in its *entirety*" which the creditor is not allowed to sell. A very cursory examination of that case will show that it refers not to the manner of using the exempted land, but simply to the sale of (179) what is called the "reversionary interest."

Again, it is argued that a judgment creditor cannot bring an action of waste. No one pretends that he can, as he is neither a reversioner nor a remainderman, but having a *charge* upon the land, he has a right to invoke the aid of a court of equity in certain cases to prevent the impairment of his security. This is so well settled as to charges generally that it is unnecessary to cite in support of it the various works on equity jurisprudence. That equity has interfered to protect the lien of a judgment creditor will be seen by reference to *Webb v. Boyle,* 63 N. C., 271; High on Injunctions, sec. 252, and the case from Connecticut cited in the opinion of the Court by *Justice Merrimon.* But it is said that Thompson, in his work on Homesteads, remarks (sec. 165) that "these questions have all, under various phases, addressed themselves to the courts. It would seem, upon principle, that they are questions with which the creditor can have nothing to do." What questions? A glance at the chapter (which is entitled "Of the estate or interest in lands and goods necessary to support an exemption") will show that the questions are, whether a debtor can have his homestead assigned in equitable

estates for years, in remainder, etc.; and yet this is cited as authority as to the *manner* in which the homestead shall be *used* when assigned. Equally inapplicable to the question before us in section 635 of the same work, which relates to the sale of the "reversion" only. It is confidently asserted, however, that a homestead is "a determinable fee," and that the homesteader is not impeachable for waste, and, therefore, cannot be enjoined in a case like this.

Even if the homestead were a "determinable fee," if it had a *charge* upon it, it would be as much subject to the supervision of a court of equity as if the charge were upon other estates, whether for years,
(180) for life, or in fee. So the question as to whether the homestead is a determinable fee has nothing whatever to do with the decision of this case. But the definition affords a striking illustration of the almost bewildering confusion of terms, which has grown out of the word "homestead."

Another illustration is presented by the use of the words "reversionary estate," when there can *technically* be no "reversion" in the case of a homestead, for the estate has never *been changed.* It is hard to understand how the words in the Constitution, to the effect that a certain parcel of land shall not be sold upon final process for a limited period, can be made the basis upon which to erect estates and create reversions. These words in the Constitution amount to nothing more or less than a *stay of execution* for the period mentioned, and the "inadvertent" assumption, that a new estate is conferred upon the judgment debtor, is swept away by the convincing logic of *Bynum, J.,* in *Bank v. Green,* 78 N. C., 247, approved by our present *Chief Justice* in delivering the opinion in *Markham v. Hicks,* 90 N. C., 204, and *Rankin v. Shaw,* 94 N. C., 405. *Judge Bynum* says that "the homestead has been called a determinable fee, but as we have seen that no new estate has been conferred upon the owner and no limitation upon his old estate imposed, it is obvious that it would be more correct to say that there is conferred upon him a determinable exemption from the payment of his debts, in respect to that particular property allotted to him." Now, if the homestead provision confers no new estate upon the judgment debtor, but simply exempts it, not from a lien, but from sale upon final process for a limited period, why, I ask again, should the lien—the *charge* conferred by a docketed judgment—be alone exempted from the protective power of a court of equity? I am clearly of the opinion that there is nothing in the Constitution or the laws which warrants such an exception.
(181) But, while I think that a judgment creditor, in a proper case, is entitled to this protection, I would, by no means, be understood as assenting to any inference, which may be improperly made, that the judgment debtor is to be assimilated, in respect to the use of the prop-

erty, to tenants for life. In my opinion, he has a right to commit the most injurious acts of waste, and he is not to be molested so long as he leaves enough (though it be but the bare land) to satisfy the lien. Nay, he may even *impair* the security, if he does it in a prudent use of the property, for the purposes of which it is alone susceptible of being used, such as the use of mining lands, shingle swamps, and even land valuable only for timber. I think the principles we have laid down are applicable to the present case. Here, it is admitted that the security will be impaired, that the land is not alone valuable for timber, but that a good portion of it is cleared and in a state of cultivation, but that the defendant has sold the timber trees, and is about to remove them. Ordinarily, it is necessary that the facts should be set out, in order that the court may see whether irreparable injury will be done. This, I conceive, is wholly unnecessary, where the *allegation* of irreparable injury is, as in this case, admitted. In the administration of this preventive remedy by the court, each case must be governed, of course, by its peculiar circumstances, and it is, therefore, difficult to lay down any general rule of application. I think the facts in this case entitle the plaintiff to the injunction, as prayed for.

AVERY, J., dissenting: I regret that, after patient consideration of the argument, and investigation of every phase of the subject, I feel constrained to dissent. My conclusions are embodied in two propositions, each of which I shall discuss as briefly as the importance of the questions involved will permit:

1. If the homestead is to be treated as an estate, with all of the (182) incidents, rights and liabilities on the part of the owner that the law attaches to other analogous estates, the owner is not impeachable for waste, and if a court can enjoin him from injury to the land at all, it can interfere only when the waste is wanton, malicious or extravagant, and not simply because, in the enjoyment of the profits, he may be doing permanent injury to the land, and thereby lessening the security of the judgment creditor.

The homestead right was engrafted on our system of laws in North Carolina to meet a distressing emergency. Our people were overwhelmed with debt, incurred before their slaves were emancipated, and their stocks had become worthless. The liability remained when their property was destroyed. The unconstitutional stay laws, and the attempt to make the homestead provision retroactive, sufficiently evince the fact that the lawmakers were exponents of a popular sentiment, which demanded a temporary suspension of sales, and a present and future provision of a home, whose boundary line those armed with execution or other process for the collection or even security of debts could

never cross. Where the meaning of the framers of our Constitution of 1868 may be left in doubt, by reason of any ambiguity of the terms in which it is expressed, we are at liberty to consider the circumstances that surrounded them in interpreting its provisions.

This principle of construction will apply with equal force, however we may settle the vexed question, whether the homestead is to be considered as an estate, or only a personal right of exemption, attaching to the land first, when the creditor is armed with authority to subject it to sale. Upon this point opinions of this Court, delivered at different times, are, apparently, conflicting.

In *Poe v. Hardie,* 65 N. C., 447, the Court says: "The *estate in* the homestead, as created by the Constitution, is a determinable fee, and the tenant was not impeachable for waste even before the passage (183) of the act above referred to (the act of 1870, forbidding sale of the reversionary interest till the termination of the homestead right). That act was intended to protect the owner of a homestead from any vexatious litigation, which might be instituted by the purchaser of a reversionary interest."

In *Bank v. Green,* 78 N. C., 247, it is said: "The homestead has been called a determinable fee, but as we have seen that no new estate has been conferred upon the owner, and no limitation upon his old estate imposed, it is obvious that it would be more correct to say, that there is conferred upon him a determinable exemption from the payment of his debts in respect to the particular property allotted to him."

In *Littlejohn v. Egerton,* 77 N. C., 379, *Chief Justice Pearson,* for the Court, says: "A condition is a quality annexed to land, whereby an estate may be defeated. A homestead is a quality annexed to land, whereby an estate is exempted from sale under execution for debt." The laws enacted to make the provisions of the Constitution operative (Bat. Rev., ch. 55, secs. 26 and 27) designate the interest after the termination of the life estate as a reversionary interest.

In *Keener v. Goodson,* 89 N. C., 273, it is said that the assignment of a homestead has no other effect than to attach to his *existing* estate a quality of exemption from sale under execution.

After a sale of the reversion, or a conveyance by the owner, with joinder of the wife, of an allotted homestead, or the sale by a childless widow of her homestead interest allotted to her in her husband's land, the idea that there are two existing estates in the land is not unreasonable.

Prior to the passage of the act exempting the reversionary interest from sale, there were, doubtless, many sales of the reversionary interest in the land—to take effect in enjoyment after the expiration of a (184) life or lives in being (the life of the husband or the lives of hus-

band and wife) and possibly after twenty-one years. When our lawmakers called the interests that were then being sold on the first Monday of every month, at every courthouse in the State, reversionary interests, they certainly adopted a term that, according to its definition, more nearly described the interest that purchasers were acquiring than any other term known to the law. "A *reversion* is the remnant of an estate continuing in the grantor undisposed of, after the grant of a particular interest. It differs from a remainder. It arises *by act of law*, a remainder by act of the parties." 2 Bl. Com., 175. The act referred to proceeds upon the idea that the particular estate was dedicated to the use of the debtor and his family, under the provisions of law, while the reversionary estate or interest remained in the debtor subject to the lien of any judgment that might be docketed in the county where the land lies. This Court approves of that view of the matter in holding that it is not necessary that the wife should join the husband in a conveyance of such reversionary interest. *Jenkins v. Bobbitt*, 77 N. C., 385.

On the other hand, where the reversionary interest was sold before the act of 1870 was passed, an interest that had been carved out of the whole fee, and dedicated by law to the use of the family, remained unsold. It might continue during the life of a husband or the widowhood of his wife, and twenty-one years in some instances. Shall we call it a quality of exemption? When husband and wife joined, with privy examination of the latter, in conveying all the interests they had power to convey in the husband's only tract of land, worth less than a thousand dollars, and subject to the lien of a judgment, *Justice Ashe* says for this Court (in *Adrian v. Shaw*, 82 N. C., 474), that their bargainee "acquired a good and defeasible title for the life, at least, of Jackson, against the creditors of Jackson, notwithstanding he may since have removed from the State." The same case was before the Court again (84 N. C., 832), when the Court refused to over- (185) rule, and adhered thereby to the idea that the grantee of Jackson took a life estate, as that was the only point involved in either appeal. When the owner sold the life estate, as then decided, he still held, subject to the lien of docketed judgments, all of the fee simple that remained after a life estate, and an interest that was carved out of the whole estate by act of law, and kept in the grantor, though he was trying to alien the fee simple. The estate remaining in Jackson fills exactly the definition of a reversion. It did remain in him, subject to the lien, because the sale under execution, without assignment of the homestead, was void. *Lambert v. Kinnery*, 74 N. C., 348; *Littlejohn v. Egerton, supra; Arnold v. Estis*, 92 N. C., 162.

It has been contended, not without reason, therefore, that such an interest was a determinable fee, and (for the same reason that operated

in the case of tenant in tail after possibility of issue extinct) because the tenant once had an estate of inheritance. 2 Bl. Com., 124-5, sec. 167. If we construe the Constitution as marking out two estates as soon as the land becomes liable to sale under a lien, the "homesteader" is not impeachable for waste, on the one hand, and on the other, the only adjudicated case, outside of our own State, cited and relied on to sustain the opinion of the Court in this case, is *Camp v. Bates,* 11 Conn. Reports, 51, and in that opinion (on page 57) *Chief Justice Williams* says: "Even a tenant in tail, *without impeachment* of waste, has been restrained from *wanton, malicious* or *extravagant waste,*" and in support of that proposition, cited four Chancery cases, decided in the English Court: *Vane v. Barnard,* 2 Vernon, 739; *Packingham's case,* 3 Atkyns, 217; *Strathmore v. Bowes,* 2 Brown's Ch. Reports; *Chamberlayne v. Dummer,* 3 Brown's Ch., 549.

(186) An examination of these authorities brings out the judicial history of the efforts to restrain tenants not impeachable, and those liable for waste, and shows how the principle stated in *Camp v. Bates,* and that announced by this Court in *Crawley v. Timberlake,* 2 Ired. Eq., 460, was established. In the English and American courts it has been held that no tenant for life, not liable for waste, could be restrained by the courts at the instance of the remainderman or reversioner, unless it was shown that the waste was wanton, malicious or extravagant. In England the rule was held to apply where the life tenant maliciously injured or destroyed houses or ornamental shade trees, whether transplanted or left standing for shade along avenues or parks, but it was expressly held that such tenants by virtue of their exemption from liability for waste, could cut *ab libitum* forest trees for timber, as will appear by reference to the cases cited *supra.*

"A tenant for life, without impeachment for waste, may fell trees fit for the purpose of timber, though young and not such as would be felled in a course of husband-like management of the estate *(Burges v. Lamb,* 16 Ves., 174-177); but he will be restrained, though having the legal right so to do, from what has been termed malicious, extravagant or wanton waste; for instance, the total destruction of a wood or coppice. So he will be restrained from cutting down trees planted or left standing for ornament, but not merely because they may be really ornamental." Spencer's Eq. Jur., pages 570 to 573; *Williams v. Williams,* 15 Ves., 427.

This rule applied to tenants for life, who held with an express grant in the deed of exemption from waste, and also to tenant in tail after possibility of issue extinct, or one who held a determinable fee, because the two last mentioned might have had an estate of inheritance. Bispham's

Principles of Equity, sec. 434; *Cooke v. Whaley,* 1 Eq. Ab., 400; Pom. Eq. Jur., sec. 1348, note 3.

In *Davis v. Gilliam,* 5 Ired. Eq., 308, this Court recognized (187) the reason of the rule also, in holding that "the husband was dispunishable for waste, because, while in possession he was tenant for life in his own right, but was seized with his wife in fee in her right."

The ordinary life tenant, liable for waste, is allowed, without restraint, to clear as much of the timbered land, on his estate, for cultivation as a prudent owner in fee simple would, and sell the timber that grew on that part. *Crawley v. Timberlake,* 2 Ired. Eq., 460; *Davis v. Gilliam, supra.*

The rule laid down in the opinion of the Court gives the defendant in this action harder measure than is meted out to an ordinary life tenant, in confining his right to cutting trees "necessary for the reasonable use of the homestead property, for making repairs, necessary houses, fences and the like." As has been well suggested by *Justice Davis,* it would be just and reasonable, now that timber trees are everywhere being converted into timber for market, and so many new industries are springing up to consume the product from the sawmills that are being planted in almost every forest, to allow even ordinary life tenants more latitude in disposing of trees. If the owner of a homestead, however his right may be designated, is denied by the courts the privilege of cutting fifty dollars' worth of timber from a homestead worth nine hundred dollars, even for the purpose of paying off a judgment for fifty dollars, then his condition would be better if the court would go further, and appoint a receiver to sell the timber and apply the proceeds in discharge of liens. Such a remedy would better accord with the idea that the defendant in this case is still the owner of an estate in fee simple and liable to a charge. It is more just and reasonable that the charge should be satisfied out of the proceeds of the sale of trees than held till the expiration of the so-called exemption, and then used to buy the land and trees *usque ad cœlum.* The law, as applied in this case, calls the "homesteader" an owner in fee entitled to the privilege of exemption, (188) but declares his home subject to a lien—that is, a charge—and operates so as to give the holder of the lien the power to prevent his selling his pine trees suitable for timber, as any other tenant in fee would do. Truly, it would seem, that the Constitution has promised bread and the courts have given a stone, if this new departure in the way of constitutional construction has come to remain a permanent part of our law. The opinion of the Court sometimes seems to be predicated upon the idea of dealing with life estates and remainders or reversions, and again with judgments, charges and rights. In order to meet every

aspect of the argument, I have arrived at a second proposition, embodying, as I believe, the correct interpretation of Article X.

2. If the homestead be not an estate, but a mere personal right of a landowner to hold one thousand dollars in value of land, not liable to sale under execution for debt, still the *Constitution, in express terms,* gives the further exclusive right of enjoying the *"rents* and *profits,"* arising out of the homestead, to the persons entitled to it, and thereby grants exemption from impeachment for waste, *which carries with it a license, not only to use the rents* of the farming land, but to appropriate the *products* of the *mines* and the proceeds of the *sale of forest timber trees,* taken from the whole homestead, as *free from restraint* or *interference* as when the fee simple is held subject to no lien whatever.

A review of Article X of the Constitution will show the strength of this position, if we will consider all of the sections that grant and define the right together as in *pari materia.* Section two gives the owner of land the power to select the location of the homestead on his own land, not to exceed in value one thousand dollars, and declares it "exempt from sale under execution for debt or any other final process," but does not in terms declare the duration of the exemption. We are left (189) to sections three and five for further explanation. Section three provides that *"the homestead, after the death of the owner thereof,* shall be exempt from *the payment of any debt* during the minority of the children, or any one of them." Here, for the first time, we find the indirect declaration that the owner is to hold the homestead till his death, and then the term of exemption is to be extended during the minority of any child. Still there is no suggestion as to the *nature of the dominion,* that is to be exercised over the territory from which the sheriff is expelled.

When we reach section *five* we find, first, the exemption prolonged, on certain conditions, during the widowhood of the owner's wife, and then the definition of the extent, not only of her rights, but of those of the husband and children, in the enjoyment of the exempted land. Section *five* provides: "If the owner of a homestead die, leaving a widow but no children, the same shall be *exempt from the debts of the husband, and the rents and profits thereof shall inure to her benefit during her widowhood,* unless she be the owner of a homestead in her own right."

It will not be contended that the Constitution should be construed to give the widow, while she remains single, any peculiar power over the land, or exclusive privilege in the enjoyment of it, not extended to the husband or infant child.

Every rule of construction would lead us to consider these sections, as a whole, declaring first, that there shall be an exempt estate, and where and how selected, and then that it shall extend during the life of the

owner, the minority of the children, and contingently during the widowhood of the wife, and lastly, how the rents and profits shall be enjoyed. Both of these words are terms known to the law, have a legal meaning, and it must be understood that those who laid the foundation of our political edifice understood their legal significance, and in- (190) tended that they should be interpreted accordingly.

In Rapalje and Lawrence's Law Dictionary, it is said: "In the law of real property, 'Profit' is used in a special sense, to denote a produce or part of the soil of land. Therefore, 'if a man, seized of lands in fee, by his deed, granteth to another the profit of those lands, to have and to hold to him and his heirs, and maketh livery, *secundum formam chartæ,* the whole land itself doth pass; for what is the land but the profits thereof; for thereby *vesture, herbage, trees, mines* and all, whatsoever parcel, of that land doth pass.'" Coke Litt., 46.

If the grant of the profits in land by the owner to another carried with it, *ex vi termini,* the trees on the land, why should the sovereign State, under which all the lands within its borders are holden, in conferring upon the landowner the rights of exemption and enjoyment during such exemption in his lands, be deemed not to have used "profits" in its apt legal sense, and to have granted for the time prescribed the unrestricted use of mines and timber trees thereon? To the same effect is Bouvier's definition: "Under the term profits is comprehended the produce of the soil, whether it arise above or below the surface, as *herbage, wood,* turf, coals, minerals, stones, also fish in a pond or running water." The damages that were recovered in an action against a trespasser for occupation from the disseizin till the recovery, were called mesne profits, and the plaintiff in such action recovered not only a reasonable rent for agricultural products, but for timber trees cut down and new mines opened and worked. Rents would have included the damage arising out of crops raised, but a broader generic term was needed, and hence the action was called one of trespass for "mesne (or intervening) profits." See Rapalje and Lawrence's Law Dict., and Bouvier's Law Dict., definition of mesne profits.

If the sovereign State, in its organic law, has not invested (191) every citizen who owns a homestead with the right to the untrammeled use of mines, timber, stone, and everything that might be used or consumed by an owner of a life estate in England, conveyed to him, coupled with exemption from waste, then it must be because the State has no power to grant the privilege, or because by a strained construction we distort the meaning of words that have had a known significance as far back as the time of Lord Coke. I cannot concede that this privilege of enjoying profits of every kind can be ruthlessly snatched from a grantee of a privilege, held by virtue of the fundamental law

from the sovereign State, under the specious pretext that he is lessening the security of one who extended him credit, with a knowledge of the Constitution, and as much subject to its provisions as if they had been incorporated in the note given for his debt. Moreover, it will be observed, that the personal property mentioned in the first section of Article X, is declared exempt from sale under execution or other final process, and the debtor's right to it depends entirely upon that declaration. Yet it is held that he has the unrestricted power to dispose of personal property assigned him, and to have other articles exempted in a reassignment made to him, even though the judgment creditor's security may be diminished. *Durham v. Speeke,* 82 N. C., 87.

This section is mentioned to show that the construction given it by this Court is in harmony with the idea, that the purpose of the framers of the Constitution was not only to exempt the property, real and personal, assigned for the debtor's family from seizure, levy or sale, but from interference or control on the part of the creditor. In *Bank v. Green,* 78 N. C., 247, *Justice Bynum,* for the Court (speaking of Article X and the "subsidiary statutes"), says: *"Their legal effect is simply to protect the occupant in the enjoyment of the land set apart as a homestead, unmolested* by his *creditors."*

(192) *Chief Justice Smith,* delivering the opinion in *Markham v. Hicks,* 90 N. C., 204, states the rule still more forcibly: "They (the Constitution and statutes in reference to exemption) place the property, when ascertained and set apart, outside of that which the creditor may seize and appropriate to his judgment, *as if for the time the debtor did not own it."*

But it is contended that the plain letter of the Constitution must be disregarded, the spirit that inspired the Convention ignored, and the rights of one holding this favored family franchise from the State determined by analogy to the ruling of this Court, in a case where the debtor belonged to a class expressly excluded from claiming a homestead in their lands.

In *McKethan v. Terry,* 64 N. C., 25, this Court held that where a *fi. fa.* was issued and levied on land in December, 1867, it was liable to sale on a *ven. ex.* issued on the judgment in 1869, discharged of any homestead right, because by the levy a specific lien had been acquired.

In the case of *Webb v. Boyle,* 63 N. C., 271, which is the sole reliance of the Court, among our own decisions, to sustain the position that the owner in fee simple of land can be restrained from cutting timber by a judgment creditor, an execution had been issued and a levy made upon the land in 1861, and again in 1867, when the creditor was prevented, by military orders and stay laws, from selling. Boyle, the debtor, therefore, had no right to a homestead in his lands. If his land had been

subject to the homestead provisions of the Constitution, *Justice Dick,* who subsequently delivered also the opinion of the Court in *Poe v. Hardie,* would have adverted to the fact that an occupant holding without impeachment for waste, was being restrained from any destruction of timber, not wanton, malicious or extravagant. Conceding the principle contended for as established by the case of *Webb v. Boyle,* it was applied there to land in which the owner could not claim a homestead, and it is therefore distinguishable from this case.

But it may be well to note the fact that, of the authorities (193) cited in *Webb v. Boyle,* not one relates in the remotest degree to or tends to establish the new doctrine, that a judgment creditor can in any case enjoin the debtor from committing ordinary waste, such as cutting or disposing of pine timber trees on his land. The section (455) in High on Injunctions, cited in support of the decision, is based entirely upon *Webb v. Boyle*—is, in effect, a quotation from it. I have shown that it is not in point, if adhered to by this Court as correct. But it is a significant fact, that so careful and discriminating a writer as Mr. Pomeroy, has, in his work on Equity Jurisprudence, neither cited *Webb v. Boyle,* nor noticed the extreme principle enunciated in it. In a somewhat extended examination of authorities, I have failed to find the case cited with approval by any other court or writer, or alluded to, except in the short section of High on Injunctions, embodying a syllabus of the opinion, inserted in his work without comment, as we infer, to show the *ultima thule* to which a court stretched its equitable jurisdiction at the close of a gigantic and exciting civil war, when the lines that defined the powers and duties of courts, in the protection of private rights, were so far obscured that gross usurpations of authority were recognized as lawful legislation, and sanctioned by the judicial departments of State governments.

It would seem, from an examination of sections 421 and 431 of High on Injunctions, that the author does not, in fact, concur in the doctrine laid down in *Webb v. Boyle.*

While the syllabus in *Camp v. Bates* is misleading, when we examine the facts we find that the court granted an order to restrain an insolvent debtor, at the instance of a creditor who had levied an attachment on his land, upon the allegation that the defendant had committed waste "by cutting down and carrying away *the young wood* and *timber* growing *thereon,* and that he threatens to cut down, carry away and convert to his own use, *all the wood* and *timber and fruit trees,* (194) *which would render it of little value* or *security* to the *plaintiff,* and the plaintiff was apprehensive this would be done before he could obtain judgment and execution in said suit." The learned *Chief Justice* rests his decision entirely upon the nature of the threatened waste,

when he says: "The possession, therefore, has always been suffered to remain unmolested so long as he contented himself with *ordinary* returns. This seems necessary, that the property may not be abandoned; but *it can confer no right to do such acts as are charged in this bill—acts of wanton and malicious waste.*"

It is not contended that when the defendant made a contract, such as thousands of the citizens of the State have made within a recent period, to sell the "timber trees," (understood everywhere to mean the trees large enough to be valuable for the purpose of sawing into lumber), that he thereby threatened a wanton or malicious destruction, like one who cuts down fruit trees. Nor can it be successfully maintained, on reason or authority, that the judgment debtor, with right of homestead in his lands, is no more protected against the interference of the judgment creditor than the mortgagor is against restraint, on complaint of the mortgagee, for diminishing his security. The mortgagor is only a tenant at will of the mortgagee as to the mortgaged land, while the mortgagee has the right to take possession if his debt is not paid, and receive the rents of the land—is really, in law, the owner of the land. The defendant in this case is the owner in fee of a tract of land worth less than one thousand dollars. The creditor has no estate or right in the land—only a lien on it as a security for his debt. The laws of North Carolina do not recognize in the judgment creditor one who has a charge on the land. He has no power to touch an ear of corn or a blade of grass raised thereon, and he is as much a trespasser, if he attempts to exercise ownership, as if he held no claim against the debtor. By what
(195) arbitrary rule, then, can we defy the Constitution and declare the homestead right one of no higher dignity than a tenancy at will under the creditor? The words *charge upon land* are used in a general sense, to mean any claim to satisfy which it is liable to be sold (see Rapalje and Lawrence's Dictionary), and a homestead may eventually be sold to satisfy a judgment docketed in the county.

The case of *Gordon v. Lowther,* 75 N. C., 193, cited in the opinion to sustain the power of the court to grant injunction, is one in which *Justice Settle,* for the Court, justifies the granting of injunction against the defendant on the ground that she was "a tenant for life with contingent remainder in fee," etc. But it is contended that the defendant in this case must be treated as the owner in fee. If so, I maintain that the sovereign has granted him an exemption from impeachment for waste, and a *consequent exemption from* injunction against any but wanton, malicious or extravagant waste, as distinctly as the exemption from sale under execution for debt as to his land, and for the same period. If an estate of less dignity than a fee simple is marked out by the Constitution as the measure of the debtor's right, when the land

becomes liable to a lien, then I contend that the estate is a determinable fee, the holder of which would be exempt from impeachment for waste by the common law as well as by the express grant of the profits in the Constitution, and, according to all the authorities in England and America, would not be subject to restraint by a court of chancery, except for wanton, malicious or extravagant waste.

Braswell v. Morehead, Bus. Eq., 26, is the only remaining authority relied on to establish the plaintiff's right to extraordinary relief.

The principle decided there was, that one holding a contingent estate by executory devise in slaves was entitled to an order restraining the guardian of an infant, whose right to the absolute property in said slaves would accrue on the contingency that she should (196) attain the age of twenty-one, from removing the slaves from the State till the infant should arrive at said age. I cannot see, therefore, how the right of the plaintiff to the injunction is sustained by that authority. I am not disposed to doubt that a docketed judgment creates a lien upon the land of the debtor in the county where it is entered, though the statute does not purport to convert that lien into a charge, but merely defines the rights of the creditor as to priority.

In *McKethan v. Terry, supra,* the Court declared that an actual levy before 1868 created a specific lien, which was superior to the homestead right; while it was there held, on the contrary, that a judgment docketed in the county did not defeat the right. We do not deem it material to determine whether a docketed judgment, obtained on a contract made since the homestead provision was enacted (in 1868), has the force of a levy. The force of a levy is not sufficient to destroy a right of exemption from restraint or accountability for the enjoyment of the homestead profits, short of wanton or malicious destruction, derived directly or by implication from the Constitution. Moreover, it is settled that even where the judgment has been rendered on a debt contracted prior to the passage of the homestead law, the sheriff is required to lay off the homestead in the judgment debtor's land, and levy execution on the excess. A judgment upon an old debt, therefore, does not operate as a specific lien and defeat the homestead right, if the excess sells for a sum sufficient to satisfy the debt. *Arnold v. Estis,* 92 N. C., 162.

The effect of the ruling of this Court is either to treat the owner of a homestead as a life tenant, or by the other theory to invite thousands of judgment creditors to establish a systematic espionage upon their debtors and bring them into court to determine in the future, and as cases arise, when the "homesteader" shall cross the line of accountability in the exercise of dominion over his land.

Uncertainty as to rights in property is next to a want of (197) security in its detrimental effects upon the public. And this fact

furnishes another reason for adhering to the well marked line, and holding that the "homesteader" could only be restrained from wanton or malicious waste, while the ordinary life tenant is entitled to destroy no more timber upon the land, outside of that necessary for fire-wood and repairs of house and fencing, than a prudent owner in fee simple, following the customs of the neighborhood and in the exercise of good husbandry, would use.

SMITH, C. J., concurring: It is with some reluctance, after a full discussion in the separate opposing opinions of the other members of the divided court, that I feel constrained to enter into the controversy and express my concurrence in the reasoning and the results of those which thereby, in this diversity of views, become the rulings and constitute the adjudication in the cause. This duty, undertaken, not because the prevailing opinions are not sufficiently self-vindicative and require other and further supporting argument, becomes imperative in view of the tendency of the dissents, one of which comes from a thorough and elaborate examination of the authorities, reaching back to the introduction of the new subject of land exemption from final process for debt, since a prolific source of controversy, to unsettle adjudications, and to impair confidence in their integrity and permanence, which have been considered as a final determination of the questions presented and decided. I can scarcely deem any evil in the administration of judicial functions in declaring and defining the law, and especially that in ascertaining the meaning of constitutional and statutory legislation, in its effect upon existing law, greater than that which springs from conflicting decisions and a want of regard shown in the latter in depart-
(198) ing from the rulings made in those that precede, thus rendering personal and property rights acquired insecure and uncertain. Except in decisions palpably erroneous, and left untouched, leading to serious, disastrous consequences, as well as disturbing the equilibrium of the system, the maxim, *"stare decisis,"* imposes an obligation to adhere to former adjudications. When the attention of the Court was early directed to a consideration of the effect and extent of the changes produced by the introduction into the organic law of the exemption of the debtor's real estate, of limited value and for a limited time, from the reach of final process for debt, analogies were sought in the principles of the common law that apply to a divided estate, one present and one future, and, perhaps, contingent, and the respective rights of each to the land, with a view of deducing from them some rule applicable to the nondescript designated as a *homestead.* It was called "a determinable fee," "a quality annexed to land whereby the estate is exempted from sale under execution," and the interest beyond the period of ex-

emption, "a reversion," terms appropriate to estates separated into parts owned by different persons, but wholly unsuited to a mere freedom from liability for sale at the instance of a creditor.

The dissenting opinion seems to go back and revive the use of these obsolete terms, and to derive from them rules that govern the relations of owners of separate estates by the common law in respect to their interest in the land, with a view to their adaptation to the homestead. It was needless to do this in support of the argument that denies any relief, under the circumstances of the present case, to the restrained creditor; for if the creditor's estate undergoes no change by reason of the exemption and the assignment of its boundaries, as declared in the case of *Bank v. Green,* decided in 1878, and since uniformly upheld, the debtor having, as before, the same full and unabridged estate, could exercise, at least as much, if not more, control over the land than if it had been lessened, as indicated by the inappropriate terms to (199) which reference has already been made. It was not necessary for the purpose of the argument, therefore, to recall the cases anterior to that decided in 1878, which is perspicuous and clear as an exposition of the Constitution, and, in the language of Brother *Shepherd,* has "swept away, by convincing logic," the confused and inconsistent interpretations put upon the Constitution as implied in the employment of terms drawn from the common law in causes previously before the Court.

The true mode of arriving at the meaning of the provisions relating to the exemption of land as a homestead is to look at its terms and the purpose to be attained. The primary object was to secure a *home* to the unfortunate and insolvent debtor and his family, and to this end the prohibiting mandate is addressed to the creditor and the officer of the law acting in his behalf, forbidding the sale of so much of the land as is exempted, either under execution or other final process for the enforcement of a debt, except it be for taxes or the purchase money due for the land itself thus exempt. This is for the relief of the debtor and to prevent himself and family from expulsion from their home, or such land as he may choose to make his home on. It secures the home or "homestead" which designates the exempt land on which he has, or may make his home, to his and their use, for its full and undisturbed enjoyment for the time being, with all the privileges incident to such enjoyment, as a prudent and unfettered owner would use it in expectation of its indefinite continuance as his own home. This secures all the beneficent purposes of the law, and all it is intended to accomplish.

I cannot, for one moment, assent to the suggestion that the expression found in section 5, that gives the surviving widow, when the debtor dies childless, "the rents and profits thereof" during widowhood, enlarges the estate in her beyond that which her husband had, or (200)

that those words which define her interest in the land when the estate, if an inheritance, has descended to heirs, and in no sense rests in her, unless under a claim of dower, do more than define her rights therein. The purpose, in their use, is to bestow an enjoyment and use of the land commensurate with that of her deceased husband, when undisposed of by their joint deed of alienation. No argument, which interprets the words as equivalent to a conveyance of the land for her life or widowhood, can derive any force from their effect in a deed from one person to another. The expression means to confer upon her the right to appropriate to her own use the accruing profits and fruits of the possession and use, leaving the descended inheritance to whom the law gives it when undevised. It rather furnishes a reason for circumscribing the enjoyment of the owner in respect to creditors whose rights are in abeyance.

It is conceded in both dissenting opinions that the court might intervene and restrain the owner and occupant of the exempt land from committing wanton and malicious waste, when endangering the judgment debt, and thus they admit the interest of the creditor, who has a docketed judgment, in the land under its lien sufficient to authorize him to ask the exercise of an interposing power to prevent such waste as this, and this would be an interrupted possession of the debtor, or rather the putting a restriction upon the use he is making of it. But this is not a voluntary interference with the rightful and legitimate enjoyment secured to him. It is brought on by his own improper and unlawful use of the land, against which the law does not give him protection, and it follows, that he is not in the same position, as to the property, though full owner, as he would be were there no debt or judgment lien to secure it.

(201) It thus becomes a question, as to how far and when the equitable power of the court will be put forth to restrain the defendant from acts that are not done in reasonable and full enjoyment of the homestead, but from spoilation, and to convert the substance into money at the debtor's absolute disposal, and endangering the debt itself. It seems to me plain, the limit is properly fixed in the opinions with which this is in harmony, and if the exempt land consists entirely or largely of forest trees, valuable only in being worked into lumber, a right to cut down, for the purpose of use or for sale, is possessed, to a reasonable extent, as would be the working of mines by the owner, because, in such case, there would otherwise be no means of enjoyment, or not a full enjoyment of the land. But it must not be forgotten that creditors have some rights that ought not to be lost sight of and disregarded, in giving efficacy to these provisions in behalf of the debtor, nor are they in my view of the law.

The statute, in express terms, gives the lien to the docketed judgment, by the amendatory act of 1885, ch. 359, changing the law as it previously existed in The Code, sec. 501, subsec. 4, as interpreted in *Markham v. Hicks,* 90 N. C., 204; *Rankin v. Shaw,* 94 N. C., 405. This enactment not only gives the lien, but it arrests the running of the statute of limitations during the continuance of the exemption, while the creditor is disabled from enforcing it.

This lien is created by the act of docketing, and *eo instanti* attaches to the debtor's estate in the land, and there is nothing else to which it can adhere, but its enforcement is deferred by the law until the exemption expires. There is no undefined, shadowy interest springing into existence in the future, to which the lien then attaches itself, meanwhile awaiting its advent, but *it fastens at once upon the estate* of the debtor in the land, to be enforced at a future uncertain time.

This gives the creditor a *present interest* in the land as a (202) security for his debt, and leaves the debtor free to do whatever an owner, not in debt by docketed judgment, could do with his own property, with the single proviso that he must not carry his spoilations, not necessary to the full enjoyment of the premises, so far as to impair the security they afford to his debt. If the legitimate use of the land impairs the value of the security, or if a reasonable portion of that which could only be used and enjoyed by a destruction, be taken and appropriated, as in a forest growth or a mineral bed, thus making a partial denudation, the creditor must submit; but when such is not necessary to the enjoyment of the land as a whole, the creditor ought not to be, nor, in my opinion, is he, left remediless.

Surely when the sovereign, the State, says to the creditor, you shall not take the home of your debtor and put him and his family out in the world houseless and penniless, and you must therefore wait for your debt, but you may secure it by prosecuting your demand to judgment and enforce payment hereafter, it did not mean to say to him, your debtor may use the property in any way he may deem most to his own advantage in the meantime—he may remove the houses, he may destroy all the timber and convert it to his own use, leaving the premises, it may be, well-nigh worthless, and you cannot be allowed to complain, unless he was prompted by mere wantonness or a malicious motive, and did not do the act for personal advantage only. It is said the lien gives no interest in the land to be protected by the court. It is not necessary to review the authorities to the contrary, recited in the opinion by Brother *Merrimon,* sharply criticized in the dissenting opinion, but whose authority remains, in my view, unshaken, of which I will only say that of *Webb v. Boyle,* 63 N. C., 271, is directly in point and conclusive of the question of right; for there can be stronger claim for protection to a

creditor who has obtained a lien by the levy of an execution on
(203) the land than to a creditor to whom the law gives it in a docketed judgment. The correctness of the rule admits of illustration in the case of land devised to one charged with a legacy in favor of another, or an annuity payable at intervals. Can the devisee commit waste, *ab libitum,* when for his own benefit, without incurring a liability to be restrained, and thus be allowed to impair the value of the property to a degree rendering the security insufficient or precarious? And must the legatee, with no power to interfere, submit in silence to the wrong and lose the annuity, or a part of it, because of the action of the devisee? And if the annuitant has a status in court, and may ask its assistance, may not the creditor do so under like circumstances? Is there any essential difference in the cases? It is intimated that upon the construction insisted on, which prevents a sale of timber, even though necessary to a full enjoyment of the farm, would be a promise in the Constitution to give bread, while the court would be, by construction, giving a stone to the helpless insolvent. But the case may bear another and quite different aspect, if the dissenting views obtain, and it could be as well said that the Constitution gives bread to the debtor, a stone to the creditor. It does neither. It undertakes to do justly by both, and so to adjust their relations, that while one retains his house for a time, and wife and infant children are cared for, the creditor is made meanwhile to wait, with the security the law gives him, and permitted to proceed to collect when the time expires. This is the administration of impartial justice, and there ought to be no conflict of interest arising therefrom.

If the creditor may harass the debtor (and this he cannot do when the latter keeps within the prescribed limits in the use of the land), so may the possession of the homestead, carrying with it a right to destroy as well as to enjoy its substance, if for his supposed benefit, and not wanton or malicious, enable the debtor to wrong the creditor, if so dis-
posed to act. It is said in the dissenting opinion, that the ruling
(204) of the court "will tend to enable thousands of judgment creditors to establish a system of espionage upon the debtors, to determine in the future, and as cases arise, when the homesteader shall cross the line of accountability in the exercise of dominion over his land." The same disastrous consequences might follow the recognition of the rule that admits the creditor's interference in any case, even to put a stop to wanton or malicious waste, the only escape from which is in denying the right to interfere in any case. If the only limitation put upon the debtor, in his possession and use of the premises, be that his waste and spoilation will be only stopped when they proceed from a wanton or

malicious spirit, then may he leave to his creditors but a fleshless carcass, stripped of what gave it value, to be subjected to his debt. This cannot be the intent of the law. What difference can it make to the creditor, with what spirit or for what purpose the despoiling may be done? It is the needless waste and despoiling of which he complains—the fact of impaired value of the land to his hurt—and this not less when done for a personal benefit than if prompted by malice or wantonness. If the creditor is to suffer loss in the impaired value of the security resulting from the acts of the debtor done in the furtherance of his supposed personal interest—yet needless to the full enjoyment and use of the premises, as a present and protected home—what matters it to the former that it is not from wantonness or the promptings of ill will? The injury and damage is the same to the creditor, and it is against them that he is entitled to be protected, if protected at all. The rule that marks and defines the rights of parties, during their relation in respect to the property, is considerately and equitably laid down in the opinion of the majority of the Court, and, passing between extremes, adopted to secure repose in the preservation of the rights of each.

Some criticism, in my opinion not merited, is made upon the (205) case of *Gordon v. Lowther,* 75 N. C., 193, of which it is only necessary to say that as a correct assertion of the law it has been approved and followed in a case decided but a year ago, *Cowand v. Meyers,* 99 N. C., 198. But if there were no direct authority to be found, the right to be protected against the lawless and injurious misconduct of one possessed of a present estate, by one who has a remote interest therein, is clearly and distinctly recognized as an important function of a court of equity, interposing to prevent a wrong for which the strict rules of law afford no redress, and the principle has been so uniformly declared that no references are needed in its support. The idea that this concession will warrant the appointment of a receiver, and take the homestead away from the occupant, finds no support in the doctrine of interference to prevent *abuse* of the premises, for the debtor has the right to the occupancy and enjoyment of his secured home, with all the proper incidents, and is restricted from going beyond the assigned limits, nothing more, and precisely the same difficulty will be encountered when it is sought to confine him within the limits fixed by the opposing view. In either case, it is simply a restraint against unauthorized misuse.

It is a source of deep regret that the divergent views entertained by my brothers upon the point discussed could not be brought in harmony, tending, as they do, to impair confidence in the soundness and permanence of the decisions of the Court. So seriously has this been felt, that it has been thought and suggested that it would be better, to avoid such injurious consequences, that no dissenting opinions be filed. Without

concurring in this, it is of the highest importance that the court of last resort, whenever practicable, without the surrender of strong convictions, should arrive at a common conclusion, in declaring the law.

PER CURIAM. Error.

Cited: Tucker v. Tucker, 108 N. C., 237; *Farabow v. Green, ibid.,* 343; *Vanstory v. Thornton,* 112 N. C., 208, 9, 10; *Gardner v. Batts,* 114 N. C., 504; *Springer v. Sheets,* 115 N. C., 379; *Younger v. Ritchie,* 116 N. C., 784; *Bevan v. Ellis,* 121 N. C., 234; *Williams v. Brown,* 127 N. C., 52; *Springs v. Pharr,* 131 N. C., 194; *Joyner v. Sugg, ibid.,* 339; *S. c.,* 132 N. C., 588; *Coffin v. Harris,* 141 N. C., 713; *Sash Co. v. Parker,* 153 N. C., 134; *Davenport v. Fleming,* 154 N. C., 295; *Watters v. Hedgpeth,* 172 N. C., 312.

(206)

R. J. LEWIS v. W. W. LONG.

Negotiable Bond, Endorsee After Maturity—Evidence, Oral, to Explain Written Contract.

Although two obligors appear on the face of a negotiable bond to be joint principals, yet, if the obligee had notice that one was a surety, that fact can be shown by oral evidence, as against the obligee; but if the obligee endorse the bond before maturity to A., who has no notice, and he in turn endorses the paper to B. *after maturity,* who takes for value and without notice, the fact that one of the obligors was a surety cannot be shown as against B.

CIVIL ACTION, tried before *Graves, J.,* at Spring Term, 1888, of HALIFAX Superior Court.

The case was submitted upon the following case agreed:

This is a civil action, commenced before a justice of the peace, on 2 April, 1888, and upon judgment in favor of the plaintiff, the defendant, W. W. Long, appeals to the Superior Court.

The action is brought upon a note, under seal, which is as follows:

"$100.00. On or before the 1st day of November, 1883, we, or either of us, promise to pay to J. M. Grizzard or order, the sum of one hundred dollars, for value received. Witness our hands and seals, this 9th day of June, 1883.

"AARON PRESCOTT. [Seal.]
"W. W. LONG. [Seal.]"

The said note was endorsed by J. M. Grizzard, for value, to one Mrs. Alice M. Cooper, and by her endorsed and transferred, for value, after maturity, to the plaintiff. The defendant, Prescott, was principal to the note, and the defendant, Long, was surety thereto.

This was known to J. M. Grizzard, the original payee, but was (207) not known to the plaintiff. More than three years have accrued from the maturity of the note to bringing of this action.

The plaintiff bought the note for value, believing both Prescott and Long were principals, and jointly responsible.

Upon the case agreed the court gave this judgment:

"This cause coming on to be heard upon the case agreed between the plaintiff and defendant, and being heard before his Honor, Judge Graves, now, on motion of Mullen & Daniel, attorneys for the defendant, it is ordered and adjudged, that the plaintiff recover nothing of the defendant, W. W. Long, and that he go without day and recover his costs."

The plaintiff appealed.

E. T. Clark and *Batchelor & Devereux for plaintiff.*
J. N. Mullen and W. E. Daniel for defendant.

SHEPHERD, J. Whether a joint promisor may show by parol that he signed only as surety, has been the subject of conflicting decisions, both in England and America. That he can do so in this State where the payee has notice, is well settled. *Capell v. Long,* 84 N. C., 16; *Goodman v. Litaker,* 84 N. C., 8; *Welfare v. Thompson,* 83 N. C., 276.

But such a defense cannot be made against a *bona fide* holder without notice. Randolph Com. Paper, sec. 907; Daniel Neg. Inst., sec. 1338; Edwards' Bills and Notes, Vol. 2, 692; *Goodman v. Litaker, supra.*

The note sued upon was under seal, but was *endorsed,* and is "to be regarded, so far as its negotiability is concerned, and its liability to be governed by the commercial law applicable to promissory notes, as if it were a promissory note not under seal." *Miller v. Tharel,* 75 N. C., 150; *Spence v. Tapscott,* 93 N. C., 246.

It was endorsed to Mrs. Cooper, and the law presumes that (208) she took "it for value and before dishonor, in the regular course of business." *Tredwell v. Blount,* 86 N. C., 33.

Mrs. Cooper being a *bona fide* holder, and, having no notice, would have been unaffected by the defense relied upon in this action. Does the fact that the plaintiff purchased from her *after maturity* (but without notice) put him in a worse position than that occupied by his assignor? Very clearly it does not. Mr. Randolph *(supra),* section 987, says: "So a purchaser after maturity from a *bona fide* holder, who took the

paper for value, before maturity, is entitled as a *bona fide* holder, before maturity, to the rights of his endorser."

To the same effect is *Edwards, supra,* Vol. 2, 692, note; Daniel, *supra,* sec. 589.

The cases of *Harris v. Burwell,* 65 N. C., 586, and *Capell v. Long, supra,* cited by the defendants, do not conflict with this view. In the former case the plaintiff purchased the note after maturity, and, therefore, took it subject to the defense of "set-off," which the maker had against his assignor at the time of the assignment. In Capell's case the payee had notice, and assigned after maturity. In both of these cases it was held that the purchasers took subject to any defense which existed against their assignors. In our case, as we have seen, *no defense* existed against Mrs. Cooper, the plaintiff's assignor, and it is, therefore, clearly distinguishable. Error.

Reversed.

Cited: Christian v. Parrott, 114 N. C., 219; *Coffey v. Reinhardt, ibid.,* 511; *Causey v. Snow,* 122 N. C., 328, 9; *Tyson v. Joyner,* 139 N. C., 73; *Bank v. Walser,* 162 N. C., 60.

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(209)

T. L. EMERY AND WIFE v. THE RALEIGH AND GASTON RAILROAD COMPANY.

Issues—Verdict must sustain the judgment—Negligence in construction of culverts—Contributory negligence, what constitutes, and when to be declared by the Court, or left to the jury with instructions—Evidence—Condemnation proceedings, how far an estoppel—Prescription for an easement.

1. Ordinarily, it must be left to the sound discretion of the judge, whether to submit specific issues so that the findings will be in the nature of a special verdict, or to confine the inquiry to one, or a small number of issues, in imitation of the common law practice, provided, always, that the issues submitted must be those raised by the pleadings.

2. It is misleading to embody in one issue two propositions, to which different responses might be made. A new trial will be granted if such an issue is submitted, exception being taken thereto in apt time.

3. The verdict, whether in response to one or many issues, must establish facts sufficient to enable the court to proceed to judgment.

4. When the verdict establishes facts sufficient to sustain the judgment, and it appears that issues tendered by a party were refused, but the jury were told by the judge how the testimony relating to the rejected issues bore in law upon the issues submitted, a new trial will not be granted.

5. No limit will be imposed upon the discretion of the *nisi prius* judge in settling issues, except that the facts established by the verdict shall be sufficient to sustain the judgment, and that a party must be given an opportunity to have the law, applicable to any material portion of the testimony fairly presented to and passed upon by the jury, through the medium of some issue.

6. It is the duty of a railroad company to so construct its culverts that they will carry off the water of the streams over which they are built under all ordinary circumstances likely to occur in the usual course of nature, including such heavy rains as are ordinarily expected, although of only occasional occurrence. But it is not liable for damages resulting from its culverts being insufficient to carry off the overflow caused by extraordinary and unusual rainfalls.

7. The reputation for intelligence and skill of a civil engineer, under whose direction a culvert was built, cannot be shown in evidence on the trial of an issue as to whether the culvert was *in fact* so constructed as to carry off the water except in cases of excessive rain-falls.

8. Where the issue was as to whether a culvert was of proper size, and the defendant railroad company examined as its witness an expert, who stated that he built the culvert, and it was the largest one he had ever built: *Held*, that it was proper to permit the plaintiff to show that another corporation had built a larger culvert over the same stream, a short distance below the culvert in controversy.

9. Where the owner of a tract of land had his brickyard on the premises, and his crops submerged with water by reason of the negligent construction of a railroad culvert, he is not guilty of contributory negligence when he afterwards constructs a brickyard in the same place and plants a crop on the same land, both of which are again submerged from the same cause. Because a culvert was negligently constructed by a railroad company, and plaintiff knew it, is no reason why plaintiff should have abandoned his land and ceased all effort to utilize it.

10. It is often difficult to determine when the evidence in a case crosses the shadowy line and compels the court to take the case from the jury and declare as the law that contributory negligence has been proven. Such rule applies only when the facts are *ascertained*. When there is any *conflict in the testimony*, the courts will lay down the rules of law and define the standard of *care* necessary; but leave the jury to decide whether, under the circumstances, proper care was exercised.

11. Proceedings for the condemnation of land for the right of way of a railroad company will not operate as an estoppel in an action brought by a party to such proceedings to recover damages to his lands resulting from the negligent construction of a culvert by the company.

12. The right to have and maintain a culvert, so constructed as to cause plaintiff's land to be overflowed, can be acquired by a railroad company

by proof of twenty years user. But the user must have been such as to have subjected the company to an action *at any time during the twenty years*, and it must be shown that the overflow has, at regular or irregular intervals during the twenty years, *covered the very land* in controversy.

(211) CIVIL ACTION, tried before *Graves, J.*, at May Term, 1888, of the Superior Court of HALIFAX County.

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

The pleadings were as follows, omitting immaterial portions of them:

The plaintiff, complaining of the defendant, alleges:

"1. That the defendant is a corporation, duly chartered and organized under an act of the General Assembly of North Carolina, passed at its session in 18...., and acts amendatory thereof.

"2. That the plaintiff, Emma J., intermarried with Thos. L. Emery many years prior to the year 1884.

"3. That the *feme* plaintiff is the owner of, and, for some years prior to 1884, has been the owner of a valuable farm, adjacent to the town of Weldon, and lying upon Chockeyotte Creek, and upon the upper or south side of the roadbed of the defendant, which said farm is commonly known as the 'Model Farm.'

"4. That the defendant's track passes over said Chockeyotte Creek, and the defendant, more than three years prior to the beginning of this action, negligently constructed a culvert under its said track for the passage of the waters of said creek, which they have maintained ever since, to the great nuisance of the plaintiff.

"5. That in times of freshets or excessive rains the said culvert is entirely too small for the free passage of the waters of said creek, so that the said stream becomes dammed and choked up, and the waters thereof are ponded back upon the plaintiff's land, to its great injury and diminished productiveness for purposes of agriculture.

"7. That in the fall or late summer of 1885, the said defendant wrongfully and negligently, by means of its said culvert as aforesaid, caused the waters of said creek to pond back upon plaintiff's land and brickyard situated thereon, and destroyed 175,000 brick, the property

(212) of the plaintiff, standing thereon, worth five dollars per thousand, and accumulated clay and *debris* upon the said brickyard of the plaintiff, to her damage one thousand and seventy-five dollars.

"8. That about May or June, 1887, the said defendant wrongfully and negligently, by reason of its said culvert as aforesaid, caused the waters of said creek to pond back upon the plaintiff's land and brickyard situated thereon, and destroyed 75,000 brick situated thereon, the property of plaintiff, worth five dollars per thousand, and accumulated clay and *debris* upon said yard, to her damage four hundred and seventy-

five dollars, and destroyed the plaintiff's crop growing upon said land, to her further damage nine hundred dollars.

"9. That about the last of October or first of November, 1887, the said defendant negligently and wrongfully caused the water of said creek to pond back upon the plaintiff's land and brickyard as aforesaid, by means of said culvert, and destroyed 15,000 brick, the property of plaintiff, standing upon said yard, which said brick were worth five dollars per thousand, and accumulated clay and *debris* thereon, to the plaintiff's damage one hundred and twenty-five dollars.

"10. That the annual damage to the plaintiff's crops of grass, oats, corn, etc., has been five hundred dollars per year for the past three years.

"Wherefore, the plaintiff prays judgment for four thousand dollars damages and costs."

The defendant, answering the complaint herein, says:

"1. That sections 1 and 2 are admitted.

"2. That section 3 is admitted, with the following modification, *i. e.*, that the farm of the plaintiff, known as the 'Model Farm,' does not abut on or touch the roadbed or right of way of the defendant.

"3. That section 4 is denied as therein charged, and in answer thereto the defendant says, that more than twenty years before the commencement of the plaintiff's action, the defendant caused to be constructed over the said creek, by skillful engineers, and with the (213) utmost care, the said culvert as a part of its roadbed and track, which it was duly and legally authorized to do; and this defendant is informed and believes, and so avers, that the said culvert in no way obstructs or impedes the natural flow of the water in and along said creek, but, on the contrary, the capacity of said culvert exceeds many times the capacity of the channel of said creek; and this defendant denies that it has unlawfully, negligently or wilfully erected or maintained any nuisance to the plaintiff by the construction of said culvert.

"4. That section 5 of the complaint is not true, and is denied, and, further answering said section, this defendant says that the culvert of the defendant exceeds many times the natural capacity of said creek, and that the overflow of the plaintiff's said land is caused by the negligence of the plaintiff in not removing obstructions from and near the bed of said creek, so as to allow a free discharge of the surplus waters thereof, all of which said obstructions are above the defendant's culvert and right of way.

"5. That section 7 of the complaint is not true, and is denied, and, as a further answer thereto, this defendant says, that prior to placing their brickyard on said 'Model Farm,' the plaintiffs well knew that the said yard was subject to overflow, both from the Roanoke River and said

creek, in times of freshets therein, and the defendant alleges that the plaintiffs were guilty of contributory negligence in placing their said brickyard on said farm.

"6. That section 8 of the complaint is not true, and is denied, and, further answering said section, this defendant says that the damages to said plaintiff's brickyard and bricks was caused by the contributory negligence of plaintiff, as set out in section 5 of this answer; and that as to the alleged damages of the plaintiff's growing crops, if any,
(214) this defendant alleges the same was caused by the negligence of the plaintiff in not causing his said land to be properly drained, and in not removing obstructions to the flow of the water in said creek.

"7. That section 9 of the complaint is not true, and is denied, and, for further answer thereto, this defendant adopts the next two preceding sections of this answer as an answer thereto.

"8. That section 10 of the complaint is not true, and is denied, and, for further answer thereto, defendant alleges that the alleged damage to plaintiff's crop, if any, was caused by the negligence of the plaintiff, as hereinbefore set out and pleaded."

And for a further defense to the plaintiff's said action, this defendant says:

"That the alleged damages charged in complaint, if any, were the result of unusual and excessive rain, which no care, caution or foresight of the defendant could have prevented, and the defendant alleges that it was guilty of no negligence or want of due care in the construction and maintenance of its said culvert; and for a further defense this defendant says that more than twenty years before the commencement of this action, it erected its said culvert of its present dimensions, and has been in the peaceable and undisturbed possession and maintenance thereof since then up to the bringing of this action, and that the then owner of the plaintiff's land assented and agreed to the building of said culvert."

Wherefore, defendant asks judgment, that he go without day, and for his costs.

The plaintiff, by leave of the court, amends his complaint by striking out, in section 5, line 2, the word "excessive," and inserting in lieu thereof the word "heavy."

The plaintiff offered issues numbered one and two, and the defendant offered issues numbered three and four. The issues thus submitted were approved by the court and submitted to the jury. After the
(215) charge, and before the jury retired, the court directed issue number four to be divided, and the issues submitted were as follows:

"1. Has the defendant negligently ponded water back upon the plaintiff's land?

"2. If so, what damage has plaintiff sustained thereby?

"3. Have the plaintiffs been guilty of contributory negligence?

"4. How long has defendant been using the culvert in its present condition?

"5. Has the user given the defendant an easement in the lands of plaintiff?"

Defendant excepted.

The defendant asked that this issue be submitted to the jury:

"What was the depth of rainfall on 10 May, 1887? Was the rainfall of 10 May, 1887, excessive and extraordinary?"

This was refused, and the defendant excepted.

The defendant asked to have this issue submitted to the jury:

"What damages did plaintiff sustain by the ponding back of the water on that occasion?"—meaning 10 May, 1887.

The court declined to submit this issue, and defendant excepted.

There was much evidence offered on both sides, and it seems material to set out a good deal of it in order to point out the several exceptions made. The complainant, T. L. Emery, testified: "My wife owns and had owned the land known as 'Model Farm' fourteen years at the time of bringing this suit. That the tract of land did not adjoin the railroad track of defendant, but lies to the south of the road, on Chockeyotte Creek, above the culvert. The culvert at the base is 16 feet wide. The stream just above the culvert is 26 feet wide. The length of the embankment is more than one hundred feet. Close to the culvert, below, the creek is 25 or 26 feet wide, and then it widens out and (216) deepens, being 36 feet wide. Seemed to be 8 or 9 feet deep. We measured from water's edge when low, 12 inches above low water, spreads out a hundred or two feet. There is eddy or back water within a foot or two of the lower edge of culvert. I noticed that the water rushes through and had undermined the culvert, so that some of the large stones of which it was built have cracked."

The plaintiff then offered to prove that some 200 yards below, on the same stream, the Roanoke Navigation Company had constructed a culvert before defendant, which is 26 feet wide, but upon objection, this testimony was then excluded.

The witness then testified that, in time of heavy rains, when the creek is swollen, the water is ponded back on the land; that much of the land is rich, alluvial land—that it is not all low bottom; that on the land is clay suitable for making bricks; that he had made a brickyard; that in the fall of 1885, he had been damaged by the ponding back of water on the land; that his crop was injured and he had lost 175,000 unburnt, sun-dried brick, which had been packed under shelter; the water did not go over top of the stack, but came up to the lower part, and the brick softened and mashed, and others came down and were softened and

mashed down in the same way; brick worth $5 per thousand; at that time the water was ten or twelve feet higher above the culvert than it was below.

That in May, 1887, the water was ponded back over his land; land rich, partly in clover, partly in oats, and partly in other crops; the witness testified as to the damage to the crop, but as to that it is not deemed material to set out the particulars. At this time witness had about 75,000 bricks destroyed at same place and in same manner as in 1885.

Again, in October, 1887, about the time of the fair, water ponded back again; destroyed 15,000 brick. For agriculture for 1885 and 1886, damages $400 to $500 per year. The water was ponded back at
(217) almost every rain by the culvert. The land was well ditched. Any ordinary size rain would pond it back on the farm. It takes a larger rain than ordinary to pond it back on the brickyard.

On the cross-examination of witness he said, there is a mill-dam below the culvert, I do not know how high, which has been there eight or ten years. The rain in May, 1887, was a big rain, but I do not know that it was extraordinary. Culvert is higher, 25 to 30 feet. No freshet in river when my brick were destroyed. In reply to question, as to why did you not make your brickyard out of reach of the water after your bricks were destroyed the first time, witness said, "The brickyard had cost me a great deal, and I took the risk," and afterwards said it was the only suitable place for making brick. I have omitted much of the details in regard to damages to brick, etc., not deemed material.

By consent, defendant was allowed to introduce, out of the regular order, the witness, P. B. Hawkins, who testified:

"I built the culvert in 1859. I was contractor for the work. Bodwell, a civil engineer, had direction of the construction."

The defendant offered to show by witness the reputation of Bodwell as an intelligent and expert engineer.

Plaintiff objects. Objection sustained.

Exception by defendant.

Witness qualified himself as an expert, and further testified:

"I think the culvert sufficiently large for the size of the stream. I thought it sufficient to carry off any rise; largest culvert I ever built."

Upon cross-examination witness said:

"If the jury find, as a fact, the water was ponded back ten or twelve feet higher above the culvert than below, it would not be sufficient."

T. A. Clark, a witness introduced by defendant, testified:
(218) "That, under the authority of the War Department, he had kept a record of rainfall in Weldon for past seventeen years; that on 10 May, 1887, 6 63/100 inches of rain fell; fell from 9 a.m. to mid-

night; this was an extraordinary fall of rain; no such rain has fallen since I have kept record."

The plaintiff was permitted, after objection by defendant, to ask the witness, Clark, "If ponding back or accumulating water on the 'Model Farm,' in the spring or summer time, tended to injure health?"

Objection overruled. Exception by defendant.

Witness answered: "It would depend upon how long water stayed; if it became stagnant, it would."

Defendant objected to answer. Overruled. Defendant excepts.

The plaintiff proposed to show that the culvert below was larger. Defendant objects.

Court being of opinion that defendant had opened the door, by the examination of the witness, Hawkins, allowed witness to testify.

Dr. O'Brien, a medical expert introduced by the defendant, was asked by the plaintiff:

"If the jury believe, in time of large rain, large quantities of water are ponded back on Emery's Model Farm, on which the vegetation is rank, what would be the effect upon health?"

Defendant objects. Overruled. Exception by defendant.

Witness answered: "Rank vegetation would be killed by water and exposure to sun; in the summer time would produce malaria."

Objection to answer by defendant. Overruled. Exception by defendant.

The defendant prayed the following instructions:

"1. If the jury shall believe that in May, 1887, a rainfall of over six inches fell, said fall of rain excessive and extraordinary, and if the jury shall believe that damage was sustained thereby, that the defendant is not liable therefor."

Refused, except as hereinafter set out in charge. Defendant (219) excepts.

"2. That if the jury shall believe that the plaintiff knew, or had cause to know, at the time he placed the brick at the place he did, that it was subject to overflow, then it was contributory negligence, and they will answer the issue, Yes."

Refused, except as hereinafter set out in charge. Defendant excepts.

"3. That if the plaintiff knew at the time he planted his crops on the Model Farm, that it was subject to overflow, then he has contributed to the damage, and the jury will find issue, Yes."

Refused, except as is hereinafter set out in the charge. Defendant excepts.

"4. That if the defendant has used its culvert as it now is since 1857, then the law presumes it has a grant to do so, and the plaintiff cannot recover."

Refused, except as is hereinafter set out in the charge. Defendant excepts.

The defendant also asked this instruction:

"That there is no evidence that the maintenance of the culvert by the defendant in its present condition is a public nuisance," which was given by the court.

The court then instructed the jury as follows:

"The first issue is, has the defendant negligently ponded water back upon the plaintiff's land?

"The burden rests upon the plaintiff to satisfy you, by a preponderance of the testimony—*i. e.;* by the greater degree of credence raised in your minds. Now, what is the truth of this matter? No question is made about the building of the railroad and the construction of the culvert, for the defendant admits so much. The defendant says that, although it had constructed the culvert, it was built in such manner and with such care that injury to the plaintiff was not to have (220) been anticipated. It was the duty of the defendant to have constructed its culvert so that it would carry off the water of the stream, under all ordinary circumstances, and the usual course of nature, even to the extent of such heavy rains as are ordinarily expected, unless it has the right of grant, actual or presumed, to make it smaller. If the defendant so constructed the culvert that it was not sufficient to carry off the water of the stream under ordinary circumstances, and by ordinary circumstances is meant the usual rainfall), even if such heavy rains are occasional; and if by reason of the insufficient culvert the plaintiff's land was overflowed, the answer to the first issue should be 'Yes,' unless the defendant had acquired the right to pond water on the plaintiff's land. As to whether the defendant had such right, I will instruct you when I come to speak of the fourth issue.

"On the other hand, if the jury shall believe that the plaintiff's land was flooded from the creek and not by back water from the culvert, then it was done by the negligence of the defendant, and the issue should be answered 'No.' And if the jury shall believe that the mill-dam below the culvert obstructed the full flow of the water, so that it did not flow freely through the culvert, as it would have otherwise done, and that if it had not been for the mill-dam the water would not have ponded back on the plaintiff's land, then your answer should be 'No,' for the defendant is not responsible for the overflow caused by the mill-dam. It can be only responsible for its own act, not for the acts of others.

"If the jury shall believe that the culvert is sufficient to carry off all the water having a natural outlet by the creek, except in cases of extraordinary and unusual rainfall, then defendant was not negligent, and if the overflow was the result of extraordinary rainfall, the answer

should be 'No.' But whether there was overflow of plaintiff's land, whether such overflow was caused by heavy rains, such as are not unusual, and the obstructed flow of the water by the culvert, or whether the culvert was sufficient to carry off the water under (221) ordinary circumstances, or whether the overflow was all the result of extraordinary rainfall, are questions for you to say.

"Perhaps it may be proper for me to say that if you find the first issue 'No,' that is an end of the case. But if you should answer 'Yes,' then it becomes material to consider and determine other issues.

"I shall next call your attention to the fourth issue. (N. B.—This issue was afterwards divided, and constitutes the fourth and fifth issues as found in the record.)

"The fourth issue is compound. The first question presented is as to how long the defendant has been using the culvert in its present condition. This is merely a question of fact, upon which I can give you very little assistance. You must determine it upon the evidence.

"The second part of the issue is, 'and had the user given the defendant an easement on the land of the plaintiff?'

"It is insisted by the defendant that, having used the culvert for more than twenty years before the plaintiff began his action, that it has acquired a right, not only to use it for its own purposes, but to use it, although it may have the effect of ponding back water on the land of the plaintiff. It is true that a right to pond water upon the land of another may be acquired by actually ponding it back and keeping it so ponded back for twenty years. It is not necessary that it should be kept continually ponded to the same height, when the difference is made by low water in time of drought or for repairs; as in case of a mill-pond, if a dam is erected and kept up, and the water is ponded back for twenty years, the owner of the mill acquires an easement to pond the water back over the land covered by the mill-pond, when as full as usual, although it may have been taken down for repairs, and although it may occur that, by reason of drought or by reason of defects in the dam itself, temporarily the water may have been part of the time lower. The defendant assumes the burden of proof, when it un- (222) dertakes to show its right to pond water back on the land of plaintiff, and it must show it by a preponderance of evidence."

Exception by defendant.

"If the jury is satisfied that the defendant has for twenty years ponded water back on the land of plaintiff in such a way as to expose itself to action for such ponding for twenty years before this suit was begun, then the defendant has acquired a right to pond the water back on the plaintiff's land."

Exception by defendant.

"In determining this question of easement and fixing the time of the twenty years, the jury must count out the time from 20 May, 1861, to 1 January, 1870.

"In fixing the beginning, the jury must find the time that defendant's claim began—the time its right was first asserted by an actual ponding back upon the lands now claimed by the plaintiff.

"It makes no difference whether the land was then owned by the plaintiff, or by those under whom she claims.

"[In order to acquire a right by prescription, the user must have been continuously asserted and enjoyed without interruption for twenty years; and if the ponding back of water on the land of plaintiff was at long intervals, such occasional trespasses could not ripen into title.]"

Defendant excepts to portion of charge in brackets.

On the subject of contributory negligence, his Honor instructed the jury that if the circumstances were such that a man of ordinary prudence would have planted his crops and put his bricks on the land, then the plaintiff was not negligent. If the defendant had a right by prescription to pond back the water (if it did pond it back), then the plaintiff would be guilty of negligence in placing his bricks or planting his crops on the land, and the jury should answer the third issue
(223) "Yes." But if defendant had no right to pond back the water (if it did pond it back), and a man of ordinary prudence would have so planted his crops and placed his bricks, then the plaintiff was not guilty of negligence in so planting his crops and placing his bricks on the land. Defendant excepted.

His Honor also further charged the jury, that the measure of damages was the actual injury sustained by plaintiff's crops and brick.

Verdict for plaintiff, as before stated.

Defendant moved for a new trial:

"1. For admission of improper testimony.

"2. For failure to instruct as requested.

"3. For error alleged in charge given."

Then defendant moved for judgment upon the verdict. Motion overruled.

This cause coming on to be heard, and having been tried by the jury upon the following issues:

"1. Has the defendant negligently ponded water back upon the plaintiff's land?

"2. If so, what damage has plaintiff sustained thereby?

"3. Have the plaintiffs been guilty of contributory negligence?

"4. How long has defendant been using the culvert in its present condition?

"5. And has the user given the defendant an easement in the lands of the plaintiff?"

And the jury having answered the first issue "Yes"; the second issue, "$1,870"; the third issue, "No"; the fourth issue, "Since it was built, with the exception of the cracks, August, 1857," and the fifth issue, "No":

"It is now, on motion of R. O. Burton, Jr., plaintiff's attorney, adjudged that the plaintiff recover of the defendant the sum of one thousand eight hundred and seventy dollars, with interest from the first day of this term till paid, and for the costs of this action, (224) to be taxed by the clerk."

From this judgment the defendant appeals to the Supreme Court.

R. O. Burton for plaintiff.
W. H. Day for defendant.

AVERY, J., after stating the facts: The action was brought to recover damage for injury done to plaintiff's brickyard in the year 1885, and again in May, 1887, and to his crops, by overflows caused by the defective construction of a culvert over a creek on the defendant's line.

The first and second exceptions present the question, whether his Honor erred in refusing to submit two additional issues tendered by defendant's counsel. It was not the design in adopting the new procedure, that parties should be bound by rules so technical as those which governed the old system of pleading. The forms of action being disregarded, and it being requisite only, under The Code, to allege the material facts in the complaint, and to admit or deny the allegations in the answer, ordinarily it must be left to the sound discretion of the *nisi prius* judge to determine, when required or allowed to settle the issues, whether the action can be tried more intelligently and satisfactorily by the jury upon specific issues, submitted for the purpose of eliciting distinct findings in the nature of a special verdict, or by confining the inquiry, in imitation of the old method, to a single issue, or a small number of issues, and pointing out, by instruction, how the conflicting evidence, controverted in the pleadings and on trial, though not involved in the terms of the issues submitted, bears upon the verdict to be rendered in response to them, provided, always, that the issues submitted are raised by the pleadings.

It is misleading to embody in one issue two propositions, as to (225) which the jury might give different responses, and on exception taken in apt time, a new trial will in such cases be granted. The facts found by a jury, whether comprehended under one or many issues, must be sufficient to enable the court to proceed to judgment. When the judg-

ment can be predicated upon the findings, though it may appear that the judge who tried the case below refused to submit more specific issues tendered by a party, yet, if he told the jury how the testimony relating to the issues refused should be considered in connection with the law, in passing upon those submitted, and thereby gave opportunity to enter exception to the instruction given, and to the refusal to give that asked, the appellate court will not grant a new trial. The court will impose no limit to the exercise of discretion on the part of the judge below, in settling the issues, except that the facts established by the responses to them shall constitute a lawful basis for the judgment, and that an appellant was not denied an opportunity to have the law applicable to any material portion of the testimony fairly presented and passed upon by the jury, through the medium of some issue.

The defendant contends that there was error in declining to submit to the jury the two issues offered:

"1. What was the depth of rainfall on 10 May, 1887? Was the rainfall 10th of May excessive and extraordinary?

"2. What damage did plaintiff sustain by ponding back of the water on that occasion?"

His Honor presented the whole question of negligence on the part of the defendant in the first of the five issues, to which the jury responded, and which is in the following language:

"Has the defendant negligently ponded water back upon the plaintiff's land?"

The judge instructed the jury upon the question of negligence on defendant's part as follows:

(226) "It was the duty of defendant to have constructed its culvert so it would carry off the water of the stream under all ordinary circumstances and the usual course of nature, even to the extent of such heavy rains as are ordinarily expected, unless it has the right of grant, actual or presumed, to make it smaller. If the defendant so constructed the culvert that it was not sufficient to carry off the water of the stream under ordinary circumstances (and by ordinary circumstances is meant the usual rainfall), even if such heavy rains are occasional, and by reason of insufficient culvert the plaintiff's land was overflowed, the answer to the first issue should be 'Yes,' unless the defendant had acquired the right to pond water on the plaintiff's land."

We think his Honor stated the law correctly, and is sustained by the case of *Wright v. Wilmington,* 92 N. C., 156, and the authorities there cited; also *Wood on Railways,* Vol. 2, sec. 253, p. 873.

By applying the law, as stated by the court, the jury would naturally determine from the testimony whether the rainfall of 10 May, 1887, or that in the year 1885, was so extraordinary and excessive that it could

not have been reasonably expected to fall, and if such was the character of the rain at either date, they would naturally leave out any injury sustained by such a rainfall, in making their estimate of the damage; or if they found that all the damage sustained by the plaintiff, both in his brickyard and as to his crops, was attributable to extraordinary rains, they would of course respond "No" to the issue. His Honor, in addition to the language quoted from his charge, told the jury that the defendant was "not negligent, if the overflow was the result of extraordinary and unusual rainfall." The defendant introduced a witness, P. B. Hawkins, who testified that he built the culvert in 1859, was contractor for the work, and that one Bodwell, a civil engineer, (227) had direction of the construction.

The defendant offered to show by the witness, Hawkins, "the reputation of Bodwell as an intelligent and expert engineer." On objection by the plaintiff, the testimony was held to be incompetent, and the defendant excepted. Counsel on the argument in this Court did not abandon this exception, but failed to cite any authority in support of it; and we cannot see how the fact that the engineer, who had the oversight of the construction of the culvert, was an intelligent and expert engineer, tends to show that the culvert was in fact so constructed as to carry off any but an excessive fall of rain.

The plaintiff had, before the introduction of the witness, P. B. Hawkins, "offered to prove, as tending to show negligence, that, some two hundred yards below, on the same stream, the Roanoke Navigation Company had constructed a culvert before defendant, which was twenty-six feet wide," but upon objection by defendant the testimony was then excluded. The witness, Hawkins, having qualified himself to speak as an expert, said: "I think the culvert a sufficiently large culvert for the size of the stream. I thought it sufficient to carry off any rise. It was the largest culvert I ever built." Subsequently the court, being of opinion that the defendant, by the examination of Hawkins, had "opened the door" and made the evidence previously excluded competent, allowed a witness to testify, after objection on the part of the defendant, that the culvert built by the Roanoke Navigation Company, two hundred yards below, on the same stream, was larger than that built by Hawkins, and this is the ground of another exception relied on by the defendant. We concur with his Honor in his ruling. Hawkins had qualified as an expert, as we may fairly infer from the record, in part, at least, showing his experience as a contractor for work on railways, and at any rate he had been allowed, after stating that he had built that (228) particular culvert, to testify further that it was the largest he had ever built, the natural inference being that he had constructed a number, and this was of unusual capacity. In order to break the force

of this testimony, it was competent for the plaintiff to show that another had been built so near below that the volume of water in the stream would not probably be materially increased before reaching it, or certainly to show that another and larger one was very near, and in that way to meet the argument (which defendant's counsel might make to the jury) that an expert and experienced engineer had never constructed one that would allow so much water to pass. Hawkins might have been asked, on cross-examination, with a view to impeach him or destroy the weight of his testimony as an expert, what the dimensions of the lower culvert were. Greenleaf on Ev., Vol. 1, sec. 468. But we think that the testimony of Hawkins tended to show that the defendant had not done the work in a negligent or unskillful manner, by impressing the jury with the idea that no larger culvert had ever been constructed, because an educated and intelligent contractor had not, in the years of experience that made him an expert, built one so large. This is only a fair inference from the testimony, and it would follow that testimony as to the location and capacity of the lower culvert must of necessity tend to remove the incorrect impression made by Hawkins' testimony, and in that way bear directly upon the question of negligence, involved in the first issue.

The testimony, offered to prove that the stagnant water engendered malaria and caused sickness, was withdrawn from the jury, and the exception growing out of its introduction was not insisted on in this Court.

Counsel for the defendant contends that there was error in the refusal to give the instruction prayed for in reference to contributory negligence, and in giving that substituted by his Honor for it. In-
(229) deed, in the argument in this Court counsel went further, and cited a number of authorities to establish the position, that this is a case in which, upon the undisputed facts, the jury should have been told there was contributory negligence on the part of the plaintiff.

The plaintiff, T. L. Emery, testified, that in the fall of 1885 his brickyard was overflowed, and in May, 1887, it was again submerged, and that the plaintiff suffered great damage, on both occasions, in the destruction of brick.

In reply to a question, he stated, as a reason why he again made brick at the same place, after the overflow in 1885, that the preparation of the brickyard had cost him a good deal of money, and the place selected was the only place suitable for making brick on the land.

It is insisted, that there was a want of ordinary care, shown by plaintiff, in manufacturing brick a second time in a place that had been overflowed nearly two years before.

If the jury had not found that there was negligence on the part of the defendant in response to the first issue, then, under the instruction of his Honor, it would have been unnecessary to proceed to consider the third, which involved the question of contributory negligence. So, we may assume that the jury agreed upon the affirmative answer to the first issue, before discussing the third.

We cannot, upon reason or authority, reach the conclusion that the plaintiff exhibited a want of ordinary care by manufacturing brick in the year 1887, because the brickyard had been damaged in 1885, nor that he was negligent in planting another crop in the latter year on land that had been overflowed two years before, for the reason that the defendant company, by the careless and unskillful construction of its road, in the failure to provide adequately for the escape of the water of the creek, even when there was no extraordinary volume, had subjected the plaintiff to some risk in raising the usual crops on the farm, or attempting to utilize the only suitable place for manufacturing brick on that tract of land. It is often difficult to determine when the (230) admitted evidence in a case crosses the shadowy line, and compels the court to take the case from the jury, and declare, as the law, that contributory negligence has been proven. The application of the rule, that when the facts are ascertained, the question, whether there has been negligence or contributory negligence, is one addressed exclusively to the court, is attended with difficulty, because it seldom happens that the material facts in any two cases are precisely the same. When there is any conflict in the testimony the courts will lay down the rules of law and define the standard of care necessary, but leave the jury to decide whether, under the circumstances, ordinary care was exercised by a defendant.

The defendant has no reason to complain that the court allowed the jury to apply, as the test, the abstract principle that the plaintiffs were bound to exercise that degree, and only that degree, of care which a man of ordinary prudence would exhibit in the management of his affairs, and refuse to sustain the unreasonable proposition that a prudent man must either allow his land to remain uncultivated, and his brickyard, with his investment for manufacturing, to be abandoned, or incur the risk of losing the fruits of his labor, because he had some reason to fear that, by the negligent construction of a culvert, the crop or the brick might be injured or destroyed. Wood on Railway Law, sec. 300, and notes.

The authorities cited by defendant do not sustain the position, either that the court erred in refusing to give the instruction asked, or in the failure to go further in that given, and tell the jury that the admitted facts were sufficient proof of contributory negligence. The authority to

which counsel refers us is not applicable to the facts of this case. Beach on Contributory Negligence, secs. 12 and 13.

(231) The same author says, section 162: "It is for the court to say, in a majority of instances, what is and what is not negligence, *as an abstract proposition.* When, therefore, *the facts* of a *given case* are *undisputed,* and the *inferences* or *conclusions* to be *drawn from* the *facts* indisputable—when the standard of duty is fixed and defined, so that a failure to attain it is negligence beyond a cavil, then contributory negligence is matter of law. When the *facts* are *unchallenged,* and are such that *reasonable minds* could *draw no other inference* or *conclusion from them* than that the *plaintiff was* or *was not* at fault, it is the province of the court to determine the question of contributory negligence as one of law." He cites Field on Damages, p. 519, to the effect that, "to justify a nonsuit on the ground of contributory negligence, the evidence against the plaintiff should be so clear as to leave no room for doubt, and all material facts must be conceded, or established beyond controversy." The learned author concludes that, "in a majority of cases, the question of the plaintiff's negligence will be one of fact, to be ultimately determined by a jury."

In *Detroit R. R. Co. v. Von Steinborg* (cited by the author), Judge Cooley says: "The case must be a very clear one, which would justify the court in taking upon itself this responsibility." . . . Speaking of the finding by the court that there was contributory negligence in any given case, the learned judge says further: "He thus makes his own opinion of what would be generally regarded as prudence a definite rule of law. It is quite possible that if the same question of prudence were submitted to a jury, collected from the different occupations of society, and, perhaps, better competent to judge of the common opinion, he might find them differing with him as to the ordinary standard of proper care."

The last exception grows out of the refusal to give the instruction asked, that "if the defendant has used its culvert, as it now is, since 1859, then the law presumes it has a grant to do so, and the

(232) plaintiff cannot recover." The injury resulting from the unskillful construction of culverts cannot be estimated as a part of the damage for right of way, and the grant from the landowner or the proceeding for condemnation, to which he and the corporation were parties, would not operate as an estoppel in an action brought by him for injury caused by the unskillful construction of culverts and consequent damage to land located beyond the right of way. The owner of adjacent land can, of course, resort to common law remedy for damage sustained by him in the overflow of his land, directly consequent upon such carelessness on the part of a railroad company in the construction.

Wood on Railway Law, sec. 253, Vol. 2, p. 876. His recovery can be defeated only by proof of a prescriptive right, acquired by user, to maintain the culvert in its present state, with the consequent injury. The right by prescription could be acquired by the defendant by user for twenty years, and the user, in order to raise the presumption of a grant from the quiet enjoyment of the easement, must have been such as to have subjected the claimant to an action any time for twenty years before his right to the easement was controverted by the bringing of this action. The defendant must show, too, in order to establish his right to the easement, "that the user, at the time when the action was brought, was not substantially in excess of that which he had exercised during the period requisite to the right." *Sherlock v. Railway Co., supra.* To apply that rule to this case, the burden is on the defendant to show, not that the overflow has constantly extended over a fixed territory on the plaintiff's land or varied only with the water-mark for twenty years, but that at *regular* or *irregular* intervals the water has overflowed the very land on which the bricks were destroyed or the crops injured, and to the very same extent, so as to have made the defendant liable in an action for or in the nature of trespass, by the *feme* plaintiff and those under whom she claims, at any time during that period.

The floods occurring at intervals must have always covered (233) the land on which the crops were raised, or the bricks were made, in order to establish an easement, that would prove available as a defense to the one ground of action or the other. Wood on Lim. of Actions, sec. 182, p. 377; *Sherlock v. Railway Co.* (and Reports); Northwestern Reporter, Vol. 17, No. 2, p. 171.

The defendant has not attempted to establish the prescriptive right, by offering any testimony to show that the land has been overflowed. So far as we can judge from the report of the evidence, which does not purport to be full, there was no proof offered as to the nature or extent of the overflow, except that offered by plaintiff in support of his demand for damage, and covering only three years prior to the bringing of the action. The proof by the plaintiff, that ordinary rains, for four years prior to the bringing of the action, had been sufficient to cause the overflow of the brickyard and the cultivated land of the *feme* plaintiff, does not supply the omission of the defendant company, or relieve it of the burden. It does not follow that the overflow has been uniform so as to subject the company to an action in favor of those under whom she claims, for the previous time, extending back twenty years; for changes in the system of drainage by landowners above, and the clearing of lands, might have increased the volume of water in the creek and caused it to overflow more readily. But such alterations would not have relieved the defendant company of liability resulting directly from the

insufficiency of its culverts to discharge the water. No such testimony having been offered by the defendant, the complaint, that his Honor left the jury to pass upon the question whether an easement had been acquired, ought not to come from it.

We conclude, therefore, that there was no error, and the judgment must be affirmed.

No error. Affirmed.

(234)

T. L. EMERY AND WIFE v. THE RALEIGH AND GASTON RAILROAD COMPANY.

Petitions to Rehear may be filed during Term at which the Case is decided—The Code, Secs. 966, 968; Ch. 41, Laws 1887.

Sections 966 and 968 of The Code are *in pari materia*, and must be construed together. As section 968 has been amended by chapter 41, Laws 1887, so as to require the decisions of the Supreme Court to be certified to the lower courts during the term, thus placing them beyond the control of this Court in term time, the reason for requiring petitions to rehear to be filed only in vacation (as is done by section 966) has ceased, and such petitions may now be filed during the term at which the opinion is filed. In amending section 968 the Legislature also amended section 966, and modified the rule of the Supreme Court regulating petitions to rehear.

AFTER the decision of this case at this term the defendant moved the Court to direct that the certificate of the decision of affirmation should not be certified to the court below until the end of the term. The motion was denied for reasons stated in the opinion.

MERRIMON, J. At the present term the judgment appealed from in this case was affirmed more than ten days next before the first Monday in the present month (April), and the defendant, by motion, asks the Court to direct that the certificate of the decision of affirmation shall not be sent to the Superior Court until after the end of the term, to the end it may, in vacation, file its petition to *rehear* and apply for an order to restrain the issuing of an execution, as allowed by the statute (The Code, sec. 966).

We think this motion unnecessary, because the defendant can at once file its petition to *rehear*, and if a *Justice* of this Court shall "endorse thereon that, in his opinion, the case is a proper one to be reheard," as allowed by Rule 12, sec. 2, it will be docketed, and application
(235) can then be made for an order to restrain the issuing of execution, or the collection of the same if issued.

The statute (The Code, sec. 968) provided that "the Clerk (of this Court) shall, immediately after the rise of each term thereof, transmit, by some safe hand, or by mail, to the clerks of the Superior Courts, certificates of the decisions of the Supreme Court in cases sent from said court," etc. This statutory regulation has been amended by the statute (Acts 1887, ch. 41), so as to require the Clerk of this Court to so transmit the decisions thereof "on the first Monday in each month . . . which have been on file ten days." This amendment also affects and modifies the statute (The Code, sec. 966), which prescribes that "a petition to rehear may be filed during the vacation succeeding the term of court at which the judgment was rendered, or within twenty days after the commencement of the succeeding term," etc. The two sections (968 and 966) cited are *in pari materia,* and must be construed together; as by the former the certificate of the decisions of this Court were required to be transmitted to the Superior Court after the term ended, the latter provided that a petition to rehear might be filed at any time in vacation, and the petitioner had opportunity to apply for an order to restrain the issuing of execution, or the collection of the same if issued. This regulation has been changed, as above indicated, so that such certificates must be sent to the Superior Courts, on the first Monday in each month, of all decisions that have at that time been on file ten days; and thus, ordinarily, the decisions pass beyond the control of this Court in term-time, with the same effect as formerly they did after the end of the term. The reason why, formerly, the petition to rehear was filed in vacation, seems to have been, that during the term the decision was *in fieri,* and the court could correct errors without a rehearing; it could not after the term, because, then, the case had passed beyond its control, and hence an application to rehear became necessary. (236) As now the case passes beyond the control of the Court during the term, the statute (The Code, sec. 966) allowing a petition to rehear is in effect correspondingly so changed as to allow it to be filed in term-time after the time the certificate of the decision is required by law to be transmitted to the clerk of the Superior Court. Otherwise a material part of the statutory provision last cited would, or might be, defeated. There is no just reason why this should be so, nor did the Legislature so intend. In amending one of the two sections cited, it amended both, and as well modified the *rule* of this Court applicable in such cases.

The motion must therefore be denied.

Motion denied.

Cited: Brown v. Mitchell, 102 N. C., 368; *Lineberger v. Tidwell,* 104 N. C., 510; *McAdoo v. R. R.,* 105 N. C., 151; *Emry v. R. R., ibid.,* 48; *Mfg. Co. v. Assurance Co.,* 106 N. C., 49; *Bonds v. Smith, ibid.,* 564;

Boyer v. Teague, ibid., 683; *Denmark v. R. R.,* 107 N. C., 187; *Everett v. Williamson, ibid.,* 210; *Sherrill v. Connor, ibid.,* 638; *Braswell v. Johnston,* 108 N. C., 151; *Carey v. Carey, ibid.,* 271; *Waller v. Bowling, ibid.,* 478; *Adams v. R. R.,* 110 N. C., 330; *Knight v. R. R.,* 111 N. C., 83, 86, 87; *Blackwell v. R. R., ibid.,* 153; *Bass v. Nav. Co., ibid.,* 456; *Carr v. Alexander,* 112 N. C., 789; *Redmond v. Mullenax,* 113 N. C., 510; *Smith v. R. R.,* 114 N. C., 763; *Downs v. High Point,* 115 N. C., 186; *S. v. Suttle, ibid.,* 789; *Fleming v. R. R., ibid.,* 693; *Springer v. Shavender,* 116 N. C., 19; *Patton v. Garrett, ibid.,* 855; *Blue v. R. R., ibid.,* 960; *Pickett v. R. R.,* 117 N. C., 637; *Little v. R. R.,* 118 N. C., 1078; *Ridley v. R. R., ibid.,* 1006; *Turner v. Lumber Co.,* 119 N. C., 401; *Purcell v. R. R., ibid.,* 738; *Parker v. R. R., ibid.,* 685 *Williams v. R. R., ibid.,* 750; *Williams v. Gill,* 122 N. C., 968; *Staton v. R. R.,* 147 N. C., 441; *Davenport v. R. R.,* 148 N. C., 293; *Rich v. Morisey,* 149 N. C., 41; *Power Co. v. Navigation Co.,* 152 N. C., 493; *Williamson v. Rabon,* 177 N. C., 305; *Shaw v. Greensboro,* 178 N. C., 428; *S. v. Kincaid,* 183 N. C., 718; *Moss v. Knitting Mills,* 190 N. C., 646.

W. H. HUGHES, EXECUTOR, v. F. L. HODGES.

Jus Disponendi—Homestead—Constitution, Art. X.

1. The *jus disponendi* is a vested right, protected by the Constitution of the United States, and by Article I, section 31, of the Constitution of this State; and is restricted only by provisions for dower and homestead, which restrictions must be so construed as to carry out the kindly purpose for which they were created, with no more restraint on the power of alienation than is necessary to make them effectual.

2. An unembarrassed owner of land, no matter when the land was acquired, can convey the same, absolutely, or by way of trust or mortgage, free of all homestead rights, without the assent of his wife, except in the following cases: (1) Where the land in question has been *allotted* to him *as a homestead,* either on his own petition or by an officer, in accordance with law; (2) where no homestead has been allotted, but there are judgments against him which constitute a lien on the land, and upon which execution might issue and make it *necessary to have his homestead allotted;* (3) where no homestead has been allotted, but he has made a mortgage, reserving an undefined homestead, which mortgage constitutes a lien on the land that could not be foreclosed without allotting a homestead; (4) where the conveyance is fraudulent as to creditors, and no homestead has been allotted in other lands.

3. If a husband make a fraudulent conveyance of his land (the wife not joining in the deed), the proceedings of creditors to have the deed vacated

inure to the benefit of the fraudulent grantor's family, because the creditors ultimately subject the *reversion* to the payment of their demands, while the wife and children of their debtor get the *homestead* in the land.

4. The mere fact that a man owes debts does not disable him from conveying his lands (free of all homestead rights) without the joinder of his wife, unless the deed be executed with intent to defraud his creditors, and no homestead has been allotted to him.

By MERRIMON, J., dissenting. The Constitution, Art. X, by its express terms, as well as the spirit which pervades it and the judicial interpretation of it for the last twenty years, not only secures a home to an insolvent debtor and his family beyond the reach of the final process of a court, but goes further, and protects and secures to the wife and children a homestead estate in the lands of the husband and father independent of any actual allotment or defined location of the homestead. This homestead estate is protected against the reckless alienation of an improvident or vicious husband and father, by section 8, Article X, of the Constitution, which makes the joinder of the wife essential to every conveyance by a married man in order to pass title to his lands free of the right of homestead. This is true whether such land has been actually set apart and allotted as a homestead or not.

(The above is applicable, of course, to lands acquired since the Constitution of 1868, and to such lands, acquired before 1868, in which the husband has had a homestead *allotted.*)

PLAINTIFF'S APPEAL.

THIS was a civil action, heard before *Graves, J.*, at the Spring Term, 1888, of the Superior Court of NORTHAMPTON County.

The plaintiffs are the executor and heirs at law of Samuel Calvert.

On 8 January, 1876, defendant executed three notes of that date, but falling due in one, two and three years after date, pay- (238) able to said Samuel Calvert, and at the same time executed to said Calvert a mortgage deed, conveying thirty-five acres of land in Northampton County, to secure the payment of said notes. This action was brought to foreclose.

At the time when the defendant executed the mortgage deed (8 January, 1876), he owned no other land, except the tract conveyed in said deed, and another tract of two acres, both of which, together, are not worth one thousand dollars. The defendant acquired title to one undivided half interest in said land, in the year 1865, but did not become the owner of the other half until the ..... day of ....., 1876.

The defendant was first married in 1873, and his first wife was living on 8 January, 1876, but did not join in the execution of the deed. She died in the year 1881, and he married a second wife in the year 1882. This action was brought in June, 1879, after the last of said notes became due.

The defendant contended that the deed, or writing purporting to be a deed, executed by the defendant, on 8 January, 1876, was void, as a conveyance, and that no interest in said land passed by said deed.

The plaintiffs insisted, on the other hand, that the deed was valid without the joinder of the wife in its execution, and vested the title to the whole of said land in fee simple in Samuel Calvert, subject to the trusts set forth therein.

The court adjudged that the defendant and all persons claiming under him be "foreclosed of all equity of redemption in and to the reversion in the land mentioned in the complaint," after the termination of the homestead estates, and ordered that a commissioner sell the re-
(239) version, unless the debt adjudged to be due from defendant should meantime be discharged.

Both plaintiffs and defendant appealed, and both cases are considered together, the appeal of plaintiffs being the first in order.

T. W. Mason for plaintiff.
R. B. Peebles for defendant.

AVERY, J., after stating the case: When we approach the consideration of the question, whether the organic law or the statute law shall be so construed as either to preserve unimpaired or to greatly restrict the right of the citizen to alien his own land, it is wise to recur to the fundamental principles embodied in our State and National Constitutions, or the elements of the common law that have proven consistent with the genius of our institutions.

Every citizen has the right to enjoy the fruits of his own labor, and when his earnings are invested in land, the rule is that he acquires with the title the incidental right of absolute and unrestrained alienation. The few instances in which the law has trammeled the citizen in the exercise of this power, in order to reach some beneficial end, are the exceptions that establish instead of destroying the rule. The *jus disponendi,* subject only to the exceptions hereafter mentioned, is a vested right, protected even against hostile State legislation, by that clause of the Constitution of the United States which prohibits the enactment of any law impairing the obligations of a contract. *Bruce v. Strickland,* 81 N. C., 267.

In our Declaration of Rights (Cons., Art. I, sec. 31), more than a century since, perpetuities were coupled with monopolies, and denounced as "contrary to the genius of a free State."
(240) This was followed by the act, passed in the same spirit, which converted a fee-tail estate in its very inception into a fee-simple,

with the incidental right to sell, and with the avowed object of attaching the absolute *jus disponendi* to the estate created.

It has been repeatedly declared to be sound public policy to remove every obstacle to the ready sale of real estate upon the market, in order to benefit commerce and thereby promote general prosperity. It was in furtherance of this object that our General Assembly, but a few years since, so altered our registration laws that persons proposing to purchase land could be well advised as to the title by a careful inspection of the public records.

This leading purpose is subordinated, however, to two wise provisions for women and children—dower, a creation of the common law, and the homestead, which is imbedded in the organic law; but, while the humane exemption clauses of the Constitution have found favor with the courts, they have been carefully so construed as to carry out the kindly purpose for which they were created, but to restrict alienation only so far as is necessary to effectuate that object.

If we will bear in mind, in the progress of this discussion, how essential to the protection of the rights of the citizen and how important to the promotion of commercial prosperity it is to guard well the right of alienation, and to restrict it only so far as is necessary in order to extend the blessings of a homestead to those for whose support it was intended, we will find it a beacon-light to guide us safely through the mazes of conflicting authorities, emanating from more than a score of appellate courts, when the true way to steer through the sea of doubt and perplexity might otherwise be obscured. What was the legislative intent in enacting laws providing for the exemption of homestead and fixed amounts in value of personal property from sale under execution? A few definitions of a homestead given by the different courts of the Union will show what they have declared was the object of (241) the law-making power in enacting them.

The homstead law was called by the Supreme Court of California "a beneficent provision for the protection and maintenance of the wife and children against the neglect and improvidence of the father and husband."

This Court has declared that the purpose was to provide every man a home for his wife and children. *Jacobs v. Smallwood,* 63 N. C., 112.

We must acknowledge that there is some conflict between *Adrian v. Shaw,* 82 N. C., 474, and the authorities there cited *(Gheen v. Summey,* 80 N. C., 187, and *Lambert v. Kinnery,* 74 N. C., 348), on the one hand, and the cases of *Hager v. Nixon,* 69 N. C., 108, and *Mayo & Parker v. Cotten,* 69 N. C., 289, on the other; and the inconsistency of the authorities as to the true interpretation to be given to section 8, Article X, must be removed, either by modifying the abstract rule laid down in

Adrian v. Shaw, supra, or by directly overruling the plain principle announced in *Mayo v. Cotten* as the only safe solution of all the cases that might depend upon the true meaning of the restriction contained in said section.

In *Gheen v. Summey, supra,* the Court says: "It is the settled construction of this Court that the homestead right is a quality annexed to land whereby an estate is exempted from sale under execution for a debt, and it has its force and vigor in and by the Constitution, and is in nowise dependent on the assent or action of the creditor; and therefore it results, as has been expressly held, that the action of the sheriff, in assigning the same by metes and bounds, is not needed to any extent to vest the title, but merely as finding the *quantum,* so as to enable him to ascertain the excess, if any, and levy on and sell it."

The only question that arose out of the facts of that case was, whether a previous appeal by the judgment creditor to the township board of trustees (under Bat. Rev., ch. 55), to have a new allotment of
(242) homestead afterwards, to satisfy a debt created before 1868, the creditor having sold the excess previously and soon after allotment. Only the constitutional construction established by *Edwards v. Kearsey* was involved in the case, and therefore the definition of the homestead given was *obiter.* So much of the definition as is taken from *Littlejohn v. Egerton* is not inconsistent with the principle laid down in *Mayo v. Cotten;* but in the later case of *Adrian v. Shaw,* the Court not only repeated the definition given in *Gheen v. Summey* (the latter part of which was taken from *Lambert v. Kinnery),* but added to the definition another quotation, in substance at least, from the latter case, as follows: "Title to the homestead can only be divested in the mode prescribed in section eight, Article X, of the Constitution."

As we shall see presently, the facts did not in either case warrant the giving of any general definition of a homestead, and that given was unnecessary.

In *Adrian v. Shaw,* the facts were, that one Jackson and wife joined (with privy examination of the wife in proper form) in conveying, on 22 April, 1872, the only tract of land that Jackson owned, and which was worth less than one thousand dollars, but no homestead had been laid off in the land. Jackson and wife left the State, and, after they had left, execution issued in 1874 on a judgment docketed 20 November, 1871, against Jackson, in the county where the land was located. The plaintiffs, Adrian and Vollers, purchased at the execution sale, and the question presented and decided was, whether the deed of Jackson and wife conveyed any estate in the land to the grantee, and whether Adrian and Vollers had a right to recover possession from the grantee of Jackson and wife.

The Court held that Shaw took, under the deed from Jackson and wife, an estate, at least for the life of Jackson, because the sale was made subject to the right of a judgment creditor, who already had a lien upon the land, with the incidental power to have the (243) homestead allotted in it, and sell the excess, if any.

In *Lambert v. Kinnery,* the facts were, that a sheriff sold all of the land of a debtor without having a homestead assigned him in it, and the plaintiff was the purchaser at execution sale. It was also in evidence that the defendant (the debtor) had declared at the courthouse door, while the sheriff was selling the land, that it did not belong to him, but to another. The case, therefore, involved both the question, whether the homestead right could be surrendered by the owner by estoppel *in pais,* and whether the sheriff could defeat the right by refusing to allot. The idea, therefore, that the homestead right so vested, by operation of law, in every owner of land, that it could not be divested except by a conveyance executed in accordance with the provisions of section 8, Article X, must have been advanced with a view to the facts of that case only, because, to accept and interpret the language literally, and apply it to all cases, would lead us into many contradictions, not to say absurdities.

Unless the language of the Court in *Adrian v. Shaw,* interpreted in its broadest sense, shall be held to bind this Court to a construction of the Constitution fraught with consequences so serious, we are still at liberty to consider and determine whether section eight, Article X, of the Constitution, deprives the husband of the power to convey an unascertained homestead, when not subject to any lien, as well as one already laid off, either on petition of his own, or by an officer who has an execution in his hands.

The case of *Littlejohn v. Egerton* was twice before this Court; so far from justifying the limitation which is contended for by the defendant, upon the power of sale on the part of the husband in a case like this, the facts and the reasoning of the Court in both cases tend rather to sustain the opposite view of the case. In the first (244) appeal (76 N. C., 468), it appeared that the homestead had been first allotted, so as to cover a portion of Littlejohn's land, and the excess was sold to satisfy executions in favor of his creditors, and subsequently that Littlejohn consented to the sale of the homestead, and that his conduct at the time of, and his language in reference to it, were such as to amount to an estoppel *in pais.*

The Court held that he could not waive his right of homestead in favor of his creditors, except by a deed in which the wife should join with privy examination.

In the second appeal (77 N. C., 379), a doubt was suggested whether Littlejohn's homestead had been laid off so as clearly to define it by metes and bounds.

The Court held that *"the right of homestead* was a quality annexed to land (like a condition) whereby an *estate is exempted from sale under execution for debt, and cannot be defeated* by failure of the sheriff to have the homestead laid off by metes and bounds."

The two cases presented singly the two points that had been decided in the case of *Lambert v. Kinnery, supra,* at one view.

All of these rulings looked to the beneficent end of protecting the home of the family, when the husband or father was embarrassed with debt and pursued by his creditors, either against his own improvidence or the misconduct of officers. The homestead right would be worse than a delusion if it could be defeated by language, used either by accident or design, by the drunken or reckless owner, or by the arbitrary refusal of an officer to have it ascertained by metes and bounds.

But the question fairly presented, by both appeals in this case, is not whether the owner of an unallotted homestead can always, by a conveyance executed without the joinder and privy examination of his
(245) wife, defeat her right or that of his children to a homestead in the land, but whether he has the power to alien all of his land before a part or the whole is designated by law as an actual homestead, subject to the dower right of the wife, and, where the husband is free from debt, to no other incumbrance.

In *Hager v. Nixon, Justice Rodman,* for the Court, says: "It seems that the idea of a homestead which the framers of the Constitution had in mind, was ownership and occupancy of land extempted from execution obtained on any debt during the life of the owner. To this original conception was added a continuance of the exemption during the minority of any one of the owner's children; and if he died leaving *no* children, but a widow, the exemption continued during her life. The idea apparently was, that the exemption should attach to the property of the owner, or some part of it, during her lifetime."

We infer this from section 3, Article X, of the Constitution: "The homestead, after the death of the owner thereof, shall be exempt from the payment of any debt during the minority of the children, or any one of them." It is implied, that the ancestor had been owner of the homestead, by which, in this connection, *must be meant a part of his property set apart and designated as exempt and not* merely land occupied and *owned by him.* And so section 5, Article X, Constitution, is as follows: "If the owner of a homestead die, leaving a widow, but no children, the same shall be exempt from the debts of her husband, and the rents and profits thereof shall inure to her benefit during her widowhood, unless she be the owner of a homestead in her own right."

"The whole design of the Constitution, so far as can be gathered from Article X, *was to exempt property of a debtor to a certain value* from execution. . . .

The purpose of a homestead law is to regulate between a debtor and his creditors, and to affect other interests, incidentally only, and to the least possible degree consistent with its main purpose."

No explanation is needed for quoting so extensively from that (246) opinion, as it has a broad foundation for the rule that is decisive of this case. A landowner who is not in debt may convey his land, that has never been allotted to him as a homestead, without the joinder of the wife in the deed, subject only to her right of dower, if she survive him, but free from any restriction growing out of the provisions of section eight, Article X, of the Constitution, whether his land was acquired or his marriage was celebrated before or after the Constitution of 1868.

The main purpose being to protect the family against the creditor, why should the law needlessly interpose, with mailed hand, when a thrifty man, who owes nothing and holds his land unincumbered, attempts, it may be, to realize a handsome profit by a sale to one who is willing to incur the risks of the survivorship and incident rights of the wife, or to allow a satisfactory discount for such risks?

While both live, a dutiful wife can compel her husband, if he have means, to support her according to her station in life; and if she survive him, any land of which he was seized during coverture is subject to her claim of dower.

If the husband make a fraudulent conveyance (the wife not joining in the deed), the proceeding of the creditor to have the deed vacated inures to the benefit of the family, because the creditor ultimately subjects the reversion to the payment of the debt, while the wife and children of the debtor get the homestead in the land. The validity of the husband's conveyance is, therefore, subject also to the restriction, as all deeds should be, that it shall be made in good faith. *Crummen v. Bennett,* 68 N. C., 494; *Arnold v. Estis,* 92 N. C., 162. But in *Mayo v. Cotten* the question presented was, whether the owner had the right to select his homestead in any land for which he had title. After declaring that the owner might, under the Constitution, locate his homestead, without any restriction, in any tract of land owned by him, the Court says in that case, what seems to be decisive, in the very (247) plainest terms, of both appeals brought up in this action: "Neither is it material that the wife of the defendant did not by deed assent to his receiving a homestead in the Swamp place. *Section 8, Article X, of the Constitution, applies only to a conveyance of the homestead after it is laid off."*

After deciding that the husband might determine, as between the different tracts of land, the location of the homestead without the assent of the wife, the Court went further and construed section 8 to apply only to allotted homesteads, evidently having in view the possible difficulty

that might grow out of conceding to the owner the power to select as between a number of tracts of land, and determine in which one his homestead should be marked out. Suppose the owner, being free from debt, should convey all of his land, including a dozen tracts, any one of which was worth more than a thousand dollars, and to a dozen different persons, but his wife should fail to join in the conveyances to any one of the grantees, and no homestead had been allotted. Suppose, then, that he should invest the proceeds of the sale in a dozen other tracts of land. If financial misfortune then overtake him, surely it would not be contended that all of the conveyances were void, or even that they were effectual to pass only the reversionary interest. He could not take a homestead in all of the tracts, and it would be absurd to allow him to incumber a particular one, at his option, and in the face of his own deed.

The only safe rules as to the meaning of section 8, Article X, Constitution, must be deduced chiefly from the two cases last cited. When there is *no* creditor there is no reason for restricting the owner in the sale of land, not allotted as a homestead, by any construction placed upon that section, because the whole plan of homestead exemptions was formed for the purpose of affording protection against debt. But it does not follow, from the mere fact that a man owes debts, that section 8, Article X, of the Constitution, is to be construed to disable him
(248) from conveying his land without the joinder of his wife, unless the deed was executed with intent to defraud his creditors, and no homestead has been allotted to him, or unless the land conveyed by him is subject to a lien of a judgment or a mortgage reserving the homestead right, that cannot be enforced without allotting a homestead, in order to ascertain and subject to sale the excess.

The rule stated in *Mayo v. Cotten* is so far modified, therefore, as not to apply when the owner of land is embarrassed with debt and his land is subject to be sold to satisfy a lien. It was not the intention of the framers of the Constitution to restrict the rights of thrifty and successful men, who ask and need no such interference in their affairs. Hence, when the sheriff holds executions against a debtor, the latter will not be allowed, ignorantly or by collusion with the creditor, to conclude himself from the right to claim a home by the use of any mere words. It was never intended that an effectual estoppel should be so created, and allowed so easily to defeat the leading purpose apparent in Article X of the Constitution—the protection of the debtor's family.

The ideal homestead, created by the Constitution and located by proceedings under the statute, is born of financial embarrassment, and exists as to any given body of land only when the creditor can arm the

sheriff with power to sell it to satisfy a judgment; or a mortgagee, holding subject to an express reservation of the right of homestead in the land mortgaged, has the right to foreclose, and what is exempt has not already been located as the law prescribes; or, where the debtor has executed a deed to land with intent to defraud creditors, and has no homestead allotted to him in other lands. The Constitution does not annex the quality to the land, of one who is free from financial embarrassment, for the right operating, as it does, to exempt an estate from sale for debt—must of necessity be the creation of debt.

In *Markham v. Hicks,* 90 N. C., 204, this Court held, that the (249) effect of the assignment of a homestead was simply to attach to an existing estate the quality of exemption from sale under execution, and the designation of the homestead right as "a quality annexed to the land, whereby the estate is exempted from sale under execution," was an inadvertent and inaccurate expression, in so far as it conveyed the idea of carving new estates out of the land of the debtor. But, in either view of the nature of the homestead right, there can be no doubt that it relates to and grows out of debt, and exempts land from sale under execution for debt. The definition given in *Littlejohn v. Egerton* has been repeated only because it still stands as a part of the later definition given in *Adrian v. Shaw* and *Gheen v. Summey.* We cannot reconcile the decisions in all the cases cited, upon any other principle than this. In corroboration of this view, we find that not only was it held by this Court that the Constitution allowed the owner to determine where the homestead should be laid off, but it has been expressly held, that where land was acquired by a husband, and the marriage was celebrated before the Constitution of 1868 was ratified, the husband had a vested right in the land and could convey it without the joinder of the wife, unless the husband has either had the homestead allotted, on his own petition, or it has been laid off by an officer according to law. *Bruce v. Strickland,* 81 N. C., 267; *Sutton v. Askew,* 66 N. C., 172; *Castlebury v. Maynard,* 95 N. C., 281; *Gilmore v. Bright,* 101 N. C., 382.

In the case of *Lee v. Mosely,* 101 N. C., 311, this Court held that a homestead in land in this State would be deemed abandoned by the owner if he should move his residence to another State, and the Court were united as to that view. The case is cited merely to call attention to the fact that a right of homestead can be abandoned without a deed, in which the wife joins with privy examination, and if the rule stated in *Adrian v. Shaw, supra,* is to be taken literally and construed to mean that all land vests in all cases, without exception, before (250) allotment as a homestead, and "can only be divested in the mode prescribed in section 8, Article X, of the Constitution," then a change

of residence to another State, not being the mode prescribed in said section, would not have divested the right of homestead out of the claimant in that case.

Moreover, if we accept the theory, in its broadest sense, that the law so vests a right of homestead in every man who holds title to land, that it cannot be divested except in the manner prescribed in said section, it would follow that the owner would be compelled to marry and procure the joinder of his wife, with privy examination, in order to make a valid title to a purchaser of his land, because he could not otherwise comply with the rule literally construed and enforced.

It would astound the members of the legal profession, and the people of the State generally, to be informed that a phrase, apt to be repeated inadvertently, even by courts, because it is concise and euphonious, though uttered heretofore unnecessarily, will be adhered to, with the result of making utterly void every deed that has not the sanction of a wife. It would seem consonant with reason, as well as the express authority of *Hager v. Nixon* and *Mayo v. Cotten,* to construe the language quoted in *Adrian v. Shaw,* and *Lambert v. Kinnery,* in the qualified sense we have suggested as the true meaning. As between the creditor having a lien, on the one side, and the debtor and his family on the other, the Constitution does not create *a right to a home* for the benefit of the debtor's family in his lands—a home that may never be marked out by metes and bounds. The debts may be discharged before the homestead is allotted, and then the inchoate right, as applied to the debtor's land, no longer exists. But when the creditor reduces his claim to judgment, the law places him and the debtor at arm's length, and frustrates every effort of either to evade the section of the Constitution, that gives the
(251) wife the veto power, by requiring an allotment of the homestead as antecedent to any sale, and her assent, with privy examination, before the improvident husband can dispose of it; so, if the debtor sells to defraud his creditor, when the latter moves in the court to set aside his deed, and subject the land to his claim, the Constitution gives first the right to an undefined homestead, and the law, made in pursuance of the Constitution, ascertains its bounds so soon as he seeks to sell.

Until the owner contracts debts, there can be no undefined homestead right, attaching to his land, and, unless his homestead has already been allotted, section 8, Article X, of the Constitution, does not restrict his power to convey. If, however, the homestead has once been laid off at the instance of creditors, though the debts may be discharged, the restriction remains, and renders the joinder of the wife essential to a valid conveyance of it. The definition given in *Adrian v. Shaw* must be considered as modified and restricted in its application, so as to conform to

the views we have expressed in this opinion. The defendant conveyed his land by mortgage deed, to secure money (loaned to him on the land, as we infer). Until proof to the contrary is offered, the presumption is in favor of this power to convey, and the defendant offers no evidence of the existence of a debt in judgment against himself. For the purpose of this discussion there can be no difference between a mortgage and an absolute deed. His first wife, who was then living, did not join, and did not, therefore, convey her right to dower, had she survived her husband. But she died in 1881, and it is not necessary to discuss the rights of the defendant's second wife. It is sufficient to say, that neither she nor any other person can be allowed a homestead in the land. No homestead having been allotted before the deed was executed in 1876, or since, the deed of the defendant to the plaintiff's testator was valid, and passed the land to the grantee for the purposes mentioned therein, subject only to a contingent right no longer hang- (252) ing over it.

We therefore hold that the judge erred in ordering the sale of the reversionary interest, and should have adjudged that the entire interest, instead of the reversionary interest only, be sold, unless the debt should be paid by the time mentioned.

In the plaintiff's appeal there was error. Let this opinion be certified, to the end that the judgment may be modified.

Error. Modified.

MERRIMON, J., dissenting: I cannot concur in so much of the opinion of the Court in this case as declares and decides that a resident of this State, having a wife, and land in which he has a homestead, can make a valid sale and conveyance thereof, not subject to but divested of the right of homestead therein, "without the voluntary signature and assent of his wife, signified on her private examination according to law," if such sale and conveyance shall be made *before* the homestead shall be valued and laid off as prescribed by the statute; nor in the interpretation given of numerous decisions of this Court cited in the course of the opinion, some of which I will advert to presently.

The Constitution (Art. X, secs. 2, 3, 5, 8) provides as follows: "Every homestead, and the dwellings and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof, or, in lieu thereof, at the option of the owner, any lot in a city, town or village, with the dwelling and buildings used thereon, owned and occupied by any resident of this State, and not exceeding the value of one thousand dollars, shall be exempt from sale under execution or other final process obtained on any debt. But no property shall be exempt from sale for taxes or for payment of obligations contracted for the

purchase of said premises. The homestead, after the death of
(253) the owner thereof, shall be exempt from the payment of any debt during the minority of his children, or any one of them. If the owner of a homestead die, leaving a widow, but no children, the same shall be exempt from the debts of her husband, and the rents and profits thereof shall inure to her benefit during her widowhood, unless she be the owner of a homestead in her own right. Nothing contained in the foregoing sections of this article shall operate to prevent the owner of a homestead from disposing of the same by deed; but no deed made by the owner of the homestead shall be valid without the voluntary signature and assent of his wife, signified on her private examination according to law."

Thus, *the homestead exempt from such sale for the time specified,* is created, defined with particularity and much in detail, and is given and secured to every resident in this State, if he shall have a homestead. Nothing is left to statutory regulation, except to prescribe how it shall be valued and laid off.

Unquestionably, the makers of the Constitution had the power and authority to make such an organic provision, and they were the judges of the propriety and expediency of it. It seems to me that the plain purpose and effect of it was to create and give directly to every resident of this State the right to have his homestead—the place where he lives or might select to live—in the measure and way and for the time prescribed, "exempt from sale under execution or other final process obtained on any debt," and that such right attaches to any land he may have as homestead, when and as soon as he has the same, and, having attached to the land, it remains and runs with it, and the latter cannot be divested of it while the owner continues to be a resident of this State, until the wife, if there be one, shall give her assent to a conveyance of it to some person, by the owner thereof, in the way prescribed. It is not contem-
plated or intended that such right shall arise and spring into
(254) active operation, and have force and effect only when the owner of the homestead shall be in debt, or when there shall be docketed judgments against him, or when executions shall be going against his real property, but it arises presently out of and continues to exist and run with the land, as indicated per force of the Constitution, whether the owner is in debt or not, ready at all times to serve, and at all times serving, the beneficent purpose of preventing the sale of the homestead, as defined, under such legal process as that mentioned, whenever and however the occasion for such active prevention may arise or come about. The right of exemption ever accompanies and attaches to the homestead as defined by the Constitution, and the title of the owner to it can pass, when he has a wife, only with her assent signified in the way prescribed.

It is not true that the homestead right is operative and beneficial only when the owner is in debt, or pressed by "final process, obtained on any debt." It is ever operative; the owner, though he might owe nothing, and be possessed of great wealth, has it; his wife and children have the benefit of it, and he could divest himself of it only with the assent of his wife. He might have it valued and laid off to him, at any time, though ordinarily he would not do so. The statute (The Code, sec. 511), so expressly provides.

A leading and important feature of the purpose is, when the husband has a wife, to secure the benefit of the homestead to her and the children of the marriage against the possible reckless trading adventures, improvidence and dissipations of the husband. It is not intended that he shall have power as to the homestead, to deprive his wife and children of a home. Justice and sound public policy forbid that he shall have unrestricted power to do so. Hence, the broad and strong provision, that "no deed made by the owner of the homestead shall be valid without the voluntary signature and assent of his wife, signified on her private examination according to law."

While the wife lives the husband can make no valid sale of the (255) homestead without her assent so given; and it makes no difference whether the homestead has been valued and laid off or not, as provided by the statute, because the homestead exemption from such sale is given by the Constitution and not by the statute. The latter is only in aid of the former, and its purpose is simply to locate and ascertain where the homestead is, its value and boundaries. The limitation upon the husband's power to sell it without the wife's assent is very broad and comprehensive. The words employed are, "no deed made," etc., implying no sale of it shall be valid without her assent. There is nothing in the Constitution, nor in the statute, that, in terms or by the remotest implication, gives the husband power to sell it without the wife's assent before it is valued and laid off to him; but there are words of inhibition and limitation upon his power, strong and broad as they can be. It is not provided particularly that he may sell it before or after it is valued and laid off, without her consent, but that he shall not sell it at all without her consent.

In view of the important purpose to be subserved by such limitation upon the husband's power of sale, can any good and substantial reason be assigned why he should be, by implication, allowed to sell it without the wife's assent before it shall be valued and laid off? I can conceive of none whatever; but I can readily suggest grave ones why he should not be allowed to do so. He may not be embarrassed and his homestead imperiled by docketed judgments and executions—he may be free from debt, but he may be a reckless, adventurous trader; he may be improvi-

dent and hazard his home on a single transaction; he may be dissipated, drunken, a desperate gamester, and turn his wife and children out of doors, homeless, upon the turn of a die or the result of a game of cards. This he might, could, accomplish if he could sell and convey the homestead without the wife's assent. He might wilfully refuse to have (256) his homestead valued and laid off to him, to the end he might sell it, untrammeled by the wife. Such a man would have a motive more or less controlling, impelling him to refuse to do so. The very purpose of the limitation is to cut off, as far as practicable, such possibilities—to protect the wife and children against such husbands and fathers; and they may, would, often need such protection as certainly before as after the homestead shall be valued and laid off.

It is a serious mistake to conclude that the homestead provision is intended simply to protect the debtor and his family against the creditor—it as certainly intends further to protect the wife and children against the shortcomings of the reckless, unworthy husband and father. The second section of the article of the Constitution recited, creates, defines and gives the right of homestead, and protection as to it, against the creditor; the eighth section thereof affords protection against the husband in the restriction upon his power of alienation of it. This section is certainly intended to serve this purpose; otherwise, it is meaningless and nugatory. And such protection is intended to be incident to, and continuous with, the homestead as long as it lasts, if there be a wife and children of the owner of it.

It is said that the homestead provision is a restriction upon, and embarrassing to, the freedom of trade and the transfer of real property, and so it is, to some extent; but the end to be secured by it is one of great moment to the commonwealth, society and families. It is of much consequence that families—wives and children—shall have homes—homes that they cannot be ejected from by the creditor of the husband and father, and that the recreant and faithless father cannot drive them from. This is quite as important as trade, and the people did wisely when they so provided in their organic law. A constitutional provision, so beneficent in its spirit, is not to be so strictly construed in the interests of trade as to impair and destroy, in great part, (257) its efficiency. The law favors the freedom of trade, but it as well and as certainly favors the right of homested, and there exists not the slightest reason of policy why plain words and phrases should receive strained and unnatural interpretation to the prejudice or abridgement of that right. Besides, as I have said, the makers of the Constitution had the power and authority to make such organic provision, and it is not to be impaired by interpretation founded in reasons of supposed policy.

The restriction upon the husband's power of alienation of the homestead in favor of the wife and children is no more objectionable than that upon his power to alien his land in favor of his wife as to her right of dower therein. He cannot sell and convey his lands free from the wife's right of dower unless she shall join in the conveyance. No more can he sell and convey the right of homestead without her consent.

The conditions of society require such restrictions upon the hurry of trade; they are essential to its good and the common good. It is said the restriction upon the husband's power of alienation of the homestead, before it is valued and laid off to him, will give rise to confusion and inconvenience, and the inquiry is propounded, suppose the husband should in such case sell his lands in parcels, without his wife's assent, to numerous persons, in which parcel would the homestead be located? The answer is not difficult. The husband shall not sell the homestead, or any land subject to it, without the assent of the wife. Whoever buys without it does so at his peril, and he takes subject to the right of homestead, to be asserted freely upon any part of or all the land, just as the purchaser of the land of the husband would take it subject to the right of the wife to dower therein, if she failed to join in the conveyance thereof, and she would take her dower therein, if she should survive her husband, just as if no sale of the land had been made by the husband in (258) his lifetime. Such objection seems to me to be without force. Surely it has not such weight as to warrant the strained construction the Court puts upon the limitation upon the husband's power in question.

It seems to me that what I have thus said is reasonable and just. It is fully sustained by a multitude of decisions of this Court, made in the course of the last twenty years, and I will now advert to some of them.

In *Lambert v. Kinnery,* 74 N. C., 348, the defendant was a resident of this State, and had land—that then in question—which was all he had, and which was sold by the sheriff under execution, but he failed to have the homestead of the defendant, at or before the time of sale, valued and laid off to him. Hence, the plaintiff, the purchaser at the sale, contended that the defendant had no homestead, that none had been allotted to him, and his remedy was against the sheriff. But the Court held otherwise—that he had a homestead, saying that "this allotment of a homestead by the sheriff was not required in order *to vest the title to it in the owner,* for that is done by the Constitution, but for the purpose of ascertaining if there was any excess, which only was the subject of levy and sale. . . . The defendant, having a vested estate in the homestead, conferred by the Constitution, can lose or part with it only in the mode prescribed by law, to wit, *by deed, with the consent of the wife, evidenced by her privy examination.*" The Court held in

that case, that the defendant therein had his homestead exempt from sale under final process, although it had not been valued and laid off by virtue and per force of the Constitution, and hence he could not sell and convey it without the assent of the wife.

In *Beavan v. Speed,* 74 N. C., 544, the owner of the homestead had stipulated in a promissory note that he waived "the benefits of the homestead," etc. The Court said: "It is clear that the owner of
(259) a homestead is not the only object of solicitude and care in our fundamental law, but the wife, if there be one, and children, if there be any, have rights in the homestead, *fixed by the Constitution,* which cannot be divested, save in the manner prescribed by that instrument, to wit, by the deed of the owner, accompanied by the voluntary signature and assent of his wife, signified on her private examination, according to law. . . . This is justly considered one of the most beneficent provisions of the Constitution. But the construction contended for by the plaintiff, if adopted, would entirely defeat it, and would enable a thriftless husband, by a dash of a pen, to turn his wife and children out of house and home."

In *Abbott v. Cromartie,* 72 N. C., 292, the Court held, that "the defendant owned the legal estate in the land, and the Constitution confers no new estate upon him, but only confirms an existing one, to the extent therein expressed, and restricts his powers of alienation, and to charge it with his debts. Having, then, the estate in the land exempt from execution, he can part with it only by the formalities prescribed by law."

In *Littlejohn v. Egerton,* 76 N. C., 468, the Court said: "The Constitution, Art. X, sec. 8, permits a husband to dispose of his homestead *by deed,* provided the wife signs the deed, and is privily examined according to law. So the idea of an estoppel by matter *in pais* is out of the question." This was material in support of the decision of the Court.

In *Bank v. Green,* 78 N. C., 247, the Court said: "The homestead is not the creation of any new estate, vesting in the owner new rights of property. His dominion and power of disposition over it are precisely the same after, as before, the assignment of homestead." The wife must, therefore, join in the deed of conveyance of the same to make is effectual.

In *Murphy v. McNeill,* 82 N. C., 221, the *Chief Justice* said: "The land having been acquired since the adoption of the Constitution (1868), and the enactment of the law to carry into effect its provisions,
(260) for a limited exemption of the debtor's property, is subject to the homestead, and the deed made without the wife's assent is inoperative to defeat the right thereto."

In *Jenkins v. Bobbitt,* 77 N. C., 385, it is held that "the husband's deed, without the wife's concurrence, is effectual in passing what is called his estate in reversion, or, in other words, the land itself, subject

to the burden or incumbrance of the homestead as defined in the Constitution, and that the title to this can only be divested in the mode therein pointed out. *Lambert v. Kinnery,* 74 N. C., 348; *Beavan v. Speed, ibid.,* 544.

"The right to the homestead exists by virtue of positive law, and laying it off by metes and bounds is only necessary in ascertaining if there be any, and the extent of the excess, which may be appropriated to the demand of creditors. It follows, therefore, that while the plaintiff cannot deprive the defendant of the possession of the land, he is entitled to a decree of foreclosure and sale of the land charged with the homestead incumbrance."

This case is directly in the face of what is decided in the present case, and expressly decides that a sale of the homestead, not valued and laid off, is void without the assent of the wife.

In *Adrian v. Shaw,* 82 N. C., 474, the Court said: "The homestead is a right defined and secured by the Constitution, and vests in the resident owner of the land, independent of any legislation on the subject." . . . Cooley, on Constitutional Limitations, says: "The provisions of the Constitution which define a homestead and exempt it from forced sale are self-executing, at least to this extent, that it may admit of supplementary legislation in particulars, when itself is not complete as may be desirable, it will override and nullify whatever legislation, either prior or subsequent, would limit or defeat the home- (261) stead which is thus defined and secured."

"And in this State it is held that the homestead right is a quality annexed to land whereby the estate is exempted from sale under execution for a debt, and it has its force and vigor in and by the Constitution. . . . This Court held that the title to the homestead is vested in the owner by virtue of the Constitution of the State, and no allotment by the sheriff is necessary to vest the title thereto."

This case is an important one, and much in point. It was well and thoroughly considered. There was an application to rehear it *(Adrian v. Shaw,* 84 N. C., 832), and the Court declared, upon such application, their entire satisfaction with what was said and decided by it.

The following named cases are all more or less to the same effect: *Jenkins v. Bobbitt,* 77 N. C., 385; *Wharton v. Leggett,* 80 N. C., 169; *Gheen v. Summey, ibid.,* 187; *Watkins v. Overby,* 83 N. C., 165; *Wyche v. Wyche,* 85 N. C., 96; *Burton v. Spiers,* 87 N. C., 87; *Cumming v. Bloodworth, ibid.,* 86; *Murchison v. Plyler, ibid.,* 81; *Mebane v. Layton,* 89 N. C., 399; *Markham v. Hicks,* 90 N. C., 204; *Castleberry v. Maynard,* 95 N. C., 281.

I believe I am fully warranted in saying that no case pertinent here, decided by this Court, can be found in substantial conflict with what is

said and decided in the numerous cases I have cited above. In *Mayo v. Cotten,* 69 N. C., 289, the learned judge who delivered the opinion said, *obiter* simply, that "section 8, Article X, of the Constitution, applies only to a conveyance of a homestead after it has been laid off." This remark is made at the end of the opinion, no reason is given for it, and it was not at all material to what was decided.

I cannot help thinking that the opinion of the Court in this case is a substantial departure from the settled and proper interpretation heretofore given to the clauses of the Constitution recited above,
(262) and that it will have the effect materially to impair the more important and beneficent features of the homestead established by the Constitution.

Cited: Long v. Walker, 105 N. C., 110; *Thurber v. La Roque, ibid.,* 311; *Scott v. Lane,* 109 N. C., 156; *Fleming v. Graham,* 110 N. C., 374; *Dickens v. Long,* 112 N. C., 317; *Lowe v. Harris, ibid.,* 484; *Vanstory v. Thornton, ibid.,* 214; *Cowen v. Withrow, ibid.,* 739; *Kelly v. Fleming,* 113 N. C., 140; *Fulton v. Roberts, ibid.,* 425; *Dixon v. Robbins,* 114 N. C., 104; *Stern v. Lee,* 115 N. C., 442; *Kirby v. Boyette,* 116 N. C., 169; *Thomas v. Fulford,* 117 N. C., 673; *Kramer v. Old,* 119 N. C., 8; *B. & L. Asso. v. Black, ibid.,* 327; *Weathers v. Borders,* 124 N. C., 614; *Walton v. Bristol,* 125 N. C., 430; *Cawfield v. Owens,* 130 N. C., 644; *Joyner v. Sugg,* 131 N. C., 334, 339, 348; *S. c.,* 132 N. C., 585; *Rodman v. Robinson,* 134 N. C., 505; *Shackleford v. Morrill,* 142 N. C., 222; *Smith v. Fuller,* 152 N. C., 14; *Dalrymple v. Cole,* 156 N. C., 353; *Simmons v. McCullin,* 163 N. C., 412; *S. v. Darnell,* 166 N. C., 302; *Sea Food Co. v. Way,* 169 N. C., 684; *Dalrymple v. Cole,* 170 N. C., 104; *Thomas v. Sanderlin,* 173 N. C., 334; *Kirkwood v. Peden, ibid.,* 462; *Guano Co. v. Walston,* 187 N. C., 674; *Cheek v. Walden,* 195 N. C., 755.

W. H. HUGHES, EXECUTOR, v. F. L. HODGES.

Homestead—Burden of Proof—Validity of Deed Presumed.

1. Where a landowner makes a deed or mortgage, in which his wife does not join, the burden rests on him to show the existence of such facts as render the conveyances inoperative as to the homestead.

2. The presumption of law is in favor of the validity of every deed executed in due form.

(See syllabus in plaintiff's appeal, *ante,* 236.)

T. W. Mason for plaintiff.
R. B. Peebles for defendant.

DEFENDANT'S APPEAL.

AVERY, J. The defendant contends that the court below erred in refusing to declare the mortgage deed void, and in ordering the sale of the reversionary interest in the land. From the discussion of the plaintiff's appeal it will appear that the presumption of law is in favor of the validity of this and every other deed executed in due form. If the defendant seeks to have it declared void, because it was made in disregard of the requirements of section 8, Article X, of the Constitution, the burden is upon him to show that the homestead right attached to the land, and vitiated the conveyance, for the want of the joinder of the wife, with privy examination, for one of the three following reasons:

1. That a homestead had been allotted to him in the land described in the mortgage deed, either on his own petition or by an (263) officer in accordance with law.

2. That there was an unsatisfied judgment or judgments that constituted a lien upon the land, when conveyed, and upon which execution might still issue, and make it necessary to have his homestead allotted, or a mortgage reserving an undefined homestead, and constituting a lien on the land that could not be foreclosed without allotting a homestead to defendant in the land.

3. That the mortgage deed was void, because executed with intent to defraud the defendant's creditors, and that defendant did not have a homestead allotted already in other lands.

In order to rebut the presumption of validity by bringing the deed under the prohibition contained in section 8, Article X, of the Constitution, one of these grounds of objection mentioned must be made to appear by any person who would raise a question as to the effect of the conveyance. We are assuming, for the purpose of presenting the case in its strongest aspect for the defendant, that, in order to protect the right of homestead, the doctrine of estoppel would be held not to apply, and the defendant himself would no more be restrained from impeaching his own deed (which would be, as a rule, considered good *inter partes)* than he would be precluded by such conduct and language on his part as would, for any other purpose, be deemed an estoppel *in pais* against his claim to any right in the land. But in *Crummen v. Bennett,* and *Arnold v. Estis,* cited in the opinion on plaintiff's appeal, this Court held, that the bargainor in a fraudulent deed was not estopped by his deed to claim homestead in the land conveyed. In *Spear v. Reed,* the fraudulent grantor was held to be estopped, not by his deed, but by the record of the proceeding to allot the homestead. The same principle is

announced in *Whitehead v. Spivey,* 103 N. C., 66. It would, how-
(264) ever, endanger, if not destroy, the security of the homestead to families, to concede, as a general rule, that the owner of the land, by his deed simply, could destroy the homestead by way of estoppel.

No error. Affirmed.

Cited: Scott v. Lane, 109 N. C., 156; *Cowles v. Reavis, ibid.,* 422; *Blossom v. Westbrook,* 116 N. C., 516, 517.

W. B. FAULCON ET AL. v. S. JOHNSTON.

Crops, title to, when produced by adverse claimant—Adverse possession, evidence of—Evidence, a deed or record as to third parties; oral, of contents of written instrument; of listing land for taxation, when competent; incompetent brought out without objection, or elicited on cross-examination.

1. Crops produced on land by the labor of one in adverse possession under a claim of right, or his agents, belong to him, and are not the property of the rightful owner of the soil. Therefore, the owner of the soil cannot, under such circumstances, by waiving the tort, pursue and recover the specific articles thus raised, or their money value, from a stranger, who received them from the person in adverse possession of the land, or his tenants, and converted them to his own use.

2. The rightful owner of land sued A. for the value of crops purchased by A. from the tenant of B., who was in possession of the land: *Held,* that it was competent to show by such tenant that B. claimed the land as his own while in possession of it: *Held, further,* that it was competent to put in evidence the record of an action of ejectment wherein the rightful owner had recovered the land from B. as such evidence tends to show that B.'s possession was adverse and under a claim of right.

3. A record, like a deed, is evidence against all the world to establish the fact that such a record exists, or such a judgment was rendered, and of all the legal consequences necessarily resulting from those facts.

4. The principle which requires the production of a writing, and excludes oral evidence to prove its contents, does not apply when the inquiry into the contents comes up *collaterally, at the trial,* and the contents of the instrument are not directly involved in the controversy.

5. The fact that the person in possession of land listed it for taxation in his own name, though of slight, if any, import as evidence of title, is receivable as showing a claim of ownership for the reason that it is an act done in pursuance of the requirements of law.

6. It is not admissible for counsel to be quiet and allow evidence to come out and take advantage of it, if favorable, and if not, to ask that it be stricken out and not considered. Still less can he complain when it comes out in response to his own inquiries. Therefore, it lies in the unreviewable discretion of the presiding judge to refuse to exclude incompetent testimony called out on cross-examination by the party who seeks to have it excluded.

THIS was a civil action, tried before *Graves, J.*, at March (265) Term, 1888, of Superior Court of HALIFAX County.

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

The facts appear in the opinion.

J. B. Batchelor and John Devereux, Jr., for plaintiffs.
W. H. Day and R. O. Burton, Jr., for defendant.

SMITH, C. J. This action, begun on 29 December, 1886, in the Superior Court of Halifax, is prosecuted by the surviving devisees and administrators of two devisees, claiming under the will of Isaac N. Faulcon, to recover moneys received by the defendant during several years, as rents alleged to be due the plaintiffs for the use and occupation of the devised lands, paid by tenants thereon to him. The defendant, not denying his receiving said moneys, in answer to the charge of his being responsible to account with the plaintiff therefor, says that the said land, during this interval of time when rents were paid, was in the adverse possession of one James A. Faulcon, who, claiming to be (266) the owner, leased parts of the premises to the different occupying tenants to whom the defendants furnished agricultural supplies in carrying on farm operations, and that rent notes taken by the lessor were handed over to defendant to secure the advances, which notes he collected and so applied the proceeds.

He further says that said James A. Faulcon remained in possession and control of the said lands till the first of September, 1885, undisturbed, when suit was instituted, by those deriving title under the will, to recover possession, which, at November Term of the Superior Court following, terminated in a judgment in their favor, and under it possession was acquired.

The only issue extracted from the pleadings, and passed on by the jury, is in these words: "Did the defendants receive money or rents belonging to the plaintiffs, and if so, how much?" It was answered in the negative. Whereupon, judgment was rendered for the defendant, and the plaintiff appealed.

The plaintiffs introduced two contracts of letting, made by the testator, Isaac N., on 1 January, 1878, one to John Young and the other to John Faulcon, of parts of the land in contest, for four years, each writing declaring it to be the same land the lessees had rented for the two preceding years, and both lessees testified to having cultivated the land during the time, and paid the rent, seventy dollars a year, to the defendant.

The lessee, John Young, having testified to his having paid the rents due from him to the defendant, was asked on cross-examination why he did so, and answered because he was told by James Faulcon to pay the rent to defendant. Again, he was asked by defendant if James Faulcon claimed the land, and in reply witness said he did claim it. These inquiries and the responses were admitted after objection of plaintiffs.

(267) In our opinion, the testimony was competent as explanatory of his act in making that payment of the rent, and under a demand, as an assertion and exercise of a claim of ownership in James Faulcon recognized by the witness.

A similar inquiry made of the lessee, John Faulcon, met with a similar objection, and was disposed of by a similar ruling.

The defendant offered, in order to prove an adverse occupancy of the land by James A. Faulcon, the record of an action brought against him by Walter B. Faulcon, Alice B. and Thomas C. Williams, who, except said Alice B., whose administrator is a party in her stead, prosecute the present suit, to recover possession of the land in the alleged wrongful possession of said James A., and for damages for the detention, a judgment rendered by default, and also an award of a writ of possession at Fall Term, 1885, of Halifax Superior Court.

This documentary evidence, after objection to its admission made and overruled, was allowed to go to the jury.

The defense arises out of the want of any privity between the plaintiffs and defendant from which could be implied a promise to pay money had and received to the plaintiffs' use, and the existence of adverse relations in respect to the property between the plaintiffs and the said James Faulcon, who assumed control over the rents and directed their payment to the defendant, for agricultural advances to the tenants. To this evidence we can see no just grounds of objection. The record is competent proof of all such facts as result from its existence as such, and of the adversary relations of the parties to it.

"A deed," says *Gaston, J.* (and the remark is equally applicable to an adjudication of record), "is evidence against all the world to establish the fact that such deed was executed" (or of a judgment rendered),

"and of course of all the legal consequences necessarily resulting from that fact." *Claywell v. McGinsey,* 4 Dev., 89.

So, the production of the transcript shows that there was an (268) action successfully prosecuted to recover possession from the said James Faulcon, who assumed to hold the same. Besides, it was under the authority and by direction of the latter that the defendant received the rent moneys.

The defendant, on his own behalf, delivered testimony to which numerous objections were made during the course of the examination:

1. The witness was permitted, after objection, to say: "James Faulcon placed the notes in my hands for supplies; sometimes he gave me statement in writing; I either had notes or he gave me written statements authorizing me to collect of different tenants; James had the control; Walter and his sister (the devisees) lived six or seven miles from Warrenton; I frequently saw plaintiffs and had business transactions with them; they never made any demand or claim; James Faulcon's wife lived a mile and a half from the part claimed by Walter."

A part of the objection now preferred has been already answered, in upholding the competency of evidence to show under what circumstances the rent money went into the defendant's hands.

The further objection, that the writings referred to should have been produced, or their absence accounted for, before letting in parol proof of their contents, is removed by the rulings in *Pollock v. Wilcox,* 68 N. C., 46; *S. v. Carter,* 72 N. C., 99; *Carrington v. Allen,* 87 N. C., 354, and *S. v. Wilkerson,* 98 N. C., 696, in which it is held that the principle that requires the production of a writing to prove its contents does not apply, when the inqury into its contents comes up *collaterally at the trial,* and are not directly involved in the controversy.

2. The next objection is to his testifying to the fact that James Faulcon listed the land for the purpose of taxation. The fact appearing previous to 1885, *ante litem motam,* though of slight if of any import as evidence of title, is, in our opinion, receivable as show- (269) ing a claim of ownership, for the reason that it is an act done in pursuance of the requirements of law. *Austin v. King,* 97 N. C., 339.

3. Upon the cross-examination of defendant this testimony was elicited: "I have seen the will of Isaac N.; James Faulcon denied the title of plaintiff; I knew that something had been given in the will to James; I knew that the crops from which I received the rents grew on this land he controlled; I had transactions with the tenants; I do not know that I ever saw him turn out a tenant and put another in; I knew that he took notes from them; we lived in the same neighborhood; I never heard him make any bargain to rent, that I remember; I have been through the land with him once."

The plaintiff asked that so much of this evidence as indicated the control of James Faulcon over the land be withdrawn from the jury. This was denied, the court being of opinion that its value as evidence was for the jury, and was not rendered incompetent because drawn out on cross-examination. Plaintiff excepted.

The exception is not very plainly presented. The objectionable matter is stated to be elicited upon the cross-examination of the witness, the defendant himself, by interrogations put by the plaintiffs. The answer, thus voluntarily brought out by the plaintiffs, could not be a subject of exception from them, and its withdrawal afterwards from the jury rested in the sound discretion of the court, is a matter not reviewable in this Court.

As is said in *McRae v. Malloy,* 93 N. C., 154, "it is not admissible for counsel to be quiet and allow the evidence to come out and take advantage of it, if favorable, and if not, to ask that it be stricken out and not considered." Still less can he complain when it comes out in response to his own inquiries. *S. v. Efler,* 85 N. C., 585.

(270) 4. On the redirect examination the defendant's counsel put this interrogation to him: "You stated in reply to the question by plaintiffs, that you had seen the will. Did you make inquiry into the matter?" The witness was allowed, after objection, to say: "We could find no evidence of title in Isaac N. Faulcon."

The substance of the declaration was, that the witness did not discover any evidence of title in the testator, under whom the plaintiffs claim.

We can see no prejudicial effect in the answer, since, as between the plaintiffs and James Faulcon, the title of the former is adjudged in the possessory action; and, it is, at most, but a negation of a successful search—not disproof of title.

5. The defendant was then allowed to prove a sale of the land, as the property of Isaac N., by the Marshal of the United States, under an execution against him, and the Marshal's deed therefor to Faulcon Brown, and from the latter a reconveyance to the said Isaac N. This latter deed was admitted, to show the time of its registration, and was read to the jury.

This was objected to, but we are unable to see any sufficient reason for the objection, as the entire proceedings relate to the plaintiffs' ancestor, and precede his devise to them, his grandchildren.

There were many instructions, fourteen in number, asked for defendant, as follows:

"1. Every possession of real property is presumed by law to be a title in fee simple, and it being proved by both plaintiffs and defendant that Isaac N. Faulcon was in possession of the land at the time of his death,

there is no evidence before the jury to show that Isaac N. Faulcon was not the owner of the land, and the jury must find that he was."

This was not given by the court, because the title to the land was not involved, and plaintiffs excepted.

"2. There being no evidence impeaching I. N. Faulcon's title, the land went by his will to his grandchildren, and the jury (271) must so consider it in making up their verdict."

This was refused, because the jury were told the title to the land was not involved in the issue. This was not given, and plaintiffs excepted.

"3. If John Young entered upon the land under the contract between him and I. N. Faulcon, which was proved, and which was for lease of four years, and continued in possession after death of said Isaac N., then John Young was tenant of the plaintiffs, and they were his landlord, and that tenancy continued as long as the tenant (John Young) remained on the land, and he could not, in law, enter into a contract with James A. Faulcon which would make the possession adverse as to his landlord."

The Court is of the opinion that this instruction was given in substance in the charge to the jury, as hereinafter stated. The plaintiffs except, because they allege that it was not given as asked.

"4. If the jury are satisfied that John Young made the contract with I. N. Faulcon and continued on the land after his death, there is no evidence to show that there was any possession adverse to the plaintiffs."

The court refused to give this instruction, and plaintiffs excepted.

"5. If John Young made the contract with I. N. Faulcon, and entered into possession, and continued in possession after his death, then the plaintiffs are entitled to recover from the defendant all that he received from John Young on account of the rent of the land."

The court refused to give this instruction, and plaintiffs excepted.

"6. The same instructions were asked as to the part of the land rented and cultivated by John Faulcon, and were disposed of in the same way."

"7. If William Faulcon rented and entered upon the land as the tenant of Isaac N. Faulcon, and continued in possession (272) after his death, then the relation of landlord and tenant was constituted between Wm. Faulcon and the plaintiff, and continued as long as Wm. Faulcon continued to occupy the land, and no arrangement between him and James A. Faulcon could change this relation."

The Court is of the opinion that this instruction was given in substance. The plaintiffs are of the opinion that it was not, and, therefore, except.

"8. If this relation existed between Wm. Faulcon and plaintiffs, then the plaintiffs are entitled to recover of the defendant all that he received of Wm. Faulcon on account of such tenancy."

The Court is of the opinion that this instruction was refused in part, and given in part, in the charge, as stated below. The plaintiffs except, because, as they allege, the instruction was not given as requested.

"9. The same instructions were asked as to Matt. Faulcon, and were disposed of in the same way.

"10. If William Faulcon made the contract with Walter Faulcon, for himself and his sisters, to lease the land for five years, and occupied it during all that time, as it was testified to that he did, and paid the rents to the defendant, then William Faulcon became the tenant of the plaintiffs, and they are entitled to recover, of the defendant, all that was received by him from Wm. Faulcon, on account of such contract of renting."

This instruction was refused in part, and, the court is of the opinion, given in part, in the instructions given below. Plaintiffs excepted.

"11. If the plaintiffs became the owners of the land under the devise in the will of the said Isaac N. Faulcon, and then James A. Faulcon attempted to rent out the land, and to assign the rents to the defendant Johnston, and Johnston then collected the rents under this assign-
(273) ment, Johnston, the defendant, thereby became a constructive trespasser, and the plaintiffs are entitled to recover from him damages for such unlawful entries, and the amount received by Johnston is the measure of such damages; or the jury may regard the amount thus received as the measure of such damages, and render a verdict for the amount, with interest."

This instruction was refused by the court, and the plaintiffs excepted.

"12. That the acts and conduct of Walter Faulcon are not in law an estoppel."

The opinion of the Court is, that this is given in part, and refused in part, in the charge of the court as given hereinafter. The plaintiffs except, on the ground that the instruction was not given as requested.

"13. That the jury cannot consider the deeds to Brown and from Brown to Faulcon as affecting the rights of plaintiffs to this land, or in any way affecting their right of recovery. It was admitted only for the purpose of the date of its registration, and for no other purpose, and the court is requested to instruct the jury that they can consider it for no other purpose."

The court thinks that this instruction was given in substance in the charge, as stated below. The plaintiffs except, on the ground that it was not given. These general instructions are asked, subject, of course, to proper instructions as to the statute of limitations.

"14. Two of intestates of plaintiffs being infants, and one becoming covert during infancy, the statute of limitations cannot apply as to these two in any view of the case. If it applies at all to Walter B. Faulcon,

the adult, it cannot apply to the three years next before the bringing of the action of ejectment; for these three years he can certainly recover."

The counsel for defendant conceded that the statute of limita- (274) tions was not a bar to any of plaintiffs except W. B. Faulcon, and the court so told the jury.

And, therefore, the court charged the jury as follows:

"The title to the land is not at issue in this action. As between James Faulcon and those claiming under him, the title is adjudged in the plaintiffs.

"It is an established rule that a tenant cannot deny the title of the landlord, and the relation of landlord and tenant being once established, the tenant cannot change this relation until he surrenders the possession of the land, which he received from his landlord, back to him, and no contract with another can change that relation so long as the tenant remains in possession. If the relation of landlord and tenant existed between Isaac N. Faulcon, John S. Young, John Faulcon, William Faulcon and Matt Faulcon, at the time of the death of Isaac N. Faulcon, and if Isaac N. Faulcon duly made and published his last will and testament, and if that will was duly executed, and if the will was in the words read in evidence, it conveyed to the plaintiffs Walter and his sisters, children of Jesse N. Faulcon, the interest of Isaac N. Faulcon, and the tenants of Isaac N. Faulcon became the tenants of the said Walter Faulcon and his sisters, and they would be entitled to receive the rents from the tenants, and if the defendant received the rents from the tenants of plaintiff, then he would be liable, unless exonerated from such liability by some other principle or rule of law."

Plaintiffs except to the foregoing charge of the court.

"But if the land was in the adverse possession of James A. Faulcon, he being in the adverse possession of the land, claiming it as his own, and he—being in such adverse possession—caused the annual produce of the land, produced by annual planting and culture, to be taken from the land to the defendant, and the defendant took it in payment of debts due from James A. Faulcon for supplies, or otherwise due, then the defendant would not be liable for the products of the land delivered in kind, or sold and the money paid to him." (275)

To this part of the charge plaintiffs except.

"It then becomes material for you to determine the nature of the possession of James A. Faulcon. If he was occupying the land, claiming it as his own, denying the rights of the plaintiffs, the plaintiffs cannot recover of the defendant, although the land did, in fact, belong to the plaintiffs."

To this instruction the plaintiffs except. And the plaintiffs further except to the three preceding paragraphs of the charge taken together.

"If James A. Faulcon was not in adverse possession, but took possession of the land as the agent of the plaintiffs, and he misapplied the rents, and paid them to Johnston, and Johnston, knowing that James A. Faulcon was using the rents of the plaintiffs' land by delivering the notes as collateral security for supplies, then he would be liable for the amount received, if he knew of the relation, unless something more is shown. And if the plaintiff, Walter Faulcon, knew that James A. Faulcon was disposing of the rents, claiming to act as agent of plaintiffs, and he allowed this to go on with his knowledge, and acquiesced, or by his conduct led the defendant to reasonably believe he acquiesced in such disposition, then he would not be entitled to recover for such rents so disposed of to the defendant; but as to the other plaintiffs, they, being under disability, would not be estopped."

Plaintiff, Walter Faulcon, excepts to this charge in his own behalf. Other plaintiffs also except thereto.

"Now, in regard to the statute of limitations. The cause of action, if there is any cause of action, accrued at the time the rent was received wrongfully by defendant; a right of action accrued, if any cause of action accrued, at the annual receipts of the rents. The plaintiff, Walter Faulcon, cannot, under the evidence, recover, in his (276) own right, anything for his part of rent for any more than three years before the beginning of this suit. The statute of limitations does not bar the other plaintiffs."

To this charge the plaintiffs, except Walter Faulcon in his own right, except.

The court gave to the jury, orally, careful instructions as to the issues and the evidence bearing upon them, and told the jury if the first issue should be found for the defendant the other issues became immaterial. No exception was made to any except such as were in writing.

After the verdict, the plaintiffs moved for a new trial. Motion overruled. Judgment for defendant, and plaintiffs appealed to the Supreme Court.

Without revising and comparing the directions asked by appellants to be given to the jury and those given by the court, in order to ascertain if there are any such omissions or variations as might furnish some grounds for complaint, we are content with the single remark, that if correct in themselves, the charge seems to cover the whole matter in dispute, and leaves little cause for the appeal.

The solution of the controverted question of their right to recover the rents received by the defendant, under the circumstances, rests upon the

correctness of the concluding paragraphs of the charge preceding what is said in relation to the statute of limitations, to wit: that if James A. Faulcon was in the occupancy of the land, claiming it as his own, and denying the rights of the plaintiffs, although the land was in law their property, they cannot recover the rents sued for, as moneys received to their use, in this action.

The question is this: Can the owner of the land in the adverse possession of another assert title to the crops grown thereon during such occupancy, and in its assertion, by waiving the tort, pursue and recover the specific articles thus raised, or their money value, in the hands of a stranger who may have received and converted them (277) to his own use, or the rent money paid him by the tenants?

The cases cited in the argument conclusively establish the proposition that the crops, the product of the labor of the trespassing possessor and his agents, belong to him, and are not the property of the owner of the soil.

In *Brothers v. Hurdle,* 10 Ired., 490, the defendant, lessor of the plaintiff in ejectment, recovered of the plaintiff the land upon which were gathered the growing crops, the product of the year's cultivation, and being put in possession by the sheriff, took control of the crops and applied them to his own use. The action was in trover to recover their value.

Delivering the opinion, *Pearson, J.,* says: "The corn, etc., which was attached to the land at the time the defendant was put in possession, passed with it and belonged to him. But the fodder, etc., which had been severed, although on the premises, did not pass with the land, for it had ceased to be a part thereof, and the defendant had no right to take it. His remedy was an action, not for the specific articles, but for damages by way of *mesne* profits. If the defendant had a right to take the *specific articles,* he would, for the same reason, be entitled to recover their value, in trover, against the plaintiff or any one to whom he might have sold them." The same reasoning was applied to turpentine run into boxes cut in the body of the tree, the product of labor, in *Branch v. Morrison,* 5 Jones, 16, and when the case was again before the Court, reported in 6 Jones, 16.

A similar ruling, and in affirmation of that in *Brothers v. Hurdle, supra,* was made in the later case of *Ray v. Gardner,* 82 N. C., 454. If, then, James Faulcon was in hostile occupation of the land when the crops were made by the several tenants, the crops did not in law belong to the plaintiffs, and the defendant, in taking and converting them to his own use, did not become liable to the plaintiffs, (278) because they were not the property of the plaintiffs.

The principle that the owner of goods wrongfully seized and sold may waive the tort and ratify the sale, and recover the proceeds from the purchaser, has no application to the present case.

The jury having, by their verdict, established these adverse relations, and there being no error in the instructions leading thereto, the judgment must be affirmed.

No error. Affirmed.

Cited: Ruffin v. Overby, 105 N. C., 86; *Hinton v. Walston,* 115 N. C., 9; *Gates v. Max,* 125 N. C., 144; *White v. Fox, ibid.,* 549; *Morrison v. Hartley,* 178 N. C., 620.

W. G. EGERTON, ADMINISTRATOR OF MARK P. JONES, v. NANNIE P. JONES ET AL.

Deed, Absolute, intended as a Mortgage—Parol Trust.

1. In order to convert a deed, absolute on its face, into a mortgage, it must be alleged and proven that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage.

2. The principles governing parol trusts, as defined in *Wood v. Cherry* and *Shields v. Whitaker,* approved.

CIVIL ACTION, tried before *Graves, J.,* at Spring Term, 1888, of WARREN Superior Court.

The plaintiff appealed.

This was a proceeding begun by summons and petition, before the clerk of the Superior Court of said Warren County, on the ..... day of June, 1886, for the purpose of having sold, to pay the debts of plaintiff's intestate, a certain tract of land, situated in the said county of Warren, belonging to plaintiff's intestate and described in the petition, and which was allotted to plaintiff's intestate as a homestead on 3 June,

1871, the said allotment having been made when homesteader (279) was unmarried and without children; and the homesteader having, afterwards and before he ever married, conveyed the homestead to one John E. Boyd, 20 August, 1873, by a deed upon its face in fee simple. Plaintiff's intestate died in March, 1885, having intermarried with the defendant, Nannie P. Jones, in the year 1876, and leaving the defendants Willie, Lucy and Lizzie, the issue of said marriage, who are now living and are still minors. The plaintiff insisted that as his

intestate had, before his said marriage, conveyed his homestead as aforesaid, his said homestead fell in at his death and was subject to his debts, even though he, after the said deed was made by him, married and had children.

The defendants, Nannie P. Jones, the widow of plaintiff's intestate, and her children, the said Willie, Lucy and Lizzie, answered the petition, alleging that the deed made by the said plaintiff's intestate to John E. Boyd, though on its face a fee-simple deed, yet in fact was one for the security of money; that the money was afterwards paid by said Mark P. Jones to the said Boyd, and that with his consent the said Boyd, on 21 July, 1883, conveyed the same to the said Nannie P. Jones, and that the same is not, nor will be, subject to the debts of plaintiff's intestate until his youngest child shall become twenty-one years old. This issue of fact having been joined by the pleadings, the clerk transferred the same for trial to the Fall Term, 1886, of the Superior Court of said county.

The matter came on for trial at the Spring Term, 1888, of said court, after regular continuances and after several new parties had been made, as the record will show, at which Spring Term, 1888, Peter H. Allen, John Watson, and Mary Powell, on their own motion, were made parties and filed their answer. Their answer sets up the same defense which the other defendants made, and the further defense, that after the said John E. Boyd had conveyed the said homestead to the (280) said Nannie P. Jones, the said Nannie P. and her husband, the plaintiff's said intestate, executed a deed of trust to the defendant, P. H. Allen, to secure two debts due to the said John Watson, one in his own right, and the other to him as guardian of the defendant, Mary E. Powell, upon the said homestead, together with other lands of the said Nannie P., and that this deed of trust is a first lien on said homestead and other lands; and that said Boyd had the right to convey said land to said Nannie P. Jones, because he held the same coupled with a parol trust to convey the same to the said Mark P. Jones, upon the payment of a large sum of money due to him by the said Mark P., which he was unable to pay, and which the said Nannie P. paid out of her separate estate, and which conveyance was made with the consent of her husband, the said Mark P. Jones.

A jury was empaneled to try the issue submitted to them, which appears in the record, and was in the following words: "Was the conveyance by M. P. Jones to John E. Boyd subject to the trust declared in defendants' answer?"

The defendants introduced John R. Boyd, a son of the said John E. Boyd, John E. Boyd being then dead, to prove that the deed from Mark

P. Jones to the said John E. Boyd was, in truth and in fact, a deed for the security of money, and was so intended at the time of its execution, by conversations had between him and his deceased father in his lifetime. Plaintiff objected to the competency of the witness on two grounds: first, that the witness, being the son of the grantee, was interested in the event of the suit; and, second, that the deed being in fee simple on its face, and fully executed, ought not to be varied or altered in its meaning by verbal testimony. The objections were overruled, the plaintiff excepted, and the witness then testified as follows: That he had often heard his father, the said John E. Boyd, say that the said
(281) deed, although on its face a fee simple one, yet was intended only as a deed to secure him an amount of money which the said Mark P. Jones owed him; that the money was paid to him by Mark P. Jones in 1883, with money borrowed by Mark P. Jones from John Watson.

The witness further testified, that he knew nothing of these facts of his own knowledge. The defendant, John Watson, then introduced Joseph S. Jones, the father of the said Mark P. Jones and brother-in-law of the said John E. Boyd, to prove the same facts for which the witness John R. Boyd was introduced, and the plaintiff entered the same objections to the testimony as was entered to the testimony of the said John R. Boyd, and the objections were overruled by the court. The plaintiff excepted, and the witness then testified, "that he had heard both Mark P. Jones and John E. Boyd, both at the time of the execution of the said deed and afterwards, say that the said deed was intended to be a security for money due to said Boyd by said Jones." The witness was then asked by counsel for defendant Watson if there was any parol agreement by which said Boyd was to reconvey to said Mark P. Jones the said homestead tract, and also the balance of the land embraced in the tract of 720 acres conveyed by said Boyd to said Nannie P. Jones, on 21 July, 1883. The plaintiff entered the same objections, which were overruled; the plaintiff excepted, and the witness then stated, "that at the time of the purchase by John E. Boyd, of the land sold by W. S. Davis, commissioner, in August, 1873, the said Boyd agreed with the said Mark P. Jones, that if he, the said Mark P. Jones, would convey to him, the said Boyd, his homestead tract, he would hold the land bought by him from said commissioner, and also the homestead tract, for the said Mark P. Jones' benefit, and would reconvey the whole to him upon his repaying to him, the said Boyd, the amount which he had paid for the land sold to him by said commissioner, and also the
(282) value of the one-sixth interest in a tract of land in Warren County, which said one-sixth interest the said Boyd had conveyed

to said Mark P. Jones in 1868, and for which he had not paid; that on 21 July, 1883, the said Boyd conveyed by deed to said Nannie P. Jones, with the consent of said Mark P. Jones, the said 720-acre tract of land, including the said homestead, whereupon the said Mark P. Jones and Nannie P. Jones borrowed from the said John Watson the amount due by said Mark P. Jones to said John E. Boyd, and executed to P. H. Allen a deed of trust, dated 21 July, 1883, to secure the said amount, and with this borrowed money the amounts due under the said agreement between Mark P. Jones and John E. Boyd were paid off in full."

The court was asked by the plaintiff's counsel to charge the jury that the evidence in this case, being the testimony of the said J. R. Boyd and J. S. Jones, did not in law establish a parol trust, which instruction the judge refused to give, but instructed the jury that unless the declarations of John E. Boyd were corroborated by facts and circumstances inconsistent with the idea of an absolue purchase, then they must find there was no trust, and the plaintiff excepted. The jury returned a verdict in the affirmative to the said issue submitted to them; whereupon, a judgment was rendered, that the plaintiff take nothing by his suit, and that said P. H. Allen, trustee, sell the land under the said deed from Mark P. Jones and Nannie P. Jones to him, for the purpose of paying the debts named therein.

Appeal by plaintiff.

E. C. Smith for plaintiff.

J. B. Batchelor, John Devereux, Jr., and C. M. Cooke for defendants.

SHEPHERD, J., after stating the case: It seems to have been conceded upon the trial that if the deeds conveying the "homestead tract" (which was the subject of the controversy) were not declared to have been intended as a mortgage, the plaintiff would be entitled to (283) sell the land and with the proceeds thereof pay the Cheatham judgment. This judgment against Mark P. Jones constituted a lien upon his land, and if before his marriage he conveyed it absolutely to Boyd, the latter and those claiming under him could not insist upon the homestead exemption after the death of Jones. The plaintiff, representing the judgment creditor, has, therefore, a sufficient interest in the property to entitle him to maintain the integrity of the deed as it is written; for if a clause of redemption is supplied by parol, and the debt has been paid, as alleged by the defendants, the homestead exemption will be prolonged until the death of the widow and the attainment of the majority of the youngest child.

It would be needless to multiply the pages of the Reports by quoting largely from the numerous decisions of our Court to the effect, that in

order to convert a deed absolute on its face into a mortgage "it must be alleged, and of course proved, that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage." *Streator v. Jones,* 1 Murph., 449; *Bonham v. Craig,* 80 N. C., 224.

There is no pretense in our case that the alleged clause of redemption was omitted under any of the circumstances above mentioned. On the contrary, the deed seems to have been written as the parties intended. There is nothing in the testimony or pleadings which suggest any other view. The witnesses all say, in substance, that the "homestead tract" was conveyed as an additional security for the payment of the remainder of the land which Boyd had bought at the sale by the commissioner. Whatever may be said as to a trust attaching to this land in the hands of Boyd, and the admissibility of parol testimony to establish it, can have no application to the homestead tract, the *title* to which was in Jones, who conveyed it to Boyd upon the alleged agreement to reconvey
(284) if the purchase money of the other tract was paid. We think that this case falls within the principles so happily expressed by *Pearson, C. J.,* in *Wood v. Cherry,* 73 N. C., 110, cited and approved in *Shields v. Whitaker,* 82 N. C., 516.

For these reasons, we are of the opinion that the objection to the testimony was well taken, and that there should be a new trial.

Error. Reversed.

Cited: Norris v. McLain, 104 N. C., 160; *Green v. Sherrod,* 105 N. C., 198; *Blount v. Washington,* 108 N. C., 232; *Sprague v. Bond,* 115 N. C., 533; *Porter v. White,* 128 N. C., 44; *Newton v. Clark,* 174 N. C., 394; *Williamson v. Rabon,* 177 N. C., 305; *Chilton v. Smith,* 180 N. C., 474; *Pridgen v. Pridgen,* 190 N. C., 106.

BASIL DEVEREUX v. M. McMAHON ET AL.

Deeds, where to be proven; form of certificate of, probate and order of registration—Witness making his Mark—The Code, sec. 1246.

1. The Code, sec. 1246, authorizes the proof of a deed to be made before the clerk of the Superior Court of the county in which the subscribing witness resides, although the land conveyed lies in another county; and when a deed is thus proven, but the certificate of the clerk is silent as

to the residence of the witness, it will be presumed that the witness resided in the county of the clerk before whom the deed was proven, under the maxim *omnia presumuntur rite esse acta.*

2. When an order of registration is intelligible, and the essential substance thereof appears, it will be upheld without regard to mere form. *"Let the instrument of the certificate be registered"* will do.

3. One who cannot write his name is competent as a witness to a deed. Making his mark is sufficient.

CIVIL ACTION, tried before *MacRae, J.*, at January Term, 1889, of HALIFAX Superior Court.

The facts are stated in the opinion.

This is an action to recover land, and the pleadings raised (285) issues of fact. On the trial the plaintiff offered in evidence what purported to be a deed of conveyance, to the admission of which the defendants objected. The court, "being of the opinion that the *probate* was insufficient, sustained the objection," and the plaintiff excepted. He, thereupon, suffered a judgment of nonsuit, and appealed to this Court.

The following is a copy of so much of the deed mentioned, and the certificates of probate and registration thereof, as it is necessary to report here:

"In witness whereof, the said Thomas Alexander hath hereunto signed his name and affixed his seal, the day and date above written.

"Witness: +[Seal.]

"Signed, sealed and delivered in presence of John + Cobb, witness, toward of what was said Thomas Alexander did agree to the deed.

SOLOMON DAVIS.

"STATE OF NORTH CAROLINA,

"NASH COUNTY.

"I, Jno. T. Morgan, clerk of the Superior Court, do hereby certify that the execution of the annexed deed was this day proven before me by the oath and examination of Solomon Davis, the subscribing witness thereto, who says that the deed was signed and delivered in his presence 13 January, 1888, to the grantee, for the purposes therein expressed.

"Witness my hand and official seal, this 20 January, A.D. 1888.

"(Signed) JNO. T. MORGAN,

"Clerk Superior Court."

[Seal of Nash Superior Court.]

(286) "STATE OF NORTH CAROLINA—HALIFAX COUNTY.
"In the Superior Court—9 February, 1888.

"The foregoing certificate of Jno. T. Morgan, clerk of the Superior Court of the county of Nash, duly attested by his official seal, is adjudged to be correct.

"Let the instrument of the certificate be registered.

"JOHN T. GREGORY,
Clerk Superior Court.

"Registered 9 February, 1888."

R. O. Burton for plaintiff.
W. H. Day and T. N. Hill for defendants.

MERRIMON, J. It seems that no question was raised on the trial, as to the sufficiency of the deed itself, by the maker thereof, on the ground that he simply made his *cross-mark* and annexed to it his seal. No such question is raised by the assignment of error for our decision.

That one of the subscribing witnesses made his *cross-mark* in identifying himself as such with the deed is no sufficient objection. Though he could not write, he might be eligible for such purpose and make his mark. *S. v. Byrd,* 93 N. C., 624; *Tatum v. White,* 95 N. C., 453; *Pridgen v. Pridgen,* 13 Ired., 259.

The awkward and informal form of the attestation of the second subscribing witness to the deed did not render him less such witness. It seems that he intended to say, in subscribing his name, that the maker of the deed acknowledged the execution of it before him, but whether he so meant or not, he was such a witness and could testify as to its execution before the probate officer.

The land embraced by the deed in question is situate in the county of Halifax. The deed was proven by a subscribing witness thereto before the clerk of the Superior Court of the adjoining county of Nash, and his certificate as to the proof of the deed does not state that this witness lived in that county. It is contended that, under the
(287) statute pertinent, the certificate is therefore void. We do not think so.

The statute (The Code, sec. 1246) prescribing how deeds shall be proven, provides, among other things, that "when the grantor, maker or *subscribing witness* resides in the State, but not in the county wherein *the land lies,* such deed, letters of attorney or other instrument requiring registration, must be acknowledged by such grantor or maker, or proved by the oath of such subscribing witness, before a judge of the Supreme or of the Superior Court, or the inferior court, or a notary public, or justice of the peace of the county wherein the grantor, maker

or *subscribing witness resides,"* etc. Now the certificate of the clerk of the Superior Court of the county of Nash states, "that the execution of the annexed deed was this day proven before me by the oath and examination of Solomon Davis, the subscribing witness thereto," etc. The fair inference is, that the witness thus mentioned was the same identical person who witnessed the "annexed deed," and that he resided, at the time he so took his oath and was examined, in the county of Nash. The presumption is he did; it is not to be presumed, nothing to the contrary appearing, that the probate officer would take proof of the deed otherwise than in the case allowed by law; the presumption is just the reverse. *Omnia presumuntur solemniter esse acta.*

If the certificate had said, "the annexed deed was this day proven before me by the oath and examination of," etc., and had omitted the other words, "who says that the deed was signed and delivered in his presence," etc., that would have been sufficient in such respect. The words last quoted were unnecessary, but as they were used, and are not as full in stating what the witness said as might be desired, still they do not render the proof insufficient; taking them in connection with other words to which they refer and with which they have proper relation, they imply in substance and effect that the "annexed deed"—the instrument under seal—having a seal—was "signed (288) and delivered" in the presence of the witness.

The certificate sufficiently identifies the deed, and the single bargainor and single bargainee therein. It mentions and refers to "the annexed deed"; it states "that the execution of the annexed deed was this day proven," etc. What deed? Whose deed? Executed by whom? Plainly, certainly, the deed annexed to the certificate, executed by the bargainor, Thomas Alexander, to the bargainee, Bazil Devereux, therein named. The words of the certificate, in their plain meaning and application, as certainly imply and refer to the deed and the persons just named as if these persons had been expressly named in it in their proper relations, as bargainor and bargainee, as regularly and properly they should have been, and they cannot refer to any other person or persons. So that, in this respect, the probate is sufficient.

The statutory provision recited above was in force at the time the clerk of the Superior Court of the county of Nash took the proof of the deed, and expressly conferred on him the authority to take such proof, if the subscribing witness to the deed resided in that county at that time, and, as we have seen, it must be taken that he did reside there then. Nothing to the contrary appears.

The certificate was properly authenticated by the official signature of the clerk and the seal of the court. The deed and this certificate thereto attached being exhibited to and before the clerk of the Superior Court of

Halifax County, where the land was situate, he had authority, conferred by a further express provision of the same statute, to adjudge thereupon that the deed was proven, and to order the registration thereof, as he did do, substantially and sufficiently, though not in a very formal manner. His order certainly refers to and is based upon the certificate annexed to the deed, and it "is adjudged to be correct"—that is, that the proof is taken correctly, and thereupon, it is further ordered (289) by him, "that the instrument (the deed) of the certificate (the instrument, the deed attached to it, and therefore, of it) be registered." The adjudication of proof of the deed is informal, but the substance of it, and the order to register the deed based upon it, sufficiently appear. The whole purpose, the deed, the certificate of proof thereof, the adjudication of proof thereof, and the order of registration, and their bearing each upon the other, in order and relation, appears, however informally, and this is sufficient. When an order or judgment is intelligible, and the essential substance thereof appears, it will be upheld, without regard to mere form. *Holmes v. Marshall,* 72 N. C., 37; *Young v. Jackson,* 92 N. C., 144; *Evans v. Etheridge,* 99 N. C., 43.

We, therefore, are of the opinion that the probate of the deed in question was sufficient. Hence, there is error. The plaintiff is entitled to a new trial.

Error. *Venire de novo.*

Cited: S. c., 108 N. C., 145; *Williams v. Kerr,* 113 N. C., 310; *Quinnerly v. Quinnerly,* 114 N. C., 147; *Deans v. Pate, ibid.,* 196; *Cozad v. McAden,* 150 N. C., 207; *Kleybolte v. Timber Co.,* 151 N. C., 637; *Pinnix v. Smithdeal,* 182 N. C., 410.

(290)

J. W. WILSON AND S. McD. TATE v. RICHMOND PEARSON, EXECUTOR OF R. M. PEARSON.

Practice — Pleadings — Waiver—Amendment—Of Pleadings—Of Records—Administration—Before July, 1869—Action on Administration Bonds—Statute of Limitations—Of Presumption of Payment—Supreme Court—Amendment of Pleadings.

1. A defendant having proceeded to answer, etc., without reference to a demurrer previously filed, is held to have waived it.

2. Though a party has the right to demand that his plea in bar shall be passed upon before a reference of the action, otherwise requiring a reference, he waives the right by not insisting upon it before reference ordered.

3. Though no sufficient cause of action was set forth against defendant in the original complaint, the general purpose of the action appearing, he cannot be heard to complain after amendment without objection by him.

4. The original administration of one's estate having been granted before July, 1869, a creditor could bring suit against his personal and real representatives and have an account taken, so that a decree should be rendered against the one or the other as in equity entitled.

5. Though a judge has the right to amend the record in the court below so as to make it speak the truth, he has no power to make any amendment that would affect the records of this Court; an appeal from a judgment in an action against an administrator, begun before 1869, having vacated a judgment absolute in this Court, conclusively fixes him with assets.

6. Though an administrator *d. b. n.* is the proper party to bring suit to collect assets to pay the debts of the estate, his refusal to do so, without indemnity, makes it competent for the creditors to sue, making him a party defendant, either under section 185 of The Code or the former equity practice.

7. When, in a former action, it was agreed in writing, at Spring Term, 1882, that plaintiff might take a nonsuit and enter the same in vacation, and at Spring Term, 1883, a nonsuit was entered without objection, *nunc pro tunc*, as of Fall Term, 1882, the defendant cannot, in the present action, brought to Spring Term, 1883, impeach the order collaterally and avail himself of the pendency of the former action as a defense.

8. The action having been brought for a breach of an administration bond, the cause of action is the original debt, and not a judgment theretofore taken fixing the administrator with assets.

9. A party is charged with a knowledge of all that transpires and is made of record in the progress of the action, and of all pleadings and admissions of facts by his counsel.

10. The failure of an administrator to faithfully administer the assets that come, or ought to come, into his hands, constitutes a breach of his official bond, which can be cured only by actual payment, and the cause of action on the bond is not merged in a judgment obtained against the administrator for a debt due the plaintiff.

11. The statute of presumption of payment, and not the statute of limitations, is applicable to an action on an administration bond executed in 1859 and for a breach prior to 24 August, 1868, (The Code, sec. 136), and the action being brought within ten years, and judgment given, with the intervention of less than a year after nonsuit, the plea of the statute cannot avail a surety.

12. An objection in this Court that the action on an administration bond was not brought in the name of the State may be obviated by a motion to amend, under section 965 of The Code; but, under the circumstances of this case, on terms that plaintiffs pay all costs.

CIVIL ACTION, tried before *Boykin, J.*, at August Term, 1887, (291) of the Superior Court of BURKE County, and heard upon the

report of the referee (to whom the cause had been referred) and exceptions thereto. There was judgment confirming the report, and the defendant, Richmond Pearson, executor, etc., appealed.

The action was commenced by summons issued on 8 February, 1883, against John Gray Bynum, administrator *d. b. n.* of Charles McDowell, deceased, C. M. McCloud, administrator of N. W. Woodfin, deceased, Richmond Pearson, executor of R. M. Pearson, deceased, Samuel McDowell and others.

The complaint alleges in substance:

1. That Charles McDowell died in 1859, leaving a last will, which was duly proved.

2. That N. W. Woodfin was duly appointed administrator *c. t. a.* of said Charles McDowell, and executed his bond as such, with John W. Woodfin, W. F. McKesson and R. M. Pearson as sureties.

(292) 3. That said N. W. Woodfin died insolvent, and C. M. McCloud is his administrator, and that John W. Woodfin and W. F. McKesson are dead, and their estates insolvent.

4. That R. M. Pearson died, leaving a large estate, and the defendant, Richmond Pearson, is his executor.

5. That on 25 November, 1855, W. F. McKesson, Charles McDowell and James McKesson (the last two as sureties), executed their bond, signed and sealed, to W. M. Walton, promising to pay to him or to his order the sum of $2,200.

6. That James McKesson is dead, and his estate is insolvent.

7. That no part of said bond has ever been paid.

8. That the plaintiffs are the assignees and owners of said bond and the debt created thereby.

9. That N. W. Woodfin died in 1876, and John G. Bynum has been appointed and duly qualified as administrator *de bonis non,* etc., of the estate of Charles McDowell.

10. That the outstanding debts against the estate of Charles McDowell, deceased, are between $8,000 and $9,000.

11. That Charles McDowell, deceased, left a large personal estate, consisting mostly of slaves, and the plaintiffs are informed and believe that all the personal estate of the deceased has been exhausted in the payment of debts and by the emancipation of the slaves and other destructive results of the war.

12. That there are no personal assets known to plaintiffs out of which they can obtain payment of their debt, and none have come to the hands of John G. Bynum, administrator, etc., as they are informed.

13. That Mary T. Pearson, and others named, are the heirs and devisees of Charles McDowell, deceased.

14. That Charles McDowell died seized of the lands mentioned in the complaint.

15. That said lands are in the possession of Samuel McDowell (293) (and others named).

16. That John G. Bynum, administrator, etc., of Charles McDowell, has not instituted any legal proceeding to recover any assets, if any there be, from N. W. Woodfin, the former administrator, etc., nor has he instituted any legal proceedings to subject the real estate of said Charles McDowell, deceased, to the payment of the debts of the deceased.

17. That plaintiffs demanded of said Bynum, administrator, etc., before bringing this action, that he should file a petition for sale of real estate, etc., and that he declined to do so.

Judgment is demanded for sale of real estate, and for such other and further relief, etc.

To this complaint the defendant Richmond Pearson, executor, demurred, assigning as cause therefor:

"1. That no relief is prayed against him in the complaint.

"2. That the complaint admits that there had been no *devastavit* of the principal of his testator, N. W. Woodfin, administrator, etc., of Charles McDowell, and consequently there is no breach of the administration bond of said Woodfin."

It nowhere appears from the record that this demurrer was ever passed upon judicially, but at the same term of the court the following order was made:

"In this case, the defendant having filed a demurrer, and the pleadings being under oath, and the defendant Pearson being absent, it is ordered that within 30 days the defendant Pearson be allowed to withdraw his demurrer and file an answer, and he is required to serve the plaintiff with a copy of answer, in case he should file the same."

At Septemer Term, 1883, by consent of counsel for all parties (including the defendant Pearson), in writing filed, allegation 5 of the complaint was amended, by adding: "That W. M. Walton brought suit on said bond 15 March, 1866, and at Fall Term, 1869, obtained judgment thereon, as appears of record in the Superior Court of Burke County."

Allegation 8 was amended so as to read: "That W. M. Walton, (294) by a written assignment, conveyed all his interest in said bond and judgment thereon to S. McD. Tate, and that said interest belongs to the plaintiffs jointly."

Allegation 11 was amended by adding: "Nevertheless, the plaintiffs are informed that the devisees of Charles McDowell, deceased, defendants in this action, deny that the assets of the estate of Charles McDowell have been exhausted or legally applied, and allege that N. W.

Woodfin, former administrator, was guilty of a *devastavit* of said assets, and plaintiffs are not able to swear positively how the matter stands."

And the prayer for relief was amended by adding: "That an account be taken of the estate of Charles McDowell, deceased, to ascertain whether the assets have been exhausted or have been legally applied, and how much, if any, assets are still in, or ought to be in, N. W. Woodfin's hands; and if it appears that he was guilty of *devastavit,* that plaintiffs have judgment against his administrator and the security on his bond, to wit, Richmond Pearson, executor of R. M. Pearson, deceased, and for such further relief in the collection of plaintiff's debt or claim as may be consistent with the facts found in this case."

To this amended complaint the defendants answer:

"1. That the judgment mentioned, as having been entered and recorded in 1869, is barred by the statute of limitations.

"2. That the judgment aforesaid is dormant, and leave to bring an action thereon was not obtained prior to the bringing of this action.

"And for further answer they adopt the answer of their codefendant, J. G. Bynum, administrator."

This answer is signed by counsel for defendants, including G. N. Folk, counsel for the defendant Pearson.

Upon the trial of the cause at September Term, 1883, by agreement in writing, allegations 1, 2, 3, 4, 5, 6, 8, 9, 13, 14, 15, 16 and 17 were admitted, and it was also admitted that N. W. Woodfin, as ad-
(295) ministrator of Charles McDowell, within less than two years after his qualification, divided among the legatees the greater part of the personal property and took no refunding bonds, and upon being heard "upon the pleadings, the records made part of the facts and the admissions of the parties," judgment was rendered for the defendants, and the plaintiffs appealed. In the Supreme Court (92 N. C., 717), the judgment of the Superior Court was reversed.

At Spring Term, 1886, upon motion of plaintiffs, the case was referred, under The Code, to George F. Bason, "to take and state an account of the estate of Charles McDowell, deceased, to ascertain and report whether the assets have been exhausted or legally applied, and how much, if any, assets are still in, or ought to be in, the hands of N. W. Woodfin, administrator of said estate, or in the hands of his personal representative, which ought to be applied to the claim of the plaintiffs, and report," etc.

This order of reference was resisted by J. G. Bynum, administrator, etc., Cora McDowell, Manly McDowell and Thos. Walton and wife, and was made without prejudice as to them.

At the same term it was ordered that J. G. Bynum, administrator, etc., and the McDowell heirs, have leave to amend their answers, and that the "plaintiffs have leave to amend their complaint heretofore filed herein as they may be advised, said amendment to be filed either at the time or before the referee appointed herein to state an account, and upon any amendments to plaintiff's complaint, and the defendants shall have leave to amend their answers in reply to such amendments made by plaintiffs."

And thereupon the heirs of Charles McDowell, defendants, filed an amended answer, with a copy of the judgment of the Supreme Court rendered at January Term, 1870, upon appeal from the Superior Court of Burke County, in the case of "W. M. Walton, plaintiff, against W. F. McKesson, N. W. Woodfin, administrator of Charles McDowell, and W. F. McKesson, administrator of James McKes- (296) son," and insist that it was a "final judgment absolute" against the defendants in the judgment mentioned in allegation 5 of the amended complaint, and fixed N. W. Woodfin, administrator, etc., with assets sufficient to discharge the same, and that said judgment is a bar to the recovery of the plaintiffs against them.

They further say that the administration bond of said Woodfin was then and still is perfectly solvent, etc.

The plaintiffs filed (6 August, 1886) an amended complaint, admitting that the copy of the record of the judgment of the Supreme Court of North Carolina in the case of Walton *v.* McKesson *et al.*, to be true, and alleging "now that N. W. Woodfin, administrator, etc., of Charles McDowell, had in his hands assets sufficient to pay the plaintiffs' debt, and that he unlawfully distributed them and wasted them, and that the sureties on his bond and their representatives are liable for plaintiffs' debt."

Plaintiffs thereupon demand judgment against the defendant Pearson for the said debt and for such other or different relief as they may be entitled to against all the defendants."

Thereupon the defendant, Pearson, executor, etc., filed a separate answer to the "complaint and amended complaints of the plaintiffs," admitting paragraphs 1, 2, 3, 4, 5, 6 and 9 of the complaint.

That allegation 7 is not true, as therein alleged, but, in substance, that the bond set out in paragraph 5 was reduced to judgment at Fall Term, 1869, of the Superior Court of Burke County, in the action of Walton *v.* McKesson *et al.*, and by said judgment merged and extinguished, and that it was a judgment *quando* and not absolute as to N. W. Woodfin, administrator, etc., of Charles McDowell, and an admission of record that he had not and ought not to have had assets of the estate of said Charles McDowell at the date of said judgment,

(297) ment, and that the plaintiffs (assignees, etc.) are estopped from averring that there was a *devastavit,* etc., prior to said judgment.

That he has no knowledge, etc., as to paragraphs 8, 10, 11, 12, 13, 14, 15, 16 and 17; and to the amended complaint of the plaintiffs, he answers, in substance, that the judgment mentioned in paragraph 1 of the amended complaint was rendered by the Supreme Court at January Term, 1870, in an action begun in 1866 in the Superior Court of Burke County, in which there was a judgment at Fall Term, 1869, absolute, against W. F. McKesson, individually and *quando,* against N. W. Woodfin, administrator, etc., and that from said judgment W. F. McKesson alone appealed, and that there was no appeal by Woodfin, administrator, etc.

That said judgment on appeal was affirmed at January Term, 1870, of the Supreme Court, and that while it is true that said judgment of the Supreme Court appears to have been entered against W. F. McKesson and N. W. Woodfin, administrator, etc., of Charles McDowell, yet, as said McKesson had alone appealed, the court had no jurisdiction as to Woodfin, administrator, etc., and no authority to render such judgment as against him, or that it can have the effect to fix said Woodfin, administrator, etc., with assets.

The second allegation of the amended complaint is denied, and it is insisted that even if the plaintiffs were the owners of said judgment, they are estopped from averring that Woodfin had, or ought to have had, assets.

For a further defense it is insisted that the plaintiffs have no right to maintain this action, "but that the administrator *de bonis non, c. t. a.,* is the real party in interest . . . and alone has the right to maintain actions for breaches of said Woodfin's said administration bond."

For a further defense it is insisted that the judgment at January Term, 1870, is dormant, has never been revived, etc., and the ten (298) years, the six years and the three years statutes are relied on, each as a bar to this action.

For a further defense it is insisted that on 19 January, 1874, an action was commenced by W. M. Walton, in the Superior Court of Burke County, upon the administration bond of N. W. Woodfin and the surety thereon, for the "same cause of action and between substantially the same parties" as this, and that said suit was pending till Spring Term, 1883, in the Superior Court of Catawba (to which it had been removed), when the plaintiffs caused a "nonsuit" (as it is styled in the pleadings) to be entered "taken as of Fall Term, 1882," and that this action was begun on 8 February, 1883, pending said action.

For a further defense it is insisted that more than a year elapsed after the entry of said nonsuit before the filing of the amended complaint,

seeking to charge the defendant as executor, etc., or asking any relief against him, and that the defendant never gave his consent to the filing of the amended complaint, and that the court had no power to grant leave to file an amendment that would deprive defendant of the benefit of any statute in respect to the matters alleged in said amendment.

For a further defense, the defendant adopts and sets out as part of his answer a portion of the answer of J. G. Bynum, administrator, etc., in this action, and also the answer of his testator, R. M. Pearson, to the complaint of W. M. Walton *v.* N. W. Woodfin, administrator, etc., *et al.*, but in the view which we take of this case, it is not material to report them here.

The report of the referee, Bason, was filed at March Term, 1887, which was substantially, and so far as material to the questions before us, as follows:

1. That on 25 November, 1855, W. F. McKesson executed to W. M. Walton the note under seal for $2,200 (set out in full), with Charles McDowell and James McKesson as sureties.

2. That plaintiffs are the owners of said bond and judgment (299) thereafter taken thereon.

3. That W. F. and James McKesson are both dead, and their estates insolvent.

4. That Charles McDowell died in 1859, leaving a will, and on 24 November, 1859 (the executor having failed to qualify), N. W. Woodfin was appointed administrator *c. t. a.*, and gave bond as such, with John W. Woodfin, W. F. McKesson and R. M. Pearson as sureties.

5. That N. W. and J. W. Woodfin are dead, and their estates are insolvent.

6. That J. G. Bynum is the administrator *d. b. n.* of Charles McDowell, but has no assets, etc.

7. That R. M. Pearson died, leaving a large estate, and the defendant, Richmond Pearson, is his executor.

8. That Charles McDowell left, besides valuable real estate, "personal property of the value of $31,727, a large portion of which consisted of negro slaves, all of which went into the hands of Woodfin, his administrator, and all of this sum, except some $1,500 paid out on debts of his testator, was either wasted by said administrator or distributed to the legatees named in the will, without taking refunding bonds therefor, leaving the debt of plaintiffs still due and outstanding." It is further found that a part of the property so distributed (more than enough to pay plaintiffs' debt) "was lost by the result of the war."

9. That J. G. Bynum, administrator *d. b. n.*, etc., was, before the institution of this action, "requested by the plaintiffs to bring suit to

collect the assets of his testator's estate to pay their debts, but refused to do so without indemnity against costs, as set out," etc.

10. That suit was brought by W. M. Walton in the Superior Court of Burke County on 15 March, 1866, against W. F. McKesson, administrator of James McKesson, and N. W. Woodfin, administrator,
(300) etc., of Charles McDowell, on the bond referred to in section one, and at Fall Term, 1869, there was a trial of said cause, and an absolute judgment thereon, etc., from which judgment all the defendants appealed to the Supreme Court. (The verdict of the jury, judgment of the court and appeal by the defendants, as set out on the minute docket of Burke Superior Court, are set forth in *Walton v. McKesson et al.*, 101 N. C., 430.)

11. That at January Term, 1870, of the Supreme Court, said appeal was heard, and a judgment absolute in said Court was rendered for the plaintiff against all the defendants, etc.

12. That at Spring Term, 1870, of Burke Superior Court, an entry of judgment, purporting to be according to the certificate of the Supreme Court, was made of record in said cause; but in fact, said entry of judgment was not in accordance with said certificate, which only directed an entry of judgment for costs of Burke Superior Court, while the judgment actually entered was for plaintiff's debt, as well as for costs.

13. That at Spring Term, 1878, of Burke Superior Court, the records of said Fall Term, 1869, of said court were, by order of Judge Cloud, amended as set out (making the judgment absolute against W. F. McKesson individually, and *quando* as against him as administrator of James McKesson, and *quando* against N. W. Woodfin, administrator, etc., of Charles McDowell), and on 11 March, 1879, an assignment of all his right, title and interest in the said judgment was made by W. M. Walton to the plaintiff, Tate.

14. That on 5 November, 1869, W. M. Walton and one Michaux filed a creditor's bill, in the Superior Court of Burke County, against N. W. Woodfin, administrator, etc., of Charles McDowell and others, for the collection, among others, of the Walton debt, and on 21 March, 1870, an order was made in said cause restraining the creditors of said
(301) McDowell from collecting their debts otherwise than as ordered in said cause. R. M. Pearson was made a party defendant on 19 December, 1873, and at Fall Term, 1874 (24 August), the cause was dismissed.

15. That on 19 June, 1874, W. M. Walton brought suit on the administration bond of N. W. Woodfin, against the said Woodfin, and R. M. Pearson and W. F. McKesson, his sureties, to recover the debt mentioned in section 1. Pending said action Woodfin died, and J. G. Bynum, administrator *d. b. n.* of Charles McDowell, was made a party,

and R. M. Pearson having also died, Richmond Pearson, his executor, came in at March Term and made himself a party defendant.

At March Term, 1879, the cause was removed to Catawba Superior Court, and the present plaintiffs were made parties. At Spring Term, 1879, there was a trial and judgment, from which both parties appealed to the Supreme Court (see case in 82 N. C., 454; 83 N. C., 309, and 85 N. C., 34).

At Fall Term, 1881, of Catawba Superior Court, the opinion of the Supreme Court was filed, and the case continued without an entry of judgment, according to the certificate of the Supreme Court.

At Spring Term, 1882, "by consent of all parties," signed by their counsel, it was agreed that the plaintiffs have leave to take a nonsuit and "enter the same in vacation between this and Fall Term, if they desire."

At Fall Term, 1882, the case was continued, and on 6 February, 1883, two days prior to the bringing of this action, a "nonsuit" was entered of record in vacation, by the plaintiffs, and afterwards, at Spring Term, 1883 (last Monday in February), an entry of "nonsuit" was made as of Fall Term, 1882, and the costs for which the plaintiffs were liable were paid.

16. That on 14 August, 1875, W. M. Walton brought suit (302) against R. M. Pearson, to follow assets of the estate of Charles McDowell in his hands (value of certain slaves). At Spring Term, 1876, J. G. Bynum, administrator, etc., of Charles McDowell and others, were made parties defendants. At Spring Term, 1878, the death of R. M. Pearson was suggested, and Richmond Pearson, his executor, made himself a party defendant, and at Spring Term, 1879, the present plaintiffs were made parties plaintiffs.

The cause was continued from term to term, till Spring Term, 1882, when the same order as to nonsuit, etc., was entered as in Walton *v.* Woodfin (in preceding section), and on 6 February, 1883, in vacation, and at Spring Term, 1883, similar entries of nonsuit were made as in that cause.

No objection appears to have been taken, and there was no appeal therefrom.

17. That the plaintiff's debt (principal and interest), amounts to $6,329.40, is still due and unpaid, and, so far as the evidence shows, is the only outstanding debt against the estate of Charles McDowell.

18. That the assets that came into the hands of N. W. Woodfin, administrator, etc., and wasted or distributed, amount (with interest added) to $79,400, "all of which ought now to be in the hands of the present representative of Charles McDowell."

Conclusions of law:

1. The evidence offered by the plaintiffs and the McDowell heirs, defendants, tending to show a distribution of the slaves of the estate of Charles McDowell, by Woodfin, administrator, etc., among the legatees under the will, without taking refunding bonds, was competent to show *devastavit,* etc., and the objection thereto by the defendant Pearson was overruled.

(303) 2. The evidence offered and objected to, tending to show a sale of said slaves by Mrs. Pearson or Judge Pearson, after such distribution, was competent to show that they were not lost by the results of the war.

3. (The third conclusion of law relates to the amendment of the record by Judge Cloud at Spring Term, 1878, of Burke Superior Court, and the exception thereto having been sustained by his Honor below, it, and the exception thereto, need not be stated here.)

4. As a final judgment absolute was rendered in the Supreme Court, at January Term, 1870 (case 64 N. C., 154), there was properly no judgment of record in the Superior Court of Burke to be amended into *quando* judgment.

5. Said judgment having been absolute, fixed the administrator with assets.

6. The plaintiffs' cause of action, having accrued prior to The Code, is not affected by the statute of limitations, and the statute of presumption having been rebutted, the plaintiffs have a right to recover, new suit having been brought within one year after nonsuit, etc.

7. The plaintiffs having requested the administrator *de bonis non* to bring action, etc., and he having refused to do so unless indemnified, the plaintiffs had a right to bring action against him and the other defendants under section 185 of The Code, and if not, it appeared upon the face of the complaint and should have been taken advantage of by demurrer, and he finds that the plaintiff is entitled to recover.

The defendant Pearson, executor, filed numerous exceptions, 36 in number, covering many pages of the written record, besides numerous others taken before the referee, but the first, second, third and fourth were abandoned in this Court, and only so much of the substance of the others is stated as in the view of the case taken by the Court is material.

The fifth exception, the first relied on, is to the power of the referee, under the order of reference, to consider or take into the account any assets that came or ought to have come into the hands of N. W.

(304) Woodfin, administrator, etc., prior to the judgment at Fall Term, 1869, of Burke Superior Court, or before the judgment of said

court at Spring Term, 1870, or to consider any matters except the assets which came or ought to have come into his hands since the Fall Term, 1869, of said court.

The 6th, 10th, 11th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 24th, 25th, part of 26th, 27th, 28th, part of 29th, 30th and 31st, which are set out at great length and argumentatively, are based upon the assumption that the judgment of Fall Term, 1869, was a judgment *quando* as to Woodfin, administrator, etc., of McDowell; that the plaintiffs acquired, by the assignment to them, nothing but the judgment *quando;* that the testimony objected to in the several exceptions, upon which the referee acted, was irrelevant and incompetent, because the judgment *quando* was an admission that there was, up to the time of said judgment, no *devastavit,* and that the personal assets had been legally exhausted; that the several findings of fact and conclusions mentioned in said exceptions were not within the province of the referee; were immaterial and irrelevant, supported by no competent evidence; that the plaintiffs are estopped by their allegations in seeking to subject the real estate to the payment of their debt, from alleging a *devastavit,* etc., and if they were not, that an action for the *devastavit* could only be brought by the administrator *de bonis non* of Charles McDowell; and further, that the nonsuit taken in February, 1883 (both that attempted to be taken in vacation and that entered in term-time as of Fall Term, 1882), were irregular, illegal and void.

The seventh exception is, that the referee treated the action as one against the defendant, on the administration bond of N. W. Woodfin, administrator, etc., and took into consideration the alleged amendment of 6 August, 1886, which changed the nature of the action, introduced a new cause of action, and that neither the court nor the (305) referee had authority to take or allow such amendment, and that at the time of said amendment there was no action against this defendant; and further, that if there was any such judgment in the Supreme Court as that referred to in said alleged amendment, there was no evidence that the plaintiffs owned it.

The eighth exception is "that the order of reference was improvidently made and premature, in that the defenses in bar of the action were undisposed of, and said order of reference was erroneous and irregular."

The ninth exception is "that the first finding of fact by the referee is against the weight of evidence, contrary to the allegations of the complaint, without evidence to support it, and the finding is 'immaterial and without the province of the referee, and there is no competent evidence of bond not paid.'"

The twelfth exception is to the ninth finding of fact as immaterial, outside the province of the referee, "contrary to the weight of evidence, and without evidence to support it."

The twenty-second and twenty-third exceptions are to the seventeenth and eighteenth findings of fact, as without the province of the referee, upon a matter adjudicated to the contrary (as to the eighteenth finding), and which the plaintiffs are estopped to controvert, etc.

The thirty-second exception is that the referee should have found "that the complaint does not state facts sufficient to constitute a cause of action against this defendant."

The thirty-third exception is "to the admission of the testimony of G. N. Folk as irrelevant and inconsistent, and to the admission in evidence referred to in the testimony taken by the referee as the admission of facts filed in the case.

The thirty-fourth exception is to that part of the testimony filed by the referee, "which purports to be and is a copy of the testimony taken, and not the original."

(306) *"Exception* 35. The referee finds in the eighteenth finding of fact that assets found to have been wasted by Woodfin, administrator, ought now to be in the hands of the representative of Charles McDowell; and yet further finds in the sixth finding of law, that this defendant is liable for so much thereof as will pay the amount claimed by these plaintiffs to these plaintiffs; and that these plaintiffs can maintain this action in their own names to recover the same against this defendant. Such findings of law upon such findings of fact cannot be, and are not correct."

The thirty-sixth exception is substantially, and at much length, a recapitulation of the other exceptions, and is fully and in detail covered by them, and need not be repeated here.

So much of exceptions twenty-six and twenty-nine as are not covered by the summary were sustained, and need not be referred to. The other exceptions were overruled.

The Court held that the cause of action was not barred by the statute of limitations, nor was there payment under the statute of presumptions, and that the evidence of Tate and Walton, exception to which (29) was sustained, on this point was immaterial.

The court further held that the plaintiffs were not entitled to judgment against the McDowell heirs, and gave judgment, as to them, for costs against the plaintiffs.

There was judgment against Richmond Pearson, executor, for $50,000 (the penalty of the bond of Woodfin, administrator, etc., to which R. M. Pearson was surety), to be discharged on the payment, etc.

From this judgment the defendant, Richmond Pearson, executor, etc., appealed.

D. Schenck and Batchelor & Devereux for plaintiffs.
F. A. Sondley and Armistead Jones for defendant.

DAVIS, J., after stating the case: The purpose of this action is (307) to recover a debt originally due by note, under seal, executed by W. F. McKesson, with Charles McDowell and James McKesson as sureties. Actions to recover this debt have been pending in some form, against parties sought to be held liable for its payment, since March, 1866. After various amendments and many irregularities and inconsistencies in the pleadings, which perhaps would have been fatal to the action if objection had been taken and insisted upon in apt time, but which were either waived or cured by amendments, it has now assumed the simple character of an action against the representative of the only solvent surety on the administration bond of N. W. Woodfin, administrator of Charles McDowell, for a *devastavit* and misapplication of assets.

In one form or another its subject-matter has been frequently before this Court, as will be seen by reference to 64 N. C., 154; 82 N. C., 464; 83 N. C., 309; 85 N. C., 34; 92 N. C., 717, and 101 N. C., 428.

When it was here at February Term, 1885 (92 N. C., 717), *Ashe, J.*, characterized the record, "interspersed with its numerous amendments," as "obscure, inconsistent, and voluminous," and after the new trial granted at that term, and to meet the defects then suggested, it was again amended (both the complaint and the answers), and to the order allowing the amendments there was, at the time, no objection—certainly no exception noted and no appeal taken or right of appeal reserved, and whether the amendments ought or ought not to have been allowed are not now questions for our consideration.

It is said by counsel: "The plaintiff had complained; Pearson had answered by demurrer; no reply thereto had been or ought to have been filed for three years; this was the end to the pleading between them." This might have been so, but for the fact that at the first term after the demurrer was filed (September Term, 1883), by *consent*, the complaint was amended, an *answer* filed, there was a trial, a (308) judgment and an appeal to the Supreme Court. That the demurrer (if not passed upon) was thus waived, it seems too plain to need the support of authority.

It is insisted by counsel for the defendant that "the reference in this action was compulsory and irregular, because it prescribed a determination of the matters pleaded in bar, to wit, the statute of limitations;

that the action was brought in the wrong name; the pendency of another action between the same parties and for the same purpose at the commencement of this action, and the existence of a judgment *quando*"; and for this he cites numerous authorities.

The authorities cited clearly show, and it cannot be questioned, that the defendant had a *right to have any plea in bar passed upon, before the reference was ordered,* but, if he wished to avail himself of that *right, it was his duty to have insisted upon it before the reference was ordered.* This is well settled, *Grant v. Hughes,* 96 N. C., 177, and the cases there cited.

The order of reference was resisted by J. G. Bynum, administrator, etc., and the McDowell heirs, and was "without prejudice as to them," but there was no objection by the defendant, Pearson, and as to him, it "was equivalent to assent and a waiver." *Grant v. Hughes, supra.*

But it is insisted that when the order of reference was made, the defendant Pearson could not object, because there "was no case stated" as against him, as that was settled by the judgment *quando.* One of the objections now urged against the reference is that the question, whether there was a judgment *quando,* was, among others, not passed upon before the reference was ordered.

But the defendant was a party to the action, made no objection to the order, and the very purpose, and the only purpose of the reference, was to ascertain whether the assets in the hands of Woodfin, administrator, etc. (to whose bond the defendant's testator was surety), had "been exhausted or legally applied," and if he assented to the
(309) order of reference, or made no objection and took no appeal, as he had a right to do, he cannot now be heard to object.

The same may be said in regard to the amended complaint of 6 August, 1886. If the defendant had any objection to the order allowing the amendments, it should have been then taken.

But it is insisted that the "referee treated this action as one against this defendant brought on Woodfin's administration bond," and the court had no right to "permit an amendment which changes the nature of the action, makes a misjoinder of causes of action inconsistent in themselves, and inconsistent with the action originally begun, and with the admissions of the complaint."

The defendant's testator, R. M. Pearson, was made a party defendant in the creditor's action instituted by Michaux and others, and also in the action brought in June, 1874, by W. M. Walton, on the administration bond of N. W. Woodfin, in both of which recovery of the debt now sued on was attempted, and when this action was brought the present defendant, his executor, was made a party defendant.

If liable at all, it could only be on the administration bond, and so far as the defendant is concerned, no action could be brought except on the administration bond. However defective the original complaint may have been in failing, properly to allege a cause of action against the defendant, and in failing to demand, specifically, judgment against him, the purpose of the action has been apparent. The defendant was made a party with the heirs at law for some purpose, and allegations in the complaint show what the purpose was.

It is alleged that Charles McDowell died; that Woodfin was appointed his administrator; that the defendant's testator was surety on his administration bond; that McDowell, in his lifetime, was one of the sureties to the debt for the recovery of which this action is brought; that all the persons or their estates liable for said debt, except McDowell's estate, are insolvent, and that no part of the debt has been paid; (310) and, by an amendment by consent of all parties, for the purpose of ascertaining whether the assets in the hands of Woodfin, administrator, etc., have been legally applied or exhausted, an account is asked for, to the end that, if it shall appear that there was a *devastavit,* the *plaintiffs may have judgment against the defendant, Pearson, executor,* etc.

The defects in the complaint were not such as, in the absence of objection, to defeat the action altogether, and when amended by consent or without objection, as they were, they were cured.

The original administration on the estate of Charles McDowell was granted prior to 1 July, 1869, and, except so far as relates to the courts having jurisdiction, "is to be dealt with, administered and settled according to the law as it existed just prior to that date." The Code, secs. 1433 and 1476.

According to the law as it then existed, a creditor in a court of equity could, by a proper bill, obtain an account of the personal and real estate of his deceased debtor and have a decree for the payment of his debt, out of the proper fund. *Martin v. Harding,* 3 Ired. Eq., 603; *Finger v. Finger,* 64 N. C., 183. Of course, in such an action it would be necessary to have the real as well as the personal representative before the court, and the one or the other would be charged with the payment of the debt, as, upon the statement of the account, it might appear that the one or the other was liable.

This action may be treated as a bill to ascertain, by an account, whether the real or personal representatives of Charles McDowell are liable for plaintiffs' debt, and this seems to have been the view taken in this Court, when the judgment was reversed at February Term, 1885 (92 N. C., 717, and cases there cited).

(311) There was but one cause of action in the original complaint, or as amended, and that was the liability of the estate of Charles McDowell for the plaintiffs' debt, and if liable, whether that liability should rest upon the personal or real representatives, required the equitable aid of the court to determine. After the amended answer of the heirs of Charles McDowell, in which it appeared that there had been an absolute judgment final, fixing liability upon the personal representative, the plaintiffs very properly abandoned all claim as against them, and sought judgment against the defendant only.

The amended complaint was a reply and not an amendment, so far as it related to the amended answer of the McDowell heirs, admitting the truth and effect of their amended answer; but so far as it related to the defendant Pearson, executor, etc., it was an *amendment,* alleging, directly, that Woodfin, administrator, etc., had distributed and wasted assets applicable to the payment of their debt, and that the sureties on his administration bond were liable, etc. No new cause of action was alleged, so far as the heirs of Charles McDowell were concerned, it was conceded that when the record of the judgment in the Supreme Court was filed, that they were not liable, and that no judicial decree was necessary as to them, and the action was thereafter against the defendant, Pearson, executor, alone.

It is not the least singular fact connected with this action, the record in which one of our predecessors said "constituted a moderate sized volume," and which, we may add, has, with its age, greatly increased its proportions as well as its "irregularities, obscurities and inconsistencies," that the judgment of the Supreme Court at January Term, 1870, should have been so strangely overlooked by counsel on all sides. We do not know how to account for it, unless it be to prove by the exception the truth of the utterance of the wise man, that "in the multitude of counselors there is safety," for in looking through the record it will (312) be seen that there have been more than a score of counselors engaged, at one time or another. It may be, however, as they were not all engaged at the same time, the confusion resulted from a failure on the part of succeeding counsel to properly apprehend the plan of attack and defense arranged by their predecessors.

The first exception relied on was the fifth, and it may be considered with those numbered 6, 10, 11, etc. These exceptions rest mainly upon the assumption that the judgment rendered at Fall Term, 1869, of Burke Superior Court, as amended by order of Judge Cloud at Spring Term, 1878, was a judgment *quando,* and conclusive as to all questions relating to assets and *devastavit* prior to that time, and that all the evidence objected to was irrelevant.

Much of the very elaborate and learned brief of Mr. Sondley, which does great credit to his ability as well as to his industry, relates to the effect of the judgment *quando,* and the power of Judge Cloud to make the amendment. Whatever may have been the power of the judge in regard to the record of the Superior Court (and he unquestionably had the power to amend the record properly in that court), he certainly had no power to make any amendment that would affect the records of *this* Court, and (though it seems not to have been known) the final judgment was in this Court. The appeal having been taken, there was no judgment in Burke Superior Court which the judge could amend, and we regard all questions relating to this branch of the case as settled by the decision of this Court directly upon the question—*Walton v. McKesson et al.,* 101 N. C., 428—and we content ourselves with reference to it.

It is insisted, however, that it is settled in *Walton v. Pearson,* 85 N. C., 34, that Judge Cloud had the right to make the amendment in the Superior Court of Burke, so as to declare it a judgment *quando,* and that this is conclusive. However this might have been as a question of *res adjudicata,* if judgment had been entered in that case in conformity with the opinion of the Supreme Court, it was not done, (313) and a judgment of "nonsuit" was taken by consent or without objection, and a new action brought; and it now appears that there had been an appeal from the judgment sought to be amended by Judge Cloud, and a judgment absolute and final in this Court, which facts did not appear when this case was before the Court at October Term, 1881 (85 N. C., 34).

But it is insisted that the plaintiffs are estopped by their allegations, in seeking to subject the real estate to the payment of their debt, from alleging a *devastavit,* etc. As we have seen, this is an action equitable in its nature, and the plaintiffs had a right to have an account in order to ascertain whether the real or personal representatives of Charles McDowell were chargeable with the payment of their debt, and if there was any inconsistency in the allegations it was cured by the amendments, and the very purpose of the account was to determine whether there was or was not a *devastavit.*

But it is said that an action for such a purpose could only be brought in the name of the administrator *de bonis non* of Charles McDowell.

It is undoubtedly true, as the authorities cited by the defendant abundantly show, that, nothing else appearing, the action should have been in the name of the administrator *de bonis non.* This is well settled in this State, though a different rule prevails elsewhere. See *Merrill v. Merrill,* 92 N. C., 657, and the cases there cited; also *Tulburt v. Hollar, post,* 406. But it is in this case found as a fact that the administrator *de bonis non* was, "before the institution of this suit, requested by plain-

tiffs to bring suit to collect the assets of his testator's estate to pay their debts, but refused to do so without indemnity against costs." He was a necessary party, either as plaintiff or defendant, and whether (314) under section 185 of The Code, or under the old equity practice, he could be made a party defendant. *Smith v. Sheppard's Heirs,* 2 Hay., 163 (349); *Hardy v. Miles,* 91 N. C., 131; *Lunn v. Shermer,* 93 N. C., 164, and cases cited. Besides, the alleged defect appearing upon the face of the complaint, if relied on, it should have been by demurrer. *Lunn v. Shermer, supra; Davidson v. Elms,* 67 N. C., 228.

Under the old equity practice, all parties whose rights or interests were involved were required to be brought in, and now creditors may bring special proceedings against the personal representatives (The Code, sec. 1448); and if it shall appear at any time that the personal assets are insufficient, the heirs or devisees may be made parties. The Code, 1474.

It is insisted that when this action was commenced, 8 February, 1883, another action was pending between substantially the same parties and for the "same cause of action as this," and that the "nonsuit" taken in that action, in vacation, 6 February, 1883, and also the "nonsuit" taken thereafter at the February Term, 1883, were void. At Spring Term, 1882, it was agreed in writing, "by consent of all parties," "that the plaintiffs have leave to take a nonsuit and enter the same in vacation, between this and Fall Term, if they desire." This was not done, but, without objection, there was a "nonsuit" entered at Spring Term, 1883, *nunc pro tunc,* as of Fall Term, 1882.

Whether this was to carry out the written agreement of the parties, made at Spring Term, 1882, or not it was, in effect, as much a part of the proceedings of Fall Term, 1882, as if *then* made, and the defendant cannot impeach it now collaterally.

The seventh exception was properly overruled. It is based, it seems, upon the misapprehension that the action was brought on a judgment, whether *quando* or not, and that the amendment of 6 August, 1886, introduced a new cause of action; whereas, the only cause of action against the defendant, from the issuing of the summons, was on the (315) administration bond, and this sufficiently appeared, though indefinitely stated, in the first complaint; besides, there was no objection to the order allowing the amendment.

The plaintiffs' action, so far as the defendant is concerned, is for a breach of the administration bond, in distributing and wasting the assets without paying plaintiffs' debt; the judgment was evidence—not the cause of the action. Being a judgment absolute, it fixed Woodfin, administrator, etc., with assets.

The eighth exception relates to the order of reference, and has already been disposed of.

The ninth exception relates to the first finding by the referee. The finding is fully sustained by admissions in the record, the fact found is alleged in the complaint, it was within the scope of the order of reference, and there was no evidence that the bond was paid, and the exception was properly overruled. The assignment carried with it whatever interest Walton had.

The twelfth exception relates to the ninth finding of fact. The finding was material, in that it was proper that the action should have been brought in the name of the administrator *de bonis non,* unless he declined or failed to do so after request, when he might be made a party defendant. It was within the scope of the reference, it was supported by evidence, the defendant Bynum having testified that he never intended to bring any suit on Woodfin's bond unless indemnified.

But, as already said, the objection relates to a party to the action, and this appearing on the face of the pleadings, should have been taken by demurrer, so, in any event, the fact found could not be objectionable.

The twenty-second and twenty-third exceptions are to the seventeenth and eighteenth findings of fact. Both findings were clearly within "the province of the referee," and as to the eighteenth, there has been no "adjudication to the contrary," as the judgment was abso- (316) lute and not *quando.*

The thirty-second exception is to a failure of the referee to find a conclusion of law which was not within his province; and the exception was properly overruled.

The thirty-third exception relates to the admission of the testimony of Folk. His testimony covers eight pages. No exceptions were taken at the time, either to the competency of the witness or the admissibility of his evidence, and this broad exception cannot be considered. It is proper, however, to state that the defendant, being a party to the action, is charged with a knowledge of what transpired, and was made of record in its progress, and he is bound by the pleadings and admissions of fact filed in the cause. Folk was his counsel of record, and he was charged with a knowledge of that fact, as well of the pleadings and admissions filed.

We are unable to see the force of the thirty-fourth exception. It does not specify the testimony objected to, and there is nothing to direct our attention.

The thirty-fifth exception is that the eighteenth finding of fact and the sixth conclusion of law are inconsistent. The *fact* that assets, wasted by Woodfin, administrator of Charles McDowell, *ought* to be in the hands of the defendant, J. G. Bynum, administrator *de bonis non* of Charles McDowell, is not inconsistent with the *legal conclusion* that the

plaintiffs are entitled to have their debt paid by those liable for the wasted assets, which were applicable to the discharge of the debt; and as they are not in the hands of the present personal representative, the plaintiffs can (he having failed to collect them) maintain an action against him and the sureties on his predecessor's bond, to subject them to the payment of their debt.

(317) It is insisted that the note on which action was brought in 1866 was the original cause of action, and that it was merged in the judgment rendered at Fall Term, 1869, of Burke Superior Court, and is barred by the statute of limitations. This is a misapprehension. As to the defendant Pearson, this action is on the administration bond of Woodfin, to which his testator was surety. When the case of *Walton v. Pearson* was before this Court, 1881 (85 N. C., 34), it was said: "The defendant insists that, having obtained a judgment against all the makers of his note, it became merged in the judgment, as being a security of higher dignity, and could not therefore constitute a good cause of action in any suit subsequently instituted, and hence he argues that the plaintiffs can only complain of the nonpayment of the judgment as a breach of the administrator's bond, and as that was obtained in 1869, the case falls under section 34 of C. C. P. (The Code, sec. 155), which limits actions against the sureties of executors, administrators and guardians on the official bond of their principal to three years after the *breach thereof complained of.* We cannot yield our assent to the position assumed by the defendant or the conclusion he deduces therefrom. Every administrator owes the duty of faithfully administering the assets that come to his hands, and any default in that duty constitutes a breach of his official bond, which then and there gives to the creditors and others interested in a proper administration a sufficient cause of action against him and his sureties; and this breach of his bond can be cured only by a full satisfaction or by a release. Very sure it is, we think, that it cannot be cured, or in any wise affected, by any change short of actual payment, which may occur in the mere character of a claim against the estate. The dereliction of duty for which the administrator and his sureties are chargeable, and the one assigned, is the misapplication of assets of the estate in December, 1859, by making distribution thereof amongst the legatees, without taking refunding

(318) bonds from them; and the moment this occurred each creditor had a right, the plaintiffs among them, which right continued to subsist, notwithstanding his claim against the estate might subsequently assume the shape of a judgment." It was then adjudged that, for purposes of action for breach of the administration bond, the doctrine of merger has no effect.

This action is on an administration bond executed in 1859, and for a breach prior to 24 August, 1868, and the statute of presumptions, and not the statute of limitations, applies. The Code, sec. 136.

The question of the statutory bar is settled by the case in 85 N. C., 34, and this action was brought within less than one year after the nonsuit taken in that case. But the statute only raises a presumption of payment, which may be, as was, rebutted.

The original action to recover this debt from the McDowell estate was within ten years (deducting the time during which the statute was suspended), and it has been persistently pressed ever since; for immediately after the last "nonsuit," a new action was commenced, and if such a thing as continual claim could rebut a presumption it would avail in this case. The continued pendency of actions, less than a year intervening after nonsuit, defeats the plea of the statute.

The defendant moves in this Court to dismiss the action because, the bond being payable to the State, the action should have been in the name of the State, and insists that this defense was taken before Boykin, J., in the trial below; and in answer to this motion, the plaintiffs move to amend so as to sue in the name of the State to the use of the present plaintiffs, and insist that the objection is taken here for the first time.

The objection does not go to the merits of the case, and, without passing upon the conflicting affidavits, we think the case a proper one, under sec. 965 of The Code, for the exercise of the power of amendment, and the motion of plaintiffs is allowed. *Grant v.* (319) *Hughes,* 94 N. C., 760.

But, for this amendment, the plaintiffs must pay the entire costs of the action. Under the peculiar circumstances that have marked the progress of the cause, we think it is proper that they should be required to do so.

We think, upon an examination of the record, that there is no error in the ruling of his Honor below, and the judgment is affirmed.

No error. Affirmed.

Cited: Tuck v. Walker, 106 N. C., 289; *Clement v. Cozart,* 107 N. C., 704; *Hodge v. R. R.,* 108 N. C., 26; *Allen v. Sallinger, ibid.,* 160; *Joyner v. Roberts,* 112 N. C., 115; *Stith v. Jones,* 119 N. C., 430; *Kerr v. Hicks,* 129 N. C., 145; *S. c.,* 131 N. C., 93; *West v. R. R.,* 140 N. C., 621; *Robertson v. R. R.,* 148 N. C., 326; *Hardin v. Greene,* 164 N. C., 101; *S. v. Scott,* 182 N. C., 868.

LUCY A. HESTER AND J. C. HESTER v. JNO. W. LAWRENCE, ADMINISTRATOR.

Notice to Creditors under Section 1452 of The Code—Jurisdiction of Clerk of Superior Court—Special Proceedings under Section 1448 of The Code—Assignment of Error.

1. The notice to creditors required by sections 1451 and 1452 of The Code must be published as prescribed by section 1452, in a newspaper and at the courthouse door. The failure to make such publication is an error which the personal representative may assign in the Superior Court in term, upon appeal from a judgment of the clerk directing a distribution of the assets, although he did not except on this ground before the clerk.

2. A creditor is not bound by special proceeding against a personal representative, in the nature of a creditor's bill, under The Code, section 1448, *et seq.*, unless personally served with notice, or a general notice is published as prescribed by section 1452.

3. It seems that in a special proceeding under section 1448, *et seq.*, of The Code, the clerk has jurisdiction to render judgment, in favor of a creditor, against the personal representative *personally*, as well as in his representative capacity, if a *devastavit* is established.

CIVIL ACTION, tried before *Shipp, J.*, upon appeal, by the de-
(320) fendant, from a judgment of the clerk of the Superior Court of JOHNSTON County, Spring Term, 1888.

Turner Lawrence died in the county of Johnston in 1882; the defendant is his administrator, and this action was commenced by the plaintiff, on behalf of herself and all other creditors of the deceased, in the Superior Court of Johnston County, before the clerk, for an account and settlement.

The plaintiff alleges that there is a balance of $1,273, with interest from 23 November, 1884, due to her on a judgment obtained against the defendant administrator, and that there may be claims of other creditors to her unknown; that the defendant has collected assets to an amount more than sufficient to pay the indebtedness of the estate, which, without any legal excuse therefor, he has failed and refused to apply to the payment of the sum due to her, and she asks judgment that the defendant be directed to pay, and for an account, etc.

The defendant, answering, admits the indebtedness claimed by the plaintiff, and says that there are other and many claims against the estate; that there are three actions pending against him as administrator, and that a settlement of the estate cannot be had till these are determined.

He denies that he has assets, and alleges a failure to sell lands under an order of the court, by reason of the insufficiency of the price offered, and that an extension of the time for settlement was granted by the court.

In an amended answer he says that he is unprepared to settle, because of suits pending against the estate; that he has no assets in hand; that he has an order to sell real estate for assets to pay debts, but cannot sell before 1 January, 1887, and asks an extension of time, etc. An order was made allowing defendants till 3 January, 1887, to file his account.

Thereafter the following proceedings were had:

"On motion of the plaintiffs' counsel, and due notice to de- (321) fendant, I proceeded to state the account of defendant's administration of the estate of Turner Lawrence, deceased, on this 12 April, 1887, the plaintiff appearing by her counsel, Hon. D. G. Fowle, and the defendant in person and by counsel, J. H. Abell, Esq. After having stated the debit side of the account, and defendant consenting that he had received five thousand dollars for the estate, and had paid to the heirs at law about three thousand dollars, and the debt of plaintiff being unpaid, a judgment was entered against said J. M. Lawrence, as administrator, for the sum of twelve hundred and ten and 78/100 dollars, with interest thereon from 13 November, 1884, and for costs, to be satisfied out of the assets of the estate of Turner Lawrence, deceased, now in his hands, and if such assets are not to be found, then out of the goods and chattels and real estate of the said J. W. Lawrence. I therefore report that the defendant has had in his hands, as administrator, a sufficient amount to pay the said debt due to the plaintiff, and all the other debts due by the estate, so far as known (no other creditors having made themselves parties to this action).

"All of which is respectfully reported.

"L. R. WADDELL,
"Clerk Superior Court."

Upon this report the following judgment was rendered:

"This cause coming on for trial before me, and the defendant, administrator of Turner Lawrence, deceased, having admitted before the court that there were assets received to the amount of five thousand dollars, and that his disbursements, outside of payments made to the indebtedness of the estate, did not amount to more than three thousand dollars, and it being ruled by the court that said dis- (322) bursements to next of kin were not proper vouchers, as against a creditor, and no other creditor making himself a party to this action,

it is found as a fact that the defendant, J. M. Lawrence, administrator, has in his hands assets applicable to the discharge of the plaintiff's debt more than sufficient to pay the same in full. And therefore, it is considered by the court that the plaintiff, Lucy A. Hester, recover of the defendant, J. M. Lawrence, administrator of Turner Lawrence, deceased, the sum of twelve hundred and ten and 78/100 dollars, with interest thereon from 13 November, 1884, and for the costs of this action, to be satisfied out of the assets of the estate of Turner Lawrence, deceased, now in his hands; and if such assets are not to be found, then out of the goods and chattels and real estate of the said J. M. Lawrence.

"L. R. WADDELL,
"Clerk Superior Court."

From the above judgment the defendant appealed, assigning the following errors:

"1. That said clerk had not made publication according to law, for the other creditors of Turner Lawrence to come in and make themselves parties to this action, if they chose to do so.

"2. Because the clerk did not, according to the order of reference to him, take and file an account of the administration of the estate of Turner Lawrence, deceased.

"3. Because the clerk did not have power or jurisdiction, as the matter stood before him, to render a personal judgment in favor of the plaintiff.

"4. Because the clerk did not have power or jurisdiction to render a judgment against J. M. Lawrence, individually and personally, for twelve hundred and ten and 78/100 dollars, with interest thereon from 13 November, 1884, in the event that the said judgment, rendered
(323) against J. M. Lawrence, administrator, as aforesaid, could not be satisfied out of the assets of Turner Lawrence in the hands of said administrator.

"5. Because the report of the referee was not accompanied by any account of said administration, and the creditors of Turner Lawrence other than the plaintiffs had no opportunity afforded them, by publication as aforesaid, to make themselves parties to this action before the order of reference for account was made therein."

The judgment of the clerk was affirmed by his Honor, and the defendant appealed to this Court.

In regard to the question of notice, the following certificate of the clerk is filed with the record:

"I, L. R. Waddell, clerk of Superior Court of Johnston County, do hereby certify that a notice was given by me to all the creditors of

Turner Lawrence, deceased, to come forward and make themselves parties plaintiff in an action and creditor's bill, filed by Lucy A. Hester against John M. Lawrence, administrator of Turner Lawrence, deceased, and that said notice was posted at the courthouse door in Smithfield, Johnston County, and that no creditors, other than the plaintiff, filed their claims; that the original notice was not filed among the papers, and is lost or destroyed, and that no exception was taken before me by defendant's counsel, on the hearing, for want of the notice.

"Witness my hand and official seal, this second day of April, 1888.

"L. R. WADDELL,
"Clerk Superior Court Johnston County."

A. Jones for plaintiffs.
Fuller & Snow and E. C. Smith for defendant.

DAVIS, J., after stating the case: This is "a special proceeding," authorized by section 1448 of The Code, to compel the defendant "to an account of his administration, and to pay the creditors what may be payable to them respectively." "Its purpose is to ascer- (324) tain what the assets of the estate are, and distribute the same among all the creditors entitled to share them, according to their respective rights." *Dobson v. Simonton,* 93 N. C., 268.

Section 1451 of The Code directs that the clerk shall advertise for all creditors of the deceased to appear, etc., and section 1452 directs that "the advertisement shall be published at least once a week for not less than six weeks in some newspaper," etc.

The importance of a compliance with the requirements of the statute is rendered apparent, not only by the particularity with which the manner in which advertisement shall be made, or notice given, is prescribed, as will be seen by reference to the section, but by the consequences of the final report and judgment. See sections 1462, 1467, 1468, and 1469 of The Code.

But it is insisted that, while a creditor might take advantage of this want of notice, an administrator who has been guilty of *devastavit* cannot complain, and that in the case before us no exception was taken before the clerk. This is a mistake. As the judgment is to bind the administrator or executor to the extent of the assets which he may have received, or ought to have received, he has a right to be protected, by the judgment of the court, against suits by other creditors, and it is quite clear that creditors (other than parties appearing) would not be bound unless notified in the manner prescribed or by personal service of notice.

It appears in the case before us that there were other claims against the estate; that there were suits pending in other counties (two in Granville and one in Vance), and it does not appear that any notice to creditors was given, other than that posted at the courthouse door, and it does not appear that that was posted for thirty days, as required;

whereas, the clerk was required, in addition thereto, to publish
(325) the notice for at least six weeks in some newspaper "most likely to inform all the creditors."

Notice was not given as required by The Code, and the omission could be taken advantage of before the judge as well as before the clerk (sec. 1448); and the defendant's first exception should have been sustained.

The court below seems to have acted upon the idea that, as the administrator had paid over to the "heirs" or next of kin sums more than sufficient to pay the plaintiffs' judgment against the estate, it was unnecessary to state an account or proceed further. Undoubtedly, as against creditors, such payments to next of kin would not protect the administrator, but the proceedings under the statute contemplated a "final report and judgment," which shall settle the account of the administrator and close the administration; and there was error in overruling the defendant's second exception.

The other exceptions relate to the jurisdiction and power of the clerk to render the judgment set out in the record.

Conceding that the clerk has a special jurisdiction, distinct from his general duties as clerk of the court, and that he had jurisdiction to render judgment in this case, the proceedings and judgment must be in conformity with the power conferred upon him. *Brittain v. Mull,* 91 N. C., 498.

As to the nature of the judgment to be rendered against the administrator or executor, and the execution thereon, we refer to sections 1469, 1470, 1471, and 1509 of The Code.

As was said by the *Chief Justice* in *Brooks v. Headen,* 88 N. C., 449, "we do not mean to intimate that the plaintiff may not in the same action obtain a personal judgment, and then pursue his remedy against the intestate's estate, personal and real, in their proper order, for its satisfaction." It is not improper to say that such a judgment may be rendered, but in view of the errors in overruling the other exceptions of the defendant, the form of the judgment becomes immaterial.

Error. Judgment reversed.

(326)

L. D. GULLEY v. E. G. COPELAND ET AL.

Res Judicata—Practice, Motion in the Cause—Evidence, Oral, to Explain Written Document.

1. In an action brought by a mortgagor to redeem mortgaged chattels, a balance was adjudged to be due the mortgagee, and he was ordered to cancel the mortgage upon receipt of such balance, but no foreclosure sale of the mortgaged property was ordered: *Held*, that such judgment was *res judicata* as to the balance due the mortgagee, but was not a bar to a separate action of claim and delivery, brought by the mortgagee to recover the mortgaged chattels; nor was the mortgagee confined to a motion in the cause, in the action for redemption, for his remedy.

2. It is not competent to show by oral testimony what a party means in a written statement, submitted and acted upon by others. Hence, where a referee files a statement of account between parties as part of his report, which report is confirmed, he cannot, in another action between the parties, explain the account orally.

CIVIL ACTION, tried before *Shepherd, J.*, at April Term, 1887, of WAYNE Superior Court.

In February, 1883, the defendants instituted suit against the plaintiff in the Superior Court of Wayne, for an adjustment of claims held by the latter, and secured by chattel mortgages, seven in number, executed by the plaintiff, E. G. Copeland, and to compel a conveyance of a certain parcel of land, the title to which the defendant had caused to be made to himself, by the vendor, Julia Goelet. After a reference and report, it was ascertained that the said E. G. Copeland was indebted, on 1 May, 1885, to said L. D. Gulley, in the sum of $245.40, for which the said Gulley was entitled to judgment, and that upon the payment thereof the mortgages were to be discharged. It was further ascertained that all the purchase money due for the land had been paid by the vendee, Sallie A. Copeland, including the sum advanced by Gulley when he took the title, and that she was entitled to a (327) conveyance of the land from him.

At September Term, 1885, all exceptions to the report were overruled and it confirmed, and, among other things, it was adjudged by the court, "that the defendant L. D. Gulley recover of the plaintiff E. G. Copeland the sum of two hundred and forty-five dollars and forty cents, with interest on the same from 1 May, 1885, and that upon the payment of said sum to said defendant by said E. G. Copeland, it is ordered that said Gulley cancel and mark 'satisfied,' on the records of Wayne

County, the chattel mortgages referred to in the amended complaint in this action, and executed by said E. G. Copeland to said Gulley."

The conveyance of the land has been made to the said Sallie A., and the money declared to be due her paid by the said Gulley, but so much of the judgment as relates to the amount due Gulley from E. G. Copeland, and the discharge of the chattel mortgages, remains unperformed.

The present action, begun on 21 December, 1885, is to recover possession of certain personal goods, described and conveyed in the chattel mortgages, and in it the plaintiff has sued out process to secure the immediate delivery of the said articles, under the statute (The Code, sec. 321, *et seq.*), pursuant to which the sheriff seized and took in possession certain goods mentioned in his return, and restored them to defendants, on their giving the bond required by law.

Among other defenses to the action the defendants say that the subject-matter of this action was adjusted and determined in the first action between the same parties, with reversed relations, and that this adjudication is a bar to the present proceedings.

And further, that if not finally disposed of therein, the remedy lies in a motion in that cause, which is still pending, to carry into effect the unperformed part, and not in the institution of an independent suit.

(328) There was a reference, by order of the court made at April Term, 1886, to R. W. Nixon, who filed his report at July Term next ensuing, in which are separate findings of fact and law, to which said E. G. Copeland filed eleven exceptions; and upon the hearing the exceptions were overruled and the report confirmed, and judgment rendered in favor of the plaintiff for the recovery of the following articles, mentioned in the complaint, of the value of each as agreed on between the parties, to wit: One bay horse, of the value of $100; one spotted cow, of the value of $15; one cart, of the value of $1. And it was further adjudged that the plaintiff also recover of the defendant and Elizabeth Pearson, surety on the undertaking for the forthcoming of said property, as damages for the wrongful detention thereof, interest on $127, the agreed value of said property, at the rate of 6 per cent per annum from 21 December, 1885, the day of commencing the action, and that the plaintiff recover of said defendants and surety the assessed value aforesaid of such of the articles as are herein mentioned, as a return cannot be had thereof, and the costs of the action incurred by the plaintiff.

From this judgment the defendants appealed.

E. W. Kerr and N. Y. Gulley for plaintiff.

W. R. Allen for defendants.

SMITH, C. J., after stating the case: We concur in the ruling of the court, that neither of the obstructions relied on as in the way of prosecuting the present action is a bar thereto. It is distinctly adjudged in the first suit that, upon an account stated, in which all the moneyed transactions between the contesting parties are set out in detail, there remains a resultant balance due the plaintiff of $245.40, which he recovers of the defendant, E. G. Copeland, and upon its payment the mortgages wherein it is secured will be discharged and must be canceled. But this has not been done, and hence, a right to get possession still residing in the plaintiff, may be enforced, and damages (329) recovered commensurate with the secured debt, but not beyond its amount.

The former adjudication not only determines the sum due, but that it is secured in the mortgages, and these are not open longer to controversy. But it does not direct a sale of the mortgaged property, leaving the discharge of the mortgage dependent upon the action of the defendants, and they have taken no steps in the direction of the exoneration of the property. It was left, therefore, to the plaintiff to seek the remedy he has adopted, and, the result being a conversion of the property into its money value, the reception of so much as will pay the debt and costs thus becoming a satisfaction of the demand. But the recovery, in this case, falls short of the required amount, and will all belong to the plaintiff.

The exceptions, not disposed of in what has been already said, have not been urged in the argument, and are untenable, and we notice only that relating to the refusal to allow the referee in the first cause to explain his account orally. Evidence of this sort falls under the general ruling, which excludes outside oral testimony of what a party means in a written statement submitted and acted on by others.

It is obligatory, in the sense in which it was understood and acted upon by the parties affected by it, ascertained by its terms and their fitting to surrounding facts, and not from the undisclosed intention of the person preparing the paper. But a sufficient answer is found in the fact, that what was proposed to be shown sufficiently appears in the report itself, without such external aid, and the ascertained balance is determined, to be secured under the chattel mortgages, one or more of them, it matters not which, and this has become *res adjudicata.*

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

No error. Affirmed.

(330)

A. J. HARRELL v. ELI GODWIN AND N. G. HOLLAND.

Conditional Sales—The Code, Section 1275.

Section 1275 of The Code, requiring conditional sales of personal property to be reduced to writing, and registered, operates prospectively, and does not apply to such sales made prior to 1 November, 1883, when The Code became the law.

THIS was a civil action, tried at the March Term, 1887, of the Superior Court of WAYNE County, before *Shepherd, J.*

It was agreed by the parties to waive a trial by jury, and that the court shall find the facts and decide the law.

The court, on hearing the testimony, finds the facts as follows:

1. That on 3 June, 1881, one J. Southard executed and delivered to the plaintiff an instrument in writing, of which the following is a copy:

"With 8 per cent interest from 1 January, 1881, I promise to pay A. J. Harrell seventy-five dollars, balance due on wool machine, title of machine to remain in said Harrell till this note is paid. This 3 June, 1881. "J. SOUTHARD (Seal)."

2. That a payment of forty-four dollars and thirty-seven cents was made and endorsed on said instrument, 17 February, 1882.

3. That the balance of said note is unpaid.

4. That said instrument has not been registered.

5. That the value of said machine is seventy-five dollars.

6. That the plaintiff waives all damages for detention.

7. That the defendants have become possessed of and wrongfully detain from the plaintiff the said wool machine.

8. That on 1 May, 1884, the said J. Southard executed to one F. J. Finch a mortgage on said wool machine, to secure a debt therein

(331) named, which was duly registered, and which was transferred to the defendant, N. G. Holland, before the bringing of this action.

Upon the foregoing facts found, the court adjudges that the plaintiff recover of the defendant the possession of said wool machine, and in case delivery thereof cannot be had, that he recover seventy-five dollars, the value thereof, and his costs, to be taxed by the clerk of this court, to be discharged upon the payment of the balance due on said note and costs.

No counsel for plaintiff.

W. R. Allen and C. B. Aycock for defendant.

AVERY, J., after stating the case: The sale by Harrell to Southard was conditional, and made before The Code (sec. 1275), was enacted, 1 November, 1883. The effect of such a contract before that date was to leave the title in the plaintiff, though Southard was exercising all the rights of ownership over the machine. It, therefore, operated, so far as it affected the rights of others dealing with Southard, as a secret lien. The purpose of the General Assembly in changing the law was to protect others from loss by purchase of property subject to such incumbrance. The question upon which this case depends is, whether the section mentioned operated only prospectively or retrospectively also. We think that it purports to apply, and does refer exclusively to, future contracts wherein title should be retained as a security for purchase money. The section is as follows:

"All conditional sales of personal property, in which the title is retained by the bargainor, shall be reduced to writing and registered in the same manner, for the same fees, and with the same legal effect, as is provided for chattel mortgages." See, also, section 1254.

The language, "shall be reduced to writing and registered," was intended to operate only on sales to be made after 1 Novem- (332) ber, 1883, when The Code became the law. Before that time conditional sales could be made verbally, but the contracts to be made in future were required to be *written and registered.*

The case of *White v. Holly,* 91 N. C., 67, cited by counsel to prove that the contract between Harrell and Southard could not operate as a lien, superior to that of a subsequent purchaser for value, or a mortgagee who registered his mortgage, throws no light upon the point in dispute in this case. In the case cited, the plaintiff offered a receipt for a part of the title money for a tract of land in evidence, in order to establish his right to specific performance. It was, on objection, held to be incompetent as evidence without registration under the provisions of section 1264, The Code, which had taken effect in November before the court was held in January, 1884. If it had been previously registered it would have been admitted, and if in terms sufficient it would have proven the contract and established the plaintiff's right to a specific performance, as asked.

No error. Affirmed.

Cited: Perry v. Young, 105 N. C., 466; *Blalock v. Strain* 122 N. C., 288.

(333)

L. D. GULLEY v. WILLIS COLE.

Homestead—Reallotment of.

Where the homestead has once been regularly laid off, it cannot be disturbed by a revaluation thereof, or laying it off a second time.

THIS was an appeal by the defendant from an allotment of homestead, made to him under execution in favor of the plaintiff, tried at October Term, 1885, of WAYNE Superior Court, before *Clark, J.,* and a jury.

In 1879, the homestead of the defendant was duly valued and laid off to him. Thereafter the plaintiff obtained a judgment against him, sued out an execution upon the same, and under this execution the sheriff proceeded to have valued and laid off the defendant's homestead in the same land, as if no homestead had ever theretofore been laid off to him.

The court below held that the homestead, as valued and laid off the second time, was affected with such irregularities as rendered it void. The plaintiff excepted, and appealed to this Court.

E. W. Kerr and N. Y. Gulley for plaintiff.
Strong, Gray & Stamps, C. B. Aycock and W. R. Allen for defendant.

MERRIMON, J., after stating the case: The court properly decided that the attempt to value and lay off the homestead of the defendant in the same land a second time was void—not upon the ground upon which the court based its judgment, but because the homestead, as at first laid off, was effectual, continued to be so, and could not be disturbed by a revaluation thereof and laying it off a second time. This Court so expressly decided in the defendant's appeal in this case. *Gulley v. Cole,* 96 N. C., 447. That case is conclusive of this, and we need not do more than cite it.

Judgment Affirmed.

Cited: Aiken v. Gardner, 107 N. C., 239; *Thornton v. Vanstory, ibid.,* 333; *S. c.,* 110 N. C., 12.

A. C. WOODY v. J. W. BROOKS, ADMINISTRATOR.

Statute of Limitations, between Distributee and Administrator—Practice, Ordering Reference when Plea in Bar is interposed—The Code, Sections 153, 154, 155, 158—Appeal, when it Lies.

1. Where the facts upon which a plea in bar is based are admitted in the pleadings, it is the duty of the judge to determine the question of law raised, and if he refuses to pass upon the plea in bar, but orders a reference to state an account, such refusal is a denial of a right, and *in effect* an adverse ruling upon the plea, which is open to correction on appeal to this Court.

2. Upon such appeal this Court will pass upon the question, whether or not the facts admitted by the pleadings constitute a plea in bar, although such question was not passed upon *directly* by the court below.

3. An administrator filed his final account, *ex parte*, before the clerk of the Superior Court in May, 1879, which account showed a balance in favor of the administrator. The plaintiff sued in April, 1888, as one of the next of kin, to have the account restated. The defendant administrator pleaded the *six-year* statute of limitation as a bar to the account: *Held*, that such statute did not apply, and an order for a reference to state the account was proper.

4. The statute of limitation applicable to actions against administrators make a distinction between their fiduciary liabilities and their liabilities upon the administration bond.

5. Under The Code, sec. 153(2), a creditor must bring his action within seven years next after the qualification of the personal representative, *and* the advertisement for creditors.

6. Under The Code, sec. 154(2), an action against the personal representative, on his bond, must be brought within six years after the filing and auditing of the final account. In addition to the protection of this section, the *sureties* on the bond are exonerated unless action is brought within three years after breach of the bond. The Code, sec. 155(6).

7. No statute of limitations is a bar to an action to recover a balance admitted by a personal representative to be due legatees or distributees on his final account, *unless* he can show that he has disposed of such balance in some way authorized by law, or unless three years have elapsed since a demand and refusal to pay such admitted balance.

8. An action to *impeach* the final account of a personal representative must be brought within ten years from the filing and auditing thereof. Such cases are governed by The Code, sec. 158.

9. The Code, sec. 154(2), *expressly* applies to actions on the "official bond," section 154(6) to sureties only, and section 155, so far as executors, administrators and guardians are concerned, is applicable only when there has been a settlement, either by acts of the parties or a decree of court.

(DAVIS, J., dissented.)

(335)

CIVIL ACTION, tried before *Shipp, J.*, at September Term, 1888, of PERSON Superior Court.

The facts are stated in the opinion.

Defendant appealed.

No counsel for the plaintiff.

J. A. Long, W. W. Fuller and E. C. Smith for defendant.

SMITH, C. J. The plaintiff alleges that he is one of the next of kin and heirs at law of Moses A. Woody; that the defendant, as administrator of said Woody, on 17 May, 1879, "made a final settlement, *ex parte,* before the clerk of said court, . . . showing a large amount of money received by him and a large amount due him" (defendant) on a final settlement.

The *fifth* allegation is "that said final settlement is false, and a fraud upon the rights of the plaintiff and all the heirs and distributees of said Woody."

The *sixth* allegation is "that the facts contained in article five of the complaint did not come to the knowledge of the plaintiff before the last three years previous to the beginning of this action, but were discovered within said three years."

He prays that the said final account "be declared false and a fraud upon the rights of the plaintiff"; . . . "that it be restated by the court, and for other and further relief," etc.

(336) The defendant substantially admits the allegations of the complaint, except articles five and six. These he denies, and, as a further defense, he pleads the statute of limitations, for that more than six years have elapsed since the filing and auditing of said final account.

The plaintiff moved for a reference to state the account.

The defendant objected, and insisted that he was entitled to judgment upon the pleadings.

This action was commenced on 6 April, 1888.

The court declined to give judgment as prayed for by the defendant, and ordered a reference to state an account, without passing upon the plea in bar.

The plea of the statute as a defense to the action, if its applicability depended on any disputed fact, should have been disposed of, before making an order of reference, by the finding of the jury, or of the court, with the consent of the parties. But there was no controversy here as to the facts, and hence, a question of law was raised, which

it was the duty of the court to decide, and then put the defense out of the way, or put an end to the action, as the court should determine. It was irregular to postpone the ruling until after a reference and report, even though it was reserved; and the defendant was entitled to a ruling upon the point, and if the objection is valid and a fatal impediment to the prosecution of the action, the refusal to pass upon it, made, as it was, at the proper time, was the denial of a right, and, in effect, an adverse ruling, open to correction, as error in an appeal to this Court, as decided in numerous cases. *Dean v. Ragsdale,* 80 N. C., 215; *Sloan v. McMahon,* 85 N. C., 296; *Commissioners v. Raleigh,* 88 N. C., 120; *Humble v. Mebane,* 89 N. C., 410; *Grant v. Hughes,* 96 N. C., 177.

The inquiry is then presented, whether, upon the admitted facts, the action is obstructed by the statutory bar by the lapse of time since the filing and auditing the final administration account in the office of the clerk.

It will be noticed that a distinction is made in the enactments that interpose a barrier to suits, prosecuted against the personal (337) representative in his fiduciary capacity, upon the liability that results from it, and those which seek to enforce the obligation created by his bond.

The creditor must bring his action within seven years next after the qualification of the representative, "and his making the advertisement required by law, for creditors of the deceased to present their claims, when no personal service of such notice, in writing, is made upon the creditor," and this bar is applicable alike to a surety to the debt. The Code, sec. 153, subsec. 2.

To give effect to this provision, both conditions must concur, and to show the prescribed period of inaction, and the making the advertisement directed in the case. *Cox v. Cox,* 84 N. C., 138.

The action upon the bond, as superadding a legal to an equitable obligation, incurred in the assumption of the office, must be begun "against any executor, administrator, collector or guardian," on his official bond, within six years after the auditing of his final account, by the proper officer, and the filing of such audited account." The Code, sec. 154, subsec. 2.

While the sureties have this protection in common with their principal, they have a further exoneration, unless sued within three years after breach of the bond. Section 155, subsection 6.

The rulings upon this subject, in cases that have come before the court requiring a construction to be put upon the statute, do not seem to be in entire harmony; yet on examination, they will be found to be so. In *Bushee v. Surles,* 77 N. C., 62, the action was for the recovery of

the distributive shares, claimed by the plaintiffs, against the administrator of one Patience Bushee, and, delivering the opinion, *Bynum, J.*, says: "The defendants relied upon the statute of limitations in
(338) the court below, but do not press the point here. The statute does not run in favor of administrators against the suit of the next of kin for their distributive shares."

In *Vaughan v. Hines,* 87 N. C., 445, the suit was instituted by the administratrix *de bonis non* of one Henry Vaughan, appointed on 21 February, 1881, on 4 April thereafter, against a surety to the bond of the former administrator, who died in 1874, to recover the unadministered assets in his hands. The recovery was resisted, on the ground that more than six years had passed since the return of the final account by the deceased, in May, 1873, before the issuing of the summons. It was held that the statute was a bar to the action, and this ruling was sustained in this Court. This was an action *on the bond,* not at the instance of the next of kin, but of the succeeding administrator, and yet it was declared that the statute began to run against the next of kin, and continued to run against the plaintiff. This determines, in effect, that, in an action on the bond, it must be prosecuted within the six years after the filing the specified account, as well by the next of kin as by creditors, in order to escape the statutory obstruction.

In *Grant v. Hughes,* 94 N. C., 231, the administrator *de bonis non* sued the executor of the first administrator for an account and settlement, and the qualification of the former was during the same year, at the death of the latter, and the suit was instituted shortly after the plaintiff's appointment. The defense was two-fold, the alleged conclusiveness of the final account of the state of the assets, and the bar of the statute. Both objections were overruled, and *Merrimon, J.*, speaking for the Court, declares: "The court properly held that the statute of limitations invoked by the defendant did not bar the action. The action is not brought upon the *official bond* as administrator of the testator of the defendant. It is brought to compel an account and settlement of the estate of the intestate of the plaintiff in his
(339) hands in his lifetime. He was a *trustee of an express trust,* and the statute of limitations did not apply." In *Andres v. Powell,* 97 N. C., 155, the action was by the administrator *de bonis non* of one A. J. Shipman against the executors of A. F. Powell, one of the sureties to the administration bond of J. W. Ellis, the first administrator, who relied upon the six years' bar under section 154, and the defense, as in *Vaughan v. Hines, ante,* was sustained.

This view of the adjudications establishes the proposition that confines the operation of the section, which fixes the filing and auditing the final account as the initial point at which the statute begins to run,

to actions upon the bond for a breach of its obligations, but leaves the representative, in his fiduciary capacity, exposed to the demand of the fiduciary or creditor, the latter losing his remedy under the conditions set out in section 153. It would be a singular, and not to be accepted result, unless plainly declared, that the representative, holding the trust fund in his hands, an uncontested residue of the estate, could, after the defined period, disown responsibility to any one therefor, and keep and apply the fund to his own use. And this might happen, when there has been no violation of fiduciary duty under the bond or otherwise, and when the estate is kept intact, awaiting the demand of the party entitled to it. It is most obvious this was not intended in the discriminating provisions of the statute, and that the representative is left, under such circumstances, responsible as any other trustee.

We do not mean, however, to say that in *no case* does the statute bar the next of kin. Until a final account is filed and audited there can be no bar; nor is there any as to a balance admitted to be due by such final account, unless the executor or administrator can show that he has disposed of it in some way authorized by law, or unless there has been a demand and a refusal to pay such admitted balance, in which case the action is barred in three years after such demand and refusal (sec. 155). When such final account is filed and audited, (340) an action to *impeach* it, must be brought within ten years from the filing and auditing of the same. The period of limitation is not specifically declared, but we think such a case falls within section 158, which applies to actions "not herein provided for." It must come within this section or none, as section 154, subdiv. 2, *expressly* applies to actions upon the "official bond," subdiv. 6 to sureties only, and section 155, so far as executors, administrators and guardians are concerned, is applicable only when there has been a settlement, either by act of the parties or a decree of court. The final account having been filed within ten years before the commencement of this action, there was, therefore, no error in disregarding the plea, which is unavailing as a defense, and in ordering the reference, the reservation of the ruling thereupon being without prejudice to the appellant. The judgment must, therefore, be affirmed.

No error. Affirmed.

DAVIS, J., dissenting: I cannot concur in the opinion, that where a final account is filed by an executor or administrator, there is no limitation to an action against him by the next of kin, unless the action be on the bond.

Except in actions commenced before 24 August, 1868, or in cases where the right of action accrued before that date, all civil actions must

be commenced within the periods prescribed in title 3, chapter 10, of The Code, "except where in special cases a different limitation is prescribed by statute." The Code, secs. 136 and 138.

There is now no such thing as a statutory presumption, and all persons having a right to sue, unless under some of the disabilities named in the statute, must bring their actions within the times limited, or an absolute bar may be interposed.

(341) Section 154, subsec. 2, of The Code, requires that an action (not against sureties, but) against any executor or administrator, etc., on his official bond, shall be commenced within six years from the filing and auditing of his final account as required by law.

Section 155, subsec. 2, requires the action to be commenced within three years "upon a liability created by statute, other than a penalty or forfeiture, unless some other time be mentioned in the statute creating it."

The duties and liabilities of executors and administrators are prescribed in the various sections of chapter 33 of The Code, and among these, sections 1488 and 1489 define their duties in regard to paying over, to persons entitled to the same, money remaining in their hands, specifying what may be retained, and if they do not know to whom to pay, they may file petitions against all parties interested, under section 1225, *et seq.*, or they may pay it into the clerk's office, under section 1543.

By section 1402, they may be required to file their final accounts for settlement at any time after two years from their qualification, and this at the instance of any one interested in the estate; and sections 1510 and 1511 give to legatees and distributees the right to sue executors and administrators for legacies or distributive shares, at any time after the lapse of two years from their qualification.

Section 1504, directs when money shall be paid to the University.

Section 155, subsection 6, limits an action against the sureties to three years after the breach for which the action is brought. So that, as I understand the law, the limit to an action against the executor or administrator, individually, and on his bond, is six years after the filing and auditing his final account, and against his sureties on his bond, three years after a breach or failure to discharge any of the duties required of him by law. The ultimate limit of liability is three

(342) years after filing and auditing his account, unless against him individually and on his bond, and then six years is the ultimate limit.

The filing and auditing the final account is the initial point at which the statute begins to run against the executor or administrator; and this, it seems to me, is not only the proper construction to be placed on the sections of The Code referred to, but, as we shall presently see,

is, I think, the only construction that has been placed on them by this Court since The Code went into effect.

It is admitted that the statute is a bar to an action *on the bond* by the next of kin. The bond is given to insure a faithful discharge of his duties by the fiduciary, and one of these duties is to deliver and pay over, to the person entitled to the same, all sums in his hands, at the expiration of two years, with the exceptions referred to in sections 1488 and 1489 of The Code.

If the person or persons entitled shall be *vigilant* enough to do so, he or they may bring an action on the bond against the principal alone, within six years after the filing and auditing the final account.

It will not do to say that the six years' bar is to protect the sureties on the bond; they are protected by a much shorter limit. Three years, from the filing and auditing the final account, is the longest possible time by which they can be held bound, and what possible necessity can there be for the six years' bar to an action on the bond given to insure the faithful discharge of the duties of the executor or administrator, if there is an equal remedy, as against him by suit, not on the bond, to which there is no limit? It seems to me contrary to all analogy and to all precedent, to say that there shall be a limit to a right of action for breach of fiduciary duty, secured by the solemnity of a bond, and no limit at all to an action for the same breach of fiduciary duty, if you choose to ignore the bond and sue on the simple liability. It was not so with the statute of presumptions, where no such distinction existed. The statute of presumptions began to run when (343) the cause of action accrued. So, now, the statute of limitations begins to run from the respective periods designated in the statute, and where none is designated or provided for, then "within ten years after the cause of action shall have accrued." The Code, sec. 158.

This last referred to section applies to every action not otherwise "provided for," and there is now no action to which some limit, according to the subject-matter, does not apply. The administrator, after his final account and settlement, has no right to retain in his hands the money of the estate to await the demands of those entitled to it, but it is his duty to pay it over, and it is the right and duty of those entitled to it (if laboring under no disability) to see that this is done within the time limited, or they will be barred. After the filing and auditing of the final account, he has no duty to perform in relation thereto, except to pay what he may have in his hands to the persons entitled to it.

The action before us is based on section 155, subsection 9, of The Code, and the complaint recognizes the fact that the statute would bar the action, but for allegations 5 and 6, in which it is charged that there were frauds in the final settlement, and that the frauds did not "come

to the knowledge of the plaintiff before the last three years previous to the bringing of this action, but were discovered within said three years, and not without."

These allegations of fraud and recent discovery were denied, and presented issues upon which depended the plea of the statute of limitations, and the right of plaintiff to the plea of the statute of limitations, and the defendant had a right to have these issues passed upon.

After the time prescribed in section 153 of The Code, the statute is an absolute bar to creditors (*Lawrence v. Norfleet,* 90 N. C., 533; *Worthy v. McIntosh,* 90 N. C., 536), and after the time prescribed (344) in section 154, subsection 2, and section 155, subsection 2, the statute is an absolute bar to the next of kin. *Vaughan v. Hines,* 87 N. C., 445; *Spruill v. Sanderson,* 79 N. C., 466.

But it is said that *Bushee v. Surles,* 77 N. C., 62, and *Grant v. Hughes,* 94 N. C., 231, are in conflict with this position. I think not. In *Grant v. Hughes,* the action was governed by the law as it was prior to 1868, the original administration having been taken out in 1861, and so far as the question before us is concerned, has no application, and, as was said in *Vaughan v. Hines,* distinguishing it from *Bushee v. Surles:* "In that case (*Bushee v. Surles*) there had not been any final account filed by the administrator," and, besides, as will be seen by reference to the original record of the case on file though it does not appear in the report, the administration was prior to 1868, and that case does not apply.

But it is said *Vaughan v. Hines* and *Andres v. Powell* were actions on bonds.

This is true, but in *Vaughan v. Hines* it is expressly said that the statute of presumptions has been repealed, so far as it applied to actions upon the bonds of administrators, etc., and the statute of limitations substituted therefor.

There being now no statute of presumptions, the statute of limitations, according to the subject-matter, applies to all actions whatever.

I think the reasoning in *Vaughan v. Hines* is predicated upon the idea, that the limitation to an action upon the bond is the ultimate time within which an action can be brought by the next of kin, and the following citation from that case is, to my mind, conclusive of the question before us. After stating that the statute of limitations prescribed by The Code applied to that action, it is said:

"That being so, the question arises, does the statute of limitations prescribed by The Code run in favor of an administrator against an action brought by the next of kin for their distributive shares? It was held in *Ivy v. Rogers,* 1 Dev. Eq., 58, a case decided in 1827, and recently approved by this Court in the case of *Hodges v. Council,*

86 N. C., 181, that where there was a return made by an ad- (345) ministrator to the county court, admitting a balance against him, the statute of presumptions was put in motion, and, after ten years from the date of the return, a bill filed by the next of kin to recover that balance was held to be too late. *Chief Justice Taylor,* who delivered the opinion of the Court, said: 'This case is purely of equitable jurisdiction, and not subject to any legal bar, by force of the statute of limitations, yet this Court, from an early period, has adopted rules as to barring an equity, drawn as nearly as possible from analogy to the rules of law.' "

And in answer to the objection (the very objection that is made in the present) that the defendant, who was an administrator, was a trustee, and therefore could not avail himself of such a defense, proceeded to say: "I deem it unnecessary to examine the doctrine relative to *express* and implied trusts, because the settlement of the account by the administrator presents a clear ground of decision, whatever the defendant's original character may have been. *From that time* the trust ceased to be open, and the defendant stood in a new relation to the complainant as his debtor. Could the complainant have sued at law, his cause of action would then have begun to run from that time."

The principle to be deduced from this decision is, that if the action could be brought at law upon the bond of an administrator, who had filed his final account in the proper office, the *statute of presumptions* would begin to run in his favor against the next of kin, and the claim would be presumed to be paid after the lapse of ten years from the time of filing the account.

Where the statute of presumptions began to run under the old law, I think the statute of limitations begins to run under the new, and whether under the one or the other, the filing of the account is the initial period of time at which it begins to run in favor of an administrator or executor against next of kin or legatees. As (346) was said by *Chief Justice Taylor* in *Ivy v. Rogers* (quoted in *Vaughan v. Hines* and *Cox v. Cox*), the doctrine in regard to *express trusts* has no application after the filing of the final account. Certainly, if it could have none under the law as it then stood, it can have none now; and, as was said by this Court in regard to the return of the administrator in *Vaughan v. Hines,* "it was such a statement as showed to all persons interested in the distribution of the estate that the administration of the estate was finished."

Whenever the right of action *accrues* to the *cestui que trust* against the trustee, whether the trust be express or implied, and certainly after the "trust ceased to be open," by the plain and unmistakable language of the statute, it begins to run, and the action must be brought within

the time limited, if there be no disability. The right of action *accrues* to the legatee or distributee after two years from qualification of the executor or administrator, and he, if no disability exists, brings his action within six years after the filing and auditing the final account, or he may be barred.

For the reasons given, I think the defendant had a right to have the issues of "fraud" and "discovery within three years," raised by the allegations of the complaint and denials of the answer, passed upon before reopening the account.

NOTE.—DAVIS, J. Since this was filed, the opinion of the Court has been so changed as to make ten years a bar, and to that extent what is said in the dissenting opinion does not apply.

Cited: Wyrick v. Wyrick, 106 N. C., 86; *Kennedy v. Cromwell,* 108 N. C., 1; *Brawley v. Brawley,* 109 N. C., 525; *Nunnery v. Averitt,* 111 N. C., 395; *Koonce v. Pelletier,* 115 N. C., 235; *Self v. Shugart,* 135 N. C., 188; *Edwards v. Lemmonds,* 136 N. C., 331; *Brown v. Wilson,* 174 N. C., 670.

(347)

STATE EX REL. FRANK BROWN AND HIS WIFE, ELIZABETH, v. JAS. S. MITCHELL ET AL.

New Trial for Newly Discovered Evidence—Issues—Fraudulent Conveyances — Husband and Wife, dealings between; Conveyances directly to Wife from Husband—Burden of Proof on Issue of Fraud—Constructive Delivery of Chattels Sold—Amendments after verdict—Nol. pros.

1. Granting a new trial for newly discovered evidence is purely discretionary, whether made in the lower court or in the Supreme Court. In the future, such motions will be disposed of without discussing the facts.

2. Where the newly discovered evidence tends only to contradict a witness on the other side, a new trial will not be granted.

3. The ruling as to the proper issues to be submitted to the jury, made in *Emery v. R. R., ante,* 209, is reiterated.

4. The three classes of fraudulent conveyance, as defined in *Hardy v. Simpson,* 13 Ired., 132, and the rules established by that case, governing the burden of proof on the trial of an issue as to fraud in a conveyance, are approved.

5. A wife handed the proceeds from the sale of her lands and timber to her husband, and he orally promised to repay the same to her; ten years

afterwards the husband made a bill of sale directly to his wife, conveying chattels equal in value to the amount borrowed of his wife, with interest at eight per cent added: *Held*, that the oral agreement to repay the wife's money was valid, and the sale of the chattels was not voluntary.

6. If, in making such bill of sale, the intent of the husband was to defraud creditors, such intent did not vitiate the wife's title, unless she participated in or had knowledge thereof.

7. Where a husband transfers property to his wife, in payment of his indebtedness to her, the wife must show, by a preponderance of evidence, that her husband was in fact indebted to her.

8. A husband in January, 1886, conveyed chattels directly to his wife by a bill of sale, which was delivered to the wife, but there was only a constructive delivery of the chattels; the husband continued to use the property as his own, and to give it in as his own on the tax lists. The conveyance was proven for registration in the night, during the month of November, 1886, about the time the husband was sued by a creditor whose claim antedated the conveyance to the wife, which creditor had not been informed of the transfer of the chattels to the wife: *Held*, that such conveyance being attacked by the creditor for fraud, the burden rested upon the wife to show that her husband was indebted to her; but that fact being established, the question of fraud in the conveyance was an open one, to be left to the jury, with a caution from the bench to scrutinize the transaction closely, owing to the relation of the parties. But, upon such a state of facts, the judge did not err in refusing to charge that the conveyance to the wife was presumed in law to be fraudulent, and that the burden was thrown upon the wife to show the contrary.

9. A husband executed a bill of sale of chattels to his wife, delivered the instrument to her, and told her the property was hers. There was no actual delivery of the property to the wife, but she accepted the bill of sale and gave her husband authority to hold the property as her agent, and he used it as hers and for the benefit of the family, according to her directions: *Held*, that this constituted in law a constructive delivery of the chattels, and the title thereto vested in the wife.

10. An action was brought in the name of the State upon the relation of A. against a sheriff and the sureties upon his official bond. After verdict, relator was permitted to *nol. pros.* all the sureties and to strike out the State as a party plaintiff, and judgment was entered against the defendant sheriff upon the verdict: *Held*, that no error was committed.

(SMITH, C. J., dissented.)

CIVIL ACTION, tried before *MacRae, J.*, at the February Term (348) of the Superior Court of HERTFORD County.

The defendant is the sheriff of Hertford County, and the plaintiff brings suit on his bond to recover damages, alleging that defendant, having an execution in the case of *Wynne v. Brown* (the plaintiff in this action), wrongfully took possession of certain goods and chattels of Elizabeth Brown (the *feme* plaintiff in this action), and converted the

same to his own use; and that the property, at the time of the seizure and conversion, was worth $750.

The defendant denied the alleged conversion, and for further (349) defense, says that the sale of said property by Frank Brown to his wife Elizabeth was fraudulent and void, and made to defraud creditors, especially the plaintiff in said execution; and that said Elizabeth accepted the sale with notice of the fraudulent intent.

This action was begun in the name of the State, on the relation of Frank Brown, etc., and was amended, as hereinafter stated.

The following issues were presented by the defendants:

1. Did Brown continue in possession and control of the property in question after the making of the bill of sale as before?

2. Was it the understanding between Brown and his wife that the execution of the bill of sale should be kept secret, and did they keep it secret until Wynne warranted Brown?

3. Did Frank Brown execute said bill of sale to his wife with intent to hinder, delay, and defraud any one of his creditors?

4. Did Mrs. Brown have notice of her husband's said unlawful intent?

5. Were the acts and conduct of Frank Brown, accompanying the execution of the bill of sale, such that Mrs. Brown might and ought to have drawn the inference of his said unlawful intent?

6. Was it any part of the purpose of Brown and wife, in executing said bill of sale, to hinder, delay and defeat Wynne, or any other creditor of Brown, in collecting his debt against Brown?

The presiding judge declined to submit any of the foregoing issues proposed to the jury, and defendants excepted.

The following issues were submitted to the jury:

1. Was the plaintiff, Mrs. E. Brown, the owner of the property described in the complaint?

2. Did the defendant, James S. Mitchell, wrongfully seize and (350) convert the same?

3. What is the plaintiff's damage?

The defendants excepted.

The plaintiffs offered in evidence a bill of sale from Frank Brown to Elizabeth F. Brown, his wife, which purported to convey the property in dispute.

W. T. Brown, a witness for the plaintiffs, testified: That he is not related to the plaintiffs; that he wrote the bill of sale; that he does not remember whether he was called upon to make any calculation as to the amount Frank Brown owed his wife; something was said about what he owed her; it was said to be money he owed her for her land and other things.

On cross-examination, witness testified that he thinks he wrote part of it at Murfreesboro, and part of it at his (witness') house. Frank Brown was present at Murfreesboro when witness wrote part of it; it was at his (Frank Brown's) house. Witness does not remember what part of it he wrote there; does not remember whether Mrs. Brown was present or not. Frank Brown named to witness several times about owing Colonel Wynne; not before witness wrote the paper. He came to see witness several times about it; witness does not remember his wife being present, and his talking about owing Colonel Wynne; witness heard him speak of the peanuts; witness finished the paper at his own house a day or two before he carried it back; witness does not know who was at his house then; does not think Frank Brown was there. Witness saw some of the furniture, horses, etc., at Frank Brown's place, when witness wrote the first part of the bill of sale at Frank Brown's house; witness gave the paper to Frank Brown, but he does not know where he (Frank Brown) wanted the paper written; he said he owed his wife. Witness thinks the paper bears the true date; witness thinks he was at Frank Brown's house when he signed the bill of sale, but don't remember now who was there; he thinks that it was in the room next the (351) street; that Frank Brown and his wife were present, and that he said that it was not worth while to say anything about it at that time; that he did not want it known. Witness does not remember that he said he did not want it known until Colonel Wynne and other creditors got after him; witness is not certain about it; he did not think or care much about it; witness heard about Frank Brown's not thinking he was treated right about the peanuts by Wynne so often, witness does not know exactly what he did hear.

On the redirect examination, witness testified that all the conversation about the peanuts was after the transaction (of the bill of sale), or most of it.

Frank Brown testified for the plaintiff: That, at the time of the execution of that paper, he owned the property therein described, the same as that described in the complaint. He conveyed to his wife all the horses he owned at the time (except a gray filly); a gray stallion, $300; a bay horse, $62; a bay mare, $100; a bay colt, $75; a black mare, $125; a buggy, $30, and a sulky, $30.

Witness was indebted to his wife about $750, money she loaned him. She sold her land that her father gave her for $1,000, and the timber off of it for $187.50; the timber was sold about eleven years ago; the land nine or ten years ago. Witness promised her faithfully when she loaned it to him that he would pay her back. Witness sold a lot in Murfreesboro and paid her $1,000, near four years ago. The difference between what witness owed her and what he had paid was the interest at 8 per

cent. She was after witness several times to pay her, and witness did convey her the property to pay her. Witness conveyed to her all of the horses he had, except a gray filly, which he afterwards sold to his brother-in-law, all the buggy and sulky he had, and all the furniture.

Cross-examined: Witness testified that the gray stallion was (352) worth $300 at that time. Witness gave the paper to his wife, and she put it away; witness delivered the property to her; some of it was at the plantation, and some was at home; the gray horse and the sulky were at home, and also the furniture and the buggy; the cows were in the field at the Wilson farm, near Murfreesboro, of which the witness was in possession, under a contract of purchase; there was a mortgage on it. Witness worked the work-horses on the farm, and kept the property over there, and went backwards and forwards, just as before; witness told that it was his wife's and never offered to sell any of the colts; he might have, but is not certain. Witness thinks this paper was registered about November, 1886; about the same day that Wynne warranted witness; it was in the night at nine or ten o'clock; witness found the clerk of the court at home in bed, and got him up to get him to record it; it had been in Mrs. Brown's possession all the time. The debt to Wynne had been contracted the year before for supplies; witness did not think he owed Wynne much; he had witness' peas in his hands. Witness does not know that he did tell anybody about it after he had this paper executed; witness don't think that he swore that no one knew anything about it but himself, his wife, and Tom Brown; witness did not tell Wynne and the other creditors, because it was not his business to tell them; witness did say, on his cross-examination before the commissioner, that he would have been a pretty fool, or you must think me a fool, to have told them; witness said he delivered the property to her, and then used it as her property, and used it as he did before. The gray horse was then in her possession; witness delivered the horses to her as they stood in the stable; witness can't tell here where in the house they were; witness gave her the paper and told her the property was hers; the gray horse (stallion) stayed in the stable till the first of March; witness sent him round in his own name, as agent for his (353) wife, and made the entries in the horse-book in his own name, and warranted persons for the stallion's services after the bill of sale in her name; where the service was performed before the bill of sale, witness warranted in his own name; witness listed the property afterwards in his own name, and expected to pay the taxes. Witness traded a little while with Colonel Wynne after making the bill of sale, and did not tell him about it; traded at other places also, and did not tell any one about it; witness owed his wife $1,187.50, and interest run it up; witness did not give any note to his wife for it, but promised to

pay her 8 per cent; witness don't think he took any receipt from her; witness thinks Worrell paid him $187.50 for the timber on his wife's land, and ..... paid for the land at the house of witness and wife, nine, ten or eleven years ago.

Cross-examined: Witness said that when the property was sold by the sheriff, Mr. Brewer bid in most of it for witness' wife; she bid in the gray horse at $100, the sulky at $11; brother bid off the two colts for witness' wife, the black one for $80, the other for $43; Brewer took them and paid for them. After witness got the money from his wife he paid Vann, who had loaned him the money to pay for the Gatling place, and when he sold the Gatling place he put the money received from it in the Wilson farm; witness sold $600 worth of lumber off of the Gatling farm, and paid a part of it for a lot in town, of which he wanted his wife to take the title, but she said no; she wanted to have the title for the Wilson farm when he finished paying for it; witness failed to pay for the Wilson farm, and she insisted on his making her a conveyance for the lot in town, which he did; witness consented at the time that she should have title for the Wilson place when paid for. These papers in the handwriting of witness. Witness' wife went to the Wilson farm a few times; she knew the property as well as witness did.

On the redirect examination, witness stated that he gave $800 (354) for the lot in town, and sold it to his wife for $1,000; Mr. Smith took back the Wilson farm; witness did not think he owed Wynne over $100; witness had ninety bags of first-class peanuts, and seventy-five of other quality, in Wynne's hands, and he promised witness he would hold them; he sold them and got very little for them; Mr. Vaughan got nearly as much for forty-five bags as Wynne did for all witness' peanuts; witness and his wife have continued to live together all the time.

The plaintiff rested, and the defendants offered evidence:

Mr. Deloatch testified: That before Wynne warranted Frank Brown, in 1886, witness went over to F. Brown's to buy a horse; he offered to sell witness the black colt, and did not say anything about its being his wife's; witness don't know who was in the possession of this personal property; part of it was on the Wilson farm, which Frank Brown was cultivating; don't know who sent the horse round.

Colonel Wynne testified: That the debt was an account in the store for family supplies generally, goods and merchandise, and witness credited Mr. Brown; it was considerable of an account, as much as witness thought ought to be upon the amount of work he was doing; witness assisted him, and about the end of the year he was to deliver his crop in the payment of the account; he did deliver more or less from time to time; he was not as active as witness thought he ought to be, and witness told him; witness would always insist on his giving directions as to the

disposition of the crop delivered by him, and he would always say, "Colonel, do just as you think right"; the peanuts were all to be delivered to witness; he told witness he could not get hands; witness said to him, "If you will give me control of your crop, I will provide hands"; he said, "I will satisfy you"; witness paid his hands for picking his peanuts; witness ascertained that he was letting other parties
(355) have the peanuts; he admitted it afterwards; witness shipped the peanuts delivered to him with Brown's knowledge, and thought they brought a fair price; witness insisted on a settlement, and took from him three notes, amounting to about $387.42. Frank Brown was in possession of this property before and after 1 January, 1886; there was no change of possession to witness' knowledge; witness was doing business with him all the time, and never was advised of the bill of sale to his wife; he spoke of the property as his own; witness had no notice of the bill of sale; witness supposes that Mrs. Brown knew of her husband's indebtedness to witness; the family were in the store trading; the peanuts were sold late in the winter; he was farming before and after January, 1886; he and his wife were living together at Murfreesboro; that is all witness knew of the possession; witness thought the house and lot was his until this development. After the making of the bill of sale he continued to trade with witness until the spring of 1886, about the time he gave witness the notes.

The defendants' counsel proposed to ask witness these questions:

Would you have given credit to Mr. Brown if you had known of the execution of the bill of sale?

Plaintiffs object. Objection sustained. Defendants except.

Did you think Brown was the owner of the property at the time you gave him the credit?

Plaintiffs object. Objection sustained. Defendants except.

I knew of no disposition of the property at all by Brown. I don't remember the exact amount the property sold for at sheriff's sale; it lacked about $175 of paying the debt due to witness. The gray horse is worth $150 or $175, probably $200; it is a nice-looking stallion, rather under size. Mr. Brown stated at the sale that Mrs. Brown claimed the property.

(356) Dr. Gatling testified that he was clerk of the Superior Court in November, 1886, and remembers Frank Brown coming and waking him up late at night; witness went to the window and took the paper, between 10 and 11 o'clock p.m.; he wanted it proved for registration.

W. B. Spencer was offered as a witness for defendants, and counsel for defendants proposed to examine him as to what Frank Brown swore before him (Spencer) on the taking of said Brown's deposition—counsel

having the deposition in his hand—and that witness be permitted to use the deposition to refresh his memory.

Objection by plaintiffs. Sustained, and defendants except.

The deposition was then proven and read for the purpose of contradicting Frank Brown.

The defendants offered in evidence abstract of the tax-list for Frank Brown in Mauney's Neck, 1886, which showed that horses, cattle, hogs, farming utensils and household furniture were listed in the name of Frank Brown.

Defendant closes.

The plaintiff offered the tax returns of Frank Brown in Murfreesboro Township for 1886, which show a residence listed in Frank Brown's name.

A deed from Frank Brown to his wife, 5 February, 1885, for town lot in Murfreesboro.

This was objected to by defendant as immaterial and irrelevant. Objection overruled. Defendant excepted.

Mrs. Elizabeth Brown testified that she was a plaintiff, and wife of Frank Brown; that she owned the property in dispute at the time of the seizure; it belonged to Frank; witness don't know exactly when he conveyed to her; this is the bill of sale dated 1 January, 1886; witness loaned him the money; sold her land for $1,000, and her timber for nearly $200, and loaned it to him to finish paying for the Gatling place; he promised to refund the money to make it good; he conveyed the house and lot in Murfreesboro to witness at $1,000; witness (357) did not take it at first, because she was not satisfied with it; in addition to that, he owed witness the principal, about $1,200, besides interest, when he conveyed the house and lot in town; the father of witness gave her the land; Tom Brown wrote this paper, and witness' husband gave it to her; she took it, put it away, and kept it; did not register it, because her husband told her he had consulted those who knew, and they said it was not necessary.

Defendants objected to last statement of witness. Objection overruled, and defendants excepted.

Henry ..... bought witness' land and paid the money; he handed Frank the money; Frank handed it to witness, and said he would like to borrow it to finish paying for the Gatling place; witness told him that she had no objection, provided he would make it good to her; Frank told her he had the money for the timber, and if she would let him have it to finish paying for the Gatling place he would make it up to her, and witness agreed to let him have it on that condition; at the time this bill of sale was given to witness, she did not know that her husband was insolvent. (Objected to by defendants.) Did tell several other people

in town; did not try to keep it secret; was in her sitting-room when he gave it to her; she put it away, and that was all that was done with it; she told him to list the property; she spoke to Judge Barnes a year or so before the bill of sale; her intention to take the Wilson farm in her name, but finding he was not going to pay for it, Judge Barnes advised her to take the house and lot in Murfreesboro and personal property for the balance; he promised to refund it to her when she loaned it to him; he said he would pay 8 per cent; it was mentioned when the bill of sale was written; the income from the gray horse was paid to him, and he would bring it home and pay it over to witness; and she would spend it or tell him to use it to the best advantage; she gave him the
(358) privilege of using it for the family; when he made her the bill of sale, she did not tell him he should not have the profits from the horse; she consented for him to use it, and to use the horses on the farm to the best advantage; she told him that some of the stock was an expense, and she wished he would sell it. He afterwards sold the Gatling place and bought the Wilson place, and paid half down, $2,000, on the ground that it was immaterial whether she knew it or not.

Objection overruled, and defendants excepted.

Witness knew that he had a running account with Wynne, but thought the peanuts would pay it; her only purpose in taking the bill of sale was to protect herself; she spoke of it several times; she sent for Judge Barnes to have the matter fixed; she spoke to her husband several years before this about it; she was told by Judge Barnes if she was not willing to take the house and lot, to let him sell her enough of his personal property to pay the debt.

Objected to by defendants. Objection overruled, and defendants excepted.

Witness spoke to Judge Barnes and to Frank when he did not owe a dollar in the world, that she wanted him to make her money safe.

Cross-examined: Witness testified that she and her husband lived together in 1885 and 1886; the property was kept first on farm and then over in town, backwards and forwards; he used the work-horses in cultivating the farm; witness gave him the privilege to do that; it was necessary for the support of the family; he used it as he did before witness gave him permission; witness knew he had an account with Colonel Wynne; witness traded there, and did not tell Colonel Wynne about it; she consented, provided he would make her safe; she supposes he took the papers in his own name; she did not raise any objections; he promised that when he finished paying for it, it should be in her name.
(359) *Redirect:* He paid no rent; his family and her family were the same.

The defendants asked the following instructions, which were not given, and defendants excepted:

1. That if it was any part of the purpose of Brown and wife, when said bill of sale was executed, to transfer the property of Frank Brown to his wife, in order to keep his creditors, or any one of them, from collecting their or his debt then the bill of sale is fraudulent and void, and they should find for the defendant.

2. That if it was any part of the understanding between Brown and his wife, when said bill of sale was executed, that Frank Brown should continue in the possession and use of the property mentioned in the bill of sale, or any part thereof, as before, then in law said bill of sale was fraudulent and void as to the creditors, and they should find in favor of the defendants.

3. If it was any part of the purpose of Brown to place his property beyond the reach of his creditors, and that unlawful purpose was brought to his wife's notice, either directly or indirectly, or by circumstances, then she is a participant in the fraud, and derives no title to the property under said bill of sale to the prejudice of her husband's creditors, and this is true even if Brown was indebted to his wife, as stated.

4. If the acts and conduct of Frank Brown attending the execution of the bill of sale were such as his wife might, and ought to have drawn the inference of fraud and of his fraudulent intent, she is fixed with notice of the fraud, and she cannot hold the property against the demand of the creditors of her husband.

5. That if it was any part of the understanding between said Brown and wife, at the time said bill of sale was executed, that the making said bill of sale was to be kept secret, and not to be made known, unless in case of his financial embarrassment, and it *was* kept secret, and Brown continued to use and possess the property as before, that would amount to a secret trust for her husband, and in law would be (360) fraudulent and void as to creditors, even if he were justly indebted to her, as stated.

6. That after Brown executed said bill of sale, if he continued in possession of the property as before, the law presumes that the sale to his wife was fraudulent as to his creditors, and throws the burden on Mrs. Brown of showing the contrary.

7. The law regards with suspicion all conveyances between husband and wife, when they conflict with the rights of creditors, and raises the presumption that they are fraudulent, and compels those claiming under such conveyances to show that they were fair, honest, and free from any intent to defeat, hinder or delay creditors in their rights.

8. And even if there were no fraud in the transaction, then the bill of sale would not pass the title to Mrs. Brown, unless it was accompanied

by a delivery of the possession or control of the property; and if Frank Brown continued in the possession of the property, claiming and using it as before, then there was not a sufficient delivery, and no title passed as against creditors of Brown.

9. If the bill of sale was intended as merely a security for a debt due Mrs. Brown, and no release of the debt was executed at the time of the bill of sale, which indicates that it was a security, then the bill of sale cannot operate against creditors, either as a mortgage or absolute conveyance, and no title passed to Mrs. Brown as against the creditors of her husband.

10. If you believe all the evidence, the plaintiffs are not entitled to recover.

11. That if you find that the *feme* plaintiff is the owner of the property, and that the sale from her husband to her was not tainted with an unlawful purpose, as the court has charged you, then she can only recover the value of the property at the time of the sheriff's sale,
(361) with 6 per cent interest; but if she became the purchaser of any of the property at the sale by the sheriff, for that she can only recover the amount of her bid, with interest at 6 per cent.

12. That if the *feme* plaintiff appeared at said sale by the sheriff, either in person or by agent, and objected to the sale of the property, and claimed it as hers, and then by her agent bid at the sale of the property by the sheriff, this is a badge of fraud, and you may consider it in passing upon the question of title or ownership.

13. The court further charges you that if the *feme* plaintiff, Mrs. Brown, appeared by her agent at said sale and objected to the sale of the property and claimed it as hers, and then by her agent bid at the sale of the property by the sheriff, she is estopped from afterwards setting up title to said property.

14. The fact that Frank Brown owed his wife a just debt is immaterial, if it was any part of the purpose of Brown and wife, at the time of the execution of the paper, to so place the title of said property that Brown's creditors could not reach it for their debts.

15. The law views such transactions as the one involved in this cause between husband and wife with suspicion, and whenever they conflict with the rights of creditors it requires the parties to them to show that they were not intended to defeat creditors. The law likes fair dealings, and hates fraud of all kinds, and juries should be rigid in compelling fair dealing between parties.

The presiding judge instructed the jury as follows:

"This action is brought by Mrs. Brown against Sheriff Mitchell, to recover damages from him for the conversion of certain personal property which he seized and sold, under execution in favor of Colonel

Wynne against Frank Brown, and which Mrs. Brown says was her property, and not her husband's. The first issue presented to you is, 'Is the plaintiff, Elizabeth, etc.' Several questions will present themselves for your solution, to enable you to reach the answer (362) to the issue. There is no question but that this property did belong to Frank Brown, and that on 1 January, 1886, he executed a bill of sale of the same to his wife, and, according to the testimony, the property, part of which was at their home in Murfreesboro, and part on the farm of Mr. Brown, was used as it was before, by the husband—the horses upon the farm, in the cultivation of the farm, for the benefit of the family of Mr. and Mrs. Brown, and that the husband used the horse which was at their home in Murfreesboro, a stallion, and would pay over to his wife the money made by the use of the horse, or that she authorized him to use the same for their mutual benefit. If there was no delivery of the property by the husband to the wife, the sale was not complete, and the property never did pass to the wife, and the sheriff had a right to levy upon and take it as the property of the husband, and your response should be, 'No, the plaintiff is not the owner, etc.'

"A delivery may be actual, as the absolute transfer of the possession of the property by the vendor to the vendee; or it may be constructive, which is something that amounts to a delivery of the thing sold—a delivery of a bill of sale, the property not being present, with authority to take it when it comes within reach of the vendee, and a consequent abandonment of possession or claim on the part of the vendor; or a symbolical delivery, as the delivery of a key to the house in which the goods are stored. It is not claimed that there was an actual manual delivery by Mr. Brown, and taking possession by Mrs. Brown, of the property described in the bill of sale, nor a symbolical delivery of some article to represent the whole, but it is contended that it was a constructive delivery; that Mr. Brown handed her the bill of sale and told her the horses were hers, and she told him to take it and use it for their mutual benefit, and that he did thereafter so hold it. If there was no transfer of possession, no delivery of the property, but the vendor (363) remained in possession, using the property as his own, just as he did before the execution of the instrument, then, as to the creditors of the vendor, Frank Brown, there was no transfer of title, but it remained in the vendor, and the property, being still in his possession, was subject to levy and sale under execution as his property.

"It is not contended that there was an actual delivery of the possession. The testimony of the husband is that he gave her the bill of sale, and told her the property was hers. Some of the property was at the stable at their home in the town, and some was at the farm in the country, which was worked by the husband. Mrs. Brown testified that

she gave him permission to use the horses in working the farm, for the support of the family, and to use the stallion, which he did, and brought her the money, which she would take, or tell him to use for the best advantage.

"Now, if the testimony satisfy you that Mrs. Brown accepted the bill of sale, and gave her husband authority to hold the property as her agent, they living together, and he using the property as hers, and for the benefit of the family, according to her directions, this would be a constructive delivery.

"If you have been satisfied that there was a constructive delivery, was it a *bona fide* sale by husband to wife? The law looks with suspicion upon a transaction of this kind, where the husband is indebted to others and conveys his property to his wife for the alleged purpose of paying her, or securing to her an indebtedness owing by the husband to the wife, and you are required to scrutinize the matter closely in reaching your conclusion as to its validity.

"Was there an indebtedness by the husband to the wife? You have heard the testimony of both husband and wife on this point.

"If they have satisfied you, by a preponderance of evidence, (364) that there was an actual debt owing by husband to wife, he had a right to pay or to secure to her the debt. And, if owing her a valid debt, he transferred and delivered to her his personal property, with the sole purpose of paying her, or securing to her the payment of the indebtedness, in such case the wife got a good title to the property, and the sheriff had no right to seize the same as the property of the husband; or if he owed her the debt, and in consideration of the same, conveyed to her personal property, not being in value more than the debt, even though he may have intended to hinder and delay, or defeat, his creditors by this conveyance, yet, if this intention was unknown to and not participated in by the wife, it would be a valid sale, and would convey the property to the wife.

"But if the husband was indebted to others and also to his wife, and, with the intent to hinder, delay or defeat his other creditors, he conveyed and delivered his property to his wife in payment of a debt which he owed to her, if she participated in this design of his, or even if she knew that it was being done to hinder the other creditors, or delay them, the conveyance to her cannot stand.

"And if you have found that there was a sale perfected by a delivery, it hinges upon this question, was it done to hinder or delay the other creditors, and did she participate in this purpose, or even know of it? And, to enable you to determine as to the truth of this matter, you must look with suspicion upon the transaction and scrutinize it closely. You will consider all the testimony. Was he permitted by her to continue

in possession and use it as before the sale? Was the transaction kept secret, especially did she keep it secret, or know of its being kept from the knowledge of her husband's creditors until he was pressed by another creditor? Was the bill of sale kept by Mrs. Brown until her husband was pressed by another creditor, and then was it taken by her husband and carried to Winton and acknowledged by him before (365) the clerk, and delivered by him to the register of deeds in the night-time? You must remember also the testimony as to explanations given by the vendor and vendee. You must consider these matters, and all others which have been brought to your attention by the testimony, and if they have not satisfied you of the completion of the sale by a delivery, or that it was a *bona fide* sale by husband to wife to secure or pay a debt then existing, or if it was to secure such debt, if it was intended to hinder or delay other creditors, and this purpose was participated in or known by Mrs. Brown, your response should be, 'No.'

"If you should respond 'No' to the first issue, you need not trouble yourselves about the others.

"But if you shall find that it was a *bona fide* transaction, that there was such a delivery as the law recognizes, and as I have explained to you, that there was no intention participated in or known to Mrs. Brown to hinder or delay the other creditors of Mr. Brown, your response should be 'Yes.'

"If 'Yes' to the first issue, it should be 'Yes' to the second, and the damages would ordinarily be the value of the property taken, with six per cent interest from the taking. If, however, Mrs. Brown bought in any of the property at sheriff's sale for less than its value, the damages as to that property would not be its value, but what she paid to get it back.

"To arrive at the value of the property, you may consider all the testimony on that subject, the price for which any of it sold about that time; while it is not to control you in your view of its value, yet it is to be considered by you with all the surrounding circumstances of the sale. If Mr. Brown owned two bay colts and only attempted to convey one of them, without giving a description of the colt, so as to enable you to distinguish between them, it did not convey one of the colts. So you will leave out the value of the colt in estimating damages."

The defendants excepted to the charge as given. (366)

There was a verdict for the plaintiffs.

After verdict, plaintiffs moved to amend by striking from summons and complaint the words "State on relation of," and to enter a *nol. pros.* as to all the defendants except J. S. Mitchell. Defendants objected.

Motion allowed, and defendants excepted.

The plaintiffs then moved to amend their complaint in conformity to the above amendment. Defendants objected.

Motion allowed, and defendants excepted.

Rule for new trial for errors alleged, and for amendments.

Rule discharged.

Judgment for plaintiffs, and defendants appealed.

There was a motion by defendant, in the Supreme Court at this term, for a new trial, on the ground of newly discovered evidence.

W. D. Pruden, J. B. Batchelor and John Devereux, Jr., for plaintiffs.
B. B. Winborne for defendant.

AVERY, J., after stating the case: When a party to an action moves in the Superior Court, before the end of the trial term, for a new trial, on account of testimony discovered after the rendition of verdict, the motion is addressed to the sound discretion of the presiding judge, and, if he rests his refusal to grant it solely upon his discretionary power, his decision is not reviewable in the appellate court. *Carson v. Dellinger,* 90 N. C., 226. So, where a party moves for a new trial in the Supreme Court, on the ground that he has discovered, since the expiration of the trial term below, new and material evidence, that he could have the benefit of on a future trial, the higher Court exercises a purely discretionary power in passing upon the motion. We therefore deem
(367) it proper to give notice, that this Court will, as a rule, in future, grant or refuse such motions without discussing the facts embodied in the petitions or affidavits of the moving party, as we cannot see that any good will be accomplished by contributing another to the volumes that have been written upon the exercise of legal discretion in deciding questions raised by applications for new trials. In this case, however, we find, that the new testimony which the defendant proposes to offer is intended only to contradict the *feme* plaintiff as to her alleged declarations to the witness. The testimony in chief is not separated in the statement from that elicited by cross-examination; but it may be, and indeed it seems probable, that her testimony on that point was given in response to a question from defendant. We can readily see how, if the motion were granted, and acted upon as a precedent, a majority of defendants in cases like this might lay the foundation for a new trial, by asking one charged with being a party to a secret fraudulent conveyance, to whom the witness communicated the fact that it was executed, and then proposing by some of the persons named in reply to contradict on a future trial. The proposed new testimony, as to the collection of fees for the services of the horse, would be offered confessedly to contradict statements made by the husband on cross-examination. The

general rule is, that, when the new testimony will tend merely to contradict a witness examined on the trial, a new trial will not be granted the party wishing the benefit of it. Hilliard on New Trials, ch. 15, sec. 19; Graham and Waltman on New Trials, 498.

The defendant excepted to the refusal of the court below to submit the more numerous and specific issues, tendered on his part, and the substitution of those passed upon by the jury instead of them.

The judgment can be predicated upon the facts found by the jury, as set forth in the record. It does not appear that the defendant was denied the opportunity to have the law applicable to any material portion of the testimony fairly presented and passed upon by the (368) jury, through the medium of some one of the issues submitted. *Emery v. R. R., ante,* 209. The exception cannot therefore be sustained.

The defendants insist that there was error in the refusal to give the instructions asked, numbered 6, 7 and 15, involving the question whether, upon the evidence, the court should have told the jury that there was a presumption, not only that the wife had not paid *bona fide* for the property assigned to her by her husband, but that a transaction of the kind between husband and wife cast upon the plaintiff the burden of rebutting the presumption that it was fraudulent.

The doctrine of the burden of proof, in its application to causes involving an issue of fraud, has led to their division into three classes *(Hardy v. Simpson,* 13 Ired., 132): First, when fraud appears so expressly and plainly upon the face of the deed as to be incapable of explanation by evidence *de hors* (as when it is manifest, from reading a conveyance, that it was made and was intended to secure the ease and comfort of a debtor embarrassed with debt at the time of its execution), there is conclusive presumption of fraud, and the court, without the intervention of a jury, declares the deed fraudulent. Second, when the law raises a presumption of fraud because of the relation of the parties to a transaction, or the circumstances attending it, and if rebutting evidence is offered the issue must be left to the jury. But in the absence of such testimony, the court acts upon the presumption, as when a person stands in certain fiduciary relations to others, such as arise out of reposing trust in his skill and integrity. The law raises a presumption in any transaction between the parties, that the party in the superior position has used it to the injury of the person in the inferior position. Bigelow on Fraud, 190; *Lee v. Pearce,* 68 N. C., 76; *McLeod v. Bullard,* 84 N. C., 515; Kerr on F. and M., 385 and (369) 386. Among the other cases classified under this head, are those in which a conveyance seems (nothing more appearing) to have been made for the ease and comfort of the debtor, but in which it is evident that some explanation might be given, and a different purpose and

intent might be shown. *Hardy v. Simpson,* 13 Ired., 132. Third, as a general rule, where there is only evidence of such circumstances as naturally excite suspicion as to the *bona fides* of a transaction, the issue involving the question as to its fraudulent character should be left to the jury, with instructions that such circumstances are badges of fraud, and should be scrutinized closely in passing upon the issue. Among these badges, as enumerated by the courts, are failure to register a conveyance, required by law to be registered, within a reasonable time after its execution; the embarrassment of a grantor, and his failure to reserve sufficient property to satisfy his indebtedness; inadequacy of price; unusual credit given by one in failing circumstances; secrecy in the execution of a conveyance; the fact that one involved in debt makes a conveyance to a near relation. Bump on Fraud. Con., ch. 4, *ibid.,* p. 158. The last proposition embodies the usual but not the universal rule, however.

When a voluntary conveyance is attacked for fraud by the creditors of a donor, the burden is always upon the donor to establish the truth of circumstances that will repel the presumption of fraudulent intent, or by showing that the grantor retained other property sufficient to discharge all of his pecuniary obligations. *Ibid.,* 286.

The possession of the wife is also prima facie the possession of the husband, and consequently raises a presumption of ownership in him, and where the wife purchases property during coverture, whether from the husband or another, the burden is upon her to show distinctly,
(370) that she paid the purchase money out of her own separate estate, not with the funds furnished by her husband. Bump on Fraud. C., 318. But this Court has held that certain combinations of the several badges of fraud, already mentioned, will raise a presumption of fraudulent intent, and make it incumbent on the party benefited by the alleged fraud to show the *bona fides* of the transaction. Counsel for the defendant cited especially the cases of *Reiger v. Davis,* 67 N. C., 185; *Tredwell v. Graham,* 88 N. C., 208, and *McCanless v. Flinchum,* 98 N. C., 358, in support of his position, and we propose, at a later stage of this discussion, to distinguish each of said cases from that at bar.

In applying some of the principles announced, we find that his Honor instructed the jury as to the delivery:

"Now, if the testimony *satisfies you* that Mrs. Brown accepted the bill of sale, and gave her husband authority to hold the property as her agent, they living together and he using the property as hers and for the benefit of the family, according to her directions, this would be a constructive delivery."

This instruction was given just after calling attention to the testimony of the plaintiff and her husband, and plainly left the recovery of

the plaintiff to depend upon the question, whether their evidence should show to the satisfaction of the jury that there was a constructive delivery. The *onus* was thus plainly thrown upon plaintiff to prove the delivery. The instruction was correct, too, as to what constituted a constructive delivery. Benjamin on Sales, sec. 1018 (and notes), 1043 and 1044; *Jenkins v. Jarrett,* 70 N. C., 255; *Bartlett v. Blake,* 37 Me., 124. The judge also left to the jury the question, whether the testimony of the husband and wife combined (there being no other evidence as to the point) had satisfied them that there was a *bona fide* debt due from the former to the latter, and made the right of recovery dependent upon the weight given to their testimony as to the existence of the debt. 58 Am. Dec., 775. On this point, he charged as follows:

"Was there an indebtedness by the husband to the wife? You (371) have heard the testimony of both husband and wife on this point. If they have satisfied you, by a preponderance of evidence, that there was an actual debt owing by the husband to the wife, he had a right to pay or secure the debt," etc.

He did not tell the jury that the law presumed that the deed was executed in good faith and for a fair consideration, but imposed the burden upon the plaintiff of showing a delivery, and also of establishing the consideration. The judge was not bound to adopt the language of the defendant's counsel.

He went far enough when he required the jury, as a condition precedent to find for the plaintiff, to be satisfied of the truth of the fact mentioned by him, when *those facts, if true,* would rebut the presumption arising out of the relation of husband and wife, that he was in possession in his own right, and that she had not paid for the property with her own funds. Indeed, it has been held by eminent authority incorrect to use the phrase "burden of proof" in such connection as suggested in the prayer for instructions. The burden of proof, it is said, never shifts, but is always on the party having the affirmative of the issue. The *weight* of evidence does sometimes shift in the progress of a trial. Greenleaf on Ev., 74, and note; Am. and En. Ev. of Law, Vol. 2, p. 655. This case cannot be made to depend on any construction given to the language used in *Reiger v. Davis,* 67 N. C., 185, nor upon the more decided terms used in *Tredwell v. Graham,* 88 N. C., 208. It differs from both in the facts, that a stranger, who was present and wrote the bill of sale, was examined in the trial, as well as the husband and wife, and there was an opportunity given to the jury, to weigh the testimony of all as to the good faith of the transaction in question. It differs from both of those cases, and also from *McCanless v. Flinchum,* 89 N. C., 358, in another respect. The husband and wife both testi- (372) fied that he had owed her a certain sum of money, and had paid

a portion, leaving still due a balance sufficient to pay, and that was used to pay an adequate price for the property described in the bill of sale. While the testimony as to the existence of the debt does not seem to be controverted by any other testimony, still the *onus* was put upon the plaintiff by a preponderance of testimony.

In *Hodges v. Lassiter,* 96 N. C., 351, *Chief Justice Smith,* for the Court, says: "But assuming proof, not controverted, to have been given of the indebtedness, the *burden* then rests on the plaintiffs, who allege, to prove fraud."

If it were not true, as it is, that our case is distinguishable from *Reiger v. Davis,* we will find, by referring to the language used by *Justice Boyden* (not to the syllabus), that the Court intended to state the rule of evidence laid down by Best in his work on the Principles of Evidence, p. 277: "Where effective proofs are in the power of a party, who refuses or neglects to produce them, that naturally raises a presumption that those proofs, if produced, would make against him." When the proofs are produced, the presumption is gone. The Court said in *Reiger v. Davis, supra:* "It is a rule of law, to be laid down by the Court, that when a debtor, much embarrassed, conveys property of much value to a near relative, and the *transaction is secret and no one is present to witness the trade but these near relatives, it is to be regarded as fraudulent,* but when *these relatives are made witnesses in the cause,* and depose to the *fairness* and *bona fides* of the transaction, and that there was no purpose of secrecy, it then becomes a question for the jury to determine the intent which influenced the parties, and to find it fraudulent or otherwise, as the evidence may satisfy them." The relatives and a stranger were introduced, and an attorney named, with whom plaintiff had consulted. The court evidently meant (373) that the question, whether the fraud was shown by the defendant to the satisfaction of the jury, would, in our case, be left to the jury. Having pointed out the distinction between our case and that of *Tredwell v. Graham, supra,* it, therefore, is not necessary to question the proposition that the burden of proof shifted in that case.

Abbott, in his work, Trial Evidence, pages 171 and 172, says: "It is held that, if the wife shows title to separate property or capital, not derived from him, the fact that she employs him upon it and supports him, does not raise a presumption of fraud. But his conduct in the business may be given in evidence on the question of fraud." The conduct of the husband in managing her horses and other property was given in evidence.

It is not material whether the husband gave her any written evidence of an indebtedness, and how he invested or reinvested the money, if he owed her an honest debt and agreed to pay it. *George v. High,* 85 N. C.,

99; *Dula v. Young,* 70 N. C., 450. We conclude, therefore, that the learned judge who tried the case correctly interpreted the law, when, after declaring the *onus* upon the plaintiff to establish the debt and prove the delivery of the property, he left the jury to determine what weight they would attach to the circumstances in the evidence that amounted to badges of fraud, and, mentioning each circumstance, especially cautioned the jury, because of the character of the evidence, to scrutinize the matter closely, and if they found that the husband executed the bill of sale with intent to hinder, delay or defraud his creditors, and that the wife participated in that intent, they would return a verdict for defendant on the first issue. Bump on Fraud. Con., ch. 4; *Johnson v. McGuire,* 11 Iowa, 151. After establishing the debt, it was proper to tell the jury that, though the husband intended to defraud his creditors, the validity of the transfer to the wife would not be destroyed unless she participated in the intent. *Battle v. Mayo,* (374) *post,* 413. It was competent for plaintiff to show the advice of her attorney, as evidence of her good faith. Bump on F. C., 553.

There was no testimony tending to show that the bill of sale was intended as a security. On the contrary, the witnesses testified that it was a sale. We cannot see how the principle stated in *Duker v. Jones,* 6 Jones, 14, applies to the facts of this case. The judge was not bound to leave the question, whether the bill of sale was intended as a chattel mortgage, to the jury, merely because the plaintiff did not show affirmatively that she gave her husband a written receipt for the debt.

The defendant objected to the order of the judge, allowing the pleadings to be amended, to conform to the proofs, after verdict. Superior Courts possess an inherent power to amend pleadings, and, under the provisions of The Code, have power to allow amendments, both before and after judgment. The only limitation on the power is, that no vested right shall be disturbed, and that the cause of action or defense shall not be substantially changed. *Knott v. Taylor,* 96 N. C., 553; *Gilchrist v. Kitchin,* 86 N. C., 20; *March v. Verble,* 79 N. C., 19. If the action in this case had been orginally begun and prosecuted against the sheriff individually, and not against him and his sureties on his official bond, it is obvious that the defense would have been the same made in this case, and the same issues would have arisen. The nature of the action has not been so changed as to surprise the defendant by making it necessary to establish any fact not already material under the issues submitted to the jury. The judge could, in his discretion, refuse the motion to amend or grant it, with or without terms. The Code, secs. 272, 273; *Carpenter v. Huffsteller,* 87 N. C., 273; *Reynolds v. Smathers,* 87 N. C., 24.

(375) We conclude, therefore, that the defendant has shown no error that entitles him to a new trial. The judgment must be affirmed.

No error. Affirmed.

SMITH, C. J., dissenting. The facts developed at the trial, that the alleged consideration of the conveyance was an indebtedness arising out of the sale of the wife's land ten years before, and the application of the moneys received therefor to the husband's use; that he was on the eve of hopeless insolvency; that the deed was kept without disclosing the transfer of the property; that it was proved at a late hour of the night, under unusual circumstances; that specific values were not put upon each article; the continued possession and use of the personal property, with no indication of a change of title, sustaining the credit of the husband in making contracts upon the faith of it; the assent of the wife thereto, whereby he had the beneficial enjoyment as before; —these, in my opinion, raised a presumption of fraud between parties, husband and wife, thus dealing with each, which the appellant was entitled to have given as an instruction to the jury, requiring proof in rebuttal. If the agreement for the continued use of the property, after as before the making of the deed, had been part of the arrangement for the transfer, it would have rendered the deed *ipso facto* void, as securing an interest to the vendor. *Rea v. Alexander,* 5 Ired., 644.

The assent to such possession and use may authorize the inference of its being a prior condition, express or implied, which would avoid the deed, and certainly strengthens the presumption of the presence of this vitiating element in the transaction.

In *Askew v. Reynolds,* 1 D. and B., 367, the following language is used by *Gaston, J.,* quoted with approbation by *Ruffin, C. J.,* in *Foster v. Woodfin,* 11 Ired., 339, in reference to a conveyance unat-

(376) tended with a change of possession: "But such a repugnance between the transfer and the possession yet *raises the presumption of a secret trust* for the benefit of the grantor, which, while it admits, also requires an explanation, and which, unexplained or not satisfactorily explained, establishes the fraud." Here there is none—the consent, to the use for his own benefit, of the vendee, his wife. The refusal to so charge is an error, in my opinion, entitling the appellant to a *venire de novo.*

Cited: Woodruff v. Bowles, 104 N. C., 206; *Berry v. Hall,* 105 N. C., 163; *Bobbitt v. Rodwell, ibid.,* 242; *Helms v. Green, ibid.,* 263; *Stephenson v. Felton,* 106 N. C., 120; *Booth v. Carstarphen,* 107 N. C., 401; *Waller v. Bowling,* 108 N. C., 294; *Osborne v. Wilkes, ibid.,* 670; *Maggett v. Roberts, ibid.,* 176; *Bray v. Creekmore,* 109 N. C., 49;

Orrender v. Chaffin, ibid., 425; *Walker v. Long, ibid.*, 514; *Peeler v. Peeler, ibid.*, 631; *Black v. Black*, 111 N. C., 305; *Ferebee v. Pritchard*, 112 N. C., 88; *Nadal v. Brittain, ibid.*, 186; *Davis v. Smith*, 113 N. C., 100; *Allen v. McLendon, ibid.*, 326; *S. v. DeGraff, ibid.*, 694; *Forte v. Boone*, 114 N. C., 177; *Benbow v. Moore, ibid.*, 274; *Bank v. Bridgers, ibid.*, 386; *Stoneburner v. Jeffries*, 116 N. C., 83; *Bank v. Gilmer, ibid.*, 703; *Sledge v. Elliott, ibid.*, 717; *Crabtree v. Scheelky*, 118 N. C., 105; *Clark v. Riddle, ibid.*, 692; *Nathan v. R. R., ibid.*, 1070; *Cook v. Guirkin*, 119 N. C., 17; *Ricks v. Stancil, ibid.*, 103; *Mining Co. v. Smelting Co., ibid.*, 418; *Sydnor v. Boyd, ibid.*, 485; *Redmond v. Chandley, ibid.*, 578, 579, 580; *Trust Co. v. Forbes*, 120 N. C., 359; *Herndon v. R. R.*, 121 N. C., 499; *Howard v. Early*, 126 N. C., 174; *Jordan v. Newsome, ibid.*, 556; *Turner v. Davis*, 132 N. C., 189; *Aden v. Doub*, 146 N. C., 13; *Chrisco v. Yow*, 153 N. C., 436; *Eddleman v. Lentz*, 158 N. C., 73; *Murdock v. R. R.*, 159 N. C., 133; *Alford v. Moore*, 161 N. C., 386; *Johnson v. R. R.*, 163 N. C., 454; *Odom v. Lumber Co.*, 173 N. C., 136; *Allen v. Gooding*, 174 N. C., 273; *Garland v. Arrowood*, 177 N. C., 374; *Alexander v. Cedar Works, ibid.*, 537; *Wallace v. Phillips*, 195 N. C., 672.

W. A. HAISLIP v. WILMINGTON AND WELDON RAILROAD COMPANY.

Railroads—Right of Way—Damages to Crops—Benefits to Landowner.

1. In an action to recover damages against a railroad company for right of way, the injury done to growing crops, both inside and outside of the land apportioned, must be estimated in assessing damages.
2. Under the charter of the Wilmington and Weldon Railroad Company, upon payment of damages assessed for right of way, the land covered by the road, and sixty-five feet from the base of the road on each side, becomes vested in the company in fee simple.
3. In estimating benefits to the owner of the land on the line of the road, he is to have the benefit, without charge, of all advantages common to others in the community.

THIS was an action to recover damages for right of way for branch railroad of defendant company, across land of plaintiff, tried at December Term, 1888, of MARTIN Superior Court, before *Graves, J.*

The plaintiff filed his petition before the clerk of the Superior Court of Martin County, asking the appointment of commissioners or jury,

under the charter of defendant company, to assess the damages,
(377) and benefits in accordance therewith, to the lands of plaintiff, by reason of the building of defendant company's railroad over the same.

Commissioners were appointed, who made report, a copy of which is annexed as part of the case. The clerk affirmed the report.

The plaintiff and defendant both appealed from the assessment and report of the commissioners, and from the order of the clerk confirming the same.

The defendant's appeal was, that the estimate of damages was too large and that of benefits too small.

Exceptions to report were:

1. That there was no land condemned for the use of the railroad.

2. That that laid off is too vague and indefinite in its location.

3. That it was not for the jury to mark out the course of the road, but the privilege of the company.

4. That there is no way from the report to ascertain the quantity of the land so as to estimate the value of land or damages.

The court ruled as follows on the exceptions:

"Upon considering the exceptions, the court considers that the reference of the report to the location by the engineers of defendant, would enable the court to see definitely how the road bed is located. Therefore the first exception is overruled.

"It is true that it was not for the jury to mark out the course of the road, but the privilege of the company; but the court understands the report as assigning damages on the land as laid out by the defendant's engineers.

"As to the third exception, that is certain which can be made certain,
and by reference to the location of road of defendant, made by
(378) its engineers and referred to by commissioners, the land subjected to the easement for the benefit of the defendant may be ascertained and identified.

"Exceptions two and three are therefore overruled."

After the disposition of the exceptions as above, issues were submitted to the jury as to the damages and benefits accruing to the plaintiff by reason of the use and occupation of the land by defendant as right of way for its railroad.

Evidence was introduced tending to show amount of damages, etc., and to show destruction of growing crop in the right of way, and also injury to crop outside of right of way, by passing over it, and by insecure cattle guards over which hogs passed and destroyed it.

To this evidence as to injury to crop and insecurity of cattle guards, defendant objected, but it was allowed by the court.

The defendant requested the court to charge:

1. That, in this action, the jury cannot consider the damage done to the growing crop.

2. That the railroad, having no title to the land, but only the right to use the same for the purpose of its construction, the jury, in estimating damages, will consider only the land actually used by the railroad, and not the entire width of 130 feet.

3. That the jury will consider any special benefit to plaintiff from the construction of the railroad and offset same against such damage as they may allow, and in this connection they may consider the increased value of plaintiff's timber, in that the railroad makes it more salable and more accessible to market, and makes a market for cross-tie timber—his timber lying on both sides of the road.

His Honor refused the 1st and 2d, and gave the 3d, with this addition: "But the jury will bear in mind that the plaintiff is entitled to have, in estimating the increased value of his timber, the benefit of all advantages common to others."

His Honor, after explaining how the land of the citizen might (379) be taken for public use, but that it could only be done upon making to the citizen just compensation, charged them that "the material matter for you to determine is, what is just compensation to plaintiff, for the right which the defendant takes to occupy his land and build its railroad thereon, and to maintain and operate it there.

"The measure of the value is the damages which the plaintiff has sustained by reason of the taking of his land—the removal of earth by reason of the embankments and cuts, and the direct consequences which result from the building and operating defendant's railroad.

"It is true that the defendant does not acquire the legal title to the land itself, but it does acquire an easement or right to use the land taken from the plaintiff for all the purposes of building, making, repairing, operating and using the railroad, so exclusively that the plaintiff would not be allowed to do anything on the land which would interfere with its franchise.

"But while the plaintiff is entitled to be paid, as compensation for the injury done him by taking his private property, so much damage as he has received, on the other hand, in arriving at a just and fair compensation, it is proper to take into consideration the benefits which the plaintiff has received specially—that is, such benefit as inures peculiarly to that land.

"He is entitled to have, without any deduction, the general benefit which is common to the community.

"But such special benefits as the plaintiff has received must be deducted from the damages, in order to arrive at the just compensation."

Verdict and judgment in favor of the plaintiff. Appeal by plaintiff.

Errors alleged: That the court erred in admitting testimony ob-
(380) jected to, and in refusing to charge as requested, and error in charge as given.

C. M. Busbee for plaintiff.
J. E. Moore and H. W. Stubbs for defendant.

SHEPHERD, J. No error is assigned as to the rulings of the judge upon the exceptions to the report of the "jury," or commissioners, and the only exceptions presented for our consideration grow out of the trial of the issues, as to the damages sustained by the petitioner and the value of the benefits resulting to him by reason of the construction of the defendant's road over his land.

The admission of the testimony objected to, and the refusal of the court to give the first instruction prayed for by the defendant, may be considered together, as they substantially involve the same question, viz.: Whether the defendant is liable for damages to the growing crop on and outside of the right of way, which damages were actually sustained by reason of, and incident to, the construction of the road. The mere statement of the proposition excludes the idea that the damages sought to be recovered were "remote, speculative or contingent." The action of the court is fully sustained both by reason and authority.

"The value of growing crops destroyed by the appropriation of the lands, both inside and outside of the location, . . . (have) been held proper elements of damages." Woods' Railway Law, 2 Vol., 917; *Lance v. C. M. & St. P. R. R. Co.*, 57 Iowa, 636.

The second instruction asked for was properly refused, and there is no error in the charge upon the subject to which it relates. A mere glance at section 18 of defendant's charter (2 Rev. Stats., 342) will show that his Honor was correct. "After the assessment of the damages to be paid, and the payment thereof, the property covered by the
(381) road, and sixty-five feet on each side thereof, measuring from the base of the road, shall become to all intents and purposes vested in the company in fee simple."

The addition to the third instruction was unquestionably proper. After a careful scrutiny of the entire charge, we are unable to find any error of which the defendant can complain.

No error. Affirmed.

Cited: Elks v. Commissioners, 179 N. C., 246.

JOSIAH G. ALLEN v. THE WILMINGTON AND WELDON RAILROAD CO.*

Exceptions must be made Below—Eminent Domain—Charter of W. & W. R. R. Co.—Joinder of Causes of Action—Remedy of One whose Land is Appropriated or Damaged by R. R. Co.—The Code, ch. 49, sec. 1932, et seq.; sec. 1945, sec. 1975.

1. Only those exceptions which were made below will be considered in the Supreme Court.

2. The statutory method of condemning a right of way by the W. & W. R. R. Co. can be exercised only when the parties are unable to agree upon the terms of acquirement.

3. The right of eminent domain can be exercised only in the mode pointed out in the statute conferring it.

4. The method of proceeding, for the condemnation of land by railroad corporations, prescribed by chapter 49, The Code, is applicable to all railroads, whether formed under the general law or special act of incorporation.

5. Semble that section 1945, The Code, applies to the W. & W. R. R. Co.

6. The only remedy open to one, whose land is appropriated by the W. &. W. R. R. Co. as a right of way, is under section 16 of the company's charter, as (possibly) modified by chapter 49, The Code. The statute has taken away the common law remedy.

7. Where a deed for a right of way was obtained from a landowner by fraud on the part of a railroad company, the Superior Court has jurisdiction to set aside the conveyance, but cannot go further, in the same action, and ascertain and enforce payment of damages suffered by the grantor by reason of the appropriation of his land *as a right of way* by the company, although such appropriation was made by the company under the deed in question.

8. There is a great difference between the joinder of incongruous causes of action, over *each* of which the court *has jurisdiction*, and the association of separate alleged causes of action of which *some are within* and *others without the jurisdiction* of the court. In the latter case the allegations of causes of action of which the court has no jurisdiction are but harmless surplusage. *Therefore*, where plaintiff sued a railroad company in the Superior Court for the value of his land appropriated as a right of way by the company, and joined a cause of action for damages sustained by him by reason of the *faulty construction* of the road: *Held*, that he could recover on the last mentioned cause of action, although the court had no jurisdiction of the first.

*AVERY, J., did not sit.

(382) THIS was a civil action, tried before *Avery, J.*, at Fall Term, 1888, of the Superior Court of JOHNSTON County.

The defendant company, to whom, under the name of "The Wilmington and Raleigh Railroad Company," its charter was granted in 1833 by the General Assembly, and whose corporate name was, by the act of 14 February, 1855, changed into that it now has, upon the substitution of another terminus for the road, was authorized by section 21 "to construct a branch or branches to the main road, to be connected with the main road at such point or points as they (the stockholders) may determine on, and to lead in such direction and to such point or points as they may think best."

In the exercise of the authority conferred, the company proposed to construct a branch road from a point in the county of Wilson on its line to a point on the boundary line between the State and South Carolina, in either the county of Richmond or the county of Robeson, and with a view to this end procured from the plaintiff free and per-

(383) petual right of entry to the plaintiff's land, an easement therein for the location and operating its contemplated railway, upon any part wherever the company may select its route. The deed conveying the easement, with all the incidental rights and privileges necessary to its full enjoyment, was made and bears date 29 August, 1882. Under this grant of the right of way, made, as on its face is expressed, "in consideration of the benefits to be derived from the building of the said branch road, and in further consideration of one dollar," the company proceeded, in the latter part of December, 1885, to construct its road upon a route selected and determined by its agents, and have, since its completion, been running its trains over the same.

On 5 December, 1887, the plaintiff began the present action against the defendant, and in his complaint alleges that the deed for the right of way was procured from him by the false and fraudulent representations of the company's agent, that the road was to be built upon a line which had theretofore been surveyed and marked out, and ran through the rear part of the tract, from which but little inconvenience would have been caused to the use of the plantation, and an assurance that if the location was elsewhere a new conveyance would be required, for which, if not meant as a donation, compensation would be given; and that the road had been built on a different route, over cultivated land, and to the great damage of the farm.

The plaintiff further demands, in other assigned causes of action, compensation and damages sustained by reason of the alleged unskillful and negligent construction of the road in the various particulars mentioned. The demand is: that the deed be declared void; for fifteen hundred dollars damages, and for general relief.

The defendant, in answer to the complaint, denies all the imputations of falsehood and fraud in inducing the execution of the deed, averring that it was made freely and willingly, and after it had been read and explained, admits that a change had been adopted in (384) the route of the road after the plaintiff's conveyance in general terms of the right of way across the land, as it was found most convenient and useful to the company; and, after controverting most of the allegations in the complaint, as a further defense, alleges that the plaintiff "demanded and received from it $100 for the license and privilege of constructing said road on the line as located."

Upon issues submitted to the jury, they find:

1. That the deed was procured through false and fraudulent representations, made by the company's agent, who thereby superinduced its execution.

2. That the road has been constructed over a different route from that marked out when the deed was given.

3. That the damage resulting from the change of route is $500, and from the failure to construct cattle-guards and crossings at plantation roads, $225.

4. That none has been occasioned by washings of the land caused by the negligent and unskillful manner of constructing the road.

Judgment having been rendered according to the verdict, defendant appealed.

Among the exceptions taken below, was the following:

"Counsel for defendant insisted that plaintiff's damage could not be assessed in this action, because this court could only take jurisdiction of the action to set aside deed and not of the assessment of damages for right of way.

"His Honor held that the Superior Court, having exclusive jurisdiction of the question of fraud and misrepresentation, had a right to grant complete relief in this action; and this was not only the rule of the courts of equity, but was in accord with the idea upon which the new Code of Procedure was based, of deciding in one action all questions growing out of the same transaction."

C. M. Busbee for plaintiff. (385)
George Davis for defendant.

SMITH, C. J. (after stating the case): The exceptions are very numerous, and we deem it necessary to notice only one, that is taken to the prosecution of the claim set out in article 5 of the first named causes of action contained in the complaint, and none is taken to the first, whose sole object is the setting aside the conveyance of the right of way over

the premises, nor to the damages arising from the failure to put up cattle-guards and to construct crossings. The deed, if effectual, allowed the company to select its route, and would bar all claim for damages incidental to and necessarily incurred in exercising the conferred right. This obstacle in the way of any proceeding, under the statute, to acquire an easement in the land, must be removed by annulling the deed, for this method of obtaining the right is given when the *parties are unable to agree upon the terms of the acquirement.*

There is no difficulty, then, in prosecuting the action, so far as it proposes to put the conveyance out of the way, and seeks damages for subsequent injuries, unless it be in the plaintiff's own inaction to make objection, when he found a new line had been adopted by the defendant, and even accepted compensation for letting the water out of his pond to enable the company to go on with its work and expend largely in constructing the road. This point has been strongly urged in the argument, but as no exception of the kind is shown in the record, it cannot now be entertained, whatever may have been its force if taken in apt time.

The judgment, following the verdict, which affirms the allegations as to the influences brought to bear upon the plaintiff in inducing the making of the deed, will remain undisturbed.

The remaining causes of action are based upon trespasses committed upon the land, and the complaint demands compensation in damages therefor, simply as such, and *not* for the value of any perma-
(386) nent right of way, to be acquired over the land, when such damages have been paid. It is obvious, if the judgment is permitted to stand, which gives compensation therefor, the defendant would have no easement or estate in the land, and would be equally exposed to another and successive actions for continuing trespasses, in the use of the road, by running its cars over the track.

The right of eminent domain, possessed by the State, may be exercised when conferred upon public corporations of the class to which the defendant belongs, as decided in *R. & G. R. R. Co. v. Davis,* 2 D. & B., 451, and many subsequent cases; but it must be exercised, and can only be exercised, in the mode pointed out in the statute. The provision in the act incorporating the defendant company, authorizing the proceeding to condemn lands of an owner over which the road is to pass, when the parties cannot agree on the terms of purchase, renders it "lawful for the president and directors to file a petition, in the name of the company, in the (now extinct) Court of Pleas and Quarter Sessions of the county wherein the land lies, under the same rules and regulations as are now prescribed for laying off public roads in said county," under certain restrictions mentioned. Section 14.

Authority is given the company, in section 17, to enter upon lands for the purpose of surveying a route for the track, and laying off and marking the same, and upon failure of the company to take steps for condemning the land, the same remedy is given the owner, and he is required to proceed, "after the manner and according to the rules provided in the 16th section hereof, and *not otherwise.*" Section 18. The concluding clause of this section declares that "if the owners of said lands shall bring any action of trespass against the company or any of its officers, or any other action but a petition as aforesaid, the defendant may give this act in evidence under the general issue or upon a special plea, and it shall bar the said action or suit."

The abolition of the county courts prevents a literal compli- (387) ance with the terms prescribed in reference to the tribunal to which application must be made, but the objection disappears by the enactment contained in sections 9 to 22 inclusive of chapter 61, Revised Code, which supersede, at least in some particulars, the method of procedure, and determine the corporate rights and privileges of public corporations found in the charter.

By these provisions the railroad company may enter upon land and lay out the route on which to put the road, and either company or proprietor "may apply by petition" (five days previous notice having been given) "to the county or Superior Court of the county in which the land or some part thereof may be situate, and the court shall appoint five disinterested and impartial freeholders to assess the damages to the owner for the occupation and use of the land aforesaid." And the method of proceeding for the condemnation of land, in furtherance of such public enterprises, is furnished in detail in chapter 49 of The Code, sec. 1932, *et esq.*, entitled "Railroad and Telegraph Companies."

In its original form, as found in Acts 1871-72, sec. 13, the procedure for condemnation prescribed is confined to companies formed under the act, but in The Code, sec. 1943, that clause is reproduced by the addition of the words "or by special act of the General Assembly," so that it is now applicable to railroads whether formed under the general law or by special act of incorporation.

It is not material to inquire, to what extent the charter of the defendant, in these features, has been modified by subsequent legislation; though, as not impairing vested rights, we are inclined to the opinion that the modified provisions made on the subject must be pursued, and instead of a jury of view, the freeholders, as directed in section 1945, should be appointed, whose duty it is *to go upon the premises and hear the proof,* and then make up and return their report to the clerk, as representing the Superior Court, for its action thereon, (388) as directed in the section next succeeding.

However this may be, the course pursued in the present case, in which the jury was allowed to ascertain the value of the rights and privileges demanded by the plaintiff, is wholly without warrant of law; and as no easement has been acquired, so no damages should have been awarded as the consideration therefor, nor could any damages be recovered for the act of entry upon the premises and the constructing and using the road.

The third instruction proceeds upon the idea of a vesting in the defendant of an interest in the land as a right of way over it, and directs the jury to ascertain, as the measure of value thereof, "the difference between what the whole property would have sold for, unaffected by the road, and what it would have sold for as injured (if it was injured) by the construction of the road," this being "the measure of damage for *the right of way*," etc.

The charge is excepted to by the appellant in exceptions 5, 6, 7 and 8, and we think there is error therein.

The counsel for the appellee, in answer to the objection, argues that it should have been taken by demurrer, and has been waived. But this is not a case of the joinder of incongruous causes of action in the complaint, over each of which jurisdiction is possessed, but an association of separate alleged causes of action, of which some are within and others without the jurisdiction of the court, so that redress may be given in the former, and cannot be given in the latter. The cause of action, growing out of the act of appropriating the plaintiff's real estate to the uses of the company, can be prosecuted only in a single special proceeding, provided in the statute, in its nature exclusive of any other, and which, as said by *Ashe, J.*, in *Holloway v. R. R.*, 85 N. C., 452, "has taken away (389) the common law remedy." The allegations which introduce the claim for damages growing out of the construction of the road, and for which compensation must be sought in the statutory mode of procedure, are but harmless surplusage, and may be disregarded in the pursuit of such as are recoverable and are consequent upon a faulty construction of the road *(Singer Manufacturing Co. v. Barrett,* 95 N. C., 36); and for such, redress may be had in the present action. The Code, sec. 1975.

The complaint does not profess to transfer to the defendant any interest in the land, or easement upon it, upon the payment of the assessed damages, and hence no equivalent is secured to the company by making payment.

As while the deed continued in force, and it could be annulled only for the imputed vitiating infirmity, at the instance of those who made it, and by them it was acquiesced in until the bringing of the suit, the condition, the inability of the parties to come to an agreement, did not

exist so as to warrant the summary action by petition, and therefore the case stands upon the conferred authority to enter upon the land and build the road. The compensation for this deprivation of property must await the result of the action of the commissioners and its confirmation, and meanwhile the common law remedy for other lawless invasions of the property of another is withheld, unless damages supervene afterwards, for which it does afford relief.

We pretermit an inquiry into the sufficiency of other exceptions taken at the trial, to rulings of the court that have been the subject of earnest controversy upon the hearing, because not necessary in disposing of the case on appeal.

The counsel for appellant conceded the plaintiff's right to recover damages as assessed in the issues for defendant's neglect to put up cattle-guards and provide proper crossings at the intersection of the railroad with plaintiff's plantation roads, and the judgment, so far as it awards these sets aside the conveyance, must be affirmed, and reversed so far as it awards damages for the building of the road over the new instead of the original route by the mill. (390)

Modified and affirmed.

Cited: S. c., 106 N. C., 515; *Durham v. Rigsbee,* 141 N. C., 130; *R. R. v. R. R.,* 148 N. C., 73; *Abernathy v. R. R.,* 150 N. C., 108; *Clinton v. Johnson,* 174 N. C., 287; *Parks v. Commissioners,* 186 N. C., 498; *Rouse v. Kinston,* 188 N. C., 10; *Ingram v. Hickory,* 191 N. C., 53; *Engineering Co. v. Boyd, ibid.,* 143; *Power Co. v. Moses, ibid.,* 746; *Winston-Salem v. Ashby,* 194 N. C., 393.

FARRELL & CO. v. THE RICHMOND AND DANVILLE R. R. CO.

Judge's Charge—Stoppage in Transitu—Carrier's Stipulation for Lien for Arrearages—Delivery, Actual and Constructive—Priority of Liens as between Vendor, Carrier and Attaching Creditor.

1. A charge, that if the jury believe a certain state of facts the plaintiff is not entitled to recover, while it was proper upon the general issues submitted, under the old practice, is confusing when applied to our present system. The loose practice in this respect should be discontinued.

2. The right of stoppage *in transitu* is the right of the vendor, after he has delivered goods out of his own possession and put them in the hands of a carrier for delivery to the buyer, to retake the goods before they reach the buyer's possession, upon discovering the buyer's insolvency. The right

is *based* upon the plain reason of justice and equity, that one man's goods shall not be taken to pay another man's debts, and is highly favored on account of its intrinsic justice. The right *arises* solely upon the insolvency of the buyer, and such insolvency being unknown to the vendor at the *time of the sale*, and may be *exercised* at *any time* before the actual or constructive delivery of the goods to the buyer by the carrier.

3. The vendor's right of stoppage *in transitu* is paramount to all liens against the buyer, even to a lien in favor of the carrier, existing by usage, for a *general balance* due him from the consignee, and to the lien of an execution or attachment against the buyer levied before the delivery of the goods to him.

4. A vendor shipped a safe to his vendee, taking therefor a bill of lading, in which was the clause: "The several carriers shall have a lien upon the goods (shipped) for all arrearages of freight and charges due by the same owners or consignees on other goods": *Held*, that such a stipulation would not give the carrier such a lien on the safe for arrearages of freight, due by the consignee on other goods, as would take precedence of the consignor's right of stoppage *in transitu*.

5. *Quære*, whether such a stipulation as the above is reasonable and binding at all? If it is, it is entirely subordinate to the right of stoppage *in transitu*.

6. A. sold and shipped to B. a safe, taking a bill of lading containing the clause quoted above. The safe was in the carrier's warehouse, and B. and the carrier's agent were both leaning on it. B. said to the agent, "I place this safe in your hands as security for what I owe" (alluding to arrearages of freight, due on other goods, which B. owed the carrier). There was no response by the agent; but he held the safe until some time afterwards, when, hearing that B. had run away, he took out an attachment on behalf of the carrier, and had it levied on the safe: *Held*, that what transpired between B. and the agent did not alter, in the slightest degree, the relations existing between B. and the carrier, for the reason that the carrier already had a lien on the safe for the freight on the safe, and, under the clause in the bill of lading, it claimed to have a lien on it for arrearages of freight on other goods also; and there being no *actual* delivery of the safe, or new consideration for the proposed pledge, what transpired left B. and the carrier in precisely the same position as before.

7. There being no *actual* delivery of goods by a carrier to the consignee, a *constructive* delivery can only be effected by a valid agreement on the part of the carrier to hold for the consignee.

(391) THIS was a civil action, tried before *Merrimon, J.*, and a jury, at June Term, 1888, of the Superior Court of DURHAM County.

The plaintiffs alleged, in substance, that they were residents of Philadelphia, Penn.; that they sold a safe on credit to Robertson & Rankin, of Durham, N. C.; that they delivered it to the defendant company for transportation to Durham, in said State, directed to said Robertson & Rankin; that after said shipment, and before its delivery to the pur-

chasers, the plaintiffs learned that the purchasers were insolvent, and that they notified the defendant not to deliver the safe to said purchasers, or any other person but the plaintiffs, at the same (392) time tendering to defendant the freight and all other charges on said safe, and demanding the delivery thereof; that defendant refused to surrender said safe, but retained the same wrongfully, etc.

As there was no objection to the issues, only so much of the answer of the defendant as relates to them and the exceptions will be stated. The answer denied that defendant wrongfully withheld the said safe from the plaintiffs, and alleged that Robertson & Rankin, being indebted to defendant in the sum of $130, defendant sued out a warrant of attachment against the said property before defendant had any notice of the plaintiffs' claim on said safe, and before any demand made by them for the same, and that under the judgment and execution in said proceeding, defendant purchased said safe. Defendant also alleged that after the safe was received at its warehouse in Durham, it was delivered to Robertson & Rankin, and by them delivered to Col. J. A. Holt, agent of defendant at Durham, to be held by him as security for certain indebtedness then due and owing to the defendant by the said Robertson & Rankin.

The following issues were submitted to the jury:

1. Did the defendant deliver the safe to Robertson & Rankin? Answer: No.

2. If it was delivered, did the plaintiffs demand possession before it was delivered, and tender freight and charges as alleged in the complaint? Answer: Yes.

3. What damage, if any, have plaintiffs sustained? Answer: One hundred dollars, with interest from 10 September, 1885.

The plaintiffs introduced the deposition of Jordan Matthews, as follows:

I am a member of the firm of Farrell & Company; the other (393) members of the firm are John Farrell and George L. Remington. The business of the firm is manufacturing and selling fire-proof and burglar-proof safes; our agent in May, 1885, for the State of North Carolina, was E. F. Hall, of Greensboro, N. C. Through him we sold a No. 5 Champion safe, at one hundred dollars, at Philadelphia, to the firm of Robertson & Rankin, of Durham, N. C., upon an order dated 21 May, 1885, signed by Robertson & Rankin (witness produces and identifies the order referred to, marked "Exhibit A"). By the terms, "at Philadelphia," which I have just used, I mean that we deliver the safe free on board at Philadelphia, and the purchaser pays the freight. [We delivered the safe to the steamship company named in the order, only in the capacity of a common carrier; when the safe was shipped

we believed Robertson & Rankin to be solvent; otherwise we would not have shipped it.] I did not personally stop the delivery of the safe. [That I believe was done by our agent, Mr. Hall. *It was within* the scope of the *authority given by us to said agent to stop the delivery of any safe shipped to any person,* upon the discovery that the vendee was insolvent.] Robertson & Rankin have never paid us a cent for this safe. [We have taken no security for the payment of the safe except the printed clause in the order reserving the title to us until the safe should be paid for.]

The defendant objected to that portion of the foregoing testimony embraced within brackets. The court overruled the objections, and permitted the entire deposition to be read, and the defendant excepted. No point was made as to the right of the defendant to object, it being admitted that, by an agreement made when the deposition was opened, the defendant had the right to make the objections on the trial.

(394) "EXHIBIT B."

THE ASSOCIATED RAILWAYS OF VIRGINIA AND THE CAROLINAS—PIEDMONT AIR-LINE—BILL OF LADING.

PHILADELPHIA, 6-14, 1885.

Received by Philadelphia and Richmond S. S. Line (the Clyde S. S. Co.), of Farrell & Co., under the contract hereinafter contained, the property mentioned below, marked and numbered as per margin, in apparent good order and condition (contents and value unknown), viz.:

Marks and numbers: One iron safe, 1184, shippers' weight.

. . . . . .

The several carriers shall have a lien upon the goods specified in this bill of lading for all arrearages of freight and charges due by the same owners or consignees on other goods.

The above extracts, and all of "Exhibit B," which is necessary to an understanding of this case.

W. W. Fuller, witness for plaintiffs, testified: That a few days before the sale of the safe, E. F. Hall, plaintiffs' agent, and W. W. Fuller, plaintiff's attorney, went to the depot of the Richmond and Danville Railroad Company, in Durham, saw the safe in the warehouse covered with bagging, marked to Robertson & Rankin, from Farrell & Co., and demanded the delivery to Hall and Fuller of the safe, at the time asking the amount of freight and charges thereon, which amount not being given, they tendered to Colonel Holt, agent of defendant, a sum of money not less than ten dollars, and offered to pay said freight and charges. Colonel Holt refused to receive the money or to deliver the safe.

Plaintiffs rested, it being agreed that they might later give evidence of the insolvency of vendees of the safe at time of demand by Hall and Fuller.

John A. Holt, witness for defendant, testified: That he was (395) agent at Durham station for the defendant company, and was such agent at the time the safe was received at the warehouse; Robertson & Rankin were and had been receiving a lot of lumber, the freight on which amounted to considerably over one hundred dollars, which was then owing by them to defendant company; witness had been sending to them demanding payment of these freight bills, and had seen them in person about it; that he went down the side track we term "lumber track," and found they had been taking off lumber, after having been notified not to do so; that he had sent for Robertson, whom he knew to be the one attending to the firm's business. He came down to the warehouse, and witness met him at the upper end of the warehouse, where safe was standing; asked him if I had not notified him time and again not to remove any lumber without first paying the freight. He said I had. I told him he had placed himself in a very bad situation, and that I was compelled to take steps against him. We were then standing right beside the safe, both of us leaning upon it. He said, "Colonel, here is a safe I paid one hundred dollars for in Philadelphia. It is true I have disappointed you in my promises about coming to pay you those freight bills, but I have been disappointed myself in not receiving money." He mentioned about having a large amount of money at several places, and said, pointing in the direction of Webb & Kramer's warehouse, that he was having an office put up there, and it would be completed the next day, or the day after. He then said, placing his hand on the safe, "I place this safe in your hands as security for what I owe, until the next day, or the day after, when my office will be completed, and I will come and pay all freight bills and remove the remnant of lumber and the safe, and take it over to my office." I held the safe till some little time after that, when I got news that he had run away. This was before the time Mr. Fuller came after it—some weeks before—may have been a month or two months—considerable (396) time—don't remember exactly what time it was.

Cross-examination: The safe came about the 9th or 10th of June; had been here three, four or five weeks before my conversation with Robertson. The defendant sold the safe on the 10th of the same month, either August or September. The place where Robertson came, at the warehouse, was the same place where the safe was first placed. Robertson & Rankin were notoriously insolvent here when Mr. Fuller came and made demand, and had been so long before. Defendant has no

receipt from Robertson & Rankin for the safe. Defendant took out attachment proceedings after Robertson & Rankin left here, and levied upon the safe, under the proceedings, as Robertson & Rankin's, and it was afterwards sold under these proceedings, and bought by the defendant, who paid nothing for it, but credited Robertson & Rankin on their debt to the defendant. It is a rule of the defendant company not to deliver goods to any one without their signing receipt and paying freight.

Redirect: At the time the safe was shipped to Robertson & Rankin, they were entirely solvent.

By the court: It is a rule of the defendant company not to deliver goods until the freight is paid. I had the power, and could have delivered it, but it would have been disobeying orders, and would have thrown the entire responsibility on me. I was seeking to secure the freight on the lumber as well as on the safe. It is also a rule of the defendant that if the freight is not paid in thirty days, notice is given to the shippers to pay. The safe had been in the warehouse fully thirty days before Robertson pledged it to me, but no notice had been given the plaintiffs by me. I do not remember positively about this—it was some two, three or four weeks; never made any memorandum of it. I meant to
(397) say the safe was in the warehouse thirty days before it was sold under the attachment.

The defendant asked the following special instructions:

"1. That upon the testimony the plaintiffs are not entitled to recover."

Refused, and defendant excepted.

"2. That if the jury believe the testimony of Col. Jno. A. Holt, they must respond to the first issue, 'Yes,' and to the second issue, 'No.'"

Refused, and defendant excepted.

"3. That if the jury shall find that Robertson & Rankin were insolvent at the time the safe was shipped to them by the plaintiffs, the plaintiffs are not entitled to recover."

Refused, and defendant excepted.

His Honor charged the jury that there was no evidence that Colonel Holt, the defendant's agent, was authorized to accept the safe from Robertson & Rankin as a pledge to secure the freights due on the safe and lumber by them to the defendant; and even if he was authorized so to do, that what transpired between Holt and Robertson did not amount to a delivery of the safe to Holt, and was not sufficient to deprive plaintiffs of any rights they might acquire in respect to the safe; that while the defendant might ratify Holt's act, if there was any pledge, yet, if the safe had been pledged, the jury might consider the fact that the defendant took out attachment proceedings against Robertson & Rankin as evidence of the repudiation by defendant of any contract or pledge;

that if the jury should find that the plaintiffs, or any of them, knew, or had reason to know, that Robertson & Rankin were insolvent at the time the safe was shipped, the plaintiffs are not entitled to recover.

His Honor then instructed the jury that there was no evidence of any delivery of the safe to the defendant, or its agent authorized for such purpose, and directed them to answer the first issue in the negative and the second in the affirmative.

The defendant excepted to the charge of the court, and to the (398) instructions given the jury.

The jury rendered a verdict as set out in the record.

Motion by defendant for new trial. Motion overruled.

Appeal by defendant.

Upon the appeal taken in the above entitled action, the defendant assigns as errors:

1. The admission in evidence of the portions of the deposition of Jordan Matthews objected to by defendant.

2. The refusal of the court to give the special instructions asked by the defendant.

3. That the court erred in instructing the jury that Holt was *unauthorized*(?) to accept the safe from Robertson & Rankin as a pledge, and that even if he was authorized, what transpired between Holt and Robertson did not amount to a delivery of the safe to Holt, and was not sufficient to deprive plaintiffs of any rights they might acquire in respect to the safe.

4. That the court erred in instructing the jury that they might consider the fact that the defendant took out attachment proceedings against Robertson & Rankin, as evidence of the repudiation by defendant of any contract of pledge.

5. That the court erred in instructing the jury that there was no evidence of any delivery of the safe, and in directing the jury to answer the first issue in the negative and the second in the affirmative.

There was a verdict for the plaintiffs.

E. C. Smith and W. W. Fuller for plaintiffs.

D. Schenck and C. M. Busbee for defendant.

SHEPHERD, J. (after stating the case): Several objections were made to the testimony, all of which we think were properly overruled. That which relates to the witness speaking of the contents and effect of "Exhibit A," would have been tenable, but as the exhibit was (399) subsequently introduced, and was entirely consistent with the

witness' statement, the defendant was in no wise prejudiced, and the exception is therefore without merit.

It is proper to notice that the third instruction asked by the defendant was, that if the jury should believe a certain state of facts, "the plaintiffs are entitled to recover."

The same words are used by the court in one of the instructions given. Such language is not pertinent to any of the issues submitted.

These present questions of fact, or mixed questions of law and fact, and upon the findings, it is for the *court* to say whether or not the plaintiffs are entitled to recover. Such instructions were proper upon the general issues submitted, under the old practice, but are confusing when applied to our present system.

It is true that in the present case no harm has resulted, as we can dispose of the appeal upon the testimony of the defendant; but we have adverted to this improper manner of asking for and giving instructions, in order that the loose practice in this respect may be discontinued. We can very readily conceive how juries may be perplexed and misled by such general charges when they come to pass upon the *specific* issues submitted to them, and how new trials may be thus made necessary, which could otherwise have been easily avoided.

The plainitff's right is based upon this alleged right to stop the property *in transitu*. This right "arises solely upon the insolvency of the buyer, and is based upon the plain reason of justice and equity, that one man's goods shall not be applied to the payment of another man's debts. If, therefore, after the vendor has delivered the goods out (400) of his own possession, and put them in the hands of a carrier for delivery to the buyer (which, as we have seen . . . is such a constructive delivery as divests the vendor's lien), he discovers that the buyer is insolvent, he may retake the goods if he can, before they reach the buyer's possession, and thus avoid having his property applied to paying debts due by the buyer to other people." . . . It is "highly favored on account of its intrinsic justice." Benjamin on Sales, 2 Vol., secs. 1229-1231. It "is but an equitable extension or enlargement of the vendor's common law lien for the price, and not an independent or distinct right." *Note to sec.* 1229, *supra*. "It is quite immaterial that the insolvency existed at the time of the sale, provided the vendor be ignorant of the fact at the time." *Loeb v. Peters,* 63 Ala., 243, and a number of cases cited in note to sec. 1244 Benj. on Sales, *supra*.

These last authorities fully sustain his Honor in refusing the third instruction asked by the defendant. The mere fact that Robertson & Rankin, the consignees, were insolvent at the time of the sale, could not defeat the lien of the plaintiffs, unless they knew of such insolvency.

The charge, as given, was correct in this particular, the jury having found, substantially, that the plaintiffs were, nothing further appearing, entitled to avail themselves of the right of stoppage *in transitu,* and that they exercised that right through their agent, Mr. Fuller. We will now consider the several defenses made by the defendant. No agreement or usage having been shown to the contrary, the right of stoppage *in transitu* continued until the safe was actually or constructively delivered to the consignee. Benjamin on Sales, Vol. 2, sec. 1269; *Hause v. Judson,* 29 Am. Dec., 377, and notes.

1. The first defense, though not seriously pressed upon the argument, is, that the defendant acquired title by reason of the sale under the attachment proceedings instituted by it against the consignee for arrearages of freight due on lumber.

"The vendor's right of stoppage *in transitu* is paramount to all (401) liens against the purchaser" (Hilliard on Sales, 289; *Blackman v. Pearce,* 23 Cal., 508), "even to a lien in favor of the carrier, existing by usage, for a general balance due him from the consignee." *Oppenheim v. Russell,* 3 Bos. & Pul., 42. . . .

"An attachment or execution against the vendee does not preclude the stoppage *in transitu,* for this is not a taking possession by the vendee's authority, the proceeding being *in invitum.*" Note to *Hause v. Judson, supra,* where a large number of authorities, sustaining the text, is collected. These authorities conclusively settle that the defense under the attachment proceedings cannot be maintained.

2. The second defense rests upon the following clause of the bill of lading: "The several carriers shall have a lien upon the goods (shipped) for all arrearages of freight and charges due by the same owners or consignees on other goods."

The counsel for the defendant could give us no authority in support of this defense, and none, we think, can be found, to the effect that such a stipulation should be construed to take away this "highly favored" and most important right of the vendor to preserve his lien, in order that his goods may "not be applied to the payment of another man's debts," much less to those of his agent, to whom he delivers them for carriage. Shippers would hardly contemplate that in accepting such a bill of lading the well established and cherished right of stoppage *in transitu* was to be made dependent upon whether a distant consignee was indebted to the carrier, and the commercial world would doubtless be surprised, if it were understood that whenever such a stipulation was imposed upon consignors, they were in effect yielding up their lien for the purchase money and substantially pledging their goods for the payment of an existing indebtedness due their agent, the carrier, (402) by a possible insolvent vendee.

If such is the proper construction, we can well appreciate the language of Lord Alvanly, in *Oppenheim v. Russell,* 3 Bos. and Pul., 42, when he said that he hoped it would "never be established that common carriers, who are bound to take all goods to be carried, for a reasonable price tendered to them, may impose such a condition upon persons sending goods by them."

He doubts whether an express agreement between the carrier and the consignor would be binding, and *Best, J.,* in *Wright v. Snell,* 5 B. and Ald., 350, in speaking generally of such contracts, said he doubted "whether a carrier could make so unjust a stipulation." Chancellor Kent, in the second volume of his Commentaries, remarks that "it was again stated as a questionable point in *Wright v. Snell,* whether such a general lien could exist between the owner of the goods and the carrier, and the claim was intimated to be unjust. It must, therefore, be considered a point still remaining to be settled by judicial decision." It is unnecessary, however, for us to say whether such a condition or agreement would be reasonable and binding, as it seems very clear that the present case is not susceptible of the construction contended for, and that it is entirely subordinate to the right of stoppage *in transitu.* The exercise of this right revested the right of possession in the plaintiffs, and they, having tendered all *they* owed the defendant, no interest was ever acquired by the vendee to which the claim of the defendant could attach.

3. The third and most plausible defense is, that, according to the testimony of the agent Holt, there was a constructive delivery to the consignee, and that this defeated the rights of the plaintiffs. The doctrine is well settled that "where goods are placed in the possession of a (403) carrier to be carried for a vendor, to be delivered to the purchaser, the *transitus* is not at an end until the carrier, by agreement between himself and the consignee, undertakes to hold the goods for the consignee, not as carrier, but as his agent, and the same principle will apply to a warehouseman or a wharfinger." Benjamin on Sales, *supra.* Was there any such agreement in this case? The most that can be said is that the consignee offered to pledge the safe to the defendant for the freight already due on lumber. There was no *actual* change of possession. The safe was in the defendant's warehouse, and Holt, the agent, and the consignee, were both leaning upon it. The consignee, placing his hands on it, said: "I place this safe in your hands as security for what I owe." There was no response whatever by Holt. He simply states that he "held the safe till some little time afterwards," when he heard that the consignee had run away, and that he sued out the attachment proceedings mentioned in the answer.

The majority of us are doubtful whether there was reasonably sufficient evidence to be submitted to the jury upon the question of the acceptance of the offer, and of delivery.

There being no *actual* delivery, a *constructive one* can only be effected by a *valid* agreement, on the part of the common carrier, to *hold for the consignee.*

Mr. Benjamin, from whom we have so largely quoted, says, that "the existence of the carrier's lien for unpaid freight raises a strong presumption that the carrier continues to hold the goods as carrier, and not as warehouseman; and in order to *overcome this presumption*" (the italics are ours) "there must be proof of some arrangement or agreement between the buyer and the carrier, whereby the latter, while retaining his lien, becomes the agent of the buyer to keep the goods for him."

But, conceding that the acquiescence of Holt was some evi-
dence of the acceptance of the offer, would this in law amount to (404) such a delivery as would defeat the plaintiff's right?

Passing by the question, as to whether the defendant bailee was not estopped to set up such a transaction in favor of itself, and against its principal (2 Wait's Act. and Def., 57), and also the fact that the alleged agreement was *not* to hold as agent of the vendee, but for itself, we are of the opinion that what transpired between the defendant's agent and the vendee did not alter in the slightest degree the relation in which they stood to each other.

It will be borne in mind that there was no *actual* delivery; that the defendant had a lien for the freight due on the property, and, under the stipulation in the bill of lading, it had, *as against the consignee,* also a lien for the arrearages of freight due by him. There was no *new consideration,* and the proposition of the assignee, and its alleged acceptance by the defendant, left them in *precisely the same position as before.*

It amounted virtually to the defendant saying, "if you will pay the freight and arrearages, I will deliver you the safe." This was, as we have seen, the effect of the bill of lading. In the leading case upon this subject, *Whitehead v. Anderson,* 9 M. and W., 517, cited with approval by Benjamin, *supra,* the agent of the consignee went on board of the ship, when she arrived in port, and told the captain that he had come to take possession of the cargo. He went into the cabin, into which the ends of the timber projected, and saw and touched the timber. When the agent first stated that he came to take possession, the captain made no reply, but subsequently, at the same interview, told him that he would deliver him the cargo when he was satisfied about his freight. They went ashore together, and shortly after, an agent of the consignor served a notice of stoppage *in transitu* upon the mate, who had charge

of the cargo: *Held,* "that, under these circumstances, there was
(405) no *actual* possession taken of the goods by the consignees, and that as there was no contract by the captain to hold the goods, as their agent, the circumstances did not amount to a constructive possession of the goods by them. There is no proof of any such contract. A promise by the captain to the agent of the consignees is stated, but it is no more than a promise, without a *new consideration,* to fulfill the original contract, and deliver in due course to the consignees, on payment of freight, which leaves the captain *in the same situation as before.* After the agreement, he remained a mere agent for expediting the cargo to its original destination."

This, it seems to us, is conclusive of our case. Here there was no new consideration whatever moving from the vendee, nor was there any definite understanding that the defendant was to forbear pressing the vague proceedings suggested by him. 1 Addison on Contracts, 1 Vol., 2, note.

There was, therefore, no new contract, and the defendant held the safe in the same character as he did before, when, as we have shown, it was subject to the paramount claim of the plaintiffs. We have been able to find no case where a pledge of this kind has been asserted, but we have observed that all the cases we have examined lay down the rule that constructive delivery is only made by the carrier, either agreeing expressly, or by implication, to hold as the agent of the *consignee.*

While the amount involved in this suit is small, we have thought it our duty, in view of the importance of the questions of law presented, to carefully examine many of the multitude of cases upon the subject, and our conclusion is that his Honor was correct in telling the jury that what transpired between Holt and Robertson (one of the consignees) did not amount to a delivery, and was not sufficient to deprive the plaintiffs of any rights they might acquire in respect to the safe.

No error. Affirmed.

Cited: Bottoms v. R. R., 109 N. C., 72; *Alexander v. R. R.,* 112 N. C., 732; *Williams v. Hodges,* 113 N. C., 38; *Witsell v. R. R.,* 120 N. C., 558; *Willis v. R. R.,* 122 N. C., 909; *Norton v. R. R., ibid.,* 934; *Jones v. Balsley,* 154 N. C., 65; *Craig v. Stewart,* 163 N. C., 534.

(406)

J. N. TULBURT ET AL. v. ISRAEL HOLLAR, ADMINISTRATOR ET AL.

Administrators, Resignation and Removal of—Probate Court, Jurisdiction of—Administrator d. b. n. Only can Sue for Unadministered Assets of Intestate—The Code, secs. 103, 1521, 1517, 1518.

1. In 1869 an administrator, in proceedings pending in the Probate Court, resigned, with the permission of the court, and administrator *d. b. n.* was appointed and duly qualified. In 1887 the next of kin of the intestate brought an action on the bond of the original administrator, alleging breaches of the bond and for an account and settlement: *Held*, that accepting the resignation of the administrator and appointing his successor, having been done in proceedings duly instituted, and there having been no exceptions filed or appeal taken, it was too late to disturb the judgment of the Probate Court after the lapse of nearly twenty years.

2. The Probate Court in 1869 (and *semble* the clerk now) had the power, for good and sufficient cause, to remove an administrator; or for like cause, as necessarily equivalent, to permit him to resign his trust.

3. However it may be held elsewhere, it is well settled that in this State an action against a former administrator or his bond must be brought by an administrator *d. b. n.*, and not by the next of kin, distributees or creditors of the intestate.

CIVIL ACTION, tried before *Clark, J.*, at March Term, 1888, of the Superior Court of WILKES County.

This action was commenced 14 January, 1887.

The material facts are as follows:

J. W. Tulburt died intestate in Wilkes County in 1865, and the plaintiffs are his next of kin and distributees. In October, 1865, the defendant, Israel Hollar, was duly appointed administrator of said Tulburt, and executed his bond as such, with Noah Brown, the intestate of the defendant, Jarvis, as his surety, and this action is brought by the plaintiffs, alleging breaches of the administration bond, and demanding an account and settlement.

The defendants answer, admitting the death of J. W. Tulburt (407) and the appointment of Hollar as his administrator, and the execution of the bond, but denying the alleged breaches, or that there is anything due from the defendant Hollar to the plaintiffs. For a further defense, they say that in 1869 the letters of administration to the defendant, Hollar, were revoked by the Probate Court of Wilkes County, and, at the request of the next of kin and the widow of said Tulburt, he was removed by the court from said office of administrator, and has not acted as such since; that upon his removal, and at the same time, one

F. D. Welborn (who had married the widow of the intestate) was duly appointed by the court administrator in his stead, and executed his bond as such, and within a few days thereafter the defendant, Hollar, made a full settlement with the court and with said F. D. Welborn, as the substituted administrator, and paid and delivered over to him, as such administrator, the whole of the estate of J. W. Tulburt, deceased, which had come or ought to have come into his hands, and thereafter the said Welborn held and administered the same; that said Welborn died about three years before the bringing of this action.

The defendants insist that the plaintiffs cannot maintain this action:

"1. Because no administrator *de bonis non,* or other representative of the estate of J. W. Tulburt, is a party plaintiff.

"2. Because Mary W. Welborn, who is still living and is (was) the widow of said J. W. Tulburt, and entitled to a part of his personal estate is not a party.

"3. Because of the great lapse of time," etc.

The following was the evidence:

The docket of the judge of probate, from which this entry appears:

"Court of Probate, 21 May, 1869. Israel Hollar resigns his administration on the estate of J. W. Tulburt, and, on account of his going to remove permanently beyond the limits of the State, one of de-
(408) fendants applies for letters of administration *de bonis non* on the said estate, and he having entered into bond in the sum of $600, with J. J. Foster, J. H. Thompson and R. F. Hacket as sureties, the said bond is accepted and him duly qualified."

It was also admitted that said Hollar intended to remove when such proceedings were had, but did not do so, and is yet alive.

F. D. Welborn acted as administrator seventeen years, and is now dead.

Upon this evidence his Honor intimated an opinion that the plaintiffs could not get along without making the administrator *de bonis non* of J. W. Tulburt, deceased, a party.

In deference to his Honor's opinion, the plaintiffs submitted to a judgment of nonsuit, and appealed.

W. W. Barber for plaintiffs.
R. B. Glenn for defendants.

DAVIS, J., after stating the facts: We have not been favored with any argument on behalf of the appellants, but it is suggested that the action is brought against the defendant, Hollar, and the surety on his bond upon the assumption that he had no right to resign as administrator,

and that the appointment of Welborn was void, and, therefore, no administrator *de bonis non* could be appointed.

In *Washington v. Blount,* 8 Ired. Eq., 253, it is said that an executor, after having accepted and entered upon the discharge of his trust, cannot resign, but can "only be removed upon a suggestion of unfitness or unfaithfulness."

However that may have been with regard to executors, and, assuming it to have applied to administrators, we are not called upon to determine whether the removal of an executor or administrator from the State would not constitute such "unfitness" or disqualification as would justify his removal; and a resignation and acceptance, and the appointment of a successor, can have no other practical effect (409) than a removal or revocation of letters.

Section 103 of The Code, which confers upon clerks of the Superior Courts power "to grant letters testamentary and of administration," also confers upon them the power "to revoke letters testamentary and of administration." By section 1521, it is made the duty of clerks, in all cases of revocation, to "appoint some other person to succeed in the administration," etc. Section 1517 enacts that, "whenever the letters of an executor, administrator or collector are revoked, his bond may be prosecuted by the person or persons succeeding to the administration of the estate," etc., and an action, even if pending against the removed executor or administrator, can only be continued against him within the limitations prescribed in section 1514.

In *Taylor, Admr., v. Biddle,* 71 N. C., 1, it was said by *Bynum, J.:* "Without invoking the aid of our statutes, the power of removal is inherent in the office at common law, and must of necessity be so, to prevent a failure of justice."

We think it clear that the probate court had the power, for good and sufficient cause, to remove the administrator, or, for like cause, necessarily equivalent, to permit him to resign his trust, and appoint F. D. Welborn in his stead; and it appears that this was done in proceedings instituted for that purpose, and no exception was taken thereto, or appeal therefrom, and it is too late to disturb the judgment of the probate court after a lapse of near twenty years.

Whether whatever action can be brought should not be against the representative of the deceased administrator, F. D. Welborn, and the sureties on his bond, it is not necessary for us to determine; but an administrator *de bonis non* is the proper person to bring the action. See The Code, sec. 1518; *Latham v. Bell,* 69 N. C., 135; *Carlton v. Byers,* 70 N. C., 691; *Merrill v. Merrill,* 92 N. C., 657, and the numerous cases there cited.

(410) In the case of *Beall v. New Mexico,* 16 Wall., 540, to which attention has been called by the *Chief Justice,* it was held that an administrator *de bonis non* could not maintain an action on the bond of the original administrator, but that it must be brought by the persons directly beneficially interested in the estate, whether distributees, next of kin, or creditors, and it is there said: "To the administrator *de bonis non* is committed only the administration of the goods, chattels and credits of the deceased which have not been administered."

However it may be elsewhere, under the section of The Code and decisions referred to, it is different in this State, and it is well settled that such an action cannot be maintained by the next of kin, distributees or creditors.

When Hollar settled with Welborn, his successor, under the direction of the court, it terminated his "trust," and was a fulfilment of his obedience to the "lawful orders of the clerk of the court touching the administration of the estate committed to him," as required by the condition of his bond.

No error. Affirmed.

Cited: Wilson v. Pearson, ante, 313; *Gilliam v. Watkins,* 104 N. C., 182; *Clement v. Cozart,* 107 N. C., 704; *McIntyre v. Proctor,* 145 N. C., 292.

M. W. STRICKLAND v. JOHN M. COX.

Judgments—Validity of—Action for Land—Defending without Bond.

1. Alternative or conditional judgments are void.
2. Where a judge granted a judgment for plaintiff in an action for the possession of land, to be stricken out if defendant filed a proper bond in 30 days after adjournment of court, the judgment was void, and the clerk had the power to make an order allowing defendant to answer without bond, upon his filing the affidavit and the certificate of counsel required by law.

(411) MOTION IN A CIVIL ACTION, heard before *Clark, J.,* at Fall Term, 1888, of the Superior Court of SURRY.

The action was brought by plaintiff for the possession of the land described in the complaint, returnable to August Term of said court,

1887. At the November Term, 1887, Judge Gilmer granted judgment for plaintiff for possession of the said land, to be stricken out if defendant filed a justified bond in the sum of two hundred dollars within thirty days from the adjournment. That the defendant failed to file in thirty days the justified bond required in said judgment, but within thirty days, and without notice to plaintiff, did file with the clerk an affidavit that affiant was unable to give the justified bond required, and also unable to make the deposit, and also, at the same time, R. L. Haymore, defendant's attorney, filed with the clerk the certificate required by statute, and upon producing the affidavit and certificate, the clerk made an order allowing defendant to defend the suit without bond.

After the expiration of the thirty days, to wit, on 13 February, 1888, the defendant having failed to file the justified bond as required, the clerk issued a writ of possession, and delivered the same to the sheriff, and same was duly executed 16 February, 1888, by M. L. Patterson, a regular deputy sheriff, by putting defendant out and (412) plaintiff in possession of the said land. That defendant, after due notice to plaintiff, moved his Honor, Walter Clark, Judge, at the Spring Term of said court, to set aside said writ of possession, on the ground that the same was illegally issued, and for an order of restitution. That said motion was allowed, and the judge assigned the following grounds:

"First. That the judgment of Judge Gilmer contained a condition, and was therefore void.

"Secondly. That the clerk was legally authorized to make the order he did, allowing the defendant to defend the suit without bond, and that the writ of possession, issued after such order, was without legal authority, and therefore void."

And rendered judgment setting aside the writ of possession and ordering a writ of restitution.

From this judgment plaintiff appealed.

J. C. Buxton for plaintiff.
No counsel for defendant.

SHEPHERD, J. We are aware that it has not been unusual to render judgments like the one in question, but as they have generally been granted as an indulgence to defendants, and acquiesced in by them, their validity has never been directly determined by this Court. "At law a judgment is yea or nay, for one party and against the other." Freeman on Judgments, 2. And a court cannot delegate its judicial functions to its clerk, so that he may set aside a judgment upon the performance of a

condition. Alternative or conditional judgments at law are void in civil as well as in criminal cases. *S. v. Bennett,* 4 D. & B., 43; *S. v. Perkins,* 82 N. C., 681.

No error. Affirmed.

Cited: In re Deaton, 105 N. C., 61; *Henning v. Warner,* 109 N. C., 408; *S. v. Hatley,* 110 N. C., 524; *Hopkins v. Bowers,* 111 N. C., 180; *Fertilizer Co. v. Taylor,* 112 N. C., 152; *Hinton v. Ins., Co.,* 116 N. C., 25; *S. v. Wynne, ibid.,* 986; *Nimocks v. Pope,* 117 N. C., 319.

(413)

JACOB BATTLE, RECEIVER, v. JAMES M. MAYO ET AL.

Consent Reference—Exceptions to Report—Reviewing Facts in Superior and Supreme Courts — Manner of Conducting Trials before Referees—Dealings between Husband and Wife—Married Women, Income and Separate Property of—Mortgage—Fraudulent Conveyances and Transfers—The Code, section 1837—Constitution, Art. IV, sec. 8.

1. A reference by consent is a waiver of trial by jury; and the referee's report has the effect of a special verdict.

2. Where there is a *consent reference* the *judge below* can review the facts found by the referee as well as his conclusions of law. If the judge makes no special findings of fact it is presumed that he adopts those of the referee. But in such cases the *Supreme Court* will not review the findings of fact made or adopted by the judge below, its appellate jurisdiction being confined to the review of matters of law. And this is so although the action is one cognizable in a court of equity prior to 1868.

3. The point, that there is *no evidence* to support the findings of fact made or adopted by the judge below, must be made by exception filed and called to the attention of the judge *during the term,* in analogy to a motion for a new trial. An exception based on such grounds, filed after the term, under Rule 7, will not be considered in the Supreme Court; although the exception, *that there is no evidence, etc.,* is one which the court will pass upon if made in apt time.

4. An exception to the report of a referee must be specific; it must point out the conclusion at which it is aimed and the precise error complained of.

5. Trials before referees should be governed by the rules formulated in *Green v. Castlebury.*

6. Where a husband occupied his wife's land for nine years, during the whole of which period he received the rents therefrom, under *an express* agree-

ment with his wife to account to her for such rents, and each year gave his wife a note for the rent: *Held*, that the notes constitute a valid indebtedness on the part of the husband to his wife.

7. The agreement of the husband to pay rent precludes the possibility of assent, and implies *objection* on the part of the wife to her husband's applying her rents to his own use, and such agreement removes the restriction, as to husband's liability to account for rents, imposed by section 1837, The Code.

8. A mortgage to secure a preëxisting debt is made upon a valuable consideration; and is not vitiated by a fraudulent intent on the part of the mortgagor, not participated in by the mortgagee, and of which he had no knowledge.

9. Where a husband, being indebted to his wife, transfers choses in action to her as security therefor, such transfer is valid.

THIS was a civil action, heard at the Fall Term, 1888, of the (414) Superior Court of NASH County, before *Graves, J.*

The plaintiff Battle, under an order in a supplementary proceeding against the defendant James M. Mayo instituted by T. P. Braswell & Co., judgment creditors of said Mayo, was appointed receiver on 7 January, 1887, after judgment creditors of Mayo had been made parties to that proceeding.

The plaintiff alleges in the complaint:

1. That on 14 January, 1886, the defendants, A. H. Ricks and A. L. Taylor, executed three sealed notes to Carr Bros. & Co., each for the sum of five hundred dollars, with interest from date at eight per cent, payable, respectively, 1 September, 1886, 1 November, 1886, and 1 January, 1887.

2. That on each of said notes are the following endorsements:

"For value received, we hereby transfer all our interest in the within note to J. M. Mayo, or order.

(Signed) M. J. CARR.
J. B. CARR.

14 January, 1886."

"Pay to the order of W. T. Mayo, trustee, for F. L. Mayo.

(Signed) JAMES M. MAYO."

That on the note maturing 1 November, 1886, there is a credit (415) endorsed as follows:

"Received, 20 December, 1886, one hundred and fifty-eight and 57/100 dollars ($158.57).

(Signed) W. T. MAYO, *Trustee.*"

After alleging his own appointment as receiver, at the date mentioned, and barring other judgment creditors, who have intervened in the supplementary proceedings, the plaintiff alleges that the notes mentioned are now in his hands, and are, as far as creditors are concerned, the property of James M. Mayo; that he transferred them to his brother, the defendant W. T. Mayo, for his wife, the defendant F. L. Mayo, with intent to hinder, delay and defraud creditors, without consideration, and as a mere gift.

The plaintiff demands judgment against the obligors on the notes, the defendants A. H. Ricks and A. L. Taylor, for the sum alleged to be due on the notes, and that the judgment be applied, after deducting costs and charges, to the payment of their judgments of the plaintiff's creditors.

Subsequently, and after vacating a judgment by default, at the November Term, 1887, in reference to the action above named, and three other actions, brought by the plaintiff Battle, and pending in the same court, the following order was made:

"It is now, on motion of the plaintiff, and with consent of the defendants, ordered by court that the four actions be consolidated, and that J. M. Mullen, Esq., be and he is hereby appointed a referee, under C. C. P., to find all issues of law and of fact therein involved. And the defendants are to be allowed sixty days in which to file answers."

In an amended complaint, consolidating the four actions, the receiver subsequently alleged that, with the same fraudulent intent, the defendant James M. Mayo had transferred to his said wife:

(416) The equitable interest in the Williford tract of land (he having contracted to pay about $1,200 for the land, and having paid over half the price).

2. The Baker land (explained below).

3. The Ricks and Taylor notes.

4. Oxen, stock and farming utensils.

5. A piece of land, of about 300 acres, in Edgecombe, with stock on it.

6. The Charley Knight place, of about forty acres.

The other facts that will throw light upon the exceptions, appear in the report of the referee, the exceptions, and the judgment.

REPORT OF REFEREE.

1. That the following judgments, obtained and docketed, as hereinafter appears, against the defendant Jas. M. Mayo, are unpaid; that executions have been duly issued thereon, and the same returned wholly unsatisfied, to wit:

(a) Three judgments in favor of John G. Spotts and George Gibson, copartners trading as Spotts & Gibson—one for $346.17, with interest from 26 March, 1886, and costs, confessed in Nash Superior Court, and docketed therein 23 April, 1886, and docketed in Edgecombe Superior Court about the same time; one for $101.48, with interest from 10 April, 1886, and costs, docketed in Edgecombe Superior Court 13 April, 1886, and in Nash Superior Court 23 April, 1886; and one for $41.17, with interest from 15 April, 1886, docketed in Edgecombe Superior Court 17 April, 1886, and in Nash Superior Court 23 April, 1886.

(b) Judgment in favor of T. P. Braswell and M. C. Braswell, copartners trading as T. P. Braswell & Son, obtained at Spring Term, 1886, of Nash Superior Court, for $360, with interest from 1 November, 1885, and costs, docketed 26 April, 1886, in said court, and docketed also in Edgecombe Superior Court. (417)

(c) Judgments (2) in favor of the Brown Cotton Gin Company—one for $129.15, with interest on $1.15 from 17 November, 1884, and on $128 from 16 September, 1885, and costs, obtained 1 February, 1887, and docketed same day in Nash Superior Court, and one for $144, with interest from 16 September, 1885, and costs, obtained and docketed 1 February, 1887, as above.

(d) Judgment in favor of H. Cohen and her husband Wm. Cohen for $170, with interest from 1 March, 1884, and costs, obtained and docketed as above, 1 February, 1887.

(e) Judgment in favor of Rountree, Barnes & Co., for $520.80, with 8 per cent interest from 1 November, 1885, and costs, obtained in Nash Superior Court and docketed there November, 1886.

2. That subsequent to the issuing and return as aforesaid of executions upon said judgments, to wit, on 18 December, 1886, proceedings supplementary to execution were duly instituted before the Superior Court clerk of Nash County by said T. P. Braswell & Son, on their said judgment; the defendants herein (Jas. M. Mayo and F. L. Mayo his wife, Mary H. Lyon, who has since intermarried with the defendant Dr. J. C. Braswell, W. T. Mayo, V. W. Land, A. H. Ricks and A. L. Taylor) were also duly served with the clerk's order therein. After an examination before said clerk, an order was duly made in said proceedings, 10 January, 1887, appointing Jacob Battle receiver of the debts, etc., of said J. M. Mayo. Said receiver duly qualified. Afterwards, the other judgment creditors intervened. The orders had and made in said proceedings were duly recorded in Nash and Edgecombe Superior Courts. For fuller particulars, reference is had to the third section of the complaint, the allegations of which are adopted by the referee. (418)

3. That the defendant James M. Mayo is insolvent, and had been insolvent for more than two years prior to 1 January, 1886, but before that time he was in the possession of a large real and personal estate, and was considered to be worth from fifty to seventy-five thousand dollars. He, however, early in 1885, sold most of his real and personal property to different parties, on long time, payable in annual installments, evidenced by their bonds, executed and delivered to them absolute deeds and conveyances therefor, and taking from them contemporaneous mortgages, securing their bonds for the purchase price. These bonds, amounting to about seventy thousand dollars, said Mayo deposited with Rountree & Co., merchants, doing business in Norfolk, Va., to secure his indebtedness to them, then amounting to about forty thousand dollars. The property sold as above was worth about twenty-seven thousand dollars, and was sold to parties pecuniarily insolvent. Subsequently, on 18 March, 1886, the aforesaid purchasers having failed to comply, and having, by mutual agreement, surrendered their purchases, said Mayo and wife conveyed said property to said Rountree & Co., for the sum of twenty-seven thousand dollars, the purchase price to go as a credit upon said Mayo's aforesaid indebtedness, leaving still due thereon a balance of between sixteen and eighteen thousand dollars, which is still unpaid. A certified copy of said deed, part of the evidence herein, is made a part of this report.

4. That said Mayo, in settlement or part payment of other creditors, conveyed and assigned to them, during the early part of 1886, the balance of his property other than that in litigation in this action. He still owes upon said indebtedness two or three thousand dollars.

5. That prior to 2 February, 1886, the defendant V. W. Land was bound as surety for the defendant Jas. M. Mayo to the Pamlico Banking and Insurance Company, of Tarboro, N. C., in the sum of
(419) $3,000, for money borrowed by said Mayo, originally, some time in the spring of 1885. On 2 February, said Mayo deeded to said Land certain real property situate in Edgecombe County, for $2,500. A certified copy of said deed in evidence is made a part of this report.

Said deed was twice recorded: first, 22 February, 1886, and second, 10 March, 1886. (See certified copies.)

About same time said Mayo deeded to said Land a tract of land in Bertie County, worth $1,500; but at the time the same was in litigation, and Land was to pay and has paid the expenses attending that litigation.

Land was to pay for the above property by assuming and paying the bank debt, and paying the wife (the defendant F. L. Mayo) of said Mayo $1,000, Mayo claiming that he was indebted to her.

Shortly after said conveyances, said Land and said Mayo confessed judgment to the bank, the bank refusing to release Mayo. Land has

paid the bank debt down to about $900. He gave Mrs. Mayo his due bill for $1,000, and has paid her $120 thereon—paid the $120 in January, 1888. Land is, and was at the time of said conveyances, a brother-in-law of the defendant Jas. M. Mayo, and was then, and is now, perfectly solvent. At the instance of Land, who became uneasy by reason of rumors of the *bona fides* of his aforesaid transactions with the defendant Jas. M. Mayo, the bank (a defendant herein), caused execution to issue upon its aforesaid judgment, and, after due advertisement, sold thereunder, on 18 April, 1887, the interest of said Mayo and of said Land in the property in Edgecombe, conveyed as aforesaid to said Land by said Mayo, said Land becoming the purchaser at $2,910, and received the sheriff's deed therefor. Said property was worth $2,910 on 2 February, 1886. Land paid the bank no part of this bid, except that he has been paying off the aforesaid debt from time to time.

6. That said conveyances to the defendant V. W. Land were (420) not made with intent to hinder, delay or defeat creditors.

7. That none of the conveyances and transfers of property, referred to in section 3 and 4 of this report, were made with intent to hinder, delay or defeat creditors.

8. That the defendant Mary H. Lyon (now Braswell) is a niece of both the defendants, James M. Mayo, and F. L. Mayo, his wife.

On 29 October, 1885, said James M. Mayo was indebted to said Mary H., on account of her distributive share of her grandfather's estate, upon which said Mayo was administrator. She also held a claim of $200, and interest, upon the land of the defendant F. L. Mayo, for equality in division. Said Mayo gave her his note on said 29 October, 1885, for $1,500, to cover both these amounts, which, he believed, was as much as $1,500. On 2 February he executed to the said Mary H., a mortgage to secure said note, which was payable six months after date, whereby he conveyed to her his equitable estate in the Herbert land in Nash County, and certain personal property thereon, consisting of a steam engine, two mules, one farm cart, half interest in a wagon, lot of corn, fodder, tobacco, cottonseed and other personal property upon said farm. Said Mayo also, on same day, executed to said Mary H., another mortgage securing said note, conveying certain lands in Edgecombe County; but there is no controversy as to that mortgage. Said Mayo remained in the possession of said Herbert tract and the personal property aforesaid thereon, and continued in possession until the Herbert tract was sold, about the first of this year, under a prior mortgage, using and enjoying the same, and consuming the property, to wit: the corn, fodder and cottonseed. On ..... February, 1888, the personal property remaining, consisting of one mule, half interest in the (421) wagon, and one cart, were sold, bringing $118, and the proceeds

by agreement deposited with one A. Braswell, to abide the determination of this suit. The engine was also sold, but it was claimed as a fixture by the owner of the land, and brought only $5.

At the time of the execution of said mortgage it was the purpose and intention of said Mayo to remain in the possession of said Herbert place and the personal property thereon, and use, enjoy and consume the same (such as would be consumed by the use), until the same was sold under said mortgage.

9. That the Herbert place, when sold, did not bring enough to pay the first mortgage debt.

10. That prior to 1 January, 1885, and since her marriage, the defendant F. L. Mayo owned, in her own name and right, the tract of land known as the "Lyon" tract, situate in Edgecombe County, and containing about 227 acres. On said date, said F. L. Mayo joined with her husband, James M. Mayo, in the conveyance of said land to one W. B. Harper. The purchase bonds therefor were taken, payable to said J. M. Mayo. At the time of said sale to said Harper, and as a consideration therefor to said F. L. Mayo, it was agreed between said J. M. Mayo and his wife, that he would convey to her property, in exchange, of equal value to her property sold Harper. In pursuance of that agreement, the deeds referred to in the pleadings were executed and delivered by J. M. Mayo and wife to W. T. Mayo, trustee, conveying the Lowe tract, containing 360 acres, and the personal property thereon, the Charlie Knight tract, containing about 45 acres, all situate in Edgecombe County, bearing date 1 January, 1885, and were recorded in said county 27 February, 1886. A certified copy thereof is in evidence, and is made a part of this report. The property thereby
(422) conveyed is about of equal value to the Lyon tract.

11. That said deed to W. T. Mayo, trustee, was not made with intent to hinder, delay or defeat creditors.

12. That the trust deed from the defendant J. M. Mayo to the defendant W. T. Mayo, conveying the Williford tract, situate in Nash County, bearing date 2 December, 1886, and recorded same day, was not recorded until after the docketing of the judgments, set out in section 1 of this report, in favor of Spotts & Gibson, T. P. Braswell & Son, and Rountree, Barnes & Co.; besides, it was made to hinder, delay and defeat creditors.

13. That at the time of his failure, on or about 1 January, 1886, the defendant J. M. Mayo was justly indebted to his wife, the defendant F. L. Mayo, in the following sums:

(a) One thousand dollars given her by her father in 1873.

(b) Fourteen hundred and thirty-nine dollars, her distributive share of her father's estate, settled in 1882, and upon which said Mayo administered.

(c) One hundred and forty dollars and thirty-seven cents, amount collected for her from J. L. Lyon in 1883.

These amounts were received by J. M. Mayo with the knowledge of his wife, and with her tacit consent for him to use the same. No express understanding or agreement was entered into between them as to payment. The defendant J. M. Mayo treated and used the same as his own property, with no expectation of accounting to his wife therefor. But his said wife was not a party to any agreement that he should so use said money.

This is true as to her land also. No express agreement was entered into between them as to the rents and profits. Her said husband took possession of said lands and used and enjoyed the same and received the rents and profits, as he did the aforesaid sums of money, as a matter of course, and with no expectation of accounting to her therefor.

These rents and these sums of money were received by him long (423) prior to 1886, and with the exception of rents accruing thereafter and the small amount received from J. L. Lyon, prior to 1882, when, he admits, he believed himself perfectly solvent, and he gives none in his wife's name for taxes. He has been her agent to list her taxes, and swore to her property.

14. That the defendant F. L. Mayo has received in payment of her aforesaid demands: One thousand dollars, 2 February, 1886, from V. W. Land; eleven hundred and fifty-eight dollars and fifty-nine cents, from A. L. Taylor and A. H. Ricks, during the year 1886, and eight hundred and ten dollars ($810), 2 August, 1886, as appears from credits on the alleged $1,439 note—more than enough to discharge her demands.

The referee therefore concludes:

1. That the mortgage to Mary H. Lyon (now Braswell), conveying the Herbert tract and the personal property thereon, is fraudulent as to creditors and void, and that the plaintiff is entitled to the proceeds of the personal property, to wit, $118, to be applied to the judgment creditors aforesaid, in the order of their priority.

2. That the deed of trust to W. T. Mayo of the Williford tract is fraudulent and void as to creditors. Said land has been sold, by order of Nash Superior Court, to pay the balance due on the purchase money and costs. The plaintiff is entitled to the surplus, to be applied by him as aforesaid.

3. That the plaintiff is entitled to collect and apply the proceeds of the three notes for $500 each (one subject to credits of $158.69, 26 December, 1866), executed by A. L. Taylor and A. H. Ricks, upon which he has obtained judgment, in the manner above stated. For the facts

as to these notes, see section eleven of the complaint, which is adopted to the extent it is admitted by the answer.

(424) 4. That the defendant F. L. Mayo is only entitled to interest on the principal ($2,759.37) of her debt against Jas. M. Mayo from 14 January, 1886, date of assignment to her of the A. L. Taylor and A. H. Ricks bonds.

The defendants filed the following exceptions to the report:

1. That the referee committed error in his eighth finding, wherein he finds that, at the time of the execution of said mortgage to Miss M. H. Lyon, it was the purpose and intention of the said Mayo to remain in the possession of said Herbert place and personal property thereon, and use, enjoy and consume the same, until the same was sold under said mortgage. The only evidence on the subject is found in the testimony of James M. Mayo, on page 22, wherein he testifies as follows: "Miss Lyon got all the tobacco, so far as I know. The corn, fodder and cottonseed embraced in her mortgage were kept upon the land, subject to her order. I think I notified Miss Lyon that the corn, fodder, etc., were there at her disposal, but she got none. I think I stated to the clerk that these articles were not measured. If I did so state, I did not then know they had been measured by the tenants."

2. That said referee committed error in his finding No. 12, to wit: that the deed from the defendant James M. Mayo to defendant W. T. Mayo, trustee, conveying the equitable interest of said James M. Mayo in the Williford tract of land, situated in the county of Nash, was made to hinder, delay and defeat creditors. The interest of the defendant J. M. Mayo in the tract of land referred to was covered by the deed, referred to in paragraph two of the referee's report, and when it is found as a fact, that said deed was not made to hinder, delay and defeat creditors. The only testimony upon this subject is found in the testimony of James M. Mayo, on pages 13 and 14 of the evidence, wherein said Mayo testified that, by an agreement with his wife,

(425) he conveyed her the Lowe place, the Charlie Knight place, and his interest in the Williford place, in exchange for the Lyon tract, the property of his wife, and which she had joined with him to convey to W. B. Harper. The referee adopts the testimony of said Mayo in his 10th and 11th findings, and sustains this transaction as bona fide. The defendants submit that, at the time of docketing the judgment in favor of Spotts & Gibson, T. B. Braswell & Son, and Rountree, Barnes & Co., in the Superior Court of Nash County, the defendant J. M. Mayo had no interest in the said Williford land liable to sale under execution, or upon which a lien could be created by force of docketing said judgment. That there is no evidence to support the referee's finding.

3. The referee committed error in his 13th finding, wherein he finds the various sums in which James M. Mayo is indebted to his wife, F. L. Mayo. He should have found that James M. Mayo was justly indebted to his wife, F. L. Mayo: 1. In the sum of $1,396.27, with interest from 4 November, 1879, at the rate of 8 per cent, evidenced by note of that date. 2. In the sum of $1,439, with interest from 31 March, 1882, at the rate of 8 per cent, as evidenced by note of that date. 3. In the sum of $140.37, with interest from 17 March, 1883, at the rate of 8 per cent, as evidenced by note of that date. 4. In the sum of $700, with interest from 1 January, 1878, at 8 per cent, as evidenced by note of that date. 5. In the sum of $700, with interest from 1 January, 1879, at 8 per cent, as evidenced by note of that date. 6. In the sum of $700, with interest from 1 January, 1881, at 8 per cent, as evidenced by note of that date. 7. In the sum of $700, with interest from 2 January, 1882, at 8 per cent, as evidenced by note of that date. 8. In the sum of $700, with interest from 1 January, 1883, at 8 per cent, as evidenced by note of that date. 9. In the sum of $700, with interest from 1 January, 1884, at 8 per cent, as evidenced by note of that date. 10. In the sum of $700, with interest from 31 December, (426) 1885, at 8 per cent interest, as evidenced by note of that date. 11. In the sum of $700, with interest from 1 January, 1886, at 8 per cent interest, as evidenced by note of that date. 12. In the sum of $700, with interest from 1 January, 1880, at 8 per cent, as evidenced by note of that date.

The finding of the referee that the amounts represented by the first, second and third notes above mentioned were received by the said James M. Mayo, with the tacit consent of his wife, and with no express understanding or agreement to pay the same, is altogether unwarranted by the evidence. The referee assumes arbitrarily to accept or reject the testimony of James M. Mayo, the only witness upon the subject. (Reference is made to pages 17, 18, 19 and 20 of the testimony of James M. Mayo.) The referee committed further error in finding no express agreement was entered into between James M. Mayo and his wife F. L. Mayo, in respect to the rents of his wife's land, and wherein he found the said Mayo took possession of the said lands, and used and enjoyed the same and received the rents as a matter of course and right, and with no expectation of accounting to his said wife therefor. The defendants submit that said finding is arbitrary and unwarranted by the evidence.

The testimony of James M. Mayo, on page 17, is as follows: "The nine notes, each for $700, were executed at the time they were dated, and were for the rent of my wife's land, heretofore mentioned by me, that

being my agreement with her. I thought $700 was a fair rental value, and it was the price agreed upon between us." That there is no evidence to support the referee's finding.

4. That the referee has committed error in his 14th finding, wherein he finds that F. L. Mayo has received from James M. Mayo, in payment, more than enough to discharge her just demands against said James M. Mayo. He has committed error in not charging James M. Mayo with the amount of the nine rent notes, and the further error of not
(427) allowing F. L. Mayo interest upon the first, second and third notes mentioned in paragraph 3.

The defendants except to the conclusions of law of the referee:

1. The first conclusion of law is unwarranted, either upon the facts contended for in the first exception hereof, or upon the facts as found by the referee.

2. The second conclusion of law is unwarranted, either upon the facts contended for in the second exception hereof, or upon the facts as found by the referee.

3. The defendants except to the correctness of the conclusion of law No. 3, for the reasons set forth in exception 3 hereof.

4. The defendants except to the referee's fourth conclusion of law.

This cause coming on to be heard upon the report of J. M. Mullen, Esq., referee (filed at Spring Term, 1888), and upon the exceptions to the same, filed both by the plaintiff and the defendants, and all the exceptions of the defendants being sustained (except only that in regard to the Williford land, which exception is withdrawn by the defendants), and all the exceptions of the plaintiff being overruled (except his third exception, in regard to the Edgecombe real estate, mortgaged by Jas. M. Mayo to Mary H. Lyon, now Mrs. Braswell, which exception is withdrawn), it is now, on motion of the defendants, ordered, adjudged and decreed by the court that said report shall be reformed in accordance with the said defendants' exceptions, and as thus reformed shall be confirmed and sanctioned by the court, the particulars wherein said report is reformed being as follows:

(a) Referee's 8th finding is to be changed so as to show that if, at the time of the execution of the mortgage by J. M. Mayo to Miss M. H. Lyon, it was the purpose and intention of said Mayo to remain in the possession of said Herbert place and personal property described
(428) in said mortgage, and use, enjoy and consume the same, until the same was sold under said mortgage, she did not accept said mortgage with any knowledge of or concurrence in any unlawful intent on his part, but accepted the mortgage in good faith to secure a just debt.

(b) Referee's 13th finding is to be changed so as to show that Jas. M. Mayo was justly indebted to his wife, F. L. Mayo, (1) in the sum of $1,396.27, with 8 per cent interest from 4 November, 1879, evidenced by note of that date; (2) in the sum of $1,439, with 8 per cent interest from 31 March, 1882, as evidenced by note of that date, for distributive share in her father's estate; (3) in the sum of $140.37, with 8 per cent interest from 17 March, 1883, as evidenced by notes of that date, given for money collected on note F. L. Mayo held on J. T. Lyon; (4) in nine sealed notes, each for $700, given for the rent of the wife's land inherited from her father, and bearing date 1 January, 1878, 1879, 1880 and 1881, 2 January, 1882, 1 January, 1883, 1884, 31 December, 1885, and 1 January, 1886, bearing 8 per cent interest from their respective dates. The amounts represented by the first, second and third notes above mentioned were received by the said James M. Mayo (sums of money belonging to his wife), with the express agreement that he would repay the same. That the defendant J. M. Mayo occupied the lands of his wife, and with her knowledge received the rent therefrom during the nine years for which said $700 notes were executed. There was an express agreement between them, as shown by the said notes, that he would repay her said rents. That at the time of the assignment of the Ricks and Taylor notes, by said Mayo to his wife, he was indebted to her, upon three notes, one $1,396, one $1,439, one $140, with interest, in the sum of $4,132.25. That the defendant F. L. Mayo is entitled to interest on the three notes mentioned in the first exception, and numbered 1, 2, and 3, from the dates thereof, upon which there was due, 2 August, 1886, after allowing all credits thereon, and also (429) the payments on the Ricks and Taylor notes, the sum of $308.26. That in addition, he owes her the nine $700 notes, with interest as aforesaid.

It is further adjudged by the court as conclusions of law:

"1. That the mortgage executed by James M. Mayo to Mrs. Braswell, conveying the Herbert place, in Nash County, and certain personal property mentioned in the 8th finding of the referee, was not executed with any intention on the part of Mrs. Braswell that J. M. Mayo should remain in the possession thereof, and use, enjoy and consume the same, and therefore was not fraudulent.

"2. That the assignment of the Ricks and Taylor notes by J. M. Mayo, to his wife, F. L. Mayo, was not voluntary, but upon fair and full consideration.

"3. That the defendant F. L. Mayo is entitled to interest upon all her said notes against her husband. Now, upon motion of the defendants, it is adjudged that Mrs. J. C. Braswell is entitled to the fund of $118 deposited with A. Braswell to await the determination of this suit; and

further, that W. T. Mayo, trustee for F. L. Mayo, is entitled to recover of the plaintiff whatever collections, if any, made by him on the Ricks and Taylor notes, and of A. H. Ricks and A. L. Taylor whatever may still be due on the judgment against them. The surplus in Williford *v.* Williford is $28.90, with 8 per cent interest from 1 August, 1887, and it is adjudged that the same shall be collected and held by the plaintiff as receiver.

"The costs of this action, and of all the actions consolidated into this one, to be taxed by the clerk, and to include a fee of seventy-five dollars, hereby allowed the referee, shall be paid by the plaintiff as receiver, and as far as he has the funds, but he is not responsible personally for the same; and whatever sum may still remain due on such bill of
(430) costs shall be reported by the said receiver in the several actions brought by creditors of J. M. Mayo, as appears in the complaint."

The plaintiff does not assent to any part of this judgment, unless where it so distinctly appears in the same, and he especially objects to the judge's finding additional facts to those found by the referee. The plaintiff is allowed thirty days in which to file exceptions to this judgment, under Rule 7 of the Supreme Court. Judgment signed 19 November, 1888.

The plaintiff appealed from this judgment to the Supreme Court.

Plaintiff's exceptions filed under Rule 7:

1. That his Honor erred in stating on the face of said judgment that the value of J. M. Mayo's interest in the Williford land was nothing at the time of the assignment to W. T. Mayo, and that it was agreed that that matter should be eliminated from the controversy. The record in Williford *v.* Williford, a mere memorandum of which is filed by the referee as an exhibit, shows that there was a surplus after paying the debt for purchase money against J. M. Mayo.

2. That his Honor, while sustaining the findings of fact set forth in paragraph 8 of the referee's report, erred in not declaring that such facts rendered null and void the mortgage from J. M. Mayo to Mary H. Lyon, dated 2 February, 1886, made to secure a preëxisting debt, even though there was no actual intent on the part of the mortgagee to defraud mortgagor's creditors.

3. That while it was admitted that said mortgagee had no actual intent to defraud said creditors, it is manifest from the evidence, and his Honor erred in not finding the fact, that she had notice that the mortgagor was greatly in debt, that his object was to take care of himself at the expense of his creditors, and that said mortgage was, therefore, null and void as to such creditors; or the report should have been recommitted, that this fact might be ascertained.

That if the above fact appeared to his Honor not to have been (431) distinctly found by the referee, and if participation in the fraud on the part of the said mortgagee were necessary, then his Honor erred in not recommitting the report to the referee, that he might distinctly pass on that fact.

5. That his Honor erred in sustaining the defendants' third exception and declaring that there was no evidence to support the finding of facts set forth in the thirteenth paragraph of the referee's report. (See last part of said exception.)

6. That his Honor erred in not declaring (as the referee in effect declared) that J. M. Mayo did not execute the notes described in the defendants' third exception at the times when they purport to have been executed. The preponderance of evidence was against the finding of his Honor.

7. That if it appeared to his Honor that there was a discrepancy between the referee's findings (in paragraph 13 of his report), that J. M. Mayo was justly indebted to his wife on 1 January, 1886, in the sums $1,000, $1,439, and $140.37, and that he received these sums from her long before he became insolvent, and without any agreement between them or expectation on his part of accounting to her for the same, then his Honor erred in not recommitting the report to the referee to pass clearly on the facts.

8. That if it appeared to his Honor that the referee had not definitely passed on the fact, alleged in the latter part of the 11th paragraph of the consolidated complaint, to wit, that the transfer of the Ricks and Taylor notes was made with intent to hinder, delay and defraud creditors, then the report ought to have been recommitted, that said facts might be passed upon.

9. That his Honor erred in not declaring that the referee's finding of facts stamped the transfer made by J. M. Mayo to his wife in payment of alleged indebtedness, with fraud, and that, as that made the transfer void *in toto,* his (the referee's) allowing her to retain (432) to the extent of collections, which she had made and appropriated before the plaintiff effected a lien, was not an error of which she could complain.

10. That his Honor erred in overruling the plaintiff's 4th exception, and it is insisted that he ought to have declared that not even the principal money received by J. M. Mayo from his wife constituted valid, enforceable indebtedness in her favor as against the claims of her creditors, and that it ought to have been found as a fact that she was a party to an agreement that he should use her money as his own, with no expectation on the part of either, at the time he received it, that it should be accounted for.

11. That his Honor erred in overruling the plaintiff's exception. Mrs. Mayo should have been directed to refund so much of the money received by her from him as is necessary to satisfy the claims of creditors.

12. That his Honor erred, also, in not declaring that the nine notes, which J. M. Mayo claimed to have executed to his wife, each for $700 with interest, for the rent of her land, were fraudulent, fictitious and void.

13. That his Honor erred in not declaring that, in any event, J. M. Mayo, under the circumstances which existed in this case, was not liable to account for the income of his wife's separate estate, under The Code, sec. 1837, and that such income did not constitute valid, enforceable indebtedness in her favor against him, to the prejudice of creditors.

14. That his Honor erred in finding that there was no express promise by J. M. Mayo to repay to his wife the money received from her, and also to pay her each year $700 for the rent of her land.

15. That in any event he ought to have found that $700 was greatly more than the annual value of said land.

16. That his Honor erred in finding that, at the time of the transfer of the Ricks and Taylor notes by J. M. Mayo to his wife, he was indebted to her in the sum of $4,132.25.

(433) 17. That his Honor erred in sustaining the defendants' 4th exception, and in overruling the referee's 14th finding of fact.

18. That his Honor erred in declaring that the assignment of the Ricks & Taylor notes to F. L. Mayo by J. M. Mayo was not voluntary, but upon full and fair consideration.

19. That his Honor erred in adjudging that F. L. Mayo was entitled to collect interest upon the three notes specified in the defendants' third exception.

20. That his Honor erred in his adjudication touching the fund of $118 deposited with A. Braswell to await the determination of this suit. It should have been ordered that this fund be paid over to the receiver.

21. That his Honor erred in his adjudication in regard to the judgment obtained by the receiver against Ricks & Taylor. The receiver, who has collected nothing on said judgment, should have been authorized to collect the same, and apply the proceeds to the payment of judgment creditors.

22. That his Honor erred in directing costs to be taxed against the receiver personally, under The Code, sec. 535(1). Such costs should have been chargeable on the sum of $118 and the judgment against Ricks & Taylor.

23. That his Honor erred in overruling the plaintiff's first exception.

24. That his Honor erred in overruling the plaintiff's second exception. He should have reversed the referee's finding, and declared that the conveyances to V. W. Land were made with intent to hinder, delay and defeat creditors.

25. That his Honor erred in this: He had no right to find additional facts—facts that the referee had not passed on at all. For instance, it is alleged in the complaint that the Ricks & Taylor notes were transferred by J. M. Mayo to his wife with intent to defraud creditors, and the defendants, J. M. Mayo and wife, contend that he executed to her notes described in the defendants' third exception. (434)

It may be that these facts are not passed upon by the referee at all. If so, the report should have been recommitted to him.

Jacob Battle for plaintiff.
Geo. V. Strong and Don. Gilliam for defendants.

AVERY, J., after stating the facts: On the argument counsel revived the discussion as to the right of this Court to review findings of fact, made by a referee or judge, and also questioned the power of the judge below to modify the report of the referee upon the facts. It is necessary, therefore, to collate, rearrange and reiterate some of the settled rules that define the duties and powers, respectively, of the referee, the trial judge and the appellate court in disposing of references by consent.

This is a mode of trial selected by the parties, who, in agreeing to it, are deemed to have waived their constitutional right of trial by jury. Const., Art. IV, sec. 13. Sections 422 and 423 of The Code are, so far as is material to the decision of the questions before us, the same as sections 246 and 247 of the Code of Civil Procedure (including the provision, that "the report shall have the effect of a special verdict"), and therefore our decisions, running through twenty years, have been constructions of the same language.

The referee must state in his report his findings of fact and law separately, and when the judge, who hears exceptions to the report, makes no special finding of fact, it is presumed that he adopts those of the referee which are considered *prima facie* correct. *Barcroft v. Roberts*, 91 N. C., 363; *Green v. Jones*, 78 N. C., 265.

But in the exercise of his revisory power, the judge may "set aside, modify, or confirm, in whole or in part, the report of the referee, and the appellate jurisdiction attaches to his rulings *in matters* (435) *of law only.*" *Vaughan v. Lewellyn*, 94 N. C., 472.

"His findings of fact, upon appeal to this Court, are conclusive, and his conclusions of law upon them alone are reviewable." *Barcroft v.*

Roberts, 91 N. C., 363; *Green v. Castleberry,* 70 N. C., 20; *Klutts v. McKenzie,* 65 N. C., 102; *Armfield v. Brown,* 70 N. C., 27; *Patterson v. Wadsworth,* 89 N. C., 407.

One valid objection may be raised to the findings of the referee adopted by the judge, either directly or by failing to modify them, or to those of the judge substituted for the referee's; but it raises in reality only the questions of law, whether there is *any evidence to support the conclusions of fact.*

Where no such objection is made, and, in apt time, the findings of the judge, whether made or adopted, are final and cannot be reviewed in this Court, and if, upon hearing such exception when taken, it appears in the appellate court that there is any evidence to sustain the finding, it will be "deemed conclusive." *Usry v. Suit,* 91 N. C., 406; *Reaves v. Davis,* 99 N. C., 425.

The Supreme Court, under the Constitution of 1868 (Art. IV, sec. 10), had no jurisdiction to try any "issue of fact as distinguished from a question of fact." Issues of fact were defined by the court to mean "such matters of fact as are put in issue by the pleading, and a decision of which would be final and conclude the parties upon the matters in controversy in the issue." *Heilig v. Stokes,* 63 N. C., 612.

This cause, constituted as it is in this Court, is certainly not one in which the Supreme Court could have decided the issues of fact, before the Constitution of 1868 was ratified, according to the practice as it then existed.

Though this is a cause that would have been cognizable in a court of equity then, it presents issues of fact which the parties have elected to try by referee in place of a jury trial, and the evidence does not
(436) come to this Court in such shape as to require us to review it or even to determine whether, with or without the aid of legislation, the case might have been so presented on appeal as to require us, in the exercise of the jurisdiction conferred by the amendment of 1877, to decide the issues of fact involved. *Jones v. Boyd,* 80 N. C., 258; *Coates v. Wilkes,* 92 N. C., 376.

Having stated the foregoing general principles applicable to the consideration of trial by referee, we will find that some of the exceptions which appear in the record will fall within the rules laid down, and be disposed of without directly discussing them at any length.

The following were all of the exceptions filed by the plaintiff in the court below:

1. The plaintiff objects to the referee's finding of fact No. 4, as to the amount of indebtedness still due from Mayo after transferring, or attempting to transfer, all his property.

2. The plaintiff objects to the referee's sixth finding of fact as being contrary to the evidence.

4. The plaintiff objects to the referee's finding of fact, and insists that not even the principal money there mentioned constitutes valid enforceable indebtedness in favor of Mrs. Mayo as against the claims of creditors; our objection being mainly this, that he ought to have found that Mrs. Mayo was a party to the agreement which he mentions.

5. The plaintiff objects to the report because the referee did not direct Mrs. Mayo to refund to her husband so much of the money received by him from her as is necessary to satisfy the claims of creditors.

Without considering whether his Honor ultimately modified the findings of the referee, covered by the first, second and third exceptions, we will see at a glance that they were all based on the objection that the facts were found against the weight of evidence, and could serve no purpose unless they could have induced the judge below to set that portion of the report aside, and find the facts on the points mentioned for himself, and whether he did or did not make any (437) alteration, his decision is not reviewable.

The fifth exception is in form subject to an objection that has frequently been held to be fatal. It is not sufficiently specific—does not point out any conclusion of law stated by the referee in his report, at which the exception is aimed, nor the precise error in the referee's ruling. *Suit v. Suit,* 78 N. C., 272.

The exception in that case was, "that the referee ought to have found as a conclusion of law, that the plaintiff recover nothing." Here the ground is, "because the referee did not direct Mrs. Mayo to refund to her husband so much of the money received by him from her as is necessary to satisfy the claims of creditors." The only difference is, that in this case the exception raises objection in general terms to the final disposition of one of several funds in controversy, and there it was to the final conclusion as to the only matter involved in the action. We concur with the judge in overruling this with the three other exceptions. *Currie v. McNeill,* 83 N. C., 176; *Whitford v. Foy,* 71 N. C., 527.

Embodied in the judgment of the court, we find but one exception, which is as follows:

"The plaintiff does not assent to any part of this judgment, unless where it distinctly appears in the same, and he especially objects to the judge's finding additional facts to those found by the referee."

The withholding of assent cannot be treated as a specific exception to the whole judgment, just as an exception to a whole charge has been held not sufficient, even where the counsel after the term filed their assignments of error, pointing out the particular objections. *Bost v. Bost,* 87 N. C., 477.

In *Green v. Castleberry, supra, Justice Reade,* avowing for the Court the purpose to give sections 246 and 247 (C. C. P.), such a construction as would best subserve "the convenient administra-
(438) tion of justice," and to settle the practice, formulated ten rules, governing trials by referee, that clearly "blazed the way" and constitutes the substratum of the principles already stated; but, probably because of the fact that the judges usually adopted the findings of referees, he did not indicate when or how an appellant should enter the exception, that there was no evidence to support a finding of fact made by a judge revising a referee's report.

Counsel are required to present such objections to the judge's rulings as constitute grounds of motion for new trial during the term at which the verdict is rendered, in order to give the judge an opportunity to set aside the verdict, if convinced that there is error, because he has no power to do so after the end of the term, and exceptions on that ground made after the term are not considered.

The objection, that there is no evidence to sustain one of the conclusions of fact stated by a judge on revising a referee's report, should be likewise made during the term, when the cause is heard, in order to enable the judge to modify his findings, if any error is pointed out, and we will not consider exceptions based upon such alleged errors, filed for the first time within ten days, under Rule 7 of this Court.

The plaintiffs, it seems, filed, under Rule 7, twenty-five exceptions, which we find in the record, and which ought to have been printed, instead of the assignment of errors remodeled and rearranged, that appears in the printed record. As the argument was addressed to the printed exceptions, or what purported to be exceptions, we find greater difficulty in reviewing the points properly presented for our consideration. Disregarding the order observed by the plaintiff, we address ourselves first to the twelfth exception. His Honor, after finding that, though J. M. Mayo occupied his wife's lands for nine years, and with her knowledge received the rents therefrom, and that there was an express agreement on his part to account to her for the rent, which
(439) was afterwards set forth in the nine notes for $700 each, declares and adjudges in effect that the notes constitute valid indebtedness on the part of the husband to his wife. It was insisted, that the wife's power to contract with her husband in reference to the rents of her separate estate was restricted by the provision of section 1837 of The Code, that "no husband who, during coverture (the wife not being a free trader, under this chapter), has received, without objection from his wife, the income of her separate estate, shall be liable to account for such receipt, for any greater time than the year next preceding the date of a summons issued against him in an action for such income, or next

preceding her death." It is settled that none of the other sections of chapter 47 of The Code are to be construed as limiting the wife's power to acquire property, by contracting with her husband or any other person, but only to restrain her from, or protect her in, disposing of property already acquired by her. *Kirkman v. Bank of Greensboro,* 77 N. C., 394; *George v. High,* 85 N. C., 99; *Dula v. Young,* 70 N. C., 450.

But section 1837 does contain the restriction, that the liability of the husband for rents received, "without objection" on the part of the wife, shall be limited. The wife must have "knowledge" in order to enter into any contract, and the fact that there was an express agreement that ultimately assumed the form of notes precludes the possibility of assent, and implies objection on her part to the receipt of the rents, unless upon a promise to account for them.

The defendant James M. Mayo, on 22 October, 1885, being indebted to his niece, Mary H. Lyon (now the wife of J. C. Braswell), for her distributive share in the estate of her grandfather, as he supposed, in the sum of $1,500, executed to her on that day a mortgage conveying a tract of land, known as the Herbert tract, and also certain personal property on said place, to secure the payment of a note for $1,500, executed contemporaneously as evidence of his indebted- (440) ness to her. He continued to live on said place and to use the personal property conveyed in the mortgage (some of which was consumed in the use) until about the first of the year 1887, when the Herbert place was sold under a prior mortgage, and the proceeds were insufficient to satisfy the debt secured by it.

The $118 is the fund realized by a sale of the said personal property in February, 1888, and deposited with A. Braswell to await the decision in the case.

His Honor finds that the said mortgage deed was not executed with any intent on the part of Mary H. Lyon (now Mrs. Braswell) that Mayo should remain in possession thereof, and use, enjoy and consume the same, and, therefore, was not fraudulent. The plaintiff's exception (No. 2) is based on the ground that there was error in the holding that the mortgage deed, made to secure a preëxisting debt, was not void because the mortgagee did not participate in the fraud. The deed was executed to secure a valid preëxisting debt of $1,500, which is held to be a valuable consideration.

A mortgage deed executed (as this was) for a valuable consideration, and with no fraudulent intent on the part of the mortgagee, is valid, though the mortgagor did execute it for the purpose of defrauding his creditors. *Savage v. Knight,* 92 N. C., 493; *Lassiter v. Davis,* 64 N. C., 498; *Beasley v. Bray,* 98 N. C., 266; *Means v. Dowd,* 128 U. S., 273.

This principle is sustained by the reasoning in the cases cited, and disposes of the twentieth exception, relating to same subject.

The referee found that J. M. Mayo justly owed his wife, F. L. Mayo, these notes mentioned in his report. His Honor adopted his finding, and allowed her interest on the unpaid notes. We can discover no error in this, and the exception points out none.

Exception 19 is overruled. The judge finds that when the Ricks & Taylor notes were assigned by J. M. Mayo to his wife, he was indebted to her in a large amount upon these notes, as set forth in the (441) judgment, and subsequently he holds that said assignment was not voluntary.

His finding of fact was conclusive; his legal deduction naturally followed from the finding. Therefore, we cannot sustain either exception 18 or 21, because the assignment was not voluntary, if the consideration was a large debt, as found, and if made upon consideration it is valid, and the money collected on the judgment against Ricks & Taylor should be paid over to W. T. Mayo, trustee, for the benefit of F. L. Mayo.

All the other exceptions filed by counsel, under Rule 7, we think are amenable to the objection that they ask us to review findings of fact which, under the rules already stated, are conclusive, and we cannot, therefore, sustain any of them.

No error. Affirmed.

Cited: Howerton v. Sexton, 104 N. C., 83; *Woodruff v. Bowles, ibid.,* 211; *Fertilizer Co. v. Reams,* 105 N. C., 291; *Mfg. Co. v. Brooks,* 106 N. C., 113; *Stephenson v. Felton, ibid.,* 121; *Joyner v. Stancill,* 108 N. C., 155; *Osborne v. Wilkes, ibid.,* 667; *Smith v. Hicks, ibid.,* 251; *Blake v. Blackley,* 109 N. C., 264; *Walker v. Long, ibid.,* 514; *Tilley v. Bivens,* 110 N. C., 344; *Rouse v. Bowers,* 111 N. C., 367; *Comrs. v. Tel. Co.,* 113 N. C., 221; *McEwen v. Loucheim,* 115 N. C., 351; *Cotton Mills v. Cotton Mills, ibid.,* 485; *Light Co. v. Light Co.,* 116 N. C., 121; *Wolf v. Arthur,* 118 N. C., 899; *Sydnor v. Boyd,* 119 N. C., 485; *S. v. Harris,* 120 N. C., 578; *Dunavant v. R. R.,* 122 N. C., 1001; *Holt v. Johnson,* 128 N. C., 68; *Faircloth v. Borden,* 130 N. C., 267; *Lewis v. Covington, ibid.,* 542; *Ramsey v. Browder,* 136 N. C., 253; *Comrs. v. Erwin,* 140 N. C., 194; *May v. Getty, ibid.,* 317; *Williams v. Hyman,* 153 N. C., 167; *S. v. Bailey,* 162 N. C., 585; *Mfg. Co. v. Lumber Co.,* 177 N. C., 407; *S. v. Jackson,* 183 N. C., 701.

TRUSTEES OF THE DIOCESE OF EAST CAROLINA v. TRUSTEES OF THE DIOCESE OF NORTH CAROLINA.

Religious Societies—Episcopal Church—Division of Diocese of North Carolina—Will—Construction of.

Until 1883 the Protestant Episcopal Church in the State of North Carolina constituted the Diocese of North Carolina. In that year, in accordance with the Constitution and Canons of the Church, a Diocese, known as *East Carolina*, was constituted out of part of the territory of the Diocese of North Carolina, and the Church in the residue of the territory retained the name of *The Diocese of North Carolina*. In 1881 M. R. S. executed a will, by which she devised certain of her property "to the Board of Trustees for the Protestant Episcopal Church in the Diocese of North Carolina," and died in 1885: *Held*, that the object of the testator's bounty was the Episcopal Church in the State of North Carolina, and the Diocese of East Carolina is entitled to share with the present Diocese of North Carolina in the property.

THIS was a controversy, submitted to the court without action, as allowed by the statute (The Code, sec. 376), and tried before *Graves, J.*, at February Term, 1889, of the Superior Court of WAKE.

The following is a copy of the case agreed upon:

The parties above named, plaintiffs and defendants, claiming rights and interests which are mutually disputed and denied, and desiring to have the same legally and amicably settled and adjusted, do submit to your Honor this controversy without action, upon the facts hereinafter stated, which are mutually admitted and agreed:

1. That the Protestant Episcopal Church in the United States is, and for many years has been, a collective unincorporated body or society of Christian men, united and organized under laws established by themselves for the worship and service of Almighty God, and the promotion of the Christian religion.

2. That the said church is divided into dioceses having a (443) greater or less territorial extent, and known by a certain name or designation, each diocese being presided over by a bishop regularly and duly consecrated according to the laws and ceremonies of the said church, and each diocese is divided into a greater or less number of parishes or congregations.

3. That the ultimate jurisdictional authority of the said church in each diocese is vested in a diocesan convention or council, composed of clerical and lay delegates from each parish, and presided over, *ex officio*, by the bishop, which assembles annually for the regulation and government of the affairs of the church within the diocese.

4. That the ultimate jurisdictional authority of the said church for the whole of the United States is vested in a general convention, which is composed of a House of Bishops, consisting of all the bishops of the said church in the United States, and a House of Clerical and Lay Deputies, elected by the diocesan convention or council of each diocese; and which general convention assembles every third year.

5. That by the constitution of the said church, article 5, it is provided as follows:

"Whenever the division of a diocese into two or more dioceses shall be ratified by the general convention, each of the dioceses shall be subject to the constitution and canons of the diocese so divided, except as local circumstances may prevent, until the same be altered in either diocese by the convention thereof."

6. That by the general canons adopted for the government of the said church it is provided as follows:

"CANON IV.

"SECTION 1. Whenever any new diocese shall be formed within the limits of any other diocese, . . . and the same shall have been ratified by the general convention, the bishop of the diocese (444) within the limits of which another is formed . . . shall thereupon call the primary convention of the new diocese, for the purpose of enabling it to organize, and shall fix the time and place of holding the same, such place being within the limits of the new diocese.

"SEC. 4. Whenever the formation of a new diocese shall be ratified by the general convention, such new diocese shall be considered as admitted, under article 5 of the constitution, so soon as it shall have organized in primary convention in the manner prescribed in the previous sections of this canon, and the naming of the new diocese shall be a part of its organization."

7. That prior to the year 1883 the Protestant Episcopal Diocese of North Carolina embraced the whole territory of the State of North Carolina.

8. That at the annual convention of the said church in the diocese of North Carolina, which assembled in the month of May, 1883, the following resolution was duly adopted and passed, to wit:

"*Resolved,* That, the General Convention assenting, a new diocese be formed out of the present diocese of North Carolina, consisting of counties of Hertford, Bertie, Martin, Pitt, Greene, Wayne, Sampson, Cumberland and Robeson, and of all the counties lying between those counties and the Atlantic Ocean."

9. That at the said Diocesan Convention of 1883 the following additional resolutions were also duly adopted and passed:

"*Resolved* 1. That the convention hereby ratifies and confirms the action of the Convention of 1882 in regard to the expediency of a division of the diocese.

"*Resolved* 2. That the Bishop is hereby respectfully requested (445) to give his consent to the formation of the proposed new diocese; and, in case such assent shall be given, the deputies from this diocese to the General Convention to be held in October next are hereby instructed to take the necessary steps for securing the consent of the General Convention to the erection of a new diocese within the limits of the present Diocese of North Carolina, as described in the foregoing resolution.

"*Resolved* 3. That the securities and property of all descriptions at present constituting the 'Permanent Episcopal Fund,' the fund for 'Education of Children of Deceased Clergymen,' and the 'Fund for Relief of Disabled Clergymen and Widows and Orphans of Deceased Clergymen,' with such additions thereto as may accrue up to the date of the organization of the new diocese, shall be divided equally, dollar for dollar, between the two dioceses within this State, as may be agreed upon by a joint committee of four laymen, of which committee two members may be appointed by the convention of each of the two dioceses concerned."

10. That the Bishop of the Diocese of North Carolina consented to the formation of the said new diocese, with the territorial limits above set forth, and the General Convention of the said church, in October, 1883, duly and legally ratified the same as required by the canons aforesaid.

11. That afterwards, on 12 December, 1883, the primary convention of the said new diocese, which had been duly called according to the requirements of the said canons, assembled at New Bern, within the limits of the new diocese, which was the place legally fixed for such assembly, according to the said canons, and the said new diocese was thereby fully, duly and legally established and organized by the name of the Diocese of East Carolina, and the plaintiff, Alfred A. Watson, was duly elected Bishop thereof, and has been duly consecrated to the said office, and has entered on the discharge of his duties.

That the formation, as aforesaid, of the said Diocese of East (446) Carolina was occasioned solely by motives of policy for the well-being of the church, and not by any disputes or differences in matters of faith, doctrine, discipline, form of worship or polity, all of which continued to be the same, without alteration, in both of the dioceses, as they had been before the division. And the said creation and organization of

the new diocese were made and done in strict conformity with the law and usage of the said church.

13. That before the formation of the said new diocese, to wit, in the month of February, 1881, Miss Mary Ruffin Smith, of Orange County, in the State of North Carolina, duly made and published her last will and testament in writing, a copy of which is hereunto annexed, and is to be taken as part of this agreed statement of facts.

14. That after the formation of the said new diocese, to wit, on 13 November, 1885, the said Mary R. Smith, died, without having revoked or in anywise altered her said will, and on the ..... day of November, 1885, the said will was duly admitted to probate before the clerk of the Superior Court of Orange County, and the defendant, Kemp P. Battle, the executor therein named, was duly qualified as such, and received into his possession a large amount of personal property belonging to the estate of his testatrix.

15. That the plaintiffs are the trustees, duly and lawfully appointed under the laws of this State, for the purpose of taking and holding the title and managing the property of the Protestant Episcopal Church in the Diocese of East Carolina; and the defendants, Theodore B. Lyman, Richard H. Battle, and William E. Anderson, are the trustees in like manner duly and lawfully appointed for similar purposes in the Diocese of North Carolina, and were such trustees before the formation of said new Diocese of East Carolina.

(447) 16. That in and by her said will the said Mary R. Smith devised and bequeathed as follows, to wit:

"(1) I devise the tract of land on which I reside, about 1,500 acres, of several tracts originally, but now used as one tract, including all the land in Orange County I own, outside of Chapel Hill, and also all the stock and farming implements used on said land, to my dear friend, Maria L. Spear, during her life, and after her death, to the Board of Trustees for the Protestant Episcopal Church in the Diocese of North Carolina, appointed to hold the property of the diocese not otherwise provided for by the General Convention of said diocese, as authorized by act of the General Assembly of North Carolina in such case made and provided, said trustees to have full power to dispose of the same in fee simple and absolutely as said convention may direct, specially, or by general ordinance; this devise, however, subject to the exceptions hereinafter mentioned.

"(2) Out of the aforesaid tract I devise to Cornelia Fitzgeral, wife of Robert Fitzgeral (colored), for her life, free from the control or debts of her said husband—after her death, to her children—one hundred acres out of the aforesaid tract.

"(3) I devise to Julius Smith (colored) likewise, out of the tract of land on which I now live, twenty-five acres in fee.

"It is my will that the devise to Cornelia Fitzgeral and to Julius Smith shall take effect at my death, and the tract given them be good land, equal to the average of the whole tract, with a fair proportion of wood and arable land, and to be laid off by metes and bounds by three white commissioners, one to be chosen by the said trustees of the church, the other by the devisee or devisees interested—the mother, if living, to choose for herself and children—and those two to choose a third; my executor to make conveyances according to the report of the said commissioners (or a majority of them, whose report shall be final) and the terms of this will.

"(6) Whatever of my kitchen and household furniture Miss (448) Maria Spear wishes to have, I bequeath to her absolutely; what she does not want I give to Cornelia Fitzgeral, Emma Morphis, Annette Kirby and Laura Tirle (all colored), equally to be divided between them.

"(7) I bequeath, out of any money on hand or due me, to Ed. Cole (colored), one hundred dollars, and to my namesake, Mary Ruffin Smith, daughter of Rev. Columbus Smith, deceased, of Mississippi, two hundred dollars. The residue of all moneys due me, and also any property not specifically willed, I give to the trustees of the Episcopal Church aforesaid in trust for the Diocese of North Carolina."

17. That Maria L. Spear, the devisee for life in the said will, is dead, having died before the testatrix.

18. That a large amount of personal property, constituting the residue of the estate above mentioned, has come into the hands of the defendant, Kemp P. Battle, as executor, and is now held by him as a part of said estate, and subject to the trusts of the said will.

1. Upon the foregoing facts the plaintiffs claim that they are entitled to an equal division of all the real and personal estate devised and bequeathed by the said will to the trustees of the Diocese of North Carolina in trust for the church in said diocese.

2. If not entitled to an equal division, then they claim that they are entitled to such a proportion of the said real and personal estate as the whole number of members and pew-holders of the said church, in the Diocese of East Carolina, at the time of the organization thereof, bore to the whole number of the members and pew-holders in the present Diocese of North Carolina at that time.

These claims are denied by defendants, who insist that all of the said real and personal estate legally belongs to the defendants, the trustees of the *present* Diocese of North Carolina, in trust for the church in said diocese.

(449) And these conflicting claims are respectfully submitted to the adjudication of the court upon the foregoing agreed statement of facts.

Whereupon, the court gave judgment for the plaintiffs, whereof the following is a copy:

"Upon consideration of the agreed facts set forth as the basis of this controversy without action, and the cause having been debated by counsel on both sides, it is considered, adjudged and decreed by the court that the plaintiffs are entitled to share in all the real and personal estate devised and bequeathed by will of Mary Ruffin Smith to the board of trustees of the Protestant Episcopal Church in the Diocese of North Carolina; and that the said real and personal estate be equally divided between the plaintiffs and the defendants, the trustees of the Diocese of North Carolina.

"It is further adjudged, that an account be taken of the personal estate in the hands of the defendant, Kemp P. Battle, as the executor of said Mary R. Smith, and belonging to the residue bequeathed to the board of trustees for the Diocese of North Carolina; and the parties may agree on a referee for that purpose."

From this judgment the defendants, having excepted, appealed to this Court.

Geo. Davis and John Hughes for plaintiffs.
John Manning and R. H. Battle for defendants.

MERRIMON, J., after stating the case: The Protestant Episcopal Church in the United States is an organized body of Christian people, and in its ecclesiastical organization it has a constitution, canons, rules and regulations for its government. It is divided into dioceses, each designated by an appropriate name, and having greater or less territorial extent. It has existed in this State for a long period of time—about a hundred years—and prior to 1883, the whole territory of (450) this State was designated as the Diocese of North Carolina.

Under the statute (The Code, sec. 3665), the church thus organized was capable of taking and holding property of every kind by purchase, gift, grant or will, and it is provided as to such cases, that "the estate therein (the property) shall be deemed and held to be absolutely vested, as between the parties thereto, in the trustees, respectively, of the said churches, denominations, societies and congregations, for their several use, according to the intent expressed in the conveyance, gift, grant or will; and in case there shall be no trustees, then in the said churches, denominations, societies and congregations, respectively, according to such intent."

Thus the devisee of the will and of the particular devise under consideration had certainty and distinctiveness of character and capacity to take and hold the property devised. The testator must be deemed to have known and understood the nature, the constituent elements, the purposes and territorial extent of the collective object of her bounty. She knew that it was a subdivision of the Protestant Episcopal Church in the United States, that it was composed of all the clergy and laity of that church within the limits of this State. Having such knowledge, she "duly made and published her last will and testament in writing," in the month of February, 1881 (the material parts of which are above set forth), whereby she devised and bequeathed the property in question "to the board of trustees for the Protestant Episcopal Church in the Diocese of North Carolina," etc. If this were all of the matter, there could be no question as to the intention of the testatrix; the whole church within the State would share in her bounty without distinction.

But afterwards, in 1883, a new diocese, designated as the Diocese of East Carolina, was created, strictly as allowed by the canons and usages of the church, having prescribed boundaries, within the Diocese of North Carolina, the latter retaining its name unchanged. The formation of the new diocese "was occasioned only by motives of (451) policy, for the well-being of the church, and not by any disputes or differences in matters of faith, doctrine, discipline, form of worship or polity, all of which continued to be the same, without alteration, in both dioceses, as they had been before the division."

The testatrix, having executed her will in 1881, continued to reside and have her domicile within the Diocese of North Carolina until her death, on 13 November, 1885. She never resided within the new diocese. The appellants contend—first, that, properly interpreting the devise, it is exclusively to the Diocese of North Carolina as it is now constituted; and secondly, that the clergy and laity of the new diocese, having voluntarily abandoned the old one, must be treated as having abondoned or lost any possible right they may have had under the will in question.

We are of opinion that these contentions are not well founded, and that the judgment must be affirmed. The intention of the testatrix in disposing of the property in question, as expressed in her will, and not otherwise, must prevail. The court has no authority to look beyond the will in ascertaining its true meaning, and consider what she may have said before or after its execution, at one time or another, or to one person or another, as to her intention. This must be ascertained from the will itself—its reference to the property disposed of, and the persons to whom, or organization to which, it is devised and bequeathed. The very purpose of putting it in writing was to declare and express her

settled intention as to the property in a solemn and unequivocal manner, and thereby provide certain and permanent evidence of it, not to be thereafter altered or modified, except by an intentional destruction of the will by herself or by her direction, or by a codicil thereto, or by a subsequent one properly executed. Nor could the changed condi-
(452) tion or circumstances of the devisee and legatee surviving, subsequent to the execution of the will, change or affect the intention of the testatrix as therein expressed, as to the property embraced by it, in the absence of any provision contemplating such change, except as such intention may be in such case affected by some rule of law or statutory provision. This must be so, because the intention, once expressed in the will, could not be effectually changed otherwise than by one of the ways above indicated.

Then, what was the intention of the testatrix as to the property in controversy? The will was executed in 1881. At that time the Diocese of North Carolina embraced the whole territory of this State; that of East Carolina did not then exist—so far as appears, it had not been thought of. The devise was "to the board of trustees *for the Protestant Episcopal Church* in the Diocese of North Carolina." Obviously, she had in view, and intended at the time she executed her will, the whole church within this State, and not that part of it in one section or locality more than another; she said so in express terms; she could not have intended or contemplated a subdivision such as has come about since 1881, because none existed, and the language employed does not imply or suggest any such thing. The devise is not to the diocese as such, nor to the board of trustees for it as a diocese, but to *the Church—to the Trustees for the Church*—within the diocese. And upon the death of the testatrix, the statute above recited vested the property in the trustees for the church, and, in the absence of trustees, directly in the church itself. The statute so expressly provides. The mere subdivision of the diocese—the change of its boundaries or its name—could not change or render the devise inoperative; the church would remain sufficiently designated and identified, and the church, and not the diocese, was the religious organization to be benefited. If, in the division of the Diocese of North Carolina into two parts, one part had been called the Diocese
(453) of West Carolina and the other East Carolina, this would not have affected the devise adversely, because the church, the real object contemplated, sufficiently designated, remained to take and be benefited. The diocese was not the church, nor an essential part of the devise—it was only a part of the machinery of the church, through which it effected its purposes, that might be changed, modified, or dispensed with, as to its name and territorial extent, or altogether, by the proper ecclesiastical authority; this could be done without affecting the

entirety of the church generally, or in a particular locality, or within a fixed boundary. Hence, the testatrix, in making her will, had in view, and intended to benefit, not the mere name and form of church organization, but "the Protestant Episcopal Church" within North Carolina; and neither the church nor the diocese could change or give direction to her intention, as expressed in her will, by anything they could do. She alone had the right to designate the object of her bounty, and that object, as a whole, has the right to accept and take benefit of it, accordingly as she directed in the devise, although, for its convenience and advantage, it has changed its name, bounds and relations, not affecting materially its nature and substance, since the execution of the will.

There is nothing in the will, or in the particular devise under consideration, that indicates the slightest purpose, on the part of the testatrix, to modify, limit or restrict at all, the devise, in the contingency that the diocese should be divided, or in any other contingency. It is unrestricted and absolute as to the devisee to be benefited.

It was said on the argument that the Diocese of North Carolina continued to exist at the time of the death of the testatrix, and therefore, the devise should be construed as applying to it as it existed at that time. This argument is specious, but certainly not sound. It is true, that diocese existed at that time in name, but it was not the same in territorial extent, nor did it then embrace a very large and substantial part of the certain and well defined object embraced by the inten- (454) tion and purpose of the testatrix as expressed in her will. At the time of her death, a large part of the church which she clearly intended to benefit had been detached from the diocese, and nothing appears, in terms or by reasonable implication, in the will, to show that she intended to modify her expressed purpose so as to exclude the detached part of the church. This church within North Carolina—within the diocese embracing the whole State—as she contemplated it at the time she made her will and therein expressed her intention, continued in all material respects to exist at the time of her death just as it did at the time she made her will—it had only been changed into two dioceses instead of one; the church as defined and specified in the will remained the same, capable of taking benefit under the devise as contemplated and intended by the testatrix. As is said above, the mere division of the diocese could not modify or defeat her intention. This was settled and expressed, not to be modified except in one of the ways already specified, at the time she executed her will. *Richmond v. Vanhook,* 3 Ired. Eq., 581; *Tayloe v. Bond,* Busb. Eq., 5 (18); *Garrett v. Niblock,* 1 Rus. Myl., 629; *Parker v. Merchant,* 1 Young and Cally, 299; *Bonlow v. Rignold,* 8 How., 131; 1 Red. on Wills, 384, par. 9.

Nor can that part of the church embraced by the new diocese of North Carolina be deemed and treated as having lost, abandoned or forfeited its right to have benefit of the devise. The division of the Diocese of North Carolina was made by common consent of the clergy and laity of the church within it, for the common good of the church and its purposes, strictly as allowed by and in accordance with its canons and usages; it was not prompted by any spirit of rivalry or insubordination, or dissent from the doctrines of faith, the polity, usages or practices of the church; there was neither secession nor schism; it continued,
(455) and continues now, to be in its substance, integrity, spirit and life, just as before the division and the creation of the new diocese, and just as when the testatrix made her will. The church within the Diocese of East Carolina is as certainly now within her intention and purpose, as expressed, as it was then; it has done nothing to put itself without such intention or to forfeit its right to share in the devise; it has done nothing in the eye of the church or the law, that was or is culpable, or that justly subjects it to censure in any respect. On the other hand, the creation of the new diocese was praiseworthy and to be commended, because it was intended by and through it, as a legitimate instrumentality, to accomplish increased and great good. As the church within it comes, as we have seen, within the purpose of the testatrix, we cannot discover the slightest reason why it should not share in her generous bounty to the church of her choice. Why shall it not do so? What has it done, in the eye of the law of the church or law of the land, that prevents it from doing so? We cannot conceive of a just reason why it may not. It might—no doubt would—be otherwise, if the clergy and laity of the new diocese had abandoned the faith, doctrines, usages and practices of the church—had seceded from it and set up an independent church organization. But it is not suggested that anything inimical to the church, or at all improper, has been done by that part of it within the new diocese.

The views we have expressed, it seems to us, are founded on principles of justice, and are fully sustained by numerous authorities cited by the learned counsel of the appellees in the course of his able argument, some of which we cite: *Smith v. Swormstedt,* 16 How. (U. S.), 288; *Ferrana v. Vasconcellas,* 31 Ill., 53; *Niccolls v. Rugg,* 47 Ill., 47; *Wiswell v. The Church,* 14 Ohio St. R., 44; *Gaston v. Penick,* 5 Bush. (Ky.), 110; *Hale v. Everett,* 53 New Ham., 80; *Friends v. Friends,* 89; *ibid.,* 136.

(456) It seems to us, that the authorities in respect to the division of counties, towns and the like, cited on the argument by the learned counsel for the appellants, have no proper application in this case.

In those and like cases, simple rules of law applicable determine the rights and liabilities of the county or town and the detached parts thereof. In this case, the *intention* of the testatrix, expressed in her will, not inconsistent with established rules of law, settles, directs and controls the right of the Diocese of North Carolina, and the detached part thereof forming the new diocese, as to the property embraced by the devise in question. If the devise were to a county, and, pending the lifetime of the testator, a part of the county were detached and made a new county, or part of another, the detached part would certainly share in the property devised, if it should appear that the testator so intended; and this is so, because his intention must prevail, if it be lawful and practicable.

It has been suggested that the testatrix really intended that the present Diocese of North Carolina alone should have benefit of the devise. This, if so, can avail nothing. As we have already said, we can only know her intention as expressed in her will. If she so intended, she ought to have modified the devise by a codicil, or in some other effectual way. But with her change of purpose, if she had one, we have nothing to do. We cannot doubt that we have properly interpreted her intention as expressed in her will.

In view of the interpretation we have given of the devise in question, there is no objection to the judgment appealed from; and so, it must be affirmed.

By consent of the parties, the costs of this controversy must be paid by the defendant executor out of any fund arising from the sale, rents or hires of the property, or any part of it.

No error. Affirmed.

Cited: Church v. Trustees, 158 N. C., 123.

E. E. MOFFITT AND W. K. JACKSON, EXECUTORS, v. ELIAS MANESS.

Evidence, Oral, to vary written contract; rules of should not be refined away—Lost Negotiable Bond.

1. There is too great a tendency in courts to relax the well settled rules of evidence excluding oral testimony offered to contradict, vary, or add to the terms, of the written contract. This Court has gone far enough in the liberal application of these rules.

2. The wise rules of evidence, which are intended for the protection of the provident, should not be refined away for the relief of the negligent.

3. Plaintiffs alleged the execution and delivery, by the defendant, to their testator, of a bond for the payment of a certain sum, and of a mortgage to secure the same. Defendant denied the execution of the bond and mortgage, but did not set up any equitable defense. On the trial defendant offered to show, by oral testimony, that it was agreed between himself and the obligee in the bond, at the time it was executed, that the bond should cover only such amount as should be found to be due from defendant to obligee upon a settlement: *Held*, that such testimony was properly ruled out.

4. When it appears on the trial that a bond sued on is lost, there being no allegation of its loss in the complaint, a judgment rendered below for the amount of the bond will be set aside in this Court, to the end that a proper indemnity may be required from plaintiff in the lower court, if it shall be made to appear in that court that the bond has not been destroyed, and was negotiable, and cannot be produced.

(457) CIVIL ACTION, to foreclose a mortgage, tried before *Merrimon, J.*, and a jury, at the October Term, 1888, of MOORE Superior Court.

The plaintiffs, executors of E. N. Moffitt, alleged that the defendant executed a bond to their testator in the sum of $508.50, and a mortgage on certain lands to secure the payment of the same.

They also allege that no part of said indebtedness has been paid.

The defendant denied all of these allegations.

(458) The plaintiffs offered in evidence the mortgage, *which recited the execution of the bond,* and stated that they did not have possession of any notes against the defendant.

The defendant then introduced Eli Howard, who testified that he was subscribing witness to the mortgage, and that he was present with E. N. Moffitt and the defendant Maness when it was executed; that they did not go into any settlement when it was executed, but that it was agreed that it should cover whatever should be found to be due upon a settlement.

The court held this evidence incompetent. Defendant excepted.

This was all the evidence. The court charged the jury that if they believed the evidence they must find that the defendant owed the plaintiffs the sum named in the mortgage, with interest, according to the mortgage.

The defendant excepted.

Judgment for the plaintiffs. Appeal by defendant.

J. C. Black for plaintiffs.

John W. Hinsdale for defendant.

SHEPHERD, J., after stating the facts: Whatever effect the non-production of the bond may have upon the character of the judgment which should be rendered (and of this we will speak hereafter), there was clearly enough in evidence to warrant the charge of the court and the verdict of the jury.

No exception was made to the admission of the mortgage alone, and no special instructions were asked in reference to the absence of the bond. So, in passing upon the exception as to the exclusion of the parol testimony offered by the defendant, we must assume that such a bond was signed, sealed and delivered by the defendant to the plaintiff's testator.

The answer denies the execution of the bond and mortgage, and (459) sets up no equitable defense whatever; we must, therefore, determine the question in its *legal aspects alone.*

There is, we fear, too great a tendency to relax the well settled rules of evidence against the admissibility of parol testimony, to contradict, vary or add to, the terms of a written contract, and it is thought that the courts, in their anxiety to avoid probable injustice in particular cases, are gradually construing away a principle which has always been considered one of the greatest barriers against fraud and perjury.

Even the Supreme Court of Pennslyvania, which, perhaps, has gone further than any other in this direction, sounds the alarm, and *Bell, J.,* who delivered the opinion of the Court in *Benwick Ex'rs v. Benwick,* 3 Harris, 66, says: "Were the door opened still wider for the admission of all the loose dicta of the parties, running, it might be, as in this instance, through a long course of years, the flood of evil would become so great as to sweep before it every barrier of confidence and safety which human forethought, springing from experience, is so sedulous to raise against the treachery of memory and the falsehood of men. To avoid, therefore, what would really be a social calamity, it is recognized as a settled maxim that oral evidence of an agreement, entertained before its execution, shall not be heard to vary or materially affect it. . . . If any dicta or even decision in hostility to this axiom are to be found, they must be ascribed to the strong desire we are all apt to be swayed by, to defeat some strongly suspected fraud in the particular case. But these occasional aberrations but lead to the more emphatic reannunciation of a principle found to be essential to the maintenance of that certainty in human dealings, without which commerce must degenerate into chicanery, and trade become another name for trick."

In speaking of the higher dignity and the inviolability of written evidence, *Taylor, J.,* in *Smith v. Williams,* 1 Mur., 426, (460) elegantly remarks, that "the writers on the law of evidence have

accordingly, in arranging the degrees of proof, placed written evidence of every kind higher in the scale of probability than unwritten, and, notwithstanding the splendid eloquence of Cicero to the contrary, in his declamation for the poet Archias, the sages of our law have said that the fallibility of human memory weakens the effect of that testimony, which the most upright mind, awfully impressed with the solemnity of an oath, may be disposed to give.

"Time wears away the distinct image and clear impression of facts, and leaves in the mind uncertain opinions, imperfect notions and vague surmises."

Impressed with the warning thus given by these able judges, we will proceed to an examination of the question before us.

Here is a bond, containing an *absolute* promise to pay to the obligee a certain sum of money, and without the slightest suggestion of fraud, mistake or accident, either in the pleadings or testimony, it is proposed to show that it was not an *absolute* promise to pay a *definite* sum, but that it was agreed that it should cover whatever should be found to be due upon a settlement. It cannot, it seems to me, be doubted that the proposed testimony materially contradicts and varies the terms of the writing. The most specious reasoning is incapable of reconciling them. The bond is a solemn declaration that so much is now due. The testimony offered is that the sum mentioned is *not due,* but is to be determined upon a *future settlement.* This is clearly in the "teeth" of the writing. In *Maham v. Sherman,* 1 Black., 380, the language of the Court is as follows: "They set up a verbal contract, made at the time the note was executed, varying the terms of the note. The note is for the payment of a certain sum, on a specified day. A verbal (461) contract, contemporaneous with the note, is relied on to show that the note was not to be paid till a certain account should be adjusted and the amount credited on the note. That would be making the promise conditional, which, upon its face, is absolute."

In *Erwin v. Saunders,* 13 Am. Dec., 520, the defendants, the makers of the note, "offered to prove that the note was given conditionally, to be void if it should be shown that Saunders, then in insolvency, had included in his inventory the amount due Erwin—the amount of the note." The evidence was held to be inadmissible.

In *Dyar v. Walton,* S. E. Reporter, Vol. 7 (which is a case directly in point), the Supreme Court of Georgia says: "The defense, when analyzed, resolves itself into an effort to vary a written contract by parol, and to show the consequence of gross negligence. If, at the time the notes and mortgages were given, there was an agreement entered into that they should be varied by the result of subsequent examination,

that agreement ought to have been embodied in the written contract, or in some other writing, whereby to establish it. The omission to do either is decisive of this branch of the defense. There is no allegation in the plea, and no indication in the evidence, that this agreement was intended to be embraced in any writing, or that it was left out by fraud or mistake. Its effect, if allowed to have any, would be to overrule the writings executed as the result of the settlement, and to reopen the settlement altogether."

These authorities, upon the pleadings in this case, fully sustain his Honor in rejecting the testimony. But the defendant strenuously insists that the *entire* contract was not reduced to writing, and that his case is governed by the principles laid down in *Manning v. Jones,* Busb., 368; *Daughtry v. Boothe,* 4 Jones, 87; *Twidy v. Saunderson,* 9 Ired., 5, and a long line of decisions collected in *Ray v. Blackwell,* 94 N. C., 10, and ending with *Cumming v. Barbee,* 99 N. C., 332.

We think that a careful examination of these cases will show (462) that, even where the contract lies partly in parol, that part which is in writing is *not to be contradicted.*

In *Manning v. Jones, supra, Nash, J.,* said that the testimony admitted "added no new covenant to the deed made by Jones, nor did it contradict or explain any one that was contained in it." And *Ashe, J.,* in *Sherrill v. Hagan,* 92 N. C., 345, speaking of *Manning's case,* said: "It was held that the proof was admissible, the deed being an execution of one part of the agreement, the other having been left in parol. So that the proof offered was not to add to, alter or explain the deed." So in *Cumming v. Barbee, supra,* the parol testimony was admitted because the writing was silent "upon the matter sought to be proved"; and in *Ray v. Blackwell, supra,* the present *Chief Justice* said that "the cases cited do not contravene this rule, and rest upon the idea that the writing does not contain the contract, but is in part execution of it."

The case of *Kerchner v. McRae,* 80 N. C., 219, goes nearer the line than any other, but does not cross it. The testimony admitted was that at the time the bond was executed it was agreed that the obligees were to credit it with the proceeds of certain cotton, which had been deposited with them for sale by the testator of the obligors. Even here the *terms* of the bond, as to the amount due, were not impugned as in our case; but an agreement was shown that the proceeds of certain cotton were to be applied as a credit.

The decision was put on three grounds: First, because the contract was partly in parol. Second, because no exception was made to the submission of an issue upon the matter sought to be proved; and third, because the agreement, if established, constituted a "counterclaim or set-

off." Conceding that the first ground was a correct one, the case is easily distinguished from ours. There it was not sought to be proven that the sum stated in the bond was not the amount due, and the (463) testimony offered related only to the manner of payment. Here, the testimony, as we have said, is for the purpose of directly proving that what is asserted to be due by the bond is false, and that the true amount is to be ascertained by a future settlement. Our decision, in applying the rule mentioned, clearly establishes, as we have said, that the terms of that part which is in writing cannot be varied by parol.

What the defendant seeks to prove is not something consistent with the terms of the bond, as in the cases cited, but is in conflict with the *very matter* which the bond itself determined.

To say that in the absence of fraud such a contradiction is to be permitted of a solemn instrument, duly *sealed* and *delivered,* is to strike a fatal blow at the sanctity given to such writings.

It will be observed that there was no condition precedent upon which the bond was to take effect. Even where it is held that bonds may be shown by parol to be payable only upon contingencies, "it is not allowable when the terms of the bond are thereby impugned." 2 Wharton Ev., sec. 1067.

Howell v. Hooks, 2 Dev. Eq., 258, in addition to the cases first cited, removes our case from all doubt. It was charged that a son procured an absolute bond from his father, and that in writing it he fraudulently left out a condition that it was to indemnify him against loss by reason of his having become bail for his brother. There was no proof of fraud, or that the bond was written other than the parties intended, but there was evidence of the declarations of the son "that his father gave him the bond as an indemnity, and that it was to be paid if he suffered, otherwise to be destroyed."

In our case it is contended that the bond was a security for a debt, and there can be no distinction in principle between them. *Ruffin, J.,* in delivering the opinion of the Court, said: "The evidence is as to the manner in which the son should use the bond upon certain con- (464) tingencies, and that drawn from his verbal declaration. To act upon it would be to insert a condition inconsistent with the legal operation, and contradicting the express terms of the instrument, which would break down all distinction as to degrees of evidence, and destroy the confidence that ought justly to be reposed in solemn contracts. . . . I believe no case can be found in which a court of equity, more than a court of law, has received parol evidence in the teeth of the contract as reduced to writing." As no fraud was proved in the case cited or the one before us, it is unnecessary to consider the effect of

such a transaction, where fraud or other equitable matter is pleaded; we have therefore discussed this question, as proposed, in its legal phases alone. The principles upon which parol testimony is excluded in the case of written contracts are plain, but their application to the infinite variety of transactions daily arising is exceedingly difficult, and the books are full of conflicting decisions upon the subject. We think we have gone far enough in this State in their liberal application, and that the wise rules which are intended for the protection of the provident should not be refined away for the relief of the negligent.

For the reasons given, we think that there was no error in the ruling of the judge who presided at the trial, and that the verdict should not be disturbed. It is doubtful, from the record, whether any exception was made to the rendition of the judgment, without accounting for the absence of the bond. It is, however, insisted upon here, and to avoid any possible injustice it is ordered that the judgment be set aside, so that, if it appears that the bond has not been destroyed, and was negotiable, and cannot be produced, a proper indemnity may be required by the court. Daniel Neg. Instru., Vol. 2, sec. 1481.

Modified and affirmed.

Cited: Bank v. McElwee, 104 N. C., 308; *McAbsher v. R. R.,* 108 N. C., 347; *White v. R. R.,* 110 N. C., 461; *Taylor v. Hunt,* 118 N. C., 171; *Jones v. Rhea,* 122 N. C., 725; *Jones v. Warren,* 134 N. C., 393; *Cobb v. Clegg,* 137 N. C., 157; *Knitting Mills v. Guaranty Co., ibid.,* 569; *Bank v. Moore,* 138 N. C., 532; *Evans v. Freeman,* 142 N. C., 65; *Basnight v. Jobbing Co.,* 148 N. C., 357; *Medicine Co. v. Mizell, ibid.,* 387; *Woodson v. Beck,* 151 N. C., 148; *Kernodle v. Williams,* 153 N. C., 481; *Garrison v. Machine Co.,* 159 N. C., 288; *Machine Co. v. Bullock,* 161 N. C., 12; *Pierce v. Cobb, ibid.,* 305; *Ipock v. Gaskins, ibid.,* 681; *Wilson v. Scarboro,* 163 N. C., 385; *Sykes v. Everett,* 167 N. C., 607; *Guano Co. v. Live-Stock Co.,* 168 N. C., 447; *Pickrell v. Wholesale Co.,* 169 N. C., 383; *Potato Co. v. Jenette,* 172 N. C., 3; *Cherokee County v. Meroney,* 173 N. C., 656; *Farquhar Co. v. Hardware Co.,* 174 N. C., 373; *Kime v. Riddle, ibid.,* 442; *Jerome v. Setzer,* 175 N. C., 391; *Patton v. Lumber Co.,* 179 N. C., 108; *Thomas v. Carteret,* 182 N. C., 379; *Cooper v. Commissioners,* 183 N. C., 231; *Colt v. Turlington,* 184 N. C., 139; *Henderson v. Forrest; Forrest v. Hagood, ibid.,* 234; *Colt v. Kimball,* 190 N. C., 172; *Watson v. Spurrier, ibid.,* 729; *Hite v. Aydlett,* 192 N. C., 170.

(465)

STATE EX REL. WM. G. DEBERRY v. JOHN A. NICHOLSON.

Elections, Powers of Canvassing Board and Courts—Election Laws, how far Directory merely — Registration of Voters — Oath of Elector, The Code, sec. 2681—Oaths, how Administered, Presumption as to, The Code, sec. 3310—Constitution, Art. VI, sec. 2—Officers de facto; acts of valid—The Code, sec. 2687—Province of Judge and Jury.

1. The election returns from a polling precinct to the Board of Canvassers failed to show for what *office* the votes cast for certain candidates were given, whereupon the canvassing board refused to consider the returns from that precinct: *Held*, that upon a *quo warranto* the Superior Court could look behind the precinct returns to ascertain for what office the votes were cast, especially when it was admitted in the pleadings that the relator and the defendant were competing candidates for the office in dispute, and were voted for as such at the various polling places in the county.

2. *Semble*, that the Board of County Canvassers can look behind the precinct returns and inspect the ballots cast at a precinct, or resort to the personal knowledge of one of its members, to ascertain for what office certain candidates were voted for.

3. Statutes prescribing rules for conducting popular elections are designed chiefly for the purpose of affording an opportunity for the free and fair exercise of the right to vote. Such rules are directory, not jurisdictional or imperative. Only the forms which affect the merits are essential to the validity of an election or the registration of an elector.

4. An irregularity in the conduct of an election, which does not deprive a voter of his rights, or admit a disqualified person to vote, which casts no uncertainty on the result, and which was not caused by the agency of one seeking to derive a benefit from the result of the election, will be overlooked when the only question is which vote was the greatest? The same principles are applicable to the rules regulating the registration of electors.

5. The oath to be taken by electors, prescribed by The Code, sec. 2681, in substance and legal effect, fully meets the requirements of Article VI, section 2, of the Constitution of the State.

6. Where it appears that the registrar administered the prescribed oath to electors, but that he did not swear them on the Bible, it will be inferred, in the absence of direct proof to the contrary, that the oath was taken with uplifted hand, as specified in The Code, sec. 3310, and was accepted as a valid mode of administering it, by both the registrar and the elector. Administering the oath in such manner is sufficient to meet the requirements of the election law.

7. The vote given at a polling place must not be rejected, because of a disregard of those directions contained in the Constitution or statutes (except

as to the time and place of holding the election) the nonobservance of which amount to mere irregularity. The same principle governs the registration of electors.

8. The registration of an elector, who is qualified to vote, must be accepted as the act of a public officer, and entitles the elector to cast his vote.

9. (By SMITH, C. J. Even if no oath is administered to the elector or the registrar, the registration must be accepted as the act of a public officer, and the elector allowed to vote, and this, so far as it concerns the elector and the person for whom he votes, just as other acts of the officer, acting *de facto* under color of office, and so recognized by the public, cannot be questioned by inquiring into his rightful title thereto in their relations to others.)

10. The principles governing the acts of officers *de facto*, but not *de jure*, as laid down in *Norfleet v. Staton*, extend to the acts of those charged with the duty of conducting a popular election.

11. A failure to keep the registration books open on the Saturday before the election, during the whole of the prescribed time, does not vitiate the election when no one was denied the right of examining the books.

12. That one of the officers appointed to conduct an election was absent a short time from the polls, during which time no vote was cast and the ballot boxes were not tampered with, nor was any opportunity afforded for tampering with them, does not vitiate the election.

13. Where votes were handed to the judges of election rolled up and secured by an elastic band, and the judges distributed the votes among the boxes, The Code, sec. 2687, was not violated, and such votes were properly received and counted.

14. Where the jury asked for instructions from the judge, as to whether they had the right to pass upon the legality of certain votes, and the judge told them no, and *advised* the jury that they should take and act upon the law as laid down by him: *Held*, that in this, not as a mandate, but as advice, there was no error.

CIVIL ACTION, tried before *Merrimon, J.*, at February Term, (467) 1889, of RICHMOND Superior Court.

Defendant appealed.

The relator of the plaintiff and the defendant were, at the election held in Richmond County, in the month of November last, competing candidates for the office of register of deeds for said county, and were voted for, as such, at the various precincts therein. The returns of the several elections were duly made to the board of county canvassers, one of which, that coming from Wolf Pit Township, while giving the votes cast respectively for the two candidates, omitted the name of the office for which the votes were cast, as were the others, except the vote for electors, which did conform to the requirements of the statute.

The Board of County Canvassers proceeded to open, canvass and determine the result of the election, rejecting the returns from Wolf Pit precinct, for the imperfection mentioned, and declared the defendant to be elected, he having received, of the votes cast at the other places of voting in the county, 1,740 votes, and the relator 1,628 votes. There were cast at the rejected precinct, for the relator 265, and for the defendant 105 votes, which, if counted, would have reversed the result, and given to the relator a majority of 48 votes. The exhibit of the rejected returns shows that none of the offices to fill which the election was then held are designated, it containing only the names of the several persons voted for, and the number of votes given to each, except the electors of president and vice-president of the United States.

The sole issue submitted to the jury, and responded to in the affirmative, is in these words: "Was the relator duly elected to the office of register of deeds of Richmond County at an election held on 6 November, 1888, and is he entitled to be inducted into said office?"

Upon this verdict, it was declared and adjudged that the defendant is not and the relator is rightfully entitled to said office, and to
(468) be admitted into its possession on complying with the conditions prescribed by law.

His Honor charged the jury that if they believed, from the evidence, that at the election in Wolf Pit Township, on 6 November, 1888, three hundred and seventy votes were cast for the candidates for the office of register of deeds for Richmond County, and of that number the relator W. G. DeBerry received two hundred and sixty-five, and the defendant John A. Nicholson one hundred and five, they should answer the issue in the affirmative.

The jury retired, and while they were out sent to the judge the following question to be answered by him: "Is the legality of the votes a question for the jury?" His Honor called the jury in the box, and replied: "No; it is not." His Honor then repeated his charge, and instructed the jury to retire and make up their verdict. The jury thereupon responded to the issue, "Yes," without leaving the box, and the defendant excepted.

J. A. Lockhart for plaintiff.
P. D. Walker for defendant.

SMITH, C. J. The legality of the action of the canvassing board, in refusing to count, for the reason alleged, the votes cast in the township mentioned, in ascertaining the general result, is alone drawn in controversy in the action, and, to support that action, the appellant super-

adds and assigns numerous alleged irregularities and departures from the statutory regulations in the conduct of the election at that voting place. These, enumerated in the answer and urged in argument upon the hearing before us, are now to be considered, and their sufficiency to affect the result, to be determined.

The defect in the return itself, as a ground for its entire exclusion from the count:

The statute does require the canvassing board, in passing upon (469) the returns conveyed to it by a designated judge of election, acting at the place of voting, to "make abstracts stating the number of legal ballots cast in each precinct for *each office,* the name of each person voted for, and the number of votes given to *each person for each different office";* and this presupposes the return to furnish the information, without which the abstract could not be prepared. But, as the board judicially determines the result, is this omission irremediable and fatal to the reception of the vote, or may it be supplied or deduced from attending facts?

When, from the possession of the other regular and unobjectionable returns, it is seen what persons were voted for, and to fill what offices, may not the knowledge, thus obtained, be used to supply the defect, in the absence of any suggestion that the electors voted for any others to fill the office? or may not the canvassing board resort to the ballots, or the personal knowledge of the member of the body who brings the return, in proof of the fact? It would be strange if so technical and rigid a rule of action should be sufficient to stifle so large an expression of the popular will, and defeat its operation in the choice of a public county officer. But, however this may be in the action of the canvassing board, whose functions are largely ministerial, it is certainly competent in the court to which the wronged party appeals, in suing out the writ of *quo warranto,* to look behind the return, to see for what offices the votes were given to the contesting candidates, and an inspection of the ballots themselves would very conclusively settle the inqury, if it became necessary, the ballots being identified without further proof. In the present case the fact is not disputed, for the complaint avers that the parties to the suit "were the opposing and competing candidates *for the office of register of deeds* for said county, and *were voted for as such at the various polling places, precincts and townships in said county";* and this is admitted in the answer, with the sole qualification that the ballots cast in the disputed township were (470) not legal.

The reason given for the rejection of the entire vote cast at this precinct, failing to invalidate the election then held, and to warrant

the retention of the office into which the defendant has been inducted, his counsel assails the vote on other grounds, alleging that:

1. The proper oath (and in some instances none was taken) was not administered to the electors before the registration of their names.

2. The registrar of voters was not legally appointed.

3. The failure to keep open for inspection the registration books from 9 a.m. until 5 p.m., on Saturday preceding the election.

4. The rolled-up votes were improperly received; and other deviations from the statutory regulations as found in Vol. 2 of The Code, ch. 16, secs. 2668, and following.

It is not pretended that persons incompetent to vote, for want of the necessary qualifications of an elector, have in fact been registered, but that the prerequisite conditions for such registration have not been observed, and their votes ought not to have been counted.

In *Southerland v. Goldsboro,* 96 N. C., 49, it is declared that registration, as prescribed in the Constitution, is an essential prerequisite to the exercise of the right of suffrage, as much as the possession of the personal qualifications without which no one is entitled to be registered, and that when such registration is made the registration furnishes prima facie evidence of the right to vote, made as it is under officers of the law charged with that duty. So that, here, in the registration, we have evidence of the personal qualifications of the voter, his right to be registered and his actual registration, without any testimony to the contrary; and thus the sole question is as to the effect of the omissions to comply strictly with the law in the particulars pointed out, or others of a similar kind, upon the validity of the election held in the
(471) township in which they occurred. We propose to consider these alleged inequalities in a group, because the answer to them is common and alike applicable to each.

In *Perry v. Whitaker,* 71 N. C., 477, an election to ascertain the will of the electors as representing the body of which they form a part, in reference to a prohibition of the sale of spirituous liquors in the township, was declared void "for the reason that a large number of the citizens of the city were not allowed to vote, for the reason that they were not registered and no opportunity was offered them to vote."

In *Swain v. McRae,* 80 N. C., 111, it is declared that the failure to have a new registration when ordered, because the order was made within thirty days of the time required by law for opening the books of registration, did not excuse the action of the canvassing board in excluding that precinct vote from the count made to ascertain the general result.

The true principle which should govern in cases of popular elections is thus concisely and clearly laid down in *People v. Cook,* 8 N. Y., 67,

and reported as a leading case, with a valuable note, in Brightly's Leading Cases on Elections, page 438:

"The neglect of the inspectors or clerks to take an oath would *not have vitiated the election.* It might have subjected *those officers to an indictment if the neglect was wilful.*"

So *Breese, J.,* in a carefully considered case in Illinois, thus more fully states the rule: "The rules prescribed by law for conducting an election are designed chiefly to afford an opportunity for the free and fair exercise of the elective franchise, and to ascertain with certainty the result. Such rules are *directory merely, not jurisdictional or imperative.* If an irregularity, of which complaint is made, be shown to have *deprived no voter of his right,* nor *admitted a disqualified person to vote,* if it cast no uncertainty upon the result, and had not been occasioned by the agency of a party seeking to derive a benefit from it, it may well be overlooked in a case of this kind, when the only question is, which vote was the greatest? The forms which must be observed in order to render the election valid are *those* which affect the (472) merits." *Platt v. People,* 29 Ill., 72.

We deem this a sound and just exposition of the law, and as furnishing a reasonable guide in solving controversies growing out of popular elections, which are becoming so numerous.

Judge McCrary, in his work on elections, speaking of irregularities in conducting them, which deviate from the provisions and directions of the statute, pushes the proposition further, and says that, "if, as in most cases, the statute simply provides that certain acts or things shall be done within a particular time, or in a particular manner, and does *not declare that this performance is essential to the validity* of the election, then they will be regarded as *mandatory if they do,* and *directory if they do not, affect the merits of the election.*" Sections 187 to 190 inclusive.

It is urged with much emphasis in the argument for the defendant, that the form of the oath itself and the manner in which it was administered to the voter, depart from the imperative demands of the Constitution and the positive provisions of the statute, to a degree that vitiates the registration of so large a number, that are thus rendered illegal voters, that, if excluded, would change the result of the election, and give it to the relator. There are estimated to be about 400 votes which are exposed to this condemnation.

The registrar testifies that he did enter some names on the registry at first without swearing the persons, but does not undertake to state the number, nor does it appear for whom these voted, if they voted at all. But he says he did not swear those to whom he did administer

the oath upon the Bible, without stating in what manner it was done; and that the form of the oath used was that prescribed in the statute (The Code, sec. 2681). It is in these words: "I,....., do solemnly swear (or affirm) that I will support the Constitution of the
(473) United States and the Constitution of the State of North Carolina; that I have been a resident of the State of North Carolina for twelve months, and of the county of.....for ninety days; that I am a duly qualified elector, and that I have not registered for this election at any other precinct, and that I am an actual and bona fide resident of.....township (or precinct). So help me, God."

Inasmuch as 400 or more voters were registered upon taking the oath in this form, and the total number of ballots cast were but 370, it must be inferred that all who did vote, voted upon such oath. The contention is, that the rejection of the whole ballot operates only as an exclusion of those cast by persons alleged to have been illegally registered.

If the proposition of an illegal and incapacitating registration be conceded, the conclusion drawn follows as a consequence, and the entire ballot cast at the precinct must be discarded. But it ought to appear, to warrant this, that none of those voting were regularly and properly sworn; for it is no reason to deprive a qualified voter of his vote that another has been registered who ought not to have been, and has no right to vote. In such case the list should undergo expurgation, and those of the latter class—not qualified—stricken from the number given to the candidate for whom, when ascertained, the illegal votes were cast, for it is equally the right of the candidate receiving lawful votes to have them counted, as for the opposing candidate to have those that are not lawful rejected from the count.

But assuming the alleged taint to permeate the whole registry, is it such as to vitiate and annul the entire, or, indeed any part of the vote, cast at the contested precinct?

The oath taken is that prescribed by the statute in the very words, and differs from that directed to be taken by section 2, Art. VI, of the Constitution, only in the omission of the words "and laws of the United States," following the word "Constitution," and "laws of North Carolina not inconsistent therewith," following the same word in reference
(474) to the State. In substance and legal effect the constitutional requirement is fully met in the oath as taken, for, as the laws derive their force from the Constitution, which gives authority for their enactment, it is plain that an obligation undertaken and a promise made "to support and maintain" the respective constitutions, extends to, and embraces, all legislative action which is authorized by, and made

pursuant to, them, and the violation of a valid enactment is a violation of the Constitution that imparts its sanction to the enactment.

The next objection is directed to the mode of administering the oath. It must be inferred, in the absence of any direct evidence upon the point, that the oath was taken with uplifted hands, as specified in section 3310 of The Code, and was accepted, as a valid mode of administering it, by both the registrar and the elector. We regard this objection as equally untenable with the other.

The oath was administered in the form authorized by law (section 3310) for persons who have conscientious scruples about swearing upon the "Holy Evangelist," as specified in the preceding section, in providing that such may be sworn with the right hand uplifted. Whether, if an inquiry had been instituted, the presence of such scruples would have been found to exist or not, it is quite sufficient that an oath was administered in a form sanctioned by the statute, and taken with a full recognition of its binding force upon the conscience and of the responsibilities which are incurred by taking it.

Aside from these considerations, we are of the opinion that a disregard of those directions found in the law, fundamental or statutory (except as to the time and place of holding the election), relating to the manner of conducting it, designated as irregularities, not affecting the result as a fair expression of the popular will, does not warrant a rejection of the vote given at a polling place. The (475) same principle must govern the registering of the electors. If none are incompetent to vote who are put on the list, the registration must be accepted as the act of a public officer, and entitles the elector to the casting of his vote; and this, in my opinion, speaking for myself, even if there had been no oath in fact administered, so far as it concerns the elector and the person to whom he gives his ballot, just as other acts of the officer acting *de facto,* under color of office, and so recognized by the public, cannot be questioned by inquiring into his rightful title thereto in their relations to others. His acts, and the exercise of his functions, from the highest considerations of public policy, as affecting the interests of third persons, must be accepted as rightful and valid. This includes and disposes alike of the objection to the registrar's appointment and to his alleged nonobservance of the statutory directions in placing the electors' names upon the registry. It is needful only to refer in this connection to *Norfleet v. Staton,* 73 N. C., 546, where the effect of acts of persons acting *de facto,* as such, and not *de jure,* is fully discussed and authorities referred to.

In this case a judge elected to fill a vacancy in the term of office, in pursuance of an act of the General Assembly, declared to be repugnant

to the Constitution, which itself provided a different mode of supplying the vacancy, made an appointment of clerk, while so acting, the validity of which was called in question, and sustained upon an appeal to this Court. Yet, in this case, an appointee, deriving his title under the Constitution, was asserting his claims to the office, which were afterwards made good, and he inducted into possession.

The extension of the principle to those charged with the duty of conducting a popular election, is fully supported by adjudications. McCrary Elec., sec. 216.

(476) The fact that the registration book was not kept open during the whole prescribed period, on the Saturday before the election, cannot be allowed to render the election void, when it was kept open for inspection up to 2 p.m., and no one was denied the opportunity of examining it or sought it afterwards. This does not vitiate the election.

Quite as little force is found in the objection that one of the officers absented himself for a short time for dinner, as it affirmatively appears, from the uncontradicted testimony, that no one voted during the interval, and tampering with the ballot-boxes did not take place nor was opportunity afforded for it.

Again, there were many votes, more than a hundred, as a witness testifies, handed in rolled up, secured by an elastic band, which were given for the relator, and these were distributed among the boxes by the judges. These were, in our opinion, not obnoxious to the requirements of section 2687, and were properly received and counted. *Deloatch v. Rogers,* 86 N. C., 357.

What has been said is an answer to the complaint made of the refusal of the court to give any of the fifteen instructions asked, which are based upon the imperfections and irregularities already considered and passed upon, and sustains the instructions given, which is confined to an inquiry as to the state of the vote as actually given at the Wolf Pit Township place of voting, about which, indeed, there was no controversy.

A further error is assigned in the response to an inquiry from the jury, as to their right to pass upon the legality of the votes. The negative is the only answer that could be given, as it was a pure question of law, about which it was the duty of the judge to instruct, and them to be guided thereby.

It is true the verdict involves an inquiry into the lawfulness of the votes, as well as their number, but it was eminently proper to

(477) advise the jury that they should accept the law as declared by the court, and apply it to the facts as they find them to be, for in this division and exercise of functions by the court and jury, concurrently leading to the verdict, can the law be properly administered in the courts

and enforced before juries. The response of the judge is, in substance, that the jury should take and act upon the law as laid down by him.

In this, not as a mandate, but as advice, there is no error.

The judgment must therefore be affirmed, and it is so ordered.

No error. Affirmed.

Cited: Smith v. Trustees, 141 N. C., 149; *Hendersonville v. Jordan,* 150 N. C., 38; *Younts v. Commissioners,* 151 N. C., 586; *Smith v. Fuller,* 152 N. C., 6; *Briggs v. Raleigh,* 166 N. C., 153; *Casey v. Dare County,* 168 N. C., 287; *Hill v. Skinner,* 169 N. C., 409; *Brown v. Costen,* 176 N. C., 65; *Forester v. Betts,* 179 N. C., 608; *Riddle v. Cumberland,* 180 N. C., 326; *Davis v. Board of Education,* 186 N. C., 229; *Plott v. Commissioners,* 187 N. C., 132; *Flake v. Commissioners,* 192 N. C., 593.

J. P. GOODMAN ET AL. V. T. H. SAPP ET AL.

Partition, Jurisdiction of Clerk in—Parties as Witnesses; when failure of to testify subject of comment—Comments of Counsel—Discretion of Judge—The Code, secs. 1350, 1353—Deed Proven by Fraud or Undue Influence.

1. In a special proceeding for partition, commenced before the clerk, it was alleged in the complaint that plaintiff was tenant in common with the defendant, the facts upon which the tenancy in common was claimed to exist being set out. The defendant denied the allegations of the complaint, and claimed to be sole owner: *Held,* that the clerk had jurisdiction, and the refusal of the judge in term to dismiss the case was proper, whatever construction is to be placed upon chapter 276, Laws 1887.

2. Where, upon an issue as to whether a deed, made by one of the parties to the action to the defendant's wife, was procured by fraud, etc., the evidence was that the deed was procured by the defendant by getting the grantor drunk, and that defendant was present when it was executed: *Held,* that it was not error to permit counsel to comment on the fact that defendant was present in court, but had failed to go on the stand as a witness to contradict such testimony.

3. The extent to which counsel may comment upon witnesses and parties must be left, ordinarily, to the sound discretion of the presiding judge, which will not be reviewed, unless it is apparent that the impropriety of counsel was gross and calculated to prejudice the jury.

4. The introduction or nonintroduction of a party as a witness in his own behalf should be the subject of comment only as the introduction or non-

introduction of any other witness might be. This is the necessary result of The Code, sec. 1350, which does not contain the clause, which is in section 1353, forbidding such comment in criminal prosecutions.

5. A deed is void if procured from one so weak in mind, from old age, as not to understand what he is doing.

(478) CIVIL ACTION, tried before *Brown, J.*, at January Term, 1889, of CABARRUS Superior Court.

This was a special proceeding for partition, commenced before the clerk, and transferred to the Superior Court in term, upon issues being raised by the pleadings.

The plaintiffs were J. P. Goodman and wife Peggy, Leah Safrit, Thomas J. Safrit, George W. Safrit, and Rufus, Sarah and Francis Yost.

The defendants were Thomas H. Sapp and wife Sarah, Emeline Safrit, Eli J. Safrit, Henry, Lawson, Mary, John and George Bost, Jr., and Peter Cruse.

Defendants appealed. The other facts are stated in the opinion.

L. S. Overman and Paul B. Means for plaintiffs.
W. J. Montgomery for defendants.

DAVIS, J. The complaint alleges that Katie Safrit died in 1882, seized and possessed of the land in controversy, and that the plaintiffs and defendants (other than Peter Cruse) are her heirs at law, upon whom the said real estate descended, and that Peter Cruse claims title in fee, under a pretended deed from Thomas H. Sapp, to a portion of the land described.

(479) The defendants, Thos. H. Sapp and Sarah, his wife, answer denying all the allegations of the complaint, and alleging that the defendant, Sarah Sapp, is the sole owner in fee of said land, except a portion named, which they say is owned by their codefendant, Cruse.

The defendant Cruse answers, and claims to be the sole owner in fee of the portion of said land described in his answer.

Upon the trial before his Honor, the defendants moved to dismiss the action, "upon the ground that it was apparent, upon the pleadings, that the clerk did not have jurisdiction."

"His Honor intimated that the clerk did not have jurisdiction of the matter in controversy between the plaintiffs and the defendant, Cruse, whereupon the action was dismissed as to the defendant, Cruse, and the land claimed by him," and his Honor held that the court had jurisdiction as to the other defendants.

The defendants excepted.

Whether his Honor erred in ruling that the clerk had no jurisdiction as to the defendant Cruse, we are not called upon to determine.

The plaintiffs did not appeal.

We think it clear that the court had jurisdiction as to the other defendants. *McBryde v. Patterson*, 73 N. C., 478.

Whatever may be the construction to be placed upon chapter 276 of the Acts of 1887, the action ought not to have been dismissed, and there was no error in his Honor's ruling of which the defendants can complain. This disposes of the first exception.

"It was admitted upon the trial that Katie Safrit was, at one time, the owner of the land in dispute, and that she died the owner thereof, unless she had conveyed the land to one George Safrit, under whom the defendant, Sarah Sapp, claimed. It was further admitted, that the heirs at law of Katie Safrit were correctly stated in the com- (480) plaint."

The following issues were submitted:

"1. Is the defendant, Sarah Sapp, sole seized of the whole of the land described?

"2. Is the defendant, Sarah Sapp, the owner of George Safrit's share or interest?"

The defendants offered in evidence a deed from Katie Safrit to George Safrit, dated 25 August, 1873, and a deed from George Safrit to Sarah Sapp, dated 2 September, 1873, conveying the land in controversy. The consideration in both deeds was stated to be $500.

Many witnesses were examined on both sides, and the evidence is sent up with record.

That on the part of the plaintiffs tended to show that Katie Safrit was an old woman of very weak mind; that she was incapable of understanding, attending to, or transacting any business; that she could not understand a deed, and one of the witnesses speaks of her as "idiotic."

The evidence also tended to show that the land was worth $3,000.

Geo. W. Safrit testified, among other things, as follows: "Sapp got after me to get mother (Katie Safrit) to come and live with him; said he would give me a horse to get mother away from Goodman's. I got the horse and mother came to Sapp's to live. She lived there a couple of weeks or better before the deed was made. . . . I never made any deed to Sarah Sapp. Thos. Sapp and witness went to Sol. Fisher's to get the deed written. Sapp offered $500 if I would make him a deed. We got on a spree and went up to Roseman's. Here I suppose he got me to sign something else. I don't know what I did there, or when I signed it. Sapp gave me liquor and insisted on me drinking. If I signed deed I don't remember it." He also said: "Sapp never paid me anything."

(481) George Shank testified that he was at Roseman's; that Sapp and Safrit asked Roseman to write for them; that he wrote some and asked to whom the deed was to be made. Sapp said, "to Sarah Sapp, of course."

This constituted the defendants' second exception.

The witness had testified, without objection, that her mind was very weak, and that she did not know what she "was about in making the deed," and we can see no force in the objection.

The testimony of the witnesses for the defendants tended to show that Katie Safrit had capacity to make a deed.

S. Fisher testified that he knew Katie Safrit. "I think she had sense enough to make a deed, if explained to her; never saw her do anything foolish; I wrote deed from Mrs. Safrit to George. Thos. Sapp and George got me to do it," etc.

The plaintiffs' counsel, in his argument to the jury, stated that Sapp, the defendant, had procured the deed from George Safrit without paying anything for it; that from the recital in the deed he had obtained a $3,000 tract of land for $500; that from the evidence of Safrit it was proven that Sapp got him drunk and procured the deed from him when he did not know what he was about. Sapp was in court, and had the right to contradict Safrit if that was not the truth, and he did not avail himself of the opportunity and right to contradict him.

In the midst of this argument, made by the plaintiffs' counsel, defendants objected, that counsel had no right to comment on the fact that the defendant was in court, and failed to avail himself of his right to contradict the statements set forth. Court overruled the objection and permitted the counsel for plaintiff to argue that Sapp was in court and had the right to contradict George Safrit, if Safrit had not told the truth, and did not avail himself of his rights. Defendant excepted.

This constitutes the defendants' third exception.

(482) The power and the duty of the court to check counsel when abusing his privilege, in commenting on witnesses and their testimony, and on the conduct of parties to the action, is clearly settled by many decisions. Very soon after the change by statute, allowing parties to actions to testify, it was adjudged that the mere fact that a party, plaintiff or defendant, did not testify in his own behalf, was not the proper subject of comment.

In *Devries & Co. v. Phillips & Haywood,* 63 N. C., 52, the court was asked to charge the jury: "That inasmuch as the defendant was a competent witness, the fact that he did not offer himself as a witness in his own behalf, authorized the jury to presume the facts against him. His Honor declined to give the instruction, but charged the jury that they might consider the circumstances and give to it what weight they might think proper," etc.

In commenting on this ruling, *Reade, J.*, said: "It is true, as a rule of evidence, that when, in the investigation of a case, facts are proved against a party which it is apparent he might explain, and he withholds the explanation, the facts are to be taken most strongly against him." . . . "We conclude that the fact that a party does not offer himself as a witness, standing alone, allows the jury to presume nothing for or against him, and can only be the subject of comment as to its propriety or necessity in any given case, according to the circumstances, as the introduction or nonintroduction of any other witness might be commented on."

In *Gragg v. Wagner*, 77 N. C., 246, but three persons were present at the bargain and execution of the deed in controversy—the plaintiff, the draftsman, and the defendant. The two former were examined on behalf of the plaintiff. The defendant was not present, but was in the State of Oregon, and it was not alleged that he knew facts other and different, in connection with the execution of the deed, from those testified to by the witnesses present, and counsel was not permitted to comment upon the fact that he had not offered himself as a (483) witness.

The court said: "It is the privilege and not the duty of a party to an action to offer himself as a witness in his own behalf, and he is not the proper subject for unfriendly criticism, because he declines to exercise a privilege conferred upon him for his own benefit merely. The fact is not the subject of comment at all; certainly not, unless under very peculiar circumstances, which must necessarily be passed upon by the judge presiding at the trial, as a matter of sound discretion. Only an abuse of that legal discretion is reviewable here."

Peebles v. Horton, 64 N. C., 374; *S. v. Williams*, 65 N. C., 505; *Jenkins v. Ore Co.*, 65 N. C., 563; *S. v. Bryan*, 89 N. C., 531; *S. v. Sugg*, 89 N. C., 527; *Gay v. Manuel*, 89 N. C., 83; *S. v. Rogers*, 94 N. C., 860, and *Chambers v. Greenwood*, 68 N. C., 274, and numerous other authorities, settle the general principle that the extent to which counsel may comment upon witnesses and parties "must be left, ordinarily, to the sound discretion of the judge who tries the case, and this Court will not review his discretions, unless it is apparent that the impropriety of counsel was gross and calculated to prejudice the jury."

It was said by *Reade, J.*, in *Chambers v. Greenwood, supra*, "the mere manner of conducting the trial below is, and ought to be, so much within the discretion of the presiding judge, that an alleged irregularity must be palpable, and the consequences important, to induce us to interfere." And this is said in citing and approving *Devries v. Phillips*, where it is said that his introduction or nonintroduction should be the subject of comment only as the introduction or nonintroduction of other witnesses might be.

We think this is the necessary result of the change made by section 1350 of The Code.

It will be noted that there is a difference between section 1350, (484) which relates to civil actions, and section 1353, which relates to criminal actions. In the latter it is expressly declared that a failure of the defendant to testify "shall not create any presumption against him." The reason for the difference readily suggests itself.

The doctrine laid down is not in conflict with *Wilson v. White,* 80 N. C., 280; *Greenlee v. Greenlee,* 93 N. C., 278; *Kerchner v. McRae,* 80 N. C., 219, or *Blackwell v. McElwee,* 96 N. C., 71.

If the defendant in the present case had had any witness present who was cognizant of, and could have contradicted the damaging facts testified to, and failed to introduce such witness, we think it would have been the subject of proper comment, and the ruling of his Honor in this respect does not entitle the defendant to a new trial.

The next exception is, "because his Honor, in his charge, recapitulated the evidence merely, and did not state it in the legal bearing upon the issues submitted to the jury."

The charge of his Honor is set out in full and at length. A careful examination of it will show that this exception is without any foundation. It is a clear statement of the law as applicable to the evidence, and we deem it unnecessary to reproduce it here.

The last exception is to the following special instruction given by his Honor, the ground of exception being, because there is no evidence that Thos. H. Sapp procured Katie Safrit to make the deed to George Safrit:

"I am requested to charge you, that if the jury believe from the evidence that Katie Safrit was weak in mind, from old age, so as not to understand and know what she was doing, and while in that condition Thos. H. Sapp procured Katie Safrit to execute a deed to George Safrit for a tract of land worth $3,000, for a consideration of $500, with the intention of shortly thereafter procuring a deed from George to (485) his own wife Sarah, such transaction is void. I so charge you, and if you so believe, you must answer first issue, 'No.'"

The evidence is not reproduced by us in full, but so much of it only as is sufficient to show that his Honor was fully warranted in giving the charge complained of.

There is no error.

Affirmed.

Cited: Hudson v. Jordan, 108 N. C., 12; *Cawfield v. R. R.,* 111 N. C., 598; *Pearson v. Crawford,* 116 N. C., 757; *S. v. Surles,* 117 N. C., 725; *S. v. Craine,* 120 N. C., 603; *Cox v. R. R.,* 126 N. C., 106; *S. v. Tyson,*

133 N. C., 696; *Yarborough v. Hughes,* 139 N. C., 209; *Thaxton v. Ins. Co.,* 143 N. C., 42; *Powell v. Strickland,* 163 N. C., 402; *Bank v. McArthur,* 168 N. C., 54; *S. v. Turner,* 171 N. C., 804; *Davis v. Smoot,* 176 N. C., 541; *In re Hinton,* 180 N. C., 213; *Stone v. Texas Co., ibid.,* 560; *Maney v. Greenwood,* 182 N. C., 582.

D. L. RUSSELL v. FRANK D. KOONCE.

Appeal—Making up Case on—Excusable Mistake.

Where there had been two defendants, as to one of whom a *nol. pros.* was entered, and a verdict and judgment against the other, who appealed and served a case on appeal upon plaintiff's counsel, and he having reason to believe that the attorney for the *nol. prossed* defendant was also attorney for the appellant, though such was not the fact, served his countercase on such attorney: *Held,* upon motion, that it was proper to remand the case to be made up, as from the rendition of judgment, according to law.

MOTION TO REMAND, heard at the present term of this Court. The grounds of the motion appear in the opinion.

T. W. Strange and Sol. Weil for plaintiff.
J. B. Batchelor, Jno. Devereux, Jr., and S. W. Isler for defendant.

SMITH, C. J. This action, brought against Frank D. Koonce and Anthony Davis, was tried at Spring Term, 1887, of the Superior Court of New Hanover, and a *nol. pros.* being entered as to the latter, a verdict was rendered upon the issues in favor of the plaintiff, (486) and he recovered judgment. Thereupon, the defendant Koonce appealed, and prepared and filed his case on appeal. The plaintiff, in the way of exceptions, filed with the clerk a countercase, a copy of which was sent to H. R. Kornegay, supposed to be of counsel for the appellant, who, as appears from his affidavit filed in the case, denied that he represented the appellant at the trial, and returned the paper to the plaintiff's counsel by the next mail, with an endorsement to that effect.

The record, with copies of these papers, was subsequently transmitted to this Court, in obedience to a writ of *certiorari* so commanding, and came up for hearing at the present term.

The transcript shows that the said Koonce filed his own answer, while that of the other defendant was put in by Kornegay as his counsel. It is stated in the affidavit of plaintiff's counsel, read before us, that Kor-

negay acted as counsel for both defendants, and it so appears of record, while in the explanatory affidavit of the latter he states that during his argument before the jury, the plaintiff's counsel announced their purpose to enter a *nol. pros.* as to Davis, whereupon he remarked, that, although not the attorney of the defendant, Koonce, as his line of defense was prepared for Davis, out of courtesy, he would pursue the argument in its application to Koonce.

The transcript only discloses the fact that the one answer bears the signature of "R. H. Kornegay, Att'y for def't Davis," the other that of "F. D. Koonce for himself."

It is obvious that the course of the action pursued, in preparing the case for this Court, is the result of a misapprehension, and the counsel for appellee had reason to infer, from the continuance of the defense against the claim, after their purpose to enter a *nol. pros.* as to Davis was made known, that the same counsel represented both defendants.

(487) It is, under these circumstances, proper that time now be allowed the parties to prepare the case on appal, to prevent a failure of justice; and, to this end, we remand the cause to the court below, with leave to them to proceed to make the case up, as from the rendition of judgment, in the mode prescribed by law, and, in case of disagreement, to be settled by the judge who tried the cause.

Remanded.

Cited: S. v. Price, 110 N. C., 600; *Arrington v. Arrington,* 114 N. C., 116.

MARGARET WALKER ET AL. v. IOLA SCOTT ET AL.

Appeal—Motion to Dismiss—Record—Practice—Rules.

1. An appeal will not be dismissed for the absence of a statement of the case on appeal, as error may otherwise appear The proper motion, in the absence of error assigned or appearing in the record, is to affirm the judgment.

2. When it is claimed that a statement of case on appeal was never properly served and should not have been sent to this Court as part of the record, the proper course for the objecting party is to move for a continuance here until he can apply to the court below to strike the paper from the file. In that court the record is made up for hearing in this Court on appeal.

3. It is sufficient, under the rule, if the record shall have been printed when the case shall be called for argument.

4. *The rules of practice* prescribed by this Court, under Article IV, sec. 12, of the Constitution, and section 961 of The Code, are not merely directory. Rule 2, secs. 7 and 8, as to the time within which appeals must be docketed and motion by appellee to dismiss in case of delay beyond the time, without reasonable excuse for delay, is remedial and salutary, and will be enforced; but, on motion, time will be given to the party delinquent to show reasonable excuse for his delay.

At the present term of this Court the plaintiffs moved to dismiss the appeal for the following reasons:

1. That the appellants have not complied with the statute regulating cases on appeal, by making out a statement of their case (488) on appeal, and serving a copy on the plaintiffs or their counsel as is provided by law.

2. The record does not show that any appeal was taken or entered within ten days from the rendition of the judgment, as required by the statute.

3. That the record has not been printed, as required by the rules of the Court.

4. That the appellants' case on appeal was not transmitted to this Court and docketed until after the call of docket for the Twelfth District, and no reason has been shown by them why the same was not regularly docketed, as provided by the rules of this Court.

Theo. F. Davidson for plaintiffs.
J. W. Cooper for defendants.

MERRIMON, J. The first ground of the motion to dismiss the appeal is, that the appellants failed to serve any case stated on appeal upon them or their counsel.

The motion cannot be allowed for this cause. What purports to be such statement appears in the transcript of the record; but if this were not so, the absence of it would not be ground for sustaining the motion, because it is not essential to the appeal. It may be that there are assignments of error in the record, and errors may appear in the record proper, so that a statement of the case on appeal may not be necessary.

The proper motion, in the absence of errors appearing in the record, or properly assigned, is to affirm the judgment. *Mfg. Co. v. Simmons,* 97 N. C., 89.

The appellees, in support of this ground of their motion, offered affidavits to prove that what purports, in the transcript of the record, to be the case stated on appeal, duly served on their counsel, was never in fact served on themselves or their counsel, and they ask (489) this Court to hear the evidence, find the facts, and make appro-

priate orders striking the statement from the record. This application is a misapprehension of the proper course of procedure in such case. The motion should be made in the court below to strike from the files there such statement as having been improperly filed with the clerk, as allowed in proper cases by the statute (The Code, sec. 551), and direct the clerk to take no further notice of it. The case stated or settled on appeal passes into and becomes part of the case in the court below, and it comes to this Court as part of the record. This Court has no authority to make, alter, or modify it in any material respect, or to determine that it was or was not duly filed. It is, therefore, appropriate and proper, indeed, necessary, that the court below should hear all motions and make all proper orders in respect to it. A motion here, if need be, to stay the hearing of the appeal until such motion could be made, heard and determined in that court, might be appropriate.

The second ground of the motion, and the counter-motion of the appellants for the writ of *certiorari,* will not be disposed of for the present, for the reason that it may not be necessary to consider them at all.

The third ground of the motion assigned is, that the record has not been printed, as required by the rule applicable. It seems that what purports to be the case stated on appeal has been printed. But, moreover, the appeal does not stand for argument at this term, and if the record should be printed by the time it shall be called for argument that will be sufficient. *Witt v. Long,* 93 N. C., 388.

It appears that the appeal was taken at the last Fall Term of the Superior Court of the county of Cherokee to this Court at its present term; but the appellants failed to file a transcript of the record of their appeal here, "within the first eight days of the term, or before entering on the call of cases from the judicial district to which the case (490) belongs," as required by Rule 2, sec. 7, but such transcript was filed *after* such call began. That the transcript of the record was not filed within the time prescribed by the rule, as above indicated, so that the appeal would stand for argument at the present term, is assigned as a fourth ground of the appellee's motion to dimiss it. Rule 2, sec. 8, among other things, provides, that "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." The purpose of this rule is remedial and salutary. It is intended by it to prevent appellants from delaying

the filing of the transcript of the records of their appeals until just late enough in the term, as has sometimes been done, to get a continuance, and thus delay justice, frequently to the prejudice of the appellees. Such delay cannot be allowed, unless reasonable excuse for it shall be shown, if the appellee sees fit to avail himself of the rule, as the appellees do in this case. The rule is serious and important, and must be observed. The impression seems to prevail, to some extent, that the *Rules of Practice* prescribed by this Court are merely directory—that they may be ignored, disregarded and suspended almost as of course. This is a serious mistake. The Court has ample authority to make them. (The Const., Art. IV, sec. 12; The Code, sec. 961; *Rencher v. Anderson,* 93 N. C., 105; *Barnes v. Easton,* 98 N. C., 116.) They are deemed essential to the protection of the rights of litigants and the due administration of justice. They have force, and the Court will certainly see that they have effect and are duly observed, whenever they properly apply.

Apparently, the appellants in this case have failed to observe (491) the rule invoked by the appellees. They have not shown reasonable, or any, excuse for such failure; but they insist that they can do so, and that, under the rule, they are entitled to have opportunity to show such reasonable excuse, and ask the Court to grant the same. We are of opinion that they are so entitled; and, accordingly, it is now ordered (by consent of the parties as to time) that they have leave to show excuse on the first Monday of the next term of this Court. The further consideration of the motion to dismiss the appeal will be deferred until that time.

It is so ordered.

Cited: S. c., 104 N. C., 482; *Wiseman v. Commissioners, ibid.,* 331; *Bailey v. Brown,* 105 N. C., 129; *Mitchell v. Haggard, ibid.,* 175; *S. v. Foster,* 110 N. C., 510; *S. v. Price, ibid.,* 601; *Sondley v. Asheville,* 112 N. C., 696; *Cumming v. Hoffman,* 113 N. C., 268; *Atkinson v. R. R., ibid.,* 588; *McNeill v. R. R.,* 117 N. C., 643; *Smith v. Montague,* 121 N. C., 94; *Westbrook v. Hicks, ibid.,* 132; *Barnes v. R. R., ibid.,* 505; *Brinkley v. Smith,* 130 N. C., 225; *Calvert v. Carstarphen,* 133 N. C., 27; *Lee v. Baird,* 146 N. C., 363; *Phillips v. Junior Order,* 175 N. C., 134; *Cox v. Lumber Co.,* 177 N. C., 228; *Cooper v. Commissioners,* 184 N. C., 616; *S. v. Farmer,* 188 N. C., 245; *S. v. Palmore,* 189 N. C., 540; *Finch v. Commissioners,* 190 N. C., 155; *Waller v. Dudley,* 193 N. C., 750.

PATTIE D. B. ARRINGTON v. J. P. ARRINGTON ET AL.

Fraudulent Conveyances—Sale Under Execution—Trustee—Purchaser with Notice—Husband and Wife—Her Choses in Action—Security—Judgment—Release of part of Land bound by—Divorce—Effect of Decree for, in Another State—Attorney—Appearance by.

1. Where an insolvent debtor conveyed property to one of his creditors, by a deed absolute on its face, for the purpose of securing the debt due the bargainee, and also to protect himself from security debts and pending suits, and at the same time took from the bargainee a bond to reconvey on the payment of the balance due bargainee, and afterwards said bargainee, at instance of the bargainor, purchased, at a sale under execution in favor of a third party, the interest of the bargainee in said property and took the sheriff's deed therefor: *Held*, that whether said former deed was fraudulent and void as to other creditors or not, the sheriff's deed would pass whatever interest remained in the debtor, in subordination, however, to his right to redeem in accordance with the terms of the bond, and upon payment of the additional sum advanced to secure the title.

2. The husband of a ward of said debtor, who was entitled to reduce her choses into his possession, having sued the debtor and his sureties on the guardian bond and obtained judgment, after the execution of the said deed by the guardian, the said debtor, and afterwards purchasing the land from said bargainee along with another person who had notice at the time, etc., and on suit brought by them against the guardian for possession, the land being sold, by consent of parties: *Held*, that the judgment on the guardian bond should be credited with such sum as the husband realized from the transaction.

3. A deed of release by the husband and wife, to one of several devisees of a surety on said guardian bond, of part of the lands devised by said surety, will not operate to exonerate other lands devised and subject to the judgment on the guardian bond in whole or in part.

4. In such case, the judgment attaching to all the lands of the deceased surety, partition among his devisees and heirs cannot impair the creditor's right to enforce satisfaction out of any of its parts; nor can it impair the right of the respective tenants to be relieved of a common burden by causing all to share in it, which right is unaffected by the creditor's subjecting some portion to the entire burden to the relief of the rest.

5. Where a wife who had resided here, *bona fide* removed to Illinois, and instituted an action for divorce in one of the courts of that state, and the husband in this State appeared by attorney and defended the action there: *Held*, that he was bound by a decree for divorce on a verdict rendered in that action, and that his property rights in her estate here were terminated from its date.

6. A letter from the husband to an attorney in Illinois saying, "I write to you to employ you as my attorney in the suit of myself and wife now pending

in your court," and enclosing a retaining fee, is sufficient authority for the appearance of the attorney in the suit, notwithstanding his adding in a subsequent part of the letter, "If it should be necessary that I should fight the case," etc., and this authority, taken in connection with the attorney's appearing, moving for time to answer, filing cross interrogatories to interrogatories in behalf of the wife, with a commission to take depositions, made the defendant a party to the action, even though, during its progress, a motion was made, and refused, to withdraw the appearance of the attorney.

CIVIL ACTION, tried before *Shipp, J.*, at October Term, 1887, of the Superior Court of VANCE County.

W. H. Arrington, and Pattie D. B. Arrington, then his wife, and sole plaintiff in the present suit, brought their action as (493) relators, in the name of the State, against her guardian, L. N. B. Battle, A. H. Arrington and Thomas J. A. Cooper, sureties to the guardian bond, and others, for the trust estates, which had been wasted, and at Fall Term, 1871, of the Superior Court of Franklin, recovered judgment for $8,878.30, with interest thereon from 1 January, 1871, and costs. The judgment was docketed in that county on 11 September, 1871, and in Nash County on 1 April of the next year.

The present action is prosecuted by the said Pattie D. B., as a *feme-sole,* upon an allegation that she has been divorced by a decree dissolving the bonds of matrimony, from her husband, and is prosecuted to subject the personal, and, if insufficient, the real estate of the deceased sureties, A. H. Arrington and Thomas J. A. Cooper, to the payment and satisfaction of said debt, the guardian being insolvent himself, and having, as administrator of the remaining surety, John Evans, wasted his estate. The action is against the devisees and executors, *nominatim,* of the estate of A. H. Arrington, the administrator and heir at law of Thomas J. A. Cooper and his widow, and her second husband, and others, among whom have become parties defendant, Spier Whitaker, trustee, and W. H. Morris & Sons, claiming as assignees of the fund from the husband, W. H. Arrington.

The object of the suit is to have an account taken of the personal and real estate of the said deceased sureties in the hands of their representatives, devisees and heirs, and, if the former prove insufficient, for a sale of said lands and the appropriation of the proceeds, as far as needed, to the discharge of the said judgment.

Answers were put in, and a reference ordered, in response to which a report was made by E. S. F. Giles of the administration accounts of the executors of A. H. Arrington with the estate of their testator, and of J. W. Blount, administrator of Thomas J. A. Copper, (494)

with the intestate's estate. From this report it appears that the personal estate of A. H. Arrington has been fully administered and exhausted, leaving a sum overpaid and due the executor, J. P. Arrington, of $2,678.71, and in like manner due the executor, B. L. Arrington, of $69.71, computed to 1 September, 1882.

It further appears that the defendant, J. W. Blount, has in his hands, ascertained and due 4 December, 1882, an unexpended surplus of $2,985, and that the intestate in his lifetime paid on the judgment, with interest added, $3,644.44, and his administrator has since paid on it $4,771.84.

It further appears from an exhibit that W. H. Arrington and wife, in October, 1878, after the rendition of the judgment in their favor, made a deed to John P. Arrington, one of the executors of A. H. Arrington, and a devisee under his will, conveying all their "right, title and interest" in, and releasing from the lien of their judgment, and all other liens they may have, a tract of land described, and supposed to contain 500 acres, allotted to said John P. Arrington in the division of the testator's land, such interest being declared to be by reason of said judgment against the executors docketed in Nash County, wherein the land lies.

Under another order of reference, made at Fall Term, 1883, to R. A. P. Cooley, in the present cause, and after the removal of it to the Superior Court of Vance, he reports as follows:

The payments made by Blount, administrator of the surety Cooper, out of the assets in his hands between September 25, 1874, and 16 July, 1878, are in amount $3,557.45, while those made by the executor, John P., between 1 February, 1875, and 16 February, 1876, are, in the aggregate, $2,000.

The residue of the judgment, after the last payment in July, 1878, due at that date, is $6,688.93, which sum, with interest to 1 December, 1884, $2,558.51, makes an aggregate due at that date of $9,247.44.

(495) Of this sum, in an adjustment between the estates of the sureties, that due from Cooper, at the date aforesaid, is $3,489.13, and from Arrington, $5,758.30.

The value of the land released from the judgment is $4,000, and that of the residue of the real estate of the testator, A. H. Arrington, situated in this State, is $25,000, while he owned real estate in Alabama of the value of $14,500.

There is a mortgage deed, executed on 25 June, 1872, by one W. H. Rowland to the testator, A. H. Arrington, as an indemnity against loss from suretyship on the former's administration bond, reported by the referee, on the liability whereof he finds due, on 1 December, 1884, the sum of $7,568.87, consisting of principal and interest.

The referee finds to be due on outstanding liabilities of the testator's estate $6,612.14, whereof is due on the judgment $5,758.30; and to one Nancy Bunn $853.84; and the liabilities of the estate of Cooper on the judgment, $3,489.13.

These are the only unsatisfied claims against the two estates.

These two reports were confirmed by the court, with the proviso that the defendants other than W. H. Arrington and his assignees, who were authorized to file an amended answer at the term, "may urge the defenses set up in the said amended answer in reduction of the amount due on the judgment described in the complaint, or in the discharge thereof."

It was further adjudged that, out of the estate of said A. H. Arrington, there be paid to Spier Whitaker, trustee, $1,550, with interest from 8 September, 1882, and the costs in the suit of T. S. Alford *v.* J. P. Arrington, pending in Nash Superior Court, and that, subject thereto, the balance due the executors be retained; that all other debts due said estate, as set forth in the two referees' reports, be paid by the executors; and that the cause be referred to said Cooley "to find (496) all issues of law and fact relating to the matter of defense set up for the first time in the amended answer," with certain other matters, not necessary to mention, with leave to the plaintiff, the said W. H. Arrington and his assignees, within sixty days, to reply thereto.

The referee accordingly made his report, submitting the evidence, from which, and the pleadings and admissions of parties, he finds that the said W. H. Arrington and the *feme* plaintiff intermarried in February, 1868, and prosecuted their suit upon the guardian bond against L. N. B. Battle, the principal, and the said A. H. Arrington, and Thomas J. A. Cooper, a living surety, and others, and made the recovery already stated.

That the only solvent sureties on the bond when judgment was rendered, and since, were said A. H. Arrington and said Cooper, and said judgment was also entered in Franklin Superior Court against L. F. Battle, and was docketed in Nash County on 2 April, 1879.

That sundry payments have been made on said judgment by the personal representatives of A. H. Arrington and Thos. J. A. Cooper, which leave a balance appearing to be due on 1 December, 1884, of $9,247.44, with interest on $6,688.93 from 1 December, 1884. The amount due 1 December, 1884, from Arrington's estate, was $5,758.30; from Cooper's estate, $3,489.13, as then appeared.

That A. H. Arrington died on the ..... day of ....., 1871, leaving a last will and testament, which was duly proved and recorded in Nash County, and the executors therein named, who have duly qualified as such, are the defendants, J. P. Arrington and B. L. Arrington, and the

said testator's devisees are the following: J. P. Arrington, Mary Thorpe, wife of W. L. Thorpe (she is now dead and W. L. Thorpe is her sole devisee), Thomas M. Arrington, A. H. Arrington, S. L. Arrington,

George Arrington (he has died since the commencement of this
(497) suit, unmarried, without issue and intestate), Robert W. Arrington, J. C. Arrington, who appears by his general guardian, J. J. Battle.

Said parties are the only children of the testator, A. H. Arrington, the sole devisees and legatees under said will, and are each entitled to an equal share of his estate.

Thos. J. A. Cooper died in Nash County, intestate, and John W. Blount is his administrator. O. Williams was his widow, who has since intermarried with W. A. Williams, and his only child is Lizzie Cooper—all these being defendants herein.

That the value of A. H. Arrington's real estate in Nash County was $29,000, and of his real estate in Alabama, $14,500.

At the time of filing the undersigned's previous report, the outstanding liabilities of the two estates were ascertained and stated.

That on 30 October, 1878, the plaintiff and her then husband, W. H. Arrington, executed a deed to J. P. Arrington, one of the defendants, releasing from said judgment certain land which he had acquired from the testator, A. H. Arrington, said land being worth $4,000. (For copy of said deed of release, see report previously filed by the undersigned.)

That the personal estate of the testator, A. H. Arrington, has been exhausted, and there is due to the executor, B. L. Arrington, $269.71, and to the executor, J. P. Arrington, $267.81, with interest in each case from 1 September, 1882. The debt of $269.71 has, for value, been assigned by B. L. Arrington to J. P. Arrington. This indebtedness due to J. P. Arrington, $2,948.42, with interest from 1 September, 1882, has been mortgaged to Spier Whitaker, trustee, to secure a debt of $1,550,

with interest from 8 September, 1882, and certain costs.
(498) That the Rowland mortgage, described in the previous report of the undersigned, has been foreclosed under order of court. (See judgment rendered at Spring Term, 1887, of Nash Superior Court, in the civil action entitled J. P. Arrington and B. L. Arrington, executors of A. H. Arrington, and others, against A. W. Rowland, executor, and another.) The land was sold for $3,500, and was bid in by J. P. Arrington for his father's estate.

That in 1869, on 5 March, the said L. N. B. Battle conveyed valuable real and personal estate to A. G. McIlwaine and R. D. McIlwaine by a deed recorded in the register's office of Nash County, in book 23, at page 580, the consideration expressed being $3,790, a debt due from said

L. N. B. Battle to said McIlwaines. (This deed is produced in evidence, copy herewith filed, marked "N.") That said deed was made for the purpose of securing the debt to McIlwaines, and to defend the said L. N. B. Battle from the payment of surety debts and from the event of suits then pending against him, and was not intended as a fee-simple deed.

That on the same day of the conveyance to the McIlwaines, the said McIlwaines, by their agent, S. S. Bridgers, made and executed to the said L. N. B. Battle their obligation, in the penal sum of seven thousand and six hundred dollars, to be void if the said parties should, upon the payment to them by the said L. N. B. Battle, on or before 5 March, 1872, of the sum of three thousand one hundred and eighteen dollars and sixty cents, with interest from date, execute and deliver to him, the said Battle, or to any one whom he should elect, at any time he should require the same, a fee-simple and guarantee deed to all of said property, etc.; that on the same day the said McIlwaines, by their agent, S. S. Bridgers, made and delivered to the said Battle a paper-writing authorizing and empowering him to act as their agent in the management of said property.

That the said Battle, during the years 1870-1871, sent to the (499) said McIlwaines, in Petersburg, Va., thirty-six bales of cotton, and directed them first to pay an account which he owed them for supplies, and to give him credit for the balance of the proceeds of said cotton on the debt due them for the purchase of the aforesaid property, which they did.

That in August, 1871, G. N. Lewis, sheriff of Nash County, by virtue of an execution in his hands in favor of W. W. Parker and against said L. N. B. Battle, sold the interest of said Battle in the real estate conveyed by said deed, at which sale the said A. G. McIlwaine and R. D. McIlwaine, at the request of the said Battle, became the purchasers at the price of fifty dollars, and took the sheriff's deed therefor. (See exhibit "I," herewith filed.) The said McIlwaines paid, at the request of the said Battle, $350 to said Parker, he having agreed to accept that in discharge of his debt, which amounted to about $700; that the said McIlwaines, after they had made the purchase, told the said Battle that whatever interest they acquired by said purchase they would convey to the defendant upon the payment of the amount expressed in the aforesaid obligation, and the three hundred and fifty dollars paid by them to Parker added.

That on 6 June, 1872, the said McIlwaines made and executed to B. H. Bunn a power of attorney, authorizing him, in their name, to

dispose of their interest in said property to such persons as to him should seem best. (A copy of this document herewith filed, marked "D.")

That negotiations were then had between said B. H. Bunn and said L. N. B. Battle, touching the amount of the indebtedness due from the latter to said McIlwaines, and for the settlement of the same; and said Battle's friend, Wm. Rich, agreed to advance whatever amount was justly due as aforesaid from said Battle, and to take a conveyance of the legal title to said property, to hold in trust for the security of the sum so advanced.

(500) That on 29 August, 1872, the said McIlwaines (through their attorney in fact, B. H. Bunn) sold and conveyed all their interest in said property to the defendant, W. H. Arrington, and L. F. Battle, for $5,280, and one of the grantees, L. F. Battle, had notice that the said McIlwaines held in trust, and that the sum above mentioned was the amount claimed by them, and for the security whereof they held the legal title. (See exhibit "P," herewith filed.)

That said property was worth $10,967.70.

That on 2 November, 1872, the said W. H. Arrington and L. F. Battle brought suit against the said L. N. B. Battle for the recovery of the possession of said property, and other relief. (See exhibit "A," herewith filed.)

That at Spring Term, 1874, in said court, in said action, a decree by consent, signed by the attorneys of the parties and approved by his Honor, S. W. Watts, was rendered, appointing Calvin Ward and N. W. Boddie receivers and commissioners, and directing them to sell the real and personal property described in the deed from L. N. B. Battle to the McIlwaines and in their deed to W. H. Arrington and L. F. Battle. (Copy of said decree will be found among papers marked "A.")

That on 21 April, 1874, the said commissioners sold said property for the aggregate amount of $10,967.70; that a report of sale was filed and confirmed at Fall Term, 1874, the commissioners being therein directed, after paying costs ($31.50) and retaining $300 for their services, to divide the residue of the proceeds of sale equally between the said W. H. Arrington and L. F. Battle, which was done accordingly. (See exhibits "B" and "C," herewith filed.)

I find as matters of law:

1. That if all of the legatees and devisees of A. H. Arrington were jointly responsible for the debts of the testator, the effect of the deed of release from W. H. Arrington and Pattie D. B. Arrington to

(501) J. P. Arrington would be to discharge a part of the judgment debt described in the complaint equal to the ratable portion thereof chargeable on the land released.

2. That L. N. B. Battle had an equitable estate in the property conveyed to the McIlwaines, which was subject to the lien of the judgment described in the complaint.

3. That W. H. Arrington had full control over said judgment, with power to collect the same or release or discharge it.

4. That W. H. Arrington is to be treated as having been paid on said judgment the amount he received from the commissioners, N. W. Boddie and Calvin Ward, less the amount he paid to the McIlwaines ($2,640), and the judgment is, *pro tanto,* discharged to that extent as to him and the plaintiff.

5. That the purchase of said property by the McIlwaines from G. N. Lewis, sheriff, inured to the benefit of the *cestui que trust,* L. N. B. Battle.

6. That the latter's interest in said property was not a pure unmixed trust, that could be sold under a *fi. fa.,* and hence said purchasers by said purchase acquired nothing.

7. That said Battle's interest in said property being certainly worth what it was sold for, less the amount of the debt secured to the McIlwaines, the judgment is to be credited as of 21 April, 1874, with $10,967.70, less the secured debt due the McIlwaines, and $331.50 costs, with the interest of course added to McIlwaine's debt.

8. That the said L. N. B. Battle is not entitled to credit of $1,000, on account of cotton shipped the McIlwaines, as the evidence shows that this cotton was applied elsewhere than in discharge of said secured indebtedness.

9. That the said W. H. Arrington and L. F. Battle had constructive notice of the trust existing in the hands of the (502) McIlwaines sufficient to put them on inquiry.

10. That the following is a more exact statement, showing what credit ought to be applied to said judgment described in the complaint (this aside from the discharge on account of the deed of release above mentioned):

Property was sold 21 April, 1874, for		$10,967.08
Ten per cent cash	$ 1,096.77	
Deduct costs and commissions	331.50	
	$ 765.27	
Interest to 1 January, 1875	31.88	
Ninety per cent deferred payment due 1 January, 1875	9,870.93	
	$10,668.08	

Amount received by W. H. Arrington		$ 5,334.04
Amount of McIlwaines' debt, 29 August, 1872	$ 5,280.00	
Interest to 1 January, 1875	739.25	
Making	6,019.25	
One-half paid by W. H. Arrington	3,009.62	
Leaving a difference between the amount paid by W. H. Arrington and the amount he received of		$ 2,324.42

which, it is respectfully submitted, should be applied to the discharge of the judgment described in the complaint, so far as it will go, and this as of 1 January, 1875. The said W. H. Arrington could have applied this amount to the said judgment, and equity will consider it so applied.

Judgment will fix the undisputed rights of Mrs. Nancy Bunn, J. P. Arrington, executor, and Spier Whitaker, trustee.

All of which is respectfully submitted.

The defendants, other than W. H. Arrington and his assignees, (503) filed twelve exceptions to the report, of which all but that numbered 2 were overruled, and that alone sustained, while the plaintiff, Pattie D. B., filed thirteen, whereof those numbered 1, 3, 4, 6, 7, 9, 10, 11 and 12 were sustained, and those numbered 2, 5, 8 and 13 were overruled, and judgment having been entered, which was subsequently modified, the defendants, other than W. H. Arrington and W. H. Morris & Sons, appealed.

Spier Whitaker for plaintiff.

E. C. Smith for W. H. Arrington and W. H. Morris & Sons; Jacob Battle for the other defendants.

SMITH, C. J., after stating the case: The referee disallowed the credit of $1,000, claimed upon the consignment of cotton to the McIlwaines, or any abatement of the debt by reason of the deed of release to John P. Arrington of the judgment lien upon his land, but does admit a deduction therefrom to the amount of the excess received on the sale of the land of L. N. B. Battle, the principal debtor, over the moneys expended in obtaining the title thereto.

The rulings of the court disallow any abatement of the debt for these causes, and charge the estates of both sureties, *in solido,* with the whole debt, and fix the executors with personal assets to the amount of $3,500, devised under the Rowland mortgage.

Without a minute inquiry into the terms of each of the exceptions specifically, the appeal, in substance, brings up, for review, the rulings upon points mentioned, and to such we confine our attention.

The appellants (and in using the term we do not include, in considering this part of the appeal, the said W. H. Arrington and his assignees, whose interests are those of the plaintiff herein) insist as follows:

1. The court erred in overruling the referee in disallowing the (504) credit for the excess received in disposing of the land of the guardian, obtained from the McIlwaines, by which the referee reduced the judgment debt. This sum, it is said, belonged to the principal, and being received by the husband, while entitled to reduce into possession, and apply to his own use the wife's choses in action, must be deemed a reduction into possession and discharge of so much of the debt as if a direct payment had been made. The facts connected with this exception are fully set out in the referee's findings, and do not require repetition. Sections 13 and 14, and, again, sections 16 to 23, inclusive.

Whatever infirmities may exist in the conveyance from L. N. B. Battle to the McIlwaines, from the fraudulent intent of the former, as between the parties, it was effectual, and subject to the condition for redemption contained in the contemporaneous sealed instrument given by the bargainees to the bargainor. The title was made good under the execution sale, under the judgment recovered by W. W. Parker, at which the said McIlwaines bought whatever estate remained in the judgment debtor, and took the sheriff's deed therefor, at the instance of the latter. This, if the deed was fraudulent, would pass, not the right retained to redeem, but the full legal estate, as if no conveyance had been made. But it would still be held by the purchasers, in subordination to the debtor's right of redemption, upon payment of the additional sum advanced to secure the title at the request of Battle. These sums constituted the incumbrance, the removal whereof entitled him to a reconveyance. In this condition, and while Battle was negotiating to raise the requisite amount, which one William Rich agreed to pay, and take the title and hold it as a security therefor, the said McIlwaines, through their attorney in fact, sold and conveyed, for the consideration of $6,280, the said land to said W. H. Arrington and L. F. Battle, this sum being claimed by the grantors as that for which the property was held as a security. An action was brought by the said (505) purchasers against Battle, who had remained in possession, to recover the same, and for other relief, in which, by consent, a decree of sale was entered, and, pursuant thereto, the premises were put up for sale on 21 April, 1884, and brought the sum of $10,967.70. This sum, after deducting expenses of the suit and sale, $331.50, was divided be-

tween the plaintiffs in the action. The appropriation of the moiety by the said W. H. Arrington to his own use was of moneys belonging to the principal debtor, Battle, for which, in equity, the latter was entitled to a credit, and therefore must be regarded as a reduction into his possession of so much of the chose in action as if directly paid by him. The self-adjustment is but the enforcement of an equity to have the sum thus received applied as a payment upon the debt, the husband having then the right to collect it, or any part of it, and appropriate the sum collected to his own use.

We, therefore, reverse the ruling of the judge, and restore that of the referee in respect to this sum.

2. The appellants claim a further reduction of the judgment by reason of the deed of release given the executor and devisee, John P. Arrington, on land of the value of $4,000, and an exoneration altogether or *pro tanto* of the remaining lands liable for the debt. We are unable to give either effect to the act of exoneration, as demanded by the appellants. If this was done to enable the devisee to make sale of the land unencumbered, the personal liability of the said John P. would remain to account for the funds received therefor in an apportionment of the loss among the different terre-tenants, and if retained itself would not escape the obligation to contribute. The rule in equity, under which an exemption results from the release of one of several sureties to the same obligation to the others, is personal, and does not prevail, even in such cases, when there is but an agreement or covenant not to (506) sue, and the relinquishment of a right to proceed against one of several tracts of land with different owners is, in legal operation, but an agreement to look only to other lands, alike subject to a lien, as a means of satisfaction. *Dudley v. Bland,* 83 N. C., 220, and cases cited.

If there were a right of exoneration, it would be confined to such excesses required of others, over and above the aliquot portion of each—the release operating only as would a payment, leaving to all others the duty of contributing their ratable parts.

But the judgment here attaches to the *entire* real estate of the said A. H. Arrington as a unity, and the subdivision into parts, upon a partition proceeding, cannot impair the creditor's right to enforce satisfaction out of any of its parts, as that right existed in the testator's lifetime, nor can it impair the right of the respective tenants to be relieved of a common burden, by causing all to share in it, a right unaffected by the creditor's action, in subjecting some portion to the entire burden in relief of the residue. The contribution is the consequence of the relations of tenants who have made partition, which the creditor cannot destroy or impair.

We, therefore, uphold the ruling of the court which sustains the action of the referee in refusing any abatement of the debt on this account.

3. The further reduction demanded in the McIlwaine debt, for the proceeds of cotton consigned, above the debt incurred for supplies, thereby enlarging, by the value of the excess of $1,000, the sum with which the judgment should be credited, upon the resale of the land, cannot be allowed, for the reason that the sum went into the hands of Battle as his homestead exemption. This was surrendered to him in the suit to recover the land, and never having been received by W. H. Arrington, could not be applied to a payment upon the judgment; for it ought to have been thus collected and applied, and a personal liability rests upon him for the loss, it is not money received, and cannot (507) diminish the debt as if in fact paid.

These embracing the substantial matters presented in the record, we do not find it needful to pursue and discuss the exceptions in detail outside of those disposed of, and in general terms deem it sufficient to say that, except in the error pointed out, the judgment must be affirmed, when modified in accordance with this opinion.

Upon the trial of this issue, the record of proceedings in said court was exhibited in evidence, and parol proof offered.

The defendant, W. H. Arrington and W. H. Morris & Sons, his assignees, asked of the court the following instructions, predicated upon the evidence:

"1. That upon the *whole* evidence W. H. Arrington did not appear either personally or by any duly constituted attorney in the said action for divorce, and therefore the decree pronounced in said action is null and void.

"2. That the courts of Illinois had no jurisdiction of this cause of action, and hence the decree is null and of no effect in North Carolina.

"3. That the courts of Illinois had no jurisdiction of or over W. H. Arrington, he never having been an actual resident of said State, and hence the decree in said cause is void and of no effect in North Carolina.

"4. There is no evidence to show that an appearance by attorney gives the court jurisdiction of a party in the State of Illinois, and therefore, even though appearance had been made by attorney in said court of said State, unless the statutes of said State regulating said appearance had been proven, such decree cannot be sustained under our law.

"5. That if Mrs. Arrington went to Illinois for the purpose of obtaining a divorce from the said W. H. Arrington, the decree granting such divorce is null and void.

(508) "6. There is no evidence to show that a residence of one year is sufficient to obtain a divorce in Illinois, for that the statutes of Illinois regulating the length of residence in that State requisite to render competent a suit for divorce in the courts of that State have not been proven as by law required."

The presiding judge instructed the jury as follows:

"There is but one issue or question submitted to you to pass upon in this case, and that is whether the plaintiff and the defendant, W. H. Arrington, were divorced by the decree of the court in Illinois, which has been read to you in evidence. You see there was a decree or judgment of that court, granting to Mrs. Arrington a divorce from her husband.

"And the question for you is whether that judgment is of legal, binding effect here. If it is, your answer should be, 'Yes'; if it is not, and she is still his wife by the laws of North Carolina, you should answer 'No.'

"You are the sole arbitrators of the fact, but your judgment is controlled by the law, and it is incumbent upon me to explain to you the principles of law which govern this case, and they are not difficult nor perplexing. In the first place, did Mrs. Arrington have such a domicile in the State of Illinois, at the time the suit for divorce was instituted, as gave the courts of that State jurisdiction over her cause? Ordinarily, the domicile of the husband is the domicile of the wife, and the authority to fix that domicile is in the husband. But there are circumstances which would warrant the wife in changing her domicile. For instance, if the husband should, by cruel or barbarous treatment, endanger her life, or should offer such indignities to her person as to render her condition intolerable and her life burdensome, in either of these cases the wife would have the right to change her domicile; and there is no law which would require her to remain in North Carolina.

"If it were more convenient to her or more pleasant to her to
(509) live in another State or another country, she would have the right to do so. Now, apply these principles which I have laid down.

"Did the husband, W. H. Arrington, afford to his wife the home which he ought to have done and the treatment which is due from husband to wife, and this is, at the least, kindness, support, protection; or did he treat her in such a manner as to render her condition intolerable and her life burdensome?

"If he treated her with kindness, and afforded her the support and protection which he ought to have done, and was unwilling for her to change her domicile, she would have no right to leave him. But if he treated her with such indignities, or acted in either of those ways which

I have cited to you as affording her just cause for leaving him, she had a right to leave him and to select her own place of residence, either in this State, in Illinois, or anywhere else. If she left him without cause, and went to Illinois, not with the bona fide intention of living there, but simply for the purpose of obtaining, through the courts of that State, a divorce from her husband, it would be a fraud upon the jurisdiction of the courts of that State, even if she remained there for one year, as required by the statutes of Illinois, before bringing her action for divorce; and if, after considering the evidence which has been submitted to you, and the instructions which I am now giving you, you come to the conclusion that she had no just cause for this step, and was not acting in good faith, as I have described, then you should answer, 'No'; *i. e.*, they were not divorced.

"But if she had good cause to leave him for any of the reasons I have given you, and did go to Illinois with the bona fide intention of residing there, even though she intended to sue for a divorce, and remained there a year, she had the right to bring her suit for divorce against him there, and if he appeared there in person or by authorized counsel, and so recognized the jurisdiction of the court over him, he is bound (510) by its decrees, you will answer, 'Yes'; *i. e.*, they were divorced by the decree of the Circuit Court of Sangamon County, Illinois.

"Now, if you have come to the conclusion that she did have cause to leave her husband, and went to Illinois with the bona fide intention of remaining there, I instruct you that the letter of defendant of 5 August, 1880, to Clinton L. Conkling, attorney, gave him (Conkling) full authority to enter an appearance; and as he did enter an appearance in the month of August, the court of Illinois thereby acquired jurisdiction over him, which it could not have done by personal service in North Carolina, nor by publication, and you will answer, 'Yes.'

"But if you find that she had no cause to leave her husband, and did not go to Illinois with the bona fide intention of remaining there, but simply to stay there long enough to enable her to bring her suit for divorce, the court had no jurisdiction, and you will answer, 'No.'"

Defendants excepted to the refusal to give the special instruction as asked, and to the instruction as given.

The jury responded to the issue, "Yes."

The sum to be paid being ascertained, we are next to inquire whether it belongs to the plaintiff or is subject to the disposal of her husband or his assignees, and this depends upon the efficacy of the decree of divorce *a vinculo* obtained by her in the proceeding instituted in Sangamon Circuit Court, sitting in Chancery, in the State of Illinois, against him for that purpose in dissolving the bonds of matrimony and rein-

stating her in the possession of all her property rights as a *feme sole*. Upon an issue framed to raise the question, and under instructions of the court, the jury responded in the affirmative.

(511) In our opinion, the directions given to the jury in passing upon the issue properly presented the matter, and the law bearing upon it, for an intelligent rendering of the verdict. The bona fides in the act of removal was made an essential element in giving the jurisdiction invoked in a decree of separation that puts an end to the marriage relation.

We sustain also the instruction that the communication to the attorney in Illinois, dated 5 August, 1880, conveys an authority to him to appear in the cause for her husband, and warranted his action in the premises. In it he uses these words: "I write to employ you as my attorney in the suit of myself and wife, which is now pending here and *in your court*. I herewith enclose you ten dollars for advice and retaining fee in the case." It is true, in the concluding part of the letter, after detailing his domestic troubles, he adds: "If it should be necessary that I should fight the case, then I am willing to pay you a liberal fee to appear for me. Please answer at once, and write me what you will charge me to appear in the case, or what you will charge me to guarantee me my success in the case and possession of my children."

This indicates some misgiving as to what course should be pursued, but does not recall the previous employment.

When depositions in the cause were to be taken for the plaintiff, interrogatories on her behalf were sent out with the *dedimus protestatem* to one Harper, as commissioner, in Nash County, to which were added cross-interrogatories, signed Clinton L. Conkling, attorney for defendant, and with this endorsement, "Filed 6 September, A.D. 1880. James A. Winston, clerk."

The commission was executed, the depositions taken, and direct and cross-interrogatories answered, and return made to the court.

Again, the record contained this entry, made on 4 October,

(512) 1880, a term day of said court:

"PATTIE ARRINGTON, *Complainant*,

v.

WILLIAM H. ARRINGTON, *Defendant*.

In Chancery: For Divorce.

Now, at this day, come the parties hereto, by their solicitors, and the complainant, by her solicitor, moves the court that defendant be required to file his answer to the bill of complaint, whereupon, the defend-

ant, by his solicitor, C. L. Conkling, moves that the time for filing defendant's answer be extended to 4 November next, which is allowed, and it was thereupon ordered that the said defendant file his answer to said bill by said 4 November."

Subsequently, application to withdraw the appearance was made and refused, and the cause proceeded, without further interference from defendant's counsel, to a final determination.

The understood and exercised power to interpose thus introduces the defendant into the action, and the court, thus having jurisdiction of the subject-matter and of the parties, may proceed to final judgment, and it becomes binding and conclusive on both, as a dissolution of the relation. We are not disposed to concede this effect to a proceeding wholly *ex parte,* and wherein no personal service of process is made on the defendant, and he is brought in by publication under the local law of the State, as is strenuously, but unnecessarily, pressed in argument, though in direct conflict with the case of *Irby v. Wilson,* 1 D. & B. Eq., 568, a decision which has not been disturbed since its rendition, in 1837, by the eminent judge who then constituted one of the Court, as to the extra-territorial effect of such a decree upon a nonresident defendant. There are cases, and some are cited in the brief of the plaintiff's counsel, to the effect that an *ex parte* decree of divorce, obtained by one who has a domicile in the State in which the court is held that grants it, operates as a change of the status of the plaintiff, and its efficacy prevails everywhere. Such is the ruling in *Ditson v.* (513) *Ditson,* 4 R. I., 87, based on Art. IV, sec. 1, of the Constitution of the United States. Such is declared to be the result where the husband resided in Connecticut with his wife, deserted her, and left the State, and she obtained divorce in one of its courts. *Hull v. Hull,* 2 Stroth., S. C., 174.

Such a proceeding is recognized as valid in the State granting it, because authorized by its laws, as well as to the marriage relation as to rights of property, growing out of relations, situated within its jurisdiction. *Harrison v. Harrison,* 19 Ala., 499.

There are admitted difficulties in reconciling the rulings which determine the status of a resident plaintiff, without determining, at the same time, that of the nonresident defendant, where the relation subsists between the two, and what disunites the one fails to disunite the other; and, on the other hand, to take from one who has never been served with personal process, by a foreign judgment, not only personal, but property rights, possessed beyond the jurisdictional limits. These difficulties may be removed by harmonious and consistent legislation, which they seem to invite. But our province is to interpret, not to

make, the law, and we must abide by that of our own State. The case most relied on, or at least most largely quoted from, in the brief therein, *Cheever v. Wilson,* 9 Wall., 108, does not sustain the contention of counsel. The husband, who, with his wife, resided in Washington City, on her removal to Indiana, and instituting the suit against him for divorce, both put in his answer thereto and filed a bill against her, to which she appeared without process. The controversy was as to the residence of the wife, and the acquirement of jurisdiction in the Circuit Court of Indiana.

The present case has peculiar features in its claims for recognition in this State. The marriage contract was entered into here, and the facts alleged, which form the grounds of the divorce, occurred here,
(514) and are insufficient to warrant a disruption of the marriage tie, and are cause for a separation only. They are adjudged sufficient in Illinois, whose court takes cognizance of the complaint and decrees a dissolution. Could the court of this State, were the defendant not a party, permit the rights of property in the wife's estate to be divested and taken from him? Would it not be, intended or not, an evasion and fraud upon our law to allow to the decree such an operation? We should be slow to recognize such a result. But the point does not arise, though discussed in a contingent aspect of the case for the plaintiff, since the defendant, by the act of his counsel and under his authority, has become a voluntary party to the action, and submitted to the jurisdiction of the court in the premises, so that he must abide by the consequences.

The plaintiff, ceasing to be the wife, is to be reinstated to the right of all her choses in action, not reduced to possession by her husband, before the entering up the decree of separation. This is the settled law upon the subject.

In *Slave v. Peace,* 8 Conn., 541, the effect of a legislative divorce upon rights of property, arising out of marriage in extinguishing it, was earnestly contested as a violation of the contract, under the Federal Constitution, but it was sustained and put upon the same footing as a judicial divorce, and such is now the declared law in reference to each mode of separation *a vinculo matrimonii.* 1 Bishop Mar. and Div., section 693.

"Personal choses in action which belong to the wife, reduced into possession by the husband, in the words of a recent author, remain his, but as to rights dependent on marriage, and not actually vested, a full divorce or the legal annihilation ends them." Schouler's Dom. Rel., sec. 221, and authorities cited in the notes.

(515) The rule is supplemented by our act of 1871-72 (The Code, sec. 1843), which puts an end to an estate in dower or by curtesy,

a claim to the year's provisions or distributive share in the estate of either, the right to administer, and "every right and estate in the real or personal estate of the other party, which, by settlement before or after marriage, was settled upon such party in consideration of the marriage only." The judgment will be thus

Modified and affirmed.

Cited: Arrington v. Arrington, 114 N. C., 165; *Harris v. Harris,* 115 N. C., 588; *Arrington v. Arrington,* 127 N. C., 192; *Moore v. Moore,* 130 N. C., 335; *Bidwell v. Bidwell,* 139 N. C., 410.

J. W. WINFREE v. E. G. BAGLEY.

Summons, service by Publication—Attachment—The Code, secs. 218(3) and 3765 (6).

1. A *chose in action* is *property,* and embraced in the terms of section 218(3) of The Code, providing for service by publication, "when the defendant is not a resident of this State, but has property therein," etc.

2. In an action for unliquidated damages no attachment can issue, and constructive service, by publication, in such action, is insufficient for any purpose.

THIS was a motion to dismiss, heard before *Philips, J.,* at June Term, 1887, of the Superior Court of GUILFORD County.

The action was for libel, and the defendant being a nonresident, publication of the summons was made. The affidavit upon which the order was made stated that the plaintiff was a resident of North Carolina, that the defendant had property within the State, and was in other respects regular. The defendant entered a special appearance for the purpose of making this motion *to dismiss,* and filed an affidavit, in which he stated that he had no property within this State. (516) He admitted that the plaintiff owed to him a bond for $1,000, dated 24 April, 1882, and payable on demand. His contention is, "that said bond is not such property within the State of North Carolina, within the provision of the statute (The Code, sec. 218, subdiv. 3), in order to give the courts of this State jurisdiction to hear and determine actions against a nonresident, and, if within the provision of said statute, he is further advised, and so charges, that the same is unconstitutional and void."

His Honor denied the motion, and the defendant appealed.

J. T. Morehead for plaintiff.
J. A. Barringer for defendant.

SHEPHERD, J., after stating the facts: The Code, sec. 218, subdiv. 3, provides that service, by publication, may be made "where he (the defendant) is not a resident of this State, but has property therein, and the court has jurisdiction of the subject of the action." The defendant contends that the bond mentioned in the affidavit is not "property" within the meaning of the above section. The cases cited by him involved the construction of the word "property" when made in wills, and have no application to the construction of the word as used in The Code. Section 3765, subdiv. 6, provides that the word property, when used in statutes, shall "include all property, both real and personal." So there can be no question that a *chose in action* is embraced in section 218.

But there is another objection, which we think is fatal to the plaintiff, unless personal service can be made on the defendant. No attachment has been issued in this action, and none can issue, because it is for unliquidated damages. *Price v. Cox,* 83 N. C., 261; *Wilson v. Mfg. Co.,*
88 N. C., 5. There being no attachment, and the suit being merely
(517) *in personam,* constructive service in this form, upon a nonresident, is insufficient for any purpose. *Justice Field,* in delivering the opinion in the case of *Pennoyer v. Neff,* 95 U. S., 714, says: "The want of authority of the tribunals of a State to adjudicate upon the obligation of nonresidents, where they have no property within its limits, is not denied by the court below, but the position is announced that, when they have property within the State, it is immaterial whether the property is in the first instance brought under the control of the court, by attachment or some other equivalent act, and afterwards applied by its judgment to the satisfaction of demands against its owner, or such demands be first established in a personal action, and the property of the nonresident be afterwards seized and sold on execution. But the answer to this position has already been given in the statement, that the jurisdiction of the court, to inquire into and determine his obligations at all, is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon the facts to be ascertained after it has tried the cause and rendered the judgment. . . . Even if the positions announced were confined to cases where the nonresident defendant possessed property in the State at the commencement of the action, it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution, the defendant had or had not disposed of the

property. If, before the levy, the property should be sold, then, according to this position, the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law. The validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently."

To this reasoning it has been said, that each State has the right (518) to regulate its own proceedings, so far as to bind the property of the debtor within its territory, and that there is no mode of directly reviewing or impeaching the judgment in the State where it is rendered. The force of this is admitted by the learned *Justice,* but he says, "that since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be *directly questioned,* and their enforcement *in the State* resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties, over whom that court has no jurisdiction, do not constitute due process of law, . . . except in cases affecting the personal *status* of the plaintiff, and in cases in which that mode of service may be considered to have been assented to in advance, as hereinafter mentioned. The substituted service of process by publication allowed by the laws of Oregon (which is the same as in North Carolina), and by similar laws in other States, where actions are brought against nonresidents, is effectual only where, in connection with process against the person for commencing the action, property in the State *is brought under the control of the Court,* and subject to its disposition by process adopted for that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein."

This decision, which we are constrained to follow, is so contrary to the general view, as to the right of a State to regulate its own process in subjecting the property of nonresident debtors within its limits, that we have thought it proper to quote largely from the opinion, in order that it may be seen upon what ground the restriction is based.

For the above reasons, the court below should declare that there has been no service on the defendant, and that he is not required to answer. As the defendant's motion was simply to *dismiss* the action, and there has been no *discontinuance,* his Honor was correct in his ruling, as the court had jurisdiction of the subject-matter, and the (519) plaintiff may be able to make personal service in the State; we have deemed it our duty, however, to declare that as yet there has not been due and proper service, in order that the court below may proceed advisedly.

No error. Affirmed.

Cited: Boyd v. Ins. Co., 111 N. C., 378; *Mullen v. Canal Co.,* 114 N. C., 10; *Long v. Ins. Co., ibid.,* 469; *Kiser v. Combs, ibid.,* 642; *Morris v. Burgess,* 116 N. C., 42; *Bernhardt v. Brown,* 118 N. C., 706, 709; *Foushee v. Owen,* 122 N. C., 363; *Cooper v. Security Co., ibid.,* 465; *Balk v. Harris,* 124 N. C., 468; *Best v. Mortgage Co.,* 128 N. C., 354; *Sexton v. Ins. Co.,* 132 N. C., 2; *Evans v. Alridge,* 133 N. C., 380; *Goodwin v. Claytor,* 137 N. C., 230; *May v. Getty,* 140 N. C., 318; *Lemly v. Ellis,* 143 N. C., 213; *Currie v. Mining Co.,* 157 N. C., 218; *Armstrong v. Kinsell,* 164 N. C., 127; *Everitt v. Austin,* 169 N. C., 622; *Patrick v. Baker,* 180 N. C., 591; *Mohn v. Cressey,* 193 N. C., 571; *Frazier v. Commissioners,* 194 N. C., 49.

WILLIAM EDWARDS v. JOHN DICKINSON.

Deeds—Unregistered—Waiver of Tort—Damages.

1. An unregistered deed vests an *inchoate legal estate,* deficient only in the want of registration, under our statute, and when tortiously destroyed by the bargainor after delivery, he will be decreed, in a proper action, to execute another deed for purpose of registration.

2. Where the plaintiff, the bargainee in an unregistered deed from his father-in-law, committed it to the latter to be kept for him during his absence from home, and the father-in-law wrongfully destroyed the deed and executed another to his daughter, plaintiff's wife, and the plaintiff, instead of bringing an action to have the latter deed canceled and another deed executed to him to be registered, sued the bargainor for the value of the land: *Held,* (1) that there being no express promise to repay the purchase money, none was implied, and plaintiff was not entitled to recover the value of the land; but (2) that his action would lie for the spoliation of his deed, for such damages as plaintiff would suffer in regaining the land and securing a restoration of the deed.

CIVIL ACTION, heard before *Philips, J.,* at Spring Term, 1889, of the Superior Court of ALLEGHANY.

The plaintiff, on 3 August, 1888, sued out of the office of the clerk of the Superior Court of Alleghany, a summons against the defendant, and simultaneously a warrant of attachment against his estate, he (520) being a nonresident, and, to complete the service, obtained an order of publication, which was accordingly executed.

At Spring Term, 1889, the defendant's counsel, A. E. Holton and George W. Brown, entered for him a special appearance and moved to

dismiss the action, for the reason that notice of attachment had not been given, as directed by law, which was denied; and thereupon they entered a general appearance for him.

The complaint filed, the demurrer thereto, and the ruling of the court upon the issue thus made, and the judgment rendered, from which the defendant takes an appeal, are as follows:

Plaintiff complains and alleges:

"1. That on 23 January, 1873, he purchased of the defendant a valuable tract of land, lying in our said county of Alleghany, on Little River, adjoining the lands of Morgan Edwards, Solomon Fender and others, being the lands whereon plaintiff now lives; the defendant at the time executed and delivered to plaintiff his several good and sufficient deeds for said lands, and plaintiff paid to defendant the price in full for the same, to wit, thirty-two hundred dollars.

"2. That plaintiff took possession of said deeds, but failed at the time to register the same, and kept them in his own possession until about the winter of 1874 or 1875; when about starting to the West, where he expected to remain some time, he deposited said unregistered deeds with defendant, who is his father-in-law, and in whom plaintiff had entire confidence, for safe-keeping, and did not doubt said deeds would be returned when called for.

"3. That after plaintiff returned from the West he sent to defendant, asking him to return said deeds, but on some pretense he declined to do so; and about 23 March, 1885, plaintiff went to defendant and demanded the said deeds, when he (the defendant) peremptorily refused to give them to plaintiff; and soon thereafter plaintiff discovered (521) that the defendant had, at some time while they were in his possession, mutilated and destroyed said deeds, and had conveyed said land in fee to the wife of the plaintiff, who is defendant's daughter, and intending thereby to advance her out of his estate; and by this act of defendant he has rendered himself wholly unable to surrender said deeds to plaintiff, or to reconvey said land to him, thereby becoming indebted to plaintiff for the value of said land, which, after deducting all just credits to which the defendant is entitled, amounts to twenty-five hundred dollars and interest thereon.

"4. That plaintiff is a resident and citizen of our said county and State, and the defendant, for his whole life, has been, and now is, a citizen of Virginia.

"Plaintiff, therefore, demands judgment:

"(1) For twenty-five hundred dollars and interest thereon from December, 1873.

"(2) For such other and further relief as the nature and justice of plaintiff's case demands; and for costs."

The defendant moved to dismiss the proceeding, on the ground that the notice had not been given according to law, and, upon the court's overruling his motion, the defendant filed a demurrer, as follows:

"1. That the complaint does not state facts sufficient to constitute a cause of action, in that it shows that the title of the lands is still in the plaintiff, and at the time the defendant executed the deed to plaintiff's wife the defendant had no title to the lands, and could not divest the plaintiff's title by such conveyance.

"2. That the plaintiff cannot recover damages for the value of the lands, based upon a destruction or mutilation of plaintiff's title deed, but plaintiff has his remedy to have the same sustained.

(522) "3. That on the plaintiff's own showing he has title to said lands, and cannot be divested by the defendant without consent of plaintiff.

"Wherefore, defendant demands judgment, that the action be dismissed and the motion of attachment set aside, and for costs."

This cause coming on to be heard upon demurrer to plaintiff's complaint, and the same being heard upon argument of counsel, and the whole matter being considered by the court:

It is adjudged and declared by the court, that the said demurrer be, and is hereby, overruled at the cost of the defendant.

It is further adjudged, that the defendant have leave to answer.

C. M. Busbee for plaintiff.

A. E. Holton for defendant.

SMITH, C. J. The probate and registration of a deed conveying land as a substitute, dispensing with the old form of livery of seizin (The Code, sec. 1245), have been so far deemed necessary to its efficacy in transferring the estate, that, if before such registration, it be surrendered and canceled, the title will remain undisturbed in the maker, when no intervening rights of others have been acquired to be affected thereby. This is held in *Hare v. Jernigan,* 76 N. C., 471, and many other cases cited in the argument of counsel, down to that of *Southerland v. Hunter,* 93 N. C., 310. In the latter case, it is said that registration is now held to be "an inseparable incident to the efficacy of the deed itself."

Yet an unregistered deed is not wholly inoperative as a conveyance of real property, possessing only the force of an executory contract to convey. It is more than an equity. It is an incomplete conveyance of the land, lacking registration only to make it perfect; and,

(523) when registered, relating back to the time of execution and passing the estate from that period.

It is recognized as so far an executed instrument, acting upon the title, that when delivered, if lost before registration, it will be set up in equity and another conveyance decreed, whether it was made upon a valuable consideration or not, against the vendor or his devisees or heirs at law. *Hodges v. Hodges,* 2 D. & B. Eq., 72; *Plummer v. Baskerville,* 1 Ired. Eq., 252.

And this in behalf of a purchaser from the vendee. *McCain v. Hill,* 2 Ired. Eq., 176.

It may be sold under execution independently of the act subjecting trust estates to levy and sale. *Morris v. Ford,* 2 Dev. Eq., 412.

A conveyance made before, but registered after, death defeats the wife's claim to dower under the former law, in which she only was entitled to claim it in such lands as the intestate owned at his death. *Norwood v. Marrow,* 4 D. & B., 442.

The surviving wife may have a lost or fraudulently destroyed deed set up, to the end she may have dower in the legal estate assigned her therein. *Tyson v. Harrington,* 6 Ired. Eq., 329.

These, and other adjudications in the same line, show that an unregistered deed transmits, not a mere equitable right to have it registered, if existing, or restored in order thereto, by a decree for the execution of another, or in itself accomplishing the same result, but an *inchoate legal estate,* deficient only in the want of registration under the statutory requirement. *Phifer v. Barnhardt,* 88 N. C., 333.

"An unregistered deed for land passes," in the language of *Merrimon, J.,* "an *inchoate legal* as well as the *equitable title,* to become complete and absolutely operative for all proper purposes, according to its true intent, as soon as it shall be registered. *Austin v. King,* (524) 91 N. C., 286.

While such is the operation of a deed for land from its delivery, the conveyance may be defeated by its voluntary cancellation by all the parties thereto, and, as between them, the estate left undisturbed in the grantor. *Hare v. Jernigan, ante; Beaman v. Simmons,* 76 N. C., 43; *Davis v. Inscoe,* 84 N. C., 396; *Fortune v. Watkins,* 94 N. C., 304.

"But such cancellation," quoting from the opinion in *Austin v. King, ante,* "can be made only *by agreement of the parties* to it, or those claiming under them, and it cannot be made fraudulently and to the prejudice of third parties."

There was no consent given by the plaintiff, according to his own allegation, to the destruction of the deed with reference to the making of another, or for other purpose of benefit to him; but the act was a betrayal of trust, an act of spoliation of a muniment of title, not impairing it or the plaintiff's estate in the land. It was done, not only in disregard of fiduciary obligation, but for the wrongful purpose—a pur-

pose not allowed by law—of vesting the estate in the daughter, for which an ample remedy is afforded in the right to demand another commensurate in its operation with the former, and putting the estate in the plaintiff, after registration, in the plight and condition it would have been had the first been kept and registered, as decided in *Hodges v. Spicer,* 79 N. C., 223.

The cancellation, being made with a fraudulent intent, is a tort, the quality of which, as such, is not changed, though the right of action for the tort may be surrendered by the party wronged, by the subsequent submission of the plaintiff to it, with a view to seeking a remedy which might be founded upon a consent originally given upon or without some anticipated advantage to arise out of the cancellation.

Regarding the complaint as waiving the tort, the plaintiff is left without redress; for as there is no positive promise, so none can (525) be implied in law, to restore the purchase money, or the unpaid part of it, and it is not a case of the failure of consideration, admitting the recovery of the money paid.

If the waiver be permitted, it would leave the plaintiff remediless, because it constitutes no consideration upon which to base an *implied,* in the absence of a positive, promise to return the money in whole or in part. This results from the fact that no promise can be inferred from an act, itself tortious, because of an assent that takes away its quality as such.

But the spoliation is itself a wrong, for which an action will lie and some redress be given by the law, not commensurate with the value of the premises, because the plaintiff can regain them, and his loss will be measured by costs and expenses incurred in securing the restoration of the deed. The judgment overruling the demurrer must, therefore, be affirmed.

No error. Affirmed.

B. A. BERRY v. W. C. HENDERSON.

Married Women; Contracts of—Jurisdiction of Justices of the Peace—Necessaries.

1. Justices of the peace have no jurisdiction to enforce contracts of a married woman, unless she is a *free trader,* whether she has separate property which she has charged or not.

2. Whether a cooking stove is a *necessary,* within the exceptions specified in section 1826 of The Code, depends upon the circumstances, manner of living etc., of the *feme covert* alleged to have purchased it.

3. A widow, sued on her note, given during coverture, for a cooking stove, which she retained after her husband's death, cannot be held liable as upon contract for the price—the note being void in law, and no new promise alleged.

CIVIL ACTION, tried on appeal from a justice of the peace, (526) before *Armfield, J.*, and a jury, at Spring Term, 1889, of BURKE Superior Court.

This was an action upon a note, executed by defendant for the purchase money of a cooking stove, purchased by the defendant. It was admitted that the note sued upon was executed by the defendant during her coverture for the purchase of a cooking stove; that the husband of the defendant had died since the execution of the note, and that said cooking stove had been in use during his life and since his death in cooking for the family. The court said that the jury would be charged that a cooking stove was not a necessary, and that a note given for the purchase money of a cooking stove did not fall within any of the exceptions specified in section 1826 of The Code (it being bought during coverture), and that plaintiff could not recover. To this ruling plaintiff excepted.

Plaintiff offered to show that said stove was in use during the lifetime of the husband, and had been in use since, the cooking for the family being done thereon, and that defendant was worth about eight or ten thousand dollars, and to argue therefrom that the stove was a necessary, for one in her condition of life. His Honor excluded the evidence, and stated that he would charge the jury, upon the evidence which was admitted and upon that offered, that the plaintiff could not recover, to which plaintiff excepted.

Upon this intimation from the court, the plaintiff, in deference to the opinion of the court, submitted to a judgment of nonsuit, and appealed.

T. G. Anderson (by brief), for plaintiff.
J. T. Perkins for defendant.

SHEPHERD, J. The defendant moved to dismiss this action for want of jurisdiction, and it is very clear that the motion must be allowed.

It has been repeatedly decided by this Court that a justice of the peace has no jurisdiction to enforce the engagements of a (527) married woman, unless she is a free trader. In *Dougherty v. Sprinkle,* 88 N. C., 301, *Ruffin, J.*, speaking for the Court, says, "that no such jurisdiction can be exercised by the court of a justice of the peace, seeing that, according to all authorities, his is but a common law court, and that his jurisdiction does not embrace causes of a peculiarly equitable nature. *Fisher v. Webb,* 84 N. C., 44; *Murphy v.*

McNeill, 82 N. C., 221; *McAdoo v. Callum,* 86 N. C., 419; *Lutz v. Thompson,* 87 N. C., 334. . . . At law a *feme covert* is incapable of making a compact of *any sort,* and any attempt of hers to do so is not simply voidable, but absolutely void. If, however, she be possessed of separate property, a court of equity will so far recognize her agreement as to make it a charge thereon. But even in that case and in that court, her contract has no force whatever as a personal obligation."

The present *Chief Justice,* in *Smaw v. Cohen,* 95 N. C., 85, says, in speaking of *Dougherty v. Sprinkle, supra:* "The decision has reference to contracts generally entered into by married women, and their enforcement against their separate estates. They are held to be obligatory, not upon the contracting *feme covert* personally, but upon her separate estate, and as the proceeding is in its nature equitable, as in a bill for foreclosure of a mortgage, relief could not be had in a justice's court."

Merrimon, J., in *Planing Mills v. McNinch,* 99 N. C., 517, recognizes the law as above stated, by sustaining the jurisdiction of the Superior Court in an action against a married woman, for an amount under $200. He says, "it is expressly decided that the Superior Courts have jurisdiction in such cases," citing *Dougherty v. Sprinkle.*

We would have been content to have simply cited the latter case, in support of the view we have stated, but as its correctness was earnestly questioned, we have thought proper to cite other later cases in (528) which it has been most completely sustained.

As this claim may be further prosecuted in the proper jurisdiction, it may not be improper to say that we do not concur in the ruling of his Honor, to the effect that "a cooking stove *(per se)* was not a necessary," and did not fall within any of the exceptions specified in The Code, sec. 1826. This should be determined in view of all the circumstances surrounding the defendant, such as her manner of living, her pecuniary means, and those of her husband, and to what extent he contributed to the support of herself and family. The mere fact that the wife has separate estate does not absolve the husband from the duty to support his family. Schouler's Domestic Relations, sec. 109.

It was suggested on the argument, in support of the jurisdiction of the justice, that the defendant, having kept and used the stove after the death of her husband, is liable, *as upon contract,* for the price. The answer is, that no new promise is alleged in the complaint, that the action is brought upon the note executed during coverture, and that the note, being void *at law,* and not merely voidable, could not be ratified in this way, so as to sustain the common law jurisdiction of the justice. Especially is this true, when in her answer the defendant signifies her willingness to restore the property. If, however, the circumstances were such as to make her original engagement binding in equity, under The

Code, sec. 1826, it would be a sufficient consideration to support an express promise made after discoverture. 3 Amer. & Eng. Cyc., 841. This would be entirely consistent with *Felton v. Reid,* 7 Jones, 269, for there the original transaction was binding neither in law nor equity, and the promise was probably held to be void.

The justice having no jurisdiction, the action must be

Dismissed.

Cited: Farthing v. Shields, 106 N. C., 296; *Fidelity v. Jordan,* 134 N. C., 238; *Wilson v. Insurance Co.,* 155 N. C., 175; *Lipinsky v. Revell,* 167 N. C., 509; *Timber Co. v. Bryan,* 171 N. C., 265; *Grocery Co. v. Banks,* 185 N. C., 151.

C. G. McCULLOH AND JAMES McCULLOH v. JOSIAH DANIEL.

Land—Statute of Limitations—Purchaser at Judicial Sale.

A purchaser at a judicial sale of the lands of a decedent, and holding under a deed from the commissioner, which purports to convey the entire interest in the land, is protected by his adverse possession for seven years, against any of the heirs, not under disability, though they were not made parties to the proceedings. And so it would have been if the deed had been executed by a stranger.

CIVIL ACTION, tried before *Clark, J.,* at Spring Term, 1888, (529) of the Superior Court of DAVIE County.

The plaintiffs alleged that they were the owners of two undivided fifths of the land in controversy, as devisees of Alfred McCulloh, deceased, and that the defendant is the owner of the other three-fifths, as tenant in common with plaintiffs, and is in possession, and wrongfully withholds the same, and they demand judgment, that they be "let into possession," etc.

The defendant answers at much length, averring several grounds of defense, and among them, in substance, that the land in question was sold publicly by James M. Johnson, executor of Alfred McCulloh, deceased, on 1 May, 1869, in obedience to a decree of the Superior Court of Davie County, at which sale the defendant became the purchaser; that the sale of the land was confirmed, the purchase money was paid, and a deed, under a decree of the court, executed to him therefor, and that he has held the same ever since, adversely to all persons, under the said deed. That the purchase was "with the full knowledge, and without objection on the part of the plaintiffs, and that by their acts

and conduct he was encouraged to buy" said land. There are also averments of facts, showing possession adverse to plaintiffs, and the recognition, by them, of the sole ownership of the defendant, and he
(530) relies upon his purchase and deed, and the adverse possession thereunder, and the statute of limitations.

After referring to the complaint and answer, to be taken as part thereof, the following is a statement of the case on appeal:

"The testator died, and James M. Johnson duly qualified as his executor prior to 11 September, 1867, at which time said executor filed his petition for the sale of the land in controversy for assets to pay the debts of said Alfred McCulloh. An order of sale was granted, and the land was sold at public auction at the courthouse in Mocksville, when and where defendant bought. The sale was, at Fall Term, 1869, of Davie Superior Court, confirmed, defendant paid the purchase money, and on 6 November, 1869, took a deed from the executor for the entire tract of land, and has been in the exclusive and adverse possession of the same, under said deed, from that time down to the present. The judgment purported to be against all the heirs-at-law of Alfred McCulloh, deceased, but as a matter of fact the plaintiffs were not served with process, nor did they appear and file any answer.

"The only question presented on the appeal is that of lapse of time and statute of limitations, the above facts being agreed. The plaintiffs contended that the defendant only obtained by his purchase the undivided three-fifths interest of the three devisees made parties to the proceedings to sell the land for assets, and that as he had not been in possession of the land for twenty years, their rights were not barred, as they claimed to be tenants in common with defendant.

"The court being of opinion that the land descended to the heirs-at-law only *sub modo,* subject to the prior right of the creditors of testator to subject it to payment of his debts, and the sale having been adjudged of the entirety owned by such testator, and not of the interest
(531) of any of the tenants in common, the deed made in pursuance thereof, purporting to convey the entire interest of such testator, was color of title of the testator's interest, and it being admitted that defendant has been in exclusive adverse possession, under known and visible lines and boundaries of the land, under said deed, from its date (1869) down to this date, directed the jury to find the issue submitted in favor of defendant."

Verdict and judgment for the defendant, and exception and appeal by plaintiffs.

A. E. Holton for plaintiffs.

Ed. Gaither (by brief) for defendant.

DAVIS, J., after stating case: This case cannot be likened to a sale of the interest of one tenant in common under execution, as in *Ward v. Farmer,* 92 N. C., 93, or to any one of the numerous cases of a sale of one tenant in common, whether purporting to sell his own interest only, or the entire interest in the land, cited by the counsel for the plaintiffs.

It is insisted for the plaintiffs that, as in fact no process was served on them, the sale, as to them, was absolutely void, and the effect of the deed was to constitute the defendant a joint tenant with them, and could not confer a title adverse to them. We are relieved, by the facts in this case, of the necessity of considering this question.

The defendant does not claim under a deed from any one or more of the heirs or devisees of Alfred McCulloh, or under a deed purporting to sell the interest of one or more of the heirs, but he claims against all of them, and not under any of them, under a deed from J. M. Johnson, made under a decree of the Superior Court of Davie County, in certain judicial proceedings to sell land of the testator to make assets; and an adverse possession under such a deed for seven years would confer a perfect title against all persons who were (532) laboring under no disability, and this even if the deed had been made by a stranger, and without any pretense of judicial or other sanction. The defendant having held the land, under the deed referred to, exclusively and adversely to the plaintiffs for more than seven years from 6 November, 1869, to the bringing of this action, 17 September, 1877, there was no error in the ruling of his Honor.

No error. Affirmed.

Cited: Ames v. Stephens, 111 N. C., 174; *Ferguson v. Wright,* 113 N. C., 544; *Lumber Co. v. Cedar Works,* 165 N. C., 86; *Alexander v. Cedar Works,* 177 N. C., 143; *Crocker v. Vann,* 192 N. C., 430.

THEO. GORDON AND WIFE v. AUSTIN COLLETT ET AL.

Contract to Convey Land—Statute of Frauds—Mortgage, Priority of—Issues.

1. The following memoranda on a sheet of note paper was *held* sufficient to bind M. C. A., the owner of the land, under the statute of frauds: "C.'s boundary. Beginning at a stake in Grant's corner and running north with the Rocky Ford road," etc., . . . "containing 1¼ acres more or less." "Received of A. C. $33, in part payment on a lot on Rocky Ford

road. 27 October, 1885." (Signed) M. C. A. And on the opposite page of the paper: "I, A. C., promise to pay Mrs. M. C. A. $53 on a lot, adjoining W. Grant's, on Rocky Ford road, by the 1st of March, 1886." (Signed) A. C.

2. If M. C. A., at the request of C., after C. had executed a mortgage on the lot to G., conveyed the lot to R. A., upon payment by the latter of the balance of purchase money due by C., G. would have the right to be paid his mortgage debt, subject only to the payment to R. A. of the purchase money so paid by him.

3. But if, before the mortgage to G. by C., the latter abandoned his right to the land, and authorized R. A. to buy for himself, then G. took nothing by his mortgage.

4. It is error not to try all the material issues raised by the pleadings, unless they are waived.

(533) CIVIL ACTION, heard before *Armfield, J.*, at Spring Term, 1889, of the Superior Court of BURKE County.

The following is a copy of the material parts of the case settled on appeal:

Plaintiffs bring suit for the foreclosure of a mortgage, dated 21 July, 1887, to secure the sum of $253.90, a part of which sum, to wit, $129, had been secured by a former mortgage, dated 30 October, 1885. That said mortgages were given by the defendant Austin Collett, who claimed an interest in the land therein described, under the following writings:

"COLLETT'S BOUNDARY.

"Beginning at a stake on Grant's corner and running north with the Rocky Ford road to Tate's line, then west with Tate's line 18 poles to a stake in Tate's line, then southward to Grant's black oak, and then with said line to the beginning; containing 1¼ acres, more or less."

On the same piece of paper is the following:

"Received of Austin Collett $33, in part payment on a lot on Rocky Ford road, 27 October, 1885. M. C. AVERY."

On the opposite side of the same piece of paper is the following:

"I, Austin Collett, promise to pay Mrs. M. C. Avery 53 dollars on a lot adjoining W. Grant's, on the Rocky Ford road, by 1 March, 1886.

"(Signed) AUSTIN COLLETT.

"Balance due, $20, at 8 per cent interest."

It further appears, from the complaint, that at the time said (534) mortgage was executed by said Collett, the legal title to said land was in the defendant M. C. Avery.

Defendant M. C. Avery demurs to the complaint, and among other causes of demurrer, sets up the statute of frauds.

His Honor sustains the demurrer as to her, but does not dismiss the action. Defendants except.

Defendant Rufus Avery demurs, *ore tenus,* for the causes assigned in the demurrer of M. C. Avery.

Demurrer overruled and defendants except.

Defendant Rufus Avery answers, and sets up the statute of frauds, and, further, that the said Austin Collett was justly indebted to him, and had given him his note on 1 April, 1885, for the sum of $150, same being seven months prior to plaintiffs' first mortgage, and more than two years before the second mortgage, that said indebtedness has been greatly increased since that time by his letting said defendant have money and goods.

Defendant Rufus Avery further pleaded that he had paid the purchase money.

His Honor held that the statute of frauds had no application, by reason of the admission in the answer. Defendants excepted.

The following issue was submitted to the jury:

"Did defendant Rufus Avery become bound for the purchase money of the land prior to the execution of plaintiff's mortgage?"

The defendant Rufus Avery testified that he paid to M. C. Avery the purchase money of the land under the following circumstances: That he had, as agent of M. C. Avery, made a parol contract with Austin Collett to sell him the land, but with the express understanding that if the purchase money, amounting to fifty dollars and interest, was not paid by 1 March, 1885, then said contract was to be void, and said Collett was to forfeit his improvements; that said Collett was not able to pay at the time appointed, and told witness if he would satisfy (535) M. C. Avery for the purchase money, and give him a little more time, he would give him his note for $150, and the land should stand good for it, and if not paid by the year 1888, that he should have the said land; that, on the strength of this assurance, witness did satisfy M. C. Avery by paying the purchase money, and Collett having failed to pay by 1888, under Collett's direction M. C. Avery made him a deed for a part of the land, the other having been sold to one S. J. Ervin.

And, thereupon, his Honor withdrew the issue which he had at first submitted, and substituted the following:

"Is the lien of plaintiffs' mortgage on the land in question superior to the rights and equities of defendant Rufus Avery, as set up in the answer?

"What amount is defendant Collett indebted to plaintiff?"

Defendants excepted to the withdrawing of the issue first submitted and the submission of the last two to the jury.

There was no evidence offered by plaintiff to show that the receipt for "$33" was for the same land as that included in "Collett's boundary," or that it was for any land, the word "lot" only being used in said receipt.

And, thereupon, his Honor instructed the jury that, upon the evidence—taking the evidence of Rufus Avery to be true—they must find the issue as to the superiority of the lien in favor of plaintiffs. To which instructions defendants excepted.

On judgment being rendered, defendants appealed to the Supreme Court.

S. J. Ervin for plaintiff.

C. M. Busbee, J. T. Perkins and J. B. Batchelor for defendants.

MERRIMON, J., after stating the case: The appellants contend that the plaintiffs obtained no title to the land in question, nor any (536) interest therein, by deed of mortgage under which they claim, executed to them by the appellants Collett and wife, because the latter had no title to nor any interest in that land, that they could convey; that the husband Collett had but a parol contract with M. C. Avery, who had the title to it, whereby she contracted to convey the title to him when he should pay the purchase money he agreed to pay her for the same, and he had not paid such purchase money or any part thereof; and they pleaded that such parol contract was void under the statute of frauds, because no memorandum or note thereof was put in writing, and signed by M. C. Avery or by some other person by her authorized to sign the same. The plaintiffs, on the contrary, contended that the writing set forth above, beginning with the words "Collett's boundary," and ending with the other words, "balance due $20, at 8 per cent interest," constitute a sufficient memorandum or note in writing, of the parol contract mentioned, to render it effectual in contemplation of the statute; and we are of the opinion that it is sufficient.

The memorandum in writing referred to is all on a half-sheet of ordinary commercial note paper, in the order as set forth above. Between the description of the land and the receipt, which are on the same side of the paper, is a blank space about two inches wide, and the

promissory note and memorandum at the foot of it fill the upper half of the paper on the opposite page, beginning close to the top of it.

The juxtaposition of the several parts of the writing, their nature, purpose and meaning, as expressed, their reference to and bearing upon each other, as appears from express words and plain implication, all go to show that the land described is that mentioned and referred to in the receipt; and the terms therein, "in part payment on a lot on Rocky Ford road," imply that Austin Collett, to whom the receipt was given, had contracted with M. C. Avery to purchase from her, and she with him, to sell him the land mentioned and described. The (537) description certainly designated a piece or lot of land by metes and bounds, containing one acre and one-quarter of an acre, situate on the Rocky Ford road, capable of being identified by parol proof. The receipt near to such description, on the same side of the half-sheet of paper, refers to "a lot on Rocky Ford road," and, by the strongest implication, acknowledges a contract of sale of it to Austin Collett. The note, immediately following the receipt on the opposite side of the paper, made by him to M. C. Avery, recites that it was given "on (for) a lot adjoining W. Grant's, on the Rocky Ford road."

The several parts of the writing clearly refer to one and the same transaction, and must be construed together. It is evidence, and intended by the parties so to be, of a contract of sale of the lot of land specified, by M. C. Avery to Austin Collett, and she, by signing the receipt, acknowledged and signed this contract in writing as certainly as if it had been formally drawn out and signed by her. Hence, the references and recitals. The contract is informally and awkwardly expressed in the writing, but its nature, scope and purpose clearly appear from it, and this is a sufficient compliance with the requirements of the statute. *Mayer v. Adrian,* 77 N. C., 83; *Farmer v. Batts,* 83 N. C., 387; *Thornburg v. Masten,* 88 N. C., 293. It may be added, that if the contract in question were to be treated as not in writing, M. C. Avery, the person to be charged therewith, did not avail herself of the statute rendering such contracts void—she was not bound to do so; but she recognized and acted upon it, and, at the request of Austin Collett, conveyed the land to Rufus Avery. If, therefore, Austin Collett, under the contract of purchase, paid for the land, or paid any part of the purchase money, the plaintiffs, by their deed of mortgage, acquired the whole of his interest in it—indeed, they acquired the right to have the land for the purposes of the mortgage, subject to the right of M. C. Avery to have the purchase money (538) due to her for it. And so also, if Rufus Avery, after the execution of the plaintiffs' mortgage, at the request of Austin Collett, paid the purchase money for the land or any part of it, and took the title therefor,

having notice of the mortgage, as he must have had, as it was registered, then he took the title for the plaintiffs for the purposes of their mortgage, the land being charged with so much of the purchase money as he paid. Indeed, he, in that case, sustained the same relation to the plaintiffs as did M. C. Avery before she conveyed the title to the land to him. By virtue of her contract with Collett, and the mortgage made by him to the plaintiffs, she held the land for them, subject to the payment of the purchase money due her. Rufus Avery, having obtained the title, with notice of the plaintiffs' right, so holds the land for the like purposes, unless, as he alleges, his right to the land antedates the mortgage of the plaintiffs.

In his answer, Rufus Avery expressly alleges that Austin Collett, a long while before he executed the mortgage to the plaintiffs, abandoned his parol contract of purchase of the land, and consented to allow him to pay for it and take the title, and there was some evidence produced on the trial tending to prove this allegation. Collett might thus abandon his executory contract, or transfer it to another. We can see no reason why he could not. The contract to convey was not a conveyance of the title to the land, and might be abandoned. If the allegation just mentioned were true, then Collett conveyed nothing by his deed of mortgage to the plaintiffs, because he had nothing to convey —not even an equity. The plaintiffs, in their reply, expressly deny the allegation of the answer just mentioned, and thus a material issue of fact was raised by the pleadings. The appellants did not waive the trial of this issue, nor did the court submit it to the jury. Perhaps the issue which was at first submitted to the jury, and afterwards, in the course of the trial, withdrawn, might have been sufficient, though it (539) was scarcely pertinent. The court, however, the appellants objecting, withdrew it entirely and submitted another, not at all that raised by the pleadings. The issue raised was material and important, and should have been tried. All the material issues must be tried, unless waived, and it is error not to try them. *Porter v. R. R.*, 97 N. C., 66; *Davidson v. Gifford,* 100 N. C., 18.

It seems that the court was of the opinion that Rufus Avery had rights and equities in conflict with the same of the plaintiffs. How this was, is not clearly disclosed by the record before us. If Collett owed him before he made the mortgage to the plaintiffs, and gave him a mortgage, by parol or otherwise, of his interest in the land he so contracted to purchase, to secure such indebtedness, this could not prejudice the rights of the plaintiffs as mortgagees, because such mortgage was not registered. At most, he could only be entitled to have so much of the purchase money, and the interest thereon, as he paid to M. C. Avery; to that extent he might be subrogated to the latter's

rights, and lien for such part of the purchase money as he paid. Beyond, so far as appears, he would be on no better a footing than any other creditor who had a senior unregistered mortgage.

There is error, such as entitles the appellants to a new trial.

Error. New trial.

Cited: S. c., 104 N. C., 382, 384; *Mfg. Co. v. Hendricks,* 106 N. C., 493; *Gordon v. Collett,* 107 N. C., 362; *Falkner v. Pilcher,* 137 N. C., 451; *Bateman v. Hopkins,* 157 N. C., 473; *Simpson v. Lumber Co.,* 193 N. C., 455.

JAMES & MAYER BUGGY COMPANY v. T. H. PEGRAM, JR., ET AL.

Commissioners of Deeds—Probate and Registration of Deeds—The Code, sec. 632.

1. Under The Code, sec. 632, commissioners of affidavits have full authority to take the acknowledgment, within the States for which they are appointed, of the grantors to any deed or conveyance of lands in this State, and to take the private examination of *femes covert.* Therefore, where a man and his wife, being residents of this State, duly acknowledged a deed before a commissioner in Virginia, to which State they had gone on a visit merely, and the certificate of the commissioner, being in due form, was approved by the clerk of the Superior Court of the county in which the land was situate, and the deed duly *recorded,* the registration was valid.

2. The powers of commissioners, as defined by chapter 21, section 2, Rev. Stat., and *Decourcy v. Barr,* were subsequently enlarged by chapter 21, section 2, Rev. Code, which is almost the same as The Code, sec. 632.

CIVIL ACTION, tried at February Term, 1889, of FORSYTH (540) Superior Court, before *Philips, J.*

The defendant T. H. Pegram, Jr., on 31 October, 1887, executed his promissory note for value to plaintiff for three hundred and thirty-four dollars and thirty cents, upon which, at May Term, 1888, of said court, the plaintiff recovered judgment for the full amount of the debt, with interest and costs, and no part of said judgment has been paid. On 5 December, 1887, said Pegram executed a deed of trust, conveying his personal property and a town lot to the defendants Buxton and Grogan, for the benefit of his creditors, with a power of sale, and said trustees have sold, and after satisfying some liens prior to said deed of trust on said lot, out of the proceeds of sale, have now on hand a sufficient balance to pay plaintiff's debt in full.

The foregoing facts are allegations of the complaint not denied.

(541) The plaintiff, in his complaint, alleges further:

6. T. H. Pegram, Jr., and his wife, Helen L. Pegram, at the time of the execution of the above mentioned deed of trust, were citizens and residents of the town of Winston, county of Forsyth, State of North Carolina, both having been born and reared in said State, as plaintiff is informed and believes, and had been such residents and citizens for many years previous to said assignment to Grogan and Buxton, and that they are still citizens and residents of the State of North Carolina. And that said Pegram had been for many years previous to assignment engaged in business in the town of Winston.

7. That said deed of trust was drafted by an attorney residing in the county of Forsyth, State of North Carolina, and was taken by said Pegram from this State to the city of Richmond, State of Virginia, whither he and his wife were going for a pleasure trip of only a few days, and there acknowledged by them in the following form:

(The commissioner's certificate of acknowledgment and private examination, the clerk's certificate, adjudging the commissioner's certificate to be in due form, and ordering the registration of the deed, and the certificate of the register of deeds, all of which were in the usual form, were here set out in full.)

8. That before the beginning of this action the plaintiffs demanded of all the defendants the payment of said promissory note, which demand was refused.

9. That the defendant T. H. Pegram, Jr., has no other property or effects, liable to execution, sufficient to satisfy the judgment of the plaintiffs, he also being irredeemably insolvent beyond the property embraced and named in the above deed of trust.

Wherefore, the plaintiff demands judgment:

1. That said deed of trust be declared null and void as to the plaintiff.

2. That the assignees, Grogan and Buxton, be held and de-

(542) clared trustees for the plaintiff of the money received by them from the sale of the real and personal property attempted to be conveyed in said deed of trust, or of so much thereof as will satisfy the judgment of the plaintiff, and for such other and further relief as the plaintiff may be entitled to.

All of the allegations of the complaint were admitted in the answer, except that the defendants denied that the wife of T. H. Pegram went to Richmond on a pleasure trip, and averred that she was an invalid, and went there to be treated by a physician, expecting to be away for an indefinite period for that purpose.

The only question discussed was whether the acknowledgment of the deed of trust before the commissioner was valid, and from the ruling of the court, that the deed of trust was not properly proven, defendants appealed.

The judgment was as follows:

"This cause coming on to be heard, upon motion of J. L. Patterson, attorney for plaintiff, for judgment upon the complaint and answer filed, it is now adjudged, after argument for both plaintiff and defendants, that upon the complaint and answer the plaintiff do recover of the defendants the sum of $358.32, and interest from 16 February, 1889, on the said $358.32, and the costs of this action, and that said assignees be declared trustees of the proceeds of said sale of real and personal property described in the complaint, and that said deed of trust be null and void so far only as the plaintiff in this action is concerned."

J. L. Patterson (by brief) for plaintiff.
J. C. Buxton for defendants.

AVERY, J., after stating the facts: We think that The Code (sec. 632) confers upon commissioners of affidavits, regularly appointed, full authority to take the acknowledgment, within the (543) State for which they are appointed, of the grantors of any deed conveying lands lying in this State, and, when necessary, to take the privy examination of a married woman, who is a grantor, joining her husband in the execution. When the certificate of such commissioner is adjudged correct by the clerk of the Superior Court of the county in which the land lies, and the deed is registered upon the order of the latter, the registration will be deemed valid for all purposes. If a deed of trust is so proven and registered in obedience to the order of such clerk, after adjudication by him, it will be effectual to pass the title of land or other property conveyed in the deed to the trustee, and will create a lien, as against subsequent purchasers for value, or docketed judgments of later date, in favor of the *cestui que trust* named in the deed.

It is not material in such cases, whether the grantors, or either of them, are, at the time of the execution of the deed or deed of trust, residents of this State, or domiciled in the State in which the acknowledgment is taken. Counsel contended that the ruling of this Court, in the case of *Decourcy v. Barr*, Busb. Eq., 181, is decisive of the question raised in this case. We cannot concede the position to be tenable. The Court, in that case, construed section 2, chapter 21, of the Revised Statutes, as empowering commissioners of affidavits to take the acknowledgments of nonresidents only, upon the ground that the section

declared that the acknowledgment should have "the same power and effect," etc., as if the same had been made "before some one of the judges of supreme jurisdiction in any other State." Section 5, chapter 37, of the Revised Statutes, authorizes judges of courts of supreme jurisdiction in other States to take the acknowledgments of grantors residing "in any of the United States *other than this State.*" The Revised Code was enacted at the next session of the General Assembly held after that decision was rendered, and the law (as embodied (544) in sec. 2, ch. 21, Rev. Code) seems to have been drawn with the purpose of enlarging the powers of commissioners of affidavits, and enabling them to take and certify acknowledgments of grantors of deeds, whether they were nonresidents, or residents of this State temporarily absent from the State. The section last mentioned has been in force since its enactment by the Legislature of 1854-55, being almost the same as section 633 of The Code. The latter gives to acknowledgments, taken before commissioners of affidavits, "the same force and effect, for all purposes, as if the same had been made or taken before any competent authority in this State." It does not seem that any serious doubt has been entertained as to the true meaning of the law now in force since the case of *Simmons v. Gholson,* 5 Jones, 401 was decided. It has been considered as conferring upon a commissioner of affidavits the same authority to take the proof of executions or the acknowledgment of grantors, who may be in the State for which they were appointed (whether there temporarily or as residents), as to the execution of deeds conveying land or other property located in this State, that are required or allowed by law to be registered—that is, given by law to the clerk of the Superior Court of the county in which the land lies; but the clerk has power to adjudge that the execution has been properly proven and order the registration, while the commissioner is *functus officio,* as to any given deed, when he has attached to it his certificate as to proof or acknowledgment of its execution. *Evans v. Etheridge,* 99 N. C., 43; *Simmons v. Gholson, supra.*

The plaintiff is not entitled to judgment against the defendants Buxton and Grogan. He has already recovered judgment against the defendant Pegram.

Error. Reversed.

Cited: Maphis v. Pegram, 107 N. C., 505; *Long v. Crews,* 113 N. C., 257; *Barcello v. Hapgood,* 118 N. C., 727, 728; *Cozad v. McAden,* 150 N. C., 208; *Kleybolte v. Timber Co.,* 151 N. C., 638.

MARTIN HOLLER v. WILLIAM RICHARDS.

Statute of Frauds as Regards Lands.

1. Where plaintiff declares upon an oral contract respecting lands, void under the statute of frauds, and defendant either denies the contract, or sets up affirmatively another and a different contract, or admits the alleged contract and pleads specially the statute of frauds, in each of these cases testimony offered to prove the alleged contract is incompetent, and should be excluded.

2. *Michael v. Foil*, 100 N. C., 178, distinguished from this case.

CIVIL ACTION, tried at Fall Term, 1888, of the Superior Court (545) of CALDWELL County, before *Clark, J.*

The plaintiff alleges in his complaint, that he bought the tract of land in controversy in this action at a judicial sale by a commissioner (or by assignment took the place of bidder), and had paid a portion of the purchase money (to wit, a little more than one-half), when he agreed to sell the defendant the timber on said land, suitable for being sawed into timber, and that defendant persuaded him to convey, by deed absolute, one undivided half of said land to him, defendant, by representing that it was necessary to do so in order to protect him, defendant, in using the timber, and by solemnly promising, that so soon as he should cut and use the timber, he would reconvey to the plaintiff said undivided half interest. Plaintiff prayed to have, etc., defendant declared a trustee for him as to one-half the land.

The defendant in his answer denies the alleged verbal agreement, and avers that the plaintiff, after the purchase at the sale, found that he was unable to pay the purchase money, and proposed to the defendant to advance the last payment in order to prevent the court from ordering a resale, on motion of the petitioners in the special proceeding, and proposed that the defendant should, in consideration of said (546) payment, take a deed for one undivided half interest, and the defendant did pay the second note, executed by said Holler for the purchase money, and by direction of said Holler the deed was made to defendant and Holler, as tenants in common.

The case stated by the judge is as follows:

The plaintiff testified that he purchased the land at a commissioner's sale and sold the timber on the land to defendant. On the defendant's alleging that another party claimed a pretended interest in the land, and that he made a deed to the land to protect the possession, it was agreed between them that a deed absolute on its face should be made jointly to the plaintiff and the defendant, but that the defendant should

hold it only for the purpose aforesaid, of protecting his timber right, and should reconvey the undivided half interest in the land to the plaintiff as soon as and whenever the marketable timber was cut off.

Upon the inducement of such representation, and relying thereon, the deed was made to plaintiff and defendant jointly by the commissioner under the direction of the plaintiff.

The defendant objected to the above evidence, on the ground that it contradicted the deed and was an agreement concerning land not reduced to writing. Objection overruled. Exception by defendant. There was other evidence, but this was the only exception. Verdict and judgment for plaintiff. Appeal by defendant.

The other facts are stated in the opinion.

No counsel for plaintiff.
B. C. Beckwith for defendant.

AVERY, J., after stating the case: The issue and finding thereon were as follows:

(547) "Did defendant take deed for a half interest in the land, upon an agreement that he was to have all the timber on said land, and when it was cut off he would reconvey to plaintiff?" Answer: "Yes."

The judgment of the court was, in substance, that William Richards holds title to one undivided half of the factory land (one hundred and three acres, described in the complaint), as trustee for Martin Holler, the plaintiff, and that said Richards forthwith execute and deliver to said Holler his deed conveying all the interest of said Richards, being one undivided half in said land, to said Holler in fee simple, and that said plaintiff do recover costs.

The plaintiff does not allege, in his complaint, that he ever made any payments except ten dollars due on the first half of the purchase money, and subsequently the whole of the first payment, and lastly, ten dollars on the last half, the deferred payment.

The defendant alleges positively that he paid the amount of purchase money still due, when he bought from plaintiff the second note for purchase money given by the plaintiff.

The plaintiff replies: "As to paragraph one of the new matter, that it is true; that the administrators of Mr. Bean were pressing him on the second note. But he denies he approached defendant and agreed to assign one-half interest in the land on his paying said note, and that by reason of said payment the deed was made to said defendant and plaintiff as tenants in common. He avers the truth to be as stated in the complaint."

Counsel for defendant confined the discussion to the question, whether the testimony of the plaintiff, if admitted to be true, would be sufficient to establish his equity in the undivided half of the land in controversy, conveyed by the commissioner to the defendant.

The objection is, however, to the competency, not the sufficiency, of the plaintiff's evidence in itself. We must, therefore, determine at the threshold, before reaching the point presented by counsel, (548) whether the nature of the action is such that the testimony was admissible to be considered with other evidence tending to prove the plaintiff's right to the relief demanded, even though, without the aid of extrinsic facts, his testimony, as a whole, does not constitute proof of a cause of action.

One who asks a court for relief must allege and prove such facts as will establish, if true, his right to the remedy specified. *Willis v. Branch,* 94 N. C., 143.

The plaintiff does not pretend that the deed was executed by mistake, but admits that it was drawn with his assent, if not by his request, so as to convey to the defendant a half interest in the land. The pleadings do not justify the conclusion, that the plaintiff paid the whole of the purchase money, and therefore claimed, in the court below, that his testimony was competent to be considered in connection with other testimony tending to establish a resulting trust in his favor as to the interest conveyed to the defendant. Had the complaint contained an allegation of mistake, or set up such a claim of resulting trust, it may be that his Honor's rulings would have been correct. If so, the question whether there was evidence *dehors* the deed, and in addition to the evidence of the plaintiff, such as required the court to submit an issue to the jury, might have been raised at the close of the evidence, and then the principle stated in *Hemphill v. Hemphill,* 99 N. C., 436, and the other cases cited by counsel, would have applied.

But the complaint does not show who paid the second installment of the purchase money, while the answer sets up, as new matter, that it was paid by the defendant Richards, and the replication contains no denial of the payment alleged in the answer. We must assume, therefore, that the defendant paid a large proportion (probably about half) of the purchase money that the plaintiff had agreed to pay, and that the deed was, thereupon, made to him, with the assent of (549) the plaintiff.

The right to recover, therefore, rests upon the naked allegation, by the plaintiff, that the defendant made a verbal promise to reconvey when the timber should be cut off the land, and that allegation is denied in the answer. In view of the state of the pleadings, then, the testimony

of the plaintiff did not tend to show his right to any relief, and the objection ought to have been sustained by the court. It may be added, that upon the finding on the issue simply, that the defendant had promised verbally, when the deed was delivered to him, to reconvey to the plaintiff, when he had cut all of the timber off the land, leaves the plaintiff's right to relief to depend still entirely upon a verbal promise, when there is no principle, in view of the denial of the defendant, to take the case out of the operation of the statute of frauds. Where the plaintiff declares upon a verbal promise, void under the statute of frauds, and the defendant either denies that he made the promise, or sets up another and different contract, or admits the promise and pleads specially the statute, testimony offered to prove the promise is incompetent, and should be excluded on objection. *Gulley v. Macy,* 84 N. C., 434; *Morrison v. Baker,* 81 N. C., 76; *Young v. Young, ibid.,* 91; *Bonham v. Craig,* 80 N. C., 224.

The case of *Michael v. Foil,* 100 N. C., 178, to which our attention has been called, is not at all analogous to this. There, the plaintiff brought his action, not to compel a reconveyance, or affect the deed in any way, but upon a verbal promise to pay money that might be realized by a future sale of the mineral interest in land conveyed.

The court below erred in admitting the testimony, and the defendant is entitled to a new trial.

Error. *Venire de novo.*

Cited: Thigpen v. Staton, 104 N. C., 42; *Fortescue v. Crawford,* 105 N. C., 31; *Browning v. Berry,* 107 N. C., 235; *Cox v. Ward, ibid.,* 511; *Dover v. Rhea,* 108 N. C., 92; *Blount v. Washington, ibid.,* 233; *Vann v. Newsom,* 110 N. C., 125; *Loughran v. Giles, ibid.,* 425; *Williams v. Lumber Co.,* 118 N. C., 932; *Jordan v. Furnace Co.,* 126 N. C., 147; *Winders v. Hill,* 144 N. C., 617.

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(550)

F. J. McMILLAN, ADMINISTRATOR, v. M. REEVES ET AL.

Jurisdiction of Court in Term in Special Proceedings Transferred from Clerk—Chapter 246, Laws 1887—Estoppel by Judgment.

1. Where a special proceeding is duly transferred from the clerk's office to the Superior Court in term, and the court in term, having jurisdiction of the subject-matter, with the assent of the parties interested, finally disposes of case, such action is regular and will be upheld, although the

proceeding, as originally constituted, was not within the jurisdiction of the clerk; and would be so even if chapter 276, Laws '87, did not apply to this case.

2. A sale of land under the judgment of a court having jurisdiction of the subject-matter, is binding upon and estops all persons interested therein, who were duly represented before the court by counsel.

CIVIL ACTION, tried before *Connor, J.*, at Fall Term, 1888, of ALLEGHANY Superior Court.

In December, 1874, George T. Reeves, F. J. McMillan and Andrew McMillan, administrators of Alexander B. McMillan, filed their petition in the Superior Court of Alleghany, before the clerk, against numerous defendants, alleged to be the heirs at law of the intestate, praying that the land described therein "be sold and converted into personal assets," and for general relief. It is therein recited that the intestate in his lifetime contracted to sell to persons designated as Pierce, Hale & Co. the tract of land (describing it) for a sum, of which a very small portion was paid to the intestate before his death, and to recover the residue the plaintiffs instituted suit against the vendees; that the suit terminated under a compromise arrangement in favor of the defendants, and by the surrender of the bond for the purchase money to them; that at the same time the title bond executed by the intestate was returned by the defendants for cancellation, and they relinquished all claim in the land to the plaintiffs, to the end it might be resold to raise (551) the residue of the purchase money due on the original contract.

On 3 February, 1875, an order was entered in these words: "It appearing to the court that the defendants residing in the State have been duly served with summons, and that publication has been made for the nonresident defendants; upon reading the petition of the plaintiffs, it is adjudged, that the plaintiffs sell the land described in the petition at public auction, to the highest bidder, after giving thirty days notice, on a credit of six months, and report their proceedings to this court."

Pursuant to this order the land was put up and sold, and, as it appears, purchased by David C. Edwards, to whom notice was subsequently issued of an intended motion to confirm the sale, and order a collection of the purchase money, to be heard at the clerk's office on 30 October, 1875.

To this the said Edwards made answer, which, so far as material to the present inquiry, and we condense from, is as follows:

He declares his willingness to pay the purchase money as soon as a good title to the premises can be made to him, and alleges several defects in the title, as well as a want of jurisdiction in the court to order its conveyance.

That the defects consist in the want of words of inheritance in the deed of one Reeves to one Ausborn, and in the deed from the latter to the intestate, preceding owners under whom he claims, and a mistake in the boundary as described in the first of said deeds.

That the contract of sale entered into in the intestate's lifetime remains in force, and one of the original purchasers is dead, leaving heirs, to whom his equitable interest has descended.

That the land has been sold for taxes and bought by Frank McMillan, to whom a deed therefor has been executed.

That in the suits against Pierce, Hall & Co., some necessary
(552) parties were not served with process, and consequently are not bound by what was done in disposing of that cause.

Thereupon, a summons was issued and a further complaint filed, wherein are repeated the allegations in the former, with the superadded explanatory statement that the first contract of sale was made with Alexander Pierce and Jeremiah Jennings, who agreed to admit into the benefits of their purchase others, to wit, James Wilkerson and John Wilkerson, acting jointly and associates, who entered into the bond sued on, substituted for that first given for the purchase money, enlarged, as before explained, to the sum of $3,300 from $2,200, the contract price.

Steps were adopted to bring in these other parties alleged to be interested, and at Spring Term, 1880, it was "adjudged that the defendants have been duly served with process, and one W. E. Harden was appointed guardian *ad litem* to those ascertained to be minors, and he put in an answer admitting the plaintiff's allegations to be true."

The cause being in the Superior Court, and under the direct cognizance of the judge, after several continuances, at Spring Term, 1888, was, by consent, referred to Q. F. Neal, Esq., "to take the evidence, find the facts thereon, and report the same, with his conclusions of law arising upon the objections filed by David Edwards, to judgment being rendered against him for the purchase money for the lands purchased by him, and especially whether the plaintiff can make a good title to the said land."

The report was accordingly made, in which are found the facts, which have been briefly stated, in greater detail and accuracy; and, further, that at the hearing before the referee, on 9 August, 1888, Messrs. Field & Doughton, attorneys of said court, declared that they were the attorneys of record, and in this case represented the heirs of A. B. McMillan, deceased; "which fact," in the words of the referee, *"I find to be true,* and, as such attorneys, they fully acquiesce in and
(553) agree to said sale, and here *insist upon its confirmation,* agreeing to submit to any orders or decrees of this court, now or hereafter

to be made, by which the title to said land may be perfected to the respondent and divested from the heirs of A. B. McMillan, deceased." The referee adds that the attorney of the widow of the deceased, Kelley Boyer, Esq., "also agreed to any decree, as to her rights, so as to perfect the title in the respondent." As conclusions of law, the referee finds as follows:

"1. I decide that all the interest of Pierce, Hale & Co., and of Pierce & Jennings, in this land, has been divested from them by the compromise above mentioned, and the proceedings and judgments of this court instituted to bar and conclude their said interests, and also by the presumption of abandonment arising under chapter 65, section 19, of the Revised Code, as construed by the case of *Headen v. Womack.*

"2. That the heirs of A. B. McMillan were properly before the court in this case, as defendants, it having been so adjudged by the court, and that the facts in the case bring it within the letter and spirit of section 185 of The Code.

"3. Upon the main question involved, I decide that the clerk of the Superior Court of Alleghany has no jurisdiction over the subject-matter of this suit, brought by the plaintiffs as administrators; for the sale of land for distribution as personal assets, made by consent of many of the heirs, or all of them, indeed, did not confer jurisdiction upon the said court, or authorize or legalize the orders and decrees made therein; and for want of jurisdiction, the order of sale, and all the proceedings in the said suit, were a nullity. The title to said land being in the heirs of A. B. McMillan, deceased, divested of all equities in Pierce, Hale & Co., or others, the plaintiffs, as administrators, cannot perfect the title to the respondent."

"1. The plaintiff excepted to the report, in that the referee ruled that the Probate (Superior) Court has not jurisdiction of (554) the subject-matter of the action.

"2. That he erred in finding as a conclusion of law in his third conclusion that the plaintiffs and defendants could not, by waiving all irregularities, and could not by consent, confer such jurisdiction upon this court (the Superior Court) so as to enable it to vest in the respondent a title to said land."

Respondent, D. C. Edwards, excepts to the report of the referee:

"For that the referee erred in his conclusions of law (marked 2), that the heirs of A. B. McMillan, who had not been served with process, were bound by the orders of the clerk; that those served could answer for all."

The following judgment was rendered at Fall Term, 1888, by Connor, Judge:

"This cause coming on for a hearing upon the report of Quincy F. Neal, Esq., referee heretofore appointed herein, and the exceptions

thereto, the plaintiffs being represented by Messrs. Vaughan & Boyer, the defendants by Messrs. R. A. Doughton and W. C. Fields, and the purchaser, also a defendant, by J. W. Todd, Esq., all of said counsel being regular attorneys of this court, and duly empowered to represent their said duties in this behalf, the defendants, upon the intimation of the court that the names of the defendants not appearing in the summons, the same was defective, requested and obtained permission to file the supplemental petition, setting out the names of all of the defendants and heirs at law of A. B. McMillan, deceased, and requesting the confirmation of the sale heretofore made in this cause, and the court, finding, as a fact, that the names of the persons set out in said supplemental petition are all of the heirs at law of the said A. B. McMillan, deceased, and that Messrs. R. A. Doughton and W. C. Fields, attorneys as aforesaid, have powers of attorney from said persons, proceeded to hear and pass upon said exceptions of the parties to said report.

(555) "The report is so amended that the first exception of the plaintiffs and defendants became immaterial.

"The supplemental petition filed by the defendants removing the objection upon which the exception filed by D. C. Edwards, the purchaser, is based, the said exception is overruled.

"In regard to the other exceptions filed by the plaintiffs and the defendants, the court being of the opinion that the judgment rendered in the Superior Court of Alleghany County, in the action wherein the plaintiffs, administrators of A. B. McMillan, were plaintiffs, and Pierce & Jennings and others were defendants, wherein the defendants, heirs at law of said A. B. McMillan, were plaintiffs, and the said Pierce & Jennings and others were the defendants, vested the legal title to the lands in controversy in the heirs at law of said A. B. McMillan, discharged of any trust, and that the plaintiffs, as administrators, had no power or duty in respect to the same. That the clerk had no jurisdiction to render the judgment directing a sale of said land for the purpose set out in said petition. That the summons and all the proceedings had in said proceeding are *injudicious*.

"The court being further of the opinion that the plaintiffs and defendants, being the owners of the said lands, were entitled to a sale thereof for partition, and that they had a right to elect to so treat and regard this proceeding, and waive all irregularities therein. That they have so elected, and that they are entitled to have the sale and all proceedings in connection therewith ratified and confirmed. That the purchaser, having entered into the possession of the said land under and by virtue of said sale, and received the rents and profits thereof since 1875,

cannot be heard to object to the confirmation thereof and payment of the purchase money, upon a good and sufficient deed being tendered him.

"It is therefore considered and adjudged by the court (the parties, pursuant to the act of 1887, chapter 276, having re- (556) quested that the cause be retained in this court for final judgment), that the sale made to D. C. Edwards by the plaintiffs, pursuant to the judgment herein, be and the same is in all things confirmed, and that all orders, judgments and decrees heretofore made in this cause in respect to said sale be confirmed. And that upon the payment of the *purchase* money and interest due from said D. C. Edwards, according to the terms thereof, to the commissioners hereinafter named, the said commissioners to execute a good and sufficient deed to said D. C. Edwards, conveying to him all of the right, title and interest which the plaintiffs and defendants acquired in said lands as the heirs at law of A. B. McMillan; also all right to dower therein which the defendant, Mary Alexander, acquired as the widow of the said A. B. McMillan; that the said D. C. Edwards pay to the commissioner hereinafter named, within ninety days from 1 January, 1889, the amount of said purchase money and interest due as aforesaid; that upon his failure to pay said purchase money within said time, the said commissioner to proceed to sell the said lands for cash, at the courthouse door in Sparta, first giving thirty days notice of such sale in the newspaper having the largest circulation in said county, and posting a notice thereof at the courthouse door and four other public places in said county.

"That in the event such sale becomes necessary, he make report thereof to the term of this court next ensuing thereafter.

"That W. C. Fields, Esq., be and he is hereby appointed a commissioner, with power to perform and execute the provisions of this judgment, and make report thereof to the next term of this court. The exceptions of the plaintiffs and defendants .....

"That ..... of the dower of Mary Alexander may be ascertained by a referee. The costs will abide the final judgment herein. The cause will be retained for further orders and decrees."

On the judgment was written: "We hereby assent to the pro- (557) visions of the foregoing judgment."

This was signed by counsel for the plaintiff, F. J. McMillan, the counsel for A. B. McMillan's heirs, and the counsel for Polly Alexander.

The respondent, David C. Edwards, appealed.

No counsel for plaintiffs.

C. M. Busbee and G. V. Strong for appellant.

SMITH, C. J., after stating the facts: It will be seen from the foregoing recapitulation of facts and rulings, that the appeal of the respondent, Edwards, brings up for review but two questions:

1. The validity and effect of the jurisdiction exercised in ordering and confirming the sale; and

2. The sufficiency of the proceeding to bind all the parties in interest by a conveyance made under the direction of the court.

The first of these exceptions has been most earnestly pressed in the argument, and the conclusion of the referee maintained by the counsel of the appellant, of a total want of jurisdiction and consequent nullity in the proceeding.

There seems to be some misapprehension of the nature and purposes of the action, having for its object the sale of the land and its conversion into *personal assets,* with which, ordinarily, the administrator has nothing to do, unless the fund to be raised by the sale of the realty is required to pay the debts and expenses of administration.

The administrators came into possession of the debt due for the purchase money, and the legal estate in the land descended to the heirs, charged with its payment. They were but trustees holding the title as security for the payment of the debt, and interested, only as dis-
(558) tributees, in having it discharged by the proceeds of sale, the vendees being insolvent, and this being the only means of obtaining payment. Their interest in the subject-matter lay in securing an enlargement of the personal estate passing into the hands of the administrators, and with which he was chargeable. The action upon the note was brought, as well as that in the name of the heirs at law, to regain possession of the land, to compel an appropriation of the land to the discharge of the debt, and the compromise was effected, primarily, to obtain the land exonerated from liability under the title bond as a security for the debt, to be surrendered for that purpose, in place of the personal obligation assumed in the note. It was proposed in this way, not to extinguish the debt and *pro tanto* diminish the personal estate in the administrator's hands, but, as it was the only resource from which the debt could be made, to accept the land itself, the purchasers surrendering the title bond, and all equities and rights arising under it, as the sole security, and to raise the money by subjecting it to a sale. The result would of course be to replace for the note whatever sum could be made by selling the security, in the personal estate of which the note constituted a part. To this end the assent of the heirs was necessary, and was given in the adjustment arrived at, and consummated in the disposition of the two actions, as far as could be, by the parties to them.

But the sum lost in the surrender of the note could only be reinstated, and the personal estate belonging to the distributees made good,

by the sale of the land, and hence recourse was had to the present proceedings to divest the title out of the heirs, who, being numerous and scattered, and some of them under age, could not, by voluntary deeds, effectually pass the title to a purchaser.

It is not material to inquire into the question of the jurisdiction invoked in initiating the suit, since any objection on this account is obviated by the removal of the cause into the Superior Court, presided over by the judge, and the submission of all the parties (559) thereto to his exercise of jurisdiction in the premises, as fully as if the action had there originated. As, then, the court, assuming to exercise jurisdiction, did possess it fully over the subject-matter of the action and the parties to it, in which all the heirs were represented by counsel, the cause was, in a strict sense, *coram judice,* under the rulings in *West v. Kittrell,* 1 Hawks, 493, and *Boing v. R. R.,* 87 N. C., 360, even without the aid of the act of 1887, ch. 276, which sustains the jurisdiction thus acquired, and authorizes the court "to proceed to hear and determine all matters in controversy in such action," etc.

No exception has been taken at any time by any party to the action. On the contrary, by their respective counsel, they have at all times assented to what was done, and even to the final decree rendered in the cause.

The appellants' objection has no force unless the proceeding, in its entirety, is a nullity, and it certainly cannot require argument to combat such contention. *Norwood v. Peoples,* 94 N. C., 167.

There can be no successful resistance made to the proposition that a title obtained under the decree or judgment to which all those having any property or interest in the land are privy as parties, in a case whereof the court has cognizance, will be perfected against them, and each, *sui juris,* estopped to dispute it.

While the want of power in the court to entertain and proceed with the cause has been most urged in the argument before us, the appellants' only exception, appearing in the record, is the alleged ruling that the service of process on some of the defendants, on account of their number, would be sufficient to bind all under section 185 of The Code. The act does so indeed provide; but if it were otherwise, the whole of the heirs are represented by counsel, professing to act for all, and the decree itself recites that the names of the defendants set out in (560) the supplemental petition "are *all of the heirs at law* of the said A. B. McMillan," and that the attorneys, R. A. Doughton and W. C. Fields, appearing for them, "have powers of attorney from said persons." These facts come before us not controverted, and remove, if there be any force in the objection, the complaint of the ruling from which the appeal is taken.

The other alleged defects set out in the appellants' response seems not to have been relied on at the hearing below, and are not the subject-matter of the complaint presented in the appeal.

There is no error, and the cause will proceed at the point where it was interrupted by the appeal, until fully disposed of.

No error. Affirmed.

Cited: Foster v. Hackett, 112 N. C., 554; *Jones v. Comrs.,* 143 N. C., 65; *Oldham v. Rieger,* 145 N. C., 257; *Wilson v. Insurance Co.,* 155 N. C., 177; *S. v. McAden,* 162 N. C., 578; *McIver v. R. R.,* 163 N. C., 547; *Fertilizer Works v. Aiken,* 175 N. C., 398; *Holmes v. Bullock,* 178 N. C., 379; *Hargrove v. Cox,* 180 N. C., 364.

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COLORED PERSONS.

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COMMISSIONERS OF DEEDS.

1. Under The Code, sec. 632, Commissioners of Affidavits have full authority to take the acknowledgment, within the states for which they are appointed, of the grantors to any deed or conveyance of lands in this State, and to take the private examination of *femes covert*. Therefore, where a man and his wife, being residents of this State, duly acknowledged a deed before a commissioner in Virginia, to which State they had gone on a visit merely, and the certificate of the commissioner, being in due form, was approved by the clerk of the Superior Court of the county in which the land was situate, and the deed duly *recorded*, the registration was valid. *Buggy Co. v. Pegram*, 540.

2. The powers of commissioners, as defined by chapter 21, section 2, Rev. Stat., and *Decourcy v. Barr*, were subsequently enlarged by chapter 21, section 2, Rev. Code, which is almost the same as The Code, 632. *Ibid.*

COMMON CARRIER.

1. The right of stoppage *in transitu* is the right of the vendor, after he has delivered goods out of his own possession and put them in the hands of a carrier for delivery to the buyer, to retake the goods before they reach the buyer's possession, upon discovering the buyer's insolvency. The right is *based* upon the plain reason of justice and equity, that one man's goods shall not be taken to pay another man's debts, and is highly favored on account of its intrinsic justice. The right *arises* solely upon the insolvency of the buyer, and such insolvency being unknown to the vendor at the *time of the sale*, and may be *exercised* at *any time* before the actual or constructive delivery of the goods to the buyer by the carrier. *Farrell v. R. R.*, 390.

2. The vendor's right of stoppage *in transitu* is paramount to all liens against the buyer, even to a lien in favor of the carrier, existing by usage, for a *general balance* due him from the consignee, and to the lien of an execution or attachment against the buyer levied before the delivery of the goods to him. *Ibid.*

3. A vendor shipped a safe to his vendee, taking therefor a bill of lading, in which was the clause: "The several carriers shall have a lien