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NORTH CAROLINA REPORTS.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA,

JUNE TERM 1868, JAN. TERM 1869, AND JUNE TERM 1869.

VOL. LXIII.

By S. F. PHILLIPS, Reporter.

RALEIGH:
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1869.

JUDGES OF THE SUPREME COURT.

AT JUNE TERM, 1868.

RICHMOND M. PEARSON, C. J.
WILLIAM H. BATTLE.
EDWIN G. READE.

JUDGES OF THE SUPERIOR COURT.

BEFORE JULY 1, 1868.

DAVID A. BARNES,
EDWARD J. WARREN,
ROBERT B. GILLIAM,
RALPH P. BUXTON,
ANDERSON MITCHELL,
WILLIAM M. SHIPP,
ALEXANDER LITTLE,
CLINTON A. CILLEY.

ATTORNEY-GENERAL.

SION H. ROGERS.

CLERKS.

EDMUND B. FREEMAN.
CHARLES B. ROOT.*

*Appointed by the Court to succeed Mr. Freeman, who died June 30, 1868.

JUSTICES OF THE SUPREME COURT.

AT JANUARY AND JUNE TERMS, 1869.

RICHMOND M. PEARSON, C. J.
EDWIN G. READE.
WILLIAM B. RODMAN.
ROBERT P. DICK.
THOMAS SETTLE.

JUDGES OF THE SUPERIOR COURTS.

SINCE JULY 1, 1868.

FIRST CLASS.*		SECOND CLASS.†	
CHARLES C. POOL,	1st District.	EDMUND W. JONES,	2d District.
CHARLES R. THOMAS,	3d "	SAMUEL W. WATTS,	6th "
DANIEL L. RUSSELL,	4th "	JOHN M. CLOUD‡,	8th "
RALPH P. BUXTON,	5th "	ANDERSON MITCHELL,	10th "
ALBION W. TOURGEE,	7th "	JAMES L. HENRY,	11th "
GEORGE W. LOGAN,	9th "	RILEY H. CANNON,	12th "

*Term expires in 1872.
†Term expires in 1876.
‡Appointed by Gov. Holden, August 25, 1868, in place of D. H. Starbuck who was elected by the people, and declined.

ATTORNEY-GENERALS.

WILLIAM M. COLEMAN.
LEWIS P. OLDS.*

*Appointed by Governor Holden, June 1, to succeed V. C. Barringer, who declined the appointment, tendered him upon the resignation of Mr. Coleman, May 10, 1869.

CLERK.

W. H. BAGLEY.

PREFACE.

During the period embraced by the Reports in ths volume, a change occurred in the organization of the Courts of the State, consequent upon the adoption of a new Constitution, by a vote of the people taken on the 21st, 22d and 23d days of April, 1868. This Constitution having been submitted to the Congress of the United States, was approved upon the 25th of June, 1868; and the adoption by the General Assembly of the XIVth Amendment to the Constitution of the United States, mentioned in the Act of Congress as a prerequisite for certain purposes, took place on the 4th of July, 1868.

Governor Holden was installed as Provisional Governor on the 1st, and as Governor upon the 4th of July 1868.

By Art. IV, s. 1, of the State Constitution, "the distinction between actions at law, and suits in equity, and the forms of all such actions *were* abolished;" and by section 4 of the same Article "the judicial power of the State *was* vested in a Court for the trial of Impeachments, a Supreme Court, Superior Courts, Courts of Justices of the Peace, and Special Courts."

The latter provision abolished the Courts of Pleas and Quarter Sessions formerly held for the respective counties.

The Superior Courts, which before were held by eight Judges (in as many *Circuits*,) elected by the General Assembly, and commissioned during good behavior, are now (by Art. IV, ss. 12 and 26) held by twelve Judges (in as many *Districts*,) elected by the People for terms of eight years, and divided into two classes, so that the terms of six may expire every four years.

The Term of the Supreme Court which began on the 8th day of June 1868 and ended on the 1st day of July thereafter, was held by three Judges elected by the General Assembly and commissioned during good behavior, according to the former organization. The two terms that succeed it in this volume were held under the present Constitution, (Art. IV, ss. 8 & 26) and so by a Court composed of a Chief Justice and four Associates, elected by the People for a term of eight years.

The first election of Judges under these provisions occurred at the time of the adoption of the Constitution.

In conformity with action upon the same subject in other States, it has been ordered by the Supreme Court that the reports of its decisions shall be known hereafter simply as—"North Carolina Reports." In view of the large number of names by which Reports in the United States are now known, this change will no doubt commend itself to the public. The present volume, reckoning upon a condensation of Winston's two volumes, will be known as volume LXIII.

INDEX TO NAMES OF CASES REPORTED.

INDEX TO CASES CITED BY THE COURT.

CASES AT LAW,

ARGUED AND DETERMINED IN THE

Supreme Court of North Carolina,

AT RALEIGH.

JUNE TERM, 1868.

STATE *v.* YOUNG HARRIS.

There being evidence that the deceased came to his death by the infliction of whippings by the prisoner, whilst the latter insisted that the death was caused by a burn of which there was an appearance on the abdomen, the testimony of a physician that in his opinion the burn was inflicted *after death*, was admissible in support of other evidence for the prosecution.

The evidence being closed on both sides, upon the defendant being permitted to recall a witness to explain a part of his testimony, it is within the discretion of the Judge to forbid the examination of the witness as to new matter.

The prisoner and a woman offered as a witness in his behalf having lived together as husband and wife while they were slaves, and having subsequently observed the ceremonies required by the Act of 1866, ch. 40, s. 5: *Held* that they were legally married, and her testimony properly excluded.

Although the law allows to a person *in loco parentis* the broadest latitude in governing, it is not necessary to prove *express* malice on his part in order to convict of murder, if the facts show such cruelty and inhumanity in whipping as exclude the idea of passion.

It being a question whether a severe injury, supposed to be a burn, was received by the deceased before death, it was competent for the prisoner to show that the deceased *said* he had a large burn upon his abdomen; such declarations being admissible as *natural* evidence.

(*State* v. *Samuel*, 2 Dev. & Bat. 177; *Roulhac* v. *White*, 9 Ire., 63; *Biles* v. *Holmes*, 11 Ire., 16; *Lush* v. *McDaniel*, 13 Ire., 485; *Bell* v. *Morrisett*, 6 Jon., 178, and *Henderson* v. *Crouse*, 7 Jon., 623, cited and approved.)

MURDER, tried before *Mitchell*, J., at Spring Term 1868, of the Superior Court of ROWAN.

The prisoner, a colored man, was indicted together with one Jane Harris, who had lived with him as his wife while they were slaves and after emancipation had continued to live with him having complied with the requirements of the Act of 1866, ch. 40; but he was put upon trial alone. The deceased, a boy eighteen or nineteen years old, was the illegitimate son of Jane, and it was alleged that he came to his death in consequence of numerous and severe beatings upon his naked body, inflicted by the prisoner every day for a week, with a large leather strap, a bed cord twice doubled and knotted, and an iron ramrod—the alleged offence being that he had begged a piece of meat from a neighbor, and had denied doing so. At the end of the week he died.

The witness to the beating was a girl named Louisa Harris. Dr. Fraley was also examined as a witness for the State, having been previously called upon by the coroner to examine the body. His testimony tended to corroborate that of Louisa Harris—by showing that the back, loins and sides of the deceased were covered with bruises, &c. The theory of the defence was that the deceased came to his death by a burn, of which there was an appearance on his abdomen. Dr. Fraley testified that in his opinion this was caused by fire applied *after* the death. The prisoner introduced Dr. Jones and Dr. Whitehead, who testified that from the description of the burn given by Dr. Fraley, it had occurred *before* death. The prisoner offered Jane Harris as a witness, but the Court ruled her to be incompetent. He then introduced his son Wallace Harris, who testified that about a week before deceased died, he was burning a brush-heap, and on getting upon it the flames flashed as high as his waist, when he jumped off and ran to a branch near by; and that the deceased showed him a burn on his leg. The prisoner offered to prove by this witness that the deceased told him he was burned on the abdomen, but his Honor excluded the declaration.

After it was announced by both sides that the evidence was closed, the prisoner's counsel obtained leave to recall Dr. Jones, to explain part of his testimony. They then proposed

to examine him upon other points; but the Court refused to allow the examination to proceed further.

The charge of the Court and the exceptions thereto are sufficiently set forth in the opinion of the Court.

Verdict, Guilty. Rule for a new trial discharged. Judgment, and Appeal.

Attorney General, for the State.

Boyden & Bailey and *J. E. Kerr, contra.*

READE, J. In considering the legal questions involved, we hope that we have not allowed ourselves to be unduly influenced by the cruel and inhuman acts detailed in the evidence.

1. In considering the first exception on the part of the defendant, it is to be recollected that the theory of the defence was that the deceased did not come to his death by the whippings, but in consequence of a severe burn on the abdomen.

Dr. Fraley was introduced by the State, and gave it as his opinion that the burn was received after death. This testimony was left to the jury by his Honor, as tending to corroborate the evidence of the girl, and the theory of the prosecution. We see no force in the exception to it by the prisoner.

The opinion of the Doctor as an expert, was clearly admissible, and, if his opinion was well founded, it proved the defendant's theory, that the deceased came to his death by the burn—to be false, and it tended to corroborate the testimony of the girl.

2. After the evidence was closed on both sides, the defendant's counsel asked leave to recall a witness to make an explanation of some point in his testimony. He was permitted to do so. After the explanation was made, the counsel attempted to extend the examination to new matter. This was refused by the Court, and the defendant excepted again.

It was clearly within his Honor's discretion whether he would allow the witness to be recalled, and it was as clearly

within his discretion to prescribe the terms, and to limit the examination.

It would be unjust to the counsel to suppose that there was any attempt to entrap the Court by proposing to recall the witness for a simple explanation, when the real purpose was to open the evidence anew; and so we take it that the only purpose in recalling the witness was, to explain. Therefore, as soon as the explanation was given it was legitimate for his Honor to stop the examination.

3. The defendant offered Jane Harris as a witness. The defendant and Jane while slaves, cohabited as man and wife. After their emancipation they observed the ceremonies prescribed by the statute of 1866, chap. 40, sec. 5. That statute provides that "the parties shall be deemed to have been lawfully married as man and wife at the time of the commencement of such cohabitation, although they may not have been married in due form of law."

The competency of Jane was objected to by the State. She was ruled out and again the defendant excepted.

Whether Jane was a competent witness, depends upon the question whether she was the defendant's wife; and this again depends upon the force of the above statute. Marriage is a civil contract. It is more than that: I at least the status which marriage creates is a divine, as well as a civil institution. But our Courts deal with it only as a civil contract. And therefore it is insisted that as slaves had no power to contract, the status of marriage did not exist among them. *State* v. *Samuel*, 2 Dev. & Bat. 177.

We have no purpose to controvert this position. It is true that during the existence of slavery our law did not provide for the solemnization of marriage among them. They were left in a state of nature. And being so, it might be interesting to enquire how far a former marriage *per verba de presenti* affected their relations after their condition had been changed from slavery to freedom. For, in a state of nature, where no solemnities of marriage are prescribed, a marriage *per verba de presenti* must be valid. But we are relieved from the neces-

sity of a consideration of that question, because of the wholesome statute which we have cited. The substance of marriage—the consent of the parties, existing, it was as clearly within the power of the Legislature to dispense with any particular formality, as it was to prescribe such.

This neither made nor impaired the contract, but gave effect to the parties' consent, and recognized as a legal relation that which the parties had constituted a natural one.

So 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. This would be so upon the *strictest* construction; much more then upon the liberal construction which should be given to a statute of great public necessity, affecting the domestic relations of one-third of our people, and the morals of society in general.

We conclude that Jane was the wife of the defendant, and I was properly excluded from testifying.

4. The defendant insisted that he was *in loco parentis* towards the deceased, and that in the absence of express malice, his crime would be manslaughter only.

His Honor charged otherwise, and the defendant excepted. Conceding, for the sake of the argument, that the defendant did stand in the place of parent to the deceased, still the exception cannot avail him. It is true that the law allows to parents the broadest latitude in governing, and to that end correcting, their children. But the acts detailed in this case, were so cruel and inhuman, and so often repeated, and long continued, as to manifest "a heart totally regardless of social duty and fatally bent on mischief." They totally exclude the idea of *passion*, and fully prove *malice*.

"Parents, masters and other persons having authority *in foro domestico*, may give reasonable correction to those under their care; and if death ensue without their fault, it will be no more than accidental death. But if the correction exceedeth the bounds of due moderation, either in the measure of it, or in the instrument made use of for that purpose, it will be

either murder or manslaughter, according to the circumstances of the case." Foster's C. L., p. 262, s. 4.

In the case before us, what was the "measure" of correction? The deceased was stripped naked, placed on his back with his feet tied up, and was kept in that position every day from morning until dinner, for the space of a week, and repeatedly whipped each day while in that position, and on the first day severely whipped. What were the "instruments" used? A heavy leather strap, a knotted cord four double, and an iron ramrod; and with these he was beaten day after day until he died. There was "due moderation" neither in the "measure" nor the "instruments." The provocation was a very slight one, and all the circumstances showed deliberation and malice. We are entirely satisfied with his Honor's ruling in this particular.

5. It being a question, whether a severe injury, supposed to be a burn, existed upon the abdomen before the death, the defendant offered to prove that the deceased *said* that he had a burn upon his abdomen. The Solicitor for the State objected to the evidence, and his Honor ruled it out. In this we think his Honor erred. The declarations of the deceased, as to the condition of his body and health at the time when the declarations were made, fall under the head of *natural evidence*. Such declarations are admissible in the very nature of things. No physician would undertake to prescribe for a patient without enquiring of him "how he felt," "where were his pains" and the like. What weight the physician will give to the patient's declarations must be for *his* consideration. And so what weigh the jury will give, is for *their* consideration. The question has been before this Court repeatedly, and need not be elaborated now. All that can be said upon the subject will be found in *Roulhac* v. *White*, 7 Ire., 63; *Biles* v. *Holmes*, 11 Ire., 16; *Lush* v. *McDaniel*, 13 Ire., 485; *Bell* v. *Morrisett*, 6 Jones, 178; *Henderson* v. *Crouse*, 7 Jones, 623.

For this error there must be a *venire de novo*. Let this be certified, &c.

PER CURIAM. *Venire de novo.*

STATE *v.* HENRY STORKEY.

The Supreme Court has no power to grant a new trial because a verdict is found upon *insufficient* testimony, or *against the weight* of testimony. The *sufficiency* of the testimony offered is a question exclusively for the jury. Whether a verdict is *against the weight* of the testimony is a matter exclusively for the discretion of the Judge who presides at the trial.

It is not necessary, in North Carolina, to show emission in order to prove rape, even where the indictment concludes against the form of the "Statute"—not "Statutes:" the 20th sec. of Rev. Code, chap. 35, having abolished all distinction between these phrases.

An indictment for rape need not charge that the person ravished is over *ten years* of age.

RAPE, tried before *Warren, J.*, at Spring Term 1868, of the Superior Court of BEAUFORT.

No statement of the facts is necessary.

Attorney General, for the State.

Rodman, contra.

READE, J. In the case made for this Court, the evidence is stated in detail as the basis of exceptions by the defendant, That the evidence was insufficient to satisfy a jury beyond a reasonable doubt, and, That their verdict was against the weight of testimony.

If there was *any* evidence, its *sufficiency* was a question for the jury, and, Whether the verdict was against the *weight* of the evidence was a question for the *discretion* of the Judge who presided at the trial. In neither case can this Court interfere. There was some evidence tending to show the defendant's guilt, and it may not be improper for us to say in support of the propriety of the conviction, that in our opinion it was plenary.

The defendant's second exception, that there was no proof of emission, cannot avail him. In the first place, the witness said that the defendant "penetrated her person and ravished

her against her will." That is evidence from which the jury might infer emission. But, in the second place, it is not necessary, under our Statute of 1860, chap. 30, to prove emission. This was probably not intended to be controverted by the prisoner's counsel. His objection probably is that the case is not governed by the Statute of 1860, because the indictment concludes, *not* against the "*Statutes*" but, against the "*Statute.*" But our act (Rev. Code, chap. 25, sec. 20,) provides that no indictment shall be vitiated by reason that it concludes against the *Statutes*, instead of against the *Statute*, or *vice versa.*

We therefore do not perceive any ground for a new trial.

The motion in arrest of judgment because the indictment does not charge that the female was over ten years of age, was properly refused. Our Statute makes it rape carnally to know a child under ten years of age, even although she consent; but it in no way affects the guilt of one who carnally knows a female above that age against her will. Nor is it necessary to state the age except where the victim is under ten, nor even then unless the act is with the child's consent.

Let it therefore be certified to the Court below that there is no error, in order that the sentence of the law may be executed.

PER CURIAM. No error.

STATE *v.* JAMES PULLEY and ELLIS WILKERSON.

A witness for the State (*here* an accomplice) having been asked upon the examination in chief, whether he has not upon some other occasion given a different statement of the transaction, may thereupon, at the instance of the Solicitor, be permitted to explain why he gave such statement.

The comma, at the end of the word "store," in section 2, of Rev. Code, ch. 34, is a misprint; the enrolled bill in the office of the Secretary of State has no such comma, and thus shows that the word is used as an adjective, qualifying the word "house" which follows.

ARSON, tried before *Cilley, J.*, at Spring Term 1868, of the Superior Court of PERSON.

Upon the trial, one Stokes, an accomplice, a colored boy of 16 years of age, was a principal witness to prove the commission of the crime. On the examination in chief, after he had given an account of the transaction, he was asked by the Solicitor if he had since denied this statement to be true. He answered that on one occasion he had denied it to a gentleman of the bar. The Solicitor then asked why he had denied it. The prisoner's counsel objected to this question. The Court overruled the objection, and allowed the witness to say that he denied it in consequence of threats made to him by one Thaxter, a colored man living in Virginia, who though not a preacher, held meetings in his neighborhood which one of the prisoners attended.

Verdict, Guilty; Rule for a new trial; Rule discharged; Judgment and Appeal.

Attorney General, for the State.

Graham, contra.

PEARSON, C. J. The witness was impeached by the position in which he stood before the jury,—that of an accomplice turning "State's witness," and we can see no reason why the Solicitor for the State was not at liberty, by questions asked upon the examination in chief, to enable the witness to say that he had made a different statement, and then give an explanation, by stating what was the cause of his doing so. Suppose the matter had been passed over, and the prisoners had afterwards proved that the witness had made a different statement: It certainly would then have been proper for the Solicitor to recall the witness and give him an opportunity of making the explanation. What prejudice could, by any possibility, be done to the prisoner by the course pursued by the Solicitor in asking these questions by way of anticipating what he supposed would afterwards come out in the course of

the trial, in consequence of what had been elicited from the witness by a gentleman of the bar.

The motion in arrest was based on the manner in which the word "store" is disconnected by a comma from the word "warehouse," as printed in the Revised Code, but upon inspection of the enrolled bill in the office of the Secretary of State, it appears to be a misprint, by the introduction of a comma which is not contained in the enrolled bill. The word "store" is there plainly used as an adjective, connected with "ware" by the disjunctive "or," both being added to the word "house"—thus, "store or ware house," whereas, as printed the word "store" might be considered as used for a substantive. Upon an inspection of the enrolled bill the counsel for the prisoners properly abandoned the motion.

There is no error. This will be certified to the end, &c.

PER CURIAM. No error.

GEORGE L. GIBSON *v.* HENRY L. GRONER.

In the present condition of the Government and the Courts and as the process of the Courts is now controlled, a plaintiff in execution can only collect currency, or United States Treasury notes. *Therefore,* in assessing damages, the jury should estimate the value of the demand *in currency.*

CASE, tried before *Mitchell, J.*, at Spring Term 1868, of the Superior Court of CABARRUS.

The plaintiff borrowed from the defendant $150 in United States currency, and deposited with him $360 in gold coin, as a security for the return of the $150. In a few days thereafter the plaintiff tendered $150 in currency to the defendant, and demanded the return of the gold. The defendant refused, and thereupon this action was brought. The only question was as to the measure of damages. The plaintiff insisted that he was entitled to the $360, with the *premium* added for gold,

and interest from the time of refusal. His Honor charged the jury that the plaintiff could only recover $360 and interest. Verdict accordingly. Judgment; and Appeal by the plaintiff.

Boyden & Bailey, for the appellant.

No counsel *contra*.

READE, J. In the present condition of the Government and the Courts and as the process of the Courts is now controlled, a plaintiff in execution can only collect currency, *i. e.* United States Treasury notes.

In assessing damages therefore, in any given case, justice requires that the jury should consider that fact, and that their verdict should be for the value of the demand in currency. If the demand be for a horse, and the horse is worth $100 in coin, and $150 in currency, the verdict ought to be for $150.

In applying that principle to this case, the plaintiff is entitled to a verdict for the amount of the value of the gold which he deposited, in currency—*i. e.*, to the nominal amount of the gold coin, with the depreciation of the currency added.

There is error.

PER CURIAM. *Venire de novo.*

URIAH VAUGHAN *v.* THE RALEIGH AND GASTON R. R. COMPANY.

Where an Agent of a Rail Road Company was introduced in its behalf, to prove that certain goods were not delivered to the Company as a common carrier, it was competent for this purpose to show that it was the custom of the Company to weigh, mark and book such goods; those in question not having been so treated.

CASE, tried before *Gilliam, J.*, at Spring Term 1868, of the Superior Court of HERTFORD.

The plaintiff sought to charge the defendant as a common

carrier, with the value of seven and a half bales of cotton alleged to have been stolen while in the defendant's possession. The evidence was that the plaintiff's agent, one Futrell, took a quantity of cotton to the depot at Henderson and offered to deliver it to the defendant's agent, one Moore. The defendant had an old and a new warehouse at Henderson, and Moore told Futrell that he had room for only eight bales. These he received and stored in the new warehouse. The other bales, twenty-seven in number, were put by Futrell in the old warehouse, of which the key was given him by Moore. Shortly afterwards the old warehouse was broken open, and seven and a half bales stolen. Moore was introduced for the defendant, and testified that the old warehouse was not used by the Company, and that of this Futrell was aware; that the proposition to deposit the cotton in the old warehouse was made by Futrell and nothing was said as to who should bear the risk; that the eight bales were weighed, marked and booked, but the others were not so weighed, &c. The defendant also offered to prove in this connection, by Moore, that it was the custom of the Company, at the Henderson depot, to weigh, mark and book bales of cotton immediately after they were received for transportation. This evidence was objected to, and excluded by the Court; and the defendant excepted.

Verdict and judgment for the plaintiff, and appeal by the defendant.

Moore, for the appellant.

Smith and *Bragg*, *contra*.

READE, J. As bearing upon the question whether the Rail Road had received the cotton for transportation as a common carrier, and as confirmatory of the statement of the Agent that it *had not*, the defendant offered to ask the Agent whether it was not the custom to weigh and mark goods as they were taken for transportation, the goods in question not having been weighed and marked. The evidence as to the

custom was ruled out. In this there was error; and for this error there must be a *venire de novo*.

The learning upon the question will be found in the authorities cited at the bar. See especially *Price* v. *Earl of Torrington*, 1 Salk., 285, (1 Sm. L. C., [390.])

PER CURIAM. *Venire de novo.*

THE STATE *v.* SAMUEL HAMPTON.

Where one was going down the steps which led from a Court room, and another who was before him in striking distance, stopped, turned about, clenched his right hand (the arm being bent at the elbow but not drawn back) and said, I have a good mind to hit you, whereupon the former walked away and went down another staircase: *Held* that the latter was guilty of assault.

(*State* v. *Myerfield*, Phil., 108, cited and approved.)

ASSAULT, tried before *Cilley*, *J.*, at Spring Term 1868, of the Superior Court of GUILFORD.

The following special verdict was submitted to the judgment of his Honor below: As the prosecutor was going in a crowd down one of the staircases leading out of the Court House in Greensboro', and was stepping down the first step, the defendant, who was in front of him, and in striking distance, stopped, turned about, and with right hand clenched, his right arm bent at his side, but not drawn back, said, I have a great mind to hit you; that before this, and as the crowd was leaving the Court House, the defendant had said, If the crowd will go along to see, I will cowhide Lindsay; that Lindsay had no way to go down that staircase but by pushing past the defendant; and that he turned away from defendant and went down another staircase.

The Court being of opinion that the defendant was not guilty, the Solicitor for the State appealed.

Attorney General, for the State.

No counsel *contra*.

READE, J. It would seem that there ought to be no difficulty in determining whether any given state of facts amounts to an assault. But the behavior of men towards each other varies by such mere shades, that it is sometimes very difficult to characterize properly their acts and declarations.

We find it so in the case before us. An assault is usually defined to be an offer, or attempt to strike another. An *attempt* means something more than an *offer*. As therefore, an *offer* is a necessary ingredient in an assault, and as an *attempt*, or anything else, is not such, it would probably be more precisely accurate to say, that an assault is an offer to strike another.

The distinction between an offer to strike and an attempt to strike, is very clearly stated in *State* v. *Myerfield*, Phil. 108, and need not be repeated.

In the case before us, the defendant placed himself immediately in front of the prosecutor, assumed an attitude to strike, within striking distance, in an angry manner, and turned the latter out of his course. This was an offer of violence, and constituted an assault, unless there was something accompanying the act, which qualified it, and indicated that there was no purpose of violence. The only accompaniment of the act was the declaration: "I have a good mind to strike you." If the declaration had been, I intend to strike you, that would not have qualified the act favorably for the defendant. Nor if he had said, I have a mind to strike you.

It is suggested, however, that the expression, "I have a great mind to strike," is used to express indecision; as if one should say, I had a great mind to do so and so, but I did not, indicating that he was only debating in his own mind as to whether he would or would not. If that were the common

acceptation of the expression, it would not avail the defendant, because, when violence is apparently offered, the qualifying declaration must not be equivocal, but unequivocal, so as to leave the person attacked no good reason to suppose that violence will be executed.

We think that the facts found in the special verdict constitute an assault, and that his Honor was in error. Let this be certified, &c.

PER CURIAM. There is error.

STATE *v.* HARRISON CHURCH.

Where one drew a pistol, (neither cocked nor presented,) and ordered another, who was within ten steps, to leave a public place, or he would shoot him: *Held* to be an assault.

(*State* v. *Hampton*, *ante* 13, *State* v. *Myerfield*, Phil. 108; *State* v. *Mooney*, *ibid*, 434, cited and approved.)

ASSAULT, tried before *Mitchell, J.*, at Spring Term 1868, of the Superior Court of WILKES.

The following is the special verdict found upon the trial: On a certain Sabbath, at a Church, where people had assembled for religious exercises, the defendant, with several others, was sitting outside of the building, about six or seven steps from it, and the prosecutor was approaching the Church, when the defendant, addressing him, said: We have no use for you in this company; you shall not come here; go back. The prosecutor declined to do so. The defendant then rose to his feet and said to the prosecutor, I have a pistol, and placed his hand on a pistol that was belted around him. The prosecutor then commenced retiring, but tardily. The defendant followed him a few steps, being not more than ten steps from him, and urged him to go off or he would shoot him, and while he was walking, drew the pistol from its scabbard, but did not cock it, or present it towards the prosecutor.

Upon these facts, his Honor was of opinion that the defendant was not guilty, and the Solicitor prayed an appeal.

Attorney General, for the State.

No counsel *contra*.

READE, J. A mere threat unaccompanied by an offer or attempt to strike, is not an assault.

So an offer to strike, qualified by some declaration which shows that there is no purpose to execute violence, is not an assault, unless the offer is with a deadly weapon, and then words are not allowed to qualify the act. So an offer of violence is an assault, even if it be accompanied with a declaration that violence will be forborne upon a condition which the actor had no right to impose: as if one offering to strike says, I will strike you if you do not pull off your hat. This will be an assault, because he has no right to require the hat to be pulled off.

So, in the case before us, if the defendant had not drawn a deadly weapon, but had simply raised his fist in striking distance, and said, If you do not leave I will strike you, that would have been an assault, because he had no right to require him to leave. But the case is stronger than that. The prosecutor was where he had a right to be, and was in no wrong; the defendant drew his pistol from his scabbard, advanced towards the prosecutor who was retiring, threatened to shoot him if he did not leave, was in ten steps of him, and drove him from the place. This was certainly an "offer" of violence, and constituted an assault.

The fact that the pistol was not cocked and pointed makes no difference. That would have been but the work of a moment, and was not needed to put the prosecutor in fear, and to interfere with his personal liberty: *State* v. *Hampton*, *ante*, 13; *State* v. *Myerfield*, Phil. 108; *State* v. *Mooney*, *Ibid.* 434.

Let it be certified to the Court below, that there is error; to the end that judgment may pass upon the special verdict as upon a verdict of guilty.

PER CURIAM. Error.

ARMAND J. DEROSSET *v.* JAS. A. BRADLEY.

Where two sureties on a note to a bank agreed, after the insolvency of their principal, to employ a broker to buy notes of the bank to an amount sufficient to pay the debt, and one of them paid the broker for notes purchased by him, and discharged the debt: *Held* that he could maintain an action on the case against his co-surety for contribution.

Where a note with two sureties, given before May 1865, was discharged by one of them after that time, *held* that the County Court had jurisdiction of a suit for contribution, under the Ordinance of June 1866, Ch. 9.

CASE, tried before *Barnes, J.*, at Spring Term 1868 of the Superior Court of NEW HANOVER.

The action had been brought by appeal, from the County Court, where it was commenced in May 1867. The plaintiff and defendant became sureties of one Brown on a promissory note payable to the Commercial Bank of Wilmington. Brown afterwards became insolvent, and in April 1867 the plaintiff and defendant agreed to employ one Dawson, a broker, to purchase bills of the bank to an amount sufficient to pay the debt. The bills were accordingly purchased, and the broker charged 25 cents in the dollar for them. The defendant refused to pay the price, and the plaintiff paid for all of them and discharged the note to the bank. He then demanded contribution from the defendant, and upon refusal brought this action.

The defendant insisted that the plaintiff was not entitled to recover, for three reasons:

1st. That the remedy was in Equity: 2d. That the action should have been for a breach of the contract, and not for contribution: 3d. That the County Court had no jurisdiction under the Ordinance of June 1866.

The Court charged that the plaintiff was entitled to recover. Verdict and judgment for the plaintiff, and appeal by the defendant.

No counsel for the appellant.

W. A. Wright, contra.

BATTLE, J. Neither of the objections urged against the right of the plaintiff to recover can avail the defendant. The parties were joint sureties of their principal, who was insolvent, and their agreement as to the manner in which the debt was to be paid, did not change their liability to each other upon the payment by one of them of the whole debt. Upon such payment, the Revised Code, ch. 110, s. 2, gave to the party paying, an action on the case against his co-surety for his rateable proportion of the sum paid, whether of principal, interest or cost. This disposes of the first and second objections. The remaining one is equally untenable.

The plaintiff had no claim upon the defendant until he had paid the debt of their principal in 1867. His cause of action did not arise, therefore, prior to the 1st day of May 1865, and hence the jurisdiction of the County Court was not taken away by the Ordinance of the Convention of 1866, ch. 19.

PER CURIAM. Judgment affirmed.

THE STATE *v.* AUGUSTUS HOLMES.

In a case where the list of registered voters of a county was in the hands of the military authorities, and the proper civil officers for drawing a jury were unable to procure a copy of such list: *Held*, that the order of September 13, 1867, requiring jurors to be registered voters, did not apply.

Where a prisoner had already accepted as jurors three colored persons, *held*, that he had no right to challenge a fourth juror when tendered, on the ground that *he* was a colored person.

(*State* v. *Arthur*, 2 Dev. 217; *State* v. *Cockman*, 2 Win. 95, cited and approved.)

MURDER, tried before *Buxton, J.*, at Spring Term 1868 of the Superior Court of EDGECOMBE.

The counsel for the plaintiff moved to quash the bill of indictment, and assigned therefor the following reasons, viz:

1. "That it was not found by a grand jury drawn from the registered voters of the county, but from a list of the good and lawful men of the county, consisting of white freeholders only."

2. "That it was not found by a grand jury drawn from the list of *citizens assessed for taxes and who had paid taxes for the current year.*"

The Attorney General admitted that the grand jury had been drawn in accordance with the laws unqualified by military orders, and examined as witnesses the Chairman of the County Court and the Sheriff of the county, who proved that before drawing the jury list, they had applied personally and by letter to the military head quarters, for a list of the registered voters of the couuty, and that they had failed to obtain it; that such list was taken by, and was still in the hands of the military authorities, and that they had been and were still unable to procure a copy, and that without such copy they were unable to ascertain who were the registered voters of the county.

The motion to quash was therefore overruled, and the prisoner excepted.

A special *venire* of fifty *good and lawful men* was ordered to be summoned to try the case. The Sheriff returned twenty-five whites and twenty-five colored men as jurors.

The prisoner accepted three colored jurors, and they were sworn in. He then challenged one Camper, a juror, on the ground that he was a colored man. This cause of challenge was overruled, and the prisoner challenged him peremptorily. The prisoner made but *twelve* peremptory challenges.

After a verdict of guilty, there was a rule for a new trial, which was discharged, and the prisoner appealed.

Attorney General for the State.

No counsel for the prisoner.

BATTLE, J. The case, as it appears in the bill of exceptions filed by the prisoner, presents two questions, the first of which relates to the drawing of the grand jury, and the second to the prisoner's challenge of a petit juror.

1. The prisoner's counsel moved to quash the bill of indictment, because the grand jury by which it was found was not drawn in accordance with the Military orders of the 30th of May, and the 13th of September, 1867. The second section of the first of those orders, prescribes as follows: "All citizens assessed for taxes and who shall have paid taxes for the current year are qualified to serve as jurors. It shall be the duty of the proper civil officers charged with providing lists of jurors, to proceed within their several jurisdictions, without delay, and ascertain the names of all qualified persons, and place them on the jury lists, and from such revised lists, all jurors shall be hereafter summoned and drawn in the manner required by law."

The second order relates to and modifies the first, so as to make it read as follows: "All citizens assessed for taxes, and who shall have paid taxes for the current year, and who are qualified, and have been and may be duly registered as voters, are hereby declared qualified to serve as jurors." It is manifest that the effect of this modifying order is to prevent a person from being competent as a juror merely on account of his being a tax payer; he must have the additional qualification of having been duly registered as a voter. It appears from the case, that "the proper civil officers, charged with providing lists of jurors," attempted to comply with the requirements of the order, but were unable to do so because they could not obtain from the military authorities, in whose custody they were, the lists of the registered voters. We cannot suppose, for a moment, that the military authorities intended that the whole administration of the criminal law should be suspended, because of its not being convenient for them at the time to furnish those lists, and we, therefore, think that the Court acted right in directing a grand jury to

be drawn in the usual manner, according to the laws of the State.

2. The second question is, whether the prisoner is entitled to a *venire de novo* as a matter of right, because of the Court having overruled his challenge for cause to a person tendered to him as a juror, and whom he then challenged peremptorily, withal, however, accepting a jury before his peremptory challenges were exhausted. It appears from the record that a special *venire* of fifty good and lawful men were ordered to be summoned to try the case, and that thereupon the Sheriff returned twenty-five whites and twenty-five colored men as jurors. In forming the traverse jury, three colored jurors were tendered to and accepted by the prisoner, but upon the tender of the fourth he was objected to on account of his color; and the objection was overruled and he was then challenged peremptorily. The overruling of this objection is the ground of the application for a *venire de novo*. It is manifest that the special *venire* was summoned in accordance with the requirements of the military orders to which we have referred, and the prisoner insisted upon his right to have them so summoned, as appears not only from his acceptance of three colored jurors, but also from his motion to quash the bill of indictment, because it had not been found by a grand jury selected from a list made out by the Justices of the County Court in obedience to such orders. Why the motion to quash was not sustained, we have already seen. When the Superior Court, at which the prisoner was tried, sat, the difficulty, it seems, was removed, and the prisoner clearly showed his acquiescence, if not his desire, in the summoning of colored as well as white jurors on the special *venire*. Having done so, we think he is not at liberty to object for cause to a juror merely on account of his color. This makes it unnecessary for us to notice the effect of the circumstance that the traverse jury was formed before the prisoner's peremptory challenges were exhausted. See *State* v. *Arthur*, 2 Dev. 217; *State* v. *Cockman*, 2 Win. 95.

It must be certified to the Superior Court for the County of Edgecombe that there is no error in the record.

PER CURIAM. No error.

NANCY E. LITTLE *v.* LABAN LITTLE.

Upon an application for alimony *pendente lite*, it is unnecessary to decide whether the petition warrants a divorce *a vinculo*, or only a divorce *a mensa et thoro*.

Where a petition for divorce by the wife showed forbearance (and connivance) by her in regard to adulteries committed by the husband while she remained in his house, and then charged that afterwards he drove her from his house by threats of violence, swearing he would kill her if she did not leave: *Held*, to set forth ground sufficient for a divorce *a mensa et thoro*, at least.

(*Whittington* v. *Whittington*, 2 D. & B. 64, and *Hansley* v. *Hansley*, 10 Ire. 506, cited and approved.)

MOTION for *alimony pendente lite*, heard by *Mitchell, J.*, at Spring Term 1868 of the Superior Court of MECKLENBURG.

The facts necessary to an understanding of the opinion appear sufficiently set forth therein.

The Court below having allowed the plaintiff's motion, the defendant appealed.

J. H. Wilson for the appellant.

Dowd, contra.

BATTLE, J. For the purposes of this case, it is unnecessary for us to decide whether, upon the facts stated by the petitioner, she is entitled to a decree for a divorce *a vinculo matrimonii*, according to the special prayer of her petition; for we are clearly of opinion that, under the general prayer, she is entitled to a divorce *a mensa et thoro*, and that this is sufficient to authorize a decree for alimony *pendente lite*.

The counsel for the defendant made a strong argument to show that the long delay of the plaintiff after a full knowledge of the adulterous acts of her husband amounted to acquiescence in his criminal intercourse with the two black women mentioned in the petition, and was a bar to her claim for a divorce. In support of this argument, he referred to and relied upon the case of *Whittington* v. *Whittington*, 2 Dev. & Bat. 64. In which it was held that an unreasonable delay by one party after a probable knowledge of the criminal conduct of the other would, if unaccounted for, preclude such party from obtaining a decree for either kind of divorce. This argument was met by one equally forcible from the plaintiff's counsel, to prove that a woman might remain for a long time in the same house with her husband while he was carrying on an adulterous intercourse with another woman, and yet obtain a decree for a total divorce if he continued his criminal acts after his brutal condct had at last compelled her to leave him. The counsel referred to the case of *Hansley* v. *Hansley*, 10 Ire., 506; in which is contained the following language: "After such a separation, forced on her by the debasing depravity, violence and other outrages of the husband, she might well insist on any supervening criminality on his part. For so far from being precluded from making complaint of the repetition of the fault, the guilt of the repetition after such forbearance—not connivance—on the part of the wife, would be aggravated beyond that of the first fault. We shall hold, therefore, that she might insist on adultery with this slave, supervening the separation thus forced on her." Upon the petition which we are now considering, we might hold the same thing were there any distinct and unequivocal charges of acts of adultery committed after the petioner had been driven away from her husband's house. But the only expression in the petition tending that way is, that after her husband had forced the petitioner to leave, "he was left in the uninterrupted enjoyment of his negro prostitute, by whom he had begot a child." Whether that expression alleges such a charge of continued adultery as will justify a decree

for a divorce *a vinculo matrimonii*, is, as we have already said, unnecessary for us to decide; because there is a clear and explicit allegation that the defendant drove the petitioner, "with threats of violence, from his house, and swore he would kill her if she did not leave." This, coupled with the previous statements of his adulterous intercourse with two black women successively, clearly entitles the petitioner to a decree at least for a partial divorce, and that is sufficient to sustain the order for alimony *pendente lite*.

The order appealed from is affirmed, and this must be certified to the Court below.

PER CURIAM. Order affirmed.

ROBERT BYNUM *v.* WILLIE DANIEL.

After a *nol. pros.* had been entered as to one of several defendants, upon motion by the respective parties remaining, material amendments were allowed to each: *Held*, that any question as to costs upon the process against the defendant discharged, should have been settled at the time of such allowance; and that upon such question being raised after final judgment for the demand and costs it will be presumed by the Court to have been settled.

ASSUMPSIT, tried before *Shipp, J.*, at Fall Term 1867 of the Superior Court of WILSON.

The writ was original in Debt, wherein one Rountree had been made defendant together with Daniel.

At Fall Term 1867, the first trial term, the plaintiff entered a *nol. pros.* as to Rountree, and the defendant obtained leave to add the plea of "the statute of limitations," whereupon the plaintiff, upon motion, was allowed to change his writ to assumpsit, and to claim for damages the sum of $2,000. Upon the trial, there was a verdict for the plaintiff. Judgment accordingly, and for costs to be taxed by the Clerk; and Appeal by the defendant to the Supreme Court.

Moore, for the appellant.

Bragg, contra.

READE, J. This was an action against two defendants, in which there was *nol. pros.* as to one, and a verdict and judgment against the other for the demand and full costs. The defendant insists that the costs incurred in regard to the defendant against whom *nol. pros.* had been entered ought not to be taxed. Probably that would be so (but we do not decide it) if it were not for the peculiar circumstances of this case. The action originally was *debt.* On the plaintiff's motion, it was changed to assumpsit,—the defendant, by leave of Court, having previously added the plea of the statute of limitations. Upon this the parties, by common consent, proceeded to trial.

It seems to us that the proper time to raise any question about the costs of the action was at the time when the form of action and the pleadings were changed. It was then the province of the Judge to impose such terms as to costs as he might think proper.

We are of opinion that it is to be presumed that the question of costs was at that time considered, and that, by proceeding with the cause as it stood, its incidents, including the costs, passed along with it and must abide the result.

There is no error.

Let judgment be entered in accordance with the verdict and judgment below.

PER CURIAM. Judgment affirmed.

THE STATE *v.* ALEXANDER WILLIS.

Upon a trial for murder, the fact of killing with a deadly weapon being admitted or proved, the burden of showing any matter of mitigation, excuse or justification is thrown upon the prisoner.

It is incumbent upon the prisoner to establish such matter, neither *beyond a reasonable doubt* nor *according to the preponderance of testimony* but, *to the satisfaction of the jury.*

(*State* v. *Ellick*, 2 Win. 56, cited and approved. Language used in *State* v. *Peter Johnson*, 3 Jon. 226, in regard to degree of proof of matters of excuse, &c., modified.)

MURDER, tried before *Buxton, J.*, at Spring Term 1868 of the Superior Court of WAKE.

Upon the trial it was shown by the State, and admitted by the prisoner, that the latter killed the deceased by intentionally stabbing him with a knife, which was exhibited, and admitted to be a deadly weapon.

The Court was asked by the prisoner to charge the jury that the State was required to establish to the satisfaction of the jury, beyond a reasonable doubt, the commission by the prisoner of the particular act for which it asked his conviction. This the Court declined to do, and the prisoner excepted.

Upon this point the Court instructed the jury, that when it is proved or admitted that one killed another intentionally, with a deadly weapon, the burden of showing justification, excuse or mitigation is on him, and all the circumstances of such justification, excuse or mitigation are to be satisfactorily proved by him, unless they appear in the evidence against him; that the fact of killing being proved or admitted, nothing more appearing, the law presumes such killing to have been done in malice, and so to be murder; that the circumstances of justification, excuse or mitigation, are to be satisfactorily proved, not proved as the State is required to prove an essential fact, that is beyond a reasonable doubt, for the doctrine of reasonable doubt is never applied to the condemnation of a

prisoner, but to his acquittal; and that the jury must be satisfied by the testimony offered in the case on either side that the matter in justification, excuse or mitigation is true.

To this the prisoner excepted.

Verdict, Guilty; Rule for a new trial; Rule discharged; Judgment and Appeal.

Haywood and *Fowle & Badger*, for the prisoner.

Attorney General, for the State.

BATTLE, J. The exception of the prisoner raises fairly and distinctly the question, whether upon the trial of an indictment for murder, the fact of killing with a deadly weapon being admitted or proved, the burden of showing any matter of mitigation, excuse, or justification, is thrown upon the prisoner, or whether it still remains upon the State to prove, beyond a reasonable doubt that the act of killing was done with malice prepense, express or implied. It has, as we think, always been considered as the rule in this State, that from the fact of killing with a deadly weapon, the law will imply malice, and then the *onus* of the proof to remove it, is devolved upon the slayer. It was so held by this Court in the case of the *State* v. *Peter Johnson*, 3 Jon. 266, in which it was said that the rule that the jury must be satisfied beyond a reasonable doubt, of the prisoner's guilt, before they could convict him, applied only to the fact of the homicide, for if the jury found that fact against him, every matter of excuse, mitigation or justification, ought to be shown by him. The burden of proof in such case being shifted from the State to the prisoner, it was incumbent on him to establish the matter of excuse or justification, beyond a reasonable doubt." Again, in the *State* v. *Ellick*, 2 Win., 56, which was ably argued and well considered, the Court say: "The position that the principle, on which the doctrine of reasonable doubt is grounded, is as much applicable to the grade of the homicide, as it is to the fact of the homicide, is not true. The

error consists in not attending to the distinction, that the fact of the homicide must be proved *by the State*, but if found or admitted, the *onus* of showing justification, excuse or mitigation, is upon the prisoner. At page 290, Foster says, whoever would shelter himself under the plea of provocation, must prove his case to the satisfaction of the jury; the presumption of law is against him, till the presumption is repelled by contrary evidence." The rule thus laid down by Foster, in his Crown Law, and sanctioned by this Court, will be found to be sustained by all the most approved of the English elementary writers on the criminal law, as well as by many adjudged cases. See 4 Bla. Com. 201, 1 East Pl. Cr. 224, 340, 1 Russ. on Cr. (1st ed.,) 614, 616. Bac. Abr. Tit. Murder C. 2, 2 Stark on Ev. 948, Archb. Cr. Pl. (1st. ed.) 212, 213, 2 Chit. Cr. Law (4 Am. ed.) 727. Ros. Cr. Ev. (2nd ed.) 20, 653. And for adjudged cases, see, among others, *Regina* v. *Kirkham*, 8 C. & P. 116, (34 C. L. Rep. 318,) *Rex* v. *Greenacre*, *ib.* 35 (34 C. L. Rep. 280.)

In America the leading case on the subject is *Commonwealth* v. *York*, which was tried in Massachusetts, and is reported in 9 Metcalf, 93. The case was ably argued at the bar, and the Court being divided in opinion, gave the subject a thorough and exhaustive examination, reviewed all the English authorities ancient and modern, and many cases decided in this country, with the following result as announced by the majority, consisting of every member of the Court except one: "When on trial of an indictment for murder, the killing is proved to have been committed by the defendant, and nothing further is shown, the presumption of law is, that it was malicious and an act of murder, and proof of matter of excuse or extenuation lies on the defendant, which may appear either from evidence adduced by the prosecution, or from evidence offered by the defendant. But where there is any evidence tending to show excuse or extenuation, it is for the jury to draw the proper inferences of fact from the whole evidence, and to decide the fact on which the excuse or extenuation depends, according to the preponderance of evi-

dence." The opinion of the Court resulting in this conclusion was delivered by Chief Justice SHAW, but there was a dissenting opinion filed by WILDE, Judge, in which he endeavored to maintain the following propositions:

1. "That when the facts and circumstances accompanying a homicide are given in evidence, the question whether the crime is murder or man-slaughter, is to be decided upon the evidence, and not upon any presumption from the mere act of killing.

"2. That if there be any such presumption, it is a presumption of fact, and if the evidence leads to a reasonable doubt, whether the presumption is well founded, that doubt will avail in favor of the prisoner.

"3. That the burden of proof in every criminal case is on the Commonwealth to prove all the material allegations of the indictment; and if, on the whole evidence, the jury have a reasonable doubt whether the defendant is guilty of the crime charged, they are bound to acquit him."

The propositions thus enunciated by WILDE, Judge have received the sanction of a few adjudications in some of the States, and have been adopted by both Wharton and Bishop in their elementary works on the Criminal Law; and it is upon these authorities that the counsel for the prisoner in the present case mainly rely.

We prefer to stand *super antiquas vias*, and to adhere to the rules laid down in the *State* v. *Ellick*, above referred to. In that case the erroneous statement which we had inadvertently made in the *State* v. *Peter Johnson*, that it was incumbent on the prisoner to establish the matters of excuse or extenuation beyond a reasonable doubt, is corrected. In it is also corrected what we consider as erroneous in the decision of the Court in *Commonwealth* v. *York*, that the matters of excuse or extenuation which the prisoner is to prove, must be decided according to the preponderance of evidence. It is more correct to say, as we think, that they must be proved to the satisfaction of the jury. It is seen that, in the proof of such matters, we do not recognize any distinction

between the case where the question is whether the homicide is murder or manslaughter, and that where it is whether the killing is murder or excusable or justifiable homicide.

Upon the whole case, we are constrained to say that there is no error in the record, and it must be so certified, as the law directs.

PER CURIAM. No error.

THE STATE *v.* HENDERSON CAUDLE and others.

After conviction of a Forcible Trespass, judgment will not be arrested because the indictment contains no allegation as to the *time* when the offence was committed.

FORCIBLE TRESPASS, tried before *Mitchell, J.*, at Spring Term 1868 of the Superior Court of YADKIN.

On the trial below, after a verdict for the State, the defendant moved in arrest of judgment because the indictment contained no specification of time in connection with the commission of the offence charged. This motion was refused, and judgment having been pronounced, the defendant appealed.

Attorney General, for the State.

No counsel for the prisoner.

BATTLE, J. The only ground upon which the motion in arrest of the judgment in this case is based, is expressly removed by the Act, Rev. Code, c. 35, s. 20. Among the omissions in an indictment, which by force of that section cannot be made available in arrest of judgment after a verdict, is that of not stating "the time at which the offense was committed, in any case where time is not of the essence

of the offense." It cannot be insisted that time is of the essence of the offense of Forcible Trespass.

There is no error, and it must be certified as the law directs.

PER CURIAM. No error.

THE STATE *v.* WILLIAM MURRAY.

The prisoner has a right, with a view of impeaching her credibility, to ask the prosecutrix when introduced as a witness in a case of alleged rape, if she had not been delivered of a bastard child.

The *error* in excluding such question is not *cured* by permitting the prisoner to show afterwards, by various witnesses, that the prosecutrix had been delivered of such child, and that her character for chastity is bad.

Errors committed by the Court during the trial can be remedied only by a *venire de novo.*

(*State* v. *Patterson*, 2 Ire. 346; *State* v. *Garrett*, Bus. 357; *State* v. *March*, 1 Jon. 526, cited and approved.)

RAPE, tried before *Barnes, J.*, at Spring Term 1868 of the Superior Court of STANLY.

The prosecutrix, one Jemima Motley, was introduced as a witness for the State, and proved all the facts necessary in law to constitute the offence. With the view of attacking her credibility, the prisoner's counsel proposed to ask her if she had not been delivered of a bastard child, and if she had not had sexual intercourse with other men. To these questions the Solicitor for the State objected, and thereupon the Court excluded them. The prisoner excepted.

The prisoner was permitted to show, by various witnesses, that the said Jemima had been delivered of a bastard child, and that her character for chastity was bad.

The other parts of the case transmitted to this Court are not important.

Verdict, Guilty. Rule for a new trial; Rule discharged; Judgment, and Appeal.

Merrimon, for the prisoner.

Attorney General, for the State.

PEARSON, C. J. "With a view of attacking her credibility, the prisoner's counsel proposed to ask her if she had not been delivered of a bastard child? And if she had not had sexual intercourse with other men?" The Court held that the questions could not be asked.

There is error. We consider the point settled. *State* v. *March*, 1 Jon. 526; *State* v. *Garrett*, Bus. 357; *State* v. *Patterson*, 2 Ire. 346.

"The prisoner was permitted to show, by various witnesses, that the said Jemima Motley had been delivered of a bastard child, and that her character for chastity was bad."

We do not think that this can have the effect of curing the error. The admission of an allegation in pleading is in some instances cured by verdict. But an error committed by the Court can only be remedied by a *venire de novo*.

It is unneeessary to notice the other points made in the case.

This opinion will be certified, &c.

PER CURIAM. *Venire de novo.*

STATE *v.* JOSEPH McCURRY.

A *special venire* summoned previous to the day of trial cannot be successfully challenged because the original panel was set aside upon a challenge to the array.

An objection by the State to a question asked of a witness being sustained by the Court but immediately afterwards withdrawn so that the prisoner might have asked it: *Held*, no ground for a new trial, especially where the same question was asked and answered by another witness.

There being no evidence of a mutual combat between the prisoner and the deceased, it was proper for the Court to refuse to charge the jury upon the supposition that there was such evidence.

(*State* v. *Owen*, Phil, 425; *Freeman* v. *Edwards*, 3 Hawks, 5; *State* v. *Benton*, 2 D. & B., 196, cited and approved.)

MURDER, tried before *Gilliam, J.*, at Fall Term 1867 of the Superior Court of CLEAVELAND.

Upon the trial, the prisoner challenged the array of the original panel, because the list had not been made out according to the Revised Code. The Solicitor admitted the cause of challenge, and the panel was set aside. The prisoner then challenged the array of the special *venire* summoned the day before, because the original panel had been set aside. His Honor refused to set aside the *venire*, and the prisoner excepted.

The deceased, Huldah McCurry, the wife of the prisoner, was found dead in her bed, on the morning of the 4th December, 1866, and it was alleged that she was strangled by choking. There were marks of violence on her neck, as if made by a man's thumb on one side, and his fingers on the other. Dr. J. W. Harris, who was present at the coroner's inquest, testified that the marks were made upon the neck of the deceased at the time of her death, or immediately before, though the prisoner told him and one Noah Bickerstaff when the marks were noticed, that he made them there in a *fuss* he had with the deceased on the evening of the 2nd of December. A witness who was at the house of the prisoner on the 3rd, testified that the deceased then seemed well, and no marks on her neck were observable. Noah Bickerstaff was asked by

the prisoner, upon cross-examination, whether the Crow family (the maiden name of the deceased being Crow) were not affected with a disease of the throat. The Solicitor objected, and the objection was sustained. Immediately afterwards the objection was withdrawn, but the prisoner did not repeat the question, but asked and obtained an answer to the same question from another witness, without objection. The prisoner excepted because the Court sustained the objection to the question to Bickerstaff. Several witnesses testified that the prisoner frequently beat his wife, and threatened to kill her, when he was drunk. There was no evidence of her offering any resistance, except that of one witness, who saw her strike him with a chair, some eight or ten years before, upon his slapping her in the face.

The prisoner's counsel asked the Court to charge the jury, that if they were satisfied the killing took place in a mutual combat between the prisoner and the deceased, they could convict of manslaughter only. The Court declined so to charge, because there was no evidence of a mutual combat, and the prisoner again excepted.

Verdict, Guilty. Motion for a new trial overruled. Judgment, and Appeal.

Merrimon, for the prisoner.

Attorney General, contra.

BATTLE, J. The exceptions upon which the prisoner founds his application for a *venire de novo*, and also for a new trial, have been carefully examined and considered by us, and we are unable to find anything in either of them to prevent the sentence of the law from being passed upon him.

1. The objection raised by the prisoner's challenge to the array of the special *venire* was urged and overruled at the last term in the case of the *State* v. *Owen*, Phil., 425.

2. On the application for a new trial, the objection to the exclusion of the testimony of Bickerstaff, in relation to sore throat in the family of the deceased, cannot avail, because the

objection was immediately withdrawn, and the prisoner had liberty to introduce it if he chose. He did ask the same question of another witness, and it was answered. Whether the question was relevant or not, he cannot complain that he was deprived of the benefit of an answer to it.

3. There was not the slightest evidence of a mutual combat, and the Judge was right in refusing to give the charge asked upon the supposition that there was. As early as the case of *Freeman* v. *Edmunds*, 3 Hawks, 5, it was decided that a Judge should not charge a jury on a point upon which no testimony had been offered. See also *State* v. *Benton*, and other cases referred to in the Digest, Vol. 2, Tit. Practice, Judge's Charge.

As we find no error in the record, it must be so certified to the Superior Court of Law for the county of Cleaveland, to the end that the sentence of the law may be executed upon the prisoner.

PER CURIAM. There is no error.

JESSE HOOD *v.* A. FRONEBERGER and D. QUINN.

A note given to C in 1866 by A as principal, and B as surety, in payment for certain notes made in 1864 by B to C, which in 1866 were purchased by A from C, is a *new* contract by A and B, and not one "in renewal of or a substitute for" the contracts of 1864, within the 5th section of the Ordinance of March 14th, 1868.

DEBT, tried before *Little, J.*, at Spring Term 1868, of the Superior Court of CLEAVELAND.

The action was brought originally in the County Court upon a note, of which a copy is set out in the opinion of the Court.

Judgment having been recovered by the plaintiff, in the County Court, the defendant appealed to the Superior Court.

Upon the trial in the Superior Court the only question made was, whether the note was embraced by the Military order of

General Canby, No. 164, or by the Ordinance of 1868, Staying proceedings, &c. The Court instructed the jury that it formed a *new* contract and could be sued upon in the County Court.

Verdict for the plaintiff; Rule for New Trial; Rule discharged; Judgment and Appeal.

Merrimon, for the appellant.

Bragg, contra.

PEARSON, C. J. "We promise to pay Jesse Hood two hundred and sixty-nine dollars in silver coin or its equivalent in currency, for some notes on Aaron Quinn for the year 1864, for value received, July 1st, 1866.

D. FRONEBERGER & Co.
A. QUINN, Security."

We concur with his Honor in the opinion that this is a *new* contract, made 1st July, 1866, and does not fall within the exception set out in the 5th section of the Ordinance of the Convention, ratified 14th March 1868. It is not a note made since 1st May, 1865, in *renewal* of or substitute for a contract made prior to 1st May 1865. In 1866 Froneberger & Co. purchased of Hood notes which he held on Quinn. The fact that Quinn signs the note as surety for Froneberger & Co., does not, *per se*, give to it the character of a note in renewal of the notes of Quinn.

There is no error.

PER CURIAM. Judgment affirmed.

ESLEY RHYNE, Ex'r., &c. *v.* G. W. WACASER and others.

Debt is the proper form of action upon a bond for the payment of a specified sum of money "in specie or its equivalent," where the plaintiff seeks to recover only the sum specified.

DEBT, tried before *Little, J.*, at the Spring Term 1868, of the Superior Court of LINCOLN.

The plaintiff sued upon a bond, executed to his testator by the defendants, for the payment of $1,103.50, "in specie or its equivalent."

The defendants moved to non-suit the plaintiff, on the ground that the action should have been *covenant*. His Honor refused to non-suit. Verdict and judgment for the plaintiff, and appeal by the defendants.

Bynum, for the appellants.

Bragg, contra.

READE, J. There can be no doubt that *Debt* is the proper action upon the bond declared on, if the plaintiff seeks to recover only the amount mentioned in the bond, to wit, $1,103.50. If he had sought to recover that, and a further sum as the equivalent of specie in currency, because of its depreciation, whether *Covenant* would not have been the proper action, is not necessary to decide; as it appears that the sum recovered was the nominal amount of the bond.

Let judgment be entered here for the nominal amount of the bond, with interest.

PER CURIAM. There is no error.

J. M. STOUT *v.* DANIEL WOODY.

Where a father so acts as to render his house no longer habitable by his children, it is a desertion of them by him within the meaning of Rev. Code, c. 5, s. 1.

One who seduces away and employs the apprentice of another, is liable to the master for the value of such services during the time that he is so seduced and employed.

It is the duty of the party appealing to specify the points upon which he excepts to the ruling of the Court upon the trial below.

CASE, tried before *Cilley, J.*, at Spring Term 1868, of the Superior Court of CHATHAM.

Upon the trial, it appeared that a boy, by the name of Johnson, had been apprenticed to the plaintiff by the County Court of Chatham, at August Term 1861. There was evidence tending to show, that in 1859, the father of this boy being about to marry, as a second wife, a woman of bad character, his children applied to their mother's brother, to take them under his protection, and thereupon the latter, with the consent of the father, did so. That subsequent to such marriage he made no provision for his children, who lived about among their relatives, the father having no property, and having been discharged from his place as miller about the time of the breaking up of his family. It was also shown that the binding was done at the instance of one of the relatives above-mentioned; that after having been with his master for more than three years, the boy ran away, and went to the house of the defendant, where he remained for several months; and that the plaintiff had made a demand of him, and the defendant had refused to give him up.

There was other evidence which it is not necessary to state.

The Judge charged the jury, that if from the evidence, they were satisfied that, in consequence of any act or series of acts of the father, the children found their home no longer habitable by them, or if the father left his home and having none other to take to, they were left to the charity of their relatives, and if their relatives cared for them out of charity to them, and not in consequence of an arrangement made in their favor by the father, they would find that the father had deserted his children within the meaning of sec. 1, chap. 5, Rev. Code, and that if they found that the abandonment continued twelve months, they would find the desertion complete; that if they found that notice had been given to an uncle of the children, who was at time partially engaged in their maintenance, they would find the notice sufficient, and, if further, they found that the boy was bound by the County Court of Chatham to the plaintiff, and that the boy was afterwards, and before the expiration of his indentures, employed by Woody without the consent of the plaintiff, they would find for the plaintiff.

Verdict for the plaintiff. Rule for new trial. Rule discharged: Judgment and Appeal.

No counsel for the appellant.

Phillips & Battle, contra.

READE, J. The evidence is given in detail on both sides; the charge of the Judge is given in full; there is no exception on either side; the verdict is for the plaintiff, and the defendant has appealed.

This is an unusual way of presenting a case to this Court. It ought to have been presented upon exceptions to the evidence or to the charge of his Honor, specifying the errors complained of.

Under our statute, Rev. Code, c. 5, s. 1, if a father desert his family, and be absent for the term of one year, leaving them without sufficient support, his children may be bound out as apprentices. There was evidence tending to show that such was the case here.

The boy was bound to the plaintiff by the County Court, and during his term of service the defendant seduced him away and employed him for eighteen months. For the value of his services during this time the suit is brought.

It is well settled that the master of an apprentice may recover the value of the services of the apprentice from any one who may harbor or employ him.

There is no error.

PER CURIAM. Judgment affirmed.

Doe ex dem. JAMES B. BEARD and others *v.* JACK HALL.

Where land had been conveyed by a Clerk and Master under an order of the Court of Equity, in pursuance of a sale theretofore made for partition upon an application by tenants in common, and the purchaser had reconveyed the land to another; *Held* that the tenants in common could not impeach the conveyance by the Clerk and Master (for being made without a payment of

the purchase money)—by the medium of an action of ejectment; and that their remedy was in Equity.

(*Emerson* v. *Mallett*, Phil. Eq., 234 and *Barnes* v. *Morris*, 4 Ire. Eq., 22, cited and approved.)

EJECTMENT, tried before *Mitchell, J.*, at Spring Term 1868 of the Superior Court of ROWAN.

In 1858 the lessors of the plaintiff, as tenants in common of the land in question, being minors, had filed a petition for partition in the Court of Equity for Rowan, and at a sale thereunder, in the Spring of 1860, Mrs. M. L. Beard became the purchaser. Subsequently there was an order to collect and make title. There was evidence tending to show that before the title had been made, Mrs. Beard agreed to sell the land to the defendant, and received from him therefor $15,000 in Confederate money, and such sale having been made through the medium of the Clerk and Master as agent for Mrs. Beard, he (in February 1863,) received the money from the defendant, and regarding so much thereof as was necessary to discharge Mrs. Beard's debt to him, as being in his hands as Clerk and Master for the use of the petitioners, charged himself with the remainder as her agent. The deed to the defendant bore date 25th October, 1863.

In deference to an intimation of his Honor the plaintiff suffered a non-suit, and appealed.

Boyden & Bailey, for the appellant, to show that ejectment may be brought to test the validity of proceedings for partition, and that the legal title is not divested by filing such proceedings or by a decree for sale, cited *Doe* v. *Carpenter*, 18 How, (U. S.) 279; *Clary* v. *Morely* 1 Mar., (Ky.) 360; *Brown* v. *Sceggel*, 2 Fos. (N. H.) 548; *Merritt* v. *House*, 5 Ohio, 307.

James E. Kerr, contra.

PEARSON, C. J. Tenants in common file a bill in Equity praying to have land sold under the order of the Court for the purpose of partition; the Court orders a sale, which is

made and the report of the sale confirmed; thereupon it is ordered that the Clerk and Master collect the purchase money, and make title to the purchaser on payment of the purchase money; the Clerk and Master makes a deed to the purchaser, setting out that the purchase money has been paid in full, and the purchaser makes a deed to a third person, admitting the receipt and payment of the price agreed on. Can the tenants in common treat all of these "actings and doings" as nullities, and maintain ejectment against the second purchaser? A bare statement of the facts is enough to show that the action cannot be maintained.

It may be that the tenants in common, by petition and order in the cause, may have relief upon the matters on which they rely to impeach the deed of the Clerk and Master so as to hold the land still bound for the purchase money, as, in the case *Emerson* v. *Mallett*, Phil. Eq., 234; or it may be, as a third person has intervened, paid the price and taken a deed from the purchaser who had obtained the deed of the Clerk and Master, that in order to have relief the tenants in common should file a bill, as was done in *Barnes* v. *Morris*, 4 Ire. Eq., 22. But certainly they cannot sustain themselves in a Court of law, in the face of these facts, for the plain reason that they have no legal title. That passed to Mrs. Beard by the deed of the Clerk and Master, and by her deed it passed to the defendant Hall.

A grant issues for vacant land, signed by the Governor and countersigned by the Secretary of State: its validity cannot be impeached in an action of ejectment, on the ground of fraud, imposition or the like cause. Why? Because the land was the subject of grant. A sheriff sells under *fieri facias* or *vend. exponas*, and makes a deed: the debtor cannot maintain ejectment against the purchaser on the ground that the sheriff made the deed without receiving the purchase money, or that the bidding was suppressed by fraud, and the land in consequence sold for little or nothing. Why? Because the sheriff had power to sell, and did sell and make title. An agent with power to sell, makes a sale and executes a deed convey-

ing the land: the principal cannot treat the deed as a nullity and maintain ejectment, on the ground that the agent was imposed on and received depreciated notes or counterfeit notes, or on the ground that he was in collusion with the purchaser, und sold the land for too small a price. In all such cases the remedy is in Equity, and a court of Law, seeing that the title has passed, takes no jurisdiction. For if it takes hold with its rough hand, the one side or the other is crushed, whereas in a court of Equity a decree may be so moulded as to adjust all of the equities, give to each claimant that to which he is entitled, and declare who shall have the legal title. In our case if the tenants in common could maintain ejectment, it would nullify the proceedings in Equity, the deed of the Clerk and Master, and the deed of the purchaser to the defendant Hall—crush them all up! although Hall may have paid $15,000 in Confederate notes, which in February, 1863, was worth something, and although the Clerk and Master received from Mrs. Beard a large amount in funds of some kind, and has made himself responsible to the tenants in common for the amount of the purchase money, as reported by him in his account of the sale. Whereas, in a Court of Equity all of these matters can be adjusted, and each party get that to which he may be entitled; for in that Court the deed of the Clerk and Master will not be allowed the legal effect of passing the title absolutely, but it will be held subject to the lien of the tenants in common for the payment of the purchase money, as in *Barnes* v. *Morris*, *ubi. sup.;* which is all that that case decides, although there are some stronger expressions used by the learned Judge who delivers the opinion.

We concur with his Honor. There is no error.

PER CURIAM. Judgment affirmed.

EDWARD RANSOM *v.* HENDERSON LEWIS.

In order to revest an estate which has been divested by adverse possession under color of title, there must be an *open* entry under claim of right, so as to give notoriety to the matter.

EJECTMENT, tried before *Gilliam, J.*, at Spring Term 1868 of the Superior Court of TYRRELL.

The land in controversy formerly belonged to one William Spruill, who, in 1840, devised the same to Colin E. Spruill, with provision that if he died leaving no issue, it should go to William E. Spruill. In 1845, Colin E. Spruill bargained and sold the land in fee to Thomas Lewis, who entered immediately, and held possession until his death in 1860, and, upon his death, the defendant, as his heir at law, entered and has held the same as his own up to the time of the trial, except as hereinafter mentioned.

Colin E. Spruill died in 1862, without issue, and in March 1863, William E. Spruill, without having made any actual entry on the premises, and whilst the land was in the possession of the defendant, conveyed his estate therein to the lessor of the plaintiff, Ransom.

In 1864, Ransom from time to time cut wood on the land, also split and carried away fence-rails, and on one occasion gathered and carried off pine-straw from the land; he also leased the land to a tenant, who, however, previously to entering and cultivating it contracted with the defendant for its use and occupation, and afterwards paid the rent to the defendant. Ransom, in entering to cut wood, &c., did so, claiming the premises as his own, and he did not know that his *tenant* had contracted with the defendant,—neither did the defendont know of *his* acts of entry, &c. There was no evidence that the acts of Ransom were known to any one except himself.

Upon these facts, by consent a verdict was found for the plaintiff, subject to the opinion of the Court, and afterwards the verdict having been set aside, and a judgment of non-suit given, the lessor of the plaintiff appealed.

Smith, for the appellant.

If one have a right of entry, a stranger may enter in his name and to his use, and this vests the lands in him who has the right of entry, without command precedent or agreement subsequent. Roscoe, Real Act. 28, L. L. 58.

No counsel, *contra.*

PEARSON, C. J. Under the will of William Spruill, Colin Spruill took a determinable fee, with a limitation over to William E. Spruill, by way of executory devise.

It is clear that the possession of Thomas Lewis, to whom Colin Spruill conveyed by deed purporting to pass an absolute fee simple estate, was not adverse to William E. Spruill, nor was the possession of Henderson Lewis adverse until the determination of the estate of Colin Spruill; for, up to that time, William E. Spruill had no right of entry. It is also clear that on the happening of that event the possession of Henderson Lewis became adverse, and the deed to his father, Thomas Lewis, under whom he claimed as heir-at-law, was color of title. So at the time William E. Spruill executed the deed to the lessor of the plaintiff the estate was divested, and he had only a right of entry or of action. It is conceded that this deed did not, at the time of its execution, pass the estate, or give to the lessor of the plaintiff a right to maintain an action on his own demise, but it was insisted with much earnestness by Mr. Smith, that as the deed operated between the parties by way of estoppel, if William E. Spruill had subsequently revested the estate either by action or by entry, the estate so revested would have fed the estoppel, and would have had the legal effect of vesting the *estate* in the lessor, so as to give him title not only against William E. Spruill, but against every person, and thereby enable him to maintain an action on his own demise. And he further insisted that the entry of the lessor of the plaintiff had the same effect, for he must be considered as having made the entry as the agent of William E. Spruill, and under the authority of his deed.

We are not at liberty to express an opinion upon the soundness of either of these propositions, as the facts of the case do not raise the point, and will only observe that if the entry of the purchaser of a mere right is allowed the legal effect of revesting the estate of his vendor, so as thereby to feed the estoppel, and vest the estate in the purchaser, it would tend greatly to encourage maintenance and evade the policy of the law, which requires every man to assert his own rights, and forbids the sale of a law suit.

But the question is not presented, for there was in point of fact no such entry by the lessor of the plaintiff as if made by William E. Spruill himself would have revested his estate. To have that effect, it was not sufficient merely to go upon the land and exercise some acts of ownership, but it was necessary that the person holding adversely should be expelled from every part of the land. Lit. sec. 781; Coke Lit. 48 b.

In our case the lessor of the plaintiff, so far from taking exclusive possession, or even making an entry openly and aboveboard, merely slipped over upon the land occasionally and cut wood, and split and carried away some fence-rails and some pine straw, which was unknown to the defendant or any one else, so far as the evidence shows. It is true the lessor of the plaintiff leased the land, but the tenant, before entry, contracted with the defendant for the use and occupation of the land, and paid him the rent; so that amounts to nothing.

We hold that, in order to revest an estate which is divested by adverse possession under color of title, there must be an open entry under claim of right, so as to give notoriety to the matter, which is all that is necessary to decide to dispose of this case.

There is no error.

PER CURIAM. Judgment affirmed.

W. L. McL. McKAY, Ex'r., &c., *v.* NEIL L. RAY, Adm'r, &c.

The first proviso to s. 2, ch. 63, Acts of 1866–'67 (in regard to defendants "about to remove," &c.,) does not apply to the case of one who it is stated "is beyond the jurisdiction of the Court;" nor does it apply to a case where there is no affidavit of the fact.
(*Bunting* v. *Wright*, Phil., 295, cited and approved.)

SCIRE FACIAS to subject bail, dismissed upon motion before *Fowle, J.*, at Spring Term 1867 of the Superior Court of CUMBERLAND.

The action had been commenced in 1861, and it was admitted that the principal in the bail bond at the time of issuing the *scire facias* and ever since had been beyond the jurisdiction of the Court.

From the order made by his Honor the plaintiff appealed.

Badger, for the appellant.

Person, contra.

PEARSON, C. J. In *Bunting* v. *Wright*, Phil. 295, a construction is given to the statute, entitled "An Act to abolish imprisonment for debt," Laws of 1866–'67, ch. 63, sec. 1. It is held that the act is general in its application, and abolishes *all* imprisonment for debt, from and after its passage; so that a debtor, who had *before* the passage of the act been convicted of fraud in the County Court and appealed, could not be imprisoned if he should afterwards be convicted in the Superior Court; and consequently that no judgment could be rendered on the appeal bond, although the debtor was called, and failed. *Cui bono* require him to appear, and go through the useless form of a trial, if on conviction he could not be imprisoned? Why require his bail to surrender him if he must instantly be discharged? These propositions seemed so clear that we were content to rest our decision on "the reason of the thing."

Upon the argument of this case we were pleased to find, that our conclusion is proved to be true, by reference to several authorities which are directly in point, and establish the position, that whenever the principal on his appearance cannot

be imprisoned, and would be entitled to be instantly discharged, he is not required to appear, the bail are discharged, and an *exoneretur* should be entered on the bail bond; for, say the Judges, "*cui bono*" require a useless act to be done? *Mannin* v. *Partridge* 14 East. 599; *Boggs* v. *Teakle* 5 Binn. 332; *Beers* v. *Haughton*, 9 Peters, 329.

It was insisted for the plaintiff that this case does not fall under that doctrine, because it is embraced by the proviso of in the Act, by reason of the fact that "the principal, Duncan Buie, at the time of the issuing the *scire facias* and ever since, has been beyond the jurisdiction of the Court."

This calls for a construction of the proviso. By its terms it is confined to cases, "where the plaintiff makes oath that the defendant is *about to remove* himself or property beyond the limits of the State, and shall at the same time swear to the amount that such person is indebted to him." *Then* the plaintiff shall have a *capias ad respondendum*, &c.

We are not at liberty to express an opinion as to the legal effect of the *capias*, and the liability of the bail in cases falling under the proviso; for, very clearly, the proviso does not embrace the case of a non-resident debtor. The words "about to remove," exclude it; the remedy given, to wit a "*capias ad respondendum*," can have no application when the debtor is a non-resident, and of course the writ cannot be executed. So that construction involves an absurdity. In this case there is the further difficulty that there is no affidavit, as required by the proviso, as to his being about to remove! That of course is out of the question, for there could be no such affidavit. Then there is no affidavit as to the amount of the debt, and "that the same is justly due." So the proviso cannot be made to fit the case of a non-resident debtor.

There is no error.

PER CURIAM. Judgment affirmed.

DANIEL HEDRICK *v.* GODFREY GOBBLE.

The exceptions to the general rule excluding hearsay evidence, do not embrace the declarations of a deceased person as to the boundary lines of land where such person was in possession as owner at the time the declarations were made.

TRESPASS Q. C. F., tried before *Cilley, J.*, at Spring Term 1868, of the Superior Court of DAVIDSON.

The question was one of *boundary*, and the defendant was introduced to testify as to certain lines. He offered to testify that his father, now deceased, under whom he claimed, whilst in possession pointed out to him certain marked lines as the boundary lines of the tract. Plaintiff objected to the testimony, on the ground that the father was then in possession of the land, and so interested. His Honor admitted the testimony, and the plaintiff excepted.

The plaintiff offered in evidence what purported to be a copy of a grant from the State, with the certificate of a person signing himself Register of Deeds for Rowan County, as to the correctness of the copy. The defendant objected to the evidence, because of the want of a certificate under seal from the Clerk of the County Court of Rowan, as to the official character of the person whose name was signed as Register. The Court sustained the objection, and plaintiff again excepted. His Honor also refused to admit parol testimony as to the genuineness of the signature of the person alleged to be Register, and as to the fact that he was Register.

The plaintiff submitted to a non-suit, and appealed.

Merrimon, for the appellant.

No counsel *contra*.

PEARSON, C. J. His Honor erred in permitting the defendant to testify to the declarations of his father as to the boundary lines. By the general rule, no testimony is to be received unless subjected to two tests; an oath, and a cross-examination. The father of the defendant was subjected to neither, so his

declarations are excluded by the general rule; and the question is, are they embraced by any exception?

Suppose he had made a deed to his son, and was still living, would his declarations as to the boundary line be competent evidence? or could he be allowed to say what is the boundary line, without being sworn and subjected to cross-examination? Certainly not. Then how can the fact of his death make any difference?

An exception to the general rule is, that in regard to boundary hearsay evidence of a deceased person is admissible, but the person, whose declaration is offered in evidence, must have been disinterested at the time he made the declaration. In our case the father of the defendant was showing to his son the line which he said divided his land from that of his neighbor; so he had a direct interest, and was making a declaration in his own favor.

Another exception to the general rule is, "words forming a part of the '*res gestæ*' and explaining the nature and quality of an act, may be given in evidence." But the declaration of the old man as to the line up to which he said his tract of land extended, is not embraced by this exception. He was in possession of the land, and therefore what he said in regard to claiming it in his own right, or as tenant of some one else, was competent, for it explained the nature of his possession. But when the question is, up to what line does his title deed extend? that is another matter. It was no part of the "*res gestæ*," to wit: the fact of his being in possession, and did not explain the nature or quality of his possession; in short, it was the naked statement of an interested man as to the line up to which he said his tract extended.

As the case goes back for another trial, we will not express our opinion upon the point made by the other exception, as the ground of objection may be removed at the next Term. The Clerk of the Court of Pleas and Quarter Sessions is required to enter the appointment of any person as Register on the records of the Court. Rev. Code, ch. 96, sec. 2.

PER CURIAM. *Venire de novo.*

D. L. PARISH, Adm'r. of ALEX. MURPH *v.* A. M. WILHELM.

An officer having two executions against the plaintiff and his father, and another execution against the father alone, levied on three horses belonging to the plaintiff, as the property of the father; the plaintiff offered to pay off the executions against *himself*, but the officer refused to receive the money, and proceeded to sell the horses: *Held*, that the officer became a trespasser *ab initio*, and was liable *in an action of trespass*, for the value of the two horses last sold.

An objection that the plaintiff should have filed a special instead of a general replication, comes too late after verdict. (Rev. Code ch. 3, s. 5.)

TRESPASS, tried before *Mitchell, J.*, at Spring Term 1868 of the Superior Court of CABARRUS.

The plaintiff declared for damages sustained by the taking and converting of two horses belonging to his intestate, and offered evidence sustaining his declaration. The defendant attempted to justify on the ground that he was an officer, and proved that as such he had executions in his hands against one Rudolph Murph, the father of the plaintiff's intestate, that two of these executions were also against the latter as surety for his father, and that the third, which was for a much larger sum than the other two, was against the father alone. He levied the executions on three horses belonging to the plaintiff's intestate, as the property of Rudolph Murph.

It was further in evidence that the intestate of the plaintiff offered to pay off the executions against himself before the day of sale, and that the defendant refused to receive the money unless he would also dispose of the third execution; and proceeded to sell the horses. The first horse sold brought enough to satisfy the executions against the plaintiff's intestate.

The Court charged the jury that the defendant had failed to make out his defense of justification, and the defendant excepted. Verdict for the plaintiff; rule for a new trial discharged; judgment, and appeal.

Boyden & Bailey, for the appellant.

Defendant cannot be treated as a trespasser *ab initio*, by

reason of mere excess, *Smith* v. *Eggerton*, 7 A. & E., 167; *Shorland* v. *Govett*, 5 B. & C., 485; *Gates* v. *Lounsbury*, 20 Johns., 427; *Whitney* v. *French*, 25 Vt., 662; *Walker* v. *Lovell*, 9 Fost (N. H.) 138. Or at least, (as the articles were sold separately and not in mass) only for the horse last sold, and a *venire de novo* should be granted because of the error of the Court below in treating defendant as trespasser for all the articles. Six Carpenters' case, 1 Smith Lead. Cases 62, Eng. ed. with note, *Dod* v. *Merger*, 6 Mod. 215; *Harvey* v. *Pocock*, 11 M. & W., 740. The question of a trespass *ab initio*, can not arise on the pleadings, as it should have been made by a special replication. Six Carpenters' case *Gargrave* v. *Smith*, Salk 221, &c., Buller *N. P.*, 81; and according to our practice, if no replication is entered, as in our case, a general one is understood, *State* v. *Hankins*, 6 Ire. 428.

Phillips & Battle, contra.

When the writ has been fully executed, subsequent acts by an officer are *trespasses*, *Shorland* v. *Govett*, 5 B. & C. 285. Trespass lies against sheriff, selling under execution after judgment has been satisfied, *Kuhn* v. *North*, 10 S. & R. (Penn.) 399. After an execution has done its office, if the officer proceeds to act under color of it by order of plaintiff, both become trespassers, *Collins* v. *Waggoner*, Breese 143.

Officer taking under lawful execution, but afterwards refusing the defendant a right of selection and appraisement under exemption act, becomes trespasser *ab initio*, *Wilson* v. *Ellis*, 28 Penn., 238; *Freeman* v. *Smith* 30, *ibid.* 264.

Defect in replication is cured by verdict.

BATTLE, J. The first position taken by the defendant's counsel is undoubtedly correct. It does not matter what an officer declares when he seizes property, for if he have a lawful process authorizing him to seize it, he is not guilty of a trespass though he professed to act under another process which did not justify him, *State* v. *Elrod*, 6 Ire. 250; *Crowther* v. *Ramsbottom*, 7 T. R., 650; *Greenville* v. *College of Physicians*, 12 Mod. Rep. 385.

In his second position, the counsel for the defendant is not so fortunate. The officer by selling the horses upon which he had levied, after a tender of the money by the plaintiff's intestate for the amount of the executions against him, became a trespasser *ab initio*. The principle was fully discussed and settled in the celebrated Six Carpenters' case, reported in 8 Coke's Rep. 146, that if a man abuse an authority given him by the law, he becomes a trespasser *ab initio*. Thus it was said in that case that "when entry, authority or license is given to any one by the law, and he doth abuse it, he shall be a trespasser *ab initio;* but where an entry, authority, or license is given by the party, and he abuses it, then he must be punished for abuse, but shall not be a trespasser *ab initio*. And the reason for this difference is that in the case of a general authority or license of law, the law adjudges by the subsequent act, *quo animo*, or to what intent he entered, for *acta exteriora indicant interiora secreta.*" A better reason was we think given by the Court in the case of the *State* v. *Moore*, 12 New Ham. Rep. 42, to-wit: that it was the policy of the law for preventing its authority being turned into an instrument of oppression and injustice.

This doctrine has often been applied to persons acting in an official capacity, and they have been held trespassers *ab initio* for any act done in abuse of their authority. Thus in ancient times in England, a purveyor, who took goods for the King's house under a commission was held a trespasser for selling them in the market, though the first taking was lawful, 18 Hen. 6, 19b., cited in the Six Carpenters' case. So in Ward's case, Clayt. 44, it was held that a constable who had a warrant to search the house of a suspected person for stolen goods, and who pulled down the clothes of a bed in which there was a woman, and attempted to search her person, by this indecent abuse of his authority became a trespasser *ab initio*. And again, it was decided in Pennsylvania that a constable who seized the property of a defendant under an execution, and refused to let such defendant select and have appraised for him, property to the amount of $300

under an act of that State, the defendant demanding and being entitled to the benefit of the exemption, became liable as a trespasser *ab initio*. *Wilson* v. *Ellis*, 28 Penn. 238. The conduct of the defendant in the case now before us, was quite as unjustifiable as was that of the officer in either of the cases above cited. The plaintiff's intestate had an undoubted right to pay off the executions against himself, and thus relieve his horses from the levy, but this privilege was refused him by the defendant, who proceeded to sell the horses for the purpose of satisfying executions against another person. In doing this he abused the authority which the law conferred upon him to levy upon the intestate's property, and thereby became a trespasser *ab initio*; as, also, by selling the second horse, after the sale of the first had brought money enough to pay off the executions which he held against the intestate. But as the other illegal act extends to both the horses, it is unnecessary to rely upon this.

The defendant's counsel again objects that the question of an abuse of the defendant's authority cannot be raised upon the pleadings in the case, because it ought to have been made by a special instead of a general replication. This objection might have been sustained had it been taken in proper time, but it comes too late after verdict. The Revised Code, ch. 3, sec. 5, cures all defects arising from mispleading or insufficient pleading, after a verdict has been rendered.

The judgment must be affirmed.

PER CURIAM. No error.

W. DEVRIES & CO., *v.* E. L. PHILLIPS and MOSES HAYWOOD.

A conveyance to pay a *bona fide* debt, if made by the debtor with a fraudulent intent is void.

Counsel have no right during the argument of a case to make *observations* upon the fact that the other party to the cause has not come forward as a witness therein.

DEVRIES & Co., *v.* PHILLIPS & HAYWOOD.

ORIGINAL ATTACHMENT, tried before *Barnes, J.*, at Spring Term 1868 of the Superior Court of CUMBERLAND.

The attachment having issued against Phillips, for a debt due to the plaintiffs, was levied upon goods which were claimed by Haywood, who was allowed to interplead. Haywood claimed under a bill of sale from Phillips, and this title was impeached as fraudulent and void as to the plaintiffs, who were creditors of the latter. There was evidence tending to show such fraud.

Upon this part of the case the Court charged "that if the conveyance were made for a *bona fide* debt and without any fraudulent intent, it passed the title to the goods even as against the creditors of Phillips:" also at another point, "that the deed is absolute upon its face, and there is no evidence of a trust. The debtor conveys absolutely to his creditor, and if it were to pay a *bona fide* debt it will be upheld though the debtor made it with a fraudulent intent."

The other portions of the charge in this connection are not material here.

Moses Haywood, one of the defendants, was present in Court, and did not tender himself as a witness. The plaintiff's counsel asked the Court to charge that as the facts of the case were peculiarly within his knowledge, the circumstances that he did not tender himself as a witness in his own behalf, required them to presume the facts as to which he might have testified, most strongly against him. The Court charged the jury that they might consider this fact, and attach such weight as they thought it entitled to. Also, that as the *plaintiffs* could have compelled Haywood to become a witness in the cause, the circumstance that *they* had not done so might also be considered by them.

Verdict in favor of Haywood; rule for new trial discharged; judgment, and appeal.

Fuller and *Merrimon*, for the appellant.

No counsel, *contra*.

READE, J. His Honor charged the jury that, "If the con-

veyance were to pay a *bona fide* debt, it will be upheld though the debtor made it with a fraudulent intent." This cannot be maintained. We think it probable that the case does not state the charge with sufficient accuracy, because in another portion of it, we find the instruction to the jury was, that the conveyance would be good "against creditors if made for a *bona fide* debt, and without any fraudulent intent." We do not doubt that the impression which his Honor designed to make upon the jury was, that if the conveyance was to pay a *bona fide* debt, it would be upheld, although the *effect* of it was to hinder and delay other creditors, and although the *purpose of the debtor* was to prefer one creditor to another.

But, as stated in the case for this Court, the charge is so broad that we cannot sustain it. It is stated that there was evidence tending to show fraud, and his Honor instructed the jury that there were badges of fraud upon the conveyauce itself; yet, notwithstanding all this, if the debt intended to be secured was *bona fide*, the conveyance must be upheld.

This is the same as to say that no conveyance to secure a *bona fide* debt can be fraudulent. And yet it is well settled, that a conveyance to secure a *bona fide* debt, or for a valuable consideration, will be fraudulent if made for the ease and favor of the debtor, or to hinder and delay creditors.

For this error there must be a new trial.

We think it proper to notice another exception, as it is one which may be taken in every case.

His Honor 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 circumstance, and give to it what weight they thought proper: as they might also consider the fact that the plaintiff might also have called the defendant as a witness if he had thought proper.

It has long been debated whether a party ought to be heard as a witness on either side. On the one side it has been

urged that it would be in aid of truth to allow the parties to testify, and on the other, that it would multiply perjuries, and perplex investigations. The latter has been thought the better view with us, until the 2nd of March 1866, when our statute made the parties competent witnesses. And now, upon the very beginning of this experiment, it is insisted that if a party will not do that which until lately was supposed to be improper, and which no party was allowed to do, and which the best men will in all cases hesitate, and in most, refuse as a matter of delicacy to do, the facts which he alleges to be true are to be presumed to be false! So that in every case, if a party be his own witness he must subject himself to the imputation of perjury, or, if he do not offer himself as a witness, he must subject himself to the imputation of concealing the truth. It would be venturesome in an experienced barrister thus to trifle with the intelligence of the jury, and quite monstrous in the Court thus to charge them. It is true as a rule of evidence, that where, 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.

So the misconduct of the party in suppressing, or destroying evidence which he ought to produce, or to which the other party is entitled,—such as the spoliation of papers and the like, warrants unfavorable presumptions against him. In a case where the finder of a lost jewel would not produce it, it was presumed against him to be of the highest value of its kind. But if the defendant has been guilty of no misconduct, and the evidence is of the delivery to him of the goods of the plaintiff, of unknown quality, the presumption is that they were of the cheapest quality. 1 Gr. Ev., sec. 37.

The omission of a party to call a witness who might equally be called by the other party, is no ground for a presumption that the testimony of the witness would have been unfavorable, *Scoville* v. *Baldwin*, 27 Conn. 316.

We certainly can allow no rule of evidence which inevitably, and in every case, puts a party in a false position before

the Jury. The propriety of a party's being a witness in his own behalf must depend upon the circumstances of each case, just as the propriety of introducing a son or other near relative must be.

The Court usually allows great latitude to counsel in the argument of cases. This is right; and the liberty is not often grossly abused. But it is an abuse of the privilege of counsel, to press extraneous and irrelevant matters before a jury; and when this is attempted, it is the duty of the Court to restrain it. In the case under consideration, his Honor not only could not have given the instruction asked for, but he ought to have restrained the counsel from the argument before the jury, as calculated to pervert justice. It is not every prejudice which may be excited in an ignorant mind out of Court, which may be allowed to be excited in Court. Suppose, for instance, that a defendant is to be tried for his life, and to escape unreasonable prejudices in one county he removes his trial to another; the fact that he does so may be made to excite the prejudice that he is endeavoring to escape justice, and thus he would escape the prejudices of one community, to find them intensified in another. Would the Court allow the fact to be given in evidence or commented on by counsel? Of course not. In what does that differ from the predicament in which a party is placed who is to be assailed whether he does or does not offer himself as a witness?

We conclude that the fact, that a party does, or that he 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 non-introduction of any other witness might be commented on.

PER CURIAM. There is error.

M. L. & R. J. HOLMES *v.* SACKETT, BELCHER & COMPANY.

Since the act of 1866-67, c. 63 the defendant in an original attachment may replevy and plead without giving a replevy bond.
(*Bunting* v. *Wright*, Phil. 295, and *McKay* v. *Ray*, *ante*, 47, cited and approved.)

ORIGINAL ATTACHMENT, before *Gilliam J.*, at Spring Term 1868 of the Superior Court of ROWAN.

The attachment was returnable to Fall Term 1867, and at the next term, after publication, the defendants appeared by attorney and moved to be allowed to plead *without* executing a replevy bond.

His Honor declined to grant the motion, and the defendants appealed.

Boyden & Bailey, for the appellants.

The exception in the Act of 1866-67, c. 63, applies only to residents of this State who are about to remove themselves or property beyond the limits of this State. Then, had the plaintiffs sued the defendants while commorant here, by personal service, they could only have done so by writ of summons. What reason can be assigned why greater right should be accorded to plaintiffs and heavier restrictions imposed upon defendants, when sued by the extraordinary process of attachment?

Our attachment has never been regarded as other than what it was under the custom of London, a substitute for the ordinary process where, for certain reasons esteemed sufficient by the Legislature, the ordinary process could *not be served*, *Hightower* v. *Murray* 1 Hay 21. The object of the attachment, shown by the case and the whole tenor of the decisions as well as by the very language ("so as to compel the said A. B. to appear and answer," &c.,) was only to compel appearance; this law originally formed a part of the "Court law," and is certainly in *pari materia* with other acts touching the process of the Courts; wherefore they should be "taken as one system, and be so construed." *State* v. *Melton*, Busb. 49.

Then, the attachment and bail laws formed parts of "one system," and accordingly it has been held under the old system when bail might be claimed, that the replevy bond was nothing but a bail bond; that an action of debt would not lie on it, but only a *sci. fa.* *Summers* v. *Parker*, N. C. T. R., 147; that the sureties to the bond might surrender the principal in their own discharge. *Hightower* v. *Murray*, *supra.* Other analogies are declared in *Houston* v. *Porter*, 10 Ire., 134; *Gorman* v. *Barringer*, 2 D. & B. 502; *Bickerstaff* v. *Dellinger*, Conf. Rep. 299.

It is thus shown that a replevy bond was required under the old system, in order to harmonize the process with the ordinary process—to require of the defendant only what would have been required of him had he been sued by the ordinary process, and not to give additional rights by the process of attachment, as in some of the New England States.

The object of the process is to compel or induce appearance, under the same restrictions and no more as would be applied to a defendant in such ordinary process as might have issued against *him.*

Upon the foregoing principles is based the maxim, *leges posteriores priores contrarias abrogant*, which as is submitted, applies equally whether the repugnancy consists in the terms of the acts, or results from their construction and effect, so that whenever an act required by a former law becomes a vain and idle ceremony by virtue of a subsequent law, the former law *quoad hoc* is repealed, for the maxim is *Lex not cogit*, &c. In accordance with this view, this Court has held that where the act in question has put an end *to the object of litigation*, the suit itself must end. *Bunting* v. *Wright*, Phil. 295. So in the principal case, suppose a bail bond to be required,—*Cui bono?* What could it avail the plaintiff? What legal purpose does it carry out? What obligation does it impose?

Merrimon, contra.

1. The Act abolishing imprisonment for debt does not by its *terms* embrace proceedings by *attachment*, but only certain classes of actions begun by "*original writ*," not as understood in the English law, but as commonly understood in this State. It has never been understood here that proceedings by "*original writ*," embraced proceedings by *attachment*,—indeed the latter is generally understood to be the reverse of the former, and is in contradistinction to it.

2. Proceedings by attachment are not only not included by the plain words of this Act, but the Act taken altogether shows that it was not intended to embrace them, for it is provided, that if the plaintiff, proceeding by "*original writ*" in any action of debt, assumpsit or covenant, shall make oath in writing that the defendant is about to remove himself or property out of the State, then he shall have *bail*. This shows that the *policy* and spirit of the statute do not embrace attachment proceedings, nor was it so intended.

3. If the Court give the Act the construction contended for, it opens wide the door for fraud to non-resident debtors; they may carry off their property beyond the jurisdiction of our Courts, in defiance of their creditors, and the latter have no relief. The present case illustrates the truth and force of this view. It would be monstrous to say the Legislature intended so to provide, and it is asking the Court to go too far to so declare, *by a rule of construction*

PEARSON, C. J. In this case the defendants seek to carry the doctrine "*cui bono?*" (Why require a useless act?) farther than is done in either *Bunting* v. *Wright*, Phil. 295, or *McKay* v. *Ray*, ante, 47. It now becomes necessary to construe the Attachment Act, Rev. Code, ch. 7, in connection with the Act of 1866-'67, and to determine how far the former is affected by the latter.

The above cases, however have cleared off the ground, and make it much easier to decide the question now presented, than if it had been sprung upon us before any construction had been put on the act "To abolish imprisonment for debt."

It is decided by *McKay* v. *Ray*, that the case of a non-resident debtor does not come within the proviso set out in sec. 2 of the Act of 1866–'67. The next question is, does the 1st section of that Act embrace the case of a debtor, whose property has been seized by attachment? The enactment is, "From and after the passage of this Act, it shall not be lawful to arrest or imprison any person upon an original writ for debt," &c. It is clear that the expression, "*original writ*" is not used in the sense given to it in the English books, for there it means a writ issuing out of the Court of Chancery in order to institute a suit in some one of the Courts of general jurisdiction, to-wit: the Court of King's Bench, Common Pleas, or Exchequer, and to summon the party to appear, &c, 3 Bl. Com.

The "original writ" has become obsolete in England, and was never used in this State; so we must take the Act to mean, "*the mesne process*" by which a party is compelled to appear and answer an action. In the King's Bench this was by *capias ad respondendum*, in the Common Pleas it was by attaching the property. Upon entering an appearance the defendant was required to put in bail to the action, or go to jail. In this State the mesne process was a *capias ad respondendum*, which is styled in the Act of 1866–'67 *the original writ*. Under it the Sheriff arrested the defendant, took *bail to the writ* to compel appearance, and converted it into "bail to the action," by assigning the bail bond.

The object of the attachment, authorized by Rev. Code, ch. 7 (which is usually called an *original* attachment, so bringing it within the words "*original writ* for debt,") was to give a remedy when the *capias ad respondendum*, the ordinary process, could not be served because "the defendant was a non-resident, or concealed himself," &c. This was effected by seizing the property of the debtor, so as to compel him to appear and *give bail to the action:* in which case, the object being accomplished, the property was discharged and restored to the debtor, in like manner as the bail below taken under mesne process (in the King's Bench)

and the property attached under the mesne process (in the Common Pleas) was discharged by appearance and giving bail *to the action*. So it is manifest that the writ of attachment authorized by the Rev. Code, ch. 7 is only a substitute for the ordinary process, to-wit: a *capias ad respondendum* by which to compel a party to appear and give bail to the action; and that upon appearance and giving bail he stood on the same footing, whether brought in by *capias* or by attachment.

The effect of the Act of 1866-'67, in the view we are now taking of it, is to abolish the ordinary process by *capias* for debt, and put in its place a *summons*. If the defendant does not appear, the plaintiff takes judgment by default, and, under *fieri facias*, sells his property. If the defendant does appear, he is allowed to enter his pleas and defend, without giving *bail to the action*. It follows as a necessary consequence, that the Act has the further effect of so modifying the process of original attachment (which, as we have seen, is only a substitute for the process by *capias*) as to allow it to serve the purpose only of compelling the defendant to appear. If he does not appear, the plaintiff takes judgment by default and sells his property; if he does appear, he is allowed to enter his plea without giving bail to the action. For, as was forcibly argued by Mr. Bailey, why give bail to the action? *Cui bono?* for the bail are instantly entitled to have an *exoneretur* entered on the bail bond, inasmuch as the principal, if brought into Court and surrendered, could not be imprisoned for the debt, and the plaintiff has had the benefit of his attachment, by compelling an appearance, so as to enable him to proceed to judgment.

The reply made by Mr. Merrimon is, If the bail should bring the non-resident debtor into Court and surrender him, the plaintiff could then enter a non-suit, and take out another writ; and by making the affidavit, under the proviso in the 2nd section, that the debtor "was *about to remove*," &c., which he would then be able to do, could have a *capias ad respondendum*, and force him to give bail to the action.

In other words, the first action is not for the purpose or under the expectation of getting judgment; but to force the debtor to come into the State, and give the creditor a chance to take a better hold of him, in a second action.

There is no principle of law to support such a practice, and it would be a violation of all principle for the Courts to give countenance to it.

It is asked, What is a creditor to do? A non-resident debtor, if not required to give bail, may enter his pleas and contest the cause of action and then remove his property while the action is pending! We can only say, it is the province of the Courts to expound the laws, not to make them.

His Honor erred in declining to allow the defendants to enter their appearance by attorney and make defense, without a replevin bond.

This must be certified.

PER CURIAM. There is error.

CASES IN EQUITY,

ARGUED AND DETERMINED IN THE

Supreme Court of North Carolina,

AT RALEIGH.

JUNE TERM, 1868.

JOS. R. BLOSSOM *v.* GEORGE O. VAN AMRINGE, JR., and others.

Arbitrators are no more bound to go into particulars, and assign reasons for their award, than a jury is for its verdict. Their duty is best discharged by a simple announcement of the result of their investigations.

Where arbitrators award that the personal property for which a suit has been brought, belongs to the defendant, and that the plaintiff shall pay the costs, *held* to be *final* as regards such suit.

An award as to *the arbitration fee*, *held* to be valid where the order of reference expressly entrusted the arbitrators with its determination.

(*Patterson* v. *Baird*, 7 Ire. Eq., 255, cited and approved.)

BILL, which had been referred, and was heard upon exceptions to the award before *Barnes, J.*, at Spring Term 1868 of the Court of Equity for NEW HANOVER.

This cause, (which has been before the Court previously, Phil. Eq. 133) together with the action of Trover mentioned therein, as well as the question of the "Arbitration fee," was referred in the Court below, at Spring Term 1867, to three persons, who made their award, and returned it at the last term, when exceptions were filed by the defendants and sustained by his Honor, whereupon the plaintiff appealed.

The details of the award, so far as excepted to, as well as the nature of the exceptions, sufficiently appear from the opinion of the Court.

W. A. Wright, and *Phillips & Battle*, for the appellant.
Person and *Strange, contra.*

PEARSON, C. J. "Arbitrators are no more bound to go into particulars and assign reasons for their award, than a jury is for its verdict. The duty is best discharged by a simple announcement of the result of their investigations." *Patterson* v. *Baird*, 7 Ire. Eq., 255.

The award under consideration seems to have been drawn up with a special reference to this principle; and all of the exceptions, except two, are so fully met by it, that we do not feel called upon to discuss them in detail; and the two which do not fall under this principle, as it seems to us, may be disposed of in a very few words.

1st. "The award of the arbitrators is not final, because they have not decided the suit at law, and it was the intention and spirit of the submission, that an award to be final, should be final as to both suits." It certainly was the intention to submit all matters in difference between the parties, and this exception would be fatal, if the action at law is not decided by the award. But in point of fact it is decided. The property for which the action is brought, is decided to belong to Blossom, the defendant, and the costs of the suit are to be paid by George O. Van Amringe, the plaintiff. This, we consider a most effectual disposition of that action, fully as much so, as if the award had been, that George O. Van Amringe should dismiss the action, pay the costs, and release all right to the "stuff," for which the action was brought, the property being then in the possession of Blossom, or having been previously sold by him.

2. "The arbitrators have found their own compensation." By the very terms of the submission, the costs of the action at law, of the suit in equity, and of *this arbitration*, are referred to the arbitration and determination of the referees. This fully meets the objection. Sometimes the parties fix upon the compensation which the referees are to receive; at other times, as in this case, that matter is left to be disposed

of by the referees after the work is finished, and they are in a condition to say, what will be a proper compensation; when that is the case, in the absence of any charge of corruption, it certainly cannot be expected that the Court shall wade through all of the voluminous proceedings, accounts, time devoted to the investigation, &c., in order to determine whether the amount of compensation fixed on is too high, for the reason, that the parties have agreed to leave that question to the arbitrators, and they are bound by it, except there be an allegation of unfairness so well sustained as to induce the Court to interfere, in order to prevent fraud and oppression by an abuse of the power confided to the arbitrators.

Decretal order sustaining the exceptions reversed, and judgment in the action at law, and a decree in the suit in Equity according to the award.

PER CURIAM. Decree accordingly.

PHILIP CRAWFORD *et. al.*, *v.* DAVID MCADAMS.

A bill filed by the sureties to a bond against the obligee, alleging that the bond is tainted with usury, the knowledge of which is confined to the principal and the defendant, and praying that the testimony of the principal be perpetuated, will not be entertained unless the plaintiffs offer to pay what they acknowledge to be really due.

(Observations by Pearson, C. J., upon the distinction ordinarily taken in this connection, between bills of discovery, and bills to perpetuate testimony.)

(*Miller* v. *Miller*, Phil. Eq. 85, cited and approved.)

BILL to perpetuate testimony, filed at Fall Term 1867 of the Court of Equity for ALAMANCE, when a general demurrer was filed and set down for argument. At Spring Term 1868 the cause was transmitted to this Court.

The plaintiffs were sureties for one John Tapscott, on a bond executed to the defendant upon the 18th of December 1858. The bill alleges that Tapscott was indebted to the defendant

in several notes, amounting, on the day said bond was executed, to $1,485.42, and that Tapscott, in order to have further indulgence, agreed to give therefor his bond with security for $1,500, payable one day after date; that such bond was prepared, and the plaintiffs, in ignorance of the circumstances under which it was given, became sureties upon it; that the intent of the bond was, that the defendant should receive more than the legal rate of interest for the forbearance of $1,485.42, and the bond was therefore null and void; that the knowledge of this usury was confined to the defendant and Tapscott, and that the defendant declined to sue upon the bond, though notified by the plaintiffs of their intention not to pay it. It was further alleged that Tapscott had become unable to pay all his debts, and that the plaintiffs had reason to fear that if he should die and thus they could not avail themselves of his testimony, they would be compelled to pay the bond. The prayer was that Tapscott might be examined touching the usury in the consideration of the bond, and that such testimony be perpetuated.

No counsel for the plaintiffs.

Phillips & Battle, for the defendant.

PEARSON, C. J. When testimony is perpetuated, the depositions cannot be used until after the death of the witnesses, and are not published until after their death. It follows that whatever may have been the perjury committed it must go unimpeached. The testimony therefore is not given under a sanction of the penalties, which the law imposes upon the crime of purjury. For this reason Courts of Equity do not entertain bills to perpetuate testimony unless where it is absolutely necessary to prevent a failure of justice, *Angell* v. *Angell*, 1 Sim. & Stu. 83.

If it be possible that the matter in controversy can be made the subject of immediate judicial investigation by the party who seeks to perpetuate testimony, Courts of Equity will not entertain a bill for that purpose, *Duke of Dorset* v. *Girdler*, Prec. Ch. 531.

So the question is, can the plaintiffs have an *immediate judicial investigation* of the usury with which they allege the note is tainted? A surety is not bound to wait until he is forced to pay the debt, but is allowed to file a bill "*quia timet*," and obtain a decree that the principal pay the debt for his exoneration, *Miller* v. *Miller*, Phil. Eq. 85. So, if a surety fears that by the delay of a creditor the principal may become insolvent, he has election either to discharge the debt, and sue his principal for "money paid," or to file a bill "*quia timet.*" For the like reason, if he fears that material testimony in regard to a payment may be lost by delay, he may file a bill in order to have the true value fixed, and a decree that the principal pay the value for his exoneration. Adams' Eq. The difficulty in our case is, that the plaintiffs cannot proceed in Equity without paying the true debt, for which they are in conscience bound; whereas, their object is, to put themselves in a condition to defend the action which may hereafter be brought on the bond, and avoid payment of the true debt as well as of the usurious excess, by pleading the statutes against usury. The matter then is reduced to this: The plaintiffs have it in their power to obtain an "*immediate judicial investigation*" in regard to the alleged usury! But in order to obtain it, they are required in Equity to pay the true debt as a condition precedent. Will a Court of Equity for this consideration make an exception to the rule, that bills to perpetuate testimony are never entertained, unless it is *absolutely* necessary to prevent a failure of justice? or will the Court make an exception to the rule, "he who comes into Equity must do Equity," and allow a "*quia timet*" bill by sureties under these circumstances to be filed without payment of the true debt? Or will the Court adhere to both rules, and dismiss the bill, on the ground that it is not necessary to entertain it to prevent a failure of justice; and that it is not for the plaintiffs to elect to invoke the jurisdiction in regard to perpetuating testimony rather than that in regard to the "exoneration of sureties," because by the latter they are required to perform a condition precedent, when the

question of usury is made, which condition they seek to evade as harsh and unreasonable, particularly when the true debt amounts to $1,485.42, and the alleged usurious bond to $1,500—difference, $14.58!!! From this course of reasoning we are led to the conclusion that the bill must be dismissed. It is to be regretted that the Court was not aided by an argument on the side of the plaintiffs. We have not been able to find any case in point, and were forced to rely upon original reasoning. To locate a grant when there are no marked trees, is a very different task from that of tracing a well marked line.

Mr. Phillips, who argued the case for the defendant, upon an intimation by a member of the Court in his favor, thought proper to call the attention of the Court to a class of cases, which he thought seemed to point the other way, and referred to 2 Story Eq., sec. 1509.

These cases make a distinction between a bill for discovery and a bill to perpetuate testimony. The former is never entertained in cases which involve a penalty or forfeiture of a public nature: and, in cases which involve only a penalty or forfeiture of a private nature, it would not lie, unless the party entitled to the benefit of the penalty or forfeiture waives it. No such objection exists in regard to a bill to perpetuate testimony.

There are two reasons for taking this distinction.

1st. "A discovery" may be used as a confession to convict the party on an indictment, or to subject him to a forfeiture or penalty; but "testimony perpetuated," can only be used in the particular case, and not until after the death of the witness.

2d. In bills "for discovery," no intent to defraud the administration of the law is alleged, whereas, in a bill to perpetuate testimony, it is necessary to aver, that the plaintiff has no means of bringing the matter to a judicial investigation, and, that the defendant, taking advantage of this circumstance, is "lying by" and awaiting the death of the witness, with an intent to cause a failure of justice, by depriving the plaintiff of the means of proving a legal ground of defence. For

instance: A plaintiff alleges the defendant holds a forged bond on him, and asks for a discovery; the bill will not be entertained, because it seeks to make the defendant criminate himself, and the discovery may be used as evidence in an indictment for forgery; but a bill to perpetuate testimony will be entertained, for the testimony can only be used *in an action between the parties*, on the plea of *non est factum;* and therefore, to prevent a failure of justice, a Court of Equity will perpetuate the testimony. So, if the *principal* in a bond seeks to have a discovery in respect to alleged usury, the Court will say, "Do Equity before you ask for equity;" that is, pay, or offer to pay the true debt; but, if he simply seek to have the testimony of a witness perpetuated, and avers that he has no means of bringing the matter to an immediate judicial investigation, and that the defendant is "lying by" and waiting for the death of the witness, in order thereby to defraud him of his ground of defence, the Court will say, the testimony ought to be perpetuated, without imposing terms; for the defendant has it in his power by suing on the bond, to have the matter fairly tried, and his refusal to do so is an attempt to commit a fraud on the administration of justice, by taking advantage of the fact that the plaintiff has no possible means of having the matter before a Court for immediate judicial investigation.

In our case, the plaintiffs, being sureties, have it in their power to bring the matter before the Court for immediate judicial investigation, by a bill in Equity, "*quia timet*," and the allegation that it is not in their power to do so, which is the foundation on which a bill to perpetuate testimony is based, is not true. The circumstance that, in order to get this immediate judicial investigation, by a rule of the Court of Equity, it is necessary for the plaintiffs to pay the true debt, cannot dispense with the necessity of making this allegation. The allegation is made in the bill under consideration, and, in our view of the subject, it is not true.

The demurrer must be sustained.

PER CURIAM. Bill dismissed.

A. L. HERREN *v.* M. M. GAINES.

A contract in these words: "We have sold to Messrs. W. & D. all the ginseng we have on hand and shall collect this season or fall, amounting to from five to eight thousand pounds, as near as we can estimate, including all we can get," binds the seller to deliver *no particular quantity*, but only so much as is on hand, and may be gathered in.

INJUNCTION, transferred, upon bill and demurrer, from Spring Term 1868, of the Court of Equity for HAYWOOD.

The bill alleged that in the summer of 1865 the complainant and defendant formed a partnership for merchandizing, and particularly for dealing in ginseng in the counties of Haywood, Jackson and Macon. In October 1865 the defendant contracted on behalf of the firm to sell a certain firm in Baltimore "all the ginseng we have on hand and shall collect this season or fall [amounting to from five to eight thousand pounds as near as we can estimate, including all we shall get,] at the rate of 68 cents per pound for prime dried and crude, and 78 cents per pound for prime strained and clarified," and the Baltimore parties advanced thereupon $1,740. Some time after the defendant informed complainant of the sale, and the latter was displeased because the prices were below the market rates; thereupon the defendant remarked that he had gotten an advantage of the young men with whom he had traded—that no definite amount of ginseng was contracted for, and the contract could be met by returning the money advanced, and the delivery of what ginseng was on hand. At the same time the defendant proposed to dissolve the partnership, and after some negotiation the plaintiff bought his interest, and gave him therefor two notes, for $760.40 in all. Since then judgment has been taken upon these notes, and defendant threatens to collect them by execution. At the time of his purchase from the defendant the plaintiff did not know that the latter had bargained to the firm in Baltimore any specific amount of ginseng,—the defendant told him that he had not so contracted, and in the copy of the contract, which the defendant furnished

to him at that time, the words above included in brackets were purposely omitted. The plaintiff did not see the original contract until he visited Baltimore, and then the parties there obliged him to perform the contract to the *minimum* of the same, which required 3,500 pounds more than *the firm* had on hand—the market price being from $1.00 to $1.05 per pound, so that he lost by the operation $945, &c.

The preliminary injunction having been awarded, at the return term the defendant put in a general demurrer, which was set down for argument, and the cause transferred to this court.

Merrimon, for the plaintiff.

Phillips & Battle, contra.

READE, J. The case turns upon the construction of the following contract:

"We have sold to Messrs. W. and D. all the ginseng we have on hand and shall collect this season or Fall, amounting to from five to eight thousand pounds, as near as we can estimate, including all we shall get."

For the plaintiff it is insisted that at least five thousand pounds must be delivered. For the defendant it is insisted that no particular quantity must be delivered, but only so much as was on hand and might be gathered in. Our opinion is with the defendant.

In *Guillem* v. *Daniel*, 2. M. & Ros. 61, the contract was to deliver "all the naphtha that the defendant might make from 1st day of June next, for and during the term of two years, say from 1,000 to 1,200 gallons per month."

The defendant, instead of delivering 10,000 in ten months, which was the minimum amount mentioned, delivered but 3,000, which was all he made. For the plaintiff it was insisted that the defendant was bound to deliver at least 1,000 gallons per month. For the defendant it was insisted that he was not bound to deliver any particular quantity, but only as much as he made. And the court was of opinion with the defendant. Lord Abinger, C. B., said: "I construe it in favor of the

defendants as meaning merely that in all probability the quantity of naphtha produced will amount to 1,000 or 1,200 gallons." And so the contract in reality was this: "I undertake to sell you all the naphtha that I may make in my works during the next two years."

In the case of *Leeming* v. *Snaith*, 16 Ad. & E., 71 E. C. L. R. 273, the contract was that the defendant sold to plaintiff "what he may pull, say not less than 100 packs of combing-skin." "Combing-skin" is a kind of wool, and the defendant was a puller, or preparer for sale, of the article. He delivered a small quantity, but did not deliver 100 packs. In this case the court cited the case of *Guillem* v. *Daniel*, *supra*, and approved it, but distinguished this case from it by reason of the words "not less than 100 packs," which made it necessary that the defendant should deliver 100 packs.

In the case before us the substance of the contract evidently was, that all the ginseng on hand, and all that might be gathered during the season, whether much or little, should be delivered, and "amounting to from five to eight thousand pounds, as near as we can estimate," were words of mere expectation, indicating not what was *obliged* to be delivered, but what was *expected* to be delivered.

If therefore in construing the original contract the words "amounting to from five to eight thousand pounds, as near as we can estimate," amount to nothing, and may be treated as surplusage, the leaving these words out of the copy sent by the defendant to the plaintiff was no fraud upon him.

The plaintiff's supposed equity, being based upon this alleged fraud of the defendant, fails.

The injunction will be dissolved, the demurrer sustained, and the bill dismissed with costs.

PER CURIAM. Bill dismissed.

JOSHUA HARSHAW *v.* ROBERT D. McCOMBS, and others.

A deed conveying property in trust for the bargainor's only son and in case of the son's death without issue, then over, prepared and registered at the instance of the bargainor, will not be set aside upon a bill by the bargainor alleging that the deed was not delivered, that its object was to reclaim from vice the son (since dead, childless,) and that it was not the bargainor's intent to deprive himself of the control of the property; there being no other charge of fraud, surprise or undue influence than a recital, that in preparing and registering the deed the bargainor was "subject to the control and influence of the improper constraint, advice and duress of pretended friends," and that he was "at the infirm and advanced age of seventy years."

In such case the plaintiff will not be aided by an allegation that the deed was not duly *stamped*.

BILL, for the cancellation of a deed, filed to Fall Term 1866 of the Court of Equity for CHEROKEE.

The bill was subsequently amended, and a demurrer put in; whereupon the demurrer was set down for argument, and the cause, at Spring Term 1868, was transmitted to this Court by consent.

The bill alleged that in the year 1865, the plaintiff, in order to induce his only child, a son of sixteen years of age, to refrain from certain habits and associations into which he had fallen, executed a deed of bargain and sale, conveying to the defendant McCombs all of a large estate, real and personal, of which he was seized and possessed in Cherokee and Clay Counties, to be held in trust for his son until he should become of age and then to him discharged of the trust; but in case of the death of the son under age without leaving a child, then in trust for the defendants Ann E. and Abraham McD. Harshaw, an infant niece and nephew of the plaintiff; that the deed was retained by him several days, when he caused it to be proved by one of the attesting witnesses and registered in the Register's office for Cherokee County; that the deed was afterwards taken by him from the Register's office, and neither it nor any of the property conveyed by it has ever been delivered to the defendants, or either of them; that it was not the intention of

the plaintiff to deprive himself of the control of the property, and the provisions for the defendants Ann and Abraham were gratuitous; and that the son of the plaintiff, to influence whom the deed was made, had recently come to a violent death by his own hands, without leaving issue. The prayer was that the deed should be rescinded, &c. The amendment to the bill stated that when the plaintiff executed the deed and had it registered he supposed he might annul it at pleasure and make any disposition of the property he choose, and as an evidence of this that he did not have the deed stamped as required by the acts of Congress for the collection of Internal Revenue; and after adding that he took the deed from the Register's office for the purpose of enabling him to abrogate the same whenever he saw proper, concluding in the following words: "Your orator being all the time subject to the control and influence of the improper advice, constraint and duress of pretended friends so that he was not permitted to exercise his free will and free judgment in the making of the said deed of conveyance or having the same registered, being at the infirm and advanced age of seventy years."

Moore, for the plaintiff.

Merrimon and *Phillips & Battle*, for the defendants.

BATTLE, J. The bill was filed for the purpose of procuring the cancellation of a certain deed of conveyance therein mentioned. The demurrer presents the question whether the plaintiff has set forth such a case as entitles him to call on the defendants for an answer.

It is now well settled that the grantor or donor cannot call in the aid of a Court of Equity to have his deed cancelled, unless he can show that it was obtained from him by surprise or mistake, want of freedom, undue influence, the suggestion of a falsehood, or the suppression of the truth, *Gunter* v. *Thomas*, 1 Ire. Eq. 199; *Green* v. *Thompson*, 2 Ire. Eq. 365, and other cases collected in 3 Battle's Digest, title "Fraud," Subdiv. 2. If fraud be the ground of relief, it must be distinctly and positively alleged, and either admitted, or, sup-

ported by proof, *Witherspoon* v. *Carmichael*, 6 Ire. Eq. 143; *McLane* v. *Manning*, Winst Eq. 60. If the deed now in question had been undoubtedly delivered, such would be the rule of equity in relation to it, and we cannot conceive why the rule should be varied merely because the delivery of the instrument is a matter of doubt, or because it has not been duly stamped. The question then is, does the present bill contain sufficient allegations either of surprise, mistake, want of freedom, undue influence or fraud? We cannot discover any whatever. On the contrary, the bill states that the deed was prepared by or for the plaintiff, of his own free will and for a very commendable purpose, to wit: the reclamation from vice of his son, who was an only child. It is true that in an amendment, which the Court subsequently permitted to be made, the plaintiff says, by way of recital instead of positive averment, that he had done or forborne to do certain things, "all the time being subject to the control and influence of improper advice, constraint and duress of pretended friends, so that he was not permitted to exercise his free will and free judgment in the making of the said deed of conveyance, or having the same registered, being at the infirm and advanced age of seventy years." Surely such loose and general statements cannot be allowed to have any effect in an attempt to impeach a deed, which the grantor avers that he had signed, sealed, and procured to be registered. It is scarcely necessary for us to say that the failure of the main object of the conveyance caused by the untimely death of the plaintiff's son, cannot alter the character of the transaction. The true rule was laid down in the case of *Green* v. *Thompson*, above referred to, and by that must the present case be governed. "A Court will not annul dispositions of property because they are improvident or such as a wise man would not have made, or a man of nice honor have consented to receive; but all the contracts of an individual, even his gratuitous acts, if formally executed, and no power of revocation reserved, are binding, unless they can be avoided because of surprise or mistake, want

of freedom, undue influence, the suggestion of a falsehood, or the suppression of truth."

The demurrer must be sustained, and the bill dismissed with costs.

PER CURIAM. Bill dismissed.

SION. H. ROGERS, Adm'r, *v.* JOSEPH B. HINTON, *et. al.*

Where a *feme covert*, who had a separate estate of realty and personalty, with a general power of appointing the same by deed or will, disposed of such estate by will to various devisees and legatees, subjecting expressly only a portion of it to the payment of her debts: *Held*, that her creditors had a right to resort to the whole estate for their satisfaction.

Also, that there is no distinction in this respect between the realty and the personalty.

BILL, *reheard* upon petition by the defendants. The case as originally heard, is reported in Phil. Eq., p. 101.

Moore, and *Haywood*, for the petitioners.

1. The case of *Leigh* v. *Smith*, 3 Ire. Eq., 442, which is assumed by the Court in its former opinion to be decisive of the present case, differs from it in two marked particulars. *There*, the duty out of which the debt arose was incurred by the *feme covert*, *dum sola*, and so the debt bound her after coverture, (1 Ch. Pl. 42, 44, Tidd. 1026;) here the *debt* (?) was contracted *after* coverture, and so, as a general debt, is *void; there*, also, the interest subjected was personalty, whilst *here* the interest is the *corpus* of land.

2. The *general debts* of *feme coverts* are absolutely void, even where they have powers of appointment, or separate estates, (*Felton* v. *Reid*, 7 Ire. 269;) it is only where the debts assume the nature of appointments operating specifically upon the separate estate, or the estate subject to the power, that they

have any operation. The greatest extent to which Equity has gone in this direction, is in correcting and validating *defective appointments*. The creditors *here* have, one, an open account, another a wood ticket, and the third an ordinary note under seal, against a *feme covert*. Neither of these papers pretend to refer to the power, or to create a charge, or otherwise to act immediately upon the property subject to the power. They are, therefore, *general debts*, and in no sense *appointments*, defective or otherwise, *Marshal* v. *Rutton*, 8 T. R. 547, 2 Roper H. & W. 117, 119; *Lloyd* v. *Lee*. 1 Strange 94, 1 Ch. Pl. 437, 470, 479, 2 Sug. Pow. 103; *Doe* v. *Weller*, 7 T. R, 480; *Martin* v. *Mitchell*,2 Jac. & W. 413, 1 Sug. Purch. ch. 6, ss., 7 & 8, 2 Sug. Pow. 125, 127, 1 Sug. Pow. 416, 426, 427.

3. The English doctrine as to the *presumption* that *feme coverts* having separate estates *intend* to bind such estates for their contracts, extends only to *personalty*, and to the *profits of the lands*, *Stewart* v. *Kirkwall*, 3 Madd, 387, 2 Rop. H. & W. 241 (Jacob's note;) *Shattock* v. *Shattock*, 2 Law Rep. Eq. 182, 2 Rop. H. &. W. 182; *Hulme* v. *Tenant*, 1 Br. C. C. 16. This doctrine of presumption is not carried so far in North Carolina. Here a *feme* may bind her estate *with the consent of her trustee*, and the writing in such case *must expressly and specifically* indicate such intention on her part, *Frazier* v. *Brownlow*, 3 Ire. Eq. 037; *Harris* v. *Harris*, 7, Ire. Eq. 111; *Draper* v. *Knox*, 5 Ire. Eq. 175; *Johnston* v. *Malcolm*, 6 Ire. Eq. 120. As regards her power over her separate estate in land, the rule in North Carolina is the same as in England, *Newlin* v. *Freeman*. 4 Ire. Eq. 312.

4. The fact that here the *feme* is dead, leaving a will by which she appointed the real estate over which she had a power, to *volunteers*, does not give any validity to the *debts* (?) which they did not have in her life time, nor in any way aid the claimants, *Vaughan* v. *Vanderstegen*, 2 Drew. 165; *Shattock* v. *Shattock*, 2 Law Rep. Eq., 182, 2 Rop. H. & W. 238, 245, & n.; *Bruere* v. *Pemberton*, 18 Ves. 248; *Gregory* v. *Lockyear*, 6 Madd. 90; *Court* v. *Jeffrey*, 1 Sim. & Stu. 105; *Clinton* v. *Willis*, 1 Sug. Pow. 248, n.

5. That the *feme* here alludes to and makes some provisions for her "debts" in the will, can make no difference, for that clause referred to property not a part of the separate estate, and therefore was not included in the *limited probate* here granted, and therefore, further, is to be taken as not existing, even for the purpose of *election* if any such claim could arise here, much more not for the purpose of making out that to be a debt which otherwise is none, Adams' Eq. 92, &c., 2 Sto. Eq. s. 1096, & n., 2 Sug. Pow. 165, 2 Wms. Ex. 1238; 1 Jarm. Wills. 389, 2 Rop. Leg 1602, *Melchor* v. *Burger*, 1 D. & B. Eq. 634.

6. The cause turns on the point, are the claimants *creditors* of Mrs. Hinton within the legal meaning of that word? Did Mrs. Hinton owe them *debts*, such as could be enforced either against her or against her property, either at Law or Equity. If not, the bare styling of the claims *debts*, and the claimants *creditors*, will not make them such. If Mr. Hinton had died first and Mrs. Hinton thereupon had expressly promised to pay any or all of these claims, such promise could not have been enforced by suit. The engagements would not even have constituted a *consideration* for the new promise, *Felton* v. *Reid*, 7 Ire. 269.

Fowle & Badger, and *Batchelor*, *contra*.

I. The case here is *stronger* than that of *Leigh* v. *Smith*, 3 Ire. Eq. 442; for, in speaking of the *debts* of *feme coverts* in this connection, the Courts mean, *what would be debts but for the coverture*. Putting that objection of the petitioner aside, we have then a case where the debts were contracted (see affidavits of the creditors on file,) with specific reference to the fund, whereas in *Leigh* v. *Smith*, there was no such reference. Nor does it make any difference that the corpus is real estate and not personalty. For the same rule applies to realty as to personalty, *in cases involving a power of appointment*, as here. Sug. 136; *Newlin* v. *Freeman*, 4. Ire. Eq. 312.

2. That the special probate omits the clause referring to Mrs. Hinton's debts, if true is not important. The power

here might be executed by deed or will, and the Court would, if necessary, sustain this, even as a defective *deed.* The rule that clauses not admitted to probate are to be treated as not existing, applies only in cases of election, and not to cases of defective execution of powers, 1 Jarm. Wills 389, Sug. 135, 136; *Wilkes* v. *Holmes*, 9 Mod. 485. The appointment of an executor in this will is *decisive*; as that is *a declaration that all engagements shall be paid, Heatley* v. *Thomas*, 15 Ves. 590; *Newton* v. *Turville*, 2P. Wms. 144; *Shattock* v. *Shattock*, 2 Law Rep. 182; *Leigh* v. *Smith*, 3 Ire. Eq. 442. Although if Mr. Hinton had died first, any *promise* to pay these debts by Mrs. Hinton would have been void, yet *an exercise of her power* would have bound the property, *Wilkes* v. *Holmes*, 9 Mod. 485.

4. There is no case of a coincidence of power and intention, where a defective execution has not been aided: such aid is given rather in wills than in deeds, *Heatley* v. *Thomas*, 15 Ves. 590.

BATTLE J. This is a proceeding by petition to rehear the decree made in the cause at January Term 1867. See the case as reported in Phil. Eq. 101. When the cause was first heard it was very fully and ably argued by the counsel on both sides, was carefully considered by us, and the opinion then filed was the result of our deliberate judgment. The questions involved in the cause have been again argued with more than ordinary zeal and ability by the counsel, have received our anxious attention, and yet we are unable to discover any error in the decree.

It is a matter of regret that the limited time allowed to us for the preparation of our opinion forbids a full and thorough review of the many propositions discussed by the counsel, and the authorities referred to in support of them. It is however, unnecessary for us to do so for the understanding of this particular case, because one of the counsel for the defendants, at the close of his learned and elaborate argument, admits that the whole cause turns upon one point: "Are the

persons who claim to be creditors of Mrs. Hinton, creditors within the legal meaning of that term? Did Mrs. Hinton owe to them debts—such debts as could be enforced, either against her or against her property, either in a Court of Law or in a Court of Equity?"

In responding to this enquiry, we assume, what is admitted, that the *feme covert* had a general power to dispose of the property, both real and personal, held by her trustee for her sole and separate use, either by deed or will, and that she did duly execute her power by will. Having the power to dispose of the property to whom she pleased, she had the right to select as the objects of that disposition those who had done services for her, those who had furnished her with what she deemed necessaries, or those who had lent her money, if there were any such. It is true that she could not render herself personally liable at law for her contracts, but she might, with the concurrence of her trustee if she had one, and without it if she had none, specifically charge her separate estate with contracts and engagements. What principle is there to prevent her doing the same thing by will, when she had the power of making a disposition in that manner. The separate property was conferred upon her for her support and maintenance, and if she obtained credit upon the faith of it, why not allow her to apply it in discharge of the obligation, by will, as well as by a deed in her life time. Such engagements may not be, technically speaking, debts, but substantially they were so for the purposes of being recognized as debts, by her will, and as such, charged upon the property over which she had the general powers of disposition. In the case before us, the *feme covert* testatrix in express terms spoke of her debts and funeral expenses as obligations for which she wished to provide the means of payment, and it would be contrary to the fundamental principles of equity not to regard the substance, instead of the mere form of things, and to hold that such obligations had not a higher claim to satisfaction than mere voluntary donations. But it is said by the counsel for the defendants that from the terms of the probate, the clause of

the will which directs the sale of the negro woman Happy, and the application of the proceeds to the payment of her debts and funeral expenses, cannot be received, as Happy was not a part of her property, and that therefore, as to her the will was not proved. If this be so, then Happy's name alone must be struck from the will, for the testatrix undoubtedly had the right to speak of her debts, and to provide for their payment; and in that view of the case, the debts would be charged upon the whole estate. But supposing that the case of *Whitfield* v. *Hurst*, 3 Ire. Eq. 342, establishes the doctrine that the probate of the will of a married woman having a separate estate, extends to all the property of which it professes to dispose, and leaves the construction of it to the Court of Equity, then, we think the failure of the fund out of which the debts were directed to be paid, gives the creditors a preference over the voluntary appointees under the will, and they are to be paid out of the other property subject to the power of appointment given by the will, and in execution of that power. So far as the defendant Joseph B. Hinton was concerned, we think that as he claimed the woman Happy as his property, he could not refuse to give effect to the disposition in favor of the creditors out of his interest in the appointed property.

In opposition to the view which we have here taken, the case of *Shattock* v. *Shattock*, 2 Law Rep. Eq. 182, has been strongly pressed upon us. But in that case the debt sought to be paid was not recognized in the will of the testatrix, and no direction for its payment was therein contained, which makes, as we think, an essential difference between that and our case. When a *feme covert* testatrix contracts in her life time, what she chooses to consider and call a "debt" in her will, we cannot conceive of any good reason why a Court of Equity, in the exercise of its high duty to do exact justice to parties, should not put it upon the same footing with a debt which she had contracted before marriage. If there be any difference it would seem to be in favor of the contract made during coverture, for that was made with direct

reference to the separate estate, and the other was not. If this be so, then the case of *Leigh* v. *Smith*, 3 Ire. Eq. 442, is a direct authority in support of the former decree, and of our present opinion.

Another objection is urged on the ground that the property now sought to be charged with the debts, is real estate. That, however, can make no difference, as real estate is as much liable to pay the debts of a decedent as personal property, with the sole exception that the latter must be first exhausted before the former is subjected. See Rev. Code, c. 46.

As we have been unable to discover any error in the former decree, the petition to rehear it must be dismissed with costs.

PER CURIAM. Petition dismissed.

W. H. GULLY, Adm'r &c., *v.* MARY E. HOLLOWAY and others.

A testator having given to his wife, besides other property, one half of his land, and to a daughter the other half, (with certain slaves, *emancipated* at the time of the testator's death,) and having provided that his debts should be "paid out ot the funds raised off the property" given to his wife. *Held*, as the daughter had died in the testator's life-time, and the personalty had been *exhausted*, that her *lapsed* land should next be applied to the payment of debts.

In such case, if it becomes necessary to resort to the land devised to the wife she is entitled, under Rev. Code, ch. 118, s. 8, to one-third of the whole of the realty for life, as if the husband had died intestate.

BILL for the construction of a will, &c., filed at Spring Term 1868, of the Court of Equity for WAKE, at which Term, answers having been put in, the case was transmitted to this Court.

The defendants were the widow and the next of kin and heirs-at-law of the testator, W. H. Holloway, who died in June 1865.

The will, after giving certain slaves to his wife, contains the following clauses: "I also give to my wife half of my tract of land, on which I now live, including the dwelling-house and other improvements thereto bolonging. I also give unto my

wife all my stock," &c. "I give to my daughter Fannie, half of the tract of land on which I now live, Judy and her increase, William and Jacob." * * * "My will is that my executor dispose of enough of my property, such as he may think can be spared best, to pay all of my just debts. My will is that my wife, M. E. Holloway, have, hold and possess the residue of the property, which I have given her, after my just debts are paid, during her life time, and then if any remain, my will is that her bodily heirs have, hold and possess it."

The bill sets out that the testator's daughter, Fannie, died in his life-time in tender infancy, that the personalty belonging to the estate, in consequence of the emancipation of the slaves was insufficient to pay the debts, and it would be necessary to sell some of the land. The prayer was that the plaintiff, as Administrator *cum testamento annexo*, should be instructed whether the debts were a charge upon the real as well as the personal property given to the wife; whether the land lapsing by the daughter's death should be exhausted before that given to the widow is taken, &c.

The answers admitted the material allegations of the bill.

Fowle & Badger for the plaintiff.

Rogers & Batchelor for the heirs-at-law.

There is here an express charge of the debts on the share of the estate given to the widow. The debts are to be paid out "of the fund," &c. She is to have the "residue" of the property after "my just debts are paid," &c. *Fraser* v. *Alexander*, 2 Dev. Eq. 348; *Powell* v. *Powell*, 6 Ire. Eq. 50; *Kirkpatrick* v. *Rogers*, 7 Ire. 44. The word *property* means *real* as well as personal estate, 2 Jar. Wills (190) 4 Kent 55; *Clarke* v. *Hyman*, 1 Dev. 382; *Horne* v. *Hoskins*, 2 D. & B., 479; and there is nothing here to limit the reasoning.

In our case the contest is between the heirs and a devisee; and the land devised to the widow subject to the payment of the debts must be applied before that descended. The devisee is generally preferred to the heir, but when land devised is

charged with payment of debts, &c., the devisee takes it *cum onere*, *Palmer* v. *Armstrong*, 2 Dev. Eq. 268; *Robards* v. *Wortham*, *Ibid.* 173. If the daughter had lived, *her* land would have been exonerated; her dying does not affect the testator's intention to subject the property given to the wife to the payment of debts.

The widow should have *dissented* from the Will, in order to have any part of her land exempt from payment of debts. The words of Rev. Code, ch. 118, s. 8, do not embrace our case, and a review of the legislation on the subject shows that it does not come within their spirit. See Acts of 1784, ch. 204, secs. 8, 9; ch. 225; Acts of 1787, ch. 271, and 1771, ch. 351.

PEARSON, C. J. It is not necessary to decide whether the charge on the property left to the wife for the payment of debts, is confined to the personal property, or embraces the land as well, for we are of opinion that, as the legacy to the daughter lapsed by her death, and the property given to her was undisposed of, *it* is the primary fund for the payment of debts. As between the wife and the daughter, the testator charged the property given to the former with the payment of his debts, but the death of the daughter changed the whole matter, and the case then falls under the general rule, that property undisposed of, is first to be applied to the payment of debts, for the reason, that although as between specific legatees the testator makes a charge on the property given to one, for the remuneration of the other, there is nothing to show that he intended to make the same preference in favor of his next of kin, or heirs at law, upon whom the property devolves, not by his act, but by the act of law, and they take *cum onere*, and take subject to the payment of debts in the first instance, and have no ground to put that burden upon one who is the special object of the testator's bounty. It will be declared to be the opinion of the Court, that the personal estate and the land which is not disposed of by the Will, must first be applied. Should it be necessary to resort to the land given to the widow, she will then be entitled, under the provisions of Rev. Code,

ch. 118, s. 8, to the quantity to which she would be entitled by right of dower, which shall not be subject to the payment of the debts of her husband, during the term of her life.

PER CURIAM. Decree accordingly.

W. B. MARCH and others *v.* JOHN W. THOMAS.

Where a plaintiff or one of several plaintiffs in equity is indebted to the defendant, and is insolvent, the claim may be set off without strict regard to mutuality. If such debt be payable to the defendant, the set off may be effected under *a petition*; if *not* payable to him but only claimed by him, then the set off is to be effected under *a bill.*

Where a decree had been obtained for sums due to several plaintiffs by one defendant, and at the next term the latter made an affidavit before the Court, setting forth certain claims upon some of the plaintiffs payable to the affiant, and that the debtors were insolvent, upon which a corresponding rule was taken and served upon such debtors, *held* that this proceeding was equivalent to a petition, and that the debtors should be required to answer and show cause.

(*Iredell* v. *Langston*, 1 Dev. Eq. 392; *Sellers* v. *Bryan*, 2 *ib.* 358; *Benzien* v. *Robinett*, 2 *ib.* 67; *Bunting* v. *Ricks*, 2 D. & B. Eq. 130; *Elliott* v. *Pool*, 6 Jon. Eq. 42, cited and ap proved.)

RULE, upon the equity docket, to show cause why certain credits should not be entered upon a decree, dismissed by *Cilley, J.*, at Spring Term 1868, of the Court of Equity for DAVIDSON.

W. B. March, E. D. Hampton, and H. Adams, had filed a bill against Thomas, and obtained an injunction, &c. At Spring Term 1866, the whole matter involved, by order of Court and agreement of the parties was referred. At Spring Term 1867, a report was returned awarding, amongst other things, that Thomas should pay to Adams $338,30, and to Hampton and March $1,409.25. This report was confirmed, and a decree entered accordingly. At Fall Term 1867, the following affidavit was filed: John W. Thomas maketh oath that Henderson Adams is justly indebted to him in the sum of $650,

principal and interest, due by bond bearing date Nov. 10th, 1853, for money loaned; that the said Adams is generally understood and believed to be insolvent and unable to pay his debts, and that Felix Clodfelter and George Kinney, the sureties to said note, are also believed to be insolvent. He further makes oath that E. D. Hampton is justly indebted to him in the sum of $722.50, due by bond bearing date May 7th, 1860, for loaned money, besides other sums to the amount of about $300, that the said Hampton is considered to be greatly involved in debt, and it is very doubtful whether he will be able to pay his debts, and affiant verily believes that if he cannot get said debts applied as a credit on the award in *this* case, that he will never be able to collect the same," &c. Thereupon a rule was made and served upon Adams and Hampton, requiring them to appear at the next term and show cause why the debts mentioned above should not be applied as a credit on the amounts respectively decreed to them.

At Spring Term 1868, the rule, upon motion of the plaintiffs, was discharged, and the defendant appealed.

No counsel for the appellant.

Merrimon, contra.

BATTLE, J. The doctrine of equitable set off has several times been the subject of discussion in this Court, and the principles upon which it is allowed are now very well established. *Iredell* v. *Langston*, 1 Dev. Eq. 392; *Sellers* v. *Bryan*, 2 Dev. Eq. 358, and *Elliot* v. *Pool*, 6 Jones Eq. 42. In ordinary cases mutual debts only can be set off in equity as well as at law. *Sellers* v. *Bryan*, *ubi supra*, *Bunting* v. *Ricks*, 2 D. & B. Eq. 130. When the plaintiff or one of the plaintiffs, is insolvent, a bond or note due from him to the defendants may be set off in equity without a strict regard to mutuality. *Benzien* v. *Robinett*, 2 Dev. Eq. 67. If the bond or note is payable to the defendant, the plaintiff, obligor or maker being insolvent, it may be set off upon petition; but

if claimed by the defendant but not payable to him, then it can only be done by bill, *Ibid.*

In the present case the bonds which are sought to be set off against the sums decreed to be paid by the defendant to the several plaintiffs respectively, are payable to the defendant himself, and it seems that he might have had the benefit of them as set-offs, had he proceeded by petition. The remaining question is, whether the rule to show cause founded upon the defendant's affidavit may not be treated and acted upon as a petition filed in the cause. We see no good reason why it may not. It was served upon the plaintiffs, and they had the same opportunity to answer it as if it had been a regular petition. It ought, therefore, to have been treated as a petition in the cause, to which the plaintiffs, Adams and Hampton, ought to have been required to respond in the usual manner; and it was erroneous in the Court to order its dismission upon the motion of the plaintiffs' counsel. This must be certified to the Court below as the law directs.

PER CURIAM. Order accordingly.

CASES

ARGUED AND DETERMINED IN THE

Supreme Court of North Carolina.

AT RALEIGH.

JANUARY TERM, 1869.

V. TEAGUE *v.* HIRAM JAMES.

Actions pending at the time of the ratification of the Code, are to be proceeded with and tried under such laws and rules then existing as may be be applicable: *therefore*, in such actions a "counter-claim" is not admissible.

DEBT, tried before *Mitchell, J.*, at Fall Term 1868 of the Superior Court of ALEXANDER.

The action had been commenced by warrant before a Justice of the Peace issued September 5th 1867, upon a bond dated March 8th 1867, and from a judgment against him the defendant appealed to the Superior Court. The defendant pleaded General Issue, No consideration, and Failure of consideration; and offered to prove that the bond was given for a horse sold to defendant by the plaintiff,—which, some while before, the plaintiff had conveyed to a trustee for the payment of certain debts, and that after the horse had remained with the defendant for several months, the trustee took him and sold him under the trust.

His Honor being of opinion that such proof would not affect the plaintiff's rights to recover, there was a verdict and judgment; from which the defendant appealed.

W. P. Caldwell, for the appellant.

Furches, contra, cited *McEntyre* v. *McEntyre*, 12 Ir, 299; *Washburn* v. *Picot*, 3 Dev. 390; and also, Const. of North Carolina, Judiciary, Sec. 25; Code of Civil Procedure, §§ 296. and 402.

PEARSON. C. J. It was properly conceded on the argument, that if this case is to be governed by the old rules of "practice and procedure" there is no error in the ruling of his Honor in the Court below.

But it was insisted that the new rules of "practice and procedure," are applicable to the case. And if so, the defendant should be allowed to prove his counter-claim as a defence to the action. We are of opinion that the new rules are not applicable, and that his Honor was right in proceeding according to the old rules.

The action was commenced prior to the ratification of the "Code of Civil Procedure" and it is founded on a contract not embraced by the Stay Ordinance, and if the question was left to depend upon the construction of sub-division 4, § 8, there might have been some doubt, as that sub-division is obscurely worded, and the meaning of the words "as near as may be" is by no means clear. But all difficulty is removed by §§ 400 and 402. Sec. 400 provides that all suits pending in any of the Courts at the ratification of this Act, shall be entered on a separate docket by the Clerks of the Superior Courts. Sec. 402 provides that "said suits shall be proceeded in and tried under the existing laws and rules applicable thereto" up to final judgment. This covers the case, and leaves no room for doubt or for construction.

So the defendant must be content with the remedy by a new action to set up his counter-claim, in which by proper averments, he may entitle himself to the provisional remedy of injunction.

There is no error.

PER CURIAM. Judgment affirmed.

Doe ex dem. WILEY GAITHER *v.* ANDREW P. GIBSON.

Suits pending at the time of the adoption of the Code are to be proceeded in and tried under the then existing laws and rules applicable thereto; *therefore*, in an ejectment which was then pending the defendant has no right to have relief because of a "counter claim" under a bond for title from the plaintiff.

(*Teague* v. *James ante* 91 cited and approved.)

EJECTMENT, tried before *Mitchell, J.*, at Fall term 1868 of the Superior Court of CALDWELL.

This is the case in which a new trial was granted at January term 1868 of this Court. (Phil. p. 530)

The only matter necessary to be stated here is, that at the commencement of the trial the defendant stated that he had an equitable defence, and offered to introduce it; viz: such an agreement signed by the plaintiff, for conveying the land in question, as would entitle him to a decree for specific performance; and thereupon he offered to adopt such practice as the Code demanded in such cases.

His Honor thought the defence inadmissible. There was a Verdict, and Judgment for the plaintiff; and the defendant appealed.

Malone, for the appellant.

Folk, contra.

PEARSON, C. J. Mr. Malone rested his case mainly on the ground, that his Honor erred in not permitting the defendant (upon his offer before the trial) to rely on the counter claim arising out of the contract of sale, and to allow the pleadings to be so amended, as to let in that defence. He took two grounds, 1st the equity arising from the contract of sale, is a *counter-claim*, within the meaning of the "Code of Civil Procedure," § 100, subd. 2; 2nd, this being an action

of ejectment, comes under § 7, sub. 1, which provides that the enactments of the Code shall be applicable to civil actions pending at the time of the approval of the Constitution and not founded on contract, "as far as may be, according to the stage of the progress of the action and having regard to its subject and not to its form." His argument was, here is a counter claim within the meaning of the Code—if it is established the defendant will not be put out of possession, and the whole controversy will be settled in one action; and in an action of this kind, the Court is directed to go according to the "Code of Civil Procedure" "as far as may be."

The argument was very plausible, and at first we were inclined to adopt the conclusion.

The Code contemplates that the whole controversy is to be settled in one action. In this instance the counter claim might have been fitted in very well, but there are other sections of the Code which explain § 8, sub-division 1, and show clearly that the Judge had no power to allow the pleadings to be amended so as to let in an answer, setting up the counter claim. Sec. 400 directs the clerks of the Superior Courts to enter on a special docket all suits pending at the ratification of the Code. Sec. 402, provides that said suits shall be proceeded in and tried "under the existing laws and rules applicable thereto." This settles the question, and shows that the defendant is left to an action, in order to set up his claim to a specific performance, and must apply for special relief by the remedy of injunction, pending his new action,—see *Teague* vs. *James ante* 91.

PER CURIAM. Judgment affirmed.

S. P. SMITH *v.* J. D. McILWAINE.

The word "actions," in the first line of paragraphs 3 and 4, in § 8, of the Code of Civil Procedure, is in the objective case, and is governed by the preposition "to," in the first line of the section; therefore the words "but such actions" must be supplied in each paragraph immediately preceding the verb "shall be governed," in the fifth line of the former, and the fourth line of the latter paragraph.

Actions commenced after the adoption of the Code upon contracts not embraced in the Stay Law Ordinance, must be brought before the Clerk.

(*Teague* v. *James*, *ante* 91, and *Gaither* v. *Gibson*, *ante*, 93 cited and approved.)

ATTACHMENT, dismissed upon motion before *Logan*, *J.*, at Fall term 1868, of the Superior Court of MECKLENBURG.

The proceeding was by summons (and warrant of attachment) returnable to Fall term 1868 of the Superior Court, upon a bond dated October 11th, 1865. The plaintiff having filed his complaint, the defendant answered and demurred. No part of the proceedings are material to be stated excepting the demurrer, which alleged that as the cause of action was a contract made on the 11th of October, 1865, the Code of Civil Procedure did not apply.

His Honor having thereupon ordered the attachment to be discharged, the plaintiff appealed.

Dowd, for the appellant.

Wilson, *contra*.

PEARSON, C. J. This case involves a consideration of sub-divisions 3 and 4 of §. 8, of the Code of Civil Procedure. These two sub-divisions are not intelligible without supplying the words "but such actions" before the verb "shall be governed," where it first occurs in the sub-division. For the preposition "to," in the preliminary clause—"The following enactments are applicable to," governs the word "actions" in sub-divisions 3 and 4. So "actions" is in the objective case, and cannot be the nominative to the verb "shall be

governed." Supply the words "such actions" as a nominative. This corrects the grammatical error, and makes sense.

Our task is to construe sub-division 4. It embraces two classes: 1st, "Actions commenced prior to the adoption of the Code on contracts not embraced by the stay law ordinance:" this class is disposed of in *Teague* v. *James*, and *Gaither* v *Gibson*, *ante* 91 and 93; 2nd, Actions commenced on such contracts *after* the adoption of the Code. Our case falls under the second class. The construction depends upon the effect to be given to the words "as near as may be." We think the meaning is, as near as may be consistent with the changes made by the Constitution and Code of Civil Procedure. In other words, all actions commenced after the adoption of the Code are to conform to its provisions, unless there be some reason for departing from the rules therein prescribed, as in case of actions subject to the Stay Law Ordinance.

This construction cannot be materially varied by the fact that according to sub-division 1, the Code is to prevail "as far as may be," and by sub-divisions 3 and 4, the practice and procedure, under the existing law is to govern "as near as may be." This shading is too slight for any practical purpose. The meaning is, that in regard to actions commenced after the adoption of the Code, on contracts not embraced by the Stay Law Ordinance, the procedure is to be as before, except where the Code has made such changes as to make the old Code of Procedure inapplicable. So the construction is clear.

But the application is difficult. As to the first class there is but little difficulty in making the application of the Code as thus construed, and the old mode of procedure covers much ground.

But as to the second class the old mode of procedure can cover but little if any ground; indeed this class ought to have been set out by itself in a sub-division 5, corresponding with sub-division 2, and it is obvious that the attempt to compress both classes into one sentence has produced confusion; brevity was consulted at the expense of perspicuity.

The defendant says this debt was contracted prior to the

adoption of the Code, and the procedure ought to have been by process of original attachment, in which case the affidavit must state that the ordinary process of law could not be served.

The plaintiff replies that the Code requires the procedure to be by summons, and that the warrant of attachment issues upon an affidavit that the defendant is a non-resident, without requiring the statement "That the ordinary process of law cannot be served," and this mode of procedure supersedes the old mode of original attachment. To this the defendant rejoins—"suppose it to be so, the Code provides, § 73, that Civil actions shall be commenced by summons, returnable within a certain number of days *before the Clerk of the Superior Court*, before whom the pleadings are to be made up; but your summons is returnable before the Judge at the next term of the Superior Court. There is no provision made by the Code for this procedure, and the pleadings cannot be made up before the Judge in term time, for § 94 requires the demurrer or answer to be filed in the office of the Clerk of the Superior Court. So the old mode of procedure cannot be acted on, as the Code makes no provision for carrying it out, and the words 'as far as may be' can have no effect on the case." This objection is fatal.

Our construction is made the more satisfactory, by a view which his Honor, Judge Tourgee, presents in *The Raleigh National Bank* v. *Johnson*, and *Swepson* v. *Harvey*, at this term.

His Honor adopts our construction that the summons must be returnable before the Clerk, on the ground that no provision is made by the Code for making up the pleadings except before the Clerk, and supports his construction by the position that § 405 of the Code, makes one specific and clearly defined exception to the rule laid down in § 73, to wit: in actions embraced by the Ordinance of March 14th 1868, in which case the summons "shall be made returnable to the term of the Superior Court therein designated," and that no other exception is made in the Code of Civil Procedure. to the rule laid down in § 73.

It was suggested that the purpose was to make a kind of stay law in respect to debts contracted before the ratification of the Code, by giving to debtors the same delay as under the old mode; but the difficulty is that the Code fails to provide a mode in which that can be done; that is it does not authorize the summons in such cases to be returned before the Judge in term time, instead of to the Clerk within a certain number of days, and makes no provision whereby the pleading can be made up before the Judge in term time.

The action as well as the attachment should have been dismissed, as having been commenced irregularly.

The position that this objection is in the nature of a plea in abatement, and should have been taken before the Clerk, cannot avail, for it was the fault of the plaintiff to take the case away from the Clerk by having the summons returnable before the Judge in term time.

PER CURIAM. Judgment affirmed.

THE STATE *v.* WILLIAM UNDERWOOD.

The Act (Rev. Code c. 107, s. 71) which renders persons of color incompetent as witnesses in certain cases, is repugnant to the Constitution, and was repealed thereby.

MISDEMEANOR, in mismarking a sheep, tried before *Buxton*, *J.*, at Fall Term 1868 of the Superior Court of UNION.

Upon the trial his Honor allowed one Barnett, a person of color, to be introduced as a witness for the State. The defendant excepted.

Verdict, guilty; Rule for a new trial, rule discharged; Judgment, and Appeal.

PEARSON, C. J. We are of the opinion that the Act, Rev. Code, ch. 107, sec. 71, which makes persons of color incapa-

ble of being witnesses, except against each other, is repealed by the Constitution.

According to that instrument, persons of color are entitled to vote and to hold office. The greater includes the less—and the effect is to take away the mark of degradation imposed by the statute under consideration. We see every day persons of color holding seats in the Senate and in the House of Representatives, and filling places in the Executive departments of the State; so it would be incongruous and absolutely absurd, to rule that a free person of color is incompetent as a witness against a white man charged with the offence of mismarking one of his neighbor's sheep.

The statute must be taken to be repugnant to the spirit, if not the letter of the Constitution.

We see no occasion to elaborate the question, and indeed there is but little room for discussion. The new order of things brought about by emancipation, the XIII Article of the amendments of the Constitution of the United States, the Civil Rights bill, the military rule to which the State was subject while the government was provisional, and the approval by Congress of the present State Constitution, tend to support our conclusion, and to show, in fact, that it is unavoidable, in order to make the parts of our system harmonize, and work together as a consistent whole. There is no error. This will be certified, &c.

PER CURIAM. Judgment affirmed.

NOTE.—The same decision was made at this term in the case of *State* v. *Bell and Waggoner*, on an indictment for Fornication and Adultery.

JOHN CRAWFORD *v.* NEWTON D. WOODY and others.

Where a debtor transferred by deed to his creditor, his interest in a certain receipt given by a Constable for notes in the hands of the latter for collection, specifying the receipt as then in suit, and authorizing the creditor to receive the proceeds; and at the same time the creditor gave to the debtor a receipt stating that the amount to be received from the Constable should be credited on the note due by the debtor to him, *held* that by such agreement, the exclusive right to control the pending suit and to receive its proceeds, was vested in the creditor, and that the debtor was entitled to a credit upon his note for any amount *paid into the Clerk's office*, or otherwise, under a judgment thereon; also, that so far from its being the duty of the debtor to receive such amount and tender it to the creditor, he was not authorized to receive it.

(*Ellis* v. *Amason*, 2 Dev. Eq., 273; *Hoke* v. *Carter*, 12 Ire. 324, cited and approved.)

DEBT, tried at Spring Term 1868 of the Superior Court of ALAMANCE, before *Cilley, J.*

This action was brought by the plaintiff, as endorsee, against the defendant, Newton D. Woody, the obligor, and the other defendants, Berry Davidson, Caleb Dixon, Solomon Dixon, and Paris S. Benbow, the obligees and endorsers, of a bond for the payment of $2,045.02, bearing date Dec. 1st, 1855, and due one day after date.

The pleas were, Payment and set off, Accord and satisfaction.

It was in evidence that while the bond belonged the the endorsers, who were then partners under the name and style of S. Dixon, Davidson & Co., the defendant Woody executed to them the following transfer:

"Know all men by these presents that I, N. D. Woody, for value received, have assigned, transferred and set over, and by these presents do assign, transfer and set over to Solomon Dixon, Berry Davidson, Caleb Dixon and P. S. Benbow, trading and doing business under the name and style of S. Dixon, Davidson & Co., all my interest, right, title and claim to the debts due me which are contained in a Constable's receipt given to me by J. S. Ritter, of the county of Moore,

upon which a suit has been brought against the said Ritter and his sureties, which is now pending in the Superior Court of Law of Guilford county. A portion of the claims embraced in said receipt have been paid to me, and it is the intent of the parties to this instrument that the balance of the debts not collected and paid over by the said Ritter, are assigned and pass under this instrument. And I, the said N. D. Woody, do by these presents constitute the said S. Dixon, Davidson & Co., my true and lawful Attorneys, for me, and in my name to receive from the said J. S. Ritter, the Clerk, Sheriff, or whoever may have them in hand, the aforesaid moneys due on the above receipt, and full acquittance and discharge for me to give for the same, as I myself might or could do, and the money, when so received, to apply to their own exclusive use and benefit. In testimony whereof, I have hereunto set my hand and seal, this ninth day of February, 1861.

(Signed,) NEWTON D. WOODY, seal."

And the said firm passed thereupon to Woody, the following receipt:

"Received of N. D. Woody, a transfer of accounts embodied in a Constable's receipt, made by J. S. Ritter, of the county of Moore, which receipt is now in suit in the Superior Court of Guilford. The amount received on said receipt is to be credited on a note in my hands due to the Snow Camp Ma. Co., with Thomas Dixon as surety, and made 1st 12 m. 1855, for $2,045.02. The Ritter receipt he says he thinks is worth about ($900.00) nine hundred dollars. This 10th 12m. 1861.

(Signed) P. S. BENBOW, Agt.
Snow Camp Ma. Co."

The defendant then offered to show that the suit on the Ritter receipt had been prosecuted to a judgment, that the judgment had been discharged; and the money paid into the Clerk's office, and when it was paid in; but his Honor intimated that it was unnecessary to proceed further in the case unless some evidence of a tender of the money could be adduced.

The defendant, Woody asked his Honor to instruct the

jury that upon the evidence, he was entitled to a credit for the amount of the Ritter judgment as a payment on his bond. This his Honor declined to do, and he instructed the jury that the defendant was *not* entitled to a credit for the Ritter claim; that to have so entitled himself he should have proved an actual tender of the money to Benbow. The defendants excepted to the ruling of his Honor. Verdict for the plaintiff. Judgment, and Appeal by defendant.

Scott & Scott, for the appellants.

No counsel, *contra*.

PEARSON, C. J. The plaintiff having taken the assignment of the bond after it was due, took subject to the defences which could be made against the assignors.

The legal effect of the deed, executed by Woody, February 1861, was to transfer to Dixon, Davidson and Co., all of the debts set out in Ritter's receipt, except such as had been collected and accounted for, and to vest in them the equitable interest, with power to receive and collect for their own use, and to take the management and control of the suit then pending on the bond of Ritter, and of all the subsequent proceedings. This was not a naked power, but one coupled with an interest, and if Woody had attempted after that to arrange the matter with Ritter and his sureties, Equity would have protected the right of the assignees, by injunction, against pleading a release or dismissing the action, *Ellis* v. *Amason*, 2 Dev. Eq. 273.

The deed executed by Benbow, was the consideration of the deed executed by Woody, and its legal effect was to entitle Woody to a credit for the amount paid into the office or collected by the Sheriff, and to make it a payment on the bond of Woody, the instant it was received by the Clerk or Sheriff in discharge of the judgment which had been rendered against Ritter and his sureties. It was then the money of Dixon, Davidson & Co., and neither the Clerk nor Sheriff had a right to pay it to Woody. In fact the only reason for not

giving Woody credit for it at the date of the deed, was because the amount could not then be fixed, but the instant it became fixed by collection under the judgment, the law applied it as a payment according to the intent of the parties. *Hoke* v. *Carter*, 12 Ire. 324. In that case Fleming sold a note to Hoke without indorsement. Suit was brought in the name of Fleming. The Sheriff collected the money and paid it over to Fleming. It was held that Hoke could maintain an action against the Sheriff for "money had and received," on the ground that it became Hoke's money by operation of law, as soon as the Sheriff collected it.

So in our case, so far from its being the duty of Woody to take the money out of the Clerk's office and make a tender to the assignees, Dixon, Davidson & Co., he had no right to interfere with the money. It was not his, but had been appropriated by law, as a payment on the bond, according to the legal effect of the deed of Benbow, the agent of the assignees. It follows that his Honor erred in holding that a tender of the money by Woody to Benbow, was necessary to make it amount to a payment; and that the evidence offered of the judgment against Ritter, and that it had been paid off and discharged, was entirely sufficient.

PER CURIAM. *Venire de novo.*

GEORGE L. GIBSON *v.* WM. A. SMITH and ROBERT W. FOARD.

Where a vendor of land filed a bill for a specific performance of the contract, alleging that the vendee had contracted to pay specie, but had prevailed upon the sheriff (who had in his hands an execution for the money with instructions to accept specie only,) by menaces of an appeal to the Military, to receive currency; *Held*, that the contract to pay specie having been *merged* in the judgment, the latter was *satisfied* by the action of the sheriff, and *therefore* that the vendee had already complied with his contract.

(As to the rights of the plaintiff *against the sheriff*, *Quaere.*).

(*Crawford* v. *Woody ante* 100; *Hoke* v. *Carter* 12 Ire. 224, cited and approved.)

(Practice under the Code in preparing cases for the Supreme Court, pointed out by Pearson, C. J.)

BILL for specific performance, heard before *Logan, J.* at Fall term 1868 of the Superior Court of CABARRUS.

The bill alleged that the plaintiff on the 11th of August 1865 contracted by bond to sell the defendant Smith a certain tract of land at the price of $15,000 in specie; that Smith gave three notes for the price with the defendant Foard as surety, and had paid two of them; that suit was brought and judgment recovered upon the third (being for $7,000); that an execution issued thereon to the Sheriff of Cabarrus County who was instructed by the plaintiff to accept nothing else but specie, (Federal currency being then at a discount of forty per cent.); that the Sheriff being menaced by the defendant with the penalty for violating Gen. Canby's Order on the subject of demanding specie, received the currency which was tendered; but the plaintiff has never acquiesced in such action or received the currency from the Sheriff, so that the contract by Smith has not been performed. The prayer was for a specific performance by the defendant, and in default thereof, that the land be sold and the proceeds thereof applied &c., and for further relief.

The defendants demurred generally, "whereupon the cause was set down for hearing upon the bill of complaint and demurrer, and sent to the Supreme Court by the consent of the parties."

Wilson, for the plaintiff.

Boyden & Bailey, contra.

PEARSON, C. J. This action for the specific performance of a contract was commenced after the adoption of "the Code of Civil Procedure," and was founded upon a contract, not subject to the Stay ordinance; but the irregularity, if it be one, in making the summary return to the Superior *Court*, and not to the Clerk of the Court, is waived. So also the error of setting down the case for hearing on complaint and demurrer, and sending it to this Court by consent, instead of having a judgment in the Superior Court, and bringing the case up by appeal,

is not insisted upon; and by consent, the proper entries and amendments are considered as made in the transcript—and we will treat the case as properly constituted in this Court. We commend this liberality among the profession, until the provisions of the Code are settled by construction. We must, however, remind the Judges of the Superior Courts, that when an answer is filed, it is their duty to have *the facts* found, as distinguished from the *evidence* plainly set out, and also to set out the conclusions of law. When a demurrer is filed, it is the duty of the Judge to *decide* the questions of law, and when the entry is, judgment "*pro confesso*," these words will be treated as an idle expression, and be stricken from the record.

The plaintiff cannot maintain the action, because, by his own showing, the vendees have performed their part of the contract, by payment in full of the price agreed on. The plaintiff admits payment in full of the first two notes; and the legal effect of the judgment taken on the third note, was to merge it. In other words, the note as an evidence of debt, was extinguished by the higher evidence of the record, in the same way that an open account is extinguished by taking a bond as evidence of the debt. The less is always merged in the higher security, for both evidences of the debt cannot have force at the same time, and by taking the one, the other is gone. This is familiar learning. A distinction is taken between a bond, and a bill of exchange, or a negotiable promissory note, *Spear* v. *Atkinson*, 1 Ire. 262; but there is no exception to the rule that a judgment merges the debt upon which it is rendered.

The last note, then, was extinguished by the judgment; and when the execution issued and the sheriff accepted greenbacks in satisfaction thereof, the legal effect was to satisfy and discharge the judgment; for, as soon as the sheriff accepted the notes in payment, he held them for the plaintiff, and the debt, in any shape was gone. *Crawford* v. *Woody*, *ante* 100 *Hoke* v. *Carter*, 12 Ire. 224.

But the plaintiff says he gave that the sheriff positive directions not to receive anything but specie in satisfaction of the exe-

cution. It was the plaintiff's misfortune to have an agent who violated his instructions, and it may be the sheriff has made himself liable to an action, but there is no principle upon which that can prevent the act of the sheriff from having the legal effect of satisfying the execution; and as a necessary consequence, the judgment is likewise satisfied.

We were favored with an elaborate argument on the Constitutionality of the legal tender Act of Congress, but the point is not presented by the case, for the plain reason that the plaintiff, upon his own showing, has no debt against the defendants. Had he brought Covenant for damages by reason of the defendants refusing to pay the amount in specie, and insisted that the rule of damages was the amount of the specie, plus the discount in green-backs, the point would have been presented, but he has cut himself off from taking this position, by bringing Debt, and taking judgment for the amount, and thereby merging "his specie note." There is no error.

PER CURIAM. Judgment affirmed.

GEORGE W. SWEPSON *v.* JOHN C. HARVEY and C. L. HARVEY.

Actions upon contracts entered into before the ratification of the Code must be returned before the Clerk.

MOTION to dismiss an action upon a bond, made before *Tourgee, J.*, at Fall term 1868, of the Superior Court of ALAMANCE.

The bond was executed January 20th, 1866, and the summons was returnable *to the term* of the Court.

His Honor allowed the motion, and the defendants appealed.

Phillips & Merrimon, for the appellant.

John W. Graham, contra.

[The opinion in *Smith* v. *McIlwaine*, *ante* 95, covers this case and that of *The Raleigh National Bank* v. *Johnson;* the facts in which were the same as in this case.]

PETERSON DUNN *v.* E. J. NICHOLS and J. JONES.

The fact that the older writs of Ven. Ex. are affected by the Stay Law, in a case where the property levied on was sold by writs not so affected—does not change the rule that the proceeds of sales by a Sheriff are to be applied to the oldest execution in his hands.

The Fi. Fa. clause attached to a writ of Ven. Ex. has not the force of an alias Fi. Fa., but is dependent upon the result of the sale under the Ven. Ex.; when, if such sale be insufficient for the purposes of the execution, it for the first time becomes operative.

Where personal property was sold under a junior execution before it was known what would be the result of a sale under a Ven. Ex. of older date, *Held* that its proceeds were appropriated to such execution.

(*Allemong* v. *Allison*, 1 Hawks 325, cited and approved.)

RETURN by a Sheriff asking advice as to the application of money, made to *Watts, J.* at Fall Term 1868 of the Superior Court of WAKE.

The return set forth that at Fall Term 1867 of that Court the defendants had severally obtained judgments against one Page, and executions were issued upon them returnable to Spring Term 1868, and were levied upon land. From the last term a writ of Ven. Ex. was issued with the usual Fi. Fa. clause, returnable to Fall Term 1868.

At February Term 1868 of the County Court of Wake the plaintiff obtained judgment against Page, and an execution was issued thereupon returnable to May Term. This execution was levied on certain personal property, and also upon the land metioned above, and was returned. At May Term a Ven. Ex. was issued for both the personal and real estate.

All of the above orders of sale were delivered by the former Sheriff to the present Sheriff, who qualified in July 1868, and the former Sheriff also authorized his successor to sell the personal estate that had been levied upon as above. Thereupon the present Sheriff sold the personal property under the Ven. Ex. from the County Court, in September 1868, proclaiming that he would apply the proceeds as the law might

direct. On Monday of October Court he also sold the land, making the same proclamation as above, as to its proceeds.

The debts of the defendants were within the operation of the Act and Ordinance known as the Stay Laws, and the Sheriff states that he would not have made sale under the writs in these cases. The plaintiff's debt was a *new* one, unaffected by these laws, and the Sheriff had a right to sell and did sell the property of Page under the Ven. Ex. in that case.

The Sheriff brings the money, which is not enough to satisfy all of the debts, into Court, and asks the instruction of the Court as to its application to the several writs in his hands.

Upon argument by counsel for the plaintiff and the defendants respectively, the Court ordered the proceeds of the real estate to be applied to the writs in favor of the defendants, *pro rata;* and the proceeds of the sale of the personalty to be applied to the writ in favor of the plaintiff.

From this order both parties appealed.

Rogers & Batchelor, for the plaintiff.

The Sheriff actually sold under the writ from the County Court, and this was an application. *Yarbro* v. *State Bank*, 2 Dev. 23; *Washington* v. *Saunders lb.* 343 ; *Hill* v. *Child*, 3 Dev. 265. The Stay Law preserves *the lien* of the older executions, but does not prevent sales under junior executions. That lien is administered against the purchaser and not against the proceeds of the sale. *Ricks* v. *Blount*, 4 Dev. 128; *Alexander* v. *Springs*, 5 Ire. 475.

As regards the personalty,—it was sold by the former Sheriff, through the present as his agent. There was no process in the hands of the present Sheriff at the time of its sale, which warrants the defendants in claiming the proceeds of the personalty. *Saunders* v. *Rogers*, 3 Dev. 38 ; *Barden* v. *McKenzie*, 4 Hawks 279; *Allemong* v. *Allison* 1 Hawks 325; *Cannady* v. *Nuttall*, 2 Ire. Eq. 265; *Badham* v. *Cox*, 12 Ire. 456.

Phillips & Battle, contra.

The policy of the Stay Law was to favor the debtor, and

not the junior creditor. In a case like the present, where the existence of *new* debts prevents the debtor from keeping his property, and he actually loses its possession, the Stay Law has no operation. What was meant as a shield for the debtor cannot be turned into a sword for a junior creditor. The policy of the law is that purchasers at Sheriffs' sales shall get good titles, therefore *the lien* provided by the Stay Law is to be administered against *the proceeds.*

The reason of the thing in *Allemong* v. *Allison* and the cases which follow it, is that so long as it is not known whether the Ven. Ex. will produce enough to satisfy the execution, the Fi. Fa. clause is to have no operation. But if before money be applied to junior executions (as here) it be found (as here) that the Ven. Ex. under a senior execution will not satisfy that execution, the Fi. Fa. clause loses its dormant character. That is according to the analogies of the English law as stated in *Allemong* v. *Allison*, and is not opposed to any North Carolina case.

DICK, J. The defendants, by the levy of their executions upon the real estate of the debtor Page, acquired a lien, which was continued by the subsequent writs of *ven. ex.*, to the day of sale. The fact that the Sheriff was prevented from making sale under these writs, by the Stay Law, does not affect the lien of the defendants. Although he made sale under the junior *ven. ex*, of the plaintiff, it is expressly stated in the return of the Sheriff, that he made no appropriation of the proceeds of sale, but referred that question to the Court. It is well settled that where the conduct of the parties is *bona fide*, the execution of the oldest *teste* is entitled to priority. The defendants have done their duty faithfully and diligently, and they lost none of their legal rights by the failure of the Sheriff to sell under their process.

The special *fi. fa.* clause, in the writs of *ven. ex.*, of the defendants does not give them priority as to the personal property, which was not levied upon by their executions. This special *fi. fa.* has not the force and effect of analias *fi. fa.*—but is depend-

ent upon the result of the sale under the *ven. ex.*, to which it is annexed. If such sale is insufficient to satisfy the debt, then for the first time the special *fi. fa.* becomes operative—*Allemong* v. *Allison*, 1 Hawks 325.

The plaintiff's execution was levied upon the personal property, and the sale was made before the land was sold and before the special *fi. fa.* had any vitality, and the law appropriated the proceeds to the plaintiff's debt. The judgment appealed from by the plaintiff is affirmed. The judgment appealed from by the defendant, is affirmed.

As both parties appealed, the Clerk of this Court will state two cases on his docket, and tax the costs against the appellant in each case. Let this be certified.

PER CURIAM. Judgment affirmed.

NARCISSA G. ROGERS, *ex parte.*

It is not the lapse of time since the death of the husband, but such lapse since the taking out of administration, that affects the right of the widow to a Year's provision:

Therefore, where the husband died in June, 1860, and administration was not taken out until February term, 1868, *held* that the widow was entitled to such provision under a petition filed at that term.

(*Gillespie* v. *Hyman* 4. Dev. 118, cited, distinguished and approved.)

YEAR'S PROVISION, allowed by *Watts, J.*, at Fall term 1868 of the Superior Court of WAKE.

The petition was filed at February term 1868 of the county Court of Wake; and a report thereupon by the commissioners was made to May term. At this term the administrator intervened, and moved that such report be set aside, upon the ground that the petition was not filed in time. It was agreed that the intestate died in June, 1860, and that no letters of administration were issued until the term at which the petition was filed.

The report was confirmed in the County Court, and again,

upon appeal by the administrator, in the Superior Court. Thereupon the administrator appealed to this Court.

Haywood, for the appellant.

Rogers & Batchelor, *contra.*

SETTLE, J. The statute provides that a widow who seeks a year's provision out of the estate of her husband, must "file her petition in the County Court of the County where letters of administration or letters testamentary are issuable, at or before the first term when the same are granted."

Does the lapse of eight years without administration upon the estate of an intestate, bar the widow's right to claim a year's provision when administration is granted? If she files her petition "at or before the first term when administration is granted," she complies with the language of the act, and we can see no reason for a construction different from the plain import of the words. On the contrary, if the widow has supported herself and family during the first year of her destitution, it would appear reasonable that she should be reimbursed out of the estate of her husband

But it is suggested, that, as she had the right to administer in preference to others, and neglected to do so for that length of time, she thereby forfeited her right to a year's support. There may have been very good reasons for her failure to procure administration. She may have been prevented from so doing by circumstances beyond her control Such a construction would operate very harshly upon old or infirm widows, or upon those who could not give the requisite bonds, and would defeat the humane purposes of the act, in the very cases which call loudest for its assistance. If the suggestion of delay has any weight, it applies to the next of kin and creditors, with as much force as it does to the widow, for they could have claimed the right of administration promptly, when the widow failed to apply for and procure the same.

There is wide difference between this case and that of *Gil-*

lespie v. *Hyman, admr.*, 4 Dev.119; there the widow did not file her petition until the lapse of two years after administration had been granted.

PER CURIAM. Judgment affirmed.

EDMUND JACOBS *v.* M. W. SMALLWOOD,*

The *Stay Law*, contained in the Ordinances of June 1866 and March 1868, impairs the obligation of contracts, and is therefore void.

Semble, that the provision for a Homestead in the present Constitution of the State, is not unconstitutional, and has a *retrospective* effect.

Per RODMAN, J., *dissenting*. The *Stay Law* is not unconstitutional.

DEBT, tried upon demurrer, before *Buxton, J.*, at Spring Term 1868 of the Superior Court of NORTHAMPTON.

The suit had been brought in the County Court, upon a bond dated on the 29th of May 1867 The defendant pleaded to the jurisdiction, on the ground that the bond declared on had been given *in renewal* of a debt contracted before January 1st, 1865. To this the plaintiff demurred.

In the County Court the demurrer was sustained. Upon appeal his Honor below overruled the demurrer, *pro forma*, and the plaintiff appealed.

It was agreed that if the demurrer were sustained, judgment should be rendered for the debt declared upon.

Smith, Barnes and Yeates, for the appellant.

Peebles & Peebles, contra.

READE J. It ought to be, and it is with us, the gravest duty, to decide between the Constitution and a legislative enactment. It is settled that whenever such a question arises, every reasonable presumption is in favor of the validity of

*NOTE.—This case and the five next succeeding, are the STAY LAW cases. The opinion in the present case covers all.

the enactment, and against the alleged repugnance. Nor is it ever to be presumed, that the Legislature *intends* an infringement of the Constitution, even when the infringement is palpable; but it is to be set down to inadvertence, or mistake, or unconscious bias from pressing circumstances. The duty is not only grave but painful, when great public interests are involved, or the public mind is excited and anxious by reason of the multiplicity of individual interests which are at stake. But still the Judge has but one guide—*duty*. To maintain and enforce legislative enactments is important, but to maintain and defend the Constitution is paramount.

The Constitution of the United States provides that "no State shall pass any law impairing the obligation of contracts."

The obligation of a contract is, *the duty of its performance*—of a full and complete *compliance with its terms.*

Any statute which relieves a party from this duty, or enables him to evade it, is void.

An occasional, if not a frequent recurrence to fundamental principles is useful. Let us, therefore, consider *why* it was thought necessary by those who formed our government, to make this provision in the United States Constitution. Every word of that instrument was well-considered; every principle was founded in patriotism and virtue. Those who had fled from error, and staked all for truth and justice,—great and good men! framed a government in which virtue and intelligence were to be the powers, and the only powers; capital, privilege, monopoly, rank, had had their day, and were discarded. Upon a new soil and in fresh clime, a government was inaugurated, founded upon the virtue and intelligence of those who were of it. Very few were rich; the masses were poor; and those who were expected to come under it by immigration were to be poorer still; and the whole body were dependent upon industry and integrity for prosperity. Under these circumstances, what was necessary for the business and prosperity of the community? If it had been left to the control of capital, the few who had it would have had a monopoly, and

industry and enterprise would have been paralyzed. To prevent this, integrity was put in competition with capital—indeed almost to supply its place. Every man's word was to be his bond, and every bond—every contract—was to be inviolable. Not only was the capitalist assured that, if he would venture his capital for the interest of the community, he should have every guarantee for its safety, but the laborer was assured that industry should have its reward; that in the absence of capital to "pay down," industry and enterprise need not falter, because a *promise* of reward should never be evaded or impaired. It will be seen, therefore, that the provision was not so much for the protection of capital, as for the encouragement of industry and enterprise. It was a guaranty of justice to all, and is expressly so against him who would obtain the profits of industry, and withhold the reward. It is a provision in favor of industry and honesty, and against idleness and treachery.

Probably the wisdom of our ancestors could not be more clearly vindicated than it is by the circumstances which now surround us. Let it be supposed that there are in the State 200,000 persons acting for themselves: one-third of them, the colored portion, are neither creditors nor debtors to any considerable amount, and are dependent upon their labor for subsistence; and that depends upon the inviolability of contracts. Another third, one-half of the whites, are small farmers and laborers, dependent upon the rewards of industry. The other third may represent the creditor and debtor classes. Of these there are, doubtless, meritorious cases on each side: On one side there may be the exacting Shylock creditor, and on the other the exhausted, unfortunate debtor; on one side there may be the widow or the orphan creditor, and on the other the showy, spendthrift debtor. It is impossible to make general rules to fit these individual cases; and it was wise to leave the contract inviolable, and the hardships to private adjustment. Probably the attempted interference in favor of one class against the other, has held out false, not to say unjust hopes, and has prevented the private adjustments which might have

been made. As it is, we find that eight years of stay laws have left a considerable indebtedness, with interest and cost accumulated, and creditors and sureties impoverished, without any corresponding benefit to the principal debtors; some of whom cannot pay, and have sought relief from the Bankrupt law; and some have delayed, and have now lost the opportunity for that relief, by reason of the false hopes held out by the stay law; and some of whom will not pay, although their means are abundant, and are used in speculation and extravagance.

Again: it was very well known to those who framed our Constitution, that with the most prudent and honest purposes, persons would sometimes become involved beyond their ability to pay, and that it would be crippling industry and enterprise to afford them no escape from misfortune; and, therefore, the same Constitution, which makes contracts inviolable by State laws, provides for a General bankrupt law, by means of which a debtor may be absolved from his debts and take a new start.

Again: the laws, while they provide for the enforcement of contracts, are not used to the extent of oppressing the debtor, for there have always been exemptions of what were deemed *necessaries*. In our earlier days—times of great simplicity and small estates—we had the exemptions of wearing apparel, wheel and cards, loom, bed and furniture, &c. As our fortunes increased, the exemptions increased, and provisions, furniture, &c., were added; and subsequently, as times and habits changed, other things were added. All of which met the approval of the public, and was not injurious to creditors, while the debtors were not reduced to want, nor left to broken spirits.

Now there is a commendable spirit, which finds expression in our new Constitution and in our legislation and in popular approbation, to allow homesteads; for truly we may say, why allow a bed, without a shelter to keep off the rain!

But exemptions and homesteads on the one hand, and stay laws on the other, are very different things. The former allows a man to be comfortable and honest, and encourages

industry, while the latter enables him to be profligate and dishonest; the former is for all, the latter for a favored few.

There has been no case before us requiring the decision of the question, whether the provision for a homestead in our State Constitution is in violation of the Constitution of the United States. And although the advice of the Supreme Court was requested by resolution of the General Assembly, yet the Court is so constituted, that we have not felt at liberty to deliver any authoritative opinion upon the subject. But the fact may be stated, that our new Constitution was approved by Congress, with that provision in it; and it is not to be supposed that it would have been done, if it had been thought to be in violation of the Constitution of the United States. And it is settled, that every presumption is to be made in its favor; as having the approbation of the Convention of the State, and of the Congress of the United States. And it may be repeated that exemptions have always existed, not to any considerable amount, to be sure, but still, in increasing amounts, keeping pace with the change in manners and customs, and the condition of the country. If an exemption of the value of $100 was *necessary* in our infancy as a people, with the simplest habits, and fell under the maxim, *de minimis non curat lex*, it may be that the exemption of a homstead of $1000 value will be deemed less considerable *now* than $100 then. And it has the sanction not only of Congress and of the State Convention, but of the liberal spirit of the times as well. And it may well be supposed to be the earnest wish of the Government in all its departments, and of every enlightened and benevolent citizen, to see every man with a home for his wife and children, a home to adorn and to love—*his* home, his *castle*—"from turret to foundation stone."

Although we are not permitted to declare our *decision*, in advance of a case between parties which may come before us, yet a measure which has the sanction of the State Constitution, of Congress, the guardian of the United States Constitution, and of an enlightened public sentiment, and which is

founded on justice, and which gives to every man a home from which he cannot be driven, may well be supposed to find favor with the Court, no member of which has intimated an unfavorable opinion. If such should be the case, then every man will be saved from oppression. And, in the absence of any stay law to prevent, every man will be obliged to do justice to his creditors, by surrendering to the satisfaction of his debts so much of his property as is not exempted as his homestead.

We have been thus full in what may be regarded as an unusual discussion of the subject by the Court, because we are aware that the effect of our decision will be felt very far beyond the case before us; because of the anxious state of the public mind; and because, in declaring invalid a measure which was intended to afford relief, but which was not only invalid but mischievous, and gave a stone instead of bread, we are anxious to relieve the public mind by directing attention to a measure—the Homestead—which may enure to the benefit of all.

We come now to the question: Does the ordinance, which we are considering, impair the obligation of contracts?

We do not propose to *labor* the subject. It is plain and incontrovertible. And the learning upon it is abundant and common. *Barnes* v. *Barnes*, 8 Jon. 366.

We are obliged to concede that it was not the *purpose* of the Convention to impair the obligation of contracts, both because that is not to be presumed in any case, and because a different purpose is expressly declared. And we are to take the declared purpose as the real one. The purpose declared is, "to change the jurisdiction of the Courts," &c. To do that, is quite within the province of legislation. But while pursuing that legitimate object, it turns out that the *effect* was to impair the obligation of contracts—a consequence which, as we are to presume, was not foreseen, and is to be set down to inadvertence, or the unconscious bias of pressing circumstances and As soon as it is discovered that the *effect* is to violate the Constitution, no doubt the Legislature and every citizen will

sustain the Court in its purpose to maintain the Constitution.

The second section of the ordinance of the Convention of 1865-'66 entitled "An ordinance to change the jurisdiction of the Courts," &c., as amended by the Convention of 1868, (to be found appended to the Code,) provides that all contracts, without regard to the terms of payment made by the parties, shall be payable in four annual installments. Now if the terms of the contract be that it is all payable at one and the same time, and the ordinance changes the payment to four different and distant times, it is a material alteration, and impairs its obligation.

Section sixteen provides that the second section shall not apply to debts contracted since May 1st, 1865; so that the second section is liable to the two-fold objection of discriminating between classes, and of altering the terms, of contracts, and thus impairing their obligation, (1) as regards the particular of the time of payment, and (2) as regards the particular of the remedy for enforcement—alterations, not immaterial and reasonable but material and unreasonable.

There are several cases before us, of which this Opinion is decisive. The particular point presented in this case is, whether a bond given since May 1st, 1865, in renewal of a debt before that time, could be sued on in the County Court (this suit having originated in the County Court.) The defendant pleaded to the jurisdiction, and the plaintiff demurred, and his Honor overruled the demurrer and sustained the plea. In this there was error. According to the agreement of the parties, judgment will be entered here for the plaintiff, for his debt and interest.

RODMAN, J., *dissentiente.* I am compelled to dissent from the opinion of the majority of the Court in this case.

The question presented is, whether the Ordinance of the Convention of North Carolina, ratified on the 14th of March 1868, entitled "An ordinance respecting the jurisdiction of the Courts of this State," amending "An ordinance to change the jurisdiction of the Courts and the rules of pleading

therein," adopted June 23rd 1866, is void, by reason of a conflict with the Constitution of the United States, which prohibits any State from passing any law impairing the obligation of contracts.

The diligence of the counsel who argued on the opposite sides in the several cases in which this question has been presented, has probably furnished us with all the cases, in which similar questions have been discussed, which would aid us in our investigation. None of them are exactly in point, and I shall not undertake to review them. These principles may be taken as clear, or as conceded for the purposes of this case:

1. No State can constitutionally pass any law invalidating a legitimate contract: subject to some qualifications, which will be presently adverted to.

2. The remedy for the enforcement of a contract is a part of the contract *quodam modo*: that is to say, it is so, at least to the extent, that any law which deprives a creditor of all remedy, or of all but such as is merely illusory, impairs the obligation of the contract, and is therefore unconstitutional.

3. The States may constitutionally alter and modify the remedies for breaches of contract; but if it can be seen that the statute is not directed in good faith to the regulation of the remedy, but designedly impairs the obligation of the contract, it is unconstitutional and void. Cooley, Const. Lim. 287, 289.

It is not contended by any one that the remedy is so completely a part of the contract, that no change at all can be made in it. The consequences of so extreme a doctrine would make it absurd. Cooley, Const. Lim. 361. But it is contended for the plaintiff in this case, that if the remedy be so changed as *materially* to impair its value to a creditor, the obligation of the contract is thereby impaired, and the statute, changing the remedy, is void. This doctrine may be conceded partially, and in a certain sense, viz: that the legislator should take care not to violate the spirit of the Constitution; but the question would still remain open, whether the principle is

capable of being reduced to the certainty necessary to make it available for judicial application.

Even as thus limited by conceded principles, the area of doubt and discussion is left sufficiently wide. The questions remaining open may be stated thus:

1. When a Legislature has set forth in a statute that its purpose and intent was to change the jurisdiction of the State Courts, and to alter the modes of procedure, can any Court pronounce that declaration false, and that the real purpose was to impair the obligation of contracts?

2. Is it possible to draw a reasonable line between such modifications of the remedy as do, and such as do not, so materially impair the remedy, as to impair the contract; which line shall be so definite and certain, as to enable a Court to declare those on one side of it constitutional and valid, and those on the other side, unconstitutional and invalid?

3. How is that line defined?

4. On which side of it, does this particularly enactment fall?

I do not propose to discuss these questions *seriatim*. Observations on each separately would run into each other, and lead to useless repetition. But it is well to see the stages which must be passed, and the conclusions which must be arrived at, before the Court can declare the ordinance invalid.

A few general observations on the difference between the obligation of a contract, and the remedy on it, although not bearing very closely on the particular question, will not be useless as an introduction to it. A contract is personal; it follows the person of the debtor, and wherever made, can be enforced in the Courts of the country in which the debtor may go to reside; it must be construed according to the law of the place of contract, and if invalid there, or impressed by law with a certain meaning, it will be invalid, or impressed with that meaning everywhere. 1 Robinson Pr. 68.

The remedy, on the contrary, is local,—it must be that which is given in similar cases by the law of the country where the suit is brought. The period of limitation, and the

liability of the person or property of the debtor, are parts of the remedy; and although these may materially vary in the country where the action is brought, from those of the country of the contract, yet the creditor can have no others than those given him by the law of the place of action.

To revert to the first of the questions proposed above. In a discussion in this Court of that clause of the State Constitution which forbids the Legislature from incurring any new debt for the State (except in certain cases,) until the bonds of the State are at par, it was asked by one of the counsel *arguendo:* suppose that the Legislature, in an Act which would otherwise be in contravention of that clause of the Constitution, should declare that the State bonds were at par, when it was notorious that they were not; could any Court of the State listen to a suggestion that such legislative declaration was false, and inquire into the truth of it, and upon finding it false, declare the Act invalid because of such falsehood? Probably in the case of a private Act, the Courts might inquire into the truth of a recital, and refuse to give the Act effect, on the ground that it had been procured by fraudulent representations to the Legislature. But where the Legislature has inserted in a public Act a recital of public facts, or of facts known officially to the Legislature, or of their intent and purpose in making the law, we know of no instance in which a Court has assumed to doubt its truth. There are no means by which such an inquiry could be prosecuted, nor were the Courts of the country established for any such purpose. The Legislature is a co-ordinate department of the government with the Judiciary; their functions are distinct and independent; they are equally sworn to support the Constitution; and entitled to receive from each other mutual confidence and respect. Cooley Const. Lim. 96, 187. If it be possible to conceive that a Legislature shall ever attempt to bolster up an unconstitutional enactment, by the false recital of a fact, the remedy must be found with the people whose servants they are.

In the ordinance under consideration, the Convention

declares its purpose to be, "to change the jurisdiction of the Courts, and the rules of pleading therein."

But notwithstanding the concession of a legitimate purpose to the Legislature, it may fairly be contended that it has made so material a change in the remedy, as *in fact* to impair the obligation of the contract. It cannot be said that the ordinance in question destroys the remedy of a creditor, and it must equally be conceded that it considerably retards it. We are compelled, therefore, to consider the extent to which the admitted power of the Legislature to modify the remedy is abridged by the constitutional limitation upon that power, viz. that the modification shall not be so great as to impair the obligation of the contract; and consequently, to consider also, whether it be possible and competent for a Court, to draw the line between a legitimate and an illegitmate exercise of the power over the remedy.

It must be remembered, that to every contract there are at least two parties, an obligor and an obligee, who assume by the contract mutual duties. In the ordinary case of a promissory note, which is probably as nearly unstable as any contract which can be suggested, the maker agrees to pay a certain sum, at a certain time and place, and the payee impliedly promises to receive that sum in the lawful currency, and to discharge the maker from further liability, by a surrender of the note, or by a receipt, or in other sufficient way.

If the existing remedy be considered a part of the contract, so that it cannot be altered materially to the detriment of the creditor, it must also be so considered in reference to the debtor, and it cannot be materially altered to his detriment; if the remedy cannot be retarded, it cannot be accelerated; if property liable to execution at the date of the contract cannot be lawfully exempted, property which was exempt cannot be subjected.

We will refer here to some examples, where the Legislature, in the exercise of an undisputed power has dealt with contracts, so as directly to make some valid, which before had no legal existence, and to destroy some, which when made were

lawful and binding. As examples of the first class; it seems to be settled law that a Legislature may pass retrospective laws. Many illustrations are given in Cooley on Const. Lim. pp. 369, 383, which it is unnecessary to do more than refer to. But a more sweeping illustration may be found in an Act of the Legislature 1865–'66, ch. 40, § 5, by which it was enacted that all freedmen and women who had been living together as husband and wife, prior to emancipation, should henceforth be husband and wife, and imposed penalties on them if they failed to register themselves as such. It must be understood that their previous cohabitation was merely concubinage, and the Legislature interpolated into the terms of their contract, whatever they might have been, all the incidents of a valid marriage.

As examples under the second head, we need only to refer to the class of cases, in which a contract at the time it is made, is possible of performance and lawful, because consistent with public policy, but which, before the time of its performance, becomes impossible and unlawful, through a change in the public policy and law. Broom's Legal Maxims, 240, 241, and cases there cited. 2 Thomas's Coke, 21, 206 *a*. *Brown* v. *Mayor, &c., of London*, 9 C. B. N. S. 726, (99 E. C. L. R., S. C. 106 E. C. L R. 828.)

A striking instance will be found in the change of the policy of North Carolina (as well as of other States) on the subject of slavery. In 1861, it was lawful to hold slaves, and to contract to sell or let them to hire. In 1866, a Convention of the State emancipated the slaves, and rendered unlawful the performance of all executory contracts for their sale or hire, or for the quiet enjoyment of those previously sold with that sort of warranty. Up to a certain time, the trade in slaves between Guinea and North Carolina was lawful, and the charter of a ship to be employed in that trade, would have been enforced. If, while such a contract continued executory, the State of North Carolina had made the traffic unlawful, and thereby absolutely defeated the contract, who will say that the enactment producing that result, would have been unconstitutional

as impairing the obligation of a contract; and who will say that the ordinance of emancipation is unconstitutional and void upon that ground?

I proceed now to instances in which the enactments are conceded, or have been decided, to be constitutional, although it must be admitted, that they do materially impair the remedy of creditors, and it may be contended, that they do so in a much greater degree, than the ordinance which is impeached in this case.

At one period in the history of our law, a creditor had a remedy for the collection of a debt, as well against the person, as against the property of his debtor; the debtor might be imprisoned without hope of relief, except by payment. This must at all times have been considered a very material, and, at some time, it was probably the principal, part of the remedy. This remedy was first impaired by insolvent laws, and has now been absolutely taken away by the abolition of imprisonment for debt, except in cases accompanied by fraud. Constitution of North Carolina, Bill of Rights § 16. This was constitutional, *Sturges* v. *Crowninshield*, 4 Wheat. 122.

The Statute of limitations, as prescribing the period within which a creditor must sue, must be regarded as a material part of the remedy. Yet the Legislature may shorten, or extend it, or suspend its operation for a certain time. Cooley Const. Lim, 366. *Stearns* v. *Gittings*, 23 Ill. 387. Our Legislature have repeatedly extended it for the benefit of creditors.

The property of the debtor which the law subjects to the execution of his judgment creditor, is certainly a material part of the remedy; it was probably that to which the creditor most looked, when he gave the credit. Yet exemption laws, within certain ill-defined limits, are not unconstitutional.

In 1796 the Legislature gave widows a year's support out of the personal estate of their deceased husbands, without any reservation in favor of prior creditors. Rev. Code, ch. 118, § 18.

In 1866 the ordinance of emancipation took away from

liability to the execution of creditors the whole slave property of their debtors, amounting probably to more than half the value of the whole property of the State. Shall this Act be held unconstitutional, as impairing the obligation of contracts?

We have already said that if the remedy cannot be altered to the detriment of one party to a contract, it must follow that it cannot be, to the detriment of the other. Yet can it be doubted that it would have been competent to the Legislature, had they thought proper to do so, to have extended the Code of Civil Procedure, by which the collection of debts is materially accelerated and facilitated, over contracts made prior to its ratification?

A State may legitimately alter the rules of evidence applicable to actions respecting past transactions, whether civil or criminal: Cooley Const. Lim, 367; and it may thereby, in effect, give value to contracts, which had none before, or deprive them of value. The recent legislation of this State, by which all exclusion on the ground of interest is abolished, and parties to suits allowed to testify, must have materially affected the practical value of many contracts.

If, in these instances, the legislative acts did not so materially impair the remedy of the creditor, as to impair the obligation of the contract, it is difficult to see on what principle that effect can be attributed to an act, which leaves to the creditor every remedy he had before; their operation only being retarded, on considerations of public policy. What reasonable line can be drawn, which will leave the instances I have cited on one side, and the ordinance before us on the other? If it be said that in the instances cited, the impairment of the contract was not the purpose, nor the direct effect of the Statute, but incidental merely to changes of public policy, of which the Legislature was the exclusive judge, the same may, with equal truth, be said of the ordinance in question, if we give credit to the legislative declaration of its purpose. The Supreme Court of the United States have been unable to draw any such line, or to define the legislative dis-

cretion within narrower limits, than I have here conceded. The able counsel, who argued against this Ordinance were unable to do so. And I confess I am.

In some cases, it is easy to say that the change is very slight, in others, that is very great; but at most times, when a case lies between the two extremes, it will be impossible to say whether it falls on the legitimate, or the illegitimate side. In that case, the Legislature is entitled to the benefit of the doubt. In such cases, the injunction of the Constitution must of necessity be considered as addressed rather to the legislator than to the judge; for the former has a discretion—he can abstain from doubtful ground and act on the spirit of his instructions. The right to alter the remedy, like the right of eminent domain, or to infringe on personal liberty, must depend for its extent somewhat on the exigencies and necessities of the State. The Constitution never intended any thing so unreasonable or impossible as to bind up within rigid lines, what is, in its nature, undefinable, or that the Court should measure by degrees, what, in its nature, is immeasurable.

We sit here to administer the positive law; the ordinance of the Convention is clear, and if we can not clearly see that it is in conflict with the Constitution of the United States, which all admit is the paramount law, we must give it effect.

In *Fletcher* v. *Peck*, 6 Cr. 87, Marshall, C. J., says: "The question whether a law be void for its repugnance to the Constitution, is at all times a question of much delicacy, which ought seldom, if ever, be decided in the affirmative, in a doubtful case." "It is not on slight implication and vague conjecture, that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The question between the Constitution and the law should be such, that the Judge feels a clear and strong conviction of their incompatibility with each other." See also *Cooper* v. *Telfair*, 4 Dall. 14, and *Ogden* v. *Saunders*, 12 Wheat. 213.

If it were competent for a Court, in the absence of any reasonable standard, to undertake to measure the amount of change in the remedy, which would be so material as to impair

the obligation of the contract, it would be necessary to examine as well those provisions of the Ordinance of 1868 which operate in favor of the creditor, as those which operate against him. It might even be necessary, or legitimate, to extend the investigation to other contemporaneous legislation *in pari materia*, and to balance nicely what it gives, against what it takes away. Such an investigation could lead to no useful result; starting without the guide of any definite principle, it would yield none, and would degenerate from a judicial investigation, into a consideration of the policy of the legislation. So long as it is conceded that a State can lawfully alter the remedy within the limits mentioned, I can conceive of no standard by which the degree of the materiality of the charge can be judicially measured, any more definite than that heretofore declared, which is obviously insufficient to solve this case.

With the policy or wisdom of the Ordinance of 1868, a Court can have nothing to do. This consideration, however, may be legitimately entertained: A great social and political revolution had occurred in the State; its relations with the National Government were greatly altered; a Convention assembled, not in conformity with the Constitution and laws of the State, but under the acts of Congress; that Convention acted on the idea that the fabric of the previous State government was destroyed; proceeding to reconstruct a government, it established the judicial department on a foundation altogether new, and with a new system of practice and procedure; some change in the remedies formerly in use, was unavoidable. They made such as they thought wise, and I cannot undertake to say, that in doing so, they overstepped the limits of their power.

In coming to the conclusion I have felt myself bound to, I have have not overlooked a question, which, if the Ordinance in question shall be held void, must arise. The Constitution provides (Art. v. sec. 2) that Commissioners shall be appointed, who shall report to the Legislature a Code of procedure in civil actions. That report has been made and adopted, and

the Code, by its express provisions, is inapplicable to the class of contracts embraced in the provisions of the Ordinance. If the Ordinance, by which alone a procedure is provided for that class of actions, is declared void, by what law shall the procedure in them be governed? By the old law? That procedure and the Court which administered it are abolished. By the new Code? It is expressly declared not to apply to them. This is not the occasion to solve these questions. They are only presented as worthy of consideration, and such as must be decided in any judgment which reaches the breadth of this subject. I only refer to them, to show that I have not omitted anything which ought to be considered in connection with the question discussed.

MARY A. RIVES and others *v.* G. J. WILLIAMS and others.

COMPLAINT, heard before *Tourgee, J.*, at Chambers, in December 1868, and brought before this Court by an appeal on the part of the plaintiffs.

The case showed that the defendant as sheriff had levied an execution, returnable to Spring Term 1868 of the Superior Court of CHATHAM, upon certain lands; that a *ven. ex.* had issued thereupon returnable to Fall Term of the same Court, and that the sheriff had made no return upon this last process.

The complaint was filed upon the 18th day of December 1868; upon the 28th the defendant filed a demurrer, on the ground that the debt upon which the execution was issued, was within the operation of the ordinances staying the collection of debts.

The clerk having sustained the demurrer, the plaintiffs appealed to the Judge, and then again to this Court.

Manning, for the appellants.

York, contra.

READE, J. See Opinion in *Jacobs* v. *Smallwood.* There is error. Let this be certified.

PER CURIAM. Judgment reversed.

E. M. HOLT v. DANIEL ISELEY and others.

MOTION to strike out pleas and continue a case, heard before *Tourgee, J.*, at Fall Term 1868, of the Superior Court of ALAMANCE.

The note sued upon was given in December 1866, in lieu of one for the same amount made in December 1860 by one Simpson Iseley as principal and Daniel Iseley and William Webster as sureties. The same persons were parties to each note; Daniel Iseley being *principal* in the new note. The suit had been brought to the County Court, and was transferred to the Superior Court upon the former tribunal being abolished. Pleas having been entered in the County Court, a motion was made before his Honor to strike them out, and continue the case to Spring Term 1869. This was allowed, and the Plaintiff appealed.

Phillips & Merrimon, for the appellant.

Graham, contra,

READE, J. See Opinion in *Jacobs* v. *Smallwood*, at this term. There is error. Let this be certified.

PER CURIAM. Judgment reversed.

GEORGE W. SWEPSON *v.* ROBERT H. CHAPMAN.

ACTION tried, upon a demurrer by the plaintiff to the answer of the defendant, before *Henry, J.*, at Fall Term 1868 of the Superior Court of HENDERSON.

The note declared on had been given in substitution for one made prior to the year 1860. Upon this appearing below, his Honor ordered the complaint to be dismissed, and the plaintiff appealed.

Merrimon, for the appellant.

Bragg, contra.

READE, J. There is error. See Opinion in *Jacobs* v. *Smallwood*, at this term.

PER CURIAM. Demurrer allowed. Judgment of *respondeat ouster*. This will be certified, &c.

W. C. TATE *v.* L. J. ESTES.

MOTION to set aside a judgment and execution, allowed by *Mitchell, J.*, at Fall Term 1868 of the Superior Court of CALDWELL.

The judgment had been taken by default at Spring Term 1868 upon a bond executed October 15, 1866. The execution, which had issued from that term, had been levied September 21, 1868.

From the order made as above the plaintiff appealed.

Folk, for the appellant.

No counsel, *contra.*

READE, J. There is error. See Opinion in *Jacobs* v. *Smallwood*, at this term. Let this be certified.

PER CURIAM. There is error.

THOMAS GRIER *v.* JACOB BYSANER.

MOTION for judgment for want of a plea, heard by *Gilliam, J.*, at Fall Term 1867 of the Superior Court of LINCOLN.

The writ (Debt) was issued returnable to Spring Term, 1867, and at that Term the defendant prayed to have the advantage of the Act of February 12, 1867, "changing the jurisdiction of the Courts." Thereupon the plaintiff moved for judgment for want of a plea. The Court refused to allow this motion, and the plaintiff appealed.

It was agreed that if the Supreme Court should reverse his Honor's judgment, judgment should be given there for the plaintiff.

Bynum, for the appellant.

No counsel, *contra*.

Reade, J. There is error. See Opinion in *Jacobs* v. *Smallwood*, at this term.

PER CURIAM. Judgment here for the plaintiff.

JOHN BUIE *v.* HENRY PARKER.

Where a man, at that time a slave, on the 15th of March 1865 took possession of a mule abandoned as unserviceable by General Sherman's army which two days before had occupied that part of the State, *Held*, that the finder's owner, who upon the 12th of March had "deserted" him, acquired no title to such mule, as against him.

The Act of Congress of 1862, ch. 19, § 9, (July 17th) is not unconstitutional,—the United States and the Confederate States having been at that time "belligerents."

In cases of parol gifts of slaves under our former laws, the title to the slave *vested in the donee* subject to be divested, and did not remain in the donor.

Discussion, *by* PEARSON, C. J., of the rights of the owners of slaves to things found by the latter; also of the peculiar and contingent condition of slaves in North Carolina between the period of military occupation by the army of the United States, and that of the passage of the Ordinance of Emancipation.

(*Ex parte Hughes*, Phil. 57, and *Cook* v. *Cook*, *Ib.* 583, cited and approved.)

(Practice under the Code of Civil Procedure.)

BUIE *v.* PARKER.

COMPLAINT for the recovery of a mule, accompanied by claim and delivery, tried by his Honor *Buxton, J.*, (trial by jury having been waived) at Fall Term 1868 of the Superior Court of CUMBERLAND.

The facts, as found by his Honor, were that the defendant, formerly the slave of one McEachin (still living) was in 1857 by him given by verbal gift to his daughter, the wife of the plaintiff, and subsequently remained in possession of the plaintiff up to the time when General Sherman's army entered the county, in March 1865; the day before Sherman entered Fayetteville (13th of March 1865) the plaintiff, who had aided the Confederate cause, as he was leaving home for safety told his slaves that they could go to "the Yankees," or stay at home, as they pleased. The defendant stayed, and continued with the plaintiff for some months, as formerly, but during the latter part of this year he was put upon wages, and continued as a hired servant for a year or so; the mule in dispute was one of Sherman's abandoned stock, and was picked up by the defendant on the 15th of March, 1865, and was by him, on the plaintiff's return home turned into plaintiff's horse lot, he telling the plaintiff's wife, who expressed a wish for the mule, that he desired to retain it to make a crop with. The mule was worked in the plaintiff's wagon, part of the time by Henry himself, and was fed and kept with plaintiff's stock. Both parties claimed it. The plaintiff offered to pay the defendant for taking it up, but the defendant declined to receive it and insisted on his right to it. During the latter part of 1865 the defendant spoke of placing the mule with another person for its feed, but the plaintiff declined to let it go; in July 1868 the defendant got possession of the mule by the intervention of the Military. The plaintiff recovered possession, by means of the process in this action, on the 18th of October 1868. The value of the mule is $150.00, and it would hire for 50 cents per day.

Upon these facts, his Honor was of opinion that as between these parties, natural justice favored the defendant, and that,

if he were a slave when the mule was found, his finding it enured to the benefit of *his owner*—who was McEachin, and not the defendant. (Rev. Code, ch. 50, s 12.) Therefore as McEachin had not intervened, the defendant was entitled.

As another view, his Honor considered that the defendant was liberated by the declaration of the plaintiff, that he might go to "the Yankees;" that his subsequent remaining with the plaintiff did not affect this liberation, and so, that when afterwards he found the mule, he was entitled to all the rights of a finder.

From the judgment thereupon rendered in favor of the defendant, the plaintiff appealed.

B. Fuller and *Merrimon* for the appellant.

The defendant was a slave until the ordinance of October 1865. *State* v. *Brodnax*, Phil. 41, *Woodfin* v. *Sluder*, *Ib.* 200; *Chandler* v. *Holland*, *Ib.* 598.

Before emancipation he could not acquire or hold property. *White* v. *Cline*, 7 Jon. 174; *Love* v. *Brindle*, *Ib.* 560; *Glasgow* v. *Flowers*, 1 Hay. 122; *Heathcock* v. *Pennington*, 11 Ire. 640.

If plaintiff were not the general owner, he was the person entitled to the casual profits arising from acts of the slave whilst his; or at least has right enough as bailee to maintain this action. *Armory* v. *Delamirie*, 1 Sm. L. C. 151; *Freshwater* v. *Nichols*, 7 Ire. 251, *Scott* v. *Elliott*, Phil. 104.

The Federal Act of 1862 cannot affect this question. It is unconstitutional, except as an act of the war-making power, and at most does not extend to cases like this.

Hinsdale, *contra*.

PEARSON, C. J. Slavery no longer exists in North Carolina:—so the questions of law presented by this case, are not of importance, in a general point of view, and the interest in our decision is confined, in a great measure, to the parties to this action; for, it is hardly to be presumed that other cases, involving like principles of law, will again occur

The case, however, has some additional interest, because it

is the first that has been brought before us, where the proceedings and trial were had under the "Code of Civil Procedure."

A trial of the issues of fact by a jury was waived, and his Honor, the presiding Judge, has set out the facts found by him,—so the case comes up, as upon a special verdict, and the general question is presented, Upon the facts found is the plaintiff or defendant entitled to judgment?

His Honor was of opinion with the defendant. In that opinion we concur, and the judgment will be affirmed; although we do not concur in several of the positions assumed in the train of reasoning, by which he arrived at that conclusion.

For instance—his Honor expresses the opinion that on a parol gift of a slave to a child, the donor is to be deemed the owner, and is entitled to all of the incidents of ownership. We are of the opinion that the donee is the owner, subject to the right of the donor to treat the gift as a nullity, by act in his lifetime, or by his will—but until the gift is thus avoided, the donee is entitled to the services of the slave, to his control and management, and to all of the incidents of ownership.

Again, his Honor expressed the opinion that, as a slave has no capacity, either to acquire or hold property, as soon as he takes possession of property lost or abandoned, the right growing out of occupancy or possession is, by law, vested in his owner. We are of opinion that no right is acquired by the owner of the slave, until he makes claim and takes possession. In other words, we think, if a slave catches a 'coon, or other animal *ferœ naturæ*, or if he finds a pocket-book, or "picks up" an abandoned mule, and passes the thing to a third person before his owner takes it into possession, the third person is entitled by occupancy, and the owner of the slave has no cause of action; for the instrumentality of the slave, a mere chattel, has no legal effect, and the incapacity of a slave to acquire property, is not an incident of ownership, but a rule founded on public policy in respect to slavery.

This last principle, however, does not bear upon our case, for the defendant, after "picking up" the mule, put it into the stable yard of the plaintiff, who we assume to be his owner.

And there is not the least doubt, that, if this had occurred before the war, the plaintiff would have been entitled, by pounding under the stray-laws, to make himself the owner of the mule. But "*inter arma leges silent,*" and the question is, in the absence of a claim on the part of the true owner, upon the facts found, does the law put the title of the mule in the plaintiff, or in the defendant; taking into consideration the condition of the country at the time when the defendant took possession of the mule, and the change which had then taken place in the social relation of owner and slave in the County of Cumberland, where the parties resided, by reason of the proclamation of the President, and of the Act of Congress, of July 1862, and the movements of General Sherman's army.

Passing by the proclamation, the act of Congress, 17th July, 1862, ch. 195, sec. 9, enacts: "The slaves of persons who shall hereafter give aid to the rebellion, taking refuge within the lines of the army"—and "all slaves captured from such persons, or *deserted by them*, and coming under the control of the government of the United States,—and all slaves of such persons found or being within any place occupied by rebel forces, and afterwards occupied by the forces of the United States, shall be deemed captives of war, and shall be forever free of their servitude and not again held as slaves." Does this act apply to our case? Look at the facts found. The plaintiff did give aid to the rebellion,—on the 12th of March, 1865, he *deserted his slaves*, that is, he told them "they could go to the Yankees, or stay at home, as they pleased," and he sought safety by flight. On the 13th of March, Sherman's army entered Fayetteville, and so the defendant, as a slave of the plaintiff, came under the control of the government of the United States. On the 15th of March, the defendant "picks up" the mule, and puts it in the stable-yard of the plaintiff. His Honor, in the second view which he takes of the case, expresses the opinion, that "the defendant was then a free man." It is not necessary to go so far, in order to support the conclusion of law in favor of the defendant's right to judgment. We prefer to adjudge that his status as slave or freeman was conditional,

and dependent upon the result of the war. In this state of uncertainty, had the plaintiff made an *express* promise to pay wages to the defendant for future services, we should be inclined to the opinion, that the plaintiff would have been bound by the undertaking, although the fact of freedom may not have been accomplished until the passage of the ordinance of emancipation; but in the absence of an express promise, we should incline to the opinion, that the law would not imply a promise to pay wages—on the ground that the parties had concluded that it was better for both sides, to go on as they had done before, until the uncertainty in regard to their social relation was settled. So, if the defendant had unconditionally put the mule into the possession of the plaintiff, and waived all claim, we should have inclined to the opinion, although his freedom was afterwards fully recognized and confirmed, still he would not have had a right to set up a claim expressly waived, and to invoke the doctrine of relation by act of law. But, in our case, so far from waiving his right, the defendant at the outset asserted it, and has insisted upon it ever since, and the possession, from mutual considerations of prudence and forbearance, was held in common; both parties reserving their rights, and leaving the result to depend upon future contingencies—that is, if the Confederate States was successful, both the defendant and the mule would be the property of the plaintiff—if the United States prevailed, the defendant was a freeman, and the mule was his property. Accordingly, when the plaintiff, notwithstanding the result of the war, set up a claim to the exclusive possession of the mule, the defendant invoked the aid of "the military," We lay no stress upon this act of the military, (as it is called, in the facts found by his Honor,) because the reference is so vague that no legal effect can be given to it.

On the part of the plaintiff it was insisted, that the act of Congress is unconstitutional. For that the government of the United States has no power to interfere with the domestic concerns of a State in the Union. The reply is: The State of North Carolina was then in rebellion. The United States and the Confederate States were belligerent powers, and, by

the law of nations, a belligerent party is justified in resorting to any measure to strengthen itself or weaken its adversary. This is well settled. See *Vattel.*

The notion, that, although North Carolina was in rebellion, yet, inasmuch as she was a State in the Union, the general government had not a right "to hit her as hard" as if she had been a foreign nation at war, we consider fully disposed of by the cases *Ex parte Hughes*, Phil. 57, and *Cook* v. *Cook*, *Ib.* 583. "Fratricide is a more heinous crime than the killing of one with whom there is no tie of kindred." A State in rebellion surely can not claim to be exempted from the law of nations applicable to a foreign power waging war.

There is no error.

PER CURIAM. Judgment affirmed.

MARY DUNN, *Ex parte.*

If a widow who has petitioned for a year's allowance die after the Commissioners have made the allotment and before the confirmation of their report by the Court, the petition abates, and cannot be revived by her administrator.

(*Cox* v. *Brown*, 5 Ire. 194, *Kimballs* v. *Deming*, 5 Ire. 418, cited and approved.)

PETITION for a year's allowance, abated before *Watts*, *J.*, at Fall Term 1868 of the Superior Court of WAKE.

The petition had been filed at February Term 1868 of the County Court of Wake. Upon the return of the report of the Commissioners, at May Term, the death of the petitioner was suggested, and her executor applied for leave to become a party to the petition. The Court, however, considering that the petition had abated, refused to allow the application. Thereupon the executor appealed.

It was agreed that Mrs. Dunn had died after the Commissioners had made out their report.

In the Superior Court, at the instance of certain creditors

of the estate, his Honor confirmed the judgment below, and the executor again appealed.

Haywood, for the appellant.

Rogers & Batchelor, contra.

SETTLE, J. When a widow files a petition for a year's provisions, under the statute, and dies before any allotment is made, the administrator has no right to revive the petition, but it is abated. *Cox*, v. *Brown*, 5 Ire. 194.

Before such allotment, she has no interest transmissible to her administrator. *Kimball* v. *Deming*, 5 Ire. 418.

What amounts to an allotment?

It is contended here, that the acts of the Commissioners, appointed by the County Court to allot and set apart a year's support for the petitioner, constituted such an allotment.

We cannot think so.

Their acts were only a part of the proceedings, necessary to obtain a year's provisions. The petitioner died before the report was returned to Court. Upon the return of the report it was open to exception, and might have been set aside. The allotment is not complete until the report is confirmed by the Court. There is no error.

PER CURIAM. Judgment affirmed.

A. F. SMITH and B. S. ROBERTS, Ex'rs., *v.* R. MOORE.

A surety to a note made in 1861 having paid it off in 1866, *held*, that his claim on that account against his principal was not included in the Ordinance of June 1866, which conferred exclusive jurisdiction on the Superior Courts in regard to all actions on contracts made *prior to May* 1, 1865.

(*Pender* v. *Carter* 12 Ire. 242; *DeRossett* v. *Bradley ante* 18; cited and approved.)

SMITH AND ROBERTS, EX'RS. *v.* MOORE.

ASSUMPSIT, tried before *Cilley, J.*, at Spring Term 1868 of the Superior Court of DAVIDSON.

The facts appear sufficiently stated in the opinion of the Court.

Gorrell, for the plaintiffs.

No counsel, *contra*.

DICK, J. A note executed to A, by B as principal, and C as surety, is in no way a contract between B and C; if the note is paid by either of them, it is absolutely discharged. The only contract between the principal and surety before the payment of the note, is one of indemnity implied by law, and gives the surety certain equitable rights to secure indemnity both against the creditor and principal. After payment by the surety, he has an equity to be subrogated to all the rights of the creditor, against the principal debtor, so as to have the benefit of all collateral securities, which the creditor may hold. The right of subrogation is not founded in contract, but takes place by operation of law. If the note is paid by the surety, a *new debt* arises by implication of law, between him and his principal, which is essentially different from the contract which existed between the parties and the creditor, and it cannot be said to arise out of such contract. This new debt is created by the payment; the cause of action arises then for the first time, and the Statute of Limitations begins to run. *Pender* v. *Carter*, 12 Ire. 242.

This principle was applied to the case of co-sureties at the last term of this Court. *De Rosset* v. *Bradley*, *ante* 17.

In this case the defendant as principal, and the testator of the plaintiffs as surety, executed a note to Lowe in 1861. A judgment was obtained on said note against the parties liable, and on the 1st of May 1866, the plaintiffs, as executors, paid off said judgments; and then, for the first time, a cause of action arose to the plaintiffs against the defendant. In October 1866, they commenced suit in the County Court of Davidson, and by appeal the case was carried to the Superior Court, where a motion was made to dismiss the suit, for the want of

jurisdiction in the County Court, where it was commenced. The motion was founded upon the Ordinance of the Convention, ratified June 23, A. D. 1866, giving exclusive original jurisdiction to Superior Courts, of all actions upon contracts made prior to the 1st of May, 1865. His Honor in the Court below, being of the opinion that the plaintiffs' claim did not come within the exception of the 17th section of said Ordinance, sustained the motion to dismiss. In this opinion there was error, as the ordinance has no application to such causes of aetion.

The judgment is reversed, and a *venire de novo* awarded.

PER CURIAM. *Venire de novo.*

THE STATE *v.* JAMES C. KEITH.

In a case where a prisoner moved a Court for a discharge on the ground that his offense was within the provisions of a certain Amnesty act, and such allegation was admitted by the Solicitor for the State: *held*, that even if the act required *a plea*, in order to show its application to the case before the Court, the record exhibited a substantial compliance with such requirement.

The Ordinance of 1868, ch. 29, repealing to the Amnesty act of 1866, ch. 3, is substantially an *ex post facto* law, inasmuch as it renders criminal what before its ratification was not so, and takes away from persons their vested rights to immunity.

(*State* v. *Cook*, Phil. 535 and *State* v. *Blalock*, *Ib.* 240, cited and approved.)

MOTION to discharge a prisoner, heard before *Cannon J.*, at Fall Term 1868 of the Superior Court of BUNCOMBE.

The prisoner was held under seven different charges of murder. The *case* stated that this was an indictment for the murder of Roderic Shelton, in Madison county in 1863, and had been removed for trial to Buncombe upon affidavit of the prisoner. The defendant by his counsel, moved the Court for his discharge, upon the ground that he was acting as an officer in the Confederate States' military service when the alleged homicide took place, and he alleged that his case came

within the provisions of the Amnesty act of 1866-'67. It was admitted by the Solicitor that the case came within that act, but he submitted that that act had been repealed by an Ordinance of the Convention of 1868.

The Court being of opinion that the Amnesty act had been repealed, declined to allow the motion, and the prisoner appealed.

Phillips & Battle, for the appellant.

A general amnesty act need not be pleaded. *United States* v. *Wilson*, 7 Pet. 150; 3 Bl. 401; *State* v. *Blalock*, Phil. 242. A prisoner cannot even waive its benefit, Hawk. P. C.

An amnesty act is irrepealable. By comparing the entry of a plea of Parliamentary pardon, in 3 Co. Inst. 234 with that of pardon by the Crown, in Co. Ent. 356, it will be seen that the former is an *acquittal*. Such acts are remnants of the ancient jurisdiction of Parliaments and Legislatures to try offenders. Our Constitution forbids *attainders*, but leaves the right to *acquit*.

This case shows that the definition of *ex post facto* laws in *Calder* v. *Bull*, 3 Dall. 386, does not cover all varieties of such legislation; the Ordinance in question plainly violating that prohibition.

It also violates the XIV Article, recently adopted, as regards the prisoner's *immunities*.

When a law is a contract, a repeal of it cannot take away a vested right. The Binghamton Bridge, 3 Wall. 51.

Attorney General, contra.

RODMAN, J. As several other indictments against the prisoner are somewhat loosely referred to in the transcript of the record sent to this Court; it is proper to say, that the indictment against him for the murder of Roderick Shelton, is the only one which appears to have been adjudicated in the Superior Court, and it is the only one which is in this Court. Our decision, and the observations made in this opinion are confined to that case.

Two questions arise on the record, and have been argued by counsel:

1. Did the prisoner, in a regular manner, claim the benefit of the Amnesty Act of 1866-'67, ch. 3, p. 6?

2. How was he affected by the repeal of that Act by the Ordinance of 1868, ch. 29, p. 69?

We have considered the case with the care which its importance deserves.

Section 1, of the act of 1866 contains a full and unequivocal pardon for all "homicides and felonies" committed by officers or soldiers of the late Confederate States, or by officers or soldiers of the United States, "done in the discharge of any duties imposed on him, purporting to be by a law of the State or late Confederate States Government, or by virtue of any order emanating from any officer, &c."

Section 2 enacts: "That in all cases where indictments are now pending, either in the County or Superior Courts, if the defendant can show that he was an officer or private in either of the above named organizations at the time, it shall be presumed that he acted under orders, until the contrary shall be made to appear."

The prisoner alleged that his case came within the provisions of that act, (see *State* v. *Cook*, Phil. 535,) and moved his discharge. The solicitor admitted the allegation of fact. If a formal plea were necessary, we should be compelled, from the practice which has prevailed universally in this State, to take the allegation of the prisoner as equivalent to such plea, and the solemn admission of the officer of the State binds the State as an admission of its truth. It is said in Hawkins, Book 2, ch. 37, § 61, p. 550: "But it seems agreed that the Court is so far bound to take notice *ex officio* of a general pardon by parliament, which extends to all persons in general without exception, that it cannot proceed against any person whatsoever, as to any of the offences pardoned, though he be so far from pleading it, or praying the benefit of it, that he does all he can to waive it."

Blackstone says (Book 4, p. 401:) "A pardon by act of

parliament is more beneficial than by the King's charter, for a man is not bound to plead it, but the Court must, *ex officio*, take notice of it, neither can he lose the benefit of it by his own laches or negligence, as he may of the King's charter of pardon." Judge Marshall, in *United States* v. *Wilson*, 7 Peters 163, says: "The reason why a Court must, *ex officio*, take notice of a pardon by act of parliament, is that it is considered as a public law; having the same effect on the case as if the general law punishing the offence had been repealed or amended."

In *State* v. *Blalock*, Phil. 240, the act of 1866 was passed after the conviction of the defendants, and their appeal to this Court, and the Court took judicial notice of the Act, and seeing from the record that the case of the prisoners came within it, ordered their discharge.

All that could have been necessary for the prisoner to do in this case, was to show that he was an officer or soldier, and that the felony was committed in the discharge of his duties as such, and we are clearly of opinion that this was sufficiently alleged; indeed no objection of that kind was taken below, and it may, therefore, admit of some doubt, whether it could properly be taken here.

The more important question remains. The Judge put his refusal to discharge the prisoner entirely upon the effect of the ordinance of 1868. There are cases in which a pardon from the Chief Executive has been held void by the Courts, as having been obtained by fraudulent representations, and probably a special pardon from a Legislature might be avoided on the like grounds. But we have searched in vain for any instance, in which a parliamentary, or legislative, or other act of general amnesty and pardon, has been revoked. We find no decided case, nor even any dictum referring to such a circumstance. We are left therefore to determine on its effects from general principles alone.

The effects of a pardon are well settled in law: as far as the State is concerned, they destroy and entirely efface the previous offence; it is as if it had never been committed.

Bishop says it is "a remission of guilt," not only of the punishment of guilt. 1 Bishop Cr. L. §749.

In the *United States* v. *Wilson*, 7 Peters 163, it is likened by Marshall, C. J., to a deed vesting rights: the right, at least, to immunity for the previous offence. It is therefore a contract between the State and the offender, of the most solemn character; on the faith of which it may be that he has come within the jurisdiction.

If the effect contended for,—to revive the previous offences of the prisoner—can be attributed to the Ordinance of 1868, it can only be, because the Convention of 1868 was subject neither to the Constitution of the United States, nor to the previous Constitution of North Carolina, nor to the fundamental rules of public law and morals, which bind every political community, whatever may be its form of government; but was absolutely lawless and unrestrained. We do not think the Convention of 1868 ever claimed such powers, and we can by no means admit them. It was assembled under the Reconstruction Acts of Congress to form a new Constitution for the State, and as representing the people of North Carolina, it had general legislative powers. It could change the old State Constitution as it pleased, but the power to make a new one was at least limited by the proviso, that it should be "republican in form." The ordinance in question is not found in the Constitution, but is a part of the legislative action of the Convention. The legislative power of the Convention was limited, at least, by those sacred principles which are contained in the Constitution of the United States and of every American State; that no *ex post facto* law shall be passed, and that no man shall be deprived of vested rights, or of life andliberty, except according to law. Amendments to Constitution of the United States, Art. V, Art. I §9, ch. 3, Bill of Rights of North Carolina, §§12, 24. New Constitution, Bill of Rights, §§32, 35.

These great principles are inseparable from American government and follow the American flag. No political assemblage under American law, however it may be summoned, or by whatever name it may be called, can rightfully violate

them, nor can any Court sitting on American soil sanction their violation. Congress could not give to the Convention greater powers than itself possessed.

The ordinance in question was substantially an *ex post facto* law; it made criminal what, before the ratification of the ordinance was not so; and it took away from the prisoner his vested right to immunity.

We think the Judge should have discharged the prisoner. Let this opinion be certified, &c.

PER CURIAM. Judgment reversed.

BENJAMIN F. AYCOCK *v.* F. B. HARRISON, and others.

Where a *ven. ex.*, was returned to August Term 1866 of Wayne County Court endorsed "No sale on account of the Stay Law;" *Held*, that such was not a due return; *also*, that the plaintiff in the execution was entitled to have another writ of *ven. ex.* issued from the August Term.

Where at the time that a motion for a *procedendo* to the County Court was made in the Superior Court, the motion should have been granted, and in the interval between that time and the time when the case was decided in the Supreme Court the County Courts had been abolished, *held*, that as the Court was not informed whether the record of the case had been *transferred*, the only order practicable was, that the case be remanded to the Superior Court, in order that the plaintiff might take such steps as he might be advised.

MOTION for a *procedendo*, heard before *Barnes, J.*, at Fall Term 1866 of the Superior Court of WAYNE.

At August Term 1861, of the County Court of Wayne, the plaintiff had obtained a judgment against the defendants. Successive executions were duly issued thereupon, and, previously to May Term 1866, a levy had been made upon certain land. From May Term 1866, a *ven. ex.* was issued, and at August Term thereafter, it was returned "No sale on account of the stay law." At the term last mentioned, the plaintiff moved for an *alias* writ of *ven. ex.*, but the motion was refused. He thereupon appealed, and, before his Honor below, moved for

a writ of *procedendo*, directing the County Court to issue the writ of *ven. ex.*, as asked for before.

His Honor refused to allow the motion, and the plaintiff appealed again.

Person, for the appellant.

No counsel *contra*.

READE, J. The return of the sheriff, on the *venditioni exponas* issued from May term 1866 of the County Court, "No sale on account of the stay law," was without warrant of law. The plaintiff's motion at November term, 1866, for an *alias ven. ex.* ought to have been allowed. The plaintiff's motion at Fall Term of the Superior Court, 1866, for a writ of *procedendo* ought to have been allowed. The refusal of the motion by his Honor was error. But it was an error which can not now be cured; for the Court, in which the judgment and execution were, has been abolished. There is, therefore, no Court to which the writ of *procedendo* can issue. There is a provision for transferring the case from the County into the Superior Court, but whether that has been done, we are not informed. At least, there is no remedy which we can administer as the case now stands. The plaintiff is entitled to judgment for his costs in this Court, and the cause will be remanded, that the plaintiff may proceed as he may be advised.

This will be certified, &c.

PER CURIAM. Error.

A. J. GALLOWAY *v.* D. A. JENKINS, Treasurer, and THE CHATHAM RAIL ROAD COMPANY.

By the Court (PEARSON, C. J., RODMAN, and DICK, JJ, concurring.) 1. It is competent for a tax payer to file a complaint on behalf of himself and all other tax-payers in the State, whereby to enjoin the issue of State Bonds under an unconstitutional Act of Assembly.

2. The Act of the 18th of December 1868, in requiring the Treasurer of the State to subscribe for stock in the Chatham Rail Road Company, and to pay for the same by issuing Bonds of the State, is unconstitutional, under Art 5. § 5, clause 2, of the Constitution of the State.

3. That clause *adds* to the restrictions in the former clause of the same section, peculiar restrictions of its own in the cases covered by it.

4. A subscription for stock in a corporation and issuing Bonds to pay for such stock, is *a gift* of the credit of the State, within the meaning of Art 5, § 5 cl. 2, above.

Per RODMAN, J. Even if the Bonds of the State were at par, the General Assembly could not give or lend its credit without submitting the question to the people.

Also, The test of Bonds being at par is, whenever in the particular transaction the State receives in legal money the sum which she becomes liable to pay.

Per READE and SETTLE, JJ, *dissenting*. The Act of the 18th of December 1868 (above) is constitutional and valid.

Per READE, J. 1. *Tax-payers* do not constitute a class, in the sense in which it is said that one of a class may file such bills as the present in behalf of the whole class.

2. The injury threatened to that *class* by the issue of bonds, is not so immediate, certain and irreparable that a Court will give the extraordinary relief sought here.

3. By "*par*," in the section of the Constitution under consideration, is meant, *par* value in the particular transaction in which the bonds are issued.

4. Whether an article (stock, or other thing) purchased in the course of the particular transaction, is of a par value with the bonds issued for it, is exclusively a matter for the Legislature to decide; and such decision cannot be reviewed by a Court..

5. By the Act in question the State does not, either *give* or *lend* its credit; but *uses* it.

INJUNCTION, dissolved by *Watts*, *J.*, upon motion in the

Superior Court of Wake, at Chambers, on the 4th day of January 1869.

The complaint, filed upon the 29th day of December 1868, purported to be preferred by the plaintiff in his character as a citizen, tax-payer and property-holder of the State, on behalf of all persons of that class, against D. A. Jenkins, as Treasurer of the State, and The Chatham Rail Road Company.

It alleged that the Company had been chartered by the Act of February 15, 1861, and that its charter had subsequently been amended by Ordinances passed January 30, 1862, and March 11, 1868, and by Acts passed February 5, 1862, August 3, 1868, and August 15, 1868—the material facts of which were given. The complaint then set forth the preamble, and ss. 4 and 5, of the Act of December 18, 1868, entitled "An Act to re-enact and confirm certain Acts of the General Assembly, authorizing the issue of State Bonds to and for certain Rail Road Companies," as follows:

SEC. 4. The Public Treasurer is hereby directed, whenever the President of the Chatham Rail Road Company shall certify that the grading of the Road between Cheraw in South Carolina, and the Gulf, or some other point on the Chatham Rail Road between Raleigh and the Gulf, has been let to contract, to subscribe to the capital stock of said Company, two million dollars in behalf of the State, which subscription shall be paid by delivering to the President of said Company coupon bonds of the State at par, of the denomination of one thousand dollars, dated October 1st, 1868, and payable in thirty years thereafter, bearing six *per cent.* interest, payable semi-annually, principal and interest payable in the City of New York, said bonds to be signed by the Governor, countersigned by the Treasurer and sealed with "The Great Seal of the State," and issued under the provisions of Chapter 90, Revised Code; *Provided*, That said bonds shall only be issued on the surrender of a like amount of bonds of the State heretofore issued under an act to amend the Charter of the Chatham Rail Road Company, ratified the 15th day of August 1868. On which

surrender the same amount of bonds delivered by said Company to the State under the said act shall be cancelled. Said subscription shall be preferred stock, and pay a dividend of six *per cent.* before any dividend shall be declared on the other stock.

SEC. 5. In order to provide for the payment of the interest which may accrue on the bonds issued as above mentioned, there is hereby and shall be annually, levied and collected a special tax of one twentieth of one *per cent.* on the taxable property of the State, collectable and payable into the Treasury as other public taxes.

It then alleged that the said Company was about to comply withthe provisions of said Act, and apply for the bonds thereby authorized to be issued, and that the Treasurer of the State was about to subscribe to the stock of the Company, and to issue Bonds to it as by such Act required,

The prayer was, that the Treasurer should be enjoined from subscribing for stock and from issuing Bonds as the statute provided; and that the Company be likewise enjoined from accepting such subscription and from receiving such Bonds.

Upon reading the complaint to his Honor below, on motion for the defendants, the injunction theretofore granted upon an *ex parte* application, was vacated and dissolved; and the plaintiff appealed.

Fowle & Badger, Haywood, and Person, for the appellant.

W. H. Battle & Sons, Moore, Bragg, Phillips & Merrimon, contra.

PEARSON, C. J. On opening the case, the counsel of the plaintiff proved on principle and by authority, that the jurisdiction against irreparable injury is applicable; under the doctrine, that where there is a right common to many, or an injury that would be common to many, a bill will lie in the name of one, in behalf of himself and others, to have the right established, or the injury prevented; on the ground of

avoiding multiplicity of suits; and brought this case within the rule, by the allegation that the plaintiff was a tax-payer.

The counsel of the defendants admitted the application of this doctrine, and stated they were instructed not to raise the objection; for if the General Assembly had power to issue these bonds, their clients had a deep interest in having their validity established; so as to enhance the value of the bonds, before they were put in market; and, if the Legislature had no power to issue the bonds, it was a matter of concern to every citizen of the State, that the question should be settled at the outset, so as to avoid the complication, that would grow out of the ideas of vested rights of repudiation, and the obligation of contracts, should these bonds be put in the market with a cloud over them.

We fully concur in this suggestion. It is better for all sides to have the matter settled now and here; and we were gratified to find that the Court has jurisdiction, and can determine the question in the mode in which it is presented by this bill. *Manly* v. *City of Raleigh*, 4 Jones, Eq. 370. *Mott* v. *Pennsylvania*, 30 Penn. Reports 39.

By the Act of August 1868, chapter 14th, the General Assembly enacts, sec. 1, "that to enable the Chatham Rail Road Company to finish their Road, the Public Treasurer be directed to deliver to the Company coupon bonds of the State, not to exceed two millions of dollars." Sec. 2: "In exchange for said bonds, the Company is to deposit with the Public Treasurer bonds of the Company of the same amount, same interest, and same dates." This Act is of no significance, except to show a conviction on the part of the General Assembly, that the public interest demanded the construction of this Road, and a wish to aid the Company in its construction, provided the General Assembly had power to do so, without a violation of the Constitution.

The provisions of the statute under consideration, are expressed so plainly as to relieve the Court from the task of construction. The tenor and effect of it is, that, to aid in constructing a Rail Road from Cheraw to the Coalfields, the

State subscribes two millions of stock—and to pay for the stock, creates a debt of two millions of dollars, and directs the bonds of the State to be handed to the President of the Company, upon the surrender of the bonds issued under the Act of August, 1868, and in the same bill, a special tax is levied to pay the interest annually.

Under Art. 5, Sec. 5, of the Constitution a question is made: "Has the General Assembly power to create this debt of two millions in aid of the Chatham Rail Road Company, unless the subject be submitted to a direct vote of the people?"

The Section is in these words: "Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same bill, levy a special tax to pay the interest annually. And the General Assembly shall have no power to give or lend the credit of the State, in aid of any person, association or corporation, except to aid in the completion of such Rail Roads as may be unfinished at the time of the adoption of this Constitution, or in which the State has a direct pecuniary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon."

The statute under consideration complies with the first clause, and the question depends upon whether the two clauses of this Section are to be treated as being separate and independent of each other, or as being so connected as to mean: "*Until the bonds of the State shall be at par*," the General Assembly shall have no power to create any new debt or pecuniary obligation (except in two specified cases), unless a special tax be levied in the same bill to pay the interest—and in addition to this restriction, although the interest of the new debt is provided for, if the purpose be to aid any person, association or corporation, in respect to a Rail Road, Navigation or other like object, the General Assembly shall have no power to give or lend the credit of the State, unless the sub-

ject be submitted to a vote of the people (except in two specified cases.)

The two clauses being in the same section, and connected by the conjunction "and," would naturally lead to the inference that they are to be taken in connection; and that the second is superadded to the first, with a view of making a further restriction upon the power of contracting a new debt or pecuniary obligation, in the cases covered by it. This inference is not conclusive; and leaves the question, in some degree, open for the application of other rules of construction.

The section under consideration is worded with much precision, and without the use of expletives; the terms are intensified. In the first clause the two exceptions have the effect to make it read: "shall have no power to create any new debt or pecuniary obligation *whatever*, except," &c.,—not even to build a Penitentiary, unless a special tax, &c. In the second clause, the two exceptions have the effect to make it read: "shall have no power to give or lend the credit of the State, *in any case whatever*, except" &c., "unless the subject be submitted to a vote of the people;" so, the intention to restrict the power of the General Assembly in regard to increasing the public debt in any mode or manner, is as strongly expressed as the English language can do it. In matters of construction, the Court is not to confine itself to the particular section; but is to consider the entire instrument, in order to find the general purpose, and the object arrived at.

"To maintain the honor and good faith of the State untarnished, the public debt regularly contracted before and since the rebellion, shall be regarded as inviolable, and never to be questioned." Art. 1, § 6.

"No law shall be passed to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the payment of any debt, &c., unless the bill is read three times on three different days, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the Journal."—Art. 2, § 16.

"The General Assembly shall, by appropriate legislation,

and by adequate taxation, provide for the prompt and regular payment of the interest on the public debt, and, after the year 1880, it shall lay a specific annual tax upon the real and personal property of the State, and the sum thus realized shall be set apart as a sinking fund, to be devoted to the payment of the public debt."—Art. 5, § 4.

Here, we have a declaration of a purpose to maintain the honor of the State, and pay off the public debt,—a rebuke of hasty legislation, in reference to raising money and pledging the faith of the State,—and an announcement that, although the debt is so large that it cannot be paid off for years, yet the interest must be paid promptly, and a sinking fund be provided for the discharge of the principal. This purpose could not be effected without putting a stop to the increase of the public debt, by restricting the power of the Legislature. Accordingly, that restriction is made by the next Section, which in effect forbids the General Assembly from creating any new debt whatever, "except," &c. without providing for the interest; and in respect to debts or pecuniary obligations contracted by giving or lending the credit of the State, in aid of any person, association, or corporation, that shall be done in no case whatever, "except," &c., unless the subject is submitted to a vote of the people; "*until the Bonds of the State shall be at par.*"

But the Court is also required to look at the previous legislation, by which the evil, calling for these cumulative restrictions was caused, and this will furnish a key to the meaning, and open it so plainly to view, "that he who runs may read."

The war debt has been put out of the way by a dash of the pen. It will be found, that most of the public debt was incurred in three modes: 1st, by subscribing for stock in Rail Road and navigation companies, and issuing bonds to pay for the stock, the State becoming a member of the corporation; this is the heaviest item, and amounts to, say eight millions of dollars: 2nd, by issuing bonds of the State, and exchanging such bonds for a like amount of the bonds of the corporation, the State not becoming a stockholder, and taking collateral

security of more or less value; this is the next heaviest item, and amounts to abount three millions of dollars: 3d. by endorsing the bonds of corporations and taking a mortgage or some other collateral security; this item amounts to about two millions.

These are the three modes, by which, judging from the past, it was apprehended the public debt might be so run up, as to ruin the credit of the State, and tarnish her honor, and her reputation for good faith.

Is the construction admissible, by which the Constitution is supposed to guard against two of these sources of danger, and leave the public interest exposed to the other? And that, the one most fruitful of evil! Would we impute wisdom to an individual, who having a field exposed on three sides, should carefully fence up two of the sides, and leave the other side open?

Let us see, what word is relied on to justify this construction; for it rests on a single word. "And the General Assembly shall have no power to give or lend the credit of the State, in aid," &c. It is the word "give," and the argument is: This was a regular business transaction—the State subscribes for stock and becomes a member of the corporation, and creates a debt by issuing its bonds to pay for the stock; true, the purpose was to aid the corporation in making a Road which will greatly benefit the State; but, this is in no sense *giving* the credit of the State; for the State receives a consideration, to wit: the stock; and to give, is to do an act gratuitously; to pass something for nothing. In construing an instrument, the words must be taken in their ordinary meaning in connection with the purpose for which they are apparently used "To give," is sometimes used to convey the idea of a gratuity; but it has a much broader meaning. "Give," means to pass from one to another, and the idea of its being done for or without a consideration is not involved. In old conveyances "give and grant" is used in place of *dedi et concessi*. I will *give* you my horse for yours? What will you *give* me for my horse? What did you *give* for your house and lot? I will *give* you a

thousand dollars for it—provided you will *give* me six months credit.

This is obviously the sense in which the word is used in the section under consideration. For, besides the purpose which, as we have seen, the framers of the Constitution had in view, it is used in connection with the word *lend*, which imports a gratuity, and is introduced, lest the word "give" might be confined to cases where a consideration passed, and to cover the whole ground; so as to show that the credit of the State was not to be used in any way, either for a consideration or as a gratuity. The General Assembly shall have no power to give the credit of the State to this corporation, by making a subscription for its stock, is one sense. The General Assembly shall have no power to give the credit of the State to this corporation by an exchange of bonds, is another sense. The General Assembly shall have no power to give the credit of the State to this corporation by endorsing its bonds, is another sense. And the section might have included this class, without the additional word "lend." But its being used, shows an extreme solicitude to cover every supposable case in which the credit of the State might be used, whereby the public debt would be increased.

In the first clause of the Section, "to contract any *new* debt," covers the whole ground, without the additional words "or pecuniary obligation." It is remarkable, that these two are the only instances in which the use of what might seem to be an expletive word is resorted to, showing an extreme anxiety that the intention to cover the whole ground should be plainly expressed.

The suggestion, that the credit of the State was given by this statute to aid in the completion of an *unfinished Rail Road*, was not strongly urged on the argument, and, indeed, it could not be. An unfinished road is one that has been begun, and partly worked on, and such a road is made an exception, on the ground that it might be proper to finish it, in order to prevent a sacrifice of the work that had been done. There is no evidence that such was the fact in regard to this road.

The other suggestion, that the State has a direct pecuniary interest in this road, was properly abandoned. The word *has*, is in the present tense; the exception, is obviously confined to roads in which the State had a direct pecuniary interest at the time of the adoption of the Constitution; otherwise the State might, by a subscription for stock, become directly interested in every Rail Road or Navigation scheme, that should thereafter be projected; and thus, the restrictions of the Constitution would be of no effect, whatever.

Our opinion is, that the statute under consideration is void, and that the General Assembly had no power to pass it, without submitting the subject to a vote of the people.

In making this decision, we are relieved in some measure, from our feeling of responsibility, by the fact, that if the public interest imperiously calls for the construction of this road, the Constitution provides that it may be done, if such be the will of the people.

RODMAN, J., *concurrente.* The nature of this case has been so fully stated in the opinion of the Chief Justice, that I may enter *in medias res*, without making any useless repetition. It was admitted by the counsel, who argued this case on both sides with unusual ability, that the plaintiff as a tax payer, was entitled to appear in Court and ask for the relief which he demanded, if he could make a case entitling him to it, and thus the case was properly in Court. I think these admissions were properly made, and shall enter into no discussion of that part of the case.

The material question is, whether that part of an act of the General Assembly, ratified on the 18th of December, 1868, which relates to the Chatham Rail Road Company, (§§ 4, 5, 6,) taken in connection with the act of which it is amendatory, violates § 5 of art. 5, of the Constitution of the State, and transcends the constitutional power of the General Assembly.

In any argument on this subject, it must be admitted that the power of the Legislature, over the subject, is supreme, unless restricted by the article of the Constitution cited. It

must also be admitted, that the article of the Constitution means *something*, that it was intended to operate as *some* restriction of the legislative power, and is not entirely a dead letter, and that it must have the full force which its words fairly and reasonably import

Section 5 is divided, by its subject, into two independent clauses, and might well have been put into two sections. The first clause, (omitting the exceptions, which in this are immaterial,) says, until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State," unless it shall, in the same bill, levy a special tax to pay the interest annually. The requisition to levy a tax has been complied with in the act under consideration, and no question can arise upon this clause.

The second clause then begins. It is connected with the former clause by the conjunctive "and," but it imposes a new and independent additional restriction on the legislative power. The effect of the word "and" is simply to say, as an additional restriction. The additional restriction is superadded in certain special cases to the former general one. In *no case* (omitting the exception) could the General Assembly contract a new debt without imposing a tax. But there is a class of cases in which the Legislature is forbidden to contract a new debt in behalf of the State, even if the State bonds are at par or a tax to pay the interest be imposed, without submitting to it a vote of the people. That class is provided for in the second clause of section 5 : "And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation (except to aid in the completion of such Rail Roads as may be unfinished at the time of the adoption of this Constitution, or in which the State has a direct pecuniary interest) unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon." For the purposes of the present argument, the words in brackets may be omitted;

for it is true, or must be admitted, that the road provided for in the Act of 18th December, 1868, is neither an unfinished road nor one in which the State had, at the adoption of the Constitution, "a direct pecuniary interest."

The Chatham Rail Road, between the termini and the route established by previous legislation, was an unfinished Road, in the legislative meaning of the phrase; but the Road which was to start from one of the termini of the Chatham Road, or from some point on it, and run thence to Cheraw, was a Road which was unfinished, in the sense that it had never been begun, but not in the sense contemplated by the Constitution, which meant only to include those roads which had been begun, but were unfinished at its adoption. We are obliged to give this meaning to that phrase in the Constitution, as any other construction would render it totally ineffective, and defeat any policy which it may be supposed it was intended to enforce.

The question then is reduced to this, does the Act of Dec. 18th, 1868, "give or lend the credit of the State in aid" of the Chatham Rail Road Company or any other person, association or corporation? If it does, it is prohibited by the clause of the Constitution above cited, which this Court is bound to obey as the paramount law. The question being reduced to these brief dimensions, it seems to me, with all respect for my learned brothers who have come to a different conclusion, that the answer can scarcely be doubtful. Waiving all discussion as to the lexicographical or technical and legal meaning of the word give," as to whether it includes a grant, both with and without valuable consideration, it seems to me to be clear, that the words "give or lend" were intended to include every mode in which the State could render its aid to a Rail Road Company by means of its credit. It would be scarcely respectful to the intelligence of the Convention of 1868, to suppose that they intended to forbid the Legislature from giving the credit of the State without consideration, and yet to allow them to do it on the consideration of a pepper corn, of a certain number of shares of stock of a purely

nominal value. It is said that the Statute of uses, enacted with great care by the English Parliament, had no other effect than to add three words to a conveyance. That was because the Judges were determined to defeat the law. But we can come to the consideration of this question in no such spirit, and with no such purpose. Our duty is to give to the clause of the Constitution the effect which its words plainly import, and not to filter them into a nullity by hypercritical refinement. The construction which I give to this clause makes it mean something; any other construction, in my opinion, makes it mean nothing. Indeed, I do not know how its meaning could have been more clearly expressed. Had it said as the Constitution of Ohio does, "shall not in any manner give or lend its credit", &c—would it have been more expressive or exhaustive of every mode than the present phraseology?

"Thou shall not kill!" Would this prohibition be made more forcible by adding "in anyway?" Assuming the meaning of the word "give" to be what is here contended for, does the State give its credit in aid of the Chatham Rail Road Company, by giving its bonds for stock to be sold by the Company to raise funds to build the road? The bonds were the credit of the State, and for what purpose could they have been given, except to aid the Company to build the road described in the act?

These considerations compel me to the opinion that the act of the Legislature is in violation of the Constitutional restriction cited, and can, therefore, have no force, until submitted to and sanctioned by a vote of the people.

In the view which I have taken of § 5, Art. 5 of the Constitution, it is quite immaterial in reference to the act under consideration, whether the bonds of the State are at par or not. The Legislature cannot (even if the bonds are at par) give or lend the credit of the State, in aid, &c., without submitting the question to the people.

This view renders it unnecessary to consider a question, discussed at the bar, as to the validity of a debt contracted by the Legislature, within the first clause of §5 and not within the

exceptions, without laying a special tax to pay the interest. If, for example, the Legislature should contract with some person to build a State House for $100,000, or any other sum, and should issue bonds to him for that sum in payment, without levying a special tax to meet the interest, and if the contractor should in his contract, agree to receive the bonds at par, and it should be so set out and and provided in the act, would such an act be unconstitutional? Would the fact that the bonds were declared in this particular case to be, and to be received at par, be a substantial fulfilment of the constitutional condition precedent?

A short discussion of this point in reference to the case in question will not be without value. What does the Constitution mean, when it says, until the bonds of the State shall be at par? at par with what? It can only mean at par with gold and silver, or with the legal tender notes of the United States. It cannot mean at par with the work of the contractor, or at par with any piece of land or other property which the State might think proper to buy, because the value of these things is uncertain, and rests only in opinion and agreement. Such a construction would deprive the words "at par" of all definite meaning. Gold and silver (or their legal equivalent) are necessarily the only standards by which the value of the State bonds must be measured. If then in the case supposed, the State should undertake to pay the contractor in State bonds, it would render it impossible to ascertain whether or not the bonds would be at par. In such a case the bonds would not be at par, in the sense of the Constitution, and no legislative declaration, and no agreement in the contract, could make them so, so long as it appeared that they were parted with for a thing of uncertain and unascertainable value. It is a matter of no consequence in the construction of this section of the Constitution, what the bonds of the State ordinarily sell for in the money markets of the world; no Court can ever be called on to say whether at the ratification of a certain Act of Assembly, they were worth 99 or 100. The test in every case must be whether on the particular bonds, issued

under the circumstances supposed, the State actually received in legal money the sum which it became liable to pay. In no other way than by the conversion of the bonds into money, can it be ascertained that they are at par, and in no other way can the policy of the Constitution be effected

These considerations are responsive to some portions of the argument which has been addressed to the Court, but in the view that I take of it they are not necessary to this case

I have not considered, at all, the policy of the Act of December, 18th 1868. With that question I have nothing to do. I feel bound to obey the Constitution which the people of North Carolina have adopted as their supreme law, according to my understanding of it, and to give them the benefit of those restrictions on the legislative power, which, by inserting, they have shown that they considered valuable. I admit, fully, the weight of the observation which has been made, that a Court should not refuse to give effect to an Act of the Legislature as unconstitutional, unless it is clearly so. But, in this case, I have not been able to bring myself to entertain a doubt as to the meaning of the Constitution. I think its words are plain and that we are obliged to give them the effect which I have assigned to them, or to deprive them of all practical effect, and of all sensible meaning whatever, and, so thinking, my course of duty is plain and unavoidable.

I concur, in opinion, with the Chief Justice, and DICK, J.

READE, J., *dissentiente.* I propose to consider, first, whether the Court ought to entertain the suit; and, secondly, whether the act is constitutional.

I. The Constitution declares that the three departments of the Government, the Legislative, Executive and Judicial, shall be kept separate and distinct. The reason for this is so apparent, that it was not thought necessary to declare it. Nothing is less stable than "a house divided against itself:" and division, *i. e.* strife, would be as inevitable between the departments as between individuals, but for the observance of this important, fundamental principle. We have hitherto observed it.

and with the best results. There have often been strong inducements to depart from it. During this term of the Court the Legislature adopted a resolution, requesting the Court to advise the Legislature upon the Constitutional provision in regard to "Homesteads." It was a question of great importance, and of general interest, one in which much more was at stake than in the case before us; yet, we were obliged to decline even so much as the expression of our opinion. So, what is known as the Stay-Law, has greatly interested the public, and much anxiety has been manifested to learn the opinion of the Court, in advance of a decision in any given case. In these, and in all like cases, it has been urged, that if the opinion of the Court could be known in advance, it would prevent litigation and allay public excitement. It has not always been pleasant or easy to stand still, and let the billows of public anxiety break against us; yet we have done so, and have been sustained by considerate public sentiment.

I know it is said that we will not depart from that wholesome rule in this case, because here we have a case between parties. If that be so, I admit that my objection is answered. But it must be so in the spirit as well as in the letter, for the Court must not allow itself to be used *under cover*, in violation of a great fundamental principle:—for if it was thought that it would be a source of irritation for one department to interfere with the other in the *light*, how much more if the interference should appear in the *shade!* and if we refused our opinion to the Legislature when asked with the formality and courtesy of a resolution, how will we be justified, if we allow the end to be accomplished indirectly by an individual?

It is a great and mischievous error to regard legislative enactments as under a cloud, until the light of the Court shines upon them. Why should it be so? The Legislature is under the same oath and other obligations to observe the Constitution, as is the Court. It is composed of intelligent men, discussion is free, and all questions are considered by committees, and in two houses. And it is now the settled rule of construction that unless an Act is *plainly* unconstitutional, the

Courts are obliged to declare it constitutional. The doubt, if there be any, must be given in favor of the Act, in deference to the Legislature and the people whom they represent. Under this rule, it has been very seldom that the Court has pronounced acts unconstitutional.

I will not be understood as denying the power of the Court to declare acts unconstitutional. I concede the power. It is conservative. It is quite within probability, that a wise Legislature may, through inadvertence, pass an act inconsistent with the Constitution; and, in view of human frailty, it may be conceded that circumstances may influence legislators to commit palpable errors. The desire to do what is supposed to be a great good, or to avoid an evil, may press representatives unconsciously into the adoption of measures in conflict with the fundamental law. In such cases, it is fortunate that another tribunal, the Court, should have the power to arrest it, when it is brought to bear upon the citizens who have the right to demand that their constitutional securities shall be preserved.

How stands this case? On the 18th of December last, the Legislature passed an act directing the State Treasurer to subscribe for $2,000,000 stock in the Chatham Rail Road, and to pay for the stock in the bonds of the State, payable thirty years hence, and providing for a special tax to meet the annual interest. And on the 29th of December, ten days thereafter, before one-tenth of the citizens of the State knew, as we may suppose, that such an act was passed, the plaintiff files a bill in the name of himself, and all other property-holders and taxpayers in the State, to enjoin, not the collection of the tax, but the issuing of the bonds. Will this Court take jurisdiction of such a case? The case was argued before us by nine eminent counsel, and with great ability. It ought to be a complete answer to the question, that neither in England nor America has there been decided a case like it. It is true that the question of jurisdiction was not much labored in the argument. The eminent gentleman who opened for the plaintiff did discuss it, and referred us to divers authorities, but the counsel

for the defendants did not even controvert the question of jurisdiction, but conceded it—stating that it was desired by the parties, and the Legislature, and the public, that the Court should take jurisdiction and decide it. Thence I derive an argument against the jurisdiction. Wherefore this great and general anxiety? we are not informed that any considerable amount is involved, so far as the plaintiff is concerned; indeed, his interest is so inconsiderable that he has not thought proper to state it in his Bill. Evidently because it is a great question of *public policy*. It is a momentous question, involving the largest state interests. On the one side, it is insisted that if the bonds are allowed to be issued, the State's credit will be destroyed. On the other, it is insisted that if the bonds are not allowed to be issued, it will be impossible to develope the resources of the State. But what has this Court to do with such questions? The Legislature represent the people, and it is their duty and theirs alone, to decide upon questions of expediency or policy. The Court is bound by iron rules, to *decide cases* as they arise between citizens; and I apprehend that we will have too much occasion to regret any departure from the old land-marks. Every body, and all parties, may be anxious for an interposition now, because each interest is expecting a favorable decision; but when the result is known, then will come the clamor, and the Court will lose its hold upon the public confidence, which is its life and honor. If the Court may interfere now, at what stage of legislation may it not be called upon to interfere? It is insisted that it ought to do so at the earliest moment, to prevent unconstitutional burdens upon the citizens, and, therefore, it ought to interfere *now*, before any rights are vested, or any liabilities are incurred. Why not interfere sooner? Why not interfere the moment an alleged unconstitutional bill is introduced, or at least, as soon as it is ordered to be printed? Why allow it to be printed, referred, reported upon, debated, passed, published and circulated? All this must involve expense, and a tax upon the property-holders. It is no answer to say that the Court cannot enjoin the Legislature, but only its ministerial

officers; because, is not the printer, and is not the clerk, and is not the publisher, a ministerial officer? Clearly, as much so as the Treasurer.

I have said that no case like this has occurred before. I say so, because none was cited in the argument, and I have found none upon search. A number of cases were cited, but upon examination, they will be found not to support this.

Of the authorities cited, those most relied on, and apparently most favoring the position in favor of the jurisdiction, are Adams, Eq. 320–1, *Mott* v. *Pennsylvania Rail Road*, 30th Penn. Rep., 39, and *Caldwell* v. *Justices of Burke*, 4 Jon. Eq. 323. There were other cases, but none stronger than these.

It is common learning, that one of a class may sue for himself and all others of the same class: but that is with many restrictions, and I suppose it may be laid down as a *rule*, that one cannot have redress for himself and a class, unless, under the same circumstances, he could have redress for himself alone, if he only were interested. I put the question then: Suppose it were legitimate for the Legislature to legislate so as to affect individuals, instead of the community; and the Legislature had passed an Act, directing the Treasurer to issue a bond, payable thirty years hence, and to collect an annual tax of the plaintiff alone, to pay the interest; could the plaintiff file a bill for a special injunction against issuing the bond? To answer the question, it is only necessary to consider the cases in which special injunctions are granted. The injury sought to be enjoined must be, not merely possible or probable, but *certain and irreparable*. See *Capehart* v. *Mhoon*. Bus. Eq. 30, and a variety of cases in our own reports, of the same class. Suppose the plaintiff had sued for himself alone, and he certainly was not obliged to join the public with him—could he have the special injunction which he seeks?

(1.) Is the injury to him *certain?* That he will even be in existence thirty years hence, when the bonds fall due, is not only *not* certain, but is quite improbable: and that he will be in existence, or will retain his modicum of taxable property,

when the tax is collected, is not *certain*. But suppose that to be certain; then (2) is the injury *irreparable?* The issuing of the bonds is certainly not, and the collection of the tax is not more so; because, *if* it should fall upon him, he might enjoin it *then*, as well as now, or pay it under protest, and recover it back. So we are remitted to the idea, that this suit is not entertained because it is necessary to one, the plaintiff, but to a class, the public.

Adams's Equity, on the very page to which we were referred, lays it down as a rule, where one sues for a class, that "the Court in such cases will not proceed to a decree, until it is satisfied that the interest of all is fairly represented, and that there would be a preponderating inconvenience, in bringing them individually before it." How does it appear to us, that the interests of all are fairly represented? A measure of immense public importance, adopted by a large majority of the representatives of the people, and involving grave Constitutional questions, is brought before us within ten days after its passage, by a single citizen, whose interest, so far as we know, may be covered by a dollar; and is defended only by a mere ministerial officer, and the Chatham Rail Road Company; without any interest at all, and which with unlimited liberality, admit every thing that the plaintiff alleges—not even giving us the benefit of an argument upon the question of jurisdiction, or any other except the naked question as to the power of the Legislature. *Is* the public interest fairly represented, or is it represented at all? Suppose the plaintiff had made such admissions, or that the decision of the Court had been the reverse of what it is—that the law *is constitutional*, and that the bonds may issue, and the tax may be collected; would the public be satisfied to be concluded by such a decision under such circumstances? What would those, who really have to pay the taxes, say when they come to protest against it, and find that they have been concluded by a "man of straw."

But the cases put by Mr. Adams, where one of a class may sue, are not like this. They are cases where creditors—as

creditors under a trust deed—or legatees, having an interest in a common fund, which cannot be administered except as among many, and too many conveniently to be made parties by name—in such cases, one may sue for himself and for all, and when the Court is satisfied that all are *fairly represented*, it will proceed to administer the fund. I admit that these are not the *only* cases, but they are the illustrative ones. The case of *Mott* v. *Pennsylvania Rail Road Company*, *supra*, was this: The Legislature directed the Treasurer to sell the public canal at auction, with a proviso that the Pennsylvania Rail Road might take it at an advance price of $1,500,000, and, in that event, it should be exempt from taxation. There were three bills considered together by the Court, asking for a special injunction. The first, and the only one that prevailed, was at the instance of the Public Canal Commissioners, who sued, as well as Canal Commissioners as for themselves as tax-payers. They sought to enjoin the sale of the canal, because they had charge of it as public officers, and it was their duty to preserve, and to manage it for the public interest; and further, because the Legislature had not the power to exempt property from its proper burden of taxes. It was proper that they should interfere then, if ever, because the sale was about to be made, and the canal taken out of their hands, and to go into other hands, under terms forever exempting it from taxation. The Court refused to enjoin the *sale*, but enjoined so much of the *terms* as exempted it from taxation. That case is distinguished from this by the fact, that the injury was immediate, certain and irreparable, and was at the instance of persons who had charge of the canal, and who were about to be deprived of the possession and control of it. And the burden of the decision is upon that ground; although it is stated in the opinion of the Court, that they had the right to interfere as tax-payers; but that was not insisted upon in the argument, although it was said in the argument on the other side, that there was no case in England or America, where a corporation had been enjoined from acting under a

legislative enactment; which probably is more than can be maintained.

Another of the three bills, was at the instance of a "loan creditor," for himself and all other creditors of the same class, alleging that the canal had been built by the State, by borrowing money and pledging the canal and its products, as security for the debt: and the plaintiff alleged, that, by the sale, he and others of his class, would lose their security; but the Court refused to interfere in their behalf, as by the sale they might get their debt, and their injury was not irreparable.

The third bill was at the instance of a stock-holder in the Rail Road, and sought to enjoin the Rail Road from making the purchase, but the Court refused to interfere.

In *Caldwell, et. al.* v. *The Justices of Burke*, 4 Jo. Eq. 323, the plaintiffs sought to enjoin the Justices of Burke county from subscribing for stock in a Rail Road, and laying a tax to pay the subscription. And the Court did not determine the question, as to whether that was the proper mode in which to seek relief, saying: "Though the Court entertains but little doubt upon the question, yet in the view taken of other points in the case, it becomes unnecessary to determine, whether relief by injunction in this Court, is the proper mode of redress for those citizens of a county who allege grievances from proceedings of this kind; and, therefore, nothing will be said on it." I admit that there was an *intimation* of the opinion of the Court, but it was not a *decision*. The decision of the Court was against the plaintiffs upon the merits, and therefore the question was not important.

It is to be noted that the injunction asked for, is not against levying taxes, but against issuing the bonds. And by no possibility can *that* injure the plaintiff; indeed, it may greatly benefit him; and we have the opinion of the Legislature, competent to pass upon the fact, that it will not only not injure him irreparably, but will greatly benefit him, and all others who are made plaintiffs with him. I admit that the taxes are resultant, and when the question of their imposition comes under consideration, it must be determined,—and not till then.

I suppose the tax may be levied, notwithstanding the decision in this case, unless the Legislature repeal the Act; as the injunction in this case, does not and cannot extend to the tax. As, however, the issuing of the bonds is enjoined, I suppose the tax will be repealed.

I conclude, (1) that the plaintiff is not one of a class with a common interest which can not be determined as well for himself alone, as in conjunction with his class—that one who conceives himself entitled to a "Homestead," may as well file his bill, for himself and all others who claim Homesteads, and invoke the decision of the Court,—or one debtor who claims the benefit of the stay-law may as well ask the interposition of the Court, in favor of himself and all debtors of that class; and (2) that the plaintiff's alleged injury is not immediate, but remote; is not certain, but doubtful; is not irreparable, but remediable: and, therefore, that he is not entitled to the extraordinary relief of a special injunction.

There is one other reason why I think the Court ought not to entertain this suit. It has been already said, that the Act passed in December last. The Legislature, which passed it, is still in session. By the prompt repeal, in substance, of the August Act, upon its unconstitutionality being suggested, that honorable body has shown itself to be jealous of the integrity of the Constitution. The plaintiff is a citizen. The Legislature is his agent. If the Legislature has committed an error, why did not the citizen memorialize the Legislature for a correction of the error? Before that body he and all other citizens, could have had complete redress. Failing to do that, his appeal to the Court is untimely and mischievous.

It is urged as a reason why the Court ought to entertain the suit, that if the bonds are issued under a cloud, they will be depreciated in the market. I grant it. But how can they issue under a cloud, if the rule be, that every Act is valid unless it be *plainly* invalid? If the doctrine obtain, that nice, technical rules are to be observed in passing upon the constitutionality of statutes—if they are not to be presumed to be valid, unless they are *plainly* invalid, then all statutes will be

considered doubtful, until they are demonstrated by the Court. But if the true doctrine be now established, that every statute is to be deemed valid, unless the error be so palpable that he that runs may read, there will be no such troubles as we are now encountering.

II. I proceed now to the consideration of the second question:

Is the Act constitutional?

How ought that question to be approached?

In *Hoke* v. *Henderson*, 4 Dev. 1, speaking of the power of the Court to declare an Act of the Legislature unconstitutional, the learned Chief Justice RUFFIN said:

"The exercise of the power is the gravest duty of the Judge; and is always, as it ought to be, the result of the most careful, cautious, and anxious deliberation. Nor ought it to be, nor is it, ever exercised, unless upon such deliberation the repugnance between the legislative and constitutional enactments, be clear to the Court, and susceptible of being clearly understood by all. In every other case, there is a presumption in favor of the general legislative authority recognized in the Constitution. The Court distrusts its own conclusions, of an apparent conflict between the provisions of the statutes, and the Constitution; because the former has the sanction of the intelligence of the legislators equal to the apprehension of the meaning of the Constitution, and of their equal and sincere desire, from motives of patriotism and conscientious duty, to uphold that instrument in its true sense, and of the present and temporary inclinations at least, of a majority of the citizens, which must be supposed to be known to their representatives, and to be expressed by them. But even these sanctions are not sufficient to overturn the Constitution, if the repugnance do really exist and is plain." Note: "and is *plain.*" It is not necessary that I should cite other authorities, but they are abundant, both in the decisions of the Courts, and in the elementary writers. The settled rule is, that unless the Act is *plainly* unconstitutional it must stand; if there is any donbt

about it, it must stand, in due deference to the Legislature and the people whose views they are supposed to represent.

Let us consider, then, not whether this Act is unconstitutional, but is it *plainly* so? Is it susceptible of demonstration to plain minds? Is it so, beyond doubt? It may be said, if that be the rule, then no Act of the Legislature will ever be unconstitutional; because it is not to be supposed that the Legislature will ever pass an Act, clearly and plainly against the Constitution. I have stated, in considering the first question, that a wise Legislature might through inadvertence, inattention, haste, mistake, or the unconscious bias of pressing circumstances, violate the Constitution. Sometimes they do so, and when it is called to their attention they retrace their steps. It so happened with the present Legislature. In August, they passed an Act lending the credit of the State to the Rail Road now under consideration, without either laying a tax, or submitting it to a vote of the people. And when the error was called to their attention in December, they corrected it by the Act which we are now considering. Thence I derive an argument in support of the Act; for, while we admit that a wise Legislature may pass an Act plainly unconstitutional, through inadvertence, &c, yet, can it be that when their attention is directed to it,—when it is fully discussed and considered—the Legislature can do so unwise or criminal an Act, as plainly to violate the Constitution? If the repugnance be *plain*, why the learned and able arguments at the Bar? Or why the division of this Court, as nearly equal as we can be divided? Admit that it *may be* unconstitutional, yet can it be said to be *plainly* so, against the deliberate judgment of a majority of the Legislature, and a division of this Court, after full argument and much consideration? and note, that it is not sufficient that its unconstitutionality should be plain to any individual Judge's mind, for that may be so by some peculiar process of reasoning, or superior astuteness or vigor of intellect, but is the fact itself plain, and free from any grounds of doubt? It was commended by a very learned and long-experienced Judge, as a safe rule for a jury in a capital case,

if a portion of the jury were well convinced of the prisoner's guilt, and a portion were in doubt, those, who were well convinced, might very well adopt the doubts of their brethren; not because their own minds were in doubt, but because the doubts of their brethren showed that the fact itself was doubtful. If it were not for this wise philosophy, which compels me, both in courtesy and in sincerity, to admit that the contrary opinion of my brethren makes the fact doubtful, I should hope to proceed now to show clearly and plainly, that the Act is not unconstitutional, but is in all respects valid.

It is not supposed that the occasion for issuing the bonds comes within any of the exceptions named in the 5th section of the 5th Article of the Constitution—that is to say, it is not a "casual deficit," nor an "insurrection," nor an "invasion," nor is it "in aid of an unfinished Rail Road," or of one "in which the State has a direct pecuniary interest." It will, therefore, simplify the question, to read the section, omitting the exceptions, as follows:

"Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or obligation in behalf of the State, unless it shall, in the same bill, levy a special tax, to pay the interest annually."

The preceding is the first clause in the section, and I propose to consider (1) the power of the Legislature under that clause, and (2) whether the act, which we are considering, comes under it.

1. It was well known to the Convention that the State was considerably in debt, and that the bonds of the State were below par—not worth in the market, in coin, more than fifty cents in the dollar, and that the new bonds could not be worth more than the old. Under these circumstances what would the Convention have been likely to do? What ought it to have done? Authorize the issue of new bonds, to be put upon the market at fifty cents in the dollar? No. We would expect the Convention to have done precisely the reverse—restrain the issue of new bonds, unless they could be disposed of at par; restrain the promise to pay $100 by taxing the

people, when they had received but $50 for it. With this restriction, the people might well be supposed to be indifferent as to how many bonds may be issued, within reasonable limits: for how can it materially damage the people to issue bonds promising to pay thirty years hence only so much as they receive now? They can not be injured by it, unless it be improvidently expended; and they may be greatly benefitted, as capital is so much needed in our exhausted and impoverished condition, to renew our strength, and develope our resources. This is the illustration:

I have an agent managing my affairs, and I say to him, "You may need funds to carry on my business. If you do, I authorize you to issue bonds in my name, if you can get par for them: but you must not issue my bonds, binding me to pay at some future time more than you get now." With this restriction my agent can not injure me, except by an improvident expenditure. We have stated what the Convention would have been likely to do—ought to have done. Let us now see what it did. It provided that no new debt shall be created unless the bonds are at par. "Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt," &c.

So it seems to be clear, that the only restriction upon the Legislature in contracting debts is, that par value shall be obtained for the bonds: for, to say that a debt shall not be contracted if par value is *not* obtained, is the same as to say, that it may be contracted, if par value *is* obtained. Especially is this so, as the Legislature is omnipotent in its legislative sphere, except in so far as it is restricted by the Constitution. Nor is it meant that the bonds of the State shall be at par in the general stock market, for that is seldom, if ever, the case, and is a matter of indifference to the State; but the meaning is, that par value must be obtained for the bonds at the time they are issued, in any given transaction. If this be the proper construction, then if par value is received for the bonds under consideration, they may properly issue without any special tax. But then it is said, that a special tax is laid in

the same bill, and thence it is insisted, that it was contemplated that the bonds would be issued below par. Grant that for the argument, and still the bonds may issue; for bonds may issue at any price if a special tax is laid. But the Constitution does not say that bonds which are issued at par shall not be secured by a special tax. They may be so secured, as well as those which are issued below par, the difference being, that in one case the special tax *must* be laid, and in the other it *may* be. It being known therefore, that the bonds of the State were below par in the general stock market, how was it competent for the Legislature to order these bonds to issue?

First, because a special tax was laid in the same bill, as the Constitution provides: and,

Secondly, because no special tax was necessary to be laid; for, by the express terms of the act authorizing their issue, it is provided that they shall not issue except at par, as also by Rev. Code, chap. 90, which forbids any State bond to issue, except at par.

But I lay no particular stress upon the restriction in the Rev. Code, because the new Constitution authorizes bonds to issue below par, provided a special tax is laid in the same bill. I have said that the Act provides for their issue at par. The provision is, that the State shall subscribe for $2,000,000 worth of stock in the Rail Road—creating thereby a debt, as for the purchase of any other property—and pay for it with $2,000,000 of bonds, at par. But it is said, that that is only a *cover*, to evade the Constitution! I do not think it either respectful or just to the Legislature thus to declare. It is not so charged in the Bill, and it ought not to be taken for granted. We must expressly declare the contrary. It must not be supposed that the Legislature means otherwise than as it declares; or that it would *evade*, any more than it would directly *assail*, the Constitution. The Act says expressly that they shall be taken at par. The stock for which they pay, is to be preferred stock, and is to pay a dividend of six *per cent.* before any dividend shall be paid upon other stock. How can it be said

that preferred stock with a pledge of six *per cent.* dividend, is not worth par? The Legislature has passed upon the fact, and the Court cannot controvert that finding. Suppose the Legislature had declared, that they found the fact to be, that the stock in the Rail Road was worth par; and that it would be an advantageous bargain on the part of the State, to give par value for the stock—could the fact be controverted by the Court? It is not pretended that it could be. Whether the stock is worth par or not, is not a question of law or of construction, but of fact. And it would be within the province of the Legislature to prescribe how that fact should be ascertained, or to ascertain it itself. Has not the Legislature plainly declared the fact, by directing that the stock shall be bought as preferred stock, and that the bonds shall be taken at par. But even if they are issued below par, still it makes no difference, because a special tax is provided for it the same Bill.

I conclude, therefore, (1) that under the first clause of the 5th section of the 5th article, the Legislature has unlimited power to contract new debts, provided par value is obtained for them, without laying any tax; and, (2) that it has unlimited power to contract new debts, even if its bonds are below par, provided it lay a tax in the same bill to pay the interest.

2. But it is said, that this case does not come under the first clause, which we have been considering, but under the second clause. We must consider it, therefore, with a view to that objection.

We have been considering the case, as if the purchase of the stock in the Rail Road were an ordinary debt contracted by the Legislature,—such as one to build a State capitol; or a a penitentiary. But is is objected, that it is not a debt in that sense, but a gift or loan of the credit of the State to a Rail Road, and comes under the second clause, which is, leaving out the exception, as follows:

"And the General Assembly shall have no power to give or lend the credit of the State, in aid of any person, association or corporation, * * * * unless the subject be submitted to a vote of the people," &c.

It is said, that the Act which we are considering, gives or lends the credit of the State to the Chatham Rail Road Co. If that be so, I admit that it is void. It would seem that it ought to be easy to ascertain whether the fact is so. The Act must speak for itself. If it says so, then it is clearly void; but when it does not say so, then it is valid; because it cannot be made to say so by implication, or inference, for, unless it is *plainly* void, then it is presumed to be valid—every inference and implication must be in favor of its validity, according to all authorities. The Act reads as follows:

"Whereas doubts have been raised as to the validity of bonds of the State, issued to and for certain Rail Road Companies, under Acts whose titles are hereinafter recited; and whereas it is the purpose of the General Assemby to place the validity of such bonds beyond question; now therefore," &c.

The first section of the Act recites the title of Acts,—to amend the charter of the Williamston and Tarboro Rail Road Company, and of the Western North Carolina Rail Road Company, and ratifies and makes good the State bonds which had been issued to those roads.

The second section provides, that, upon the surrender of those bonds, new bonds may be issued in their place, under this Act.

The third section lays a special tax to pay the interest.

Then follows the fourth section, which is the part of the Act which we are considering, and which seems to have been put in as an amendment; as it has no connection with the preamble, or with the other sections, and is as follows:

"Sec. 4. The public Treasurer is hereby ordered, whenever the President of the Chatham Rail Road Company shall certify, that the grading of the Road between Cheraw in South Carolina and the Gulf, or some other point on the Chatham Rail Road between Raleigh and the Gulf, has been let to contract, to subscribe to the capital stock of said Company $2,000,000 in behalf of the State, which subscription shall be paid by delivery to the President of said Company, of coupon bonds of the State at par, of the denomination of one

thousand dollars, dated October 1st, 1868, and payable thirty years thereafter, bearing six *per cent.* interest, payable semi-annually, &c.; provided, that said bonds shall only be issued on the surrender of a like amount of bonds of the State heretofore issued under an Act to amend the charter of the Chatham Rail Road Company, ratified the 15th of August, 1868. On which surrender, the same amount of bonds delivered by said company to the State, under the said Act, shall be cancelled. Said subscription shall be preferred stock, and pay a dividend of six *per cent.* before any dividend shall be declared on the other stock, &c."

The 5th section lays a special tax.

It will be seen that there is not one single word in the act, which by implication or inference even, can be construed into giving or lending the credit of the State to the Chatham Rail Road Co. It is a plain transaction of taking stock in the Road, and paying for it in the bonds of the State at par. The stock was to be taken just as an individual takes stock. And is it ever said when an individual takes stock in a Rail Road that he gives or lends his credit to the Road? When a man goes into a store and buys goods and pays for them, either with cash or with his bond, does he give or lend his credit to the merchant? But the character of the transaction and the purpose of the Legislature are not left in doubt, by reason of what had been done before. On the 15th of August, a few months before the passage of the act under consideration, the Legislature did, inadvertently, pass an act lending the credit of the State to the Chatham Rail Road Co., in express terms, without laying a tax, or submitting it to the people, and when, in December, the error was called to their attention, they substantially repealed that act. And for what purpose? To commit the same error over again? To lend the credit of the State again, when that was the error they were trying to cure? That were folly indeed! No. They called in the bonds issued under the August act, as a loan of the credit of the State, which they could not do; and bought stock in the Road, which they could do. And this was done avowedly to avoid the

constitutional obligation, and to preserve that instrument in its integrity. But now it is said, that they did the thing over again in December, which they had done in August and were trying to undo. And, although it is apparent that they are endeavoring to correct the error of the *loan*, and the act expressly calls it a *purchase of stock*, and although every implication, inference and presumption is to be allowed in favor of the validity of the act; yet, every implication, inference, presumption, and even express contradiction of the plain words of the act is allowed—to render it void.

The act of August was professedly a loan of the credit of the State. If the December act is also a loan of the credit of the State, in what does the last act differ from the first? And yet, the whole purpose of the last act was to change the transaction—the *loan* of August, into a *purchase* of stock. The difference in the August and December transactions further appears in this: when, under the August act, the Legislature loaned the credit of the State to the Company, it took no care as to the disposition of its bonds, because it was a matter of indifference to the State, at what price the Rail Road might sell its bonds, except as it affected the ability of the Company, as its debtor. But in December, when its bonds were to be issued for its own use, in the purchase of stock, it was provided, that they should be taken at par value, and for preferred stock. So far, therefore, from the State's lending its credit to the Company, it was driving what may be called a hard bargain against it; for the State certainly went in as a stock-holder upon better terms than the other stock-holders.

But then it is said, that although the Legislature directs that the bonds shall be paid out for stock at par, yet the *stock* is not worth par. How does that appear? How can it appear to us? Did not every other stock-holder pay par, in cash, for his stock? And is not the State's preferred stock, better than other stock? Is the Court, or is the Legislature, the judge of the value of the stock? If the Legislature contract to build a State capitol at $1,000,000, can we enjoin the payment, upon

the allegation that the house is not worth half the money? But I have already shown, that, whether the bonds were put out at par or not, or whether the stock was worth much or little, makes no difference; because a special tax was laid in the same bill; and the sole question is, whether this was a purchase of stock, as the act declares it to be, or was a *gift* or *loan* of the *credit* of the State, as it was in the August act.

There was much discussion at the bar, as to the meaning of the terms, *give* or *lend* the *credit* of the State, &c. On one side it was contended that a gratuity was indicated; on the other, that the meaning was the same as, *bestow* or *allow* the credit of the State, either with, or without consideration. It seems to me that the plain meaning is, that while the State will use its own credit, or good standing, for its own benefit, as in the first clause, yet it will not allow any body else to use its credit, without asking leave of the people. And is there not great propriety in this? Let me extend my former illustration: I authorize my agent to issue my bonds at par, to get money for my own use; and then I can not be injured, because I get as much as I will ever have to pay. And so, in cases of emergency, I authorize him to issue my bonds at any price. But then he enquires, "Suppose I am called upon for charities, benevolences, liberalities, *gifts*, *loans*—how then?" I answer, "I choose to reserve such things for my own discretion—consult me."

So with the State. The Legislature, its agent, is authorized to contract *debts* for ordinary and extraordinary purposes, either with or without a tax, according to circumstances; but when gift or loans of the credit of the State are asked for, the Legislature, the agent, must consult the principal, the people.

I do not enter into the consideration of any questions of expediency, or policy. Whether it be better to go in debt for means to develope the resources of the State and to press on to prosperity, as some say, or to avoid public outlays and depend upon individual enterprise, as others say, are questions

of great moment to the legislator and to the citizen, but they are not for the consideration of the Judge. I am of the opinion that the Act is valid.

SETTLE, J. I also am of the opinion that the Act in question is valid.

PER CURIAM. Judgment reversed.

J. K. BLANKINSHIP *v.* W. B. MCMAHON, and others.

The provision in the Act (Rev. Code, ch. 7, § 16,) requiring an absconding by the defendant to be *within three months* in order to warrant an attachment, is not a Statute of Limitations, and therefore is not within the various Acts recently passed affecting that Statute.

MOTION to dismiss an attachment, made before *Shipp, J.*, at Spring Term 1868, of the Superior Court of YANCEY.

His Honor having declined to allow the motion, the defendants appealed.

No statement of facts, except as appears in the opinion, is necessary.

No counsel for the appellants.

Merrimon, contra.

RODMAN J. The attachment in this case was sued out under § 16 of ch. 7, Rev. Code, which says: "If any one shall do an injury to the proper person, or property of another, and shall within three months thereafter abscond beyond the limits of the State, &c., his estate may be attached to answer the damages, &c., provided the attachment be issued within three months after the injury to the same." The attachment omits to state that the defendant either absconded or concealed himself within the three months. It also appears affirmatively that the process was sued out more than three months after the injury; but the concluding proviso of the section is

undoubtedly a statute of limitations, and the time therein given is enlarged by the various Acts of Assembly suspending limitations. The omission of the statement referred to, would make the attachment irregular, unless the clause respecting the absconding of the defendant, in the first part of the section, can be construed as a statute of limitations also. *Webb* v. *Bowler*, 5 Jones, 362. The several acts of Assembly suspending the statutes of limitations will be found referred to in the case of *Hinton* v. *Hinton*, Phil. 410. They are very full and complete for the purposes intended, and we are disposed to give them a liberal construction. Their purpose was not to give new rights to any one, but only to prevent the loss of rights by nonaction, during the time of our troubles. *Neely* v. *Craige*, Phil. 187. In its nature, a statute of limitations supposes the existence of a right, and prescribes a certain time within which it shall be claimed by the party asserting it; and if the right be one which must be asserted by action, it limits the time within which the plaintiff must sue. If all statutes of limitation were repealed, the effect could only be to give the plaintiff a longer time for him to do something, which, before, he was required to do in a certain time. The absconding of the party charged with the injury spoken of in the first part of § 16, ch. 7, Rev. Code, is not an act to be done by the plaintiff, or the party claiming the right, but by the defendant, or the party against whom the right is claimed. Hence a prescription of the time within which it is to be done, cannot be a statute of limitations; the existence of the fact is a condition precedent to the acquisition, by the plaintiff, of a right to the particular remedy given only in case of its existence. As the defendant did not abscond within three months after the injury charged, the plaintiff cannot be said to have lost his rights to this particular remedy, by lapse of time; for he never had the right, and no diligence on his part could have acquired it. The case of the plaintiff is not within the principles of the Acts of Assembly referred to. He has lost no right or remedy by the existence of the war. If he had been injured, as he complains he was, and peace had

existed, and he been free to pursue every remedy given by law, he could not have pursued this one, unless the defendant had absconded within three months after the injury.

If the defendant had absconded after three months had elapsed from the injury, the plaintiff could not have had this remedy: all the remedies that he could then have had, are still open to him. There was error in the refusal to dismiss the attachment for irregularity; the defendant will recover his costs in this Court.

Let this opinion be certified, &c.

PER CURIAM. Attachment dismissed.

FRANKLIN A. WILEY, Ex'r., &c., *v.* JOHN H. WILEY and others.

1. A bill by an executor, praying for leave to sell land in order to pay debts, will not be entertained unless it alleges distinctly that the personalty has been exhausted.

2. Where an executor made sales of personal property in November 1861, and April 1862, on six months' credit, for Confederate currency, and received the proceeds when due, *Held* that *prima facie* he was guilty of laches in not disposing thereof in paying debts, or (failing in that) in not investing it some other way—but keeping it to become worthless in his hands.

[See *Wiley* v. *Wiley*, Phil. 131.]

BILL to convert real estate into assets to pay debts, filed to Fall Term 1867 of the Court of Equity for CASWELL, and at Spring Term 1868, set down for argument upon demurrer, and transferred to this Court.

The bill alleged that one Alexander Wiley died in Caswell county in 1861, leaving a will by which he disposed of a large amount of real and personal estate, and appointed the plaintiff, Franklin A. Wiley executor, giving him power to sell, for the purpose of paying debts, such parts of the realty or personalty as he might choose; that the said Franklin qualified as executor, and made sale, in November 1861, of personal property to the amount of $1,019.46; and again, in April 1862, of other

personal property to the amount of $905.88; both amounts being payable in Confederate money; that the whole was paid in such money excepting about $197.25, which is yet unpaid; that with the money, he paid off debts amounting to $863.92, leaving still remaining in his hands in Confederate money, $935.77; that Confederate currency was, at the time when he received payment of the sale-notes, the only currency in the country, and he expected upon receiving it to be able to pay it away for debts due by his testator; that one of the creditors of the estate, holding a claim, now of about $675, refused to receive such currency and it remains unpaid, although the said Franklin has frequently tendered the currency to him; that the testator bequeathed considerable personal property to his widow, which was not included in the sales made as above; that there is now no personal property applicable to the payment of debts, and that by accidents beyond the control of the petitioner, he has been prevented from paying them as he had designed; that a certain tract of the testator's land (describing it) may conveniently be sold, &c. The prayer was for leave to sell said tract, and for further relief.

The devisees were made parties, and put in a general demurrer.

No counsel for the plaintiffs.

Phillips & Battle, contra.

READE, J. The scope of the bill is to have a decree to enable the plaintiff, as executor, to sell the real estate to pay debts, the personal estate being, as is suggested, exhausted.

There are several reasons why the plaintiff should not have the relief which he seeks.

1. It is not alleged in the bill that the personal estate is exhausted. The allegation is, that he made "two sales of perishable property; such as was not embraced in the bequests to the widow." There was considerable personal property bequeathed to the widow, which was subject to sale to pay debts, and the executor admits that he has never sold it. So

far as it appears to the Court, therefore, there is enough personal property to pay the debts, and no reason is given why the land should be substituted for the personal property. Indeed the bill is not framed upon that idea, but upon the idea that the personal property is exhausted, or, that it need not be exhausted to enable the plaintiff to sell the land.

2. The will was proved and the plaintiff qualified as executor, in October 1861. It was his duty to convert the personal property into assets to pay debts as soon, as he could. He had a sale in November 1861, on six months' credit, the amount of which was $1,019, and another sale in April 1862, the amount of which was $905. The amount of both sales was $1,924. With the proceeds of sales he paid off debts to the amount of $863, leaving in his hands $1,061. There was but one debt outstanding against the estate, and the amount of that was about $500. Now why did he not pay off a debt of $500, when he had assets to the amount of $1,061? The reason which he assigns is, that the sale notes were paid in Confederate money, and that the creditor would not take it. He does not say *when* he tendered it, and we suppose he must have been dilatory, because in May 1862, Confederate money was but little more below par than United States Treasury notes are now, and it is not to be supposed that a creditor would have refused it at that time. He gives no reason why the whole property was not sold at once; if there was no good reason, then he is to be held responsible, as if he had sold all at once. But even when the notes of the second sale fell due, in October 1862, Confederate money was not so far depreciated as not to be usually received in payment of debts. And in May 1862, $1,061 of Confederate money would have sold in the market for more than enough gold to pay the debt, and even in October 1862, it would have sold for nearly, if not quite enough. And yet the executor laid the money away, and, as he says, has it now on hand worthless. This was gross negligence, and the executor is chargeable with the value of the Confederate money, at the time when he received it. And that, if not of itself enough to pay off the only outstanding

debt, would have been more than sufficient, we are to conclude, if added to the value of personal property left to the widow and unsold. An executor will not be allowed to sell land to pay debts, when it appears that he has, or by reasonable diligence might have had, sufficient assets out of the personal property. The demurrer is allowed. Bill dismissed with costs.

PER CURIAM. Decree accordingly.

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* R. P. DICK and J. W. DICK, Adm'rs, &c., *v.* JOHN C. McLAURIN and R. D. DICKSON.

The judgment to be entered by default against a part of numerous defendants, others, of whom plead, or are not taken, is, according to the course of the Court, only interlocutory; *therefore*,

Where a writ (in assumpsit upon a note) against *seven*, was returned to Spring Term 1867, executed upon *five*; and at the return term, three of those taken entered pleas; a judgment final by default was taken against the other two; and at the same time, an alias writ was ordered against those not taken;

Held, upon application by the parties against whom judgment had been taken, made at Spring Term 1868, that such judgment was *irregular*, and should have been set aside so far as it was *final*; and allowed to stand as an *interlocutory* judgment.

(*Keaton* v. *Banks* 10 Ire. 381; *Skinner* v. *Moore* 2 D & B. 138; *Governor* v. *Welch* 3 Ire. 249; *Price* v. *Scales* 2 Mur. 199; *Weed* v. *Richardson*, 2 D. & B., 535, cited and approved.)

MOTION to set aside an irregular judgment, made before *Barnes*, J. at Spring Term 1868, of the Superior Court of CUMBERLAND.

The plaintiffs had sued out a writ against *seven* persons, including McLaurin and Dickson, returnable to Spring Term 1867. It was returned *executed* against *five*, of whom McLaurin and Dickson are two. At the return term, three of those taken entered pleas; and at the same time a final judgment

* Judge Dick did not sit in this case.

by default was entered against McLaurin and Dickson, and further process ordered against those not taken.

At Spring Term 1868 a *nol. pros.* was entered as to the two not taken, and upon motion, made after due notice, the judgment at Spring Term 1867 was set aside, as irregular.

The plaintiffs thereupon appealed.

Hinsdale, for the appellants.

B. Fuller, contra.

1. The judgment was an office judgment, and so, under the control of the Court. *Keaton* v. *Banks* 10 Ire. 381, *Williams* v. *Beasley* 13 Ire. 112, *Cannon* v. *Beeman* 3 Dev. 363.

2. No appeal lies from an exercise of discretion, *State* v. *Lamon* 3 Hawks, 175; or from a finding of facts by the Court below, *State* v. *Raiford* 2 Dev. 214. See *Phillipse* v. *Higdon* Bus. 302; *Davis* v. *Shaver*, Phil. 18.

RODMAN, J. There can be no doubt of the power of a Court to set aside an irregular judgment at any time after it is rendered. *Keaton* v. *Banks*, 10 Ire. 381. It is equally clear that the exercise of such a power is the subject of appeal. The irregularity of a judgment is matter of law, and to have an irregular judgment set aside, is the right of every party injured by it; it is not a matter of judicial discretion.

Was the judgment in question irregular? An irregular judgment is one entered against the course and practice of the Court, *Skinner* v. *Moore*, 2 D. &. B. 138. The plaintiff's writ was returned to Spring Term 1867, executed on five of the seven defendants. At that term two of the defendants pleaded; judgment by default final was entered against John C. McLaurin and R. D. Dickson, who procured the order appealed from; and alias process was ordered to issue against two of the other defendants, upon whom the first process had not been executed.

We think it was irregular. The plaintiff was not entitled to take a judgment by default final, against two of the defendants, when two others pleaded, and he kept his process run-

ning against two others. In England, a plaintiff is not even entitled to serve one of several defendants who appears, with a declaration, until he has run his process to outlawry against the others; and if he do so, and the writ be bailable, the other may immediately sign judgment of *non. pros.* *Governor* v. *Welch*, 3 Ire. 249; *Price* v. *Scales*, 2 Murphy 199. If the plaintiff could not serve a declaration, of course he could not take a judgment by default, which implies a declaration previously served. But the plaintiff might have entered a *nolle prosequi* against those who had not been served with process, and then have taken judgment against the others. In Archbold's Forms, 338, is given the form of an entry, where one defendant lets judgment go by default, and the other pleads to issue. After reciting, that the defendant says nothing, &c., whereby he is undefended, &c., and the plaintiff ought to recover his damages, &c., it proceeds: "But because it is unknown to the Court what damage the said plaintiff hath sustained, therefore let the giving of judgment against the said J. F. (the defendant who had not defended) be stayed until the trial of the issue joined between the plaintiff and R. S. (the other defendant"); and the jury is summoned as well to try the issue joined, as to inquire of the damages on the default.

In *Weed* v. *Richardson*, 2 D. & B. 535, it is said: "In an action against two, there cannot be a judgment against both for a part of the demand, and against one of them for the residue, thus requiring different writs of execution upon the same judgment." The same necessity for different writs of execution would exist, if a plaintiff could pursue the course taken in this case. These authorities establish that the judgment taken by default, was irregular, and the Judge below committed no error in setting it aside as a final judgment. He should have permitted it to stand as an interlocutory judgment, the damages to be inquired of thereafter. We have examined the cases to which we were referred by the plaintiff's counsel, and do not think they are in point.

PER CURIAM. Judgment accordingly.

STATE *ex. rel.* JOSEPH LUSK *v.* JOHN Z. FALLS and others.

Where one who had been arrested under a *capias ad respondendum*, escaped from the sheriff, and the latter by his return negatived any idea that he intended to become special bail for the party escaped, *held*, that the sheriff and his sureties were liable upon his official bond for such escape, and that the measure of damages, was, *not* the debt and interest, but such *actual* damages as the plaintiff had sustained.

DEBT upon a sheriff's bond, tried before LITTLE, J., at Spring Term 1868 of the Superior Court of GASTON.

The breach assigned was the escape of one Hunt, who had been arrested by the sheriff under a *capias ad respondendum* in an action of debt. The arrest was made upon the 18th of October 1866, and the *return* was "The defendant arrested, signed the appearance bond, refused to give surety, and made his escape by jumping on his horse, and *running*, there being no one present to assist."

Evidence was given that when arrested, Hunt was in possession of personal property of considerable value, although not enough to cover the debt.

Upon these facts the plaintiff submitted that he was entitled to recover, and that the proper measure of damages was the amount of his debt and interest.

The defendants, on the contrary, submitted that the plaintiff was not entitled to recover at all; or that the sheriff was liable only as special bail; or that the measure of damages was only the value of the property in the possession of the defendant when arrested. They also relied upon the effect of the Act abolishing imprisonment for debt.

His Honor instructed the jury that the measure of damages was the amount of the debt and interest; and, by consent, there was a verdict for the plaintiff, subject to the opinion of the Court upon the question reserved as to the right of the plaintiff to recover at all.

Afterwards the verdict was set aside, and a judgment of non-suit entered. Thereupon both parties appealed.

Bragg, for the plaintiff.

The escape here was negligent. Seawell on Sheriffs, 440, *Adams* v. *Turrentine*, 8 Ired, 150 (at p. 161.)

Case lies for escape on mesne process, at common law, and the plaintiff recovers *actual* damages. Seawell, 448–9. His return of *cepi corpus* is enough to charge him. A return of *escape* does not render the sheriff special bail, *Tuton* v. *Sheriff of Wake*, 1 Hay. 485, *Hart* v. *Lanier*, 3 Hawks, 244.

The Sheriff is liable here upon his bond, and the measure of damages is the actual damage, as in *case* at common law, *Willey* v. *Eure*, 8 Jon. 320.

Merrimon, contra.

DICK J. At common law, a sheriff who had a person in actual custody under legal authority, and suffered him to go at large, was guilty of an escape; and in civil cases, the only remedy for the injured was an action on the case. Various statutes have increased the remedies of the party injured, and changed, in some respects, the liability of the sheriff.

The action on the case, and the action of debt given by the statutes of 13 Edw. 1, and 1 Rich. 2 (Rev. Code, ch. 105. § 20,) for either a voluntary or negligent escape on final process, lay against the sheriff alone, and did not reach the sureties on his official bond. In such cases the action of debt is usually resorted to, as it enables the party injured to recover the whole of his debt, and damages for detaining the same. This action will not lie for an escape on *mesne process*. In such cases there are two remedies: the action on the case at common law, and an action of debt against the sheriff and his sureties, on his official bond, assigning breaches under the statute 8 and 9 Will. 3 (Rev. Code, ch. 31, § 58). In these actions the plaintiff can only recover such damages as a jury, under all the evidence, may see proper to assess. If the sheriff arrests a person on *mesne process*, and before commitment to prison, allows him to go at large, this is not an escape, but the sheriff is liable as special bail. If the person after such arrest

get at large, by the negligence of the sheriff, and against his will, he may by his return elect to become special bail, but, if the return shows that he does not choose to become special bail, he must be proceeded against for an escape, by one of the actions last above designated. These positions are sustained by the cases referred to in Battle's Digest 1085, and in the briefs of the counsel.

In the case before us, the plaintiff, Lusk, had caused a *capias ad respondendum* to be issued against Hunt, to recover a large debt. The writ was placed in the hands of a deputy of the defendant, Falls, sheriff of Cleaveland County.

The deputy under the process arrested Hunt, who failed to give a bail-bond, and escaped from the deputy. The facts set forth in the return of said writ, negative the idea that the sheriff intended to be bound as special bail. This action was brought against Falls and his sureties, on his official bond, and this negligent escape of Hunt is assigned as a breach of the condition of said bond. Upon the trial in the Court below, his Honor instructed the jury, that the plaintiff was entitled to recover the whole amount of his debt and interest, and not the actual damages sustained, and there was a verdict in accordance with such instructions. Upon a question of law reserved, his Honor held that the action could not be maintained, and the plaintiff was non-suited.

His Honor was in error upon both questions. We are of the opinion that the plaintiff can maintain his action, but he is only entitled to recover the actual damages sustained. We decline to express our opinion upon the question raised upon the trial, and argued in this Court, as to the effect of the act of the General Assembly, abolishing imprisonment for debt; as it is not properly before us for adjudication.

As both parties appealed, and there is error against both, each party must pay costs in this Court. The judgment is reversed, and a *venire de novo* awarded.

PER CURIAM. *Venire de novo.*

GEORGE B. BAKER *vs.* BENJAMIN ROBINSON, HENRY L. MYROVER and THOS. S. LUTTERLOH.

Endorsements by third persons of a note payable by A to B,—if made at the time of its execution, bind them, according to the intention of the parties, either as joint principals or as sureties.

ASSUMPSIT, tried before *Buxton, J.*, at Fall Term 1868 of the Superior Court of CUMBERLAND.

The suit was brought upon four promissory notes made by Robinson, and payable to Baker. At the time that they were delivered to Baker they had upon them the endorsement of Myrover and Lutterloh, and it was in evidence that they intended thereby to become *sureties* to Robinson.

No demand was made upon Robinson before bringing this suit.

For Myrover and Lutterloh it was insisted, below, that they were mere guarantors, and therefore, that a previous demand upon Robinson, with notice to them of his failure to pay, was necessary.

His Honor was of opinion that the peculiar character of the guaranty in question, rendered such previous demand unnecessary.

Verdict, for the plaintiff; Rule for a new trial; Rule discharged; Judgment, and appeal.

B. Fuller, for the appellants, cited: *Nichols* v. *Pool*, 2 Ire. 23; *Johnson* v. *Hooker*, *Ib.* 29; *Yancey* v. *Littlejohn*, 2 Hawks, 525; *Johnson* v. *McGinn*, 4 Dev., 277; Story, Prom. Notes 142; *Topping* v. *Blount*, 11 Ire. 62; *Farrow* v. *Respass*, *Ib.* 170.

R. H. Battle, contra. The present, as regards Myrover and Lutterloh is a contract of suretyship; 1 Par. Con. 206, and n.; *Ray* v. *Simpson*, 22 How. U. S. 341. If Myrover and Lutterloh be guarantors, they must show themselves *damaged* by the alleged laches of plaintiff, or he may still recover. *Farrow* v. *Respass*, 11 Ire. 170.

SETTLE, J. The subject of this suit is four notes of hand, each in the following words and figures, to wit:

"$362 50. WILMINGTON, N. C., Nov. 9th, 1866.

Ninety days after date I promise to pay George B. Baker or bearer, three hundred and sixty dollars and fifty cents, for value received, with interest from date at 8 per cent.

(Signed) BENJ. ROBINSON."

On the back of each, were endorsed in blank, the names of Henry L. Myrover and Thomas S. Lutterloh.

In interpreting contracts, we should endeavor to carry out the intention of the parties. It appears that the defendants, Myrover and Lutterloh, put their names upon the back of these notes at the time they were made, and before they were delivered to the plaintiff, and that their purpose was to give the weight of their names as sureties for the maker, and for his accommodation. "If any one, not the payee of a negotiable note, or in the case of a note not negotiable if any party, writes his name on the back of the note at the time it is made, his signature binds him in the same way as if it was on the face of the note and below that of the maker." 1 Par. on Con. 206.

In *Ray, et al*, v. *Simpson*, 22 How. 341, a case directly in point, it was held, that the parties placed their names on the back of the note at its inception, "not as a collateral undertaking, but as joint promisors with the maker, and were as much affected by the consideration paid by the plaintiff, and as clearly liable in the character of original promisors, as they would have been if they had signed their names under the names of the other defendants upon the inside of the instrument."

These general principles establish the character and liability of Myrover and Lutterloh, the only defendants before this Court.

Our conclusion is that they are sureties, liable to the plaintiff in the same manner as if their names had been signed upon

the face instead of the back of these notes. This being so, of course no demand upon Robinson was necessary before suing Myrover and Lutterloh, and his Honor very properly declined to charge the jury that there was evidence of laches on the part of the plaintiff.

It is unnecessary to express any opinion as to what would have been their liability as guarantors, or as endorsers in the commercial sense, as we have seen that they are sureties.

The judgment below must be affirmed.

PER CURIAM. No error.

EDMUND JACOBS *vs.* HENRY K., and THOMAS P. BURGWYN.

In a case in which at Fall Term 1863, an entry of "Judgment" was made, which was brought forward to Fall Term 1864; and, no Courts being held in the county during 1865, on the 8th of March, 1866, (out of term time) the notes declared on were handed to the Clerk, who thereupon extended his memorandum above into a formal judgment as of Fall Term 1864: *Held*,

1. That such judgment was not irregular.
2. That the execution which issued thereupon on the 8th of March, 1866, was irregular, as being issued upon a dormant judgment, and therefore might be set aside, on motion by the defendants. (*Davis* v. *Shaver*, Phil. 18; *Shelton* v. *Fels*, *Ib.* 178; *Simpson* v. *Sutton*, *Ib.* 112; *Murphrey* v. *Wood*, 2 Jon. 62, cited and approved.)

MOTION to set aside a judgment and the execution thereupon, allowed by *Buxton*, *J.*, at Spring Term 1868, of the Superior Court of NORTHAMPTON.

The facts were that the docket of the Court at Fall Term 1863, showed an entry upon the Trial Docket of the word "Judgment." At Fall Term 1864, there was an entry of "Judgment $1,469.40, P. M. $495.43 int., with interest from 31st October, 1864, until paid." The Clerk proved that he brought forward the case from Fall Term 1863, because he did not know what else to do, and that the entry purporting to have been made at Fall Term 1864, was not made then.

but on the 8th of March 1866, out of term time. An execution was thereupon issued which was levied upon real and personal property upon the 8th of May 1866; thereupon writs of *vendi.* were issued on the 6th of June 1867, and again thereafter, returnable to Spring Term 1868. The sheriff testified that he had that writ in his hands at the time of his selling the property levied upon; but that he sold under *fi. fa's.* on *new debts*, also in his hands at the same time, and did not sell under the *vendi.* because of the orders of the military.

His Honor being of opinion that the entry of "Judgment" at Fall Term, 1863, did not warrant its extension into a judgment after the lapse of another term, set aside both the judgment and execution, as being irregular, and the plaintiff appealed.

Smith & Yeates, for the appellant.

Peebles & Peebles and Rogers & Batchelor, contra.

RODMAN, J. This case came up by appeal from the decision of the Judge on a motion to set aside a judgment and execution as irregular. At Fall Term 1863, of the Superior Court of Law for Northampton county, the action stood for trial, and an entry was made, "Judgment." The case and this entry were brought forward to Fall Term 1864. No Courts were held in that county during 1865. On the 8th March 1866, the plaintiff filed the notes declared on, with the clerk, who thereupon extended his memorandum of "Judgment" into a formal judgment, as of Fall Term 1864. We think this was not irregular. The entry of the clerk was a memorandum, which might, as between the plaintiff and the defendant, be put in the shape of a formal judgment at any time. *Davis* v. *Shaver*, Phil. 18. The original entry was with the sanctiou of the Court, and having been brought forward to Fall Term 1864, must be assumed to have had the sanction of the Court at that term. But when the execution issued on the 8th March 1866, it issued on a dormant judgment, and was therefore irregular: Rev. Code, ch. 31, sec. 109, *Blanchenay* v. *Burt*,

4. A. & E. N. S., 707, (45 E. C. L. R.) *Simpson* v. *Sutton*, Phil. 112. A defendant may set aside an execution irregularly issued. *Shelton* v. *Fels*, Phil. 178.

Or if the defendant has become a bankrupt, his assignee may. *Webber* v. *Hutchins*, 8 M. & W., 319.

This however is subject to the qualification, that the Court will not permit it to be set aside, to the prejudice of third persons, who have acquired rights under it. *Murphrey* v. *Wood*, 2 Jon. 63.

It remains to be seen whether that principle can influence the present case. The *fi. fa.* which issued on the 8th March 1866, tested of Fall Term 1864, was levied by the Sheriff on certain property. A *ven. ex.* issued from Spring Term 1866, and before its return day and while it was in the hands of the Sheriff, he sold the property, not under that execution but under certain *fi. fa's* from the County Court of Northampton, against the defendant H. K. Burgwyn. It does not appear but that these *fi. fa's* were regular. If so the purchaser certainly got a good title to the defendant's estate, and it is not necessary to inquire what might be the result, if it were necessary for him to rely on the present execution. He has not intervened as he might have done, and does not appear to have any concern in the present questions. This is substantially a contest between creditors as to the application of the fund. We do not undertake to say how it might be if the plaintiff's execution had been regularly issued, and the sheriff, having that in his hands and being restrained by military authority from selling under that, had sold under junior executions. We will decide that case when it arises. In this case the plaintiff's execution was irregular, and under the authorities cited, we are bound to set it aside. "*Vigilantibus non dormientibus jura subveniunt.*" The plaintiff was guilty of manifest laches. There is error in the Court below. The Judge set aside both the judgment and execution, whereas he should have set aside the execution only. As far as it sets aside the judgment, his judgment is reversed, as far as it sets

aside the execution it is affirmed. The judgment being partly reversed and partly affirmed—neither party will recover costs in this Court. Let this opinion be certified.

PER CURIAM. Judgment accordingly.

E. JACOBS *v.* T. P. BURGWYN and S. E. BURGWYN.

The assignee of a defendant has no right to have two judgments against such defendant set aside on the ground that they were taken upon the same specialty.

No one but the defendant in an execution can complain of a judgment for being *irregular*.

The judgments mentioned above are not *irregular*. Creditors complaining of them cannot be relieved by *motion* to set them aside.

(The attention of Judges and Counsel called to sections 241 and 242 of the Code of Civil Procedure.)

(*Shelton* v. *Fels*, Phil. 178, and *Cody* v. *Quinn*, 6 Ire. 191, cited and approved.)

MOTION, to set aside two judgments, disallowed by *Buxton, J.*, at Spring Term 1868 of the Superior Court of NORTHAMPTON.

The notice preliminary to the motion, was given in the names of Thomas P. Burgwyn, a defendant in the judgments, and also of W. W. Peebles, who was a trustee for the creditors of Burgwyn, under an assignment made by the latter after the entry of the judgment.

At the term when the motion was made, Mr. Burgwyn withdrew his opposition to the judgment, and thereupon, the motion was dismissed as to him. Afterwards the motion being renewed on behalf of Mr. Peebles, the latter applied for leave to show that the two judgments were given upon the same bond, but the Court being of opinion that *he* could not be heard to attack the judgments, the motion was dismissed as to him also; and thereupon, he appealed.

Peebles & Peebles and Rogers & Batchelor, for the appellant.

Smith and Barnes, contra.

JACOBS *v.* T. P. AND S. E. BURGWYN.

RODMAN, J. This was a motion to set aside two judgments, the one recovered at Spring Term 1866, the other at Fall Term 1866, of the Superior Court of Northampton County, on the ground that both were recovered on the same specialty. The motion was not made by the defendants in the judgments, or either of them, but by Peebles, who was an assignee from T. P. Burgwyn of certain property.

No one but a defendant in a judgment can complain of its irregularity, *Shelton* v. *Fels*, Phil. 178; *Cody* v. *Quinn*, 6 Ire. 191.

This stands on the maxim "*quisque renunciare potest juri pro se introducto.*"

Peebles was the assignee of certain property from T. P. Burgwyn, and we must assume that this property was affected by the judgments and executions thereon. But he did not, like an assignee in bankruptcy, represent the creditors or the general pecuniary interests of his grantor. The best position that he can occupy is that of a purchaser, who takes "*cum onere.*"

If we assume that the two judgments were issued on the same specialty, it does not follow that either of them was *irregular*. A judgment may be fraudulent and void as to creditors, but still regular, and in that case the Court cannot set it aside. The creditor nevertheless has his appropriate remedy. There is no error in the judgment below, the plaintiff Jacobs must recover his costs. Let this opinion be certified.

We take occasion here to call the attention of Judges to § 241 of the Code of Civil Procedure, and of counsel to § 242. We call the attention of the Clerk to the fact that this case should have been entitled—*Peebles* v. *Jacobs*, and to other irregularities in the making up of his record. Officers neglecting the provisions of the Code are not entitled to costs.

PER CURIAM. Judgment affirmed.

JESSE COMBS *v.* JOSHUA HARSHAW.

A promise by a third person to answer for the debt of another, which other is not thereupon discharged from all liability—is within the Statute of Frauds, and must be in writing.

That there is a consideration for such promise, does not affect this rule.

(*Draughan* v. *Bunting* 9 Ire. 10; *Stanley* v. *Hendricks* 13 Ire. 86, cited and approved.)

CASE, tried before *Cannon, J.* at Fall Term 1868 of the Superior Court of CHEROKEE.

The facts were that in 1864, a son of the defendant, who was under age, and a soldier in the Confederate service, in company with other soldiers, met the plaintiff in the road, and forcibly took from him his horse. After the termination of the war, Harshaw, in consequence of this and other acts, left his father's house in Cherokee County. The plaintiff demanded payment for his horse from the defendant, who promised, that if the former would allow his son to come home, he (the defendant) would refer the matter to some neighbors, who should say what ought to be done. Afterwards the defendant refused to refer, and the plaintiff brought this suit.

Under the charge of his Honor there was a verdict for the plaintiff. The defendant moved for a new trial, which was refused; and he appealed.

Phillips & Merrimon, for the appellant.

No counsel, *contra*.

SETTLE, J. (After stating the case as above.) Passing by the objection that the agreement to refer is too vague and uncertain to found an action upon, we will consider the point made on the trial below.

Does this promise come within the provisions of the statute of frauds?

When there is an existing cause of action between two parties, and a third party merely adds his parol promise to the subsisting liability, without the original cause of action being discharged, his promise falls within the statute, and cannot be

enforced. *Draughan* v. *Bunting*, 9 Ire. 10, and *Stanley, et al.* v. *Hendricks*, 13 Ire. 86.

Here the plaintiff had a cause of action against young Harshaw, which, it is not pretended was released by the agreement to refer. The father, being in no way responsible, superadded his promise to the liability of his son.

His Honor held, that this being a new promise, and supported by a sufficient consideration, the plaintiff was entitled to recover.

Although a new promise on the part of the father, it was not substituted for the liability of the son, and did not release the son from his accountability to the plaintiff. It is said here, that there was a new consideration for the promise of the defendant. Admit that there was, and it does not help the plaintiff.

In the cases above cited, it is said that "it required no statute to make void a promise, not founded upon a consideration. It is only in cases where there is a consideration to support the promise, that the statute of frauds must be called into action."

PER CURIAM. *Venire de novo.*

KENNETH H. WORTHY *v.* JOHN C. BARRETT, and others.

One who applies for a Mandamus to compel his induction into an office, must show affirmatively that he is entitled to hold such office.

The distinction between *officers* and *placemen*, is, that the former are required to take an oath to support the Constitutions of the State and of the United States; whilst the latter are not.

All officers under the government of the United States are either *Legislative*, *Executive* or *Judicial* officers.

Sheriffs, County Solicitors and other officers required to take an oath to support the Constitution of the U. S. by the laws of this State [Rev. Code, ch. "Oaths," &c.,] are within the operation of Article XIV of the Amendments to the Constitution of the United States, disqualifying certain persons from holding office.

MANDAMUS, allowed by *Buxton, J.*, at Fall Term 1868, of the Superior Court of Moore.

The petitioner had received a majority of the votes cast in Moore county at the election of April 1868, for the office of sheriff, but upon his offering to qualify before the Commissioners of the county, a majority of the latter refused to allow it, upon the ground that he was disqualified under the XIVth Article of the Amendments to the Constitution of the United States. Thereupon the petitioner applied to his Honor for this writ. His Honor upon consideration allowed it, and the defendants appealed.

The only objection urged to the qualification of the petition, arose from the fact that he had been elected, sworn in, and acted, as sheriff of Moore, both before and during the late war between the United States and the Confederate States.

Attorney General, and *Rogers & Batchelor* for the appellants.
Phillips & Merrimon, contra.

READE, J. It is insisted for the petitioner, that the County Commissioners for Moore county have no power to enquire as to his qualifications; that their duty is to administer to him the oath prescribed by law and to receive his bond; that their duty is merely ministerial, and involves the exercise of no discretion, and that the Court will enforce its performance by mandamus, and leave the petitioner's right to hold the office to be tested by proceedings under a *quo warranto*. The solemn act of administering an oath and inducting into office, may not be merely ministerial. But if it were, the Court will not compel them to do wrong, if it be clear that they did right.

Our statute provides that "no person prohibited from holding office by section 3 of the Amendment to the Constitution of the United States, known as Article XIV, shall qualify under this act or hold office in this State." Acts of 1868 ch. 1. sec. 8.

The Fourteenth Article of the Amendments to the Constitution of the United States, sec. 3, is as follows:

"No person shall be a Senator or Representative in Con-

gress, or Elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of the members of each House remove such disability."

Senators and Representatives in Congress, members of the State Legislature and all executive and judicial officers, both of the States and of the United States, shall be bound by oath or affirmation, to support the Constitution. Art. 6, sec. 3. Constitution of the United States.

The petitioner was a sheriff before and during the rebellion, and the question is whether he is disqualified from holding the office of sheriff now, by reason of section 3 of Article 14, cited above. The government of the United States is divided into three branches—Legislative, Executive and Judicial. These three parts make one whole. There is no other part or parcel. It follows that there can be no office in the government that is not in one of these Departments. There can be no officer unless he be the incumbent of an office. Therefore there can be no officer except he be in some office in one of these three Departments. If he is in office in the legislative department, then he is a legislative officer; if in the executive, he is an executive officer, and if in the judicial, he is a judicial officer. But note! It is not every one who is *of* these departments that is an officer. Every office is of these departments, but not *vice versa*. Members of the legislature are not officers. Theirs are *places* of trust and profit, but not *offices* of trust and profit. So in the other departments. As in the judicial, we have Judges, Sheriffs, Clerks, &c,, who are *officers*, and Jurors, Commissioners, &c., who are *placemen*. Nor is this a distinction without a difference, for our Legislature speaks distinctively of *offices* of trust or profit and of

places of trust. Rev. Code, c. 77, s. 1. And the fourth section of the same chapter is as follows: "Every officer and other person, who may be required to take an oath of office, or an oath for the discharge of any duty imposed on him, and also the oath appointed for such as hold any office of trust or profit in the State, shall," &c., &c., which shows that every person who is called upon to perform public duties, and takes an oath to discharge the duties is not necessarily an *officer*.

Let us consider,

1st. Is a Sheriff an officer? An office is a right to exercise a public or private employment, and to take the fees and emoluments; in which one has a property; and to which there are annexed duties; and with us in public offices, oaths to support the Constitution of the State and of the United States. I do not know how better to draw the distinction between an *officer* and a mere *placeman*, than by making his oath the test. Every *officer* is required to take not only an oath of office, but an oath to support the Constitution of the State and of the United States. Rev. Code, chap. on "Oaths." Whereas every mere *placeman* is simply required to take an oath to perform the particular duty required of him, as in the case of jurors, commissioners, &c., and takes no oath to support the Constitution of the State, or of the United States.

2d. Does the Sheriff's office require him to take an oath to support the Constitution of the State, and of the United States? Unquestionably it does. "Every member of the General Assembly, and every person who shall be chosen or appointed to hold any office of trust or profit in the State, shall, before taking his seat, or entering upon the discharge of the duties of the office, take and subscribe the following oath," &c. Rev. Code ch. "Oaths." Then follows the oath to support the Constitution of the State, and the 5th section requires that they shall also take an oath to support the Constitution of the United States.

The following are the officers in North Carolina who are required to take an oath to support the Constitution of the

United States: Attorney General, State and County Solicitors, Clerk and Master in Equity, Clerk of the Supreme Court, Clerk of the Superior Court, Clerk of the County Court, Comptroller, Constable, Coroner, Entry Taker, Governor, Inspectors of flour, Tobacco, &c., Judges of the Supreme Court, Judges of the Superior Court, Justice of the Peace Public Treasurer, Ranger, Register, Secretary of State, Sheriffs, Standard Keeper, Stray Valuers, Surveyor for the county, Trustee for the county. The foregoing are taken from Revised Code, chap. "Oaths," and to them may be added: Mayors of towns and cities, upon whom are cast magisterial duties.

Any person who held any of these offices before the rebellion, and then engaged in the rebellion, is prohibited from holding office until relieved by Congress.

3rd. What will amount to having engaged in the rebellion?

(1st.) Holding any of these offices under the Confederate government.

(2d.) Voluntarily aiding the rebellion, by personal service, or by contributions, other than charitable, of any thing that was useful or necessary in the Confederate service.

4th. Members of the Legislature are also excluded from office, although they are not officers, by the express terms of the Fourteenth Article. But the clerks and other employees of the Legislature, are not excluded. And thence an argument is drawn against the position we have taken; for they say, as only the principal persons in the Legislative Department are excluded, it shows that only the principal persons in the other Departments were intended. But is not the strength of the argument the other way?—for if in terms it is confined to the principal persons in the Legislative Department, and in terms is not confined to the principal persons in the other Departments, but extends to "any"—all—why the difference in *language*, unless there was to be a difference in the sense? We are not called upon to explain *why* a difference was made, nor do we know that we can give the true reason; but quære—are there any *officers in* the Legislative Department? The

members,—the principal persons are not officers. There are not many persons connected with this Department, except the members; and the few that are, are mere *placemen*. None of their employees are required to take an oath to support the Constitution of the State, or of the United States, and no oath of office even is prescribed for them in the Rev. Code, Chap. "Oaths," or elsewhere, so far as we know, nor are we aware, that it is usual for them to take any oath at all. But in the other Departments all *officers* are required to take an oath of office, and also an oath to support the Constitution of the State and of the United States; and all mere placemen are required to take an oath of office, or an oath to perform the particular duty required.

In the discussion at the Bar, the question was considered as if it depended upon, whether the officer might not be ministerial, and in that sense neither executive nor judicial. That learning is useful when we are considering the questions of the duties and liabilities of officers, but it does not help us here, for though he be ministerial here, yet he is ministerial either in the executive or judicial department, and his being such and taking an oath to support the Constitution, excludes him from office. *The oath to support the Constitution is the test.* The idea being that one who had taken an oath to support the Constitution and violated it, ought to be excluded from taking it again, until relieved by Congress.

Some confusion was caused in the public and in the professional mind, by reason that the Attorney General of the United States, was called upon for an Opinion, and it was published, as he said, before he matured it. In that Opinion, May 24th 1867, it was intimated that only the principal State officers and not the county officers were included; but on the 12th June, 1867, he published his considered Opinion, and in that he says:

"12. All the Executive or Judicial officers of any State, "who took an oath to support the Constitution of the United "States, are subject to disqualification, and in these I include "*county officers*, as to whom I make a reservation in the

"Opinion heretofore given. After full consideration, I have "arrived at the conclusion, that they are subject to disqualifi- "cation, if they were required to take as part of their official "oath, *the oath to support the Constitution of the United States.*

"13. Persons who exercised mere agencies or employments "under State authority are not disqualified; such as Commis- "sioners to lay out roads, Commissioners of Public Works, "Visitors of State Institutions, Directors of State Banks, or "other State Institutions, Notaries Public, Commissioners to "take the acknowledgement of deeds, and Lawyers."

There is error in the order for peremptory *mandamus*.

PER CURIAM. Petition dismissed with costs.

AMOS EVANS Administrator, &c. *v.* T. C. SINGELTARY.

The report of an administrator, who had been licensed to sell land by a County Court, was returned and confirmed, and an order made, to collect and make title; *held*, that upon its appearing afterwards, by the results of a judgment and execution, that the purchase money could not be collected, it was not competent for the County Court to set aside the sale. The jurisdiction of the Court in cases of such sales is at an end upon the confirmation of the sale, and the order to collect and make title.

(*Thompson* v. *Cox*, 8 Jon. 311; In the matter of Yates, 6 Ire. Eq. 212, cited and approved.)

PETITION by an administrator to sell land, before *Jones, J.* upon a motion in the case, at Fall Term 1868, of the Superior Court of PITT.

The petition had been filed by the plaintiff to August Term 1866 of the County Court of Pitt. In the course of the proceedings a sale was made to the defendant, which upon the report of the administrator, was confirmed. Thereupon it was ordered that the money should be collected when due, and title

made. The note was not paid at maturity, and thereupon suit was brought, and execution issued. Nothing having been made under the execution, the plaintiff removed the case into the Superior Court, and gave notice to the defendant that at Fall Term 1868 he would move the Court to set the sale aside.

Upon the motion being made, the Court set the sale aside, and ordered the plaintiff to resell; and the defendant appealed.

No counsel for the appellant.

Fowle & Badger, contra

DICK, J. We regret the necessity of overruling the interlocutory order of his Honor, in the Court below, as it is in accordance with the equity of the matter; but the strict rules of law must be observed in a Court of law.

Previous to the Act of 1846 (Rev. Code ch. 46, s 44 &c.,) an administrator had no power to sell the lands of his intestate to pay debts and charges of administration. The tedious and expensive method of subjecting the real estate of deceased persons to the payment of debts, induced the legislation above referred to.

That Act vested a limited equity jurisdiction upon the subject, in the County Courts, but that jurisdiction is at an end upon the confirmation of the sale of land and the order to collect the purchase money and make title. This limited jurisdiction cannot be enlarged by implication. *Thompson* v. *Cox, et. al.* 8 Jon. 311.

The transfer of the case before us from the County to the Superior Court, did not enlarge the jurisdiction, as it was on the law side of the docket, and it must be governed by the laws which were in existence prior the adoption of the Code of Civil Procedure.

It this case were in a Court of Equity, the interlocutory order of his Honor would be right, as that Court has the extensive remedial jurisdiction of decreeing specific performance of such contracts. *In the matter of Yates*, 6 Jon. Eq. 212.

As the plaintiff has failed to collect the purchase money by an action at law, and Courts of Equity are now abolished, he may find adequate relief by special proceedings, provided for in the Code of Civil Procedure, as they now furnish equitable remedies. As an incentive to active diligence on the part of the plaintiff, we think proper to suggest, that he may have made himself personally responsible for the debt, by his release under seal to Richard Singletary, one of the sureties of the defendant.

The interlocutory order appealed from must be over-ruled. Let this be certified, &c.

PER CURIAM. Order overruled.

W. DEVRIES & CO. *v.* E. L. PHILLIPS and MOSES HAYWOOD.

A mere collateral declaration as to a past transaction is not admissible as part of the *res gestæ; therefore*, where one whilst engaged in renting a store room, and arranging for removing goods thereto, stated that "he had bought some goods from Mr. Haywood," held to be inadmissible.
(*State* v. *Dula*, Phil. 211, cited and approved.)

ORIGINAL ATTACHMENT (S. C. *ante* 53) tried before *Buxton, J.*, at Fall Term 1868 of the Superior Court of CUMBERLAND.

Upon the trial of an *interplea* involviug the title of one Jernigan to the goods attached, one John H. Cook was examined as a witness for the plaintiff, and amongst other things said that in December 1866 Jernigan (who since has died) came to the house of the witness, and stated that he had bought some goods of Mr. Haywood, and wanted to rent a place in the store of the witness to put them in; that witness rented the store room to him, and loaned him some goods boxes, and he came that day with the goods, &c.

The defendants excepted to this evidence, but it was admitted by the Court.

Verdict for the plaintiffs; Rule for a new trial; Rule discharged, Judgment and Appeal.

Phillips and N. McKay, for the appellants.

Fuller and Merrimon, contra.

PEARSON, C. J. That part of the testimony of Cook, in which he says: "Jernigan stated that he had bought some goods of Mr. Haywood" was not admissible, and it was error not to rule it out. This was *a mere collateral declaration, as to a past transaction*, and cannot, in any point of view, be considered as a part of the act, to-wit: that Jeringan went to Cook, and rented from him the front part of the store, and borrowed some boxes to put goods in, and came that day with the goods. His saying, "he wanted to rent the store to put some goods in," was a part of the act, but what he said about having bought the goods of Haywood, although it occurred at the same time, was accidental and collateral: and its truth or falsehood depended entirely upon his personal veracity. The ruling in *State* v. *Dula*, Phil. 211, and the reasoning in that case is so apposite to this question, that it is unnecessary to do more than to adopt it as our opinion in this case. The only difference is, that there the collateral declaration followed, here it preceded, the act, and, on that account, it was rather more difficult to separate it; but the principle is the same, and it was the duty of the Court to separate it, and rule it out, so that the jury should not give any weight to it.

For this error, there must be a *venire de novo*. It is not necessary to notice the other points.

PER CURIAM. *Venire de novo.*

T. A. FLEMING *v.* BENJAMIN FLEMING.

Where a testator leaves two wills, that of later date not expressly revoking the former, and the former is propounded for probate, *held* to be proper for the Court to leave to the jury the question, whether it was the intention of the testator that the former paper-writing should be his will.

CAVEAT, tried before *Buxton, J.*, at Spring Term 1868 of the Superior Court of PITT.

The testator died in the army of the Confederate States in 1864. He left behind him two holographs of different dates, making in each very much the same disposition of his property. His widow, who was the sole beneficiary under both papers, propounded the former one for probate.

Under the ruling of his Honor there was a verdict establishing the paper propounded, and the caveator appealed.

Jenkins and Fowle & Badger, for the appellant.

Biggs, contra.

READE, J. The paper-writing propounded, was executed with all the formalities which the law requires. The paper-writing offered in evidence by the caveator, of a subsequent date, executed with like formalities, did not in terms revoke the paper-writing propounded, and the disposition of the testator's property is substantially the same in both.

His Honor properly left it with the jury to say whether it was the intention of the testator that the paper propounded should be his will, and the jury found that fact in favor of the paper propounded.

It was, therefore, properly admitted to probate. Whether the second paper might not have been admitted to probate also, along with the first, if it had been propounded, cannot be determined by us, nor is it important, for both papers are substantially the same.

This will be certified, &c.

PER CURIAM. There is no error.

DOE *ex dem* GEORGE DAVIS *v.* THOMAS ATKINSON.

In an action of ejectment, the only questions which arise in regard to the title are as to its validity *at law.*

EJECTMENT, tried before *Russell, J.*, at Fall Term 1868 of the Superior Court of NEW HANOVER.

The only question raised upon the trial was as to the estate given to the defendant, in the land in question, by the following clause in the will of F. J. Hill, deceased:

"I give, devise and bequeath unto Bishop Thomas Atkinson, Bishop of North Carolina, and to his heirs and assigns, my house and lot, from and after the death of my wife, in trust and for the use of the poor orphans of the State of North Carolina, and the said Bishop and his successors to hav e the right to select such orphans as shall receive benefit under this trust and bequest, and he shall direct and control said trust in the best way for the support of such orphans and the formation of their minds, and education, as to him may seem best."

At the time of bringing the action Mrs. Hill was dead.

His Honor in the Court below having upon the case agreed, given judgment for the defendant, the plaintiff appealed.

Strange, for the appellant.

Person and Moore, *contra.*

PEARSON, C. J. Upon the argument the attention of the counsel of both parties, was mainly directed to the validity of the trust declared by the will.

In this action the Court is confined to the question of the legal title, and it is not at liberty to express an opinion, in respect to the trust. It is clear, that, under the devise to "Thomas Atkinson and to his heirs and assigns," the defendant is entitled to the legal estate in fee-simple. The addition of the words "Bishop of North Carolina" has no legal effect, under the maxim, *utile per inutile non vitiatur*. There is no error.

PER CURIAM. Judgment affirmed,

FRANK W. THORNTON *v.* A. G. THORNTON, and others.

A purpose to damage does not make an act, otherwise lawful, *injurious* in a legal sense.

The relation between a creditor and a surety does not oblige the former to active diligence in collecting his debt out of the principal.

The damage received by a surety in consequence of the creditor's countermanding an execution ordered by the former against the property of the principal under a judgment obtained by the creditor against principal and surety both, is *damnum absque injuria*, and gives the surety no cause of complaint which a Court will hear.

Where such creditor, in his character as an attorney, obtained an adjudication in bankruptcy against the principal judgment debtor, and thus prevented any lien from attaching upon a part of his property, *Held*, that the surety could not complain.

(*Bizzell* v. *Smith*, 2 Dev. Eq. 271, *Cooper* v. *Wilcox*, 2 D. & B. Eq. 90, *Nelson* v. *Williams*, *Ib.* 118, *Pipkin* v. *Bond*, 5 Ire. Eq. 91, *Carter* v. *Jones*, *Ib.* 196, *Smith* v. *McLeod*, 3 Ire. Eq. 390 cited and approved.)

MOTION to dissolve an Injunction, heard before *Buxton*, *J.*, at Fall Term 1868 of the Court of Equity for CUMBERLAND.

The plaintiff alleged that he was surety to the defendant Thornton upon a bond due to the defendant Hinsdale as the administrator of one Johnston, and that judgment had been taken thereon in Cumberland County Court, which judgment specified the relative situations of the defendants therein, as *principal* and *surety:* that on an execution thereunder certain property of the principal had been sold; that the said principal had considerable landed estate in the counties of Harnett, Johnston and Moore, to which executions had not been issued, and thereupon the plaintiff Thornton, as surety, had on the 16th day of May 1868, called upon the clerk to issue executions to such counties, but that Hinsdale had refused to allow them to be issued, and had issued another to Cumberland county and was threatening to sell the plaintiff's goods, &c., thereunder, and also that as attorney for certain northern creditors, on the 4th of May, 1868, he had caused a *fiat* in bankruptcy to be issued against the defendant Thornton, thereby preventing any lien upon his property in other counties, to be

created under said judgment. The prayer was that Hinsdale should be enjoined from further proceeding upon the execution against the plaintiff, and for further relief.

The defendants answered, and upon motion of the defendant Hinsdale, his Honor below dissolved the injunction, and the plaintiff appealed.

B. Fuller and Merrimon, for the appellant.

Hinsdale, contra.

The case stated by the bill does not warrant the relief sought; as a creditor is not bound, in favor of a surety, to use active diligence against the principal. *State Bank* v. *Wilson*, 1 Dev. 484; *Coooper* v. *Wilcox*, 2 D. & B. Eq. 90; *Nelson* v. *Williams*, *Ib.* 113; *Pipkin* v. *Bond*, 5 Ire. Eq. 91; *Carter* v. *Jones*, *Ib.* 196; *Smith* v. *McLeod*, 3 Ire. Eq. 390; *Bizzell* v. *Smith*, 2 Dev. Eq. 28; Byles on Bills, 239 and cases cited; *Trimble* v. *Howe*, 16 John, 152, *Beebe* v. *Bank*, 7 W. & S. 375. He may even withdraw an execution already levied on property of the principal, without giving surety a legal right to complain. *Forbes* v. *Smith*, 5 Ire. Eq. 369, *Pole* v. *Ford*, 2 Chitty 126.

No lien can be created under a *fi. fa.* after an adjudication of bankruptcy. Act of 1867, ss. 21 and 44, *Jones* v. *Leach*, 5 Law Rep. 55; *Pennington* v. *Sale*, 1 B. R. 157. In re Smith, 1 B. R. 169; *Crawshay* v. *Thornton*, 2 Myl. & Cr. 1; *Hutton* v. *Cooper*, 6 Ex. 159; Deac. Bank, 469 n. 5.

RODMAN, J. The bill in this case complains that certain acts were done by the defendant Hinsdale fraudulently, and for the purpose of injuring the plaintiff. This averment is quite immaterial if the acts of the defendant were lawful; because in such a case, if they damaged the plaintiff, it would be *damnum absque injuria*. An injury is damage resulting from an unlawful act,—Sedgwick on Dam. 31. The maxim is true "*actus non reus, nisi mens sit rea*;" but it does not follow that the purpose to damage makes an act, otherwise lawful, injurious in the legal sense. A creditor may purpose to oppress

and break up his debtor; nevertheless, he is entitled to recover his debt.

The question presented is thus cleared of immaterial allegations, and left to rest upon the acts of the defendant Hinsdale.

The relations between a creditor and a surety are pretty well settled in this State. The creditor is not bound to sue, or to active diligence in collecting his debt out of the principal debtor. But if the creditor gives time to the principal debtor, that is, if by any valid contract he debars himself from the immediate prosecution of his remedy, or if he releases any security which may have been acquired from the principal debtor, he thereby discharges the surety. This principle will be found established in a number of cases. *Bizzell* v. *Smith*, 2 Dev. Eq. 27; *Cooper* v. *Wilcox*, 2 D. & B. Eq. 90; *Nelson* v. *Williams*, 2 D. & B. Eq. 118; *Pipkin* v. *Bond*, 5 Ire. Eq. 91; *Carter* v. *Jones*, 5 Ire. Eq. 196, *Smith* v. *McLeod*, 3 Ire. Eq. 390. It is contended that the creditor is bound to protect his "potentialities," as strictly as he is any complete liens, which he may have acquired. This doctrine may prevail in some of the States, but has never been recognized in North Carolina. If the creditor is bound to take out an execution, it may, with equal reason be held that he is bound to bring suit; and the principle would necessarily lead to the imposing the duty of active diligence on the creditor, a doctrine which has been often distinctly denied in this State.

It remains to inquire, how the acts of the defendant Hinsdale, are qualified by these principles. At March Term 1868, of Cumberland County Court, the defendant Hinsdale, recovered a judgment against A. G. Thornton, and the plaintiff Frank Thornton, and others, who were sureties of A. G. Thornton. A *fi. fa.* immmediately issued to the county of Cumberland, which was levied on certain property, among which was a house in Fayetteville, which was not sold by reason of a military order prohibiting it. The plaintiff took out an *alias fi. fa.* to Cumberland county, tested of June Term 1868, which continued his lien on the property of the principal debtor.

So far clearly nothing was done to the injury of the surety. The main complaint, however, is that the creditor not only failed to issue his *fi. fa.* to the counties of Moore, Harnett and Johnston, where the principal debtor had property, but refused to allow the sureties to do so, and countermanded an execution which the sureties had procured to be issued. We are inclined to think that if the execution had issued, it would have given the plaintiff in the judgment a lien on the property of the defendant in those counties, paramount to the claim of the assignee in bankruptcy. In the view that we take of this case, it is unnecessary to decide that question; we assume that the sureties were damaged by the omission.

But was it the special duty of the creditor to issue the execution? It was in the power of the sureties, by paying off the judgment, and taking an assignment of it for their use, to have obtained a full control over all the remedies which were in the power of the plaintiff. This might have been inconvenient to them, but it was a part of the liability which they had assumed by their contract, and from which the plaintiff was under no obligation to relieve them. If they were damaged, it was a damage without injury, inasmuch as it was not occasioned by any unlawful act of the creditor, or by the omission of any duty which he was bound to perform.

But the plaintiffs in this case complain that Hinsdale, as attorney for certain Northern creditors of the principal debtor, obtained an adjudication in bankruptcy against the principal debtor on the 4th of May 1868. There was nothing unlawful in this, and even if the purpose of Hinsdale were such as is charged, that, as has been shown, would not convert a lawful act into an unlawful one.

We do not think that sections 124 and 125, ch. 31, of the Revised Code have any bearing in this case. Section 125 is directed to the sheriff. The plaintiff in his execution must follow the judgment; he must sue it out against all the defendants; the execution having been placed in the hands of the sheriff, he must first sell the property of the principal, if he have any; but the plaintiff cannot be supposed to know that

the principal has property, and cannot control the order in which the sheriff sells. The injunction must be dissolved, and the defendant will recover his costs in this Court.

Let this be certified, &c.

PER CURIAM. Injunction dissolved.

JOHN W. SCOTT *v.* W. P. ELLIOTT and others.

A judgment in an action of Replevin, brought under Rev. Code, ch. 98, for the penalty of the bond given by the defendant according to the provisions of § 4, without a previous judgment against the defendant, as at common law, is erroneous.

In such case the judgment should be, that the plaintiff recover *the thing*, and in case it cannot be had, then *the value* assessed; and *also damages* for the caption and detention, with his costs; and, superadded thereto, a judgment against the defendant and his sureties, for the penalty of the bond, to be discharged by performing the former judgment.

The *value* should be assessed as at the time of the trial, and not at that of the caption.

It is erroneous to assume that six *per cent.* is the proper measure of damages in such case; it might be more, or less.

Semble, that the judgment in such cases should not include a sheriff who has been fixed as special bail of the defendant, but that he is to be reached by *sci. fa.*, and entitled to surrender his principal in discharge of his liability.

The provision in the Act, that Replevin may be maintained against persons in possession, *wherever Trover or Detinue will lie*, is not universal, but *sol modo* only, reference being had to the different natures of the actions spoken of.

(The Replevin Act, Rev Code, ch. 98, construed by PEARSON, C. J.)

REPLEVIN, tried before *Mitchell, J.*, at Fall Term, 1867, of the Superior Court of CHATHAM.

The action had been brought under the provisions of the Revised Code, ch. 98, for a steamboat which remained in the hands of the defendant, he having given the required bond. Upon the trial it appeared that the sheriff had levied an attachment upon the boat under the Act giving a lien for work

done and materials furnished to vessels; that it subsequently had been condemned as being "perishable" by three freeholders, and sold; and that upon the sale it was purchased by the plaintiff. Afterwards it had been seized by the defendant, and upon demand he refused to surrender it.

The Court instructed the jury that the plaintiff was entitled to recover, and that they must find by their verdict the value of the boat, and also damages for the caption and detention, which in this case would be six *per cent.* on the value of the boat from the time of its caption to the first day of the term.

There was a verdict for the plaintiff, that the value of the boat was $3,000, and they assessed the damages at $1,920.00. Judgment was entered as follows: "Thereupon it is considered by the Court that the plaintiff recover against the defendant Elliott, and George Harris his surety to the bond returned with the writ, and E. D. Hall as special bail, the sum of six thousand dollars penalty of said bond, and all costs of suit, which may be discharged by the surrender of said steamer, and payment of damages and costs."

As part of the record was also sent up a transcript of an action by *scire facias* between the plaintiff Scott, and E. D. Hall, as sheriff of New Hanover, in which Hall was called upon to show cause why he should not be adjudged special bail of the defendant Elliott. In this case judgment was given, by default at Fall Term 1867, against the defendant.

From the judgment in the principal case the defendants appealed.

Phillips and *Battle*, for the appellants.

Howze and *Manning*, *contra*.

PEARSON, C. J. From the very loose and imperfect manner in which the case is made up, this Court is left to grope its way in the dark.

In a paper signed by the attorneys it is set out: "The defendants insisted that the measure of damages should have been the amount of the claim upon which the attachment was

issued." The proceedings in that case cannot make a part of this, and we are not even at liberty to take *judicial* notice of the fact that *Bryan* v. *Steamer* "*Enterprise*" 8 Jon. 260, has any connection with our case; so we are not informed as to "the amount of the claim upon which the attachment has issued," nor do we know whether the sale made by the sheriff of the Steamboat "Enterprise" as perishable property, was held valid or not. Any one who will read the papers in this case must be satisfied, that an amendment of the law as to the manner of sending up cases for the determination in the Supreme Court has become necessary.

We infer from what is set out in the papers sent up to us, that under the instructions of his Honor, the jury assessed the value of the steamboat at the time she was taken by the defendant in 1857, and also assessed damages for the detention, at the rate of six *per cent.* per annum upon that valuation, from the time of the taking up to the time of the trial, at Fall Term 1867, and we see from the transcript that his Honor did not render judgment against the defendant, "that the plaintiff recover the steamboat, and the damages assessed for the caption and detention, together with costs, and if the boat cannot be had, the value of the boat as assessed by the jury." But the judgment is, "thereupon it is considered by the Court that the plaintiff do recover against the defendant Elliott and George Harris his surety to the bond returned with this writ, and E. D. Hall, sheriff and special bail, the sum of $6.000, penalty of said bond, and all costs of suit, which may be discharged by surrender of said steamer, and payment of damages and costs."

We think there is error in having the value assessed at the date of the caption, instead of at the time of the trial; and also in assessing six *per cent.* per annum upon such value, from the caption up to the time of trial, as the rule of damages for caption and detention. There is also error in the judgment.

As to the value. The statute, Rev. Code ch. 98. "Replevin." requires the plaintiff to swear to the value at the time of caption or detention. This is for the purpose of fixing the amount of the bond, which the Clerk is to take of the plaintiff

in double the sworn value, conditioned to perform the final judgment; the penalty being double the sworn value to compel a return of the property, if it can be had, otherwise to secure payment of its value, together with damages for its detention, during the pending of the action, and the costs. Sec. 2nd directs the Sheriff to allow the property to remain with the defendant, provided he gives bond in double the sworn value conditioned to perform the final judgment; the penalty being in double the amount to compel the return of the property if it can be had, otherwise payment of its value, together with damages for caption, detention and costs.

So far the meaning is clear, but the 3rd and 4th sections are obscurely worded, and it is necessary to resort to construction in order to make the several provisions harmonize, and give effect to all. Sec. 3, "If the property shall have been delivered to the plaintiff and he shall fail to recover, the Court shall forthwith direct an enquiry of the value of the property and the damages sustained by the defendant by the detention of his property," and judgment shall be rendered against the plaintiff and his sureties for the penalty of his bond; which may be discharged on surrender of the property and payment of the damages and costs." The difficulty is, if the judgment can only be discharged by the *surrender of the property*, and not by the payment of its assessed value if the property can not be had—why direct an inquiry of the value of the property? Can a construction be justified which gives no effect whatever to this clause, and assumes that an useless labor is imposed upon the Court and jury? Certainly not; when from a consideration of the gravamen of the common law action, for which this is intended as a substitute or more properly speaking an extension, it is seen that the purpose of this assessment of the value of the property, is to provide for a case when the property cannot be had. If this be the true construction, it is manifest that the value should be assessed as at the time when such value is to be taken in lieu of the property, should it turn out that it has been eloigned or destroyed.

Section 4, under which our case falls, "If the property shall have remained with the defendant, and the plaintiff on the

trial shall recover, the jury shall assess the value of the property, as likewise the damages for its caption and detention, and the plaintiff shall recover against the defendant and his securities, the penalty of his bond and costs of suit, which may be discharged by surrender of the property and payment of the damages and costs." To one accustomed to judicial forms and entries, this language is actually painful by reason of the inartificial use of technical words, and the confusion of ideas which it occasions. It is taken from the wording of the Act of 1828. "*The jury shall assess the value of the property*" for what purpose, if the plaintiff is to recover against the defendant and his sureties the penalty of the bond and costs of suit: that is if judgment is to be rendered for the amount of the penalty of the bond to be discharged only by the *surrender of the boat* and the payment of the damages and costs? It would seem that the utmost that could be exacted in case the boat could not be surrendered in order to discharge the penalty, was the payment of the value, damages and costs. To show that no effect can be given to the provision requiring the value of the property to be assessed, unless such value is to be a discharge of the judgment, in lieu of the property in case it cannot be had, together with the damages and costs; and that, if so, the value must be assessed at the time of the trial, we refer to what is said in reference to the construction of sec. 3. But besides all this, sec. 4 assumes that the plaintiff is to *recover*, that is, to have judgment against the defendant. What should the judgment be? "That the plaintiff recover the thing, and in case it cannot be had, the value assessed and also damages for the caption and detention, and his costs," and superadded to this (following the obligation of the bond), the Court is to give judgment that the plaintiff recover of the defendant and his sureties the amount of the penalty of the bond, to be discharged by performing the former judgment. We have seen what that judgment should have been, and there is nothing to justify the construction, that after prescribing the form of the condition, it was the intention to depart from it, and restrict a discharge of the judgment given

for the penalty, to a surrender of the property, to the exclusion of its discharge in respect to the property, in case it could not be had, by payment of the value assessed. Suppose the property to have been destroyed, pending the action, by the act of God, without default on the part of the defendant. It would be monstrous to infer an intention on the part of the law-makers to require the defendant and his sureties to pay the whole penalty, unless he surrendered the property, a thing which was impossible. It is a familiar principle of law that when the condition of a bond becomes impossible by the act of God, the condition is saved.

But it is objected—on what ground assume that the judgment against the defendant should be, that the plaintiff recover the thing and damages for detention and costs, and *in case it cannot be had*, then the value assessed, as in the *action of detinuo?* Why may not the judgment against the defendant be that the plaintiff recover the amount of damages assessed by the jury for the wrongful act of the defendant, including the value at the time of conversion and interest and costs, as in the *action of trover?* There are two answers: The statute does not direct that the jury shall assess damages for the wrongful act of the defendant, as in *trover*, but requires the jury to assess the value of the property, and damages for its detention, as in *detinue*. In the second place, although the word "*trover*" is used in the statute the action of replevin given by it is restricted to cases where *detinue* would lie, for it only applies to cases, *where the defendant is in possession*, at the time the writ issues. So "*trover*" must be used as covering only the same ground as *detinue*, or else the word is out of place and misapplied. One kills my hog—I can maintain *trover*, but I cannot maintain *detinue* or *replevin*, either at common law or under the statute, for in *detinue* or *replevin*, the plaintiff demands restitution of his property, and such demand is idle when the property is not *in esse* and is not in the possession of the defendant; so it is clear the word "*trover*" is inartificially used, unless it be confined to cases where *detinue* would lie, and it must be treated as an expletive.

We have so far treated this statute as standing by itself; but when taken in connection with the common law actions of replevin and detinue on the one side, and trespass *de bonis asportatis* and trover on the other, the construction is obvious. In replevin and detinue the plaintiff asserts the property to *continue to* be *his*, and *the* object of the action is to recover the specific thing. In replevin at common law, the thing is returned to the possession of the plaintiff pending the action, so if it dies or is destroyed the loss falls on him, and he can only recover damages, for the caption and detention "*quousque* the replevin." In detinue the thing remains in possession of the defendant pending the action, but the plaintiff asserts the property to *continue to be his*, and the gravamen of the action is to recover the specific thing, so that if it dies or is destroyed, the loss falls on him, and it is settled that the action cannot be further prosecuted, except to recover damages for the detention. So we see what judgment the plaintiff is entitled to in detinue. And the object of the statute is to extend the action of replevin to all cases where detinue lies,—with this modification, that the defendant is to retain possession pending the action, provided he executes a bond conditioned "to perform the final judgment.

In trespass *de bonis asportatis*, and in trover, the gravamen of the action is, that the plaintiff has been wrongfully *deprived of his property*, and the plaintiff sues to recover damages for the injury, but he asserts no *further claim to the property*, and if it be lost or destroyed it is no concern of his. So when the statute under consideration requires the Court forthwith to direct the jury to assess the value of the property, it can have no reference to these two actions, and must refer to the action of replevin at common law, and to the action of detinue—where the thing is demanded, or, if it cannot be had, its value, as well as damages for its detention.

As to the measure of damages, we can see no ground for making six *per cent.* interest on the sworn value, the rule, and his Honor erred in adopting it. The earnings of the boat might be more or less. As it does not appear whether the boat

is in a condition to be surrendered, or has been destroyed, and this may materially affect the question, we give no opinion in regard to it, further than to say, that the plaintiff is entitled to damages as well for the taking as for the detention, and has a right to full indemnity for the injury done to him.

This construction carries out the meaning of the statute—gives effect to all of its provisions, avoids an incongruity like that of giving judgment against the securities for an appeal without giving judgment against the principal, and also avoids the objection, that the Court had no power to give a judgment on the forth-coming bond, at variance with the conditions therein expressed.

3rd. It is not necessary to comment on the judgment, or to decide whether it could be made to include Hall, the sheriff, who, although fixed as special bail, could, it would seem, be only reached by *sci fa*, and was entitled to surrender his principal in discharge of his liability. There is error. This will be certified.

PER CURIAM. *Venire de novo.*

JOHN T. HOGAN and others, *v.* WM. J. HOGAN, Ex'r, and others.

A clause in a will providing—"and should there be anything at my death undivided, it is my will *that it be sold and equally divided* among my four sons after paying my funeral expenses and all just debts,"--in a case where the residue consisted of a considerable amount of money and choses in action, and an inconsiderable amount of other personal property, disposed of the whole of such residue.

A legacy of $1000 to A B "to pay her debts, and for her support as she needs it," does not warrant an executor in seeking out such debts, paying them off and retaining the amounts upon a settlement with the legatee.

[*Bradley* v. *Jones* 2 Ire. Eq. 245; *Alexander* v. *Alexander* 6 Ire. Eq. 229, and *Scales* v. *Scales* 6 Jon. Eq. cited and distinguished.

BILL, set for hearing upon replication and proofs, and transmitted to this Court from Fall Term 1866 of the Court of Equity for ORANGE.

The bill was filed by certain legatees and next of kin of Thomas Hogan deceased, against the defendants, as his executors.

It set forth that, by his will made on the 20th of November 1856, the deceased had, among other things, bequeathed to Martha Kirkland, one of the plaintiffs, one thousand dollars "to pay her debts and for her support as she needs it;" and after giving other legacies, had concluded as follows: "and should there be anything at my death undivided, it is my will that it be sold and equally divided among my four sons, after paying my just debts and funeral expenses;" that under this clause was not included, as they were advised, a considerable amount of ready money, notes, bonds and accounts that were on hand at his death; and that he died intestate in regard to them. The prayer was for an account, the payment of the legacies and distributive shares, and for further relief.

The answer denied that the deceased had died intestate as to any part of his estate, and in regard to the legacy due to Martha Kirkland, averred that it had been, with her consent, paid off by taking up debts due by her, and in paying an account standing against her upon the books of the testator. To this there was a replication.

An account having been ordered and taken, under a decree of this Court, exceptions were filed to it by the defendants and argued by counsel.

Graham, for the plaintiffs, upon the matter of the intestancy, cited *Teague* v. *Alexander*, 2 Dev. Eq. 348, *Bradley* v. *Jones*, 2 Ire. Eq. 248; *Alexander* v. *Alexander*, 6 Ire. Eq. 229; *McCorkle* v. *Sherrill*, *Ib.* 173; *Pippin* v. *Ellison*, 12 Ire. 61; *Scales* v. *Scales*, 6 Ire. Eq. 163; *Hastings* v. *Earp*, Phil. Eq. 5.

Phillips & Battle, contra.

The residue includes the money and choses in action. The decisions in N. C. upon this point have gradually, and perhaps inadvertently assumed a phase apparently to the contrary.

Frazer v. *Alexander* went upon special circumstances. *Bradley* v. *Jones* was argued only for the defendant, and the language varies from that before us. In *Alexander* v. *Alexander* the word is "property," at a time when it was thought in N. C. (as it is not now) that this did not include choses in action. *Pippin* v. *Ellison*, shows want of reliance on the state of authority in N. C. to that time, and presses the word "property," and other expressions. *Lowe* v. *Carter* 2 Jon. Eq. 377, has "property," and the language is not residuary. In *Scales* v. *Scales* the word is "estate," and the Court speaks of a "presumption." Is it a presumption "of law," or only "of fact," that notes are not to be *sold* under a will. At all events neither in that nor in any other case do we find that there has been submitted to the Court the construction now contended for by the defendants, to-wit, that it is more reasonable to modify the word *sell* by the word *property*, or *estate*, or *thing*, than *vice versa*. It is to be presumed (in the absence of special language as a context, to the contrary) that a testator does not intend to die intestate, and therefore that he used the word *sell*, for, *convert into money*, or a like phrase.

In *Hastings* v. *Earp*, the word is property. The later decisions ignore those before *Pippin* v. *Ellison*, which went upon a doctrine greatly modified in *Hurdle* v. *Outlaw*.

The only cases out of N. C. which we have found, hold a contrary doctrine, viz: that the primary intention is to convey *all*, and the *method* of division is only secondary. *Hearne* v. *Wigginton*, 6 Madd. 119; *Thornton* v. *Bunch*, 20 Ga. 791; *Spriggs* v. *Weems*, 2 H. & McH., 266; *Garrett* v. *Garrett*, 2 Stob. Eq. (at p. 232) *ex parte* Artz. 9 Md. 55.

READE, J. 1. The first exception is sustained. After several specific bequests, there is the following: "And should there be anything at my death undivided, it is my wish that it be sold and equally divided among my four sons, after paying my funeral expenses and all just debts."

There were on hand, undivided, a consiberable amount in money and choses in action, and an inconsiderable amount of

personal property, and the question is, whether the money and choses in action pass under the residuary clause.

It is so clear that the testator did not intend to die intestate as to anything, that we should feel but little difficulty in construing the clause, if it were not for several decisions of this Court, in cases somewhat like this, from which it is necessary to distinguish it.

In *Bradley* v. *Jones*, 2 Ire. Eq. 245, the words were, "all the balance of my estate, that is not given away, to be sold, and the money arising from the sale, I give, &c."

In *Alexander* v. *Alexander*, 6 Ire. Eq. 229, the words were "all the residue of my property, both real and personal, to be put to sale &c., out of the proceeds of which sale, &c."

In *Scales* v. *Scales*, 6 Jon. Eq. 163, the words were, "property shall be sold, and the money arising from the sale, &c."

In all those cases it is decided, that money on hand and choses in action did not pass, the prominent reason being, that they are not ordinarily the subjects of sale, and in all the cases, a *sale* was directed, and a division of the *proceeds*. And there are criticisms upon the words "estate," "property," &c.

The case before us is distinguished from those cited. (1.) The words here are as comprehensive as any that can be used. "Anything" includes *every* thing—every *thing*. (2.) In the cases cited, the property was to be *sold*; there was to be no division without a *sale*; for it was the *proceeds* of sale, that were to be divided. In our case, a sale is not indispensable. It is to be "sold and divided." Observe, not sold, and the *proceeds* divided, but "sold and divided" That is to say, it is to be *divided*, and in so far as a sale is necessary to a division, it is to be sold. If there be part money, part choses in action, and part property, the division, the main object, may be best effected by holding the money, collecting the debts, and selling the property, and then, when the whole is got together, dividing. Why might not this have been done in the cases cited? Because only the *proceeds* of the *sale* were to be divided. In this case, stress may also be laid upon the fact, that the division is directed to be made after his funeral

expenses, and just debts are paid, showing that it was the intention of the testator, that all that remained of his estate, was to be divided under the residuary clause.

II. The second exception is overruled. The legacy of $1,000 to Martha Kirkland "to pay her debts, and for her support as she needs it," was not adeemed in testator's life time, and has not been paid to *her* since his death. It was no part of the business of the executor to hunt up her debts and pay them off for her. It was his duty to pay it over to her, to be used at her discretion. It is alleged in the answer, that there are charges in the way of a book account against her by the testator, to the amount of $298, and the executor claims to retain that amount. He would have the right to retain any ascertained debt against her, due the testator, but there was replication to the answer, and there was no evidence to support it. There is an affidavit of the executor that he offered vouchers before the commissioner, of his having paid the legacy to Martha Kirkland, in accordance with the will, and that the commissioner refused to allow them. We suppose he means that he offered vouchers of his having paid off debts for her, as set forth in his answer, and we have said that that cannot avail him. If he has paid the legacy to *her*, he will be entitled to have the payment allowed when an execution shall be moved for.

The report will be reformed to correspond with this opinion, and, if the parties desire it, it will be referred to the clerk for that purpose.

PER CURIAM. Decree accordingly.

SAMUEL DONNELL *v.* THOMAS E. COOKE and others.

An administrator, who delivers the residue of an estate to the distributees, has no equity to call upon them to refund the amount of a debt paid by him afterwards, of which he had no notice at the time he delivered up the residue, unless he alleges and proves *special circumstances* showing that he was in no default, and relieving him from the imputation of negligence.

Where the case showed that the plaintiff knew at the time, that his intestate had been *administrator* as well as *guardian* of a certain estate, and that notes due *to* him as *administrator* were still outstanding; and in excuse of his ignorance of the existence of a debt of some $1,400 due by his intestate to such estate, he relied upon the fact that the Court records showed a settlement by the *guardian*, (such settlement including only the proceeds of a tract of land and a small amount of rent), *held*, especially as the records showed no settlement by the *administrator*, to have been gross negligence in him to pay over the residue to the distributees.

Where the existence of a fact *at a particular time* is important to a party, he must make a distinct allegation in regard to it in his pleading.

Parties seeking to be excused from the ordinary consequences of their actions, by reason of special circumstances, must exhibit candor and particularity in their statements concerning it.

(*Alexander* v. *Fox* 2 Jon. Eq. 106; *Marsh* v. *Scarboro* 2 Dev. Eq. 551, cited and approved.)

BILL, set for hearing upon pleadings and proofs at Spring Term 1868, of the Court of Equity for GUILFORD, and at Fall Term transmitted to this Court.

The bill (filed in 1861) alleged that the plaintiff, as administrator of John Rhodes, had amongst other things, paid over, some years before, to the defendants, as distributees, the residue of the personal estate of his intestate; that in 1846 his intestate had been guardian of certain infants named Witty, and as such had charged himself with $680 as due to them, and plaintiff in 1850 and 1851, before completing his administration, paid to one Jesse Wheeler as succeeding guardian, that amount; that in 1860 it was discovered that Rhodes' guardian returns were incorrect, by some $1,400, and that thereupon the wards, by their guardian, brought suit against the plaintiff as

NOTE.—Judge Dick did not sit in this case, having formerly been of counsel therein.

administrator, and compelled him to pay them out of his own pocket $1,430.54 and costs; that he had demanded this amount, making proper explanations, &c., from the defendants, but they had refused to pay, &c. The prayer was that the defendants should account and pay over, and for further relief.

The answers put the plaintiff upon strict proof of his claim.

The other facts necessary to an understanding of the opinion, are set forth therein.

Gorrell, for the plaintiff.

This case is within the exceptions to the rule that an executor who takes no refunding bond has no equity to compel legatees to refund in case of subsequent payment of debts. *Marsh* v. *Scarboro* 2 Jon. Eq. 106; *Stark* v. *Williams* 3 Jon. Eq. 13; *Lambert* v. *Hobson*, *Ib.* 424.

Scott & Scott, *contra.*

PEARSON, C. J. An administrator who hands over the residue of the estate to the distributees, has no equity to call upon them to refund, on the ground that he afterwards pays a debt of the intestate, of which he had no notice at the time he handed over the estate; unless he alleges and proves special circumstances, showing that he was in no default, and relieving him from the imputation of negligence. This rule rests on two grounds—it is the duty of an administrator to make diligent inquiry as to the debts of his intestate, so that when he hands over the surplus, he can settle the estate, and not leave it subject to be overhauled, with additional costs. In the second place, after the distributees have come into the possession of the property, and dealt with it as their own, an unexpected call to refund, especially if it be many years afterwards, may subject them to as great inconvenience and loss, as the administrator was subjected to by having the claim to pay in the first instance: so the loss should rest on him, unless he can show that the matter occurred without any default on his part. In *Alexander* v. *Fox*, 2 Jones' Eq. 106, relief was

granted on special circumstances, among others, that the testator, by his will, had set apart a fund for the payment of his debts, which, he says in his will, is amply sufficient so as to leave a surplus, and actually goes on to dispose of such supposed surplus. In *Marsh* v. *Scarboro*, 2 Dev. Eq. 551, relief was refused, on the ground that the allegations of the bill were too vague, and that it did not aver special circumstances so distinctly, "as to enable the defendant to put in issue, the matters upon which that right depends." In our case, the bill is fatally defective, in this: the allegations are too vague. The bill is drafted upon the idea that the plaintiff is entitled to relief, provided, he handed over the residue of the estate without knowing of the debt which he was afterwards forced to pay. It alleges that his intestate had been the guardian of the children of one Witty, that in 1850, or 1851, he and one Wheeler, who was the guardian of the children, settled according to the returns of his intestate, by which there was a balance of $680 due to the wards, which he paid, and that he and said Wheeler, at that time, both honestly supposed that $680 was all that was due, but that afterwards, in 1860, it was discovered that the guardian returns of his intestate were erroneous, and that there was a further sum of some $1400 due to the wards, which he was forced to pay. This is the allegation; no one can read it without being impressed with the conviction that it gives no satisfactory account of the matter, and no key by which to explain how it happened, that an error for so large a sum, should have occurred. No one supposes that the plaintiff knew of the error, when he handed over the estate; but the point is, how did it happen that he did not know of it? His duty imposed due diligence—do these vague allegations show that he used it? We think they do not.

But the bill is also fatally defective in this: The fact that his intestate had been the administrator of Witty, as well as the guardian of his children, which is a key to open the error, is *unfairly concealed*, and no intimation of it whatever, is given in the bill. Here is "*suppressio veri*," which excludes one

who is seeking relief upon an equity based on special circumstances relieving him from the imputation of negligence. Why was this fact not disclosed by the bill? This is unfair dealing with the Court.

The bill is also fatally defective in this: There is no averment that *at the time* the plaintiff handed over the estate to the distributees, he did not know the fact, that his intestate had been the administrator of Witty, as well as the guardian of his children. As is said in *Marsh* v. *Scarboro*, "this averment was necessary to enable the defendant to put the matter in issue," so, in the absence of an averment to the contrary, we must assume that, when the plaintiff settled with Wheeler, he knew the fact that his intestate had been the administrator of Witty. Had he ventured to put the matter in issue by an averment to the contrary, besides the general fact that the parties all lived in the same county, that the appointment of the plaintiff's intestate as administrator and also as guardian, was made by the same court, and that his returns as administrator and as guardian, were filed in the same office, there is direct proof that, after the death of the co-administrator of the plaintiff, several notes payable to his intestate as *administrator* of Witty, were put into the hands of the plaintiff, before he settled the estate: so he is directly fixed with notice of the fact, at the time he paid over the balance set out in the guardian return, that his intestate had also been the administrator. The question is narrowed down to this: it appears on the face of the return made by his intestate as guardian, that he only charges himself with the price of a tract of land, and a small amount received as rent, so he was obliged to know, that the guardian return did not contain the account of his intestate as administrator; and if he had taken the trouble to look at the return of his intestate as administrator of Witty, on file in the clerk's office, he would have seen that there was a balance to be accounted for on that score, as well as the price of the land and rent; in other words, he would have seen that his intestate had not closed his account as administrator, by charging himself as guardian with the

amount due as administrator, and taking credit on his administration account—in fact, he had made no *settlement* of his administration, and the matter was left upon his returns as administrator, and upon his returns as guardian; and we declare our opinion to be, that it was gross negligence on the part of the plaintiff, to settle with Wheeler on the footing that the return made by Rhodes as guardian covered his whole liability.

Let the bill be dismissed with costs.

PER CURIAM. Bill dismissed.

MARY H. RAMSOUR *v.* TILLETT RAMSOUR.

The Entry of a *dissent* by the widow, is an incident to the jurisdiction of Probate, and as this jurisdiction has been conferred upon the Clerk of the Superior Court, the widow's dissent is to be made and entered in his office.

The *sale* spoken of in the Ordinance of March 5th, 1868 (c. 40, s. 2) is a sale for the benefit of the creditors or heirs of the testator, and not one by the widow for the benefit of *her* creditors.

In a case where it appeared that the widow, as general devisee under her husband's will, had conveyed a large part of the land in trust for payment of her own debts, and afterwards, under the Ordinance above mentioned, had dissented and was seeking to have dower therein; *held*, that she was entitled to dower; and *also*, that the trustee in the deed was not a necessary party to her petition.

DOWER, heard before *Logan, J.*, at Fall Term 1868 of the Superior Court of LINCOLN.

The petition was filed at that term, and upon the coming in of the answer, the case was submitted upon the following facts agreed. The petitioner's husband, a resident of Lincoln county, died in 1863 leaving a will, of which petitioner was appointed executrix; she accordingly propounded the will for probate in 1864, and it being admitted to probate, she was qualified. The testator left a considerable estate, real and

personal, which he bequeathed to the petitioner in fee, with a proviso, that if he should leave a child and the petitioner should marry again, the estate should be equally divided between her and such child. The defendant is the only child of the testator.

In May 1868 the petitioner conveyed a part of the land out of which she demands dower, to one Baxter, in payment of her individual debts. On the 24th of August 1868 she entered her dissent to the will before the Judge of Probate of Lincoln county.

The estate is in debt to the amount of some $4,000, which it is likely will fall upon the real estate of the testator.

The Court thereupon ordered a writ of Dower to issue, and the defendant appealed.

Bragg, for the appellant.

Phillips & Merrimon, contra.

PEARSON, C. J. After the adoption of the Code of Civil Procedure, the County Courts being abolished, it followed as a necessary implication, that the Clerk of the Superior Court was the proper tribunal before which to enter the widow's dissent. While the County Courts exercised jurisdiction in regard to the probate of wills, granting letters testamentary and letters of administration, the duty of causing an entry to be made of the dissent of the widow, was an incident to such jurisdiction. When the jurisdiction in these respects was transferred to the Superior Court, this incident followed the jurisdiction, and as the act of causing the entry to be made was merely ministerial, there was no occasion for an express grant of power.

By an Ordinance of the Convention of 1868 ch. 40, sec. 2, it is provided, "No widow shall be entitled to the benefit of this ordinance, in any case where the real estate of the deceased husband has been sold subsequent to his death, or has been divided between his devisees or heirs at law." The object of this proviso is to prevent a dissent where the real estate of the husband has

been sold by the executor or administrator for the payment of debts, or has been divided between the devisees or heirs at law; for in such cases it was thought that this indulgence could not be granted to the widow, without an unreasonable derangement of what had been done towards settling the estate, but it has no application to a case where the widow has sold or conveyed in trust a part of the estate of her husband, or even the whole over which she had a power of sale, to secure debts of her own. Such cases are outside of the principle applicable to sales of the real estate or partition, made in *settlement* of the estate of the deceased.

It is said, in the third place, the creditors of the wife or the trustee, are necessary parties. We do not think so:

1. In an action for dower, only the heirs or devisees of the husband, or the person claiming under the husband by deed "*inter vivos*," are necessary parties defendant, for they have the land demanded by the action.

2. The creditors of the husband have rights which may be contingently affected by this decision, but they have never been made parties in a writ of dower,—*dower is not demanded of them*, and in respect to their contingent rights, they are supposed to be represented by the heir; as they are by the personal representative, if he be sued for a part of the personal estate.

3. The creditors of the wife in respect to their contingent rights are represented by her, and the fact that she has made an assignment in trust for certain of her creditors, cannot vary the matter, for her assignee has the same interest as she has. If her application for dower be refused, she and her assignee are subject to the husband's creditors. If her application for dower is allowed, then as *against her*, the assignee still retains all his rights under her deed, and as against the creditors of the husband, he is secured in at least one-third of the land, so that the interest of the assignee is on the side of the widow's application, and he is represented by her.

4. In this particular case, there is rather more reason for making the creditors of the husband parties, than the assignee of the wife, for it so happens that the interest of the heir is

against them; if the widow fail in her application, the heir according to the will, gets nothing except the limitation over as to one-half, and that half is liable to the debts of the husband.

If she succeeds in her application the heir takes two-thirds of the land, and a reversion in one-third, and it is subject to the debts of his ancestor in no otherwise than the contingent limitation over. We are satisfied that the contingent rights of creditors cannot be secured by requiring them to be made parties without rendering the proceedings too cumbrous. A decree can be made so as to settle the controversy between the widow and heir, saving the rights of third persons. Code of Civil Procedure, § 65. Let this be certified.

PER CURIAM. Judgment affirmed.

THE STATE *v.* JOHN SMITH.

That an indictment concludes against the form of the *Statute*, instead of *Statute*, is no ground for an arrest of judgment.

(*S.* v. *Moses* 2 Dev. 452; *S.* v. *Tribatt* 10 Ire. 151; *S.* v. *Sandy* 3 Ire. 570 and *S.* v. *Abernathy* Bus. 428, cited and approved.)

INDICTMENT for retailing spirituous liquors, tried before *Thomas, J.*, at Fall Term 1868 of the Superior Court of JONES.

The only question made before this Court was upon the refusal of his Honor below to arrest the judgment, although the indictment concluded against the form of the "Statue" instead of *Statute*.

No counsel for the appellant.

Attorney General, contra.

SETTLE, J. The defendant moves to arrest the judgment, for that the indictment concludes against the form of the

"statue," when it should have been, *statute*. What is the effect of substituting the word "statue" for statute, in this connection?

Formerly, it was necessary to set out at length the statute, or statutes, if more than one, upon which an indictment was founded, in order that the party might be informed of the law, against which it was alleged that he had offended. This particularity being attended with much inconvenience, and rendering the proceedings very cumbersome, the conclusion "*contra formam statuti*" or "*contra formam statutorum*" if the indictment was founded upon more than one statute, was received as a sufficient compliance with the law, instead of the long recital. But as many prosecutions still failed, because of the conclusion, "*contra formam statuti*," when it should have been "*statutorum*," and *vice versa*, the Courts permitted the device of concluding "*contra formam statut.*, and would construe the abbreviation to be *statuti* or *statutorum*, in order to fit the case.

It is interesting to trace the changes which have taken place from time to time, in regard to the substance, as well as to the form of indictments. When first introduced, the utmost particularity was required in alleging, according to the truth of the matter, all the facts and circumstances attending the offence. And as the proof had to sustain the allegations in every particular, it was very difficult to obtain conviction,—so much so indeed, that the Courts were compelled, by considerations of public interest, to relax, by construction, the stringency of the rule, which required strict proof of everything, which it was necessary to allege. They would hold, for instance, that an indictment charging that A came to his death, from the effects of a mortal wound, upon the right side of the head, was sustained by proof that the mortal wound was in and upon the left side of the body. It is somewhat remarkable, that while the Courts, by construction, dispensed with so much of the proof necessary to sustain an indictment, they at the same time strictly adhered to old precedents, in

regard to the allegations of the bill. They would not hesitate to arrest judgment, for a failure to set out a fact, which if set out, they held, it was not necessary to prove according to the truth of the matter.

It is evident that the Courts have looked with no favor upon technical objections; and the legislature has been moving in the same direction. The current is all one way, sweeping off, by degrees, "informalities and refinements," until, indeed, a plain, intelligible and explicit statement of the charge against the defendant is all that is now required, in any criminal proceeding.

The Act of 1811, Rev. Code, ch. 35, sec. 14, has received the almost universal approbation of the bench and bar. It needs no higher endorsement than that of the late Chief Justice RUFFIN. He says, in *State* v. *Moses*, 2 Dev. 452, "this law was certainly designed to uphold the execution of public justice, by freeing the Courts from those fetters of form, technicality and refinement, which do not concern the substance of the charge, and the proof to support it."

This act has received a very liberal construction, and its efficacy has reached and healed numerous defects in the substance, as well as in the form of indictment. It is unnecessary to express an opinion, as to whether the Act of 1811, alone, would not cure the defect we are now considering, for the Legislature has by a subsequent act removed all doubt upon the subject.

It seems that there is no particular magic in the conclusion against the form of the "statute," for other words may be used which might serve the same purpose.

In *State* v. *Tribatt*, 10 Ire. 151, which was an indictment for retailing spirituous liquors without a license, the conclusion was against the form of the "Act of Assembly," instead of the "statute." Attention is called to the fact, that the title of our Legislature is "The General Assembly," and that there is no such body as "The Assembly;" and yet it was held that the Act of 1811 cured the defect, and that there appeared sufficient upon

the face of the indictment, to induce the Court to proceed to judgment.

It was repeatedly ruled, however, that it did not embrace the case where an indictment concluded against the form of the "statute," when it should have been "statutes," and *vice versa*. *State* v. *Sandy*, 3 Ire. 570, and *State* v. *Abernathy*, Bus. 428.

In both of these cases, attention is called to the statute of 7 Geo. 4, ch. 64, sec. 20; and it is intimated that a similar reform would be beneficial in this State.

Shortly after Abernathy's case, we find the Legislature enacting that, "no judgment upon any indictment for felony or misdemeanor, whether after verdict, or by confession, or otherwise, shall be stayed or reversed for the want of the averment of any matter unnecessary to be proved, nor for the omission of the words "with force and arms," nor for the insertion of the words "as appears by the record," or of the words "against the form of the statutes" instead of the words "against the form of the statute," or *vice versa;* nor for omitting to state the times at which the offence was committed, in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened; nor for the want of a proper and perfect venue, when the Court shall appear by the indictment to have had jurisdiction of the offence."

The Legislature, by this Act, evidently intended to cure the defects therein named, and all others of a similar character.

It did not mean simply to abolish the distinction between the singular and plural numbers, and to say that it must be either the word "statute" or "statutes," and that no other word or words could supply their places; but it meant to say that the Courts should disregard all objections of that character, and proceed to judgment. There is no such word as "statue" in connection with legal proceedings, and the defendant could not have been misled by its use. He must have known that it was intended for the word statute, and he was

as fully informed of the nature of the charges against him, and of the law upon which it was founded, as we would have been, had the letter " t " not been omitted in the word statute.

Giving to the Acts of 1811 and 1854 the same liberal interpretation, which they have always received, we have no hesitation in declaring that they fully meet the case before us, and cure the defect, upon which it is sought to arrest the judgment. There is no error. This will be certified, &c.

PER CURIAM. No error.

LUCRETIA PEEBLES *v.* THE NORTH CAROLINA RAIL ROAD COMPANY.

An action brought by a passenger against a Rail Road Company, to recover damages for injuries to her person, does not abate by the death of the plaintiff.

(Gilreath *v.* Allen 10 Ire. 78; Collier *v.* Arrington, Phil. 356, cited and approved.)

CASE, brought to recover damages for personal injuries sustained by the plaintiff whilst a passenger on the road of the defendant. At Spring Term 1868 of the Superior Court of WARREN, before *Buxton, J.*, it was suggested that the plaintiff had died since the last term of the Court, and a motion was made to allow her administrator to become a party. This motion was resisted by the defendant, upon the ground that the action had abated by such death.

His Honor allowed the motion, and the defendant appealed.

Moore and *Rogers & Batchelor*, for the appellant.

Bragg, contra.

Damages to cover costs and charges, or loss of time, or permanent injury to the person, or pain and suffering even, are not *vindictive*, but *compensatory*, Sedge Dam. 38, 452, 529; Mayne, Dam. 264. Rev. Code ch. 1, §1, compared with §§ 8 and 9.

SETTLE, J. Legislation and the decisions of the Courts,

have wrought great changes in the common law upon this subject, so that we may now say that the maxim "*actio personalis moritur cum persona*" is itself dead, or rather has lost so much of its vitality as to be of very little use.

The general rule now is just the reverse of the old maxim; the exceptions being but few.

"No action, suit, petition, bill in equity, or information in nature of bill in equity or other proceedings of whatever nature, brought to recover or obtain money, property or damages or to have relief of any kind whatever, whether the same be at law or in equity except suits for penalties and for damages merely vindictive, shall abate by reason of the death of either party, &c., but the same may be carried on, by the heirs, executors and administrators of the deceased party." Rev. Code, ch. 1, § 1.

This enactment goes much further than the previous statutes upon the same subject, and in connection with sections 8 and 9 of the same chapter, shows conclusively, that the purpose of the Legislature was to keep alive all actions and causes of action—when the damage is actual and not "merely vindictive." Vindictive damages are such as are usually given against a defendant, as a punishment for an act of fraud, malice or oppression.

Compensatory damages are such as a plaintiff is entitled to recover for an actual injury.

It is a familiar principle that in actions of tort, juries may give, not only compensatory damages for actual injuries, but if there are circumstances of aggravation, they may go further, and take into consideration the malice or insult that accompanied the tortious act of the defendant, and may increase their damages according to the circumstances of aggration. *Gilreath* v. *Allen*, 10 Ired. 67.

The distinction between compensatory and vindictive damages is well established, and is too plain to require explanation.

In the case before us the plaintiff at the time of her death, was seeking to recover damages for permanent injuries to

her person, and for loss of time, and also for moneys, necessarily expended for medical treatment.

With what propriety can damages arising from these causes be called "merely vindictive?"

Admitting that her representative cannot carry on this action for the purpose of punishing the defendant, by the recovery of smart money; yet it is clear that he may do so for the purpose already indicated, *Collier* v. *Arrington*, Phil. 356.

The judgment of the Superior Court is affirmed.

This will be certified, &c.

PER CURIAM. Order accordingly.

DAVID KIVETT *v.* THOMAS H. MASSEY.

No action will lie against a constable for money received by him in his official character, until after a demand.

(*Potter* v. *Sturges*, 1 Dev. 79, *White* v. *Miller*, 3 D. & B. 55, *Hyman* v. *Gray*, 4 Jon. 155 cited and approved.)

DEBT, tried before *Barnes*, *J.*, at January Special Term, 1868 of the Superior Court of CUMBERLAND.

The action had been commenced by warrant before a magistrate, and upon the trial before his Honor, the plaintiff after showing a receipt given February 1, 1849, by the defendant for a claim of some $26.75, proved a collection thereof by him in 1850. The warrant in the present case was issued in 1857, and there was no previous demand for the money.

The pleas were, General Issue, Statute of Limitations.

In deference to the opinion of his Honor, the plaintiff submitted to a non-suit, and appealed.

B. Fuller, for the plaintiff.

N. McKay, *contra*.

SETTLE, J. Was a demand necessary before the commencement of this suit?

In order to determine this, let us see what was the liability of the defendant. It is true that he received money belonging to the plaintiff, but in what character did he receive it? clearly, as agent. This being so, was he bound to seek the plaintiff in order to pay over the money, which had come to his hands as agent, or was the plaintiff bound to seek him, and demand it? He was in no default unless a demand had been made upon him and he had refused or neglected to account for, and pay over, all such sums as the plaintiff was entitled to receive.

No question can arise upon the Statute of Limitations, as no demand was made before commencing suit, and therefore, the statute did not begin to run. We regard these principles as firmly settled by the adjudications of this Court. In *Potter* v. *Sturges*, 1 Dev. 79, which was very much like this case, it was *held*, that a previous demand should be shown before the action could be sustained. Again, in *White* v. *Miller*, 3 D. & B. 55, which was an action upon a constable's bond, *Potter* v. *Sturges*, was cited with approbation, and the Court awarded a *venire de novo*, upon the ground, that there was no proof of any demand before suit was brought. In a still later case, *Hyman* v. *Gray*, 4 Jon. 155, the same principle is decided. Pearson, J., delivering the opinion of the Court, says: "the defendant, having received the money as the agent of the plaintiff, was not bound to seek him for the purpose of paying it over; so we agree with his Honor, that the cause of action did not accrue until a demand."

PER CURIAM. There is no error.

W. T. and J. K. REDMOND *v* JOHN BURROUGHS Ex'r. and others

A testator bequeathed to a certain boy $2,000, to be put at interest for the purpose of educating him; and having survived the making of his will twelve years, the boy (who in the interval had received little or no eduaction) at his death was a married man of about twenty-four years of age: *held*, that the legatee was entitled to the legacy, and that the fact, that during his boyhood he refused to go to school, made no difference.

The devisee of a tract of land, which, by direction of the testator, had been levied upon to satisfy a debt, and was still bound by the levy at the death,—having paid the debt, was entitled to be subrogated to the claim of the creditor against the personal estate of the testator.

"Next of kin," in a will, means *nearest* of kin.

(*Jones* v. *Oliver*, 3 Ire. Eq. 369; *Simmons* v. *Gooding*, 5 Ire. Eq. 382, cited and approved.)

BILL, for certain legacies, dismissed, *pro forma*, by *Tourgee, J.*, at Fall Term 1868, of the Court of Equity for ORANGE; whereupon the plaintiffs appealed.

The bill alleged that one William N. Pratt, late of Orange county had died in 1867, leaving a large estate of personalty and realty which he disposed of by a will dated in 1855, and duly proved by the defendant Burroughs as executor; that by the will, among other things he gave to the plaintiff W. T. Redmond, several tracts of land, a gold watch and other articles of personal property, and also (as follows) "the sum of $2,000, to be put at interest for the purpose of giving him a classical education. It is my desire that said $2,000 shall be thus expended, and that he shall take his course at the University of North Carolina. The residue of my estate, I leave to be sold and the proceeds to be divided between my next of kin, share and share alike, with the exception that Caroline Barbee shall share equally in the aforesaid proceeds with my next of kin;" that before the testator's death an execution had been levied upon the land devised to W. T. Redmond, which having been exposed to sale after his death under a *ven. ex.*, the devisee bid it off at the amount of the debt,—and upon that account is entitled to be reimbursed out of the residue of the personal estate of the testator, under the doctrine of subroga-

tion; that the executor refuses to pay said W. T. Redmond the $2,000 bequeathed as above; that the legatee was a boy of about eleven years of age when the will was written, and is now about twenty-four, and a married man, having in the interval received only a common English education; that the executor also refuses to deliver certain horses and other legacies of personal property bequeathed to the plaintiffs.

The defendant Burroughs answered, admitting the material allegations of the bill, and insisted that the plaintiff W. T. Redmond, is not entitled to the $2,000, because he is now past the age at which it could be applied as intended, and besides that whilst a boy he had refused to be educated, and had run away from a classical school to which the testator had sent him.

Some of the other parties raised a question (preliminary to the taking of the accounts of the estate) upon the meaning of the word "next of kin," in the residuary clause of the will.

Phillips & Battle, for the plaintiffs, cited *Whedbee* v. *Shannonhouse*, Phil. Eq. 283.

W. H. Battle, for some of the defendants.

1. W. T. Redmond is not entitled to the $2,000. *Lefler* v. *Rowland*, Phil. Eq. 143; *Livermore* v. *Carter*, 4 Ire. Eq. 59, compared with *Harris* v. *Hearne*, 2 Win. 92.

2. The words "next of kin" include all who are such by representation. Technical words are to be taken in a technical sense, unless the context show to the contrary. *Rogers* v. *Brickhouse*, 5 Ire. Eq. 304; *Grandy* v. *Sawyer*, Phil 9; *Cooper* v. *Cannon*, *Ib.* 83; *Harrison* v. *Ward*, 5 Ire. Eq. 236. The cases, *Jones* v. *Oliver*, 3 Ire. Eq. 369; *Simmons* v. *Gooding*, 5 Ire. Eq. 382; *Elmsley* v. *Young*, 2 Myl. & K., 780, are only in appearance to the contrary. See also *Davenport* v. *Hassel*, Bus. Eq. 29, and 2 Jarm. Wills, 45, 46.

Bragg, for others of the defendants.

1. "Next of kin" means, nearest of kin; *Jones* v. *Oliver*, *Simmons* v. *Gooding*, *Harrison* v. *Ward*, *above*.

2. As to W. T. Redmond's legacy for education, *Livermore* v. *Carter*, *above*, and *Holt* v. *Hogan*, 5 Ire. Eq. 82.

READE, J. 1. The testator bequeathed to "W. T. Redmond $2,000, to be put at interest for the purpose of giving him a classical education" with the direction "that said $2,000 shall be expended, and that he shall take his course at the University of North Carolina."

W. T. Redmond was some eleven years of age at the date of the will, and the testator lived some ten or twelve years thereafter. W. T. Redmond never received the education designed for him (although the testator did send him to school until he received the rudiments of an English education,) and the $2,000 was never expended. He is now a grown man with a family. And thence the defendants insist that as the *sole* purpose of the bequest was to educate W. T. Redmond, and as that purpose cannot now be effected, the bequest fails. There would be much force in this view, if there were any limitation over of the legacy upon the failure to effect the purpose of the testator; but there is none. The gift is absolute; with the request, to be sure, that it shall be used in a way most to the advantage of the legatee in educating him. But as it has not been used in the *most* advantageous way, is that a good reason why it shall not be used for him in any way? Or, that he shall be deprived of it altogether? We are of the opinion that he is entitled to it.

We do not overlook the fact that the defence is set up that the legatee would not receive the education. At the same time that this defence is set up in the answer, it is stated that it was impracticable for him to receive it, on account of his age and condition. If that be so, then it is the very best reason why he did not receive it, and why he should now have the money. The fact that he was placed at school by the testator in his life time, and that he left school of his own accord without completing his education, makes no difference, because he should have been controlled, and, while a minor, is supposed to have been controlled by his parent; and especially because

the will speaks as of the time when the testator died, and is to the same purpose as if it had been dated at that time, and the bequest made to take effect thereafter.

II. There is also a devise of a certain tract of land to W. T. Redmond, which, by the direction of the devisor was levied on under an execution against himself, and after his death, W. T. Redmond bought the land at the execution sale to relieve it of the imcumbrance. And now he seeks to be subrogated to the rights of a creditor, and to have the amount which he advanced paid out of the personal estate or out of the residuum. We are of the opinion that he is entitled to be subrogated. It would not have been so, if it had been, not only levied upon, but *sold* in the life-time of the devisor.

III. The testator bequeathed the "residuum of his estate to be sold, and the proceeds to be divided between his next-of-kin, share and share alike, with the exception that Caroline Barbee shall share equally in the proceeds with his next-of-kin."

The question raised upon that clause, is, what is meant by "*next-of-kin?*" Next-of-kin in common parlance means *nearest* of kin, and such has been decided to be its meaning in legal parlance, and where used in wills. *Jones* v. *Oliver, et. al.* 3 Ire. Eq. 369; *Simmons* v. *Gooding*, 5 Ire. Eq. 382.

If this is the meaning of the words, then the living nieces and nephews of the testator together with Caroline Barbee, take the residuum, to the exclusion of the representatives or children of deceased nieces and nephews. But it was insisted by Mr. Battle, that, when technical words are used, they are to be understood in a technical sense, unless the contrary clearly appears. That is certainly true. And thence he insists, that *next-of-kin* are technical words used in the Statute of Distributions, to denote those who take the estate in cases of intestacy, and that if the testator had died intestate, and his estate had been distributed among his next-of-kin, the children of deceased nieces and nephews would have taken with the living nieces and nephews. If *next-of-kin* were the technical words so used in the statute, it would be difficult to resist the argu-

ment. But there lies the error. *Next-of-kin* are not the words used in said statute to denote those who take. If they were, then only the living nieces and nephews would take as being *next, nearest-of-kin,* as between them and the children of deceased nieces and nephews. But the words used are not *next-of-kin,* but "next-of-kin who are in equal degree, and those *who legally represent them.*" It will be seen, therefore, that to bring the terms used in the will within the technical words used in the statute of distributions, the words, "and those who legally represent them" would have to be added. We are of the opinion that the terms used in the will, "next-of-kin," mean nearest of kin, and that the living nieces and nephews take, to the exclusion of the legal representatives of deceased nieces and nephews.

IV. The plaintiffs are entitled to the other legacies named in the will, if they have not already been delivered to them since the death of the testator, as there is no evidence of their ademption in the life-time of the testator.

The plaintiffs are entitled to an account, if desired, and it will be referred to the clerk for that purpose, and the cause will be retained for father directions.

PER CURIAM. Decree accordingly.

THE STATE *v.* VIRGIL KIRKMAN.

Answers given by a witness to such collateral questions as are put with the purpose of showing his temper, disposition or conduct, are not conclusive, but may be contradicted by the interrogator.

One who calls out a statement from a witness, which he subsequently impeaches by another witness, cannot object to testimony from the other side in support of such witness, on the ground that the statement so called out by himself was *collateral matter.*

(*State* v. *Patterson*, 2 Ire. 346, cited and approved.)

LARCENY, tried before *Cloud, J.*, at Fall term 1868, of the Superior Court of SURRY.

On the trial the prosecutor, one Haymore, upon cross-examination, deposed to a conversation in relation to the theft with one Shelton, in which he represented the latter as saying, that *he* knew more of the theft than he wished to know, and that he would get witness' money (the subject of the larceny) for him by Saturday night. Afterwards the defendants introduced Shelton to contradict this statement of the prosecutor, which he did. On cross examination by the State, Shelton was asked if he had not on the same day of the conversation with Haymore, made the remark attributed to him by the latter, to one Hall, at a certain mill. He replied that he did not recollect that he had. Afterwards, to corroborate Haymore and contradict Shelton, the State offered to introduce Hall, to show that Shelton had made such a remark. The defendant objected, on the ground that it was collateral matter. The Court admitted the testimony.

Verdict, guilty: Rule for a new trial. Rule discharged. Judgment and appeal.

No counsel for the appellant.

Attorney General, contra.

SETTLE, J. The whole case discloses that the main object of the defendant was to break down the prosecutor Haymore.

He first calls for a statement from Haymore, and then attacks him with an impeaching witness; and when it is proposed to corroborate Haymore, and impeach the impeaching witness, it is not for him to say—this is all a collateral matter, and the State is bound by the answers of my witness.

At what stage did the statement become collateral? Was it when the defendant called for it from Haymore; or when he contradicted it by Shelton? It would rather seem that he regarded it so, for the first time when about to be corroborated. To permit such attacks upon the credit of a witness, and cut off, under the idea of collatteral matter, all opportunity to corroborate and sustain him, would be exceedingly unfair.

It would be nothing more nor less, than to allow one party

to set traps for another, so adjusted, that of what he caught he could take just such parts as he liked, and reject the rest.

If the matter was collateral, the defendant introduced it for the purpose of impeaching the credit of Haymore, and it was too late for him to repudiate it, when it was about to turn out differently from what he expected.

In *State* v. *Patterson*, 2 Ire. 346, this subject is discussed at length. We adopt the language of Judge Gaston, who delivered the opinion of Court in that case. He says:

"With respect to the collateral parts of the witness's evidence drawn out by cross-examination, the practice has been to regard the answers of the witness as conclusive. Of late, however, it is understood that this rule does not apply in all its rigor, when the cross-examination is as to matters, which, although collateral, tend to show the temper, disposition or conduct of the witness, in relation to the cause or the parties. His answers as to these matters are not to be deemed conclusive, and may be contradicted by the interrogator."

This language will apply, in the case before us, to the testimony of both Haymore and Shelton, but we need only consider it, so far as the testimony of Shelton is concerned. It was competent, then, to contradict him, provided the proper foundation was laid, by calling his attention to what, it was alleged, he had stated elsewhere, so as to revive his recollection, and afford him an opportunity of admitting or denying the statement, or of giving such explanations as he might see proper to do.

The case states that he was asked, if he had not, on the same Thursday he had seen the prosecutor, told "William Hall, at the mill, that he knew more about the case than he wished to know, and that Haymore should have his money by Saturday night," and that he replied, "he did not recollect that he did." It appears that he was put upon his guard, not only as to the statement, but as to the time and place, and the person to whom it was made.

After this, we think it was clearly competent to introduce the witness Hall, and prove the statements made to him by

Shelton, on the occasion referred to, both for the purpose of impeaching Shelton, and corroborating Haymore.

The issue before the jury was the guilt or innocence of the defendant, but the credit of the prosecutor Haymore, bore very directly upon that issue, and when it was attempted to impeach him with the witness Shelton, it became material and proper for the jury to inquire, what credit was due to Shelton.

PER CURIAM. There is no error.

W. B. MARCH and others *v.* JOHN W. THOMAS.

At Spring Term 1867 the plaintiffs appealed to the Supreme Court from a decree made at that Term; at the June Term 1867 of the Supreme Court they were informed that the case had not been sent up; but they took no further steps until January Term 1869, when they filed a petition in the Supreme Court for a *certiorari; Held*, that as the petitioners disclosed *no merits* in regard to the original cause of action, and had been guilty of *laches* in preferring their application—the petition should be refused.

PETITION for a *certiorari*, filed in this Court at the present term.

The case in which the *certiorari* was asked is that reported *ante* p. 87.

The petition stated that the plaintiffs had appealed from the decree made at Spring Term 1867 of Davidson Court of Equity, and filed an appeal bond; that under the belief that the cause had been sent up, they employed counsel in the Supreme Court, but were afterwards informed by him that it had not been docketed; that the reference had miscarried in regard to certain items, and had included matters in which the petitioners had no interest. The defendant answered; and affidavits were taken, by one of which it appeared that the petitioners had been apprised at June Term 1867 of the fact that the case had not sent up to this Court.

Merrimon, for the petitioners

Robbins, contra.

DICK, J. The rules of law relating to writs of *certiorari* are well settled in this State, and they are fully considered and applied in the cases referred to in Battle's Digest.

When a person thinks that injustice or error has been done in his suit by an inferior Court of record, his ordinary remedies are an appeal, or writ of error, to a Superior Court to have the matter reheard. If these ordinary remedies are denied, or fail, without any default of the party desiring to use them, he is entitled to the extraordinary remedy of the writ of *certiorari*, but he must generally show upon his application that he has a *prima facia* case of merits, and has been guilty of no *laches* in seeking this remedy. Neither of these requisites have been shown by the petitioners. Their case, in the Court below, was referred, by their own counsel, to four eminent lawyers, two of whom were their counsel, and after long and full consideration, an *award* was made, and entered as a rule of Court. There is no suggestion of fraud or partiality in the arbitrators, and even if the award was unreasonable and unjust, its validity cannot be impeached on that account. The reason and justice of the case were the very points referred to the arbitrators, and their decision must be conclusive. The award is certain in its terms, final on all points referred—and does not exceed the authority given in the order of reference. The appeal of the petitioners must, therefore, have been vexatious, or for the purpose of delay.

The appeal was prayed at Spring Term 1867 of the Court of Equity for Davidson cuonty, but the case was not sent up to the following June Term of this Court. The statements of the petitioners and the Clerk and Master of the Court below, upon this question, are contradictory, but it is unnecessary for us to decide between them, as the *laches* of the petioners in not applying at January Term 1868 for a writ of *certiorari* is wholly unexplained. At our June Term 1867, they wrote to Mr. Phillips to represent them in this Court, and be promptly informed them that the case had not been sent up, and they took no steps in the matter, until near the close of

June Term, 1868. This unreasonable delay, unaccounted for, is alone sufficient to deprive them of the extraordinary remedy which they seek. The motion is disallowed.

PER CURIAM. Petition dismissed.

J. W. WADSWORTH and another *v.* M. L. DAVIS, Adm'r. of JAMES H. DAVIS.

The jurisdiction of creditors' bills under the Code of Civil Procedne, is vested in the Superior Courts,—not in the Judge of Probate.

The act of 1866-'67, ch. 79, s. 5, allowing executors, &c., to make preference among debts of equal dignity even after suit brought, does not interfere with the operation of creditors' bills.

It is competent for a creditor in such a bill to ask, amongst other things, that the administrator be directed to sell the land of the deceased, for the purpose of paying debts, and in such case he must make all the heirs parties to his proceedings.

It is not competent for a Court under a creditor's bill to enjoin the administrator from paying debts, before a decree therein for an account.

Causes under the Code cannot be "set for hearing and transferred" to this Court; they can come up only by appeal.

(*Allison* v. *Davidson*, 1 D. & B. Eq. 46; *Simmons* v. *Whitaker*, 2 Ire. Eq. 129 *Masters* v. *Harding*, 3 Ire. Eq. 603, Anon. 1 Hay. 295; *Hall* v. *Gully*, 4 Ire. 345, cited and approved.)

CREDITOR'S BILL, filed and injunction, obtained November, 3, 1868, in the Superior Court of MECKLENBURG.

At Fall Term, the defendant demurred, and the cause was "transferred to the Supreme Court by consent."

The bill was filed by the plaintiffs on behalf of all the creditors who would come in and contribute, &c., and set forth the death of the intestate, insolvent and greatly indebted, amongst others, to the complainants, in debts particularly described; that the intestate died, possessed of personal property and a large real estate, which had come into the hands of the defendant as his administrator, or as one of his heirs at law; that the defendant was misapplying the assets. The prayer was

for an account, in order that the creditors might be paid *pro rata*, for an injunction against any further payment of debts, and for further relief.

Wilson, for the plaintiffs.

Dowd, contra.

RODMAN, J. There have been in this State too many instances of what are called "creditors' bills" to permit any doubt of the jurisdiction of a Court of Equity to entertain them. *Allison* v. *Davidson*, 1 D. & B., Eq. 46; *Simmons* v. *Whitaker*, 2 Ire. Eq. 129; *Masters* v. *Harding*, 3 Ire. Eq. 303.

It is contended however, that this jurisdiction is taken away by the Constitution, and Code of Civil Procedure, and is given to the clerk of the Superior Court, under Sec. 418, C. C. P., which authorizes the clerk to " audit the accounts of executors, administrators and guardians." This cannot be so. It was not the intention of the Code, to take away from the Superior Courts, any jurisdiction heretofore exercised by Courts of Equity. It simply changed the mode of proceeding. A creditor's bill demands more than the auditing of the executor's account; under it the Court will proceed to decree the distribution of the fund, which the clerk is incompetent to do in such a case.

It is further contended that the right of the Superior Court to control the distribution of the assets among the creditors, according to its practice in cases of this sort, is taken away by the Act of 1866-'67, ch. 79, s. 5, p. 80. It becomes necessary therefore, to examine that section. It gives to executors the right to prefer among debts of equal dignity, although the preferred creditor has not commenced suit; and payments made by an executor, shall have the like force as if made upon a judgment confessed. By the common law, the executor had a right to prefer among debts of equal dignity, but not voluntarily against a creditor who had brought suit. Anon. 1 Hay. 294 (34); *Hall* v *Gully*, 4 Ire. 345. And many creditors were induced to bring suit for the purpose of depriving the executor

of this power. The statute continues this power after suit brought. Its policy was to discharge a multiplicity of suits, and a costly scramble among creditors; and also to prevent the executors from being injured by unwary pleading, which might easily happen under the former law; and to facilitate their settlements. There is nothing in that policy to contravene the jurisdiction in question; and we do not think they intended to impair it.

The present action is more than a creditor's bill; it demands that the defendant may be compelled to sell the lands of his testator, and to apply the proceeds to the payment of his testator's debts (the personal estate being exhausted,) and that the rents and profits received from the lands by the heirs of the testator since his death, may be applied in like manner. In reply to this demand it is said, that the Court will not order a sale of the lands except on the application of the executor himself, as prescribed in Revised Code, ch. 46, s. 44. But suppose the executor in the case provided for, refuses or neglects to apply, shall creditors lose their debts? We think not. The duty is imposed on the executor for the benefit of the creditors; he is but a trustee of the right and duty for them; and if he should fail or refuse to perform it, the Court will either compel him to do so, or to avoid circuity of action, will itself undertake the duty through its proper officer.

The Court, however, can make no decree touching the sale of lands, or the rents and profits, until all the heirs or devisees of the testator are made parties. The defendant is only one of them.

The plaintiff further prays an injunction against the defendant, paying any of the debts of the testator except under the decree of the Court, and the Court allowed it. This was erroneous. In *Allison* v. *Davidson, ubi supra,* it is said that it is only a decree to account, that ties up the hands of the executor and prevents his making preferences. This is probably the reason why suits of this sort did not become the general means of settling up insolvent estates. No case is known in which the executor was enjoined on the filing of the bill.

There will be a decree that the executor account; and it

must be referred, if the parties desire it, to a referee to state, and report an account; if they do not agree on a referee, it will be referred to the Clerk of the Superior Court of Mecklenburg.

The injunction is dissolved.

As the heirs are not parties there can be no decree affecting their rights.

The case is remanded to the Superior Court of Mecklenburg county, where the plaintiffs may apply to amend their bill as they may be advised. They must pay the costs of this Court.

PER CURIAM. Injunction dissolved.

SAMUEL DAY *v.* SQUIRE ADAMS.

The power of attorney which a lawyer may be required to file, by Rev. Code, ch. 31, § 57, is some writing addressed to him by the client or an agent for the client; *therefore* letters written by the client to third persons in which no particular suit is specified, which express gratification that a certain gentleman had been employed in some controversy between the plaintiff and the present defendant, will not supply the want of such a power.

(*Walton* v. *Sugg*, Phil. 98, cited and approved.)

MOTION to dismiss a suit, made before *Henry, J.*, at Fall Term 1868 of the Superior Court of WATAUGA.

The suit having been brought to the Spring Term, the defendant required the plaintiff's attorney to produce a power of attorney, and at Fall Term, Q. F. Neal, Esq., the attorney for the plaintiff, produced two letters from him whilst in Texas. The former, addressed to his wife, was as follows:

"GOLIAD, TEXAS,
March 9th 1867.

* * * * * *

"I would rather give what I am worth to some good honest person, as to suffer him (the defendant) to have one dollar in

his rascally move. So, as you have employed lawyer Neal to assist you, I hope you will obtain justice. You are doing just what I intended doing, when I got home, for Adams pitched into me like a bull-dog." * * * *

The later letter, to his brother, was as follows:

"CHAPEL HILL, TEXAS,
April 7th, 1867.

* * * * * * *

"You wrote me that you are attending Court for me as my agent, in my absence. You also requested of me to write to you whether I was willing you should act or not. As you are engaged in it, go on with it and do the best you can. I have no doubt but what you will do as well as I could, or better."

* * * * * * *

Both letters were signed by the plaintiff.

Thereupon the defendant moved to dismiss the suit. His Honor refused to allow the motion, and the defendant appealed

Folk, for the appellant.

Phillips & Merrimon, contra.

DICK, J. An Attorney at Law is a highly useful and honorable officer of our Courts of Justice, and his principal duties are, to be true to the Court, and to manage the business of his clients with care, skill and integrity. He is admitted to his office in this State, upon a certificate of the Judges of the Supreme Court, of his "competent law knowledge and upright character." Upon taking the oaths of office, he is authorized to appear as Attorney in any cause in the Court in which he is admitted; unless at the time when he "claims to enter an appearance for any person, he is required to produce and file in the clerk's office of the Court in which he shall claim to to enter an appearance, a power of authority to this effect, signed by the persons or some one of them for whom he is

about to enter an appearance, or by some person duly authorized in that behalf," Rev. Code, ch. 31, sec. 57, par 16.

If he enter an appearance for any person and is recognized by the Court as Attorney in the cause no written authority can be required of him at a subsequent time; and he cannot quit the cause or be discharged by his client, without leave of the Court. Tidd's Pr. 86, 94 *Walton* v. *Sugg*, Phil. 98.

In this case it appears that at Spring Term 1868, of Watauga Superior Court, a written authority was required of the Attorney who claimed to represent the plaintiff. He had not been recognized by the Court at any previous Term, as the plaintiff's attorney. At Fall Term, a motion was made to dismiss the suit for the want of such authority. Mr. Neal, an Attorney of the Court, produced two letters from the plaintiff, one addressed to his wife, and the other to his brother-in-law. Both letters are copied in the statement of the case made by his Honor for this Court. Mr. Neal insisted that he had complied with the requirements of the Statute, and had a right to appear as the plaintiff's Attorney, and his Honor being of that opinion overruled the motion to dismiss. In this ruling there was error. The letters were not addressed to Mr. Neal, and therefore were not a power of authority to him, and he had no written authority from any agent of the plaintiff. If a written authority be required of an Attorney before he enter an appearance for a party in a suit, he must produce it, even if his client is present at the bar of the Court. The letters produced are too vague and indefinite to constitute either wife or brother-in-law the plaintiff's agent for the employment of an Attorney. No suit is mentioned, or names of parties given. The authority given in a letter of Attorney is either general, as to transact the business of the constituent; or special, as to do some special business particularly named, as to employ an Attorney. 2 Bouv. Law: Dict. 37.

The order of his Honor must be overruled at the costs of the plaintiff; and the suit dismissed.

PER CURIAM. Judgment accordingly.

J. T. PERRY *v.* F. A. CAMPBELL and others.

The duty of collecting taxes, although in this State ordinarily discharged by sheriffs, is not incident to their office as such, and so does not terminate with the termination of such office:

Therefore, one who is specially deputed by a sheriff to collect taxes, continues to be a deputy for that purpose after a resignation by his principal; and the sureties upon his bond are liable for the money by him collected *after* that time,

COVENANT, tried before *Mitchell, J.*, at Spring Term 1868 of the Superior Court of ALEXANDER.

The plaintiff in this case was sheriff of Alexander county, and under the revenue laws of 1866 was required to collect the public taxes in his County for that year.

On the 18th of July 1866, the defendant Campbell, covenanted with the plaintiff to collect the State and county taxes; and to indemnify him against all loss and liability, and a bond was executed by him with proper conditions, the other defendants being sureties.

Campbell received the tax lists at the same date, and entered upon the performance of his duty. On the 22nd of September 1866 the plaintiff resigned the office of sheriff. Campbell continued to collect taxes for some time after such resignation, and failed to make due return. The plaintiff was compelled to pay the balance of the County and State taxes, and to secure indemnity, he brought this suit on the said bond.

The above facts were presented to his Honor in the Court below in a case agreed, and he decided that the plaintiff was entitled to recover. From this judgment the defendants appealed.

Folk, for the appellants.

Campbell, after the resignation of the plaintiff, ceased to be deputy, and for his action thereafter, although it was by consent of the plaintiff, his sureties are not responsible. Leigh's

N. P. 2, 743, Pars. Cont. 1, 508, *Union Bank* v. *Rigsbee*, H. & Gill 324, *Miller* v. *Stewart*, 9 Wheat. 680.

Furches, contra.

Deputations by a sheriff for the purpose of collecting taxes, do not expire with the term of office of the principal; as the duty of collecting taxes does not belong *properly* to that office. *Lenoir* v. *Wellborn*, 1 Dev. 451; *Dickey* v. *Alley*, 1 Dev. 433; *Slade* v. *Garner*, 3 Dev. 365; *Fitts* v. *Hawkins*, 2 Haws 494.

DICK, J. (After stating the facts as above.) In this State the fiscal authority of a sheriff in collecting the public taxes is not a necessary incident of the office of sheriff and does not always terminate with it. This authority and duty is defined and regulated by the revenue laws of the State. By these laws it is made his duty, on or before a certain day, to receive the tax lists, and proceed to collect and make due return of the public taxes, within a specified period. To enable him to perform this duty, he is invested with ample and summary authority. When he receives the tax list his responsibility begins, and neither his duty nor authority is dependent upon the continuance of the office of sheriff. He cannot free himself from such responsibility, except by collecting and paying over the taxes to the proper officers, under the provisions of the revenue laws.

If a sheriff should die during his term of office, provision is made for his sureties on his tax bond to collect the taxes, and thus save themselves from loss. If a sheriff resign his office, he is still bound as tax-collector, and he still has ample authority to perform such duty.

The tax-list is his warrant of distress against all persons, who fail to make voluntary payment. There is nothing in the law to prevent him from collecting taxes by an agent.

It is asserted on the part of the sureties that Campbell was a deputy sheriff, and that his deputation terminated on the resignation of the plaintiff, and after that time they are not responsible for any default on the part of their principal. The only

evidence of a deputation is contained in the recitals of the bond. From these it appears that the deputation only extended to the collection of taxes. This is not such a deputation as depends upon the continuance of the office of sheriff, but it is a special deputation incident to the office of tax-collector, and as this office still existed after the resignation, the deputation was not terminated.

Campbell continued to act under this deputation, and there is no evidence that he suffered any inconvenience from the resignation of the plaintiff.

The defendant Campbell failed to perform the conditions of his bond, and the plaintiff is entitled to full indemnity.

The judgment below is affirmed.

PER CURIAM. Judgment affirmed.

PHILIP WILSON *v.* G. FRANKLIN and JOSEPH BURLESON.

A Lieutenant and a Private in the army of the United States; who by command of their Captain, took from a citizen on the 17th of May 1865, two horses, were thereby guilty of a trespass.

TRESPASS, tried before *Shipp, J.* at Spring Term 1868, of the Superior Court of MITCHELL.

The defendants, besides the General Issue, pleaded that they were soldiers of the Federal Army, and in taking the horses acted under orders of superior officers.

A special verdict was found, setting forth the details of the taking; that it occurred on the 16th day of May 1865, in Mitchell County, by order of the captain of a United States Cavalry Company to which the defendants belonged; and that General Joseph E. Johnston had surrendered on the 25th of April before, and General J. G. Martin, commanding that District of North Carolina which included Mitchell County, had surrendered on the 7th day of the same month.

His Honor thereupon considered that the defendants were

guilty of the alleged trespass, and gave judgment for the damages assessed. The defendants appealed.

No counsel for the appellants.

Phillips & Merrimon, contra.

RODMAN, J. The defendant Franklin was a Lieutenant, and the defendant Burleson was a private in the United States Army. On the 17th of May 1865, by command of one Jenkins, who was a Captain in the United States Army, they took from the possession of the plaintiff two horses. The case states, that at the time mentioned, there were no armed troops in Western North Carolina, in hostility to the United States and we know as a matter of public history, that there were none in any part of the State. The rebellion, so far as North Carolina was concerned had been entirely suppressed. It does not appear that in seizing the horses, Captain Jenkins acted under the orders of the Government of the United States, or of any superior officer. No question arises as to what might have been the rights of the armies of the United States during the existence of actual hostilities. If it should be conceded that the laws of North Carolina for the protection of private rights, were suspended during the war, as regarded the government and the military authorities of the United States, upon the suppression of the rebellion those laws resumed their original vigor, at least as against the unauthorized acts of the soldiery. There is no error in the judgment, and it is affirmed.

PER CURIAM. Judgment affirmed.

THOMAS JACKSON *v.* W. T. SPIVEY and JOSEPH HARRIS.

Unless the order for the trial of issues before a jury so direct, the answer of one of the defendants in the original cause, is not to be read on their behalf upon such trial.

Where an insolvent person misapplied money which had been placed in his hands in trust for his own son, *Held*, that he might replace the same without being guilty of fraud against other creditors.

Although the verdict of a jury upon issues which had been tried by them in obedience of the order of a Court of Equity, be not binding upon that Court, it will not lightly be disturbed.

(*Thomas* v. *Kyles*, 1 Jon. Eq. 302, *Hughes* v. *Blackwell*, 6 Jon. Eq. 63, cited and approved.)

ISSUES in an Equity cause, tried before *Buxton, J.*, at Fall Term 1867 of the Superior Court of FRANKLIN.

The bill in the original cause was for the specific performance of a contract to sell certain lands; and for an injunction against an action of Ejectment, threatened by Harris, as purchaser at a sale under an execution against one Andrew Jackson. Having been set for hearing upon the pleadings and proofs, it was transferred to the Supreme Court, and, by order of that Court at June term 1867, issues were framed, and sent down for trial before a jury at Fall Term 1867 of the Superior Court, and it was "further ordered that the parties have leave to read in evidence [at such trial] depositions *de bene esse*, and to examine witnesses."

The issues were:

1. Was the receipt, which is in the following words: "Received of Thomas J. Jackson by the hands of Andrew Jackson sixty-four dollars in full payment of the balance of the purchase money for the land which I sold, and on which the said Andrew Jackson now resides, adjoining the lands of David W. Spivey, Jacob H. Cooley and others, containing forty and one-half acres, the deed to which I am to make to the said Thomas Jackson on application, this the 16th day of January 1858.

(Signed) W. T. SPIVEY."

Witness,

S. W. Bartholomew.

given in good faith for money received from Thomas Waters, and paid by Andrew Jackson to W. T. Spivey for the purchase of the land in good faith for Thomas Jackson the plaintiff.

2. Was the said land paid for by Andrew Jackson, and the receipt given by W. T. Spivey to make title to Thomas Jackson taken fraudulently, for the purpose of hindering and delaying the creditors of Andrew Jackson in the collection of their debts.

Upon the trial the defendants offered to read the answer of Spivey (who was dead); the plaintiffs objected, and the Court thereupon excluded it. The defendants excepted.

The plaintiff offered evidence tending to show that in 1852 his grand-father had placed in the hands of Andrew Jackson, funds sufficient to buy the land in question, with directions to buy it of said W. T. Spivey for the plaintiff; that Andrew Jackson accordingly bargained for the land, but did not at once pay the whole price for it, $20 being wanting because of his having misapplied a part of the funds; that afterwards, in 1858, said Andrew paid out of his own pocket to Spivey an account held by the latter against him for $65—one item in which was the $20 above, and that thereupon he took the receipt in dispute.

His Honor, upon this part of the case, instructed the jury that if the grand-father had placed funds in the hands of Andrew Jackson, as above mentioned, for the purpose of buying the land in dispute for Thomas Jackson, it would make no difference whether Andrew had applied the identical money to that purpose at once, or had first misapplied the funds to his own purposes and then replaced them with funds of his own; in either event the plaintiff was entitled to their verdict.

Verdict for the plaintiff upon both issues. Rule for a new trial. Rule discharged; judgment against the defendants for the costs of the Superior Court, and appeal.

Davis and *Rogers & Batchelor*, for the appellants.

1. Spivey's answer ought to have been submitted as evidence

being *responsive* to the bill. Adams' Eq. 25, 3 Green. Ev. 3, 284. 1 Dev. Eq. 366, 2 D. & B. Eq. 263, 1 Jon. Eq. 226, 2 *Ibid* 505.

2. The charge is erroneous, as Andrew Jackson's replacing the money with his own, under the other evidence in the case, may have been in fraud of his own creditors.

3. The finding of the jury is not *conclusive* upon the Court. Adams' 376.

No counsel, *contra.*

RODMAN J. The first exception of the defendant, was because of the refusal of the Judge to permit the answer of the defendant Spivey, who was then dead, to be read in evidence for the defendants at the trial of the issues. The Judge committed no error in this. On a trial of a suit in a Court of Equity, the answer of a defendant may be read by him in evidence where it is responsive to the equity set up in the bill and by way of denial; but it is not evidence for him in that Court of an affirmative defence by the allegation of new matter. 2 Dan. Ch. P. 983. *Thomas* v. *Kyles*, 1 Jon. Eq. 302, *Hughes* v. *Blackwell*, 6 Jon. Eq. 63.

When issues are sent down to to be tried by a jury, it is not the practice to allow the answer of the defendant to be read, or even that part of it which is responsive and negative, unless it is so directed in the order for the trial. The Court may order that the answer shall be read, or that certain admissions shall be made, and so shape both the issues and the mode of trial, as to elicit the truth.

One reason for excluding the answer is that stated by the Judge, that the plaintiff has had no opportunity for cross-examination. Another is, that the answer is not anywhere evidence of affirmative matter, and the affirmant in the issues having on him the *onus probandi*, there can be no necessity for using the answer simply as a denial, and the issue is tried like any other issue of fact joined at law.

As to the second exception of the defendants, we can see no

error in the manner in which the Judge left the issues to the jury. The main question was, whether Andrew Jackson paid for the forty acres of land by a voluntary appropriation of his own money, or in discharge of a debt to Thomas Jackson the plaintiff, which he owed by having received the money from plaintiff's grand father with directions to apply it to the purchase of this land, and having temporarily appropriated it to his own use. If he was *bona fide* a debtor to the plaintiff to the amount paid, he might prefer him, although he was his son, and if he had made the purchase with the money of his son; and taken the deed in his own name, he would have been held a trustee for his son.

It is true that the verdict of the jury is not positively binding on the Court, but it will not be lightly disturbed, and we see nothing in the evidence to impeach it.

The plaintiff is entitled to a decree for a specific performance by the heirs of the deceased defendant Spivey, of the contract of their ancestor, and to have his injunction against the defendant Harris perpetuated.

The plaintiff will recover his costs against Harris.

PER CURIAM. Decree accordingly.

THE CAPE FEAR AND DEEP RIVER NAVIGATION COMPANY *v.* MILES COSTEN.

The Act of 1858 -'59, ch. 142, does not purport to extinguish the Cape Fear & Deep River Navigation Company; and does not in fact extinguish it.

What the effect of that Act may be in some other respects,—*Quære?*

The Statute of Limitations upon a cause of action against a stockholder in that Company, for the balance of his subscription after a sale of his stock, begins to run from the time of such sale, and not from the time of the last assessment upon the stock.

Parties to appeals have no right to waive appeal bonds so far as costs are concerned.

ASSUMPSIT, tried before *Heath, J.*, at Fall Term 1863, of the Superior Court of CHATHAM.

The plaintiff is a Company, chartered by Act of Assembly passed at the session of 1848–'49. The defendant had subscribed to the capital stock of the Company, and his stock had been duly assessed, (January 20, 1853) and upon his failure to pay the assessment, had been sold (on the 14th of March, 1854) according to the provisions of the charter. This action was brought on the 25th of August 1856, for the balance of the subscription after applying the proceeds of the sale.

By the Act of 1858–'59, ch. 142, it was provided that the property, corporate powers, privileges and franchises of the Company should be sold, and that the Governor of the State should purchase the same, and thereupon they should vest in the State of North Carolina To such sale a majority of the stockholders in general meeting assented, whilst a minority protested against it. The sale accordingly was made, and the property, &c., was bought by the Governor.

In the Court below, the plaintiff submitted that the Act of 1858–'59 was unconstitutional, and, if that were otherwise, still transactions under it did not affect the existence of the Company. On the other hand, the defendant submitted that the Act of 1858–'59 was constitutional, and that under it and the subsequent sale, the Company had been extinguished, and that so this suit had abated.

The Court, upon the facts agreed, gave a judgment for the plaintiff, and the defendant appealed.

Howze, for the appellant.

Phillips & Merrimon, contra.

DICK, J. It is admitted in the "case agreed" that the plaintiff was a corporation duly organized under an Act of the General Assembly of this State; and the first, and principal question presented for our determination, is, whether the plaintiff still has a corporate existence. It is insisted that the corporation was dissolved by an Act of the General Assembly, ratified the 16th day of February 1859.

In England the power of creating corporations is a part of the Royal prerogative, which is respected by the transcendent authority of Parliament. 1 Black. 473. When the King creates a corporation by letters patent, he cannot by his prerogative change the terms of his grant, or dissolve the body politic. This can only be done with the consent of the corporation, or by Act of Parliament, whiah is boundless in its operation. By the mutual consent of the King and his patentee, the terms of the patent may be changed, enlarged or diminished.

In this State, the power of creating corporations is vested in the Legislature, and there are two kinds of corporations recognized by our law:

1. Such as are created solely for the benefit of the public, and in which the citizen has no private individual interest.

2. Corporations which are based upon contracts between Legislature and citizens, and in which individual rights and interests are guaranteed.

Over the first class, the Legislature has entire control, and may modify, change and destroy them, at pleasure. *Mills* v. *Williams*, 11 Ire. 558.

Over the second class, the Legislature has power only so far as provided for in the charter of the corporation. The charter is a contract which is protected by the Constitution of the United States, Art. 1., sec. 10; but that provision does not prevent the parties from making changes, by mutual consent, in the obligation of their contract. It may require the unanimous consent of the corporators to surrender their franchises, or make any material change in the terms of their charter, but a majority generally have the power to make by-laws, rules and regulations, and to direct a sale of the corporate property.

The Cape Fear and Deep River Navigation Company is a corporation belonging to the second class above named, and we must enquire if the Act above referred to, and the proceedings had thereunder, had the purpose of dissolving the said corporation. We are of opinion that the Act did not

contemplate such a purpose, and had no such effect. Its declared purpose is "to protect the interests of the State," in said corporation. It provides, "that if a sale of the property and effects,' &c., of said Company is made, then the Governor of the State is authorized to purchase and take a conveyance to himself and successors in office, "which shall vest absolutely in the State of North Carolina, all the property, corporate powers, privileges and franchises of said Company.

Under an order made by a majority of the stockholders, at a regular meeting, the property was sold, and the Governor became the purchaser, and took a conveyance as directed in said Act. This transaction does not affect the plaintiff's right to recover in this suit, for whether the act was constitutional or not, the corporate existence of the plaintiff is not destroyed. This was not a surrender of the corporate franchises on the part of the stockholders, and was not so considered by the Legislature; but it was a sale and transfer, made between parties able and willing to make the contract, and did not dissolve the corporation. *State* v. *Rives*, 5 Ire. 297.

Whether the corporate franchises passed to the Governor and his successors under said conveyance, as against the protesting stockholders, is a question which it is unnecessary for us to decide, in passing upon the rights of the parties to this suit. We have not the power to adjudicate upon the rights of parties not before us. It is sufficient for the purposes of this case, that the plaintiff still has a corporate existence.

We concur in opinion with his Honor in the Court below, upon the insufficiency of the plea of the statute of limitations. The defendant was a delinquent stockholder, and was proceeded against under the provisions of the 9th section of the charter of said company. The plaintiff's cause of action did not arise until the sale of the stock of the defendant, when the deficiency was ascertained for which this suit is brought. The writ was sued out within three years from the time the cause of action occurred.

Parties to a suit have no right to waive an appeal bond, so far as costs are concerned. Hereafter, the clerk of this Court will not state any such case upon his docket, unless the costs of the Court are secured.

PER CURIAM. Judgment affirmed.

STEPHEN W. BRITTON *v* WILLIAM R. MILLER and others.

By will made in 1854, A. J. Spivey gave certain real and personal estate to his wife for life, and then to a niece. The niece died in 1864, and Mrs. Spivey in 1867. By will, the niece gave "to the children of my brother Stephen W. Britton and of my sister Mary F. Miller, all of my property of every description, to them and their heirs forever." At the death of the niece, her brother Stephen had one child, which died before Mrs. Spivey. A year or more after its death, and before the death of Mrs. Spivey, another child was born to Stephen: *Held* that—

1. The children of Stephen and Mary took *per capita*.
2. The estate of the niece in possession, was to be divided amongst such of the children of Stephen and Mary as were in being at her death; and that her interest in the estate of A. J. Spivey, was to be divided amongst such of those children as were in being at the death of Mrs. Spivey.
3. The interest of the deceased child of Stephen devolved at its death upon its father, and was not divested out of him by the birth of the second child, more than ten months after such death, (Rev. Code, ch. 38, Rule 7.)
4. The rule that remainders given by will to members of a class, vest only in such as compose the class when the particular estate falls in, applies as well to gifts disposing of remainders previously created, as to gifts which create remainders.

(*Cheeves* v. *Bell*, 1 Ire. Eq. 234, and *Chambers* v. *Payne*, 6 Ire. Eq. 276, cited and approved.)

BILL, transferred to this Court from Spring Term 1868, of the Court of Equity for BERTIE.

The bill was filed by the plaintiff in his own right, and also as executor of Margaret S. Britton deceased, as administrator of his deceased daughter Rosa Mary, and also as next friend of his infant daughter Margaret; against Margaret, Isabella and

William Miller; and William R. Miller as administrator of Fanny Miller deceased.

It set forth that one Aaron J. Spivey had died in 1854, leaving a will, by which among other things he devised certain real and personal estate to his wife for life, and then to his sister Margaret S. Britton; that Margaret S. Britton died in 1864 leaving her interest under the above will, and some personal estate in possession; the whole of which she disposed of as follows: "I give and bequeath to the children of my brother Stephen W. Britton, and of my sister Mary F. Miller, all of my property of every description, to them and their heirs forever;" that Mrs. Spivey died in 1867; that at the death of Margaret S. Britton, her brother Stephen had one child, Rosa Mary, who died, an infant, in September 1864, and that in 1866 or 1867, and before the death of Mrs. Spivey, he had another, the complainant Margaret; and that those named as defendants, other than William R. Miller, are the children of Mary F. Miller, Fanny having died before the death of Mrs. Spivey.

The prayer was, for directions to the plaintiff Stephen as executor, for an account, and for general relief.

An answer was put in by William R. Miller, as administrator of Fanny and guardian *ad litem* of the other children of Mary F. Miller deceased.

Smith, for the plaintiff, cited and commented upon *Grandy* v. *Sawyer*, Phil. Eq. 8; *Rogers* v. *Brickhouse*, 5 Ire. Eq. 301; *Burgin* v. *Patton*, *Ib.* 425; *Roper* v. *Roper*, *Ib.* 16; *Shinn* v. *Motley*, 3 Ire. Eq. 490; *Gilliam* v. *Underwood*, *Ib.* 100; *Knight* v. *Knight*, *Ib.* 167; *Lockhart* v. *Lockhart*, *Ib.* 205; *Lowe* v. *Carter*, 2 Ire. Eq. 377; *Adams* v. *Adams*, *Ib.* 215; *Lane* v. *Lane*, Winst. Eq. 84; *Ward* v. *Stowe*, 2 Dev. Eq. 509; *Bryant* v. *Scott*, 1 D. & B., Eq. 156; *Spivey* v. *Spivey*, 2 Ire. Eq. 100; *Harris* v. *Philpot*, 5 Ire. Eq. 324.

Fowle & Badger, *contra*, cited *Kirkpatrick* v. *Rogers*, 6 Ire. Eq. 130; *Patterson* v. *McMasters*, 3 Ire. Eq. 208; *Bivens* v.

Phifer, 2 Ire. 436; *Cheeves* v. *Bell*, 1 Ire. Eq. 234; *Chambers* v. *Payne*, 6 Ire. Eq. 276, 2 Fearne 91, 92.

READE, J. I. Under the 2nd clause of Margaret S. Britton's will, the children of Stephen W. Britton and Mary F. Miller take *per capita*. The general rule is that in such bequests they take *per capita*, unless there is something in the will to show the contrary. *Cheeves et. al.* v. *Bell et. al.*, 1 Jon. Eq. 234.

II. Is the estate of Margaret S. Britton which she had in possession, and that which she had in remainder, to be divided among the same persons? No! The property in possession is to be divided among those who answered the description at the time of her death; and the property in remainder is to be divided among those who answered the description at the falling in of the life estate, and those who legally represent such as may die during the life of the life tenant. *Chambers* v. *Payne*, 6 Jon. Eq. 276.

III. Does Stephen W. Britton take the share of his deceased child Rosa Mary? Yes! Margaret S. Britton's remainder was vested, and at the time of her death in July 1864, Rosa Mary Britton, daughter of Stephen W. Britton, was in being, and one to whom the remainder is given. It vested in her, and upon her death it vested in her father, S. W. Britton, and the estate is not divested out of the father by the birth of his daughter Margaret more than ten lunar months after the death of Rosa Mary,—Rev. Code, ch. 38, Rule 7. Of course he takes Rosa's share of the property in possession.

IV. Does Margaret, a daughter of Stephen W. Britton by a second marriage, and born after death of testatrix but during the life of life-tenant, take? She does not take any of the property which was in possession of testatrix at her death; but she does take a share of the remainder, which opens so as to let in all who answer the description at the time of the falling in of the particular estate. It was admitted that this would be so if the testatrix had created the remainder herself; but it is insisted that where the remainder is created by some other means, and

the testatrix is not *making*, but *is disposing of* a remainder already made, a different rule prevails, and those who answer the description at the time the remainder is disposed of, *i. e.*, the death of the testatrix, will take. But we can see no reason for the difference, and we do not agree to it.

There will be a reference to the clerk of this Court to take an account, if desired. The cause will stand for further directions.

PER CURIAM. Decree accordingly.

L. S. WEBB, CASH'R, &c., *v.* FRANCIS A. BOYLE.

Where land that has been levied upon, is being wasted, and the officer is prohibited from making sale by military order, *held* that the plaintiff in the execution is entitled to an injunction against such waste.

The fact that pending the proceedings for injunction, the military orders ceased to have effect, and the stay law was pronounced void, does not affect that jurisdiction for an injunction, which existed at the commencement of such proceedings.

A widow who is entitled to dower, can ordinarily exercise no right over the land until her dower has been assigned.

(*Powell* v. *Howell*, at this term; *Jacobs* v. *Smallwood ante* 112, and *Hamlin* v. *Hamlin*, 3 Jon. Eq. 191, cited and approved.)

MOTION to dissolve an injunction, heard before *Barnes*, *J.*, at Spring Term 1868, of the Court of Equity for BERTIE.

The plaintiff, Cashier of the Bank of North Carolina at Windsor, alleged that at February Term 1861 of the County Court of Bertie he had obtained a judgment against one John M. Boyle for $13,319.68, and that an execution upon the same was levied upon a tract known as the Rainbow Swamp; that a sale during the war was impracticable, owing to the presence of the armies, and that since the war it has been prevented by Stay Laws and Military Orders; that John M. Boyle died insolvent in the year 1866; that a *ven. ex.* was issued at November Term 1867, after notice to the heirs of the deceased, and the sheriff had been ordered by the military not to sell; that the defendant, a son of the deceased, who is also insol-

vent, has been for two years, and is now, engaged in cutting timber from the land, which is the only property of the deceased to which the plaintiff can resort for payment of his debt, and which is not sufficient for that purpose. The prayer was for an injunction, an account of the timber already cut, and for general relief.

The answer, filed at Spring Term 1868, averred that there was nothing in the condition of matters during the war, in the neighborhood of the land in question to prevent the plaintiff from selling it under execution; that the notice which issued to the heirs of John M. Boyle was not served on all of them; that the defendant is one of these heirs, and agent of the widow (who is entitled to dower on said land,) and he is also executor of said deceased; that one-half of the land had been conveyed by deed (executed July 13, 1852) made prior to the levy, by the deceased to H. G. Spruill, and that deed is now "due and payable" to the defendants, that the land is valuable for other purposes than the timber, and is not the only property belonging to the deceased; and that although owing to the difficulty of collecting he can not at present meet his debts, yet he is solvent, and able to pay all damages that the plaintiff could recover.

Affidavits were filed, in regard to the defendant's pecuniary condition, and exceptions were put in to the answer, also a copy of the deed to Spruill, and of a military order (dated February 10th 1868,) annulling the injunction granted when the bill was filed.

At Spring Term 1868 the injunction was dissolved, and the plaintiff appealed.

At this term of the Supreme Court Charles Dewey filed a petition alleging that the Bank of North Carolina had gone into bankruptcy, that he is Assignee, and asking to be made a party to the cause. This was allowed.

Moore and *Phillips & Merrimon*, for the appellant.

Biggs and H. A. Gilliam, contra.

DICK, J. The object of the bill in this case is to prevent

destructive injuries in the nature of waste, on land upon which the complainants have an execution lien. The suit at law, by which the judgment and execution were obtained, was brought by complainant Webb, as Cashier of the Bank of North Carolina. The said Bank has been adjudged a bankrupt, and the assignee, Charles Dewey, made application to become a party complainant in this Court, as provided for in Sec. 16. G. C. 68. of the Bankrupt Act of March 2nd 1867. The application was allowed. He is not a necessary party, as the plaintiff Webb has the legal interest in the judgment and execution, and can protect and secure the equitable interest of the Bank; but as the assignee and other plaintiffs have co-existent interests, they may properly be joined in a Court of Equity. Adams' Eq. 313.

The judgment in the Court of Law was obtained against John M. Boyle for a large debt due said Bank. The execution was issued from February Term 1861, of Bertie County Court, and levied upon the land in question, but a sale was prevented by the events of the late war, and by various stay laws. John M. Boyle died in 1866 insolvent. At November Term 1867 of said Court, a *ven. ex.* was ordered to be issued, due notice having been given to the heirs-at-law of said Boyle.

A sale was prevented by General Orders issued from Military Headquarters, staying the collection of debts of this character.

This bill was filed to Spring Term 1868 of the Court of Equity for Bertie, to stay by injunction destructive injuries in the nature of waste committed by Francis A. Boyle, who was in possession of said land. At said Term the injunction previously granted at chambers was dissolved in obedience to a military order to that effect. We will consider this cause upon the state of facts shown by the pleadings at that term. The first question is, was the injunction properly granted.

The plaintiffs established their right in a Court of Law, and the legal remedy for the enforcement of their lien was a sale of the land levied on. This legal remedy was stayed by military orders, and thus rendered ineffectual for immediate relief.

While thus stayed, the defendant, who was in possession of the land as one of the heirs-at-law of the said John M. Boyle, was committing very destructive injuries in the nature of waste. The land was insufficient to secure the plaintiffs' debt, and these destructive injuries were continually diminishing the value of the plaintiffs' lien. There was no remedy at law for immediate sale, or for preserving the corpus of the estate during the pendency of the *military stay law*. We may state as a general rule, that when a party has an established legal right, and, as to its enforcement, he is "remediless at law," he may find adequate relief in equity. It has been decided at this term in the case of *Powell* v. *Howell, et. al.*, that the law abolishing imprisonment for debt, necessarily enlarged the jurisdiction of Courts of Equity in the application of legal choses in action to the payment of debts. This stay law had the same effect, as it rendered the ordinary legal remedy of the plaintiffs ineffectual. The jurisdiction of equity originates in the occasional inadequacy of the remedy at law, Adams' Eq. 25., and that jurisdiction must necessarily enlarge, when from any cause a legal remedy becomes ineffectual to secure a legal right. The plaintiffs cannot bring an action of waste, or in the nature of waste, to recover damages for the destructive injuries complained of, as they have not the legal title to the land; and even if they could bring such action, any judgment for damages would be valueless, as the defendant is insolvent. Their only remedy was in equity, to restrain the commission of the injury, and such remedy was not in violation of the stay law, but was in accordance with its spirit; to preserve the corpus of the estate from destruction until such time as the *lien* could be satisfied by a sale.

These destructive injuries are plainly and positively alleged, and the insolvency of the defendant distinctly charged in the bill, and these allegations are fully sustained by affidavit, and a letter of defendant, and they are met by a very evasive answer and affidavit in defense, and the injunction would doubtless have been continued to the hearing of the cause, but for the imperative order of the military authorities then in com-

mand in this State. His Honor in the Court below, properly yielded obedience to the military orders, as *silent leges inter arma*, but that temporary government with its general orders, has passed away, and the municipal law of the State has again assumed its wise and beneficial supremacy. As the stay laws of the State have been declared unconstitutional at this term, in the case of *Jacobs* v. *Smallwood*, there is now nothing to prevent the plaintiffs from having their legal remedy, by a sale of the land in question; but this restoration of the legal remedy does not deprive the Court of Equity of the jurisdiction so rightfully acquired and exercised. *Hamlin* v. *Hamlin* 3 Jon. Eq. 191

We think proper to notice two matters insisted upon as a defense by the defendant in his answer. The deed in trust executed by John M. Boyle, deceased, in 1852, to H. G. Spruill, as trustee, to secure a large debt to Simmons, can in no way avail the defendant, as he does not state how he has any interest in it. The deed is so old in date that there is a legal presumption of its satisfaction, and the defendant does not show any thing to rebut that presumption.

The defendant insists that he is the agent of the widow of John M. Boyle, deceased, who is entitled to dower in the land, and a reasonable use of the timber for her benefit. This may be so—but until the dower is assigned, she has no right which she or her agent can lawfully exercise over said land.

The interlocutory order in the Court below must be reversed.

Let this be certified, &c.

PER CURIAM. Ordered accordingly.

THE STATE *v.* A. BAKER, J. THOMAS and G. JOHNSON.

A Court of Oyer and Terminer held in 1868 by virtue of the act of 1862, (Feb. 9,) and under a commission from Governor Holden to a Judge of the Superior Court, was competent to hear and determine cases of crime.

Where a Judge of the Superior Court holds a term, it will be taken, *prima facie* at least, that he was authorized so to do, and that it was regular.

A general verdict of guilty, upon an indictment containing several counts, will be supported, although these are *inconsistent* as regards their statement of the manner of killing.

A charge that—"if the acts deposed to by C. P. were the cause of the death, it was murder," *held* to be no trespass upon the province of the jury.

During a capital trial, one of the jury (then out of Court in charge of an officer for the purpose of eating dinner) was allowed to pass by or near a number of persons, and to eat his dinner a short distance from the other jurors, although he conversed with no one,—*held* to give no just cause of complaint to the prisoners.

(*Sparkman* v. *Daughtry*, 13 Ire. 168; *S.* v. *Ledford*, 6 Ire. 5; *S.* v. *Morrison*, 2 Ire. 9; *S* v. *Miller*, 7 Ire. 275; *S.* v. *McCandless*, 9 Ire. 375; *S.* v. *Williams*, 9 Ire. 140; *S.* v. *Hester*, 2 Jon. 83, cited and approved.)

MURDER, tried before *Mitchell*, *J.*, at a Court of Oyer and Terminer for HALIFAX, held in July 1868.

The record set forth a commission from Governor Worth to Judge Mitchell, dated June 22, 1868, authorizing him to hold the Court in question at such early time as he might appoint; also one from Governor Holden to the same, dated July 14, 1868, giving him like authority to hold a Court on the 27th day of July 1868.

The indictment contained four counts, which charged the homicide to have been committed (1) with a stick, (2) by casting to the ground, striking, kicking and beating, (3) by drowning, and (4) by some means unknown.

The prisoners and the deceased had been playing cards during the night, the deceased being winner. The prisoner Baker thereupon, became angry, abusing the deceased, and insisting that he should return the money. This was refused. Thereupon, as was testified by a witness named Cuba Panton,

who was in a room adjoining, Baker renewed his abuse, and struck the deceased with some instrument that had a handle, and knocked him down. He fell backwards, his head striking upon a passage floor. Thereupon, a blow with the same or a similar weapon was given by each of the other prisoners. They then dragged him off groaning and begging for mercy. He was not seen again until some days afterwards, when his body was found in Roanoke river. When found, a wound, apparently made by a hammer, was discovered on the frontal bone; a physician pronounced it to be mortal, and the cause of the death. Other wounds not of themselves sufficient to produce death, were found upon the body.

The Court instructed the jury that if the acts deposed to by Cuba Panton were the cause of the death of the deceased, (Wade Ditcher,) it was murder by the prisoners. The prisoners excepted.

During the trial the jury were permitted, under the charge of an officer, to eat their dinner. One of them was allowed by the officer to pass by or near a number of persons, and to eat his dinner at a short distance from the others. It was not alleged or believed that he conversed with any one.

The term of the Court was stated in the case to have been held under an appointment as Judge of the Superior Court, and under the special commission by Governor Holden.

Verdict, Guilty; Rule for a new trial; Rule discharged; Judgment, and appeal.

Conigland & Solomon, for the prisoners.

1. The acts of 1862 and 1863 ceased to have effect upon the adoption of the present Constitution; and that Constitution does not authorize Courts of Oyer and Terminer.

2. The charge in regard to the evidence of Cuba Panton, *assumed* the "acts" to exist.

3. The charge violates the rule in the *State* v. *Scates*, 5 Ire. 420.

The judgment must be arrested, for the counts charge the

killing, in *inconsistent* ways, and the verdict being general, there can be no judgment upon it. *Reg.* v. *O'Brien*, 2 Car. and Kir. 115; *Reg.* v. *Downing*, 2 *Ib.* 386.

They also cited Chitty, Cr. L. 1st, 258; 3d, 734; Hale. Pl. Cr. 1st, 439; *S.* v. *Moses*, 2 Dev. 468.

Attorney General, contra.

READE, J. The statute provides that, for "good cause shown, the Governor shall issue commissions of Oyer and Terminer to the Judges of the Superior Courts of law, which Courts of Oyer and Terminer shall have jurisdiction to indict, try," &c.,—Act of 1862, February 9.

"The laws of North Carolina, not repugnant to this Constitution, or to the Constitution of the United States, shall be in force until lawfully altered"—State Constitution, Art. 4, s. 24.

Under the Constitution, the Courts are "Supreme Courts, Superior Courts, Courts of Justice of the Peace, and Special Courts"—Art. 4, s. 4.

A Court of Oyer and Terminer held by a Judge of the Superior Court, as provided for in the act of 1862, *supra*, is a Superior Court, and is not repugnant to the Constitution, but is in consonance with it. The act of 1862 is, therefore, in force.

It appears from the record in this case, that two commissions issued to Judge Mitchell to hold the Court, the action of which we are reviewing—one from Governor Worth, before the late provisional government expired, and one from Governor Holden, after the present permanent government came in. And the statement of the case, which stands in the place of the prisoners' exceptions, sets forth that Judge Mitchell held the Court "under his appointment as Judge of the Superior Court, and the special commission of Governor Holden." We think, therefore, that it appears affirmatively that the Court was properly constituted, and had jurisdiction. But it was not necessary that it should appear on the record affirmatively;

for, when a Court is held by a Superior Court Judge,—and Judge Mitchell is such a Judge,—it is not necessary that the record should set out the authority by which he held it, because, *prima facie* at least, it is to be taken that he is authorized to hold it, and that it is in all things regular. *Sparkman* v. *Daughtry*, 13 Ire. 168; *State* v. *Ledford*, 6 Ire. 5.

The indictment has several counts, one charging the killing by blows with weapons, another, by drowning, and a third, by means to the jurors unknown. And there was a general verdict of guilty. The only evidence offered was upon the first count; and there was evidence of the blows, and the physician was of the opinion that the death was caused by the blows. His Honor's charge was confined to the first count,—telling the jury that if they believed that the blows were the cause of the death, it was murder.

It was in evidence that the dead body was found in the river some days after the blows were given, but this was not relied on as evidence of his being drowned, and there was no charge upon, or consideration of the count for drowning.

The prisoner insists that as the killing is charged in different and inconsistent ways, and the verdict is general, the verdict is inconsistent, and no judgment can be rendered. The authority principally relied on for this position, is *Regina* v. *O'Brien*, 61 Eng. C. L. R. 115. In that case one count charged the death to be by a *blow with a stick* held in the hand, and another count, by a *stone cast and thrown*. The verdict was general. It was objected that no judgment could be rendered, because the finding of the jury left it uncertain, whether the death was caused by the blow with a stick held in the hand, or by the blow with a stone cast or thrown. The case was reserved for the fifteen Judges, and was well considered. The conviction was held to be right, and judgment was pronounced. The *decision*, therefore, does not sustain the position, but is not precisely against it, because it was put upon the ground that the different modes charged were substantially the same, both being by blows. Yet it must be admitted that much fell from the Judges *arguendo*, to favor the position. The physi-

cian, who made the *post mortem* examination in that case, said there were two fractures of the skull, both might have been caused by the stick; but it was more probable that one was caused by the stone, and he could not say which was the mortal blow, as each, without the other, would have been mortal. It is to be observed that in that case there was evidence upon both counts, which differs from our case, in which there was evidence only upon one count. It seems, however, to be settled both in England and this country, that where there is a general verdict on an indictment containing several counts, some good and some bad, judgment may pass upon the counts that are good, on the presumption that to them the verdict attached. And so, where one of the two counts is good, and one bad, and the prisoner is found guilty, and sentenced generally, the presumption of law is that the court awarded sentence on the good count. Wharton's Crim. Law, Sec. 3047.

And it is said that every cautious pleader will insert as many counts as necessary to provide for every possible contingency in the evidence. To a person unskilled in legal proceedings it may seem strange that several modes of death, inconsistent with each other, should be stated in the same indictment; but it is often necessary, and the reason for it when explained will be obvious. The indictment is but the charge or accusation made by the grand jury, with as much certainty as the evidence before them will warrant. They may be satisfied that the murder was committed, but doubtful as to the manner; but in order to meet the evidence as it may developed on the trial, they are allowed to set out the mode in different counts, and then, if any one of them is proved, it is sufficient to support the indictment.

Take the case of a murder at sea—a man is struck down, lies on the deck for some time insensible, and in that condition is thrown overboard. The evidence proves the homicide certainly, either by the blows or by the drowning, but leaves it uncertain by which. That would be a fit case for several counts; charging the death, by a blow; and the death, by drowning; and perhaps a third, charging it, by the joint results of

both. A general verdict would be sustained, and a general judgment upon the verdict, and this from the very necessity of the case. Wharton's Crim. Law, Sec. 424.

The killing is the substance, the mode is the form: and while it is important, that the prisoner should be specifically informed of the charge against him, so that he may make his defence, yet he cannot complain that he is informed that, if he did not do it in one way, he did it in another—both ways being stated; and it is not to be tolerated, that *the crime* is to go unpunished, because the precise manner of committing it is in doubt.

In our own Court it has been decided, that when there are several counts, some good and some bad, and a general verdict, judgment may pass upon the good, rejecting the bad as surplusage. *State* v. *Morrison*, 2 Ire. 9; *State* v. *Miller*, 7 Ire. 275; *State* v. *McCanless*, 9 Ire. 475.

Where there are several counts, and evidence was offered with reference to one only, the verdict though general, will be presumed to have been given on that alone, *State* v. *Long*, 7 Jon. 24. Where there are several counts, charging the same crime to have been done in different ways, the jury are not bound to distinguish in which way it was done, but the verdict may be general. *State* v. *Williams*, 9 Ire. 140. We see no reason for arresting the judgment.

The Judge charged the jury that, if the acts deposed to by Cuba Panton (who testified as to the blows), were the cause of the death, it was murder. This charge was excepted to upon the ground that it assumed the acts to be true, and left only their effect to the jury; whereas, the prisoner denied that the acts ever occurred, and insisted that the existence of the acts ought to have been left to the jury. But we cannot understand how certain acts caused death, unless the acts existed. When, therefore, his Honor told the jury that, if they believed that certain acts were the cause of the death, it was murder, it was the same as if he had said "If you believe the acts were performed, and that they produced death, it is murder;" because it is impossible that the jury would believe that the

acts caused the death, without first believing that the acts existed.

During the trial, the jury were put in possession of an officer, to be kept together, with permission to eat their dinner. One of the jurors was allowed "to pass by or near a number of persons, and to eat his dinner a short distance from the other jurors, but he conversed with no one." There is nothing in this of which the prisoner has any right to complain. In *State* v. *Hester*, 2 Jon. 83, two jurors left the rest for fifteen or twenty minutes, but did not speak to any one, and it was held not to vitiate the verdict. Let this be certified, &c.

PER CURIAM. There is no error.

Doe ex dem ELISHA KINCAID *v.* E. A. AND R. C. PERKINS.

The land of a *feme covert* having been conveyed without her privy examination, *held*, that there was no adverse possession as against her issue, until after the death of the husband.

(*Davenport* v. *Wynne*, 6 Ire. 128, cited approved.)

EJECTMENT, tried before *Little*, *J.*, at Spring Term 1868, of the Superior Court of BURKE.

The facts agreed were that in 1818 one Polly Kincaid (wife of John Kincaid) was tenant in common with one Alfred Perkins of the land in controvesy. In the same year she joined her husband in a deed for the land to the said Alfred in fee, at the price of $1,000, but there was no privy examination of her. She died in 1820, and her husband in 1867. The plaintiff's lessor is their only child and heir, and the defendants are the sole heirs of Alfred Perkins, who died in 1836. There was a demand of possession, and a refusal, before bringing the suit.

His Honor below having given a *pro forma* judgment for the plaintiff, the defendants appealed.

T. R. Caldwell, for the appellants.

Phillips & Merrimon, contra.

RODMAN, J. The deed from John Kincaid, and Polly, his wife, although inoperative as to her, from want of private examination, yet passed the estate of the husband. He was entitled to an estate as tenant by the curtesy, and the possession of the defendant did not become adverse until his death in 1867, from which time only, the statute of limitation, began to run. *Davenport* v. *Wynne*, 6 Ire. 128.

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

PER CURIAM. Judgment affirmed.

JOHN H. POWELL *v.* LEVI D. HOWELL and D. H. BRIDGERS.

Since the Act abolishing imprisonment for debt, Courts of Equity have jurisdiction of suits by judgment creditors to subject their debtors' legal choses in action, after a return of *nulla bona.*

(*Hook* v. *Fentress*, Phil. Eq. 229, cited and approved.)

BILL in equity argued upon demurrer before *Thomas, J.*, at Fall Term 1868, of the Superior Court of WAYNE.

The bill alleged that the plaintiff had been surety for a note for the defendant Howell, had paid it, and having sued Howell for the amount paid, had recovered judgment, and that the execution issued thereupon had been returned *nulla bona;* that Howell had confessed a judgment for a large sum of money to one Everett, upon a feigned debt, and had paid to him a sum of money as part thereof; that Everett was dead, and the defendant Bridgers is his executor. Also, that Howell possesses a large amount of notes, bonds and other choses in action.

The prayer was that Bridgers should be declared a trustee

for the plaintiff, that Howell should be enjoined, and that the plaintiff might have further relief.

The defendants demurred jointly.

His Honor overruled the demurrer; and the defendants appealed.

Faircloth, for the appellants.

Person, contra.

DICK, J. A Court of Law is the proper forum for the enforcement of legal demands, and a Court of Equity will not interpose its extraordinary aid, until legal remedies have proved ineffectual. When a creditor has a legal demand against a debtor, he must first establish it at law by a judgment, and then use the proper legal process for its enforcement. Formerly Courts of Law afforded the *capias ad satisfaciendum* against the body of the debtor, to compel him to apply in satisfaction of his debts property which could not be reached by a *fieri facias*. This legal remedy has been taken away by statute in this State, which necessarily enlarges the jurisdiction of our Courts of Equity.

Whenever a person makes the necessary efforts, and fails to obtain his rights in a Court of Law, he may generally find relief in a Court of Equity. *Hook, Skinner & Co.*, v. *Fentress et. al.* Phil. Eq. 229.

The case before us was set for argument on joint demurrer, and all the allegations of fact in the bill must, for the purposes of the argument, be deemed conclusive.

It appears that the complainant has established his debt by a judment at law; and that a *fi. fa.* has been issued to the sheriff, and been duly returned, *nulla bona*. This legal remedy is exhausted, and still the defendant Howell has legal choses in action, which cannot be reached by *fi. fa.* He has a clear right to ask a Court of Equity for its extraordinary aid in obtaining adequate relief.

The defendant Bridgers stands in the place of his testator, James H. Everett, and is bound by the same equities, as far

as he has assets. It appears that his testator received a large sum of money from the co-defendant Howell, under a judgment confessed, which was "fraudulent and void, and given without any consideration." Such a feigned and covinous judgment is made utterly void as against the person who in anywise is hindered, delayed, or defrauded of his debts. Rev. Code, ch. 50, sec. 1, (13 Eliz.)

The judgment is valid as against Howell, but the Court will not adjudicate on the conflicting claims of co-defendants, except so far as is necessary to afford relief to the complainant. Adams', Equity, 313. If this case were now before us for final hearing upon the same state of facts, we would feel bound to make a decree against the defendant, Bridgers, such as would secure the complainant's claim. His Honor in the Court below overruled the demurrer, and we find no error.

PER CURIAM. Judgment affirmed.

JOHN P. LITTLE *v.* PRESLEY STANBACK.

Instructions to a jury, that if a plaintiff sustains no injury from the ponding of water upon his mill wheel, still he is entitled to *nominal* damages, are correct.

Where a petition under the statute, [Rev. Code, ch. 71, s. 8] for damages caused by the erection of a mill upon the stream below, described it as a "grist mill;" without calling it a *public mill*, or a grist mill *grinding for toll*, *held*, to be sufficient.

The mere raising of a stream within its banks, although it is not thrown out of them, is sufficient to support an action for injury to land through which it runs.

PETITION, to recover damages caused by the erection of a mill, tried before *Buxton*, *J.*, at Fall Term 1868 of the Superior Court of ANSON.

Upon the trial, the defendant's counsel asked the Court to charge the jury, that if the water backed, by the dam below, upon

the wheels of the plaintiff's mills produced no injury to the plaintiff, the latter was entitled to no damage. The Court declined so to charge, and instructed the jury that in such case the plaintiff would be entitled to nominal damages.

Verdict for the plaintiff; Rule for a new trial; Rule discharged; Judgment, and Appeal.

Person and *Fowle & Badger*, for the appellants.

Strange and *R. H. Battle, Jr.*, *contra.*

READE, J. The statute provides that "any person conceiving himself injured by the erection of any grist mill, or mill for other useful purposes, may apply by petition to the Court of Pleas and Quarter Sessions for the county in which the land is situate, setting forth in what respects he is injured by the erection of the mill, &c." Rev. Code, ch. 71, s. 8.

Under this statute any one whose *land* is injured by the erection of such a mill, may recover damages for the injury to the *land*, and also for incidental injuries,—as, to the health of his family, to his machinery, &c.

The parties went to trial before the jury upon the single issue, "Is the plaintiff damaged by the erection of the mill of the defendant; and, if so, what is the extent of the damage?" The issue is not as specific in terms, as it might have been, but no other was asked for, and no objection made by either party.

"The defendant asked his Honor to charge the jury, that, if there was water backed by the defendant's dam on the plaintiff's wheel, and it produced no injury to the plaintiff, the plaintiff was entitled to no damages, and their verdict should be for the defendant."

His Honor declined to give the instructions, but charged the jury, that, "if they were satisfied that the water was ponded back by the defendant's dam on the plaintiff's wheel, but produced no *substantial* injury, the plaintiff would be entitled to *nominal* damages."

Giving to the exception, and to his Honor's charge, a plain

and just interpretation, we think that the point intended to be presented was "Is the mere fact of ponding back the water upon the plaintiff's premises sufficient to entitle him to nominal damages?" His Honor thought it was, and we are of the same opinion. It is like a trespass on land, when the allegation is, that the defendant broke the plaintiff's close, and trod down his grass; it is clear that the mere entry upon the land, although there be not so much perceptible injury as the treading down a single sprig of grass, is a trespass, and entitles the plaintiff to nominal damages.

There were many points taken in the argument at this bar, that were not taken below, and our province is only to correct the errors in the trial below. But we do not see that the objections could have availed the defendant, if they had been taken in apt time.

It was objected,

1. That it is not alleged in the petition, that the defendant's mill is a *public* mill, or a grist mill *grinding for toll.* That is true: but it is alleged that it is a "grist mill;" and that is within the words of the statute.

2. That it did not appear that any portion of the plaintiff's *land* was overflowed, but only that the wheels of his mill were flooded, by the ponding of the water.

Supposing that this be true, in the sense that the water was not thrown out of the banks of the stream, yet the raising the water in the stream, necessarily overflowed the banks, to the extent that it was raised; and these incidental injuries were properly considered. So that we need not consider the question, whether the mill and machinery, being a part of the realty, answers the description of land.

PER CURIAM. There is no error.

Doe ex dem A. N. COLVORD *v.* L. D. MONROE.

The laws of North Carolina permit resident Cherokee Indians to take and hold land by grant.

The law providing that contracts with Indians shall be subscribed by two witnesses, does not require the probate for registration, to be by both.

Where one of the two witnesses to such a contract, stated upon oath that he could not recollect having subscribed it, it was competent to establish that fact by other testimony.

(*University* v. *Blount*, N. C. T. Reports, 13, *Hawkins* v. *Springs*, 10 Jon. 130, cited and approved.)

EJECTMENT, tried before *Cannon, J.*, at Fall Term 1868 of the Superior Court of CHEROKEE.

The plaintiff claimed under a grant from the State to one Clausine, a Cherokee Indian; and then showed that Clausine had conveyed to him by deed dated August 15 1864. This deed was proved, at the time of its registration, by only one of the two witnesses whose names appeared subscribed; and the other witness on being introduced at the trial, said that he could not recollect that *he* had ever subscribed it.

The defendant objected to the grant on the ground that an Indian could not hold lands in North Carolina: he also objected to the deed to the lessor of the plaintiff because not established at the probate by two subscribing witnesses; and he submitted, that it was incompetent for the plaintiff to introduce testimony to contradict what the other subscribing witnes testified to on the trial.

His Honor overruled each of these objections.

Verdict for the plaintiff: Rule for new trial: Rule discharged. Judgment, and Appeal by the defendant.

No counsel for the appellant.

Phillips & Merrimon, contra.

READE, J. I. There is nothing in the Constitution or laws of North Carolina, which forbids Cherokee Indians residents

from taking and holding land. There is, therefore, no force in the defendant's first exception to his Honor's ruling.

II. The statute requires that all contracts with Cherokee Indians, involving ten dollars in value, shall be in writing, and subscribed by two witnesses. The deed offered in evidence had the names of two subscribing witnesses, as the statute requires, but upon the probate for registration, only one of them was examined. When a will of lands, which requires two subscribing witness, is admitted to probate upon the testimony of one, it will be intended, *prima facie*, that it was legally proved by him. *University* v. *Blount*, N. C. T. R 13. *Harven* v. *Springs*, 10 Ire. 180. His honor committed no error in his charge upon this point.

III. The fact that one of the subscribing witnesses denied his signature, did not of itself render the deed void, and notwithstanding his denial, it was competent to prove by other evidence that he did subscribe it. 1 Blackstone's R. 365.

PER CURIAM. There is no error.

MARY WHITAKER *v.* LEWIS T. BOND.

A motion for an injunction made after the coming in of the answer, must be founded upon the equity therein confessed:

Therefore, Where the answer to a bill for the specific performance of a contract to sell land, alleged that the defendant was a trustee of the land in question, and as such sold it for Confederate money, at auction, *for cash*, on the 22d of January, 1863; that the complainant became the purchaser, but did not comply with the terms, and did not offer the money until ten or twelve months afterwards, when she tendered it and asked for a deed, which was refused. *Held*, that an injunction to restrain the defendant from prosecuting an action of ejectment for such land, ought not to have been allowed.

Time, which in equity generally is not of the essence of a contract, may become so at periods when the currency is rapidly depreciating from day to day.

Where a bidder at auction offered one who also proposed to bid, that if he would desist, she would divide the land with him, *held* to be a fraud upon the vendor, and so, to violate the contract of purchase afterwards made by her as the only bidder.

(*Smith* v. *Greenlee*, 2 Dev. 126, *McDowell* v. *Simms*, Bus. Eq. 130, *Morehead* v. *Hunt*, 1 Dev. Eq. 35, cited and approved.)

MOTION, for an injunction, allowed by *Barnes, J.*, at Spring Term 1868 of the Court of Equity for BERTIE.

The complainant had filed the bill at Spring Term 1866, asking for the specific performance of a contract to sell a tract of land described. It alleged that the defendant, as trustee for sale, had exposed the land at auction, for Confederate money, on the 22d of January 1863, that the attendance was considerable, the sale a fair one, and the complainant had purchased at the price of $500. Some time thereafter she tendered the money to the defendant, and demanded a deed, but he refused to give it. She submitted to pay the value of the Confederate money at the time of sale, either in specie or currency, as she might be required.

The answer, filed at the same Term, admitted the sale, and that it was for Confederate money, but alleged that it was expressly for cash; that the complainant bought by the favor of those present, as *widow* of the trustor, and it was so pro-

claimed by persons at the sale; that she agreed previously to the sale, to give two-thirds of the land to one Burch, who was there present to bid, but by such agreement was induced not to do so; that the complainant had made no offer to pay for the land until some eight or ten months afterwards, (currency in the interval having greatly depreciated,) when her offer was declined; that the price is a very inadequate one, the land being worth more than $2,000 in good money; that the creditors secured under the trust have notified him not to make a deed, &c., &c.

At Fall Term 1867, upon motion of the complainant, it was ordered that an injunction should issue against the defendant, restraining him from prosecuting a certain action of ejectment, pending in the County Court of Bertie for possession of the land in controversy, until the hearing.

From this order the defendant appealed.

Smith, for the appellant.

No counsel, *contra*.

DICK, J. The relief sought by the complainant, is the specific performance of a contract relating to land. The case comes into this Court by appeal from an interlocutory order made in the Court below, granting an injunction against the defendant, restraining him from proceeding in a pending action of ejectment, to recover from the complainant the possession of the land in controversy. The motion for the injunction was made after the coming in of the answer, and, by the rules of equity pleading, it must be founded upon the merits confessed in the answer; Adams, Eq. 359. It has become necessary, therefore, for us to consider, whether the equity confessed is sufficient to continue the injunction to the final hearing.

It appears from the answer, that the defendant, as trustee under a deed in trust, sold the land in question, at public auction, on the 22nd day of January, 1863. The sale was for Confederate money, and the terms were *cash*. The complainant, the widow of the trustor, bid five hundred dollars, and as

no other bid was made, she was declared the purchaser. The *cash* was not paid at the sale, but about ten or twelve months thereafter, she offered to pay the money and take a deed for the land. During this period of delay, Confederate money had depreciated to less than half its value at time of sale.

These are the principal facts set forth in the answer as to this part of the case, and we must consider whether they show an equity, which ought to be specifically enforced. The complainant did not comply with her part of the contract in paying *cash*, which must have been important to the defendant, or he would not have sold for *cash*. Trust sales are usually made on a credit,—cash sales are made to meet sudden emergencies. In equity, time is not generally of the essence of a contract for the payment of money; but in a case like this, where the money was needed for immediate use, and was to be paid in a currency which was rapidly depreciating, the question of time becomes really material. The price bid for the land was not one fourth of its real value, and this delay of the complainant for twelve months, ought to deprive her of the relief she seeks in a Court of Equity. *Perkins* v. *Wright*, 3 Har. & McHen. 324; *Garnett* v. *Macon*, 2 Brock. 185; *McKay* v. *Carrington*, 1 McLean, 50.

This Court cannot estimate the damages of the defendant, so as to afford him adequate compensation, and the fulfilment of the complainant's part of the contract cannot be secured, as Confederate money is now utterly worthless. It is a well-established rule of Courts of Equity to refuse specific performance, when the contract cannot be mutually enforced; Adams, Eq. 82. If the enforcement of this contract was practicable, its specific performance would be unjust and inequitable to the defendant, and the trust creditors whom he represents. The complainant also violated the contract, and it would be a strange equity to give her all the benefit of its enforcement.

It also appears from the answer, that the complainant, at the sale, entered into an agreement with William H. Burch, a creditor largely secured in the deed in trust, that, if he would not bid against her, he might have two-thirds of the land. The

commendable spirit of kindness and sympathy, which is always shown to a widow at the sale of her deceased husband's estate, gave her great advantage as a bidder, and she should have been therewith content, and not have entered into a bargain to stifle bidding, which the law regards as a fraud. In *Smith* v. *Greenlee*, 2 Dev. 126, Henderson, Judge, says: "A sale at auction is a sale to the best bidder, its object, a fair price, its means, competition—any agreement, therefore, to stifle competition is a fraud upon the principles upon which the sale is founded." It appears from the answer, that the land did not sell for one-fourth of its value, and that Burch, but for his bargain with complainant, intended to make the land bring something like its value. This bargain, therefore, stifled competition, was a fraud upon the vendor, and vitiated the contract. *McDowell* v. *Simms*, Bus. Eq. 130; *Morehead* v. *Hunt*, 1 Dev. Eq. 35. A Court of Equity in the exercise of a sound discretion cannot enforce such a contract. There are other serious objections to a specific performance, set forth in the answer, which we deem it unnecessary to advert to, at this stage of the case. After careful consideration we are satisfied that there is not sufficient equity confessed in the answer, to continue the injunction to the final hearing. It is therefore ordered, that the injunction be dissolved at the costs of the complainant, and that the case be remanded, so that the complainant may proceed as she may be advised.

PER CURIAM. Injunction dissolved.

THE STATE *v.* GREEN HARSTON.

One who is under sentence of death for a felony, is nevertheless competent as a witness.

To show the disposition of a witness towards the prisoner, he may be asked whether he had not *heard* that the prisoner had been a witness against him for the same offence.

Where a witness stated, in reply to the question whether the prisoner had not been sworn against him,—that he had not heard him examined, but had *heard* that the prisoner was a witness, and swore against him, *held*, PEARSON, C. J. *dubitante*, that the latter part of the answer was sufficiently responsive, to render it regular for the prisoner to object to the ruling of the Court upon its competency, without any further examination upon his part.

MURDER, tried before *Cloud, J.*, at Fall Term 1868, of the Superior Court of SURRY.

Upon the trial, one Minta Harston, then under sentence of death for the murder of the deceased, was introduced on behalf of the State. The prisoner excepted to her competency, but the Court overruled the exception.

The State also introduced a witness by the name of James Manly. Upon his cross-examination, in order to show ill-feeling on his part to the prisoner, he was asked whether he had not been in jail under suspicion of the same offence. To this he replied in the affimative. He was further asked, if the prisoner was not a witness and had not sworn against him on the examination before the coroner. To this he replied that he did not hear the prisoner examined, but he had heard that the prisoner was a witness, and had sworn against him. This was excepted to by the State as being hearsay. The Court sustained the objection, but added that the defendant might ask the witness what his feelings were towards the prisoner. The prisoner excepted.

Verdict, Guilty; Rule for a new trial; Rule discharged; Judgment and appeal

Wm. H. Battle & Sons and *Masten* for the appellant.

Attorney General, contra.

READE, J. There were several exceptions to the ruling of his Honor, but, as they are not likely to embarrass the trial again, and are of no general importance, it is unnecessary for us to notice more than two of them:

I. The prisoner objected to the competency of a State witness, upon the ground that she was under sentence of death for a felony. Whatever might have been the force of such an objection before our statute of 1866, it has no force now, for that statute provides, that no one shall be held incompetent as a witness, on account of crime; of course it must mean crime of which he has been ascertained to be guilty.

II. In order to show the bias of a State witness, from ill-feelings, the prisoner asked the witness if he had not been in jail for the same offence. He said, he had. He was then asked if the prisoner had not been sworn against him on the investigation before the coroner's inquest, held over the dead body. To which he replied that "he did not hear the prisoner examined, but had *heard* that the prisoner was a witness, and swore against him." This was objected to by the State, and ruled out by his Honor, on the ground that it was hearsay evidence.

It was not liable to this or to any other objection, and there was error in excluding it from the consideration of the jury.

What was the fact proposed to be proved? Not that the prisoner had, or had not been a witness; but that the witness had ill-feeling toward the prisoner, on account of something that he knew, or had heard; and whether the witness knew, or had only *heard*, that the prisoner had been a witness against him, it was supposed to be evidence tending to show his ill-blood. And so it was. If one hears that another is speaking ill of him, it is calculated to make him angry, as well as if he had heard the speech himself, and whether in a greater or less degree, depends upon circumstances; probably, in most cases, the report of what is said, is more irritating than the thing said would have been, if heard.

We have considered a doubt suggested by our learned brother the Chief Justice, that so much of the answer of the

witness, as says that he had heard of it, was not called out by the question; that he was asked, whether the fact was so, and that he had fully answered, when he said that he had not heard the examination, and that it was a voluntary statement of the witness to add that he *had heard of it*, and, that as it was not called out, it might be excluded by the Judge, and if the prisoner wanted to except, he ought to have asked the question. "Have you not *heard* that the prisoner swore against you?"

We do not think that makes any difference; the answer, it is true, was not exactly responsive to the question, but it was not foreign to it, and after it was ruled out by his Honor as incompetent, it would have been scarcely respectful to the Court, for the prisoner to have asked the question directly, and it could have answered no purpose.

The fact that the witness had heard that the prisoner had been a witness, "and swore against him," was evidence tending to show ill-feelings on the part of the witness toward the prisoner, and ought to have been left to the jury. Nor was the error of rejecting it cured by the fact that his Honor informed the prisoner, that he might ask the witness the general question "what his feelings were toward the prisoner," because the prisoner was not obliged to rely upon the prisoner's veracity, as to that. But he was entitled to prove facts and circumstances, from which the jury might infer what his feelings were. Suppose the question had been asked, "what are your feelings toward the prisoner?" and the witness had answered "they are very kind;" would not the prisoner have been entitled to contradict him, and prove that his feelings were unkind? After the witness answered, that he heard that the prisoner had been a witness, and swore against him, it would have been competent for either party to ask him what effect that had upon his feelings; but neither party chose to do it, and neither party was obliged to do it. What weight the jury would have given to the fact, if they had been allowed to consider it, we do not know, but it is evidence tending to

show the feelings or temper of the witness. and it was error to exclude it. For this there must be a *venire de novo.*

Let this be certified, &c.

PER CURIAM. *Venire de novo.*

THOMAS E. ROBERTS *v.* ALEXANDER OLDHAM, and others.

The equity of *marshalling* cannot be administered upon an application by a Sheriff for instructions for the distribution of money raised upon sundry executions.

If an execution *by its own teste* be upon an equal footing with executions in behalf of other persons, it will not be postponed because, being an *alias*, the *original* upon which it issued was *indulged.*

Where some of the executions were against a firm, and others against O., one of its members, *Held*, as the property sold was firm property, and insufficient to satisfy the former class of executions, the money should be divided *pro rata* amongst those, in exclusion of the latter class;

Also, that the fact that one of the firm creditors was secured by a mortgage upon the separate property of O., had no effect in postponing his rights to the proceeds in the hands of the sheriff.

(*Palmer* v. *Clark*, 2 Dev. 354, cited and approved.)

Question as to the application of money brought into Court upon sundry executions by a sheriff, decided by *Russell, J.*, at Fall Term 1868 of the Superior Court of NEW HANOVER.

The sheriff stated that he had in his hands some $1,400 25 which he had raised upon sundry executions; *some* of which (in all for about $1,975.00) were against the firm of Oldham, Denmark & Co.; and *others*, to a large amount, were against Oldham alone, for individual debts. The money was raised by sale of property belonging to the firm.

For the creditors of the latter class, it was argued that Mr. Murphy, the principal firm creditor, had lost the priority of his execution (which was an *alias*) because he had indulged the defendant, and because he had (as was admitted) a mortgage upon the separate estate of Alexander Oldham for the same debt, and to an amount more than enough to satisfy it.

Upon consideration, his Honor directed the sheriff to apply the money in hand among the executions in favor of the firm creditors, Patrick Murphy and Bruce & Cook, *pro rata*; thereupon the other class of creditors appealed.

No counsel for the appellants.

Strange, contra.

DICK, J. The rule that partnership property cannot be subjected to the separate debts of the partners until after all the partnership debts are paid, is so well settled by numerous and uniform adjudications, that it is unnecessary to refer to authorities. It may be regarded as a first principle of law.

In this case it appears that the sheriff had in hand three executions against Oldham, Denmark & Co., for the partnership debts; and several others against Alex. Oldham, one of the partners of said firm, for his individual debts. The property of the firm was levied on and sold, and the fund in controversy realized. After bringing the fund into the Court below, the sheriff asked instructions from his Honor as to its proper distribution. His Honor ordered the sheriff to pay the money to the partnership creditors *pro rata*. From this order, the present plaintiffs appealed to this Court.

The appellants assigned two causes of objection to the order of his Honor. First, The executions of Murphy are on alias *fi. fa.'s*, and on the *originals* he had indulged the defendants. These alias *fi. fa.'s* are of the same *teste* with the other executions. This places the claimants on terms of equality in this respect. *Palmer & Co.* v. *Clark*, 2 Dev. 354; but Murphy has superior rights to all the claimants except Bruce and Cook, because his executions are for partnership debts, and the funds to be distributed are partnership effects.

The second objection is, that Murphy has a mortgage on the separate property of Alex. Oldham, amply sufficient for the security of his said debts; and he ought to be required to resort to such property for payment.

Murphy is entitled to assert his right to both funds until

his debts are paid. He can properly claim his *pro rata* share of the present fund, and resort to his mortgage for the residue of his debts. The sale of the equity of redemption by other parties, does not affect the claims of Murphy, or materially change the equitable rights of the appellants. The equity of marshalling is a personal one against a debtor, and does not bind the paramount creditor. If however, the paramount creditor resorts to the doubly charged fund, the puisne creditors may be substituted to his rights,—but these rights cannot in this case be administered. Adams' Eq., 271.

Questions of this kind were formerly determined in a Court of Equity, but as the separate and peculiar jurisdiction of this Court has been abolished, it may be that the appellants can find appropriate relief under provisions made in the Code of Civil Procedure. The order of his Honor is affirmed, with costs against the appellants, and the sheriff will pay the money as directed.

PER CURIAM. Judgment affirmed.

THOMAS KANE AND WIFE MARTHA *v.* DENNIS MCCARTHY AND WIFE MARY, and others.

The act of Congress of the 10th of February 1865, on Naturalization, by the expression "Any woman who might lawfully be naturalized under the existing laws, "—means only, any woman, *being a free white person, and not an alien enemy; therefore*, where a descent was cast upon the 20th of May 1863, a woman who in 1857 had married in Ireland a naturalized citizen of the United States, could inherit, although she had always resided in Ireland, and continued to do so until after the descent cast.

In the same act, the expression, "Married or who shall be married to a citizen of the United States," casts a descent in the above case, upon a woman who, having been born an alien, in 1851 married another alien, who declared his intention to become a citizen in 1863, and was naturalized in 1856.

PARTITION of lands, tried in the Superior Court of WAKE, upon

demurrer to the complaint, by *Watts, J.*, at Chambers, on the 26th day of January 1869.

The complaint set forth that one John Kane, late a citizen of Wake county, died on the 20th of May 1863, seized of certain valuable real estate lying in said county; that his only heirs are the complainant Martha Kane, a sister, and the defendants other than McCarthy and wife, who are infant children of the McCarthys, Mrs. McCarthy being another sister of the deceased; that the infant defendants are natives of the United States, born at Newark in New Jersey; that the plaintiff Martha, is a free white woman, and a native of Ireland, and had always lived there until after the death of the said John Kane; that on the 28th of November 1867, when of full age, she married the plaintiff Thomas Kane, who at the date of such marriage was a naturalized citizen of the United States, and at that time upon a visit to Ireland; that Thomas Kane is a native of Ireland who emigrated to the United States in September 1848, and was duly naturalized at New York on the 18th of October 1855; that he returned temporarily to Ireland in 1857, and married the plaintiff Martha, and since then has continued to reside in Ireland, intending all the while, after accomplishing a temporary purpose, to return to this country.

It also set forth that the defendants McCarthy and wife, set up claims to the whole of said land, in right of the defendant Mary; that they are both natives of Ireland, and free white persons, the wife having lived in the United States since her infancy, and having been married to the said Dennis McCarthy in May 1851, at Newark in New Jersey; that her said husband was naturalized on the 3d of October 1856, having declared his intention to become a citizen on the 7th of January 1853.

The prayer was for an account from McCarthy and wife, who were alleged to have been in possession of the premises; for partition betwixt the infant defendants and the plaintiffs; and that McCarthy and wife be forever barred from all claim to said land, &c.

The defendants McCarthy and wife, and the infants, demurred severally.

His Honor sustained the demurrers, and dismissed the complaint; whereupon the plaintiffs appealed.

Haywood, for the appellants.

W. H. Battle, for the infants.

Phillips & Battle, for McCarthy and wife.

PEARSON, C. J. 1. "Persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States. *Provided*, however, that the rights of citizenship shall not descend to persons whose fathers never resided in the United States."

2. "Any woman who might lawfully be naturalized under the existing laws, married, or who shall be married, to a citizen of the United States, shall be deemed and taken to be a citizen." Act of Congress, 10th February, 1855.

The right of the feme plaintiff, Martha Kane, to take by descent as one of the heirs at law of John Kane, depends upon the construction of the second section.

The wording of this section is very precise, and, as it seems to us, its meaning is too clear to leave much room for construction, or to call for much discussion.

What description of woman might lawfully be naturalized under the existing laws? That depends on the act of 1802, sec. 1, "Any alien, being a free white person, may be admitted to become a citizen of the United States, on the following conditions and not otherwise:" and there is a proviso that the person must not be an alien enemy. Martha Kane is a white woman, a native of Ireland, and was not an alien enemy, therefore she might lawfully have been naturalized under the existing laws, and answers the description required by the section under consideration; she was married to a citizen of the

United States, when the descent was cast, and was then, herself a citizen of the United States by force of the act of 1855, and takes as one of the heirs of her brother.

But it is said, Martha Kane had no residence in the United States, before or at the time of the descent cast; that is true, and it might be added, she never filed a declaration of intention—never took an oath to support the Constitution of the United States, or renounced her allegiance to the Queen of Great Britain, and there was no proof of her being a woman of good moral character, attached to the principles of the Constitution of the United States.

The reply is—these are conditions, which persons applying for naturalization *under the act of* 1802, are required to comply with, but there are no such conditions imposed by the act of 1855—it only requires that the woman should be one of such a description, as might be lawfully naturalized under the existing laws; and if she answers the description, the very object of the act was to dispense with all these requirements, and make her a citizen by the mere fact of her being married to a citizen of the United States. In other words, the wife of every citizen of the United States "is to be deemed and taken to be a citizen;" so that if a citizen marries an alien woman residing here, *ipso facto* she is a citizen also, without going through the forms required by act of 1802; or if he marries an alien woman residing in Ireland, *ipso facto* she is a citizen, and should he die without returning to the United States, she will take dower, or if he settles his land on her by will or otherwise, she will take and hold. The policy of the act of 1855, is to identify the wife with the husband in regard to *citizenship*, and thus to carry out the principles of the common law as to the relation of "Husband and wife."

Does the conclusion need confirmation? It is furnished by the 1st section. The status of the father is made that of the child and on its birth, *ipso facto* it is a citizen of the United States without residence, declaration of intention—oath to support the Constitution—all being dispensed with; and the only limitation is that if the child never comes to reside in the United

States, the right of citizenship shall not descend to his children; and this section also puts a limitation upon the descent of citizenship to the children of a wife who never comes to reside in the United States, so if her citizen husband dies, and she marries an alien, her child by the second husband would not be a citizen, for it is confined to children, whose *fathers* are citizens.

On the argument our attention was called to 7 & 8, Victoria, "Any woman married or who shall be married to a natural-born subject or person naturalized, shall be deemed and taken to be herself naturalized and have all the rights and privileges of a natural born subject." It is clear the Act of 1855 was taken from this statute, and it was asked, Why change the wording, and instead of "any woman," use the paraphrase "any woman who might lawfully be naturalized under the existing laws," if the operation of the act was to be as broad and sweeping as that of Victoria? It is not seen how this can have much effect upon the argument—but the solution is easy. The act of 1802 does not make *any woman* capable of being naturalized, so it was necessary to make some change by adding the words "free *white* woman, or some equivalent expression; and the history of parties in 1855 fully explains why this equivalent expression was adopted instead of "free *white* woman," for at that time an angry contest was going on in reference to the words "all men are born free and equal," and a formidable party took the ground that the act of 1802 was in violation of the Declaration of Independence, in so far as it attempted to exclude from citizenship all who were not "free *white* persons." If the words "free white," had been left out, the bill would have met with opposition from the South, and if these words had been expressed it would have met with opposition at the North, so the reason for adopting an expression, which leaves that question open, is obvious.

Having settled the right of Martha, the right of her sister Mary can be settled in few words.

Mary was a resident of the United States at the time of her

marriage. In this, seemingly, she has the advantage of Martha, but her husband was not a citizen of the United States at the time of her marriage. In this, seemingly, Martha has the advantage of her. But in fact they both stand on the same footing, for it is not the ceremony of marriage, or its time or place, but it is the fact of being "married to," that is being the wife of, a citizen that makes the wife, a citizen,—that makes the woman a citizen. The circumstance that her husband was not a citizen at the time of marriage, is wholly immaterial, for he became a citizen afterwards *ipso facto*. So she being a free white woman married to a citizen, comes within the description, and the very words of the act of Congress "and is deemed and taken to be a citizen;" for it is the status of being married to—being the wife of a citizen—that makes her one. It can in no possible view make any difference, whether the marriage ceremony is performed first, and then the husband becomes a citizen, or whether he becomes a citizen first, and the marriage afterwards takes place. Whenever the two events concur and come together, "she is a woman married to a citizen."

The thing seems to us too plain to admit of discussion—it is like trying to prove that two added to two makes four. Mary is entitled to the other moiety, and the defendants' two children are excluded.

There is error. Judgment reversed, and judgment that plaintiff recover an undivided moiety of the lands mentioned in the pleadings, and that partition be made between the plaintiff Martha and the defendant Mary. To this end it is referred to the Clerk to enquire, whether a sale will be necessary for the purpose of partition; and an account will be taken of the rents and profits. The plaintiff will have judgment for costs.

Burton v. *Burton*, 26 Howard Pr. Reports 474. *Ludlam* v. *Ludlam*, 31 Barbour 487, cited on the argument, received due consideration by the Court.

PER CURIAM. Judgment reversed.

THOMAS P. CREDLE *v.* THOMAS D. SWINDELL.

An action on the case for deceit, will not lie for the vendee against the vendor for false representations by the latter as to the quantity of land sold; he should have had a survey, or taken a covenant as to the quantity sold. (*Lytle* v. *Bird*, 3 Jon. 222, cited and approved.)

CASE, before *Warren, J.*, upon a demurrer to the declaration, at Spring Term 1868 of the Superior Court of HYDE.

The plaintiff declared that the defendant being seized of two certain pieces of land in said County, describing them by metes and bounds, for a valuable consideration sold them to him by deed, &c., and that at various times before and at the time of the sale he falsely and deceitfully, &c., represented to the plaintiff that there were in the former tract 370 acres and in the latter 40 acres, whereas the former contained only 106 acres, and the latter only twelve acres; all of which the defendant well knew at the time, &c.; that the plaintiff could not by any reasonable means, or without excessive costs have ascertained the falsity of the representations thus made; and that he believed and relied upon them in making the purchase, &c.

The defendant filed a general demurrer. His Honor sustained the demurrer, and the plaintiff appealed.

Carter, for the appellant.

None of the former cases in this State settle the special question raised here, as to the competency of an action of deceit in case of a fraudulent misrepresentation in the sale of land. Such form of action is not unfrequent in England. Rawle on Cov. for Title, pp. 458 to 480, and notes.

Fowle & Badger, contra.

The rule *here* seems to be that where the defect being known to the vendor, might by an examination have been discovered

NOTE.—Judge Rodman did not sit in this case, having formerly been of counsel therein.

by the vendee, no action will lie. *Lytle* v. *Bird*, 3 Jon. 222; *Fagan* v. *Newsom*, 1 Dev. 20; *Sanders* v. *Hatterman*, 2 Ire. 32; *Bac.* Ab. 1, p. 80.

SETTLE, J. The vendor fraudulently makes a false representation to the purchaser, as to the quantity of land contained in certain boundaries, asserting the same to be as much as four hundred and ten acres, when in fact, there were only two hundred and eighteen acres: Can an action of deceit be maintained for this fraud?

The question is fully answered by the case of *Lytle* v. *Bird*, 3 Jon. 222, and the cases there cited.

In that case, the vendor showed to the purchaser one hundred and sixty-three acres of land, which he represented to be a part of the tract he was selling, when he knew that it was not included in his boundaries, and did not belong to him. It would be difficult to find a case more like ours. The vendor certainly stands in a very unfavorable light, yet the Court say, "the mode and facility of ascertaining the truth was open to the plaintiff equally with the defendant by a survey, which he ought to have insisted upon before receiving the conveyance; it was his own folly not to have done so."

So in our case, if the plaintiff has sustained any loss, he must attribute it to his own negligence and indiscretion; he has not exercised that diligence which the law expects of a reasonable and careful person, but was wilfully ignorant of that which he ought to have known. He might have ascertained the fact by an actual survey, or taken a covenant as to quantity. *Vigilantibus non dormientibus jura subveniunt.*

PER CURIAM. Judgment affirmed.

CHARLES E. ALLEN *v.* ELIZA PLUMMER.

The rule, that the lien of an alias execution relates to the teste of the original, is not affected by the fact that the alias issued from the Court of another county, whilst the junior execution (of the creditor contesting) issued from the Court of the county where the property lies, and in point of fact, was first levied thereupon.

An execution placed in a sheriff's hands after sale under other process, but before the return of the proceeds, cannot compete therefor, with the executions under which the sale was made.

RETURN of a sheriff, asking instructions from the Court as to the application of money raised by virtue of sundry executions in his hands,—made to *Watts, J.*, at Fall Term 1868, of the Superior Court of HALIFAX.

The money had been raised out of the lands of one Faulcon, by sale made June 15, 1868. At that time the sheriff had in his hands an alias execution from Warren county, in favor of the defendant, the original of which, tested at Fall term 1867 of Warren Superior Court, had been in his hands, and had by him been returned to the Spring term 1868, of Warren Superior Court; also a *ven. ex.* in favor of the plaintiff, issued from May term 1868, of the County Court of Halifax, upon a levy on said land made by the sheriff, by virtue of an original execution tested of February term 1868, of that Court.

After the sale, an alias execution, in favor of Lanier, Bros., & Co., came into the hands of the sheriff. The original of this execution was tested of Fall term 1867, of the Superior Court of Halifax.

Upon consideration, his Honor was of opinion that the process of the defendant was entitled to a priority, and gave instructions accordingly. From this judgment, the plaintiff appealed.

Conigland, for the appellant, cited *Hardy* v. *Jasper*, 3 Dev. 158; *Tarkington* v. *Alexander*, 2 D. & B., 87; *Smith* v. *Spencer*, 3 Ire. 256; *Yarbrough* v. *State Bank*, 2 Dev. 23; *Washington* v. *Saunders*, 2 Dev. 344.

Rogers & Batchelor, contra, cited *Green* v. *Johnson*, 2 Hawks, 309; *Brasfield* v. *Whitaker*, 4 *Ib.* 309; *Palmer* v. *Clark*, 2 Dev. 354; *Jones* v. *Judkins*, 4 D. & B., 454.

READE, J. At the time the sheriff made the sale, he had in his hands two executions, of different dates; and it is settled, that the older execution must be first satisfied.

The fact that the older was an alias, issued subsequently to the junior, makes no difference, as the alias relates back to the date of the original, and is, in that sense, the older. The fact that the older was issued from another county (Warren,) to the sheriff of Halifax, makes no difference, as the process of the Courts have when issued, the same force all over the State.

The execution of Lanier and Bro., did not reach the sheriff until after the sale, and is out of the question. The funds, or so much as may be necessary, will be applied to the older execution—Mrs. Plummer's—and if there is any surplus, it will be applied to the junior execution—Allen's.

PER CURIAM. There is no error.

In re WILLIAM L. TATE.

A county attorney is within the provisions of the XIVth Amendment of the Constitution of the United States, disqualifying certain persons from holding office.

PEARSON, C. J., dissenting.

(*Worthy* v. *Barrett*, *ante* 199, cited and approved.)

PETITION for a Mandamus, filed in this Court.

The petition alleged that the petitioner had been duly elected Solicitor of the 12th Judicial District, and subsequently had received from General Canby a certificate of that fact; but that upon producing the same to his Honor, *Judge Cannon*, in the Superior Court of HAYWOOD, and requesting to be qualified, he had refused his application, upon the ground that he was disabled by the XIVth Amendment to

the Constitution of the United States. The prayer was for a mandamus, to be directed to his Honor, &c., &c.

It was admitted that the petitioner had been a county attorney before the recent rebellion, and that during such rebellion he had been an officer in the army of the Confederate States.

Phillips & Merrimon, for the petitioner.

Attorney General, contra.

READE, J. The petitioner was a county attorney before the rebellion, and took part in that rebellion by serving in the Confederate army, voluntarily, as we take it. He now seeks to be admitted into the office of Solicitor for the State in the 12th Judicial District.

We are of the opinion that he is disqualified from holding office under the 14th Amendment of the Constitution of the United States. The opinion in the case of *Worthy* v. *Barrett* and others, *ante* 199, is referred to as establishing the rule in this case. The prayer for a mandamus must be refused.

PER CURIAM. Petition dismissed with costs.

NOTE.—PEARSON, C. J., dissents from the opinion in *Worthy* v. *Barrett*, so far as it includes county attorneys.

M. S. ROBBINS and S. S. JACKSON, *ex parte.*

Courts *have power* in North Carolina to order counsel to pay the costs of cases in which they have been guilty of gross negligence (even of a kind not included in Rev. Code ch. 9, s. 5) such conduct being a sort of *contempt.*

Where the contempt imputed, occurred in a different Court, or at another time, and was not *in the face* of the Court which punished it,—the parties affected by the order may appeal.

Upon the facts of the case stated here, there was no *contempt* by the counsel made out.

(*Ex parte Summers*, 5 Ire. 149; *State* v. *Woodfin*, 5 Ire. 199; *State* v. *Mott*, 4 Jon. 449; *Weaver* v. *Hamilton*, 2 Jon. 343, cited and approved.)

CONTEMPT, adjudged by *Tourgee, J.*, at Fall Term 1868, of the Superior Court of RANDOLPH.

At February Term 1867, of the County Court of Randolph, one Kendall, a processioner for the County, returned to Court a certificate stating that at the instance of the legatees of Brice Beckerdite he had commenced to procession a certain tract, but whilst engaged in doing so had been forbidden to proceed by an agent of Patton, Woodfin & Co.

After other proceedings in the cause, not material here, at August Term 1867, a report made by the processioner was filed and confirmed, and *the defendants* appealed to the Superior Conrt.

In the Superior Court the case was stated as *Brice Beckerdite's heirs* v. *Patton, Woodfin & Co.*, and continued from term to term until Fall Term 1868, when upon motion of the defendants, the suit was dismissed, because there were no parties plaintiff; and the Court further ordered that the cost be taxed against the *plaintiffs*, and in default of their being paid by them, then against the counsel for the plaintffs. Thereupon the counsel appealed from so much of the order as affected them.

Gorrell for the appellant.

In England an attorney is an officer of the Court, and is therefore under the power of the Court as to his official conduct and the Courts have exercised the power of compelling them to pay costs for *gross neglect.* As for instance, where there are *several palpable mistakes* through the neglect of an attorney—or when, in a Fine one parish is inserted for another through mistake, Tidds Practice, 706; 4 Moore, 171; 16 E C. L. Rep. 373.

The Court will order an attorney to pay costs to his client for neglect; and to the opposite party for vexatious delay. Tidd's Practice, 86. It will also make them pay costs for fraudulent practice, as when an attorney knowing bail to be insufficient, puts them in, 5 Barn. & Adol. 533; 7 E. C. L. R. 181.

There is no Act of Assembly in this State, except Rev. Code ch. 9, s. 5, which provides that when a plaintiff shall be compelled to pay costs of his suit in consequence of a failure of

his attorney to file a declaration in proper time, he may warrant such attorney for all the costs so paid, &c.

According to the practice in England, the Court would have the power to make the attorney pay costs to his client in this case.

If therefore the Courts in this State ever had the power to make an attorney pay costs in such case, this Act of Assembly, by direct enactment takes it away in that particular case, and by implication in all cases: *expressio unius*, &c.

It does not appear that the Courts ever had the power in this State, to make attorneys pay cost—there is no case to be found where they have ever exercised such power. And in the practice of our Courts for nearly a century when so many cases would be likely to arise authorising the exercise of such a power if it existed, the *want* of a precedent is the strongest evidence that the authority never has existed.

But even if the Court had such right, the present is not a proper case for such an order. These parties have done nothing wrong—have been guilty of no gross neglect of duty, or want of skill. The proceeding commenced out of doors, and they are not responsible for it. When it comes into Court they moved for a confirmation of the report which it was their duty to do, and they would have been guilty of neglect if they had not.

The defendants' counsel was more in fault for not moving to dismiss; it was his duty to move to dismiss an anonymous case, that had neither plaintiffs nor defendants; for "Patton, Woodfin & Co.," is just as uncertain as "Brice Beckerdite's heirs."

No counsel *contra.*

RODMAN, J. It is contended by the counsel for the appellants, who were the attorneys for those, whom, for brevity, we will call the plaintiffs, in a suit brought by "Beckerdite's heirs," *eo nomine*, against "Patton, Woodfin & Co.," *eo nomine.*

1. That the Judge had no power to make the order appealed from.

2. That if he had, the present case was not a proper one for its exercise.

As to the first point: In *Bacon's Abridgement, Article, Attorney*, II 506, it is said "Attorneys are officers of the Court, and are liable to be punished in a summary way, either by attachment, or having their names struck out of the roll of attorneys, for any ill practice attended with fraud or corruption, and committed against the obvious rules of justice and common honesty; but the Court will not be easily prevailed on to proceed in this manner, if it appears that the matter complained of was rather owing to neglect or accident, than design; or if the party injured has other remedy provided by Act of Parliament, or action at law."

In *Comyn's Digest, Title, Attorney*, B. 13, it is said: "An attorney being an officer of the Court, if he attempt anything which he cannot or ought not to do, it will be a contempt of the Court, for which an attachment shall go against him." And again, in the same, *Title B*, 15, note: "It is not usual for the Court to interfere in a summary way for a mere breach of promise, when there is nothing criminal. 2 *Wils.* 371, 2, nor on account of negligence or unskilfulness, *Pitt* v. *Yalden*, 4 Burr. 2060, except it be very gross, Say. Rep. 169, 4."

These authorities establish the English practice, which, indeed is not, contested. The same power has been habitually exercised by the Courts of many, if not all, of our sister States. The authorities are so numerous, that it is unnecessary to refer to any of them. In *Ex parte Summers*, 5 Ire. 149, the Court say: "There is no doubt that every Court must have power to control its officers by process of contempt, attachment, fine and commitment." "Attorneys of a Court, clerks, sheriffs and all officers having the returns of process to the Court, and the custody of prisoners on *mesne* and final process of the Court, must, of necessity, be thus amenable to the summary control and punishment of the Court." This case is supported by *State* v. *Woodfin*, 5 Ire. 199, and *State* v. *Mott*, 4 Jon. 449; and by the act of 1846, ch. 34, sec. 117 of Rev.

Code, the principles asserted in *Ex parte Summers*, are recognized, and the practice is regulated.

There can be no doubt, therefore, of the power of a Court, to punish any of its officers, including attorneys, for a contempt, in a proper case.

But it is said that there is no precedent in North Carolina, either reported or that can be recollected, of a Court compelling an attorney to pay costs, for negligence merely. That may be admitted; but the power to do this, is not a distinct power, but only a branch of the general power to punish for contempt; it is treated in all the books, in connection with the other instances, and referred to the same source. Upon the authorities cited, there can be no doubt of the practice of the English Courts to regard what is called in *Pitt* v. *Yalden*, *ubi supra*, "*lata culpa*," or "*crassa negligentia*," on the part of an attorney, as a contempt of Court; and no reason is seen, why this instance of the general power, should be denied to the Court of this State, unless it be taken away, as is argued for the appellants, by an implication from sec. 5, ch. 9, Rev. Code. This statute provides that, when a plaintiff shall be compelled to pay costs, by the neglect of his attorney to file a declaration in proper time, he may recover such costs from the attorney, by warrant. This implication does not arise; it is a well known principle, that when one remedy exists at common law, and a statute gives another, the latter is cumulative.

Before considering the second point made by appellants, it will be best to consider a point not made, but which ought to be noticed. Can the appellants appeal from the order of the Judge? In *State* v. *Mott*, 4 Jon. 449, it was held, that a party punished for a contempt in view of the Court, could not appeal. We do not mean to impugn that case in any degree; but its reasoning can have no application to a case like this, where the contempt alleged was negligence in the conduct of a cause, at a previous time and before another Court. We think in such a case the appellants were entitled to appeal, to bring up the legal question as to the power of the Court,

under the circumstances set forth. *Weaver* v. *Hamilton*, 2 Jon., 343.

We are now prepared to consider the second point made by the appellants; and we concur with them that the facts set forth by the Judge do not make out a case of "*crassa negligentia*," which he had the power to punish.

No fraud, or corruption, or criminal mal-practice is imputed to the appellants. It appears from the record of the case of *Beckerdite's heirs* v. *Patton, Woodfin & Co.*, which the Judge has properly sent up with the statement made by him, in accordance with sec. 117 of ch. 34, Rev. Code, that the appellants had no connection with the commencement of that suit. It was begun by the Processioner under ch. 88, Rev. Code, as his report says, "at the instance of Beckerdite's legatees;" the defendants were not summoned at all; they voluntarily intervened by forbidding the Processioner to continue to run the lines. After the suit was constituted in Court by the return of the Processioner, the counsel moved the confirmation of his report, and the various proceedings then took place, by which the greater part of the costs are incurred. The supposed negligence consisted in permitting these proceedings in a suit so defectively constituted as to parties, and in neither amending nor dismissing it. But it was equally open to each party to amend or dismiss the proceedings. It is not sure that the appellants, who were counsel for the plaintiffs, were under any higher obligation to do either, or were more culpable for doing neither, than the counsel for the defendants were; both were *in pari delicto*. Even in the Superior Court, the defendants, on proper proof might have amended, by inserting the names of Beckerdite's heirs, and have thus have had substantial antagonists. It would seem unjust to make the counsel for the plaintiffs pay to the defendants costs which they might so easily have averted.

The order of the Judge below is reversed, but the case being *ex parte*, the appellants cannot recover any costs in this Court.

PER CURIAM. Order reversed.

THE STATE, *ex. rel.* J. W. CUMMINGS *v* JOHN A MEBANE.

Guardians and other trustees, who had in their hands for management during the late war funds belonging to infants or other *cestuy que trusts* were bound to use for such persons only that care which prudent men exercise in relation to their own affairs.

It was not imprudent for a guardian to receive Confederate money in December 1862, from a debtor of his ward, who tendered it upon *his* being about to leave the State; but if such guardian mixed the money so received with his own, and both amounts were lost at the expiration of the war, he will be responsible to his ward for its value in the present currency, with interest from the time of receiving it.

EXCEPTION, to a report, in an action upon a guardian bond, allowed by *Cilley, J.*, at Spring term 1868, of the Superior Court of GUILFORD.

The report sets forth, that the defendant, Mebane, became the guardian of Margaret Cummings, J. T. Cummings, and the relator, D. W. Cummings, at February term 1859, of the Court of Pleas and Quarter Sessions, for the county of Guilford; and at the same time, received the sum of four hundred and forty-four dollars and sixty cents, belonging to the estate of his wards. Soon thereafter, he loaned out this money to a solvent person, taking good security. In December 1862, the principal in the bond, "being about to remove from the State," tendered the amount of the debt to the guardian, in Confederate currency and he accepted the same. In February 1863, Margaret Cummings and J. T. Cummings having both arrived at full age, received their portions, leaving only the amount due the relator, in the hands of the guardian, who states that he "kept the same until the act of the Confederate Congress, requiring all the old issue of Confederate money to be funded, or converted into the new issue, and that in order to prevent loss, he converted the money received into new issue, which he kept among his own, and used promiscuously with his own, as he could not lend it out, and that upon the expiration of the Confederate government, all the money he had, including that due his ward, became worthless, and that from the time he received

the new issue, up to the day the money became worthless, he had on hand an amount of new issue, more than sufficient to cover the amount due the relator."

The report of the commissioner charges the guardian with the full amount received in December 1862, making no deduction on account of Confederate currency; and also with a small amount for negro hire.

The defendant's counsel filed the following exception, to wit: "The defendant objects to the confirmation of the report of the clerk. He charges the defendant with the whole amount of money in his hands at the expiration of the Confederate government, which money was in his hands, being unable to loan the same, and being compelled by the existing government to receive the new issue, or lose the Confederate money collected in December 1862; against the evidence in the case."

His Honor below sustained the exception, and gave judgment against the plaintiff for costs. Thereupon, the plaintiff appealed.

Scott & Scott, for the appellants, cited *Emerson* v. *Mallett*, Phil. Eq. 234, and *Donnell* v. *Donnell*, *Ib.* 148, and commented on the fact that the guardian had mixed the money received, with his own.

No counsel, *contra*.

SETTLE, J. (After stating the case as above.) This case comes before us by appeal from the decision of his Honor below, sustaining the exception of the defendant's counsel to the report of the commissioner, appointed to take and state an account of the guardianship of the defendant Mebane.

The report of the commissioner charges the guardian with the full amount, and the decision of his Honor discharges him of all liability.

Several cases have been before this Court, touching the liability of those who have received Confederate currency in a fiduciary capacity. And while they establish no general rule, but seem to leave every case to stand upon its own merits, still

they afford us much assistance in dealing with this embarrassing question.

We cannot close our eyes upon the past, and forget that thousands of our most prudent citizens have become bankrupt by investments, which appeared to be the very best that could be made at the time.

It is one thing to sit in judgment upon the past, and quite another to foresee consequences. It will not do to look back now, and see how estates might have been better managed, and exact of those who had them in charge, that degree of diligence, which would have proved most beneficial in each particular case.

The degree of diligence to which we think they should be held liable, is that which a prudent man, at that time, would have exercised in the management of his own affairs. And this, we understand, to be the principle upon which all of these cases have turned. Of course, a party who has been guilty of negligence or fraud, should be held to the strictest accountability. But in the absence of any such suggestion, where a party acting in good faith, received Confederate currency, and afterwards lost, not only trust funds, but his own also, he is to be regarded with all the favor that is consistent with the policy of the law, in regard to those who undertake to discharge a trust. In the case before us there is no suggestion of fraud.

Was there such negligence as ought to subject the defendant to the payment of the full amount, received by him, for the relator in December 1862?

We think not.

When we remember that the principal in the bond, was "about to leave the State," in the midst of a war, we can very well imagine that the defendant would be, not only willing, but anxious to collect his debt in a currency, with which he was able to pay off two of his wards in February 1863.

The fact that he did pay them off, with this very money, two months after it came into his hands, shows that it was passing currently, and that no question was raised at that day, either

as to his good faith, or diligence. But it is said, he should have loaned it out. He states, that he could not lend it. Had he done so, it is more than probable, that it would have proved worse for the relator; for he "mixed it with his own, and used it promiscuously," thereby rendering himself liable for its value in December 1862, the time at which he received it.

There was error, in relieving the defendant from all responsibility; and the report of the commissioner should be reformed in the manner indicated by this opinion. This will be certified, &c.

PER CURIAM. Ordered accordingly.

E. S. DARWIN *v.* E. RIPPEY.

The addition of the words "in specie," after the word "dollars" in a sealed note made November 2d, 1865, promising to pay "one hundred and twenty-five dollars," is a material alteration; and when done by the principal therein, in the absence of the surety and without his consent, avoids such note as to the latter.

(*Mathis* v. *Mathis* 3 D. & B. 60 and *Dunn* v. *Clements* 7 Jon. 58 cited and approved.)

DEBT, tried before *Little, J.*, at Spring Term 1868 of the Superior Court of CLEVELAND.

The plaintiff declared upon a bond made by the defendant as surety to one Shuford. The bond produced was for "one hundred and twenty-five dollars in specie." It was shown that the words "in specie," had been added after the execution of the note, by agreement between the plaintiff and Shuford, in the absence of the defendant and against his consent.

His Honor having intimated an opinion that upon this state of facts the plaintiff could not recover, there was a non-suit and Appeal.

Phillips & Merrimon, for the appellant.

Bynum, contra.

RODMAN, J. It is familiar learning that if the payee of a bond alters it in any material part, without the consent of the obligor, the bond is avoided, and may be defeated on the plea of *non est factum*. *Mathis* v. *Mathis*, 3 D. & B. 60. *Dunn* v. *Clements*, 7 Jon. 58.

That principle was not contested in this case; but it was contended that the addition of the words "in specie," did not in any way change the legal effect of the bond, inasmuch as with or without those words, it would be equally solvable in legal tender notes, under the act of Congress. In the case of *Bronson* v. *Rhodes*, decided in the Supreme Court of the United States, since the argument of this case, and as yet only published in the newspapers, it is decided that a contract to pay in specie in express terms, is solvable only in specie, while a contract to pay as many dollars generally, may be discharged by a payment in legal tender notes. This decision renders any discussion on our part unnecessary, as the alteration was manifestly material.

PER CURIAM. Judgment affirmed.

SARAH RICE *v.* WILLIAM R. KEITH.

Under the Act of 1866, ch. 43, a wife was not a competent witness for her husband.

(It is otherwise under the Code of Civil Procedure, § 341.)

BEPLEVIN for a mule, tried before *Shipp, J.*, at Spring Term 1868, of the Superior Court of MADISON.

Upon the trial the defendant offered his wife as a witness in his behalf. The plaintiff objected, and she was excluded by the Court.

Verdict for the plaintiff; Rule for a new trial; Rule discharged; Judgment and appeal.

No counsel for the appellants.

Merrimon, contra.

SETTLE, J. Upon the trial, the defendant offered to introduce his wife as a witness, but she was rejected by the Court.

She was certainly an incompetent witness at the common law.

Did the Act of 1866, ch. 43, make her competent?

The first section of the Act in question, provides that no person offered as a witness shall hereafter be excluded from giving evidence by reason of incapacity from "interest or crime."

The second section makes parties, with certain exceptions, competent and compellable to give evidence in behalf of any or either of the parties to any suit, or other proceeding.

These two sections only change the common law in the particulars specified, and leave other objections and incapacities as they existed before the passage of the Act.

Mr. Starkie in his work on evidence vol. 2. p. 103, says: "It is a general rule founded on grounds of public policy, that the husband and wife cannot give evidence to affect each other, either, as it seems, civilly or criminally. For to admit such evidence would occasion domestic dissension and discord; it would compel a violation of that confidence, which ought from the nature of the relation to be guarded as sacred; and it would be arming each with the means of offence, which might be used for very dangerous purposes." So the exclusion of husbands and wives, was based on grounds of public policy, and not upon *interest*. But it is said, that the third section of the Act of 1866, by the use of the words. "Nothing contained in the second section of this Act shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband" implies that they are to be competent in other cases.

And the same argument is founded upon the wording of of the fourth section, which provides that "nothing contained in the second section shall apply to any suit or other proceeding, &c., instituted in consequence of adultery, or to any action

for breach of promise of marriage, or for criminal conversation."

Our Act is almost a literal copy of the 14 and 15 Victoria, ch. 99, and the decisions upon the English Statute will aid us in construing ours.

In *Stapleton* v. *Croft*, 10 E. L. and E. Rep. 455, Lord Campbell, C. J. says: "The wife is not a party to a suit in which her husband is plaintiff or defendant, although they are in contemplation of law one person. It might as well be said that under a judgment in an action against the husband separately, the wife could be taken in execution, because husband and wife are one person in law. It seems to me therefore that under section two, the wife remains incompetent as before. Stress is laid on section 3. If it were a doubtful question under section 2, section 3 might afford a fair argument on the ground that "'*expressio unius est exclusio alterius*,'" but I must say that after deliberately considering the matter, I think it was the express intention of the Legislature to exclude wives in civil cases.

If that be so, section 3 will not assist, and the wife will remain incompetent, as at common law."

In *Barbat* v. *Allen*, 12 E. L., and E. Rep. 596, it is suggested that section 3 is loosely worded, and only mentioned criminal proceedings *ex abundanti cautela*, as those in which husband and wife were most likely to be offered as evidence against each other, leaving the law in other cases as it stood before

The same remarks are applicable to the particular class of matrimonial suits, mentioned in section 4.

In *Alcock* v. *Alcock*, 12 E. L., and E. Rep. 354, it is said that "section 4 refers to disputes of a certain kind, in which it is thought for other reasons, not fit that the parties themselves should be examined."

It is proper to call attention to section 341 of the Code of Civil Procedure, which establishes by express enactment, the construction which the defendant contends should be placed

upon the Act of 1866. And from this we deduce an argument in favor of the conclusion at which we have arrived.

The Legislature, in the Act of 1868, has used language that leaves no room for doubt, and has introduced a new principle into the law of evidence. But under the law as it existed before the passage of this Act, the evidence of Mrs. Keith was properly rejected.

PER CURIAM. Judgment affirmed.

R. E. PATTERSON *v.* JOSEPH W. PATTERSON, and others.

Where land was devised to the widow of the testator for her life, and afterwards to a son, in fee: "provided he pays within two years from her death $150.00 to the heirs of my son William": *Held* that the land was charged with this sum, and therefore that a purchaser of it for value from the widow and remainderman, with notice of the sum charged as above, was liable for it to the legatees, in case they could not get it from such remainderman.

BILL, set down for argument upon general demurrer, at Spring Term 1868 of the Court of Equity of RANDOLPH, and transferred to this Court.

The complainants are the heirs at law of William Patterson deceased, and their claim for relief is founded upon the following clause in the will of their grand-father John Patterson:

"Item. I give and devise to my wife Mary, my tract of land lying in Forsythe county, to have and to hold, during her life. At her death I give and devise the above tract of land to my son Joseph, to have and to hold, in fee simple forever, provided he pays within two years from her death, one hundred and fifty dollars, to the heirs of my son William or their lawful attorney."

Mary Patterson, the widow of the testator, and the devisee, Joseph W. Patterson, sold the land to one R. Franklin Payne,

NOTE.—Judge Dick did not sit in this case, having been formerly of counsel therein.

and executed to him a joint deed for the same. Payne purchased with notice of the legacy charged on the land. Mary Patterson died more than two years before this bill was filed. The devisee, Joseph, had removed from the State, and left no property. Payne, the purchaser, died before the commencement of this suit, leaving the defendants, his widow and heirs at law, in possession of the land mentioned in the pleadings.

Scott & Scott, for the plaintiff, cited *Aston* v. *Galloway*, 3 Ire. Eq. 126; *Phillips* v. *Humphrey*, 7 Ire. Eq. 206; *Doe* v. *Woods*, Bus. 290.

No counsel, *contra*.

SETTLE J. (After stating the case as above.) This cause was set for argument upon the bill and general demurrer of the defendants, and transferred to this Court.

The complainants claim that the legacy of one hundred and fifty dollars is a charge upon the land, and as Payne purchased with notice of their equity, the land is still subject to such charge; and they pray for relief.

They are clearly entitled to the relief prayed for.

The questions involved are fully settled by the adjudications of this Court referred to in the brief of complainant's counsel.

The demurrer is overruled. This opinion will be certified.

PER CURIAM. Ordered accordingly.

WILLIAM P. LOVE *v.* JAMES S. COBB, A. R. HOMESLEY and EZEKIEL PRICE.

Where a part of the consideration for a contract to sell land made in March 1865, was a sum in Confederate currency, which was not paid, and before the contract was completed, that currency had become worthless, *Held*, that the purchaser was not entitled to a decree for specific performance.

Where one bargains for land of another who (as he knows,) has only an equitable title, *Held*, upon the latter being unable to procure a title, by the refusal of *his* bargainor, that he is not bound to a specific performance of his contract.

Specific performance will not be decreed, where, in the nature of things, the only effect of the decree will be to imprison the defendant perpetually.

The right of a plaintiff to relief must always be limited by his own statements in the pleadings of his grounds for complaint.

Where there is a valid contract for the sale of land betwixt A and B, as principals, *Held*, that C cannot be substituted to the rights or duties of either party without an agreement *in writing*.

BILL in equity, set for hearing upon the pleadings and proofs, and transferred from the Fall Term 1868, of the Superior Court of CLEAVELAND.

The plaintiff alleged that in March 1865, he had agreed with the defendant Cobb to exchange with him certain lots in the town of Shelby, the plaintiff agreeing to pay for the difference in value, on the 1st of May ensuing, six thousand dollars in Confederate money; that the evidence of the agreement for an exchange, was a bond signed by himself and Cobb, specifying the lots. These were all set forth. He also alleged that on the 1st of May, as agreed upon, he had prepared mutual deeds for himself and Cobb, and tendered to the latter the $6,000 in Confederate money, and offered to comply with his bargain,—and thereupon Cobb informed him that he had only a bond for title from the defendant Homesley; that some days afterwards, upon his mentioning the matter to Cobb again, the latter said that Confederate money was worthless, and he could not take it; and thereupon the plaintiff offered to pay him what it was worth in currency at the time of the contract; that Cobb has

failed to comply with his contract, and now pretends that he was acting as agent for Homesley; which is not true, as he then had a bond for title from Homesley to the lot which he bargained to the plaintiff, but has since destroyed it; and that, even if it were true, Homesley has ratified the contract by Cobb, inasmuch as he surrendered to the plaintiff possession of the lot bargained by Cobb, and took possession of those received by Cobb in exchange, and has since resided upon them, and improved the houses, and offered to sell them.

The plaintiff also alleged that the defendant Price has recently purchased from the other defendants the lot in controversy, but that he did this with notice of the plaintiff's claims.

The prayer was for a specific performance of the contract, and for general relief.

The defendants Homesley and Price, filed a joint answer denying that Cobb ever had any title to the lot bargained to the plaintiff, and averring that Cobb was a *special agent* of Homesley's to sell it, and had exceeded his powers in the particular bargain made.

The separate answer of Cobb, was to the same general effect.

Evidence was taken, but the points upon which the case went off, render it unnecessary to state it.

Bragg, for the plaintiff.

1. If, as is agreed, Cobb were Homesley's agent, the latter is bound by the agreement of Cobb, even, though the name of the latter alone appear in the written contract. *Oliver* v. *Dix*, 1 D. & B., Eq. 158; *Phillips* v. *Hooker*, Phil. Eq. 193, 2 Par. Cont. 291, Story Ag. ss. 244, 445; *Freeman* v. *Loder*, 11 Ad. and El. 589.

2. Such an agency may be by parol, *Blacknall* v. *Parrish*, 6 Ire. Eq. 70.

3. It may be created by a parol ratification; even by slight

acts. *Oliver* v. *Dix*, (above), Parsons and Story (above), Paley, Ag. 171, &c., and 324, 5.

4. As Cobb did not disclose his agency, he at least is bound by the contract, and must perform in specie. *Love* v. *Camp*, 6 Ire. Eq. 209; *Jones* v. *Garland*, 2 Jon. Eq. 502; *Forney* v. *Shipp*, 4 Jon. 527.

Phillips & Merrimon, contra.

If Cobb made the contract *for himself*, as the bill expressly charges, then, whatever be the law in cases of concealed agency, Homesley cannot be rendered liable on such contract by any intervention not in writing. *Wilson* v. *Tumman*, 6 Man. and Gra. 236, (46 E. C. L.)

READE, J. I. The plaintiff cannot have a specific performance by defendant Cobb, for the reasons, (1) that Cobb had not the legal title at the time of the contract, nor has he it now, nor can he get it, because the defendant Homesly has it, and refuses to make it to Cobb. And the fact that Cobb had neither the title nor the possession, was known to the plaintiff, and he made the contract in full view of the fact, and, of course, he knew that he was taking the chances of Cobb's being able to get the title from Homesly. It is all the same, so far as this case is concerned, as if Cobb had said, in so many words, "I will make you the title, *provided* I can get it from Homesly." And if he chose to deal under such circumstances, he must be left to his remedy at law. (2) It must be supposed to have been in the contemplation of the parties, when they made the exchange of lots, and the plaintiff gave his bond to Cobb for $6000 as the difference in the value of the lots, that the plaintiff was to pay *some value;* but by reason of an unforeseen event, the result of the war, the funds in which the difference in value was to be paid, Confederate Treasury notes, were worthless. To decree a specific performance would, therefore, work manifest injustice to the defendant Cobb. It is true that the plaintiff offered to pay Cobb what the Confederate notes were worth at the time of the contract;

which would answer the ends of justice; yet that would not be *the* contract which he is seeking to have *specifically* performed. And, (3) if a specific performance were decreed, it might amount to the perpetual imprisonment of Cobb, upon his failure to make title,—for he has not the title; or, at least, it would put him in the power of Homesly to demand an unreasonable price for title. It would be otherwise, if the Court could see that it was quite within the power of Cobb to get the title upon fair terms. Nor would it avail the plaintiff anything, to have a decree against Cobb for title with covenants of warranty of title, so as to give the plaintiff remedy at law upon the warranty, for he has the like remedy now upon the contract, if it be valid,

II. The plaintiff is not entitled to a decree for specific performance against the defendant Homesly, because his contract was not with Homesly, but with Cobb. The bill states that the contract was with Cobb as principal, and that the pretence of his agency for Homesly is untrue. It is true that Cobb in discharge of himself, states in answer, that he was the agent of Homesly; and if the bill had been framed, or amended after the answer, to meet that view, the question might be considered; but both the plaintiff and Homesly deny the agency, and the plaintiff cannot, even under the general prayer, have relief contrary to the express allegations and general scope of the bill. It is true that the amended bill *argues* that if it were true that Cobb was the agent of Homesly, and the contract in its inception was imperfect under the statute of frauds, yet the defendant Homesly ratified and confirmed the contract after it was made, and is obliged to perform it. We cannot allow the plaintiff the advantages of an argument against the facts, as he alleges them to be. But considering the case as if it were properly charged, then the acts relied on to make out a ratification and confirmation of the contract on the part of Homesly, are (1) that he took possession of the lots which Cobb got from the plaintiff, and repaired them; and (2) contracted to sell them; and (3) took from Cobb the $6,000 bond, which was given as the difference in the prices. It is a

plain proposition, that unless the contract *purported* to be Homesly's, it could not be ratified or confirmed as his. If the contract was Cobb's, then, however ratified and confirmed, it was ratified and confirmed as Cobb's. Homesly might have adopted, as his own, the terms of contract which was Cobb's, and then he would have been bound by it. But it is to be noted that, under the statute of frauds, a note or memorandum in writing, signed by the party to be bound, or his agent, is necessary to the validity of a contract for the sale of land. If, therefore, the contract as made, was not Homesly's, and it be put upon the ground that he subsequently *adopted* it as his, then the *adoption* must be by the same solemnities as were required for the original contract, for to him it is original.

If, therefore, the contract as made was Cobb's, in order to make it Homesly's by adoption, the adoption must be by some note or memorandum in writing; else it would be, that a man might do by the instrumentality of another, what he could not do himself. It would be different if the contract *purported* to be Homesly's; for, in that case, although made without his authority, he might ratify and confirm it, and that might be proved by parol. But to set up a contract in writing, purporting to be the contract of A, by parol evidence that it was not the contract of A, but was the contract of B, would be liable to the two-fold objection, (1) that it violates the statute of frauds, and (2) contradicts writing, by parol.

There will be a decree dismissing the bills without costs.

PER CURIAM. Bill dismissed.

W. M. SHIPP, Ex'r., &c., *v.* LOUISA E. HETTRICK.

The rule of diligence imposed upon Executors and others having trust funds in their hands during the late war,—as regards dealing in Confederate money, is that of a prudent man in managing his own affairs.

Although one acting as trustee, may not in a particular case have made himself responsible by *receiving* in 1862 or 1863, Confederate money for his cestuy-que-trust, yet if he do not invest it when received, or at least do not make a special deposit of it, or keep the identical money separated from all other, he will be held liable for the value of what he received, with interest.

(*Cummings* v. *Mebane*, *ante* 315, cited and approved.)

BILL in equity, set for hearing upon the pleadings and proofs at Fall Term, 1867, of the Court of Equity for RUTHERFORD, and transferred to this Court.

The plaintiff alleged that in 1855 he had qualified as executor of the will of one Whitesides, and that by such will certain legacies of money and other property were given to, amongst others, the defendant, who was then and still remains, an infant without guardian; that he had endeavored to get rid of his obligations as executor towards her, but without success, owing to her condition; that in managing the legacies given to her, he had received in 1862 for property sold, and in 1863 (March 19th,) for a note, a considerable amount of Confederate money, which he had not been able to lend, and therefore had been obliged to retain and had retained, until, by the events of the war, it became worthless; that at the time he received the money it was the universal custom of prudent business men to receive it for such claims; that after it was received he had invested a much larger amount of his own funds in Confederate bonds, with the intention of allowing the defendant, if she chose, to receive payment in them or in currency; and that he had never received any individual benefit from the money so collected for the defendant.

The prayer was that the defendant (and the other legatees,) might come to an account with the plaintiff, &c., and for further relief.

The answer of the defendant put the plaintiff upon proof of his allegations.

Proofs were taken establishing the allegations of the bill; and by a report of a commissioner appointed by the Superior Court to state an account, the plaintiff was exonerated from all liability in respect to the Confederate money received as above. The defendant excepted to the report.

Bynum and *Merrimon*, for the plaintiff.

No counsel, *contra*.

SETTLE, J. All the questions presented by the pleadings in this cause, have been disposed of in the case of *Cummings* v. *Mebane*, decided at the present term of this Court.

It is there stated, that the degree of diligence, to which those who undertook to discharge a trust during the war, should be held liable, is that which a prudent man, at that time, would have exercised in the management of his own affairs.

And it is said in the same case, that, in the absence of any suggestion of fraud or negligence, where a party acting in good faith, received Confederate currency, and afterwards lost, not only trust funds, but his own also, he is to be regarded with all the favor consistent with the policy of the law, in regard to those who undertake to discharge a trust.

The plaintiff's bill alleges, and all the proof is to the same effect, that there had been no such depreciation in Confederate currency in 1862 and 1863, the times at which he received it as executor, as prevented it from passing currently; and that it continued to do so, for some time thereafter. While this fact may furnish sufficient justification for receiving Confederate currency, it, at the same time, forbids the idea of holding it from 1863 to 1865, when it was growing worse every day, and finally became worthless, without showing some good reason for so doing, or, at least, such circumstances as would negative the suggestion of negligence. As this kind of money was passing currently for some time after it came it the hands of the plaintiff, it is his misfortune not to have invested it in

some manner, or have set it aside specially for the benefit of the party interested. He states that he invested his own funds in Confederate bonds, intending to give Louisa E. Hettrick, or the person authorized to act for her, choice between the Confederate money and the bonds; but it is not admissible for a trustee to tender an unfortunate investment of his own, in discharge of a liability incurred in the management of the funds of another. If the plaintiff had invested this fund in Confederate bonds, or had loaned it out, upon individual security, he would not have been held responsible although the investment may have proved a total loss. Or if he had separated this money from all other moneys in his hands, and retained it as a special deposit for Louisa E. Hettrick, the case would have been different, notwithstanding the fact that it became worthless. But he did none of these things; on the contrary he kept it with his own moneys. And while it may be admitted that he always had on hand an amount sufficient to meet all the demands due Louisa E. Hettrick, there never was such a separation of this particular money from all moneys in his hands, as to make it cease to be his, and become a part her estate.

If he had made a general deposit of this money in bank, in his own name, it could not have relieved him, but if he had made a special deposit of a particular parcel for this particular purpose, it would have been otherwise.

Admitting that the facts in this case make it one of peculiar hardship, we are constrained hold, that the plaintiff must be charged with the value of the Confederate currency, at the time it came into his hands.

To admit that a trustee might in 1862 or 1863, receive Confederate currency, and permit it to become totally worthless on his hands, without showing that he had invested it in some manner, or had made a special deposit of it, for the benefit of the party interested, would open the door so wide, that not only negligence, but fraud also, in its grossest forms, could easily escape.

The report of the commissioner, made to the last term of

this Court, should be reformed, so as to charge the plaintiff, in addition to the items reported against him, with the value of the Confederate money received on the sale of notes in 1862, and also with the value of the Confederate money received in 1863, on the bond of C. L. and J. W. Harris. To this end, there will be a reference to the clerk of this Court, and the cause will stand on further directions.

PER CURIAM. Decree accordingly.

VARDRY A. McBEE and others, *ex parte.*

A limitation by deed to W. J. S., and his heirs—"for and during the period of his natural life; at his death said property to go to the heirs of his body, to them, their heirs and assigns forever,"—creates a fee simple in W. J. S.; and a limitation *over*, "in default of heirs of his body living at his death," is too remote.

Where the maker of a paper writing died without delivering it, any gift therein contained is void; and the fact that the donee is *a son* of the donor will not authorize a Court of Equity to assist him as a *meritorious* claimant, in the absence of any declaration of intention by the donor in his favor, other than as contained in the writing,—especially where he is provided for in the will of the deceased, and such assistance is asked *against* other persons equally meritorious.

Real estate ordered by a testator to be sold and the *proceeds* divided amongst certain children, is considered as personalty from the time of his death.

(*Folk* v. *Whitley*, 8 Ire. 133; *Baldwin* v. *Maultsby*, 5 Ire. 505; *Garner* v. *Garner* Bus. Eq. 1; *Newby* v. *Skinner*, 1 D. & B. Eq. 438, cited and approved.)

PETITION for the sale of land for partition, heard upon exceptions to the report of the commissioner, by *Logan, J.* at Spring Term 1868, of the Court of Equity for GASTON.

The petition having been filed by numerous parties, it was referred to a commissioner to inquire and report upon their various titles, and shares therein. In the course of such investigation three questions arose which having been decided by the commissioner and reported accordingly, exceptions were filed by the parties interested adversely to such decision.

The *first* exception was by W. J. Stowe, one of the parties: "In that the commissioner has reported that he is entitled only to an estate for life under the first deed from Abram Stowe."

That deed gave the share of land in Gaston county to the party excepting, to have and to hold "to him the said William J. Stowe, his heirs, executors and administrators, for and during the period of his natural life, at his death said property to go the heirs of his body, to them their heirs and assigns forever. And in default of heirs of his body living at his death, said property to go to Lavinia J. Pegram and the heirs of her body."

The *second* exception was by the same party: "In that the commissioner has reported that he, W. J. Stowe, takes nothing by the deed of December 1st 1865, executed by A. Stowe in Arkansas."

The paper writing of December 1st 1865, purported to give to W. J. Stowe, described therein as the son of the donor, the share of land in question. It was without a seal, and without a consideration, and was made in the State of Arkansas, of which the donor was then a citizen. It had not been delivered in the life-time of the donor, but after his death was proved (by the subscribing witness) and recorded in a "record office," in Yell County, Arkansas. The case showed that A. Stowe left other children besides W. J. Stowe.

The *third* exception was by E. S. Barrett and wife Mary, (daughter of Eli Hoyle) also parties to the petition: "In that the commissioner has reported that the interest of Eli Hoyle, and Andrew Hoyle's interest in the land became personalty, under the will of Eli Hoyle."

That will, after giving a considerable sum of money to the widow of the testator, and making other bequests not important in this connexion,—provided as follows: "The proceeds of my whole estate I will and bequeath after the above bequests, debts, and incidental expenses are paid, to my four beloved children, to-wit: Sarah, Mary Ann, Margaret and Andrew, that is to my three daughters and one son," &c. The remainder of the will is not important.

His Honor below overruled the exceptions, and the parties excepting appealed.

Phillips & Merrimon, for the appellants.

Bynum, contra.

Reade, J. The first exception is sustained. The grant to W. J. Stowe, "To have and to hold said land to him, his heirs, executors and administrators, for and during the period of his natural life; at his death, to go to the heirs of his body, to them, their heirs and assigns forever," vests in them an estate tail; and that, by our statute is changed into a fee simple. *Folk* v. *Whitley*, 8 Ire. 133. The limitation over, "And in default of heirs of his body, living at his death, to go to L. J. Pegram, and the heirs of her body," is void.

The second exception is overruled. The paper writing in Arkansas was never operative at law, because it had no seal, and was never delivered. *Baldwin* v. *Maultsby*, 5 Ire. 505. Now can it be set up as an imperfectly executed instrument, because of the absence of all evidence, except the mere existence of the paper in the possession of the grantor, as to his purpose in regard thereto, and for want of such a meritorious consideration as is required in such cases. Adams' Eq. 98. It is true that the grantee is a son of the grantor, and such a relationship is ordinarily deemed a meritorious consideration, but he is not unprovided for, but was the recipient of the testator's bounty to a considerable amount, and there are others who would be injuriously affected, who are in the same degree of relationship, and, so far as it appears to us, equally meritorious objects of the grantor's bounty. *Garner* v. *Garner*, Bus. Eq. 1.

The third exception is overruled. The share of Eli Hoyle in the King's Mountain tract, under the provision in his will, became personalty, and passes as such to the four children to whom it is bequeathed. And the same is true of A. Hoyle's interest in said land, and the same passes into the hands of his executors, for the benefit of the persons to whom it is

bequeathed. But it will not be liable to the debts of the testator, if any debts there be, until the personal property proper is exhausted. *Newby* v. *Skinner*, 1 D. & B. Eq. 487.

Whether under the new Constitution, securing to wives all the property which they may acquire, this will be a matter of any moment to Barrett, the party taking the last exception, is not a question before us. This opinion will be certified, &c. The cost will be paid out of the common fund.

PER CURIAM. Decree accordingly.

STATE *v.* VINSON.

A mule had been stolen from the residence of its owner upon Saturday night, and upon the next night, again, from the residence of A. B.: *Held*, that the fact that upon Sunday morning the prisoner had carried the mule—which from appearances then had been tied out during part of the preceding night, to the house of A. B.; even when taken in connection with the additional fact that he assisted in stealing it upon Sunday night, although it might raise a conjecture, was *no evidence* that he had stolen it on the night before.

(*State* v. *Allen*, 1 Hawks 6; *State* v. *Ingold*, 4 Jon. 217; *Mathis* v. *Mathis*, 3 Jon. 132; *Sutton* v. *Madre*, 2 Jon. 320; *Hart* v. *Newland*, 3 Hawks, 122; *State* v. *O'Neal*, 7 Jon. 251; *Homesley* v. *Hogue*, 2 Jon. 39, cited and approved.)

LARCENY, tried before *Warren, J.*, at Spring Term 1868 of the Superior Court of WAYNE.

This was an indictment against the defendant and one John Thomas, for stealing a mule. The evidence was that the mule was the property of Council Wooten, administrator of John Wooten, deceased, and that it was stolen on a Saturday night from the residence of Mrs. Wooten, widow of said John Wooten. That early the next morning the mule, having on it a broken bridle, was seen about 300 yards from the residence of Mrs. Phoebe Woodward, the mother of the defendant, with whom he lived, going in the direction of said residence and from the direction of a spot in the woods where some animal

of the kind had been recently tied to a tree, about equi-distant from the residence of the said John Thomas and Mrs. Woodward. That on that morning, the defendant carried the mule to the house of one Tom Best, a colored man, who lived about a quarter of a mile from defendant's mother, and on her land, and asked him to keep it there. Best objected because of his scarce supply of provender, and because the mule might have been stolen. Defendant told him to keep it till the owner came, and the owner would doubtless pay him, and he at length consented to do so. That during that day the defendant and John Thomas had several conferences togethor at different times and places, and that Thomas and one Needham Smith went to Mrs. Woodward's about 10 o'clock in the morning, and inquired for the defendant and a stray mule. Thomas was introduced as a witness for the State, and testified that Vinson proposed to him to take the mule off and sell it. After some chaffering about the division of the proceeds of the sale, this was agreed upon. In pursuance of this design they employed Joe Best, son of Thomas Best, to chain and keep off a fierce dog, and that (Sunday) night he and Vinson went a little after dark, and took the mule from the premises of Tom Best, without his knowledge or consent. Witness carried the mule off for the purpose of selling it, but was overtaken and arrested. He told Vinson that he had said to those who arrested him, that he got the mule from him, Vinson, and Vinson replied, "you ought not to have told that."

The defendants excepted to the competency of this witness on the ground that he was a co-defendant in the indictment—that it had been found true as to him—that he had been arrested thereon and had not been tried. The exception was overruled.

It was also in evidence that during the whole of the said Saturday night, the defendant was present at a dance eight miles distant from the residence of Mrs. Wooten and two or three miles from that of Mrs. Woodard.

Mrs. Woodard testified that the mule came to her premises early on Sunday morning and jumped the fence into a lot near

the house; that shortly after the defendant came home, and at her instance, carried the mule to Tom Best's. That soon after Thomas and Smith came to the house (about 10 o'clock,) they started off at defendant's suggestion, to look at the mule.

The Court charged the jury (among other things) that if they believed the defendant did not steal the mule himself, and was not present when it was stolen, yet if he advised and procured it to be done, he was guilty. Defendant excepted, on the ground that there was no evidence to sustain this view of the case.

The Court instructed the jury as to what evidence would tend to show a felonious or an innocent purpose on the part of one who takes property by finding.

The Court also charged that if the defendant had in good faith put the mule in the possession of Best to keep for the owner, and was innocent up to that time, yet, if he afterwards confederated with Thomas to take and carry away the mule and they did this with the felonious intent necessary to constitute the crime of larceny, (which was explained to the jury,) he was guilty, and to this the defendant excepted.

Verdict: "guilty." Rule for new trial. Rule discharged, Judgment and appeal.

Strong, for the appellant.

The circumstance that the defendant stole the mule from the possession of Best, is no evidence that he had stolen him before that,—more than that he had previously stolen some other mule at a different time and place. See the cases *Bond* v. *McBoyle*, 7 Jon. 1; *Benton* v. *March*, 6 Jon. 409; *Mathis* v. *Mathis*, 3 Jon. 132; *Sutton* v. *Madre*, 2 Jon. 320; *State* v. *Revels*, Bus. 200; *Cobb* v. *Fogleman*, 1 Ire. 440; *State* v. *Haywood*, Phil. 378.

Attorney General, contra.

RODMAN, J. There was ample evidence to convict the prisoner of having stolen the mule from the residence of Best, on

Sunday night, if the jury believed it. But we cannot know that the jury did believe it, and that they did not find him guilty of the larceny, which the case states was committed by some one, on the previous Saturday night from the residence of Mrs. Wooten. *State* v. *Allen*, 1 Hawks, 6; *State* v. *Ingold*, 4 Jon. 217. The Judge told the jury, in effect, that there was evidence, from which they might find, that the prisoner either stole the mule himself on the Saturday night, or procured it to be done; to which the prisoner excepted. All the other exceptions taken by the prisoner, are properly abandoned in this Court. So that the only question is, whether the case shows any evidence tending to prove the guilt of the prisoner on the Saturday night. It is easy enough to express in general terms the rule of law; if there be any evidence tending to prove the fact in issue, the weight of it must be left to the jury, but if there be no evidence conducing to that conclusion, the Judge should so say, and, in a criminal case, direct an acquittal. *Hepburn* v. *Dubois*, 12 Peters, 345; *Gibson* v. *Hunter*, 2 H. Bl. 205.

But it is confessedly difficult to draw the line between evidence which is very slight, and that, which, as having no bearing on the fact to be proved, is, in relation to that fact, no evidence at all. We may say with certainty, that evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict, and should not be left to the jury. *Matthis* v. *Matthis*, 3 Jon. 132; *Sutton* v. *Madre*, 2 Jon. 320. We may go farther, and say that the evidence must be such as will support a reasonable inference of the fact in issue. 1 *Phil. Ev.* 460. In *Rex* v. *Burdett*, 4 B. and A. 161, (6 E. C. L. R.,) Abbott, J., says "a presumption of any fact is properly an inference of that fact, from other facts that are known; it is an act of reasoning."

Probably the rule in such cases can never be more definitely declared, than it was by this Court in *Hart* v. *Newland*, 3 Hawks, 122. There, Henderson, J., delivering the opinion of the Court, says: "Evidence is of two kinds; that which, if

true, directly proves the fact in issue, and that which proves another fact, from which the fact in issue may be inferred. The rules regarding competency, only apply to the first kind, and relevancy to the second. The Court protects the jury both from incompetent and irrelevant evidence"—"the rules of evidence are framed more with a view to exclude falsehood, than to let in the truth." "That the fact to be inferred *often* accompanies the fact proven, is not sufficient; it should *most usually* accompany it; and I would say, in the absence of all circumstances, that it should rarely otherwise happen.

In Roscoe's Crim. Ev. p. 14, citing Gilbert's Ev. 157, (1) the same rule is declared; "when the fact itself cannot be proved, that which comes nearest the proof of the fact, is the proof of the circumstances that necessarily and usually attend such fact." If the fact offered to be proved, be equally consistent with the existence, or non-existence of the fact sought to be inferred from it, the evidence can furnish no presumption either way, as in such a case, the one fact does not most usually attend the other. With the aid of these general principles, we may proceed to consider the particular question presented in this case. In doing so, we must of course regard only the affirmative evidence in the case. The evidence is circumstantial. The fact to be proved is the guilt of the prisoner on Saturday night, and the facts from which it is sought to be inferred are the occurrences on the next day. Were they such as to furnish a reasonable inference of the main fact?

The first time that the evidence directly brings the prisoner into any connexion with the mule, is on the Sunday morning, when it came to the house of Mrs. Woodward, where the prisoner resided, having on it a broken bridle. It must be assumed that the mule had been tied out to a tree during some part of the preceding night, and had broken loose. The prisoner then took the mule to the house of Best. It is quite immaterial whether he did this, because there was at Mrs. Woodward's no place proper to confine it in, or because he then formed the design of stealing it, and conceived that it would be more safely done from the house of Best, than from his mother's. We

think it must be admitted that, had the evidence stopped here, no one could do more, at the utmost, than conjecture, that the prisoner carried the mule to Best's house, because he had stolen it from Mrs. Wooten's house the night before. About ten o'clock that morning, Thomas and Smith came to Mrs. Woodward's house, and inquired for the prisoner, and a stray mule. On that night the prisoner and Thomas stole the mule from the possession of Best. The question is then reduced to this; are any of the facts proved, either singly or in combination, such as necessarily, or most usually, or often, attend a prior theft? Are they not, either singly or combined, consistent with the innocence of the prisoner of the theft on the Saturday night? No doubt, the theft on Sunday night proved the possibility of the prisoner's guilt; that he was not too good to steal. But if it proved no more than this, and we think it proved no more in respect to the theft on Saturday night, then it was not evidence of his guilt of that particular theft. The general bad character of a prisoner cannot be given in evidence to convict him of any particular charge. *State* v. *O'Neal*, 7 Ire. 251; *Homesley* v. *Hogue*, 2 Jon. 391, 3 Greenleaf on Ev. § 25,—nor can it be proved that at another time, he committed an offence similar to that charged, or that he had a tendency to commit such offences; 1 Phil. Ev. 477. There is some similarity between the present case and that of *The King* v. *Vandercomb and Abbott*, 2 Leach's Cr. Ca. 708. In that case a burglary and larceny had been committed by some one; afterwards the prisoners were detected and arrested after they had committed a burglary in the same house, but before they had committed any larceny on that occasion. They were indicted for burglary and larceny. The Judge said they could not be convicted of the second burglary, because no larceny attended it. The prosecution contended, that they could be convicted of the first burglary and larceny, although the only evidence of their connexion with it was, that they had committed the second burglary. The Judge directed an acquittal. It is true that the Judge put his directions on the ground, that the prosecutor having given evidence of one felony, could not go into

proof of a distinct and substantive one; but if the second burglary could have been received as any evidence to connect the prisoners with the prior burglary and larceny, it would have been the duty of the Judge to have left the weight of it to the jury, instead of directing an acquittal. We think there was error in the instructions of the Judge below, and the prisoner must have a new trial.

PER CURIAM. *Venire de novo.*

THOMAS C. HUMPHRIES and wife *v.* MARY SHAW, and others.

A testator devised his Skillet-handle farm to A B, in discharge of a debt due to her, and provided further, in an another part of the will, that a certain house should, at the expense of his estate, be removed from another tract to the farm given above; the devise having been accepted, *Held*, that although as regards creditors the house was to be treated as personalty, yet as against the other devisees it remained realty, and therefore, that A. B., being a purchaser for value, was entitled to have its value, and a sum sufficient to pay for its removal, as above, made up to her by the other devisees.

(*Shaw* v. *McBride*, 3 Jon. Eq. 173 cited and approved.)

BILL, filed at Spring Term 1867 of the Court of Equity for CURRITUCK, against the executor and the devisees of one Alfred Perkins; and at Spring Term 1868, set for hearing upon bill, answers and exhibit, and transferred to this Court.

The bill set forth the death of Perkins, in Currituck County, in 1856, leaving a will in which, amongst other things by the second clause thereof, he devised "to Mollie Frost my Skillet-handle Farm containing about one hundred and forty-five acres, provided she is willing to release my estate from any amount I may owe her as guardian; but if she has no heir begotten of her body at her death I give and bequeath the foregoing property to her two brothers Thomas Frost and Alfred Frost, to them and their heirs forever;" and, by the ninth clause, "I leave the house now used as a school house,

near the Baptist Church, to be moved by my executor, at the expense of my estate, upon the Skillet-handle farm, for the use of the same." It further stated that the debt due to said Mollie Frost was about $1,000, and was the full value of the land devised to her; that the devisee (now the *feme* plaintiff) had elected to take the farm, and that the plaintiffs had tendered a release of the debt to the executor; that under a decree of the Superior Court, the house had been sold to pay debts, and had brought $325, and that the expense of removing it would have been about $60; that they had applied to the executor to pay them the $385, but he had refused to do so. The prayer was for an account, and for general relief.

The answers admitted the general allegations of the bill, but denied the right of the plaintiffs to relief, inasmuch as the house was personal estate and had been used to pay debts, and the whole personal estate of the testator was exhausted; also that the farm exceeded in value the debt to the *feme* plaintiff; and the bequest of the school house, being in another clause of the will, was not intended to be subject to the conditions of the devise of the farm.

Smith, for the plaintiffs.

No counsel, *contra*.

RODMAN, J. The questions presented in this case arise upon the effect of certain clauses in the will of Alfred Perkins, which was made in 1856.

The second clause is as follows: "I give and bequeath to Molly Frost (the present *feme* plaintiff) my Skillet-handle farm, containing about one hundred and forty-five acres, provided she has an heir begotten of her body, and provided she is willing to release my estate from any amount I may owe her as guardian, but if she has no heir begotten of her body at her death, I give and bequeath the foregoing property her two brothers, Thomas Frost and Alfred Frost, to them and their heirs forever."

The ninth clause is as follows: "I leave the house now

used as a school house, near the Baptist Church, to be moved by my executor at the expense of my estate, upon the Skillet-handle farm for the use of the same, &c.

The plaintiffs accepted the gifts in the will in satisfaction of what was owing to the *feme* plaintiff by the testator, and, with the assent of the executor, took possession of the Skillet-handle farm; they offer to execute a proper release.

The executor of Perkins, under a decree of the Court in the case of *Shaw* v. *McBride*, reported in 3 Jon. Eq. 173, by which it was declared, that, as between the creditors of Perkins and his executor the school house was to be regarded as personal property, sold the same, and exhausted the proceeds in paying the debts of the testator. All the other personal estate has been in like manner exhausted; and the object of this bill is to recover from the other devisees of Perkins, the sum for which the school house sold, and the expense of its removal to the Skillet-handle farm, with interest. It appears from the pleadings, that the testator at his death, was indebted to the *feme* plaintiff, in about the value of the farm devised to her; if the case were between the plaintiffs and the other creditors of the testator, it might be material to ascertain the true relative values of the debt, and of the property devised; but as between the plaintiffs and the other devisees, that question is not material. The plaintiffs claim, that the legacy of the school house is subject to the same condition of a release of her debt as the devise in the third clause, and that as between them, and the other devisees, they stand in the position of purchasers for value, and must receive the whole that is given to them, before the other devisees can receive anything. We are of opinion that this claim is well founded. Although the ninth clause of the will is separated from the second by several other clauses having no connection with these, yet the two clauses are parts of the same will, and the ninth is necessarily referred to the second for its correct understanding, by the words " for the use of " the Skillet-handle farm. These words necessarily imply that the school house is to be attached to the farm, and made part of it, for the benefit of the devisee,

and it thereby becomes subject to the same conditions. By reason of these words, the devisee could not have rejected the Skillet-handle farm, and accepted the school house as an independent legacy, free from conditions. Although as between creditors of the testator and his personal representative, the house was to be considered as converted into personalty, yet as between the plaintiff and the other devisees, it is to be regarded as a part of the farm, to which it is directed to be removed. *Shaw* v. *McBride, ubi supra.*

The plaintiffs, on executing a proper release, are entitled to receive from the other devisees the sum for which the school house sold, and a sum equal to the expense of its removal to the Skillet-handle farm, with interest from the filing of the bill, and unless the amounts can be agreed on, there must be a reference to ascertain them. The plaintiffs are also entitled to recover their costs.

PER CURIAM. Decree accordingly.

WILLIAM WALDROP *v.* SILAS M. GREEN.

Injunctions pending at the adoption of the Code of Civil Procedure, are to be proceeded in and tried under the existing laws and rules applicable thereto; *therefore,*

The defendant in such a case has a right to have a motion to dissolve upon bill and answer, considered before a replication can be put in.

An injunction against a recovery at law, granted upon bill which stated as grounds for the application, that the title to a horse which the plaintiff had obtained by exchange from the defendant, *had failed*, and that the defendant was insolvent, and was seeking to recover damages from him for *converting* the horse which he had conveyed by exchange to the defendant, was granted improvidently.

INJUNCTION, dissolved by *Cannon, J.*, at Fall Term 1868 of the Superior Court of CHEROKEE.

The bill, filed to Spring Term 1868, alleged that the plaintiff and defendant had exchanged horses in 1866, and that

the title to the horse which the plaintiff had received failed; and that thereupon he claimed that his own horse thereby reverted to him for the breach of implied warranty by the defendant, "and by virtue of said claim it came into his possession;" that the defendant had brought suit for such horse and had recovered judgment, and was intending to enforce an execution thereupon; that in the mean time the plaintiff had brought a suit for the breach of warranty, which was still pending; and that the defendant was insolvent. The prayer was for an injunction, &c.

The answer denied all the material allegations in the bill excepting that there had been an exchange of horses, and that the two suits at law had been brought, and a judgment obtained by the defendant in the one brought by him.

At Spring Term 1868, upon the coming in of the answer, a motion was made to dissolve the injunction theretofore granted, and such motion was continued.

At Fall Term 1868 upon the cause being called, the counsel for the plaintiff objected that as it now stood upon the law docket, the motion for a dissolution should not be heard; but that the plaintiff should be allowed to put in a replication, and have the facts tried *instanter* before a jury, announcing himself ready for such trial.

His Honor overruled the objection and on consideration of the motion, ordered the injunction to be dissolved. Thereupon the plaintiff appealed.

Phillips & Merrimon, for the appellant.

No counsel, *contra*.

PEARSON, C. J. This case was entered on his docket by the clerk of the Superior Court, according to sec. 400, "Code of Civil Procedure." By sec. 402, it is directed: "The said suits shall be proceeded in and tried under the existing laws and rules applicable thereto." So we agree with his Honor in his ruling, that the plaintiff had no right to take issue upon the facts set out in the answer, and have such issue

submitted to a jury. Before the Court could take any further action in the cause, we think the motion to dissolve the injunction on bill and answer was properly before the Court for determination.

We also agree with his Honor, that upon bill and answer the injunction ought to have been dissolved, indeed we are inclined to the opinion that the bill upon its face, has no equity. The injunction was improvidently granted.

Let this be certified, &c.

PER CURIAM. Ordered accordingly.

W. C. MORRISON *v.* B. F. CORNELIUS and others.

Where the defendants, who were engaged in the manufacture of saltpetre up to the 14th of April 1865, at the discontinuance of their operations, left some of the liquid of which saltpetre is made, in troughs and hogsheads, covered with boards, and enclosed by a sufficient fence, and three months thereafter the plaintiff's cattle wandered into the enclosure, drank of the liquid, and died from the effects thereof, *Held*, that the question of *negligence* on the part of the defendants, did not arise.

If a party injured have *contributed* to the injury, he cannot recover damages on account of it.

The act of May 26th 1864, by which persons "*while engaged* in the manufacture of saltpetre" are required "to enclose their works with a good and lawful fence," under penalty of double the value of all cattle that are destroyed by the liquid saltpetre, does not apply after the operations are discontinued.

Where *both parties* to a case appeal, the Clerks of the Superior Courts should make out two transcripts, the double appeal constituting in the Supreme Court *two cases*.

(*Laws* v. *N. C. R. R. Co.*, 7 Jon. 468; *Devereux* v. *Burgwyn*, 11 Ire. 490, cited and approved.)

CASE, tried before *Mitchell, J.*, at Fall Term 1868 of the Superior Court of IREDELL.

The plaintiff declared in two counts In one, that the defendants knowingly left exposed a poisonous substance at a place about which plaintiff's cattle and other cattle were used to range; and that the defendants failed to debar cattle from

it by a sufficient fence or other barrier, and that plaintiff's cattle partook of the poisonous substance, and died. In this count he claimed the value of the cattle in damages.

In the second count he demanded double damages, for that the defendants did not guard said poisonous substance against the access of the cattle, as required by the act entitled, "An act to protect cattle, by a good and lawful fence," ratified May 26th 1864.

The defendants, as co-partners, were engaged in the manufacture of saltpetre on the lands of the defendant B. F. Cornelius, near the land of the plaintiff, for six months immediately preceding April 14th 1865. Upon the approach of Gen. Stoneman's army at that date, they discontinued the manufacture, and never afterwards resumed it. About two weeks after the discontinuance, the defendants Cornelius and Morris, removed to the house of the former the kettles and other apparatus used in the manufacture, except two troughs used in the process of evaporation, and two hogsheads, open at top and about four feet high, which were left on the lot, and remained there until after the cattle died. The hogsheads and troughs contained a liquid, of which saltpetre is made by evaporation, and some of this liquid was found therein when the cattle were discovered dead. The quantity in the hogsheads, and its accessibility to cattle, were points in controversy, upon which both sides introduced evidence. Testimony was offered to show that when the defendants removed the kettles, they covered the troughs; and on the other hand, that when the dead cattle were found, the boards had been displaced, and very little of the liquid was remaining.

The cattle, seven in number, were found dead on the 24th of July ensuing, and all, except one which was forty yards distant, were found within the enclosure and within a few yards of the hogsheads and troughs.

The evidence showed that the fence around the lot was not generally five feet high, but had successfully excluded cattle until the abandonment of the work on the 14th of April. There was conflicting testimony as to the condition of the

fence from that time until the death of the cattle. Evidence of physicians and others, was given as to the nature and poisonous effects of the liquid in the hogsheads and troughs.

His Honor charged the jury that the plaintiff was not entitled to recover double damages for the loss of his cattle, under the act of May 26th, 1864, but that, if they found that the liquid left by the defendants in the troughs and hogsheads was poisonous and fatal to cattle, that the defendants knew or had good reason to suppose that it was, that the cattle had access to it from the want of a fence or barriers that would ordinarily exclude cattle, and that the cattle had drunk the poisonous liqnid, and had died from the effects thereof, the plaintiff was entitled to recover damages to the value of the cattle.

The counsel for the plaintiff, and for the defendants, each excepted; Exceptions overruled; Verdict and judgment for the plaintiff accordingly. Appeals prayed and allowed for both parties.

Bragg, for the plaintiff.

W. P. Caldwell, for the defendants.

DICK, J. The maxim, *sic utere tuo ut alienum non laedas*, has existed in the law for centuries. It has justly been regarded as one of the golden rules of jurisprudence; but the difficulty of its application to particular cases, has given rise to much discussion and numerous adjudications, both in this country and in England. We have examined with care some of the leading American and English authorities, and in the midst of various conflicting views, we think they establish some general uniform rules on the subject. We shall only refer to those which are applicable to the case before us.

In all cases where a person, in the lawful use of his own property, causes injury to another, the party injured, before he can recover damages at law, must show that he has exercised proper care, and is free from blame in regard to the matter. If it appears that the party injured has, by any act of omission

or commission on his part, contributed to the injury complained of, it is generally *damnum absque injuria*. There are some exceptional cases to this general rule, but they are founded upon particular circumstances. *Lynch* v. *Nurdin*, 1 Ad. & E. (N. S.) 422. *Birge* v. *Gardner*, 19 Conn. 507.

If a person enters upon the lands of another to use the premises for his own benefit, under a license given by the owner, or in the enjoyment of a privilege allowed by law, he takes such benefit with all the risks and perils attendant upon it; and if he has full opportunity of inspecting the premises, and there is no concealed cause of mischief, and any existing source of danger is apparent, the owner is in no way responsible for any injury which such license may accidentally sustain. *Indemaur* v. *Dames*, 1 C. C. P. 272; *Hunsell* v. *Smyth*, 97 E. C. L. R. 271; *Butterfield* v. *Forrester*, 11 East, 60; *Bush* v. *Brainard*, 1 Cowen 78.

It is also well settled that an owner of land may on his own premises dig a well, or pit, or ditch, or do any other lawful act in the enjoyment of his property, and he is not liable for consequential injuries to his neighbor's cattle, although these causes of danger are unenclosed and unprotected. If he does such acts with an intent to cause mischief, and he uses inducements to produce such results, of course he is liable for consequent damages.

If he places such causes of danger near a public highway, and does not take the necessary precautions to prevent damage, they constitute a public nuisance, and he is liable for consequences, and also to an indictment. But when a person merely allows a cause of damage to exist on his own premises, which does not amount to a public nuisance, and a licensee or trespasser sustains injury, he has no cause of action against the owner, and the question of negligence does not arise. Damages arise in such cases from what may be styled *permissive causes* of injury, such as leaving a well, or pit, or ditch unprotected and unguarded. If an owner, even on his own premises, gives rise to an *active cause* of injury, he is required to use ordinary care to prevent damage; as, for instance, if he puts fire into

his own woods, he must take reasonable precaution to prevent it from spreading into the lands of his neighbors. These distinctions are illustrated in cases involving the responsibility of Rail Road Companies.

A Rail Road Company is not responsible for the value of a cow that is killed by falling down an embankment, or into a cut or cattle-guard; but is responsible, if the cow is killed by negligence in running the train. This *active cause* of injury is so constant and wide-extended in its consequences, that the Legislature of this State, by statute, has imposed a *prima facie* responsibility on Rail Road Companies in all cases of killing stock. The statute affords a just protection to the owners of stock, as it is very difficult for them to prove the circumstances of the injury, and it is not a hardship on the Companies, as their agents are always present when the act of killing is done, and if due care was used, it can be proved.

Let us now apply these general principles to the case before us, so as to ascertain the rights and liabilities of the parties. The defendants, on their own land, had been engaged in the lawful business of manufacturing saltpetre. While so engaged, they kept a good fence around their works, as was required by the act ratified May 26th 1864; and no damage was sustained by any one.

In April 1865, the United States' forces came into the county, and the defendants ceased their operations, and never resumed them, as the war closed in a short time. When the business was discontinued, the defendants left there some troughs and two hogsheads, containing a poisonous liquid, which had been used in the manufacture of saltpetre. At that time the premises were enclosed, and the troughs, which contained but little of the liquid, were covered with plank. The hogsheads were four feet high, and it was scarcely possible for cattle to be able to drink the poisonous liquid within, as the hogsheads were not full. On the 24th of July,—more than three months after the said works were abandoned,—the cattle of the plaintiff were found dead within and around the enclosure. These were substantially the facts proved on the

trial, and as the question of negligence is a legal one, we think his Honor erred in not telling the jury, that upon such a state of facts, the question of negligence did not arise, and the plaintiff was not entitled to recover even upon the first count of his declaration.

If the question of negligence could properly arise in this case, we think that much might be said in behalf of the defendants, for a mere omission of duty. In the Spring of 1865, the whole country was filled with alarm and confusion, produced by the closing scenes and events of a great civil war. When the minds of all men were full of fearful apprehensions for the safety of their lives, property and families, we think the defendants ought not to be held to a strict accountability for failing to empty two hogsheads of liquid *saltspetre*, which might possibly kill their neighbors' cattle.

Let us see if the plaintiff was guilty of no act of omission or commission, which contributed to his misfortune. He was a near neighbor of the defendants, and lived near the saltpetre works. He knew that the business was discontinued, and must have known that the troughs and hogsheads were in the enclosure. The public law above referred to must have advised him that the manufacture of saltpetre was a dangerous business to cattle. His cattle were pasturing on the common, and ordinary prudence ought to have prompted him to keep an eye on the enclosure of the saltpetre works. The defendants were not required to keep up the enclosure, except while engaged in their operations. The plaintiff's cattle were trespassing on the lands of the defendants, at the time they were killed. In this State the owners of cattle are not required to keep them enclosed, to prevent them from trespassing on the lands of neighbors. *Laws* v. *N. C. R. R. Co.*, 7 Jon. 468. This, however, is not a right, but a mere immunity given by law. The owner is not liable in damages for a trespass by his cattle upon unenclosed lands, but he takes this legal license with all attendant risks and perils. This privilege is similar to *common because of vicinage* in England. "It is a

trespass, but the law winks at the trespass." 2 Blackstone, 34. The owner of land may at any time drive away cattle from his common, and he is in no way bound to guard them from accidents. *Knight* v. *Abert*, 6 Burr. 472.

The second count in the plaintiff's declaration was for double the value of his cattle, under the Act of 1864 above referred to. This is a highly penal statute, and must be strictly construed. The defendants, by said Act, were required "to enclose their works with a good and lawful fence, while engaged in the manufacture of saltpetre." The cattle were killed after the defendants had discontinued their operations, and his Honor was right in instructing the jury that the plaintiff was not entitled to recover upon this count.

The judgment must be affirmed, so far as it is appealed from by the plaintiff, and the judgment appealed from by the defendant must be reversed, and a *venire de novo* awarded.

As appeals by both parties often produce difficulties as to costs, we think it proper to restate a rule of this Court, established in the case of *Devereux* v. *Burgwyn*, 11 Ired. 490. To prevent difficulties as to costs, and to prevent cases from being made too complicated, the clerks of the Superior Courts will in future, when both parties appeal, make out two transcripts, so as to make, as there really are, two cases in this Court. In this case, the clerk of this Court, will state two cases on his docket, and charge costs against the plaintiff, in each case.

PER CURIAM. *Venire de novo.*

A. CAPEHART *v.* J. H. ETHERIDGE and W. T. SUTTON.

A purchaser at a sale made by a trustee under a trust to pay debts, who is also a creditor secured in such trust, cannot enjoin the trustee from collecting the purchase money merely because he is a creditor to a much larger amount than he is debtor. Such an interference might derange or defeat the purposes of the trust.

A trustee will not be permitted, to the injury of a *cestui que trust*, to substitute his own Confederate money, when greatly depreciated, for more valuable trust funds.

INJUNCTION, dissolved by *Watts, J.*, at Fall term 1868, of the Superior Court of NORTHAMPTON.

The bill alleged that the complainant in 1860, was creditor for a large amount, of David Outlaw, of Bertie county, and that Mr. Outlaw, (January 8, 1861,) made a deed conveying to the defendants, a large estate, real and personal, to secure that and his other liabilities; that being interested in having such property bring a good price, the complainant attended the sale by the trustee, and purchased slaves to the amount in value of about $4,000, or one-third of the debt due to him, giving two bonds therefor; that afterwards he removed to Baltimore where he was sued upon the notes, and judgment taken, and an execution levied upon his property; that since then he has returned to North Carolina, and now lives in Northampton county; that the defendant Etheridge, the active trustee, owns the notes in question, having put off upon some of the creditors in the trust, during the war, Confederate money at greatly depreciated rates, so, claiming to have purchased such notes.

There were other allegations which the opinion of the Court renders it unnecessary to state here.

The prayer was for an injunction against the execution in Maryland, &c., and for further relief.

The joint answer of the defendants admitted the allegations in the bill, so far as they are set out above—excepting that it stated that the deed in trust made several classes of creditors, plaintiff being in the last class, and an explanation was given of the manner in which the defendant Etheridge became owner

of that one of the notes which he admitted that he claimed, viz: as the result of several disconnected transactions, at the conclusion of which it was transferred to him *bona fide*, &c.

From the order dissolving the injunction, the plaintiff appealed.

Bragg and Peebles & Peebles, for the appellant.

Barnes and W. A. Moore, contra, cited *McDaniel* v. *Stoker*, 5 Ire. Eq. 274; *Griffin* v. *Carter, Ib.* 413; *Mhoon* v. *Capehart*, Bus. Eq. 30; *Green* v. *Phillips*, 6 Ire. Eq. 223; *Deaver* v. *Eller*, 7 Ire. Eq. 24; *Dyche* v. *Patton*, 8 Ire. Eq. 295; *Parker* v. *Grammer*, Phil. Eq. 28.

DICK, J. On the 8th day of January 1861, David Outlaw executed a deed in trust to the defendants, conveying his estate for the benefit of various creditors. The complainant is a large creditor and *cestui que trust*, placed in the last class in said deed. The defendants sold the estate according to the terms of the trust, and the complainant purchased two negroes at the sale, and gave two bonds, with sureties, for the purchase money. After the close of the war, the complainant removed to the city of Baltimore, where he was sued by the defendants on said bonds, and judgments were obtained, and executions levied upon his property.

The object of this bill is to restrain the defendants from selling complainant's property in Baltimore, until his equities set forth in his bill, are passed upon and adjusted.

It is unnecessary for us to consider in this case, the power of a Court of Equity in this State, to restrain by injunction, parties within its jurisdiction, from proceeding in the Courts of law of another State; for if the proceedings complained of were in our own Courts, we should hold that this injunction ought to be dissolved.

The defendants assumed a trust which they are bound to execute in good faith, and with ordinary diligence, for the benefit of their *cestuis que trust*. In performing this duty, they must collect the assets, and apply them in the manner con-

templated by the grantor. If the complainant by purchasing property at the trust sale, has acquired an equity to apply the purchase money to the satisfaction of his debts in the last class, then the purposes of the trust will be deranged and defeated. No such equity exists. If he had made an express agreement with the trustees to this effect at the time of the sale, then as against them the agreement might be valid. But no such agreement was made, and it is unnecessary to consider the question farther.

It is charged in the bill that the defendant Etheridge has paid in Confederate money, the amount of the notes sued on, and now holds the said executions for his own benefit. It is well settled that a trustee cannot avail himself of his fiduciary character for any object of personal benefit, and such matters may be enquired into in an account of the administration of the trust; Adams, Eq. 59.

But such questions will not be considered at the present stage of proceedings in this case. All the material allegations in the bill are positively and fully denied in the answer; and as this is a common injunction, it must necessarily be dissolved. The rules of equity practice in cases like the present, and the distinctions between common and special injunctions are fully stated and discussed in the cases cited by defendants' counsel.

The complainant can continue his bill as an original, and by making the proper parties may be entitled, upon proofs, to have an account of the administration of the trust funds in the hands of the defendants.

The interlocutory order in the Court below, dissolving the injunction, must be affirmed.

Let this be certified, &c.

PER CURIAM. Injunction dissolved.

ABNER LATTIMORE *v.* THOMAS DICKSON.

Where by agreement between a slave and his owner, certain notes belonging to the former were made payable to the latter for the benefit of the former, *held*, that upon the emancipation of the slave, the owner became a trustee for him as to all such notes as were then in his hands.

As to the time and the means of Emancipation, *Quære.*

A demurrer bad as to part, is bad as to all.

BILL, set down for argument upon demurrer, before *Little, J.*, at Spring Term 1868, of the Court of Equity for CLEAVELAND.

The bill alleged that the plaintiff was formerly the slave of one Lattimore, who had permitted him to make money for himself, under which license he had accumulated about seven hundred dollars, in good notes, which for better security, under the law, he had taken payable to one Nolin, a White man; that Lattimore having died, the defendant had persuaded him to have the notes made payable to *him*, promising to act as his friend, and telling the plaintiff further that he intended to purchase him; that the plaintiff, relying upon his assurances, had the notes transferred as requested, and that during the same year the defendant purchased him; that in 1862 the defendant sold him to one Bedford; that since his Emancipation he has made demands upon the defendant for the notes or their proceeds, and the latter refuses to account for them, or pay him any part thereof; and that the defendant has collected all or a large part of such notes, partly since the Proclamation of President Lincoln, Emancipating slaves, and partly since the Emancipation of slaves by the ordinance of 1865. The prayer was for discovery and an account, and for other relief.

The defendant put in a general demurrer.

Bynum, for the plaintiff.

I. The emancipation of the plaintiff, remitted him *proprio*

vigore, to his common law rights, and his remedies to enforce all contracts of imperfect obligation.

The common law makes every presumption in favor of freedom:

(1.) Examples: A Lord makes a deed to, or contract with, or sues his villein. By implication of law, these acts enfranchised him.

(2.) The policy of our National Government was in favor of freedom. Slave trade was piracy, and those engaged in it are declared to be the enemies of all mankind.

(3.) The disability to make a contract or sue was incidental and collateral to the state of slavery, of arbitrary policy, not of natural right. In other words slavery was not an *extinction* of his natural rights of property, but only a *suspension* of them, and when resumed by emancipation, spring up, and being revived shall have such a relation back as to *validate* contracts of imperfect obligation.

(4.) This view is supported by the analogies of the law.

(a.) An alien is made a denizen by letters patent, buys land and dies; a son born before denization cannot inherit, but one born after may; but if naturalized by Act of Parliament, a son born before, as well as after, may inherit.

(b.) A man attainted of treason—his inheritable blood is destroyed, but if he receives a statute pardon, it is restored.

(c.) A man having good title comes into possession by a bad one; he is remitted to his good one.

(d.) A man marries an alien woman, sells his land and dies; the wife is naturalized; she is remitted to dower in the land held. Co. Lit. 33 a. Our own Courts lean as far as possible to the support of the slave. For example.

(1.) *Haley* v. *Haley*, Phil. Eq. 180 supports a devise and bequest to slaves.

(2.) *Lea* v. *Brewer*, 5 Jon. Eq. 379, refuses to assist the executor to recover the property of the slave, to benefit the masters' estate.

(3.) *Barker* v. *Swain*, 4 Jon. Eq. 220, refuses the aid of the Court to the claimants of the slave's money.

(4.) *White* v. *Cline*, 7 Jon. 174, allows the trustee for the benefit of the slave, to recover.

The cases show that the Court has never held that property of a slave acquired by consent of the owner, belongs to the master. The Court has been cautious in this, and properly so.

The doctrine of slavery here, is a modified form of the civil law of slavery.

By the Roman law, the master was the absolute owner of all the acquisitions of the slave, with one exception—the slave's "peculium"—this was a specified and limited amount of property he was allowed to hold for the comfort and convenience of his family.

It is in analogy to that "peculium," that our Court has refused to make an executor account for the acquisitions of slaves, made by the master's consent, or his own consent after the testator,s death.

Our Courts then have not held that the gains of the slave are the property of the master, but have recognized this "peculium," so far at least as to give him, if not a legal right, yet a *quasi* legal right to it.

This "scintilla juris," so to speak, remains in the slave, is sufficient to feed his estate in the contract with the defendant, and remit him to his complete right and remedy, on his emancipation.

II. This I claim as the legitimate result of emancipation, unaided by other legislation. But our second position is, that the ordinance of the Constitutional Convention of 1868, ch. XIV, gives the plaintiff the right to recover in this action.

This ordinance is the will of the people in their sovereign capacity, and is not restricted by the Constitution of the State, but only by the limitations of the Constitution of the United States.

No limitation in the Constitution of the United States affects the case; unless it is that which forbids the State to make a law impairing contracts.

But this ordinance does not impair, but enforces the obligation of a contract.

The objection on the other side is that the contract was void, and could not be validated by an act or ordinance. But this Court in the case of *Cooke* v. *Cooke*, Phil. 583, held that a void marriage could be made valid by Act of the Legislature.

This case is supported by many authorities. Cooley on Stat. Limitations 372 to 378, and cases there cited. *McCulloch* v. *State of Maryland*, 4 Wheat 466; *Balt. & Susq. Rail Road* v. *Nesbit, et. al.* 10 How. 395.

Bragg, contra.

1. The contract between the plaintiff and defendant when made was void. The defendant as master, in law, was the owner of the choses in action and the money arising therefrom. *Barker* v. *Swain*, 4 Jon. Eq. 220; *Lea* v. *Brown*, 5 Jon. Eq. 370; *White* v. *Kline* 7 Jon. Law 174; *Batten* v. *Faulk*, 4 Jon. Law 233; *McNamara* v. *Kevans*, 2 Ire. 66.

2. The Ordinance of 1868, ch. 14, p. 53, undertakes to divest vested rights. It is against the provisions of both the old and the new Constitution. See sec. 4, Bill of Rights in old and sec. 8 in new. *University* v. *Foy*, 1 Mur. 58; *Robertson* v. *Barfield*, 2 Mur. 390; *Hoke* v. *Henderson*, 4 Dev. 1.

3. Retroactive legislation may affect remedies, but not rights. It cannot take property which the law has given to one, and confer it upon another, *Hinton* v. *Hinton*, Phil. 410.

READE, J. The simple story in the plaintiff's bill strongly moves the conscience of the judge to give the relief which he seeks.

We are clearly of the opinion, that all the choses in action, which the defendant had received for and on account of the plaintiff, at any time, even when he was a slave, and which he held in hand at and after the time when the plaintiff was emancipated, were held in trust for the plaintiff. And for this the plaintiff is entitled to a discovery, and an account.

The demurrer is therefore overruled; for a demurrer bad as to part is bad as to the whole. Adams' Equity 335.

We do not think it necessary to decide now, at what time, and by what means, the plaintiff was emancipated. It will be proper, therefore, for the defendant to discover all the choses in action which he has received at any time, for and on account of the plaintiff, and all the money collected, and when, and of whom; for we purposely pretermit the decision of the question, how far the defendant may be liable for *everything* he received, while the plaintiff was the slave of persons other than himself—as whether, if he did not hold the funds as trustee for the *slave*, he did for the *owner* of the slave; and whether the consent of the owner that the plaintiff might earn the funds in controversy, though imperfect at the time, will not, the same never having been withdrawn, enure to the benefit of the plaintiff, and be perfected with his emancipation, and his status as a citizen. Demurrer overruled. This will be certified, &c.

PER CURIAM. Demurrer overruled.

CATHERINE LASSITER and others *v.* C. W. WOOD and others.

A will is to be construed not only by its language, but by the condition of the testator's family and estate.

Where a general purpose can be gathered from a will, particular dispositions in conflict therewith, must give way.

(*Bray* v. *Lamb* 2 Dev. Eq. 372, and *Biddle* v. *Carraway*, 6 Jon. Eq. 95 cited and distinguished.)

ACTION to enforce the payment of legacies, tried before *Pool, J.*, at Fall Term 1868 of the Superior Court of PERQUIMANS.

The plaintiffs were some of the legatees and devisees under the will of B. S. Skinner, deceased; and the defendants were the executors, and other devisees and legatees.

Benjamin S. Skinner died in Perquimans county in March

1861, having first made and published his last will and testament, which was duly admitted to probate, and a copy of which was filed as an exhibit to accompany the complaint. The parts of the will necessary to an understanding of the case are as follows:

"Item 3d. I give, devise and bequeath to my son Benjamin S. Skinner, his heirs and assigns, forever, the lands and plantation whereon I now reside, containing, &c. Also one hundred and forty acres, lying, &c. Also one hundred and seventy-nine acres of land on the north east side of Sutton's creek, &c., subject to my wife's privilege of timber and firewood, as named in the first clause of this will. The condition of the gift of the one hundred and forty acre tract, is, that he pay to my son Joshua, the sum of two thousand and five hundred dollars,—he to have one and two years to pay it in without interest."

"Item 4. * * * My son Joshua is to receive from my son Benjamin S. Skinner, the sum of two thousand five hundred dollars, as named in the third item of this will. This I consider due my son Joshua from my son Benjamin, to make up for the inequality in the value of their lands."

"Item 7. I give and bequeath unto my daughters Catherine, Mary, Alethia and Patsy, the sum of ten thousand dollars each, to be paid them out of my estate, also one bed and furniture and one bureau each—the legacy to my daughter Patsy to be paid her when she arrives at the age of eighteen or marries. The advances which I have already made, or may heareafter make to my married daughters, shall be taken as a part of their legacies of ten thousand dollars each, but no interest shall be charged on such advances."

"Item 8. I give, devise and bequeath unto my son-in-law, C. W. Wood, the land and plantation I purchased of T. F. Jones, &c., which I value at six thousand dollars; also one thousand dollars out of my estate to be by him held in trust for the use and benefit of my daughter, Louisa Gilliam.

* * The above named tract of land, together with the legacy of one thousand dollars, and the sum of three thousand

dollars which I have already advanced to my son-in-law, Thomas H. Gilliam, makes up the sum of ten thousand dollars, and makes my daughter Louisa's legacies equal to that of her sisters."

"Item 11. After the foregoing legacies and all the expenses attending the settlement of my estate, and carrying out the provisions of this will be paid, I wish all the rest and residue of my property and estate of every kind, to be divided into eight equal shares, my children James L. Skinner, Benjamin S. Skinner, Joshua Skinner, Catharine Lassiter, Mary Wood, Alethia Hoskins, and Patsy Skinner, taking each one share, and the remaining eighth share I give, devise and bequeath unto Charles R. Wood, in trust for my daughter Louisa Gilliam, &c."

By the results of the war, the estate other than the lands devised to the sons, is insufficient to pay the pecuniary legacies of $10,000 each to his four daughters. They, therefore, brought this suit demanding, that an account be taken of the personal estate in the hands of the executors; that the land, not specifically devised to the sons, be sold, and the proceeds applied to the payment of the legacies due the plaintiffs; that, if the legacies be not fully paid from this fund, a division be made charging the real estate devised to the defendants with the payment of the deficiency according to their legal liabilities, and that interest be charged upon the legacies due the plaintiffs.

The defendants answered admitting the allegations of the complaint, submitting to an account of the personal estate, and further submitting to the construction of the will in other respects.

Judgment for the plaintiffs accordingly; from which the defendants prayed and obtained an appeal.

Smith and *Bragg*, for the appellants.

W. A. Moore and *Gilliam, contra.*

READE, J. The testator had a large estate, consisting

almost altogether of lands and slaves; and he had eight children, five daughters and three sons.

The difficulty in settling the rights of the parties arises out of the altered condition of the testator's estate by reason of the emancipation of the slaves.

It is apparent that the leading purpose of the testator was to make all his children equal. The purpose of the testator as gathered from the will, is always to be carried out by the Court, and minor considerations when they come in the way must yield. Especially is this so, when the purpose is in consonance with justice and natural affection.

The bulk of the testator's land is given to his sons in parcels, and although the land is not valued, yet it appears that he meant to give to each son about the same in value; because he charges the land given to his son Benjamin with $2,500, to be paid to his son Joshua: saying, "this I consider due my son Joshua from my son Benjamin to make up for the inequality in the value of their lands." That he intended to make his daughters equal, appears from the fact, that he gave to each of four $10,000, and to the fifth daughter he gave a tract of land valued at $6,000, and $1,000 in cash, which added to $3,000 that he had advanced to her husband would make her share equal with her sisters. And that he intended to make all, sons and daughters equal, appears from the fact that he directs all the residue of his estate to be equally divided into eight equal parts, giving to each of his children a share.

By reason of the emancipation of the slaves, the estate other than the lands devised to his sons, is insufficient to pay the pecuniary legacies of $10,000 each to his four daughters, and the main question is, whether the pecuniary legacies are a charge upon the real estate specifically devised. If they are, then the effect may be to exhaust the whole of the real estate, and leave the sons nothing; and if they are not, then the sons take almost all the estate from the daughters. That either effect would do violence to the intention of the testator, we have made plain.

The 7th clause of the will is, " I give and bequeath unto my daughters Catherine, Alithia, Mary and Patsy, the sum of $10,000 each, to be paid them *out of my estate.*"

We have considered this clause in view of the cases of *Bray* v. *Lamb*, 2 Dev. Eq. 372 and *Biddle* v. *Carraway* 6 Jon. Eq. 95; and without disturbing those cases, we put this case upon the ground of the manifest and leading purpose of the testator to share his bounty equally among his children. To effect that purpose, we adopt the conclusion that the pecuniary legacies to the four daughters each, of $10,000, are chargeable upon the lands devised to the sons, so far as is necessary to produce equality among all the children of the testator. To this end the residue must be ascertained and applied so far as it will go, and all the property, real and personal, not specifically devised and bequeathed must also be ascertained and applied to the satisfaction of the pecuniary legacies to the four daughters; and if the said legacies are not satisfied in full, then the specific devises of land must be valued, and if their value shall be over and above the amount paid by the residuum, &c., to the daughters' legacies, then such overplus shall be equally divided among all the sons and daughters, so as to make all equal.

The reference for an account, was a proper order on the cause.

The order for the sale of the real estate other than that specifically devised, was also proper.

The interest upon the pecuniary legacies is properly chargeable from and after a year from the death of the testator.

This will be certified, &c.

PER CURIAM. Judgment accordingly.

W. PALMER *v.* ISAAC ANDERSON.

Where, by consent of the owners, a line is run between two contiguous tracts, such consent is a mutual license to both parties to treat such line as the true boundary; and neither party can hold the other as a trespasser, without a revocation of that license.

TRESPASS, Q. C. F., tried before *Mitchell J.*, at Fall term 1868, of the Superior Court of CALDWELL.

The facts are sufficiently set forth in the opinion of the Court.

Verdict and judgment for the plaintiff; whereupon the defendant appealed.

Folk, for the appellant.

Malone, contra.

SETTLE, J. The plaintiff and defendant being owners of adjoining tracts of land, agreed to have the line between them run, so that the defendant might know how far he might clear his land; and for this purpose they employed one Pool to run the disputed line.

In pursuance of this agreement, Pool did run and fix a certain line, as the true line between the parties, and when the survey was completed, the plaintiff said to the defendant and his sons: "Now boys you know where to come to."

Soon thereafter, the defendant took possession of the *locus in quo*, and began to clear and fence towards the line fixed by Pool, but did not cross that line. The plaintiff then brought this suit, and his Honor charged the jury, that he could not recover unless his consent had been revoked, and they might look to the subsequent conduct of the parties to find the revocation.

Viewing the case in the most favorable light for the plaintiff, we concur with his Honor, that he could not recover unless he could show a revocation of his license.

The only evidence offered to show a revocation, was the fact "that after Pool surveyed the line, and the defendant

took possession and began his work, one Dickson also *surveyed or run some of the lines*, at the instance of plaintiff and defendant. Whether Dickson surveyed and adopted the Pool line, or some other line, does not appear from the evidence. Nor does it appear whether the plaintiff revoked, or repeated his former words, "now boys you know where to come to,"—the Pool line.

We think that his Honor should have instructed the jury that there was no evidence of a revocation. His failure to do so, entitles the defendant to a new trial.

PER CURIAM. *Venire de novo.*

FREEMAN HURDLE *v.* JOHN F. LEATH.

The object of a reference in matters of account is to have a plain and full statement of the figures and facts, so as to enable the parties, on exceptions, to present to the Court such matters as may be controverted in an intelligible manner; and to enable the Court to dispose of them without the labor of wading through all of the testimony, and in fact, of trying the whole case over again. To this end, the master should set out the *facts* found by him, and not content himself with a general reference to the depositions.

EXCEPTIONS to a report, under an order for taking the accounts of a guardian, in the course of a suit brought against him by his wards, in the Court of Equity for CASWELL.

No statement of facts is necessary.

Bragg, for the exceptions.

No counsel, *contra*.

PEARSON, C. J. Without particular reference to the exceptions filed, the report will be set aside as vague, uncertain and unsatisfactory; and the whole matter will be referred to the clerk of this Court, to state the account.

The object of a reference in matters of account, is to have

a plain and full statement of the figures and facts, so as to enable the parties, on exceptions, to present to the Court such matters as may be controverted, in an intelligible manner, and to enable the Court to dispose of them, without the labor of wading through all of the testimony, and, in fact, of trying the whole case over again. To this end, the master should set out the facts found by him; and not content himself with a general reference to the many depositions he has taken *pro* and *con*, thus leaving the Court to find the facts from the pleadings and proofs, in regard to the whole case; whereas, the matter should have been so stated as to have the ruling of the master, upon any contested question of law or of fact, presented to the Court by exceptions.

For illustration: the report sets out, "the defendant also files $557 in currency of various banks of this and other States, as guardian funds, which I allow him as a credit," with a reference to the depositions, *en masse*. *When* this money was received by the defendant, is a fact controverted; the plaintiff alleged he received it about the time of the Surrender, when it was worthless. The defendant, in general terms, seeks to make the impression that he received it at a time when it was perfectly good. The master does not decide the fact, and his opinion, either as to the law, or the fact, cannot be made a subject of a review by an exception. Again, the report sets out that "the defendant files the following guardian bonds, for money loaned by him, belonging to his wards, viz: &c., for which I allow him credit," and the depositions are referred to *en masse*.

Whether, in the opinion of the master, the sureties to these several bonds were good and sufficient at the time the bonds were taken, or whether they are now good, or the bonds totally worthless, we are not informed. The matter is left at large, and the Court is in no way aided by the report. In regard to one of the bonds it is alleged that additional names were added as sureties, as late as 1866. How the fact is, or what, in the opinion of the master, is the legal effect, we are not informed.

It is unnecessary to allude to any other particulars, as the whole matter will be reported on by the clerk of this Court.

PER CURIAM. Report set aside.

JOHN W. STEPHENSON *v.* TODD, PUGH & CO.

Defendants in *original attachments* may appear and plead without giving bail.

In such cases any judgments theretofore obtained against garnishees should be set aside;

And if money had been collected upon such judgments, that should be repaid to the garnishees; *not* paid over to the defendant.

(*Holmes* v. *Sacket*, *ante* 58, cited and approved.)

NOTE.—The law in the first paragraph above has been modified by the Code of Civil Procedure.

ORIGINAL ATTACHMENT, before *Watts*, *J.*, upon motions in the cause at Fall Term 1868, of the Superior Court of NORTHAMPTON.

The attachment was issued on the 14th day of March 1868 and certain persons were summoned as garnishees. At Spring term 1868, judgments were taken against them for the several sums by them confessed to be due to the defendants in the attachment, and these sums were afterwards collected and paid into office under executions returnable to Fall term 1868. At Fall term 1868, the defendants intervened by attorney; and moved (1) to be allowed to plead, (2) to have the judgments against the garnishees set aside, and (3) to have the money which had been paid into the office by the garnishees paid over to the defendant, or his assignee.

These motions having been allowed by his Honor, the plaintiff appealed.

Peebles & Peebles, for the appellant.

1. By replevying, the defendant did not release the plaintiff's hold upon the fund raised from the garnishees. *Simpson*

v. *Harvey*, 1 D. & B., 208; *Spruill* v. *Trader*, 5 Jon. 42; *Parker* v. *Gilreath*, 7 Ire. 400.

2. At all events, the motion here was made too late. *Washington* v. *Sanders*, 2 Dev. 345.

3. In such case also, the Code of Civil Procedure requires *an undertaking* from the party who replevies, § 213. That section repeals former provisions. *State* v. *Woodside*, 9 Ire. 496.

4. The judgment against the garnishees was *regular*, and could not be set aside at a subsequent term. *Davis* v. *Shaver*, Phil. 18; *Skinner* v. *Moore*, 2 D. & B., 138.

5. The Court erred in taking the money raised out of the garnishees, from the plaintiff, and giving it to the defendant. *Yarbro* v. *State Bank*, 1 Dev. 25; *Sanford* v. *Roosa*, 12 John. 162; *Hill* v. *Child*, 3 Dev. 366; *Washington* v. *Sanders*, *ubi sup.*

Bragg, contra.

1. The defendant could replevy without bail. *Holmes* v. *Sackett*, *ante* 58, Bill of Rights, § 16.

2. The practice in this case is governed by the Rev. Code. Const. Art. 4, § 25, Code § 8.

3. The judgment against garnishees in attachments is only provisional, and abides the issue of the suit; being in satisfaction of the judgment for the plaintiff *if he get one*. *Freeman* v. *Grist*, 1 D. & B., 217; *Myers* v. *Beeman*, 9 Ire. 116; *Tindell* v. *Wall*, Bus. 3; *Ormand* v. *Moye*, 11 Ire. 564; *Bryan* v. *Green*, 3 Ire. Eq. 169; *Skinner* v. *Moore*, 2 D. & B., pp. 148 and 150—1.

4. After the replevy, the money being in Court, the defendants had a right to it; it may not be very material how it got there.

PEARSON, C. J. At common law, judgment could not be entered against a party, unless he appeared and made defence; hence the necessity for distress infinite, and outlawry. By the Court act of 1777, it is provided, that if the writ be served,

and the defendant fails to appear, judgment by default may be entered. But if he absconded or so concealed himself that the process could not be served, no judgment could be had. To remedy this evil, and to compel an appearance, it is provided that, in such cases, the property of the party may be attached, and any person indebted to him, may be summoned as garnishee, a judgment entered, and the debt collected, subject to the final judgment in the action. If the defendant appeared and replevied,—that is, gave bail to the action, the property attached was discharged, and the judgment against the garnishee was set aside; and if the money had been collected, it was returned to the garnishee; for, the object being accomplished, that is, the appearance of the defendant being compelled, all that had been done to effect that object, passed for nothing.

On the argument, a distinction was suggested between a discharge of the property, by giving bail to the action; and setting aside the judgment that had been taken against the garnishee. There is no ground, on principle, for this distinction. The same reason applies to both cases, and the supposed distinction is not supported by any authority.

It was also urged, if the judgment against the garnishee is set aside, the money paid into Court to abide the final judgment, ought to be taken out by the defendant in the action; for it was collected upon a debt admitted to be due to him, and he should have it in discharge of the debt.

This would seem to be so at first blush, and his Honor adopted that conclusion, but, on consideration, the position will be found untenable. The defendant was not a party to the proceedings against the garnishee, and is not bound by it; he may allege a larger sum to be due to him than that confessed, and there is no mode by which, in a proceeding at law, he can be required to accept that amount, and release all further claim; so the only way is to undo what has been done in order to compel the defendant to appear, and put all parties *in statu quo*.

Since the act abolishing imprisonment for debt, it is settled,

that a defendant may enter his appearance, and plead to the action, without giving bail. *Holmes* v. *Sackett*, Phil. 58.

This discharges the property attached, and also vacates the judgment against the garnishee, and gives him the right to take the money out of Court. It will be remarked, that after the abolishment of imprisonment for debt, the remedy by attachment was of little or no effect. But the Code of Civil Procedure puts the matter on a much better footing.

So much of the order, as allows the defendant to enter his appearance and plead without giving bail, is affirmed; so much as directs the judgment against the garnishees to be set aside, is affirmed. But so much as directs the money collected from the garnishees to be paid to the defendant, is reversed, and it is ordered that the money collected from the garnishees be paid back to them respectively.

The plaintiff will pay the costs.

PER CURIAM. Ordered accordingly.

S. S. MARSH *v.* JEREMIAH WILLIAMS and JAMES BRINKLEY.

As the Code of Civil Procedure does not provide for the writ of *Recordari*, until further legislation, the Courts must be governed in respect to that writ by the rules of the Common Law.

Attachment under the Code is not an original but an auxiliary remedy, and can be issued only for the causes specified in §§ 197—201.

A Justice of the Peace has no power to *depute* a special officer to execute civil process.

(*Garlick* v. *Jones*, 3 Jon. 404 cited and approved.)

ORIGINAL ATTACHMENT, before *Jones*, *J.*, upon a writ of *recordari*, at Fall Term 1868 of the Superior Court of BEAUFORT.

In September 1868, the plaintiff sued out the attachment before a Justice of the Peace, which after reciting that the plaintiff had made oath before him "that Jerry Williams and James Brinkley are jointly indebted to him in the sum of

one hundred and fifty dollars, and the said Edward S. Marsh having given bond," &c., directed the property to be seized, &c. Upon the writ was an endorsement by the Justice *deputing* one Ormand, "in the absence of a lawful officer," to execute it.

Under the attachment Ormand seized certain personal property, as the property of the defendant Williams, who was present and protested against the seizure. After judgment was given, Williams desired to appeal, but was informed that he could not without depositing a large sum in cash, which he was unable to do.

On the 9th of November, Williams filed a petition before *Jones, J.*, in the Superior Court of Beaufort county, praying for a *recordari*, and an injunction against the parties who purchased the property at the sale under the attachment. His Honor ordered the writ to issue as prayed for, and also allowed a writ of *supersedeas*.

Upon returns under these orders coming up for consideration, his Honor, after argument by counsel, adjudged that the proceedings before the Justice were illegal and void; that the property seized under the attachment should be delivered up to the petitioner; and that the plaintiff in the attachment should pay all costs.

Thereupon the plaintiff appealed.

Warren & Carter for the appellant.

Sparrow & Satterthwaite, contra, cited *Wilson* v. *Britton*, 26 Barb. 564; *Garlick* v. *Jones*, 3 Jon. 404.

DICK, J. There is no provision made in the Code of Civil Procedure, for the writ of *recordari*. This important remedial writ, or some proceeding of the same nature is almost indispensable in the due administration of justice. Until the practice and proceedings in such cases, are established and regulated in the Code, the Courts must be governed by the rules of the common law. The writ of *recordari* in the nature of a writ of error, is the proper proceeding to set aside the

false judgment complained of. In such cases the merits of the matter are not enquired into, but only questions of law are considered.

The proceedings before his Honor in the Court below are some what irregular in form, but they are sufficient in substance to meet the ends of justice.

The defendant Marsh sued out an original attachment before a Justice of the Peace, against the property of the plaintiff in this case. This kind of process has been abolished by the Code, and now the original process in every civil case is the *summons*. The warrant of attachment can be used as an auxiliary remedy to secure the satisfaction of a judgment which may be obtained by the summons and complaint, but it can only be issued upon affidavit for causes specified in sections 197 and 201.

The proceedings before the Justice set forth in this case, are not only irregular but void, for the following reasons:

1st. There is no summons to sustain the auxiliary remedy of attachment.

2d. It appears that Williams was in the county, and was not attempting to evade process.

3rd. The affidavit does not set forth that the debtor has removed or is about to remove his property from the State, or to assign, dispose of, or secrete the same *with intent to defraud his creditors.*

4th. The Justice had no right to depute a special officer to execute civil process, *Garlick* v. *Jones*, 3 Jon. 404.

There are other irregularities, which it is unnecessary to notice. The whole matter was before his Honor in the Court below, and although the proceedings are somewhat irregular, substantial justice has been done. The judgment must be affirmed. Let this be certified.

PER CURIAM. Judgment affirmed.

THOMAS D. SLEDGE *v.* PETER BLUM and wife.

Under the Code of Civil Procedure, a Judge may at the instance of the defendant, modify an injunction previously granted, without giving notice to the plaintiff; but in such case he must found his action merely upon the complaint; and cannot consider the answer, or affidavits on the part of the defendant.

In case of an appeal from an interlocutory order the Court is confined to a consideration of the *very* point on which the appeal is taken.

Semble, that an injunction granted without requiring a bond is only *irregular*, and not *void*.

Also, that in analogy to the case of mines *already opened*, it is not waste for an occupant to continue to make brick on premises used for that purpose when the occupancy commenced.

ACTION for the recovery of land, and for an injunction, heard by *Watts, J.*, upon a motion to dissolve the injunction theretofore granted, in the Superior Court of WAKE, at Chambers, December 14, 1868.

The complaint showed that the plaintiff had agreed to sell to the defendants the land in question, giving them the right to occupy it, they doing no damage thereto until they should have permission from the vendor; that the defendants entered and had been for some time digging up the soil and making it into brick, whereby the lease became void; that the plaintiff has demanded possession, &c.

The prayer was for a recovery of the land, and a reasonable rent; and for an injunction. An injunction was granted accordingly on the 20th of October 1868 and without requiring a bond from the plaintiff.

The answer of the defendants alleged that they had bargained for the land from one Russ, and that the plaintiff, knowing it, volunteered to advance the price to Russ, and give them two years to repay him; that they gladly complied, and thereupon a deed was made to the plaintiff, and he signed the agreement mentioned in the complaint; that at the time when the agreement was made, they had been in possession of the land for some time, and had been making brick upon it, as the

plaintiff well knew, there then being a kiln of 22,000 brick standing on the land; that the plaintiff knew that they expected to raise the money for the land by making brick on it and gave his consent to the making of the brick made since the agreement, which were only some 4000 or 5000, made out of clay that had been dug from a basement upon the premises; that subsequently the plaintiff had withdrawn his consent.

After the answer had been filed, the defendants moved to dissolve, without giving notice to the plaintiff. His Honor, reciting that the cause came on to be heard before him upon the answer, upon a motion to dissolve the injunction of October 20th 1868; ordered the injunction to be modified so as to allow the defendants to sell their brick on hand at the time such injunction was issued; also that defendants might burn other brick upon the premises, turning them over when burnt to a receiver; and that such receiver sell them and account for their price to the plaintiff.

Upon being notified of this order, the plaintiff appealed therefrom.

Fowle & Badger, for the appellant.

Busbee & Busbee, contra. cited *Bruce* v. *Conal Co.*, 8 How. Pr. Rep. 440; *Peck* v. *York*, 24 *Ib.* 363; *Smith & Tiff.* Pr. 1, 308; Thompson's Prov. Rem. 334; Hoffman, *Ib.* 340; *Sanford* v. *Granger*, 12 Barb. 392; *Ramsour* v. *Shuler*, 8 Ire. Eq. 304.

PEARSON, C. J. The appeal presents this question: A Judge grants an injunction at chambers without notice to the defendant, upon the complaint filed; is the same Judge authorized to modify or vacate the injunction, at chambers upon the coming in of the answer, without notice to the plaintiff? This depends upon the construction of sections 195 and 297 of the Code of Civil Procedure.

Sec. 195. "If the injunction be granted by a Judge of the Court without giving notice, the defendant at any time before trial may apply upon notice to a Judge of the Court in which the action is brought to vacate or modify the same. The

application may be made upon the complaint or affidavits on which the injunction was granted, or upon the affidavits on the part of the defendant, with or without the answer."

Sec. 297. "An order made out of Court without notice to the adverse party may be vacated or modified without notice, by the Judge who made it, or may be vacated or modified on notice, in the manner in which other motions are made."

Our construction of these two sections, taking them in connection, is—where a Judge acting on the complaint without notice to the defendant, grants an injunction, he may afterwards, *acting on the complaint alone*, without notice to the plaintiff modify or vacate the injunction, as irregularly or improvidently granted. But if he goes out of the complaint and takes into consideration the answer and the affidavits filed for the defendants, the plaintiff is then entitled to notice, and may meet the affidavit by counter-affidavits. This makes the two sections fit into each other, and is the only construction by which they can be made to harmonize.

The defendant then took the objection that the injunction ought to be vacated in this Court, because it issued without an injunction bond. This Court is confined in cases of an appeal from an interlocutory order, to the *very point* on which the appeal is taken.

If we were at liberty to notice this objection, we incline to the opinion that although the injunction issued irregularly, yet it is not void, and the Judge has power to put the matter right, by allowing a bond to be filed "*nunc pro tunc*;" in other words we do not consider the injunction bond as a condition precedent, on which the validity of the injunction depends, but as directory to the Judge; and the irregularity may be cured by putting in a bond afterwards on leave.

So, if at liberty to go out of the point made by the appeal, we incline to the opinion that if notice had been given to the plaintiff, so as to authorize the Judge to look into the answer, it discloses ground on which the injunction should not merely have been modified by appointing a receiver, but should have been vacated absolutely; for the answer is responsive to the

complaint, and discloses the fact that the lease for two years (as it is termed in the bill) or, more properly, the right to occupy for two years without rent (*a lease* always implies the payment of rent, if it be but a barley corn) gives to the defendant a right to use the clay for the purpose of making brick, as he had been doing before.

The case falls under the class of cases in regard to working mines that are open at the date of the lease, as distinguished from opening new mines. Upon this however we express no decided opinion.

There is error in the interlocutory order appealed from. Judgment reversed; Plaintiff is entitled to his costs in this Court. This opinion will be certified.

PER CURIAM. Judgment reversed.

F. W. SHAW and WIFE, and others *v.* DAVID COBLE and others.

A guardian who advances money for his ward over and above the income of his estate, in order to set him up in business, or for other purposes, without applying to the Court for leave, is not entitled to charge the ward with it.

Where the administrator of a deceased ward settled with the guardian in February 1864, and received from him Confederate money at its face value in payment of the balance due the ward,

Held, that such payment was conclusive, *and* the guardian was entitled to credit for it in an account taken between him and his ward's next of kin.

BILL, set for hearing upon exceptions to a report by the clerk and master, at Spring Term 1868 of the Court of Equity for GUILFORD, and transferred to this Court by consent.

The plaintiffs were the next of kin of one John Amick, deceased, and the defendants were the guardian and the administrator of the deceased, together with a representative of another one of the next of kin.

At Fall Term 1866 the cause had been referred to the clerk and master, to state an account. At Spring Term 1868

the report of the master was filed, with the exceptions thereto.

The exceptions were as follows:

1st. "That the clerk and master did not allow the defendant Coble, as guardian of John Amick, credit for the amount expended in setting up his ward as a farmer upon his own land."

2nd. "That the guardian is not allowed credit for the $7.25 paid to F. W. Shaw for the difference in the division of his wife's land."

3rd. "That he is charged with the balance, after taking out the gold value, of the payment to the defendant Lineberry on the 19th of Feb., 1864, of the sum of $699.39, viz: 458.54."

4th. "That the defendant Coble is not allowed credit for the sum of $699.36, paid by him to the defendant Lineberry, Feb. 19th, 1864."

Bragg, for the plaintiffs.

Scott & Scott, for the defendants.

READE, J. I. The first exception is overruled. A guardian who advances money for his ward, over and above the income of his estate, in order to set him up in business, or for other purposes, without applying to the Court for leave, is not entitled to charge his ward with it. It is against the interests of society, and the policy of the law, and often ruinous to the ward, to allow him the use and control of his property, and an expenditure beyond the income of his estate.

II. The second exception is sustained. The payment of the incumbrance upon the land of the plaintiff's wife, enured to his benefit, and it ought to be allowed.

III IV. The third and fourth exceptions are considered together. Coble, the guardian, settled with Lineberry, the administrator of the deceased ward; and there being a balance found to be due by the guardian, of $699.36, he paid the amount in Confederate money, which was greatly depreciated, to Lineberry, the administrator, and took his receipt. Whether the administrator ought to have received it or not, he did

receive it, and that is a discharge to the guardian, and it becomes a matter between the administrator, Lineberry, and the plaintiffs, and Lineberry is responsible to the plaintiffs for the full amount ($699.36,) because it was his fault to receive $699.36, in Confederate money, when it was so far depreciated as to be worth only $33.00.

The account will be reformed in accordance with this opinion, and a decree accordingly.

PER CURIAM. Decree accordingly.

JAMES WOOD, Adm'r. *v.* F. G. PARKER, and others.

Although a Court will set aside a sale made under its order, upon its being reported, or otherwise appearing, that the highest bid is inadequate; yet it is not according to the practice in such cases, *to accept a higher bid* tendered by another party since the sale.

The proper order is, to re-open the biddings.

MOTION to set aside a sale, reported as having been made under an order of this Court at June Term 1868.

No statement of facts is necessary.

Wooten, for the plaintiff.

Strong, contra.

Bragg, for the purchaser.

SETTLE, J. In pursuance of a decretal order made in this cause, at the last Term, the Commissioner reports that after due notice, he sold at public auction the "Goodman" tract of land mentioned in the decree, to one Jesse Jackson, for the sum of eight hundred and twenty-five dollars.

He reports that he does not believe that the land sold for its full value, and he further reports an offer from one William W. N. Hunter, to take the said Goodman tract of land, at the sum of eleven hundred dollars, and to pay the amount of cash

decreed to be paid, and give bonds with approved security for the remainder of the purchase money.

This Court certainly has the power to set aside a sale made in pursuance of its authority, either for the relief of the owner of the property if the price bid be inadequate, or for the relief of the purchaser if from mistake or fraud he has bid too much for the property. In the exercise of its large discretion, it will administer justice and equity to all persons interested. Sales of this character are only conditional, they are not complete until they have been reported to and confirmed by the Court.

We need not cite authority for the general principles above stated; they are frequently called into practice, and this appears to be a proper case for their application; for the Commissioner reports that the price bid is inadequate, and his report is supported by the proposition of Hunter. But this Court is asked to accept the bid of Hunter and decree a sale to him at his advanced price.

We can find no case either in our own or in the English books, where a Court has exercised such authority. The practice has been to re-open the biddings, upon such terms as appeared to be proper under all the circumstances, and we do not feel disposed to depart from well established rules.

The first purchaser cannot complain of this, for he bid with the understanding that the whole matter was under the control of the Court, and that the sale might be set aside, if in the exercise of its discretion the Court thought proper to do so.

We are of the opinion that the biddings should be re-opened upon the terms set forth in the former decree.

PER CURIAM. Order accordingly.

W. S. TAYLOE, Ex'r., &c, *v.* JAMES P. JOHNSON.

In construing a will, the chief object being to ascertain the *meaning* of the testator, words may be supplied or abstracted, grammatical arrangement disregarded, and clauses transposed; *therefore*,

Where the context requires it, "*oldest*" may be read, "*youngest.*"

Where a testator in 1861, provided that "*Hellen*" should "receive $2,000 less than either of my other two children," out of an estate consisting of lands, slaves, &c., *Held*, that the amount at present, by which Hellen's share is to be diminished, is to bear such proportion to $2,000, as is borne by the present value of the estate (reduced by the results of the war) to such value in 1861.

Provisions, that upon the marriage of the testator's second daughter, her share should be taken out and allotted to her; and if either of the three youngest children, of whom the daughter was one, should die before *the time* appointed for the division of the estate, the survivors should inherit her share,—did not operate to give such daughter's share to *the survivors*, upon her death after marriage, although, in fact, there had been no division of the estate.

Where a testator directed a division of his estate upon a certain contingency, and that a particular share thereof should thereupon be regarded as realty, *Held*, that such share was to be so considered from the happening of such contingency, even although there was no division.

BILL, by an executor, praying for advice, and the construction of a will, filed to Spring term 1868, of the Court of Equity for BERTIE, and at the same time transferred by consent to this Court.

The testator died in the early part of 1861, leaving four children, the eldest, Anne E., of full age, then and still the wife of Edward Watson; Hellen R Lee, then under age, who in 1863, intermarried with Jas. P. Johnson, and died leaving issue, which has since also died; William Joseph Lee, and Mary Jane Lee, who are still under age.

The value, at the death of the testator, of his personal estate, consisting of slaves, &c., was about three times as great as that of his real estate. The parts of the will necessary to an understanding of the opinion are as follows:

"4th. I desire that my plantation called Green Pond shall

NOTE.—This case was decided at the last Term.

be kept up by my executors, retaining my slaves there, and to carry on and manage my farm just as if I were living, to hire out my surplus negroes, or to purchase other lands to work them on, to sell such refractory and disobedient negroes as they may deem most advantageous for my estate, and purchase others in their place if necessary, and to exercise their best judgment in its management until my youngest child becomes of age or marries.

"5th. I desire that when my daughter, Hellen R. Lee, arrives at the age of twenty-one years or marries, that her share shall be taken out of my estate. and for this purpose I desire my executors to select three prudent and discreet men to value my land, and her share of said value to be paid over to her, and the money so paid, I wish to invest in her as real estate, and descend accordingly, to her heirs, to be considered as so much land, and in the division and allotment to my said daughter Hellen, I desire that she receive two thousand dollars less than each of my other two children, William Joseph and Mary Lee; in other words, that my two last named children are to receive two thousand dollars each, more than Hellen, out of my estate.

"6th. I desire that when my eldest child becomes of age or marries, that the whole of my estate then be divided between my two youngest children, if the said Hellen has received her portion; but if at that time my daughter Hellen is unmarried, between her and my two youngest children, reference still being had, that she is to receive two thousand dollars less than each of the other two, and if either of my three youngest children should die before the time appointed for the division of my estate, then it is my desire that the survivor or survivors shall inherit that share or shares, and in no event is my daughter Ann E. Watson, to receive any portion of my estate."

The second daughter Hellen, after marriage and the birth of issue, died, without having her share of the estate valued and set apart her, according to the requirements of the 5th item of the will, she and her husband consenting to the executor's retaining possession and continuing the management thereof.

The bill states that the plaintiff is in doubt as to the proper construction of the will, the defendant claiming that the share of his deceased wife, if real estate, descends as an inheritance in fee to him, by the death of his child, or if personal estate, vests in him as administrator of his wife; while the plaintiff, as testamentary guardian of William and Mary Lee, claims that the share of the said Hellen, by virtue of the 6th item of the will, vested in her surviving brother and sister.

The defendant further claims that an account should be stated of the value of the testator's real and personal property at the time of his death, and its present value, and that the differences in the devises and legacies should be equitably modified by reason of the depreciation in value of the personal estate, by Emancipation of slaves and other causes; and that his share should not be as much as two thousand dollars less than that of William Lee and Mary Lee, each.

Smith, for the plaintiff.

Peebles, contra.

READE, J. In construing wills the paramount object is to ascertain the meaning of the testator. To accomplish this, words may be supplied or abstracted, grammatical arrangement disregarded, and clauses transposed. Sometimes this is necessary to be done to such an extent as to cause it to be carelessly said, that the Court makes the will. But, so far from this being true, there is nothing about which the Court is more careful than to ascertain and declare the exact meaning, and to give effect to the slightest wish of the testator.

The scope of the will in this case evidently is, that the bulk of the estate shall be kept together, and managed by the executors as the testator had managed it, until the youngest child shall arrive at age or marry, and then be divided among his three youngest children, Hellen, William and Mary, charging his estate however with such sum as would make William and Mary's shares $2,000 each, more than Hellen's. With the provision that, if Hellen should marry before the period fixed for

division, then, and in that event, her share should be taken out and set apart to her. Although this is the evident scope of the will, yet we are met with these perplexities:

1st. The fourth clause of the will, in express terms, makes the period of the division of the estate, *when* the *youngest* child arrives at age or marries, and the sixth clause, in terms equally express, fixes the period of the division, *when* the *oldest* child arrives at age or marries. We are however satisfied that "oldest" was written in the sixth clause by mistake for "youngest," because the oldest child was of age and married at the time the will was written, and because the share of Hellen, the second child, is to be taken out when she arrives at age or marries, which shows that the estate was to be in bulk at that time, which, of necessity was subsequent to the marriage, or arrival at age of the oldest.

2nd. The testator's estate was a large one, and consisted of about one-fourth real, and three-fourths personal property; the greater portion of the personal property being slaves. The period for taking Helen's share out of the estate was when she married. She married in 1863. If her share had been taken out and allotted to her at that time, the charge upon the estate of $2000 each, in favor of the two youngest children, would have fallen upon the real and personal estate alike. Now however the slaves have been emancipated, and not much remains but the land. And the question is, does the $2000 each in favor of the two youngest children, attach as a charge upon the land and whatever of the personal property remains, so as to make Hellen bear an unequal portion of the loss by emancipation, or must the land and remaining portion of the personal property be charged with only so much now, as it wonld have been charged with if the allotment to Hellen had been made in 1863.

In this Court that is considered as done, which ought to have been done. In making the division now, therefore, the remaining estate is only to be charged with such portion of the $2000 each to the youngest children, as would have been charged upon the same property if the division had been made

in 1863. And so much of said sums as would have been a charge upon the slaves must be abated, and so much as would have been charged upon other personal property, which has been lost or depreciated, must be abated also. It will be necessary therefore to take an account of the estate as it was when the allotment to Hellen ought to have been made, in 1863, putting upon the property a substantial, and not an unreasonably inflated or depressed value, and also, an account of the value of the estate now. And so much of the $4000, to the two youngest children, must be charged upon the present value as will be equal to the whole amount charged upon the whole estate in 1863, so as to make the loss by emancipation and otherwise, fall upon the *estate*, and not upon Hellen alone. For illustration: if the estate was worth $20,000 in 1863 then the $4000 would have been a charge of one-fifth; or 20 *per cent.* of the present value would be charged upon it in favor of the two youngest; and then a division of the remainder into three equal parts, share and share alike.

III. The sixth clause is as follows: "I desire that when my eldest child becomes of age or marries, the whole of my estate then be divided between my two youngest children, if the said Hellen has received her portion. But if at that time my daughter Hellen is unmarried, between her and my two youngest children, reference still being had that she is to receive $2000 less than each of the other two. And, if either of my three youngest children should die before the time appointed for the division of my estate, then it is my desire that the survivor or survivors shall inherit that share or shares."

We have already said that it is evident from the whole will that "eldest child" was written in this clause by mistake for youngest child, and that it must be so read. But a more serious difficulty exists in construing this clause; the provision in the latter part of the clause is, that, if either of the three youngest children should die before the youngest became of age, then, and in that event, the share of the child so dying should survive to the others.

Yet we cannot suppose that the testator meant that if Hellen

should marry and have a child, and then die, that her share should be taken away from her child, and given to her brother and sister. This would be not only unusual but unnatural.

We think that the testator was endeavoring to provide for two contingencies, first, if Hellen should marry, then her share must be taken out and allotted to her absolutely. Secondly, if she remained unmarried, and the estate remained in bulk, and either should die, then, the share of the child so dying should survive to the others. When, therefore, Hellen married in 1863, and her share was allotted to her, (as in this Court it is deemed to have been allotted) it lost the impress of survivorship, and became hers absolutely.

IV. The allotment to Hellen is to be considered as if made at the time of her marriage. And, it being directed in the will "to be considered as land, or invested in land," it makes it as if it were land, in view of this Court. And, at her death, it descended to her heir—her child—and, upon the death of the child, is vested in the father by virtue of our statutes: Rev. Code, ch. Descents.

There will will be a decree in conformity with this opinion.

PER CURIAM. Decree accordingly.

M. CAROON, Adm'r &c. *v.* W. D. COOPER and others.

A widow is entitled for her dower to a life estate in one-third of the full value of any land in which her husband had an equitable estate, subject to valid incumbrances thereon; and so, has a right to require that the remaining two-thirds, as well as the reversion in the one-third assigned to her, shall be applied to the payment of any purchase money still due for said land, in exoneration of her dower; being liable for such purchase money only after these funds have been exhausted.

(*Thompson* v. *Thompson*, 1 Jon. 430; *Campbell* v. *Murphy*, 2 Jon. Eq. 357 and *Klutts* v. *Klutts*, 5 Jon. Eq. 80, cited and approved.)

BILL in equity, set for hearing upon bill and answers, and

by consent transferred to this Court, at Fall Term 1868 of the Superior Court of TYRRELL.

The plaintiff was administrator of one Joseph Caroon; the defendants Cooper and another were executors of one Davenport, and the other defendants were the widow and children of Joseph Caroon.

The bill alleged that Joseph Caroon in his life time had purchased of the executors of Davenport a tract of land sold by them under an order of Court, but had died leaving a large part of the price unpaid, the title remaining untransferred; that the plaintiff as administrator of a former wife of Joseph Caroon, had recovered from the executors of Davenport a large sum of money, and, being advised that when recovered it was assets of Joseph Caroon's estate, they had applied it to the debt due upon the purchase of the land; that a considerable sum remains yet unpaid, and other large debts exist, and that it is necessary to sell Joseph Caroon's interest in the land, &c.

The answer of the widow admitted the material facts alleged in the bill; but submitted that she was entitled for dower to one-third of the full value of such tract—either in land, or in its proceeds, and therefore, that the reversion upon the one-third to which she was entitled for life, together with the other two-thirds of the land, should be applied to the debts, including the balance of the purchase money, in exoneration of her share.

The other answers submitted to a decree.

Gilliam, for the plaintiff.

Smith and *Jarvis, contra.*

SETTLE, J. "When a man shall be seized of a legal right of redemption, or of an equity of redemption, or other equitable or trust estate in fee, his wife shall be entitled to dower therein, subject to valid incumbrances thereon, in the same manner as in legal estates of inheritance." Rev. Code, ch. 118, sec. 6.

In the case before us, the widow's right to dower is clear;

subject, however, to the incumbrance of the purchase money.

The learning on this subject is discussed at length in the cases of *Thompson* v. *Thompson*, 1 Jon. 430, and *Campbell* v. *Murphy*, 2 Jon. Eq. 357. In *Thompson* v. *Thompson*, Chief Justice Pearson uses this language: "Whether the other two-thirds of the land, and the reversion of the third covered by the dower, will not be bound to exonerate the widow, by being applied to the discharge of the debt of her husband, is a question that we will not now decide, as it was not discussed before us."

This case presents that very question, and indeed it is the only one which it is necessary for us to consider; for, although the plaintiff, as administrator of Louisa Caroon, a former wife of the intestate Joseph Caroon, recovered a sum of money from the guardian of the said Louisa, and applied the same in part payment of this incumbrance, he did no more than he was bound to do, and cannot now be heard to complain, or claim to be subrogated to her right.

The personal estate is the fund primarily liable to the payment of debts, and the widow has a right to have it applied in exoneration of her dower. If that fund be exhausted, her right to dower is subject only to the incumbrance of the purchase money, but not to other debts. If a widow dissents from her husband's will, she is remitted to her right of dower, which is held above the will, and is liable neither to debts nor legacies.

If the widow's right of dower is of such superior dignity as to defeat all debts and legacies, we can see no reason why, in a case like this, her claim should be entitled to less consideration. Where a purchaser of real estate at a Master's sale, gave bond for the purchase money, and died before the sale was reported to, or confirmed by the Court, but the Court after the death confirmed the sale, it was held, that the widow had a right to have the lots in question disincumbered of the lien, for the purchase money, and to have dower allotted therein. *Klutts* v. *Klutts*, 5 Jon. Eq. 80. The decisions on this subject in the different States are conflicting, but in North

Carolina, they all point in one direction, and are favorable to the view of exonerating the widow's dower.

Our conclusion is that the widow is entitled to have dower assigned out of the whole tract; and cannot be called upon, until it is ascertained that the remaining two-thirds, and the reversion in the one-third covered by her dower, is insufficient to pay off the incumbrance of the purchase money.

Let a decree be drawn accordingly.

PER CURIAM. Decree accordingly.

L. T. ADDINGTON *v.* A. McDONNELL and M. B. SETZER.

Equity will not enforce the specific performance of a contract unless it be practicable, and unless the party seeking relief show that in reasonable time he performed his part of the contract, or at the time of seeking relief is able and ready to do so; nor will it rescind a contract otherwise valid, because subsequent events have so materially changed its operation as to render it hard and oppressive upon one of the parties; *therefore*,

Where in 1863 one agreed, for a sum in Confederate money, to sell land to another, &c., and to relieve the land from a dower estate; and a deed for the land was then executed and a partial payment made; *Held*, that upon the former party's delaying to tender a deed for the dower right *until* 1867, he could not compel the latter to specific performance of his part of such contract; *also*,

That he had no right to ask for a rescission of the contract.

BILL in equity, set for hearing upon the pleading and proofs, at Fall Term 1868, of the Superior Court of MACON, and then by consent transmitted to this Court.

The facts appear sufficiently in the opinion of the Court.

No counsel for the plaintiff.

Phillips & Merrimon, contra.

DICK, J. When a contract was fully understood by the par-

ties at the time of its inception, and it is not vitiated by illegality or fraud, a Court of Equity will not rescind it; although subsequent events may have so materially changed its operation as to make it hard and oppressive on one of the parties. It is also a rule of equity, with regard to the specific performance of contracts, that they must be decreed to be performed on both sides and entirely, or not at all.

A person, therefore, seeking the specific performance of a contract, must show that it contains mutuality of consideration and remedy, and that its enforcement is practicable and necessary; and he must further show that in reasonable time, he has performed his part of the contract, or that he is then ready and able to execute it specifically. Batten on Spec. Per. 108.

By applying these well settled principles of equity to the contract now under consideration, it will appear that the complainant is not entitled to the relief which he seeks. On the 20th of August, 1863, he contracted, for the sum of fifteen hundred dollars, to sell a tract of land, and various articles of personal property, to the defendant, McDonnell, and agreed to relieve said land from the incumbrance of a dower interest. This contract was partially performed by the execution of a deed to said defendant, who paid part of the purchase money, and gave his note for the residue. In the Spring of 1867, more than three years afterwards, the complainant tendered a deed for said dower interest to the defendant, and demanded payment of the note in United States currency, to the full amount called for, &c.

The defendant refused the deed, and declined to make payment, because his personal property had not been delivered, and the fulfilment of the other part of the contract, had been unreasonably delayed by complainant. If he had performed his part of the contract in a reasonable time, there would probably have been no difficulty about the matter. It is agreed by both parties, that the note for the purchase money was solvable in Confederate currency. As this part of the

contract cannot now be specifically enforced, a Court of Equity will not interfere in the matter, but leave the parties to assert their rights in a court of law.

The alternative prayer in the bill for a rescission of the contract, cannot be granted. The contract was fair, just and well understood by the parties at the time it was made, and subsequent events will not give rise to the equity of rescission and cancellation.

The bill must be dismissed.

PER CURIAM. Bill dismissed.

WINNIFRED A. ROSE *v.* ROBERT F. ROSE.

Where the wife's right to dower in all the lands of which her husband was seized during coverture, by virtue of the act of March 2nd 1867, had attached before the execution of a deed of trust, *Held*, that, as the bargainor took by *act of the husband* and *claimed under him*, the land was subject to the wife's right of dower, even although the deed was made to secure a pre-existing debt.

If the bargainor had come in by *act of law*, as purchaser at Sheriff's sale, under an execution against the husband, the question of the constitutionality of the act of March 2nd 1867, in regard to pre-existing debts, might have been raised.

PETITION for DOWER, heard by *Fowle, J.*, at Fall Term 1867, of the Superior Court of WARREN.

The plaintiff as widow of one William P. Rose, filed her petition against the defendant at Fall Term 1867, praying for dower in the land, as that of which her husband had been seized during coverture.

The defendant claimed the land by virtue of a deed of trust executed to him by the intestate March 25th 1867, and registered on the same day. The deed was made to secure a bond executed by the intestate as principal, and the defendant as

surety. The petitioner claimed dower by virtue of the act of March 2nd 1867, entitled "An act restoring to married women their common law right of dower," which the defendant insisted was unconstitutional and void, so far as the said deed of trust was concerned; that being a deed to secure a debt contracted before its passage.

The case was submitted to the judgment of the Court upon the above facts agreed.

Judgment for the plaintiff; from which the defendant appealed.

Eaton & Barham, for the appellant.

W. A. Jenkins and Phillips & Battle, cited 2 Pars. on Cont. 704, n. (b.), *Ib.* 705, and cases cited in n. (f.), *Morse* v. *Gould*, 1 Kern. 281; *Rockwell* v. *Hubbell*, 2 Doug. (Mich.) 197; *Bronson* v. *Kinzie*, 1 How. 311; *Planter's Bank* v. *Sharp*, 6 How. 301, 330; *Potts* v. *Blackwell*, 4 Jon. Eq. 58.

PEARSON, C. J. At common law, a widow was entitled to dower in all the land, of which her husband was seized *at any time during the coverture*, of such an estate of inheritance, she might have had a child capable of inheriting.

The statute under consideration, restores to married women their common law right of dower; it was ratified 2nd March 1867. The deed, under which the defendant claims, was executed 25th March 1867. So the right of the plaintiff to have dower in the land had attached, before the defendant acquired title, and we can see no reason why he did not take the land, subject to the prior right of the plaintiff.

Suppose the husband had, on the 25th of March 1867, executed a deed for the land to the defendant, and had received the purchase money in cash, and the wife had not joined in the deed and released her right of dower on privy examination, beyond question the purchaser would have taken, subject to the right of the wife; nor would the case have been varied, if the husband had received an old debt in satisfaction of the purchase money, instead of the cash; and the case can be no

stronger in favor of one who is a purchaser for the consideration of one dollar, and takes the land upon trust to sell and apply the proceeds of sale to the discharge of an old debt. The principle is the same in the three cases—the bargainee takes *by act of the husband, and claims under him.* In the husband's hands, the land was subject to the wife's right of dower; and of course it must also be subject to it in the hands of the bargainee of the husband, without reference to what he accepted as the consideration: for with that the wife had no concern. If, in either of the three cases, the husband had conveyed *before the passage of the act*, the purchaser having acquired title, might have stood on his "vested right," as being prior to the claim of the wife, but in our case, the right of the wife had attached to the land, before the conveyance. Note the diversity.

Thus it is seen, that the point as to the constitutionality of the statute in respect to pre-existing debts, is not presented by the case, and we can give no opinion on it—had the creditors taken judgment, and sold the land under execution, the purchaser at sheriff's sale might have raised the question, as he would come in by act of law; here he comes in by act of the husband, and takes his place.

PER CURIAM. Judgment affirmed.

WILLIAM H. FULTON *v.* JOHN LOFTIS.

A bill for the rescission of a contract on account of fraud perpetrated *after* the contract is made, will not be entertained; *therefore,*

A bargainor of land is not entitled to such relief in a case where he alleged that some years after the contract had been made, the bargainee, having asked for them upon a pretence of calculating interest, put the notes for the purchase money into his pocket, at the same time drawing a pistol and telling the bargainor not to follow him.

(*Addington* v. *McDonnell*, *ante*, 389 cited and approved.)

BILL, set down for hearing upon pleadings and proofs, at

Spring Term 1868 of the Court of Equity for BUNCOMBE, and by consent transferred to this Court.

The plaintiff alleged, that in 1859, he contracted to sell a tract of land to the defendant, at the price of $412.50, for which he took two notes of the defendant, payable in one and two years, and executed a bond to make title when the purchase money was paid, and that the defendant was put into possession; that afterwards, in 1865, the defendant, on the pretence of calculating the interest, induced the plaintiff to let him take the notes into his hands, whereupon he put them into his pocket, pulled out a pistol, and walked off, telling the plaintiff not to follow him. The bill admits a payment of $100 in Confederate notes, in 1863.

The prayer is for a decree rescinding the contract; an account of the rents and profits; and that the defendant be also decreed to give up possession.

No counsel for the plaintiffs.

Merrimon, contra.

PEARSON, C. J. The plaintiff has misconceived his remedy. When a contract is obtained by fraud or duress, a Court of Equity will entertain a bill for its rescission; but the plaintiff must allege that he was induced to enter into the contract, by reason of such fraud or duress. A bill for rescission on the ground of fraud or duress prepetrated *after* the contract is made, is one of the first impression, and there is no principle upon which it can be maintained. The question is too plain to allow of discussion: *Addington* v. *McDonnell*, at this term.

The plaintiff having the legal title, may take possession, and thus force the defendant to file a bill for a specific performance, when the plaintiff may rely upon the alleged fraud, or duress, as a ground to induce the Court to refuse to entertain the bill; or the plaintiff may file a bill for specific performance, and ask for a reference as to the amount of the purchase-money remaining unpaid, and thus bring up the ques-

tion, as to the manner in which the defendant obtained possession of the notes, and thus the controversy may be settled. But as we have seen, the idea of a decree for rescission, for matters occurring six years after the contract was made, and after it has been in part performed, is out of the question.

Let the bill be dismissed, but without costs as to the defendant Loftis.

PER CURIAM. Bill dismissed.

CASES AT LAW,

ARGUED AND DETERMINED IN THE

Supreme Court of North Carolina,

AT RALEIGH.

JUNE TERM, 1869.

In the matter of B. F. MOORE, Esq., THOMAS BRAGG, Esq., E. G. HAYWOOD, Esq., and others.

A court has power to require members of its Bar to purge themselves from a charge of *contempt* incurred by their publishing, over their names, in a newspaper, libellous matter, directly tending to impair the respect due to its members.

For such persons, under such circumstances, to state that *the Judges of the Supreme Court singly or en masse, moved from that becoming propriety, so indispensable to secure the respect of the people, and throwing aside the ermine, rushed into the mad contest of politics, under the excitement of drums and flags,* if admitted to be untrue, is libellous; and, especially when connected with an inference expressly and immediately drawn in the same paper that such judges *will yield to every temptation to serve their fellow partizans* and *are unfit to hold the balance of justice,* directly tends to impair the respect due to the members of such court.

In a *rule to show cause* why a person shall not be punished for *contempt,* the *actual intention* of the respondent is material, in which respect it differs from an *indictment* for the like offence; *therefore,* where the respondent meets the words of the rule by disavowing upon oath any intention of committing a contempt of the Court, or of impairing the respect due to its authority, the rule must be discharged.

Where a party is excused, *not acquitted,* under a *rule,* &c., he will be required to pay the costs of such rule.

PROCEEDINGS for Contempt of Court.

Upon Monday the 19th day of April 1869, the following

article appeared in the columns of the *Daily Sentinel*, a newspaper published in Raleigh:

"A SOLEMN PROTEST OF THE BAR OF NORTH CAROLINA AGAINST JUDICIAL INTERFERENCE IN POLITICAL AFFAIRS.

The undersigned, present or former members of the bar of North Carolina, have witnessed the late public demonstrations of political partizanship, by the Judges of the Supreme Court of the State, with profound regret and unfeigned alarm for the purity of the future administration of the laws of the land.

Active and open participation in the strife of political contests by any Judge of the State, so far as we recollect, or tradition or history has informed us, was unknown to the people until the late exhibitions. To say that these were wholly unexpected, and that a prediction of them, by the wisest among us would have been spurned as incredible, would not express half of our astonishment, or the painful shock suffered by our feelings when we saw the humiliating fact accomplished.

Not only did we not anticipate it, but we thought it was impossible to be done in our day. Many of us have passed through political times almost as excited as those of to-day; and most of us, recently, through one more excited; but, never before have we seen the Judges of the Supreme Court, singly or *en masse*, moved from that becoming propriety so indispensable to secure the respect of the people, and, throwing aside the ermine, rush into the mad contest of politics under the excitement of drums and flags. From the unerring lessons of the past we are assured, that a Judge who openly and publicly displays his political party zeal, renders himself unfit to hold the "balance of justice," and that whenever an occasion may offer to serve his fellow-partizans, he will yield to the temptation, and the "wavering balance" will shake.

It is a natural weakness in man, that he, who warmly and publicly identifies himself with a political party, will be tempted to uphold the party which upholds him, and all experience teaches

us that a partizan Judge cannot be safely trusted to settle the great principles of a political constitution, while he reads and studies the book of its laws under the banners of a party.

Unwilling that our silence should be construed into an indifference to the humiliating spectacle now passing around us; influenced solely by a spirit of love and veneration for the past purity, which has distinguished the administration of the law in our State, and animated by the hope that the voice of the bar of North Carolina will not be powerless to avert the pernicious example, which we have denounced, and to repress its contagious influence, we have under a sense of solemn duty subscribed and published this paper:

B. F. MOORE,
A. S. MERRIMON,
E. J. WARREN,
JOHN KERR,
E. G. HAYWOOD,
JOS. B. BATCHELOR,
G. V. STRONG,
THOMAS BRAGG,
SPIER WHITAKER, Jr.,
E. T. BRANCH,
WM. A. KERR,
THOMAS N. HILL,
T. J. SPARROW,
RICH'D WATT YORK,
GEORGE WORTHAM,
G. W. BLOUNT,
JOHN H. THORPE,
B. H. BUNN,
SAMUFL T. WILLIAMS,
A. M. MOORE,
O. A. COKE,
ABNER J. WILLIAMS,
T. E. SKINNER,
WILLIS BAGLEY,
EDWARD HALL,
Z. B. VANCE,
WILLIAM T. DORTCH,
F. B. SATTERTHWAITE,
ED. CONIGLAND,
JOS. J. DAVIS,
ASA BIGGS,
S. C. LATHAM,
C. M. COOKE,
WM. F. GREEN,
J. T. LITTLEJOHN,
M. V. LANIER,
JNO. W. HAYS,
T. B. VENABLE,
J. S. AMIS,
L. C. EDWARDS,
WM. K. BARHAM,
E. H. PLUMMER,
WM. A. JENKINS,
W. A. MONTGOMERY,
C. W. SPRUILL,
R. B. WATT,
JNO. H. DILLARD,
T. RUFFIN, Jr.,

THOS. H. GILLIAM,	A. M. SCALES,
THOS. J. JARVIS,	A. J. BOYD,
MILLS L. EURE,	J. I. SCALES,
JOHN GATLING,	R. H. WARD,
H. A. GILLIAM,	J. T. MOREHEAD, Jr.,
G. H. GREGORY,	M. S. ROBBINS,
J. EDWIN MOORE,	M. MCGEHEE,
WM. F. MARTIN,	JAMES A. GRAHAM,
E. B. WITHERS,	GEO. N. THOMPSON,
J. E. BOYD,	SAML. P. HILL,
G. M. WHITING,	L. R. WADDELL,
C. M. BUSBEE,	R. J. LEWIS,
H. W. HUSTED,	E. S. PARKER,
J. W. SHARP,	J. H. ABELL,
HENRY R. BRYAN,	L. W. HUMPHREY,
ALEX. JUSTICE,	S. GALLOWAY,
W. D. W. STEVENSON,	W. G. MORRISSEY,
JOHN HUGHES,	WM. ROBINSON,
W. J. RASBURY,	STEPHEN W. ISLER,
JOHN W. DUNHAM,	E. S. WOOTEN,
JAS. S. WOODARD,	J. W. EDMONDSON,
HUGH F. MURRAY,	J. F. WOOTEN,
J. E. SHEPHERD,	F. C. ROBERTS,
GEO. W. WHITFIELD,	JOHN N. WASHINGTON,
J. W. LANCASTER,	CHARLES C. CLARK,
ED. C. YELLOWLEY,	E. A. OSBORNE,
THOS. J. HADLEY,	JOHN E. BROWN,
JOHN S. HARRIS,	A. BURWELL,
SION H. ROGERS,	LOVERD ELDRIDGE,
WM. EATON, JR.,	C. B. SANDERS.

Upon the second day of the present term (Tuesday, June 8th, 1869) the following Order was made by the Court:

"The Court being informed of a certain libellous publication directly tending to impair the respect due to the authority of the Court, which appeared in the *Sentinel*, a newspaper published in Raleigh, on the 19th of April 1869, and is headed

"A solemn protest of the Bar of North Carolina" &c., and purporting to be signed by certain attorneys of this Court; the Clerk is hereby ordered to inquire and report to the Court which of the persons whose names appear to be signed to said publication, are attorneys practicing in this Court."

Thereupon the Clerk reported the following names as those of gentlemen who, as appeared by the records of the Court, were practicing attorneys therein, viz:

B. F. MOORE, THOMAS BRAGG, E. G. HAYWOOD, SION H. ROGERS, JOS. B. BATCHELOR, A. S. MERRIMON, H. A. GILLIAM, E. J. WARREN, JOSEPH J. DAVIS, WILLIAM A. JENKINS, C. M. BUSBEE, WILLIAM EATON, Jr., W. K. BARHAM, ASA BIGGS, ED. CONINGLAND, T. J. JARVIS, GEORGE V. STRONG, C. C. CLARK, J. F. WOOTEN, W. T. DORTCH, JOHN HUGHES, T. B. VENABLE, R. W. YORK, JOHN KERR and Z. B. VANCE.

Upon the return of the Clerk's report, the Court ordered that the attorneys named therein should be "disabled from hereafter appearing as attorneys and counsellors in the Court, unless they shall severally appear on Tuesday, June 15th 1869, and show cause to the contrary;" and further ordered, that a copy of the order should be served upon the parties referred to.

This rule, by direction of the Court, was in the first instance, served (June 9th 1869) upon Messrs Moore, Bragg and Haywood only. Upon its return, the Court made the following remarks:

PEARSON, C. J. As there seems to be some misapprehension, in regard to the matter which the Court is about to take up, it is proper to say that the Rule was made upon the ground that every member of the Bar whose name purports to be signed to the paper referred to in the Rule, did sign it, and approve of its publication.

We are informed that there are about five hundred members of the Bar, and the Clerk reports that the names of one hundred and ten, or, about *one-fifth* of the whole number, purport to be signed to the paper.

He also reports that Willis Bagley, Esq., has filed a statement to the effect that he did not sign the paper, or authorize any person to do so for him, and that he did not approve of its publication.

The rule is therefore discharged as to Mr. Bagley; and it will be discharged as to all others who may file with the Clerk a like statement.

The Clerk further reports that one hundred and one members of the Bar had an appearance at the last term of this Court. Of these seventy-six did not sign the paper. The names of twenty-five purport to be signed to it: that is, *one-fourth* of the whole number.

For the purpose of showing that the Justices have no disposition to carry matters to an extreme, or to do more than what is, in their opinion necessary to preserve the respect due to the Court by its officers, and to prevent its usefulness from being impaired, (less than which they cannot do, without betraying the confidence reposed in them by the people of the State,) and also for the purpose of avoiding useless costs, the Clerk has been instructed to issue copies only to Mr. Moore, Mr. Bragg and Mr. Haywood, in the first instance, with the hope that further action in respect to others might become unnecessary. Otherwise copies will issue. and a day be given to them.

The Clerk will enter this upon the record.

The matter having been continued to Wednesday the 16th, answers upon oath in the terms following, were filed severally by the respondents above named:

The several answer of ——— to the Rule herein made by said Court, and served upon him.

This Respondent, protesting that a Rule which deprives him even temporarily of his privileges as an attorney of said Court, ought not to have been made in his absence, without notice, and without affidavit or other legal proof of the facts upon which said Rule is based, respectfully answering says:

1. That he admits the signing and publishing of the paper

called "A solemn Protest of the Bar of North Carolina against Judicial interference in political affairs," but insists that the Supreme Court hath no authority to make, or jurisdiction to enforce said Rule:

2. That the publication referred to in said Rule is not libellous, and doth not tend to impair the respect due to the authority of said Court.

3. And for further answer, this Respondent says that said paper was conceived and prepared during the recent political canvass for the Presidency, and its publication deferred until after the close of the canvass, to avoid its having the appearance of a partizan document. He admits that his purpose was to express his disapprobation of the conduct of individuals occupying high judicial stations; yet as an act of justice to himself against the charge made in the Rule, he not only disavows, in signing and publishing said paper, any intention of committing a contempt of the Supreme Court, or of impairing the respect due to its authority, but on the contrary, avows his motive to have been to preserve the purity which had ever distinguished the administration of justice by the Courts of this State.

Thereupon the Rule was argued on behalf of the Respondents, by Messrs *Battle, Person, Fowle, Barnes* and *Smith.*

Upon Saturday the 19th day of June the Court delivered its opinion as follows:

PEARSON, C. J. The protestation with which the answer opens, is irrelevant to any matter for consideration at this stage of the proceeding, and would not be noticed save that it is calculated to create prejudice in the minds of persons who do not understand the meaning of terms used in judicial proceedings—"laymen" as brother Battle termed them.

This was a rule *nisi*, to-wit: that Mr. Moore, and other gentlemen, be disabled from hereafter appearing as Attorneys in this Court, unless they shall severally appear, on Tuesday, the 15th of June, 1869, and show cause to the contrary; and it was ordered that a copy be served on said Attorneys.

The effect of the rule was to deprive Mr. Moore of his privileges as an Attorney of this Court until the matter was disposed of. No application was made to alter the form of the rule. Suppose it had been, and the rule put in this shape: Ordered, that notice issue to B. F. Moore, Esq., Attorney, &c., to appear on Tuesday, the 15th inst, and show cause why he shall not be disabled, &c., it would have had the effect of depriving him of the privilege of appearing as an Attorney in this Court until the matter was disposed of. For the order would not have been made except upon *prima facie* evidence to support it. So, in either form, the effect would have been to deprive Mr. Moore "temporarily of his privileges as an Attorney of this Court," a necessary incident of the proceeding in either form. Consequently, the *form* of the rule is no legitimate ground for complaint.

The other objection, that the rule was made without affidavit, or other legal proof of the facts upon which it is based, is equally untenable. It is admitted that where the proof is furnished by the senses of the Judges, it may be acted on. Here there was such proof. We knew by our senses that a newspaper containing the paper referred to, purporting to be signed by Mr. Moore and others, had been extensively circulated and was then in the court room; and the want of a disavowal on his part, that he had signed the paper, or consented to its publication, furnished *prima facie* proof, not sufficient for *final* action, but all sufficient as ground for the rule. On his appearance he was at liberty to deny the fact without an oath, and the denial, like the plea of "not guilty," would simply have put the fact in issue—and he would have been entitled to have the rule discharged, unless the fact was proved by *direct testimony*. Instead of that, he *admits* the fact, So this is no legitimate ground of complaint. In short, all the preliminary objections were waived, and the reference to them can answer no useful purpose.

I. "The Respondent insists that the Supreme Court hath no authority to make, or jurisdiction to enforce, said rule." This position is put on the ground that the statute, ratified 10th of

April, 1869, defines all matters of contempt, fixes the punishment, fine or imprisonment, or both ; and, by *implication*, ousts the common law jurisdiction of the Court over the morals and behavior of its Attorneys.

We agree with the learned counsel of the Respondent in the opinion that the statute does not embrace our case. It is not embraced by subdivision 8, section 1 : "Misbehavior of any officer of a Court in any official transaction," as receiving money and failing to pay it over. So the question is, are the Courts deprived, by implication, of the power of self protection and the means of relieving themselves from the presence of unworthy Attorneys, or those Attorneys who, by combination, (I will not use the harsher word, conspiracy,) seek to impair the dignity and veneration, with which the judiciary is invested, by which it can command the respect and confidence of the public,—without which, its usefulness will be greatly impaired, or altogether destroyed ? A mere statement of the proposition is sufficient to show that the statute has not that effect.

By another statute, persons who apply for the *exclusive privilege* of Attorneys at Law, and the right to enjoy the emoluments of the dignified position of "a member of the Bar," are required to produce satisfactory testimonials of good moral character, and thereupon the law tacitly annexes a condition whereby this exclusive privilege is forfeited after bad conduct ; and it is not only the right, but the duty of the courts, to enforce the forfeiture. Suppose an Attorney of a Court is tried and convicted of "forgery," and the day after enduring *infamous* punishment, appears in Court ; is he to be allowed to exercise the privilege of an Attorney, and has the Court "no power to make, or jurisdiction to enforce" a rule to show cause why he shall not be disabled from appearing before it ? Or, suppose two or more Attorneys are convicted of a conspiracy, which is an infamous offence ; or of a libel, which is also an infamous offence, has the Court no power to rule them out? No one will venture to question the power or duty of the Court to do so. It may be said these are extreme cases ;

true, but if the statute does not oust the Common law jurisdiction in such cases, the learned gentlemen must yield the position taken by them.

These cases presuppose trial and conviction for an offence where the Conrt has no further concern than to preserve the purity of its Bar. But the power and jurisdiction of the Court apply with equal clearness to cases where the integrity *of the Court itself is assailed* by a libellous publication made by a combination of a part of its Bar, which, in the argument of this point, is to be assumed to be our case. Under these circumstances, the principle of self-protection, the broad ground on which the whole doctrine rests, calls into action the powers of the Court, as soon as there is *prima facie* evidence of the fact, without waiting for a trial and conviction in another Court,—like the case of mutiny among a crew. The Captain must put a stop to it at once, else he betrays the confidence reposed in him; or, the case of the head of a family who finds some of its members combining to injure, or to bring him into disrepute, he must rebuke it at the outset, if he would preserve the influence and control necessary for the good of the family.

II. The Respondent insists "that the publication referred to, is not libellous, and doth not tend to impair the respect due to the authority of the said Court."

The paper is drafted with all the adroitness of a skilful lawyer; and, under cover "of love and veneration for the *past* purity which has distinguished the administration of law in our State," aims a deadly blow at the Court to which that sacred trust is *now* confided.

Stripped of the beautiful dress by which it is artfully disguised, it amounts to this: A Judge, who openly and publicly displays his political party zeal, renders himself unfit to hold the "balance of justice;" and whenever an occasion may offer to serve his fellow partizans, he will yield to the temptation, and the "wavering balance will shake."

"Never before have we seen the Judges of the Supreme Court, singly or *en masse*, rush into the mad contest of politics, under the excitement of drums and flags," *therefore*, the

Supreme Court, which is composed of these Judges, is "unfit to hold the balance of justice," and will, on occasion, yield to temptation in favor of a fellow partizan.

If you hurt the head, or arm, or leg, or limb, or member, or any part of the body, you hurt the man. And the idea of an intention to injure the character of the Justices who compose the Supreme Court, singly or *en masse*, without an intention to injure the Court, is simply ridiculous.

The only allegation of fact on which this "solemn protest" rests, is that 'the Judges, single or *en masse*, did rush into the mad contest of politics, under the excitement of drums and flags."

Is this allegation of fact true, or is it false? There is no pretence that it is *true*. It is said, this is a figure of speech, suggested by something that was expected to occur, but never did occur; so the allegation of fact is false, and the inference drawn from it is also false.

In our judgment the paper is libellous, and "doth tend to impair the respect due to the authority of the Court."

Indeed, the learned counsel did not press this point, and were content to take the ground that there was no *criminal* intent.

Every man is presumed to intend the natural consequence of his act. If one wilfully sets fire to his own house, which is so near his neighbor's house, that if one burns the other must burn also, and both houses are burnt down, the man is guilty of arson—the criminal intent is presumed. So, in an indictment for libel, this ground would be untenable, except on proof of insanity.

"III. And for further answer this Respondent says, that said paper was conceived and prepared during the recent political canvass for the Presidency, and its publication deferred until after the close of the canvass, to avoid its having the appearance of a partizan document. He admits that his purpose was to express his diapprobation of the conduct of individuals occupying high judicial stations, yet, as an act of justice to himself against the charge made in the rule, he not only dis-

avows, in signing and publishing said paper, any intention of committing a contempt of the Supreme Court, or of impairing the respect due to its authority, but, on the contrary, he avows his motive to have been to preserve the purity which had ever distinguished the administration of justice by the Courts of this State."

The learned counsel then fell back on the ground of a distinction between an *indictment for a libel* and a rule *nisi* to show cause, and assumed, as a matter of law, that in this case the Respondent having, on oath, disavowed any intention of committing a contempt of the Court, or of impairing the respect due to its authority, so as to meet the words of the Rule, it must be discharged. The authorities cited by the learned counsel are conclusive. The law is well settled in this class of cases, *where the intention to injure constitutes the gravamen.*

The Rule rests on sound reason. In this proceeding, as the Court is judge in its own case in the *first* instance, where a case is made out in the judgment of the Court, the party in the *last* instance is allowed to *try himself.* His *intention* is locked within his own breast, is known to himself alone, and he is permitted to purge himself by his own avowal. He cannot be convicted, *if he is innocent*, as he may be *by false evidence, before a jury.* For the Court does not try him, he tries himself." C. J. Wilmot's Opinion, 257-8, referred to on the trial of Judge Peck, 507. If the party, after the Court decides against him, declines to *try himself*, it must be because *he knows himself to be guilty.*

It affords every member of the Court pleasure that the Respondent did not decline to make a sufficient disavowal on oath. We agree with the learned counsel that this disavowal *meets the words of the rule;* but we must say, it seems to us in bad taste to have introduced the expression, "he admits that his purpose was to express his disapprobation of the conduct of individuals occupying high judicial stations."

This is so vague that the Court is unable to give to it a positive meaning; and yet, it seems to imply that in taking the

oath the Respondent meant something which he hesitated to express, lest it might be taken to neutralize the legal effect of his disavowal. The concluding words of the oath are enough to express the purpose which the Respondent avows he had in view, and the vague words referred to may be treated as surplusage. This presented the only difficulty to coming instantly to our conclusion, that the disavowal is sufficient.

We concur with his counsel in according to Mr. Moore high encomium for his ability, legal learning, integrity, devotion to the Constitution, unwavering love of the Union, and *hitherto* most consistent and influential support of the judicial tribunals of his country.

The motion to discharge the Rule is allowed, on payment of costs, a case having, in the judgment of the Court, been made against the Respondent, so as to call for a disavowal on his part. It is proper that he should pay the costs. He is not acquitted, but is excused.

PER CURIAM. Rule discharged.

In the matter of SION H. ROGERS, Esq., and Others embraced in the Rule.

The Rule will be considered discharged as to these parties severally, on their filing answers, that they were not privy to the publication of the paper referred to in the Rule on the 19th of April, 1869, and do not approve of it. Or otherwise making a disavowal, on oath, of any intention, in signing and publishing said paper, to commit a contempt of the Supreme Court, or to impair the respect due to its authority.

Should any one or more elect to ask for a day to show cause, the day will be fixed, on motion, at any time during this term.

NOTE.—Afterwards, at various times during the term, answers substantially concurring with that given in the above report, were filed by Messrs Eaton, Conigland, Davis, Jenkins, Merrimon, Venable, York, Barham, Busbee, Rogers, Batchelor, Dortch, Strong and Whiting, and thereupon the rule was ordered to be discharged likewise as to them.

The UNIVERSITY RAIL ROAD COMPANY *v.* W. W. HOLDEN, Governor, and D. A. JENKINS, Treasurer of North Carolina.

The Acts of January 30th, 1869, and April 1st, 1869, in regard to "the University Rail Road Company" are invalid; because—

1. By PEARSON, C. J., and READE, DICK and SETTLE, JJ. No corporation is created thereby, and therefore there is no *grantee* to take the franchises specified.

2. By PEARSON, C. J., and RODMAN and DICK, JJ. The question involved therein of an expenditure by the State, has not been decided by a vote of the People.

3. By PEARSON, C. J., The proportions and limitations upon taxation, required by Art. 5, sec. 1 of the State Constitution, have not been observed.

By RODMAN and DICK, JJ., *Conceding* that *an inchoate corporation* is created by the acts in question, the "Directors" required for its consummation have not as yet been duly appointed, inasmuch as to such appointment the State Constitution renders a *confirmation by the Senate*, indispensable.

ARGUENDO:

By the Court, 1. *Galloway* v. *Jenkins*, *ante* 147, cited and approved.

2. The *proportions* and *limitations* (*ubi supra*) do not apply to taxes laid for the purpose of paying either the interest or the principal of

the public debt, as it existed at the adoption of the Constitution, or for *special county purposes*, (as in Art. 5, Sec. 7, of the Constitution.)

By READE, DICK and SETTLE, JJ. The *proportions* and *limitations* (*ubi supra*) apply only to taxes laid for the ordinary and current expenses of the State, and include none of the objects of expenditure referred to in Secs. 4 and 5, of the same Article.

By PEARSON, C. J. They apply in all cases of State or County taxation, except provisions, (1) for the public debt as it existed when the Constitution was adopted, (2) for casual deficits, insurrection and invasion, and (3) county taxation for *special purposes*.

By RODMAN, J. They apply (except in regard to the public debt as it existed at the adoption of the Constitution) equally in regard to all State taxes whatever, but not with equal force to all; being, in some matters, *imperative;* in others, only *directory* to the Legislature,—whose decision in such case is conclusive, and cannot be reviewed by the judiciary. In this latter class are included, taxes, (1.) to supply casual deficits, to suppress invasions and insurrections; (2.) for the ordinary and legitimate purposes of the State, and (3.) to construct unfinished Rail Roads.

By PEARSON, C. J., and RODMAN and DICK, JJ. (*Dissentiente*, READE, J.) As the Legislature cannot give or lend the credit of the State to others, for the purpose of constructing new Rail Roads, without the sanction of a vote of the people, *so a fortiori*, it cannot without such sanction, engage in such construction *directly*.

MANDAMUS, tried before *Watts*, J., at Spring Term 1869, of the Superior Court of WAKE.

The petition, filed at the same Term, in the name of "The University Rail Road Company," set forth that the petitioner was a corporation created by An Act ratified January 30, 1869, as amended by another Act ratified April 1st, 1869, for the purpose of constructing a rail road between Chapel Hill and a certain point on the line of the North Carolina Rail Road. And, amongst other things, it alleged that the acts above, provided that it should be the duty of the Governor and the Treasurer of the State to prepare and issue to such company for the purpose of constructing its road, bonds of the State to the amount of three hundred thousand dollars. That a special tax to provide for the interest was laid, and under the pro-

visions of these acts the plaintiff was entitled to have the bonds issued; but that the Governor and Treasurer, upon being applied to, refused to have them prepared and issued.

The prayer was for a Mandamus, to be directed to W. W. Holden, as Governor, and D. A. Jenkins, as Treasurer, &c.

The writ for an alternative mandamus having been issued returnable upon the 15th day of April, during the same term, and service thereof having been accepted by the defendants, upon its return, His Honor ordered a peremptory writ to be issued; and the defendants appealed.

Attorney General and *Pou*, for the appellants.
Haywood, Fowle & Badger, and *Person, contra.*

PEARSON, C. J. I. I incline to the opinion that the act entitled "An act to incorporate the University Rail Road Company," does not have in law the effect to create a corporation. To give legal effect to a grant, there must be a grantor, a grantee, and a thing granted. Here we have a grantor, the General Assembly; a thing granted, corporate powers and franchises "to the same extent as are possessed by the North Carolina Rail Road Company;" but there is no grantee—no person, persons, or body politic to whom the grant is made. If this be so, it would seem to follow, that the Directors who are to manage the affairs of said "University Rail Road Company" (there being in contemplation of law no company) cannot have such rights as are enforced by the writ of *mandamus*.

II. In my opinion, by the proper construction of Art. V, Sec. 5 of the Constitution, the General Assembly has no power to contract a debt to build a *new* railroad, unless the subject be submitted to a vote of the people. It is decided (*Galloway v. Jenkins, ante* 147) that the General Assembly has no power to contract a debt, without a vote of the people, *to aid* in the construction of a new railroad. If the General Assembly has no power to contract a debt for the purpose of building a new railroad, with the assistance of contributions by

individuals, county subscriptions, and subscriptions by other railroads, it would seem it cannot have power to contract a debt for the purpose of making a new railroad out and out. A prohibition not to contract a lesser, surely amounts to a prohibition not to contract a greater debt, for the same object. The evil which the Constitution seeks to prevent is not that of giving aid to individuals or corporations in the construction of railroads; but, that of contracting *new* debts on the part of the State, the existing debt being almost too heavy to bear, and the credit of the State tottering under the load. A construction by which new debts may be contracted on a larger scale than one expressly prohibited, is uot admissible upon any principle of law. As this is a deduction from *Galloway v. Jenkins*, in which the Court was divided, I will put my conclusions also on the construction of all the provisions of Art. V.

III. The act under consideration is in violation of the Constitution in this: the tax levied by it disturbs the proportion which, by the Constitution, capitation tax must bear to the tax on the value of property, to wit: "*The tax on a poll shall be equal to the tax on three hundred dollars worth of property.*" Here we have the proportion. Then follows a provision: "The State and County tax combined, shall never exceed *two dollars on the head*," and the necessary effect is, that the State and county tax on the value of property shall never exceed two dollars on three hundred dollars worth of property; and the effect also is, that if the tax on a poll is less than two dollars, then the tax on three hundred dollars worth of property must be less in the same ratio. In other words, the tax on the poll is "*the standard*" by which the tax on property is to be levied.

Under two dollars, the power to levy a poll tax for State purposes is unlimited; *this interest* needed no protection, for it has a full representation in the General Assembly.

Counties are protected by Sec. 7, which provides "taxes levied for county purposes shall be levied in like manner with the State taxes, and shall never exceed double of the State tax except for a special purpose and with the special approval of the General Assembly.

Cities, towns and townships are protected, (Art. VII, Sec. 7,) which provides "no debt shall be contracted, nor shall any tax be levied except for necessary expenses, unless by a vote of a majority of the qualified voters therein.

The only remaining interest is that of *property holders*, in respect to State and County taxes. This interest is protected by the equation fixed between capitation tax and the tax on property. A statute which disturbs this equation breaks down the safeguard thrown around property by the Constitution. If it can be done to the extent of one hundredth of one per cent, it may be done to the extent of one tenth, and there is no limit.

It was said in the argument, that this equation applies only to taxes levied for current expenses of the State and counties, and has no reference to taxation necessary to pay the interest on the public debt, or the tax to be levied to pay the interest on any new debt.

1. I agree that if, under this equation, carried to its limits, the amount is not enough to meet current expenses, and also to pay the interest on the public debt, then for the excess needed it is not only within the power, but it is the duty of the General Assembly to disregard the eqnation; for this protection to property must be taken to be subject to the injunction, "to maintain the honor and good faith of the State untarnished in regard to the public debt, [Art. I, Sec. 6,] and by Sec. 4 of the Article under consideration, it is ordained: "The General Assembly shall, by *appropriate legislation and adequate taxation*, provide for the payment of the interest on the public debt, and after 1880 it shall lay a special annual tax, as a sinking fund, to discharge the principal." I do not adopt the entire position taken by Mr. Haywood, that by a *specific* tax is meant a tax on land by the acre, or on horses and cattle by the head. It is enough to admit that this tax is to be independent of the equation; as in Sec. 7, a tax for special county purposes, with the special approval of the General Assembly, may be levied without reference to the equation.

2. I do not agree to the position, that the tax required by

Sec. 5, to be levied to pay the interest on any new debt, is not subject to the equation; and that the power to tax property in reference to *new debts is unlimited*, save by the discretion of the General Assembly. There is nothing, as we have seen there is in the case in regard to taxation to meet the interest and principal of the existing debt, to take this taxation out of the equation. Its being called a *special* tax cannot have that effect; for Sec. 8 requires that every act shall state the special object to which the tax is to be applied. On the contrary, it is included in the equation by every rule of construction.

This fixed equation between poll tax and property tax, gives significance to the provisoin the first clause of Section 5: "No new debt shall be contracted in behalf of the State, *unless in the same bill a special tax* is levied to pay the *interest annually*.

If the purpose was simply to keep up the price of State bonds, this would amount to but little, as snch a tax is very easily inserted in a bill;—but suppose the purpose to be to restrain the power of taxation in regard to property by reference to the equation before fixed, so that the special tax on property cannot be levied, without making a corresponding increase in the capitation tax, and this proviso amounts to a very important practical limitation on the power to tax property, and must have a very decided effect in checking a disposition to contract new debts.

And the exceptions in regard to "supplying a casual deficit," and for "suppressing insurrection or invasion," in which cases the equation may be disregarded, speak volumes, and show that more was intended, in requiring a tax to be levied in the *same bill*, than simply to put the draftsman to the task of adding a clause to the bill. It is only in *exigencies* that this safeguard to property is not to be observed.

Except out of the operation of Sec. 1, the taxation that may be "appropriate and adequate" to meet the interest and principal of the existing debt; except also out of its operation the taxation necessary to meet the interest and principal of such new debts as shall be contracted in behalf of the State, and the effect will be to emasculate the section and fritter it away to nothing. Only current expenses are left for it to operate on;

and these expenses may be met by the tax on trades, professions, franchises and incomes (Sec. 3,) which are not embraced by the equation. So, by the construction contended for, this supposed protection to property holders is made void and illusory, and, after all, amounts to nothing.

On the argument, it was urged that the bill levying this tax on property to pay the interest on the debt to be contracted for the University Rail Road, was passed several days *before* the bill called "The Revenue Act," which fixes the capitation tax at 105 cents on the head and the property tax at 35 cents on the $100 worth, observing the equation of taxation; and if this equation must be adhered to, the effect will be either to nullify all of the taxation of the session, or to displace *pro tanto* a part of the tax on property in the Revenue Bill, in order to make room for the tax in the University bill—inasmuch as "*qui prior est in tempore*," *&c.*

I do not concur in either of the conclusions. All of the bills at the same session are to be taken together. The Revenue Bill being in exact accordance with the Constitution, must take effect, and it specially appropriates the amount to be raised under it, to the annual expenses of the State government, and to the payment of the interest of the public debt. So the scope of the legislation is: If the General Assembly has power to lay a tax to pay the interest on the debt for the University Rail Road without being limited by the equation, then the tax is to be levied, Otherwise, it will fail, as being levied *ultra vires*,, and because the General Assembly assumes an unlimited power of taxation.

Several cases were supposed in the argument, but they all involved the fallacy, that the General Assembly and County Commissioners have an independent power to tax property to the extent of 66⅔ cents on the $100 value, whereas there is no such power, and the right to tax property depends on the capitation tax. Both must be exercised jointly, in order to preserve the equation of taxation.

PER CURIAM. Order below reversed, and petition dismissed.

READE, J. I agree with the Chief Justice, that no corporation is created by the act, and, that therefore, the mandamus must be dismissed.

I do not agree with him and my learned brothers, RODMAN and DICK, that the Legislature has no power to contract a debt to build a new Rail Road without a vote of the people; but I do agree that the Legislature has no power to *give* or *lend* its aid *to others* to build a new Rail Road without a vote of the people. In so far as the questions discussed in this case, are involved in the case of *Galloway* v. *Jenkins*, (*ante*, 147.) I feel myself bound by that decision, although I did not concur in it. But I am wholly unable to comprehend how it follows, that because the State cannot *lend* its aid to others to build a Rail Road for *their benefit*, that, therefore, it cannot build a Rail Road out and out, for *its own benefit!* If the Constitution forbade the Legislature to lend the aid of the State to New York to build a State House or Penitentiary for New York, would it be supposed, that, therefore, the Legislature could not build a State House or Penitentiary, "out and out," for North Carolina? Or would it be supposed that this view was answered by the argument, that the greater includes the less, and if it cannot build a Road with the aid of others, it cannot build one without such aid? It is said that the object was to prevent the Legislature from contracting new debts. And yet it is admitted that it may contract new debts for other purposes than Rail Roads. If the object was to keep the State from going in debt, why not keep it from going in debt for *other* purposes? "If a farmer have a field requiring a fence on three sides, would it do any good to fence it on only two sides?" But I will not pursue the matter further. And I purposely refrain from approving or disapproving the internal improvement policy, because it is not a Judge's province to do so. I only seek to expound what has been done by the Constitution and by the Legislature. If the law-makers have erred in matters of policy, the remedy is with the people.

My construction of the taxing power of the Legislature, under the Constitution is as follows:

1. The first object of the Convention, in the 5th Art. of the Constitution, was to provide for the ordinary and current expenses of the government. That is done in sections 1. 2, and 3. And for that purpose the tax is limited to $2 on the poll, and the same amount on $300 worth of property, and the equation must be observed. This was thought to be sufficient for the ordinary and economical administration of the government.

2. We had a considerable public debt, and, after providing for current expenses, the next consideration was, how is the public debt to be met? And the 4th section provides, that a special tax shall be laid for that.

In regard to the construction of the first four sections, I do not understand that there is any difference of opinion among the Judges, except it may be as to what constitutes "the public debt."

3. Taxation is not the subject of the section except incidentally. Having provided in sections 1, 2, and 3 for ordinary expenses, and in section 4 for the public debt, the next consideration was, to provide for extraordinary occasions. And for such occasions the 5th section provides, not that taxes shall be laid, but that bonds shall be issued; and, as incident to the bonds, special taxes may be laid, not to pay the bonds, but only the interest, leaving the bonds as a part of the public debt, to be provided for under section 4. The power to issue these bonds is unrestricted. From the very nature of the case it must be so. If an extraordinary and unforseen occasion is to be met, how is it possible to limit the means unless you foreknow the occasion? If there be an insurrection, bonds must be issued to meet it; but whether a large or small amount, must depend upon whether it be a large or small insurrection, and so with any other occasion. It ought not to be supposed, that a Constitution would be framed with such limitations upon the taxing power, as that the vessel of State will sail safely in fair weather, to be

wrecked in the first storm. We may well impute it to wisdom, to provide that ordinarily there shall be light taxes and economy in expenditures, but when any extraordinary necessity arises, the whole power of the State must be unloosed to meet it. It is admitted that the counties, for special purposes and with the approval of the Legislature, may, under section 7, levy a tax without limit and without a vote of the people. It was supposed that extraordinary necessities may fall upon a county. And may not extraordinary necessities fall upon the State? It need not be inferred that either county or State taxes will be excessive because the counties and Legislature have the *power* in extraordinary cases to make them so. Until the new Constitution, there was no restriction whatever upon the power of the Legislature to tax; and yet the taxes were never burdensome. There was supposed to be a sufficient check in the accountability of the representative to his constituents. The restriction in our new constitution is deemed a wise one—induced, probably, by the new order of things, and intended to protect the non-property holder from an oppressive poll tax, and the property holder from an unequal property tax, for the ordinary purposes of the government.

I admit that the Legislature cannot give or lend anything to Rail Roads which belong to others, without a vote of the people; but if any extraordinary occasion or necessity arises, the Legislature may do anything for the State which the occasion may require—may issue bonds at par without limit and without tax, and issue them below par with a special tax. For any abuse of this power the representative is responsible to the people. All that the Court can say is, thus is it written in the Constitution.

RODMAN, J. This petition is filed by the University Rail Road Company, claiming to be a corporation, to compel the Governor and Public Treasurer to issue to it certain bonds of the State as required by an act of Assembly ratified 30th January, 1869, amended by an act ratified 1st April, 1869.

The Judge below granted a peremptory mandamus, and the Respondents appealed.

The first question is, Who is the petitioner, and has it a legal capacity to demand relief of the nature prayed for?

Section 1 of the Act of 30th January, 1869, enacts: "That there shall be a body corporate and politic, known as the University Rail Road Company, with corporate powers and franchises to the same extent as are possessed by the North Carolina Rail Road Company."

Section 2 requires the Company to build a Railroad from some point on the North Carolina Railroad to Chapel Hill.

Section 3. "The affairs of said University Railroad Company shall be managed by a Board of five Directors, to be appointed by the Governor of the State, which board shall, out of their number, choose a President." &c.

Section 4. "The Board of Directors shall appoint their officers and fix their compensation, and the salary of the President, subject to the approval of the Governor.

Section 5 provides for the issuing, by the Treasurer of the State, to the President of the Company, of bonds to the amount of $300,000, to be signed by the Governor and countersigned by the Treasurer.

Section 6 authorizes the Board to make certain contracts for building the road, and for the use of the rolling stock of the North Carolina Railroad Company.

Section 6 levies a tax of one-hundredth of one per cent on all the property in the State, to pay the interest on the bonds. The amendment of 1st April only changes the number of Directors to seven.

Without any minute criticism on this Act, it may be conceded to the petitioners, that its effect was to create an inchoate corporation, to consist of certain persons to be named by the Governor, to act as agents and for the exclusive benefit of the State in building the Rail Road, and that on the appointment of these persons, the corporation became perfect. This concession, however, is made subject to the consideration whether the persons thus to be appointed by the Governor

were not public "officers," and if so, whether such appointment was invalid for want of confirmation by the Senate under Art. III, Sec. 10 of the State Constitution.

I concede also to the petitioners, for the sake of the argument, that public agents of this sort (if rightfully appointed,) may maintain *mandamus* against the Governor, to compel him to perform a mere ministerial act necessary to enable them to perform their public duties.

With these concessions there will remain but two questions preliminary to the consideration of the main questions in this case.

The main questions are:

1. As to the constitutionality of the act of Assembly in reference to Art. V, Sec. 5, of the Constitution.

2. Whether the Act is unconstitutional in reference to Art. V, Sec. 1, of the Constitution.

The preliminary questions are:

1. The Constitutionality of the appointment of the Directors by the Governor without confirmation by the Senate.

2. Whether the act of which it is sought to enforce the performance, is a mere ministerial one, or one in which the Governor has a discretion; in which last case it is admitted *mandamus* will not lie.

As to the first preliminary question:

The Constitution, Art. III, Sec. 10, says, "The Governor shall nominate, and by the advice of a majority of the Senators elect, appoint *all officers* whose offices are established by this Constitution, *or which shall be created by law*, and whose appointments are not otherwise provided for, and no such officer shall be appointed or elected by the General Assembly." Were the Directors "officers" in the sense of this section of the Constitution? If they were, it is clear they were created by law subsequent to the Constitution; and then the only question remaining for consideration under this head would be, whether the words "whose appointments are not otherwise provided for," mean, otherwise provided for by the Constitution, or, otherwise provided for by the law creating them.

Were these Directors, "officers?" In 7 *Bacon's Abridg. Title, Offices and Officers, p.* 280, it is said: "any man is a public officer who hath any duty concerning the public." *In U. S. vs. Hartwell*, 6 Wall, 385 it is said, "An office is a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emoluments and duties," and it was held, that the clerk of an assistant treasurer, was an officer within the meaning of a highly penal act. In *State ex. rel. Worthy vs. Comm. of Moore county, ante*, 199, this Court recently had occasion to consider who were officers of the State, under Amendment XIV of the Constitution of the United States.

In that case the Court, without professing an exhaustive enumeration, included under that definition such persons as standard keepers, stray valuers, entry takers, inspectors of flour, county surveyors, county trustees, &c. But that decision proceeded greatly upon those persons being required by law (Rev. Code, ch. 66) to take an oath to support the Constitution of the United States, a ground which would not be applicable here. There are, however, two sections in the State Constitution from which it may be gathered what kind of State agents that instrument intended to class as "officers." Art. XIV, Sec. 5 says: "In the absence of any contrary provision, all *officers* in this State, whether heretofore elected, or appointed by the Governor, shall hold their positions only until other appointments are made by the Governor," &c. All other officers having been elsewhere provided for by the Constitution, there was nothing for this section to operate on, except the class of State agents to which these directors belong, viz: such as the directors of the several Asylums (Rev. Code, ch. 6) and the State directors in the various banks and rail road companies in which the State had stock; and we know, that in fact, it was applied to these without any question of its propriety. Art. XIV, Sec. 7 says: "No person shall hold more than one lucrative office under the State at the same time; Provided, that Officers in the militia, Justices of the Peace, Commissioners of public charities, *and Commissioners*

appointed for special purposes, shall not be considered officers, *within the meaning of this section*," thereby implying that commissioners for special purposes were "officers," within the meaning of the Constitution elsewhere, and that special words of exclusion were necessary in the particular case.

Then what is the meaning of the words, "unless otherwise provided for," in section 10? It seems clear that they mean "unless otherwise provided for in the Constitution." For nearly every officer the Constitution expressly provides the manner of appointment, but its framers seem to have apprehended that some might have been omitted, and, therefore, put in this general clause to cover all others. To read the words as applying to the Act of Assembly creating the office, would make them useless, for, in the absence of all constitutional provision on the subject, such would be law; for in such absence the General Assembly, in creating an office, surely might prescribe how it should be filled. Moreover this meaning would seem to be absolutely excluded by the words; "and no such officer shall be appointed or elected by the General Assembly," where "appointed" must refer to an appointment by the Governor alone.

Second preliminary question: Is the act which is required to be done a merely ministerial one? It is conceded that if the respondents may exercise a discretion in respect to it, its performance cannot be compelled by *mandamus*. The act is merely ministerial in its nature; but it seems to me that the time for its performance is left discretionary. It will be observed that the language of section 5 of the act of the 30th January, 1869, is not imperative. It says: "To secure the completion of said road, coupon bonds of the State are hereby authorized to be issued," &c. If we give to this word its proper weight, it can hardly be supposed that the Legislature intended to make it imperative on the Governor and Treasurer to issue in one mass bonds to the amount of $300,000 immediately on the passage of the act, and without any regard to the price at which they could be sold. It could never have been intended that the State should be thus made the victim of the

brokers of Wall Street without help from any quarter. The language was, therefore, purposely, permissive only, and the intention was that the Governor should put these bonds on the market, only as funds might be needed for the work on the Road, and only when in his opinion the price offered was a reasonable one. That discretion he has exercised by refusing to deliver them at this time.

I conclude from these considerations, 1st. That the Directors of the University Rail Road Company were such public officers as required confirmation by the Senate; that the appointments, having been made by the Governor alone, were invalid, and that consequently the inchoate corporation contemplated by the Act has not yet been perfected, and that there being no person *in esse* entitled to receive the bonds spoken of in the Act, the Respondents could not lawfully issue them: 2nd. That the act to be performed was purposely left discretionary as to the time of its performance, and hence cannot be commanded by this Court.

As these views dispose of the present case, we might decline to go farther into the consideration of the main questions which have been argued. But aware, as we are, that the principal object of this suit was to obtain the opinion of this Court on the constitutionality of that part of the Act of 30th January, 1869, which authorizes the issue of State bonds to build the University Rail Road, and on the constitutional limit of State taxation; and aware, also, of the profound interest with which both of these questions are regarded by the people of the State, and of the important consequences which will result from our decision, the Court is not willing, when it has formed a decided opinion, to avoid its expression, and permit the case to go off on matters in which it may be possibly amended hereafter.

The first of the two main questions mentioned above, arises under Art. V, Sec. 5, of the Constitution. It is conceded that the power of the General Assembly to borrow money to build a Rail Road, is not prohibited by the first clause of that section, provided a tax be levied in the same bill, and, provided, the constitutional limitation, if there be one applicable, is not

exceeded. But the second clause forbids the General Assembly "to give or lend the credit of the State in aid of any person, association or corporation, except to aid the completion of such Rail Roads as may be unfinished at the time of the adoption of this Constitution," unless it be submitted to a vote of the people. It will probably be conceded that the clause intended in general to prohibit the credit of the State from being given "*in aid*" of any new Rail Road. But it is contended that here the State does not act "in aid of" any one. It proposes to build the road through its own agents, entirely with its own means, and for its own exclusive benefit. I admit that the act here contemplated to be done, is not *literally* prohibited, but, in my opinion, it is prohibited by a natural and reasonable, and, therefore, necessary construction of the terms used. That cannot be done indirectly, which cannot be done directly. A prohibition to go one mile in a certain direction, is a prohibition to go two; a prohibition to spend one dollar for a certain purpose, is also a prohibition to spend more than one dollar; and a prohibition to render any aid to another in doing a certain act, must by all reasonable rules be construed as a prohibition against doing the act at all. In *Dwarris on Statutes*, 737, citing *Bacon's Maxims*, it is said: If the Statute, 1 Ed. 6, had been, that he that should steal one horse, should be ousted of his clergy, then there had been no question at all if a man had stolen more horses than one, but that he had been within the statute, for *omne majus continet in se minus*. To hold that when the General Assembly is solemnly prohibited from using the credit of the State in giving the slightest aid to any one else in the building of a Rail Road, it may, nevertheless, use that credit to build the whole road; that when it is forbidden to impose any part of the burden on the people, it may impose the whole, would seem to be the exercise of an uncommendable astuteness to explain away to nothing, solemn language intended to be the bulwark of the people's rights.

The rules for the construction of statutes (and the Constitution is a statute of the highest class) are clear and settled. If an adherence to the letter will lead to an absurdity, or will

defeat the plain intention, the literal construction must be departed from. To cite the well known instance: A statute enacted that any person who drew blood in a public street should be punished capitally; a person walking in the street was taken with a fit, and fell; a surgeon near by bled him on the spot, and restored him to health; did the surgeon violate the spirit of tne statute? To illustrate still farther the danger of a too literal construction: Suppose the word "person" had been left out of the second clause of Section 5, could the Legislature, in that case, have given the credit of the State to a single person in aid of a Rail Road? Or, suppose the word "person" had been retained, and the word "association" had been omitted, could it have given it to a partnership of several persons? It will scarcely be contended that the omission of either of these words would make any difference in the spirit and meaning of the section, yet by a strictly literal construction, the difference would be very great. It is to be observed, too, that this is not a penal statute, and, therefore, to be strictly construed, but one reserving rights to the people; and Sec. 27 of the Declaration of Rights, prefixed to the Constitution, says: "All powers not herein delegated remain with the people;" it must, therefore, receive a liberal construction to advance the remedy and suppress the mischief. In the construction af a new statute we must look at the old law, the mischief, and the remedy intended to be applied.

The old law here was that the Legislature could contract an unlimited State debt, and by the abuse of this power for works of internal improvement, threatened the bankruptcy and dishonor of the State, and the ruin of the people; the remedy intended was, to restrict the power of the Legislature to incur debts, and as the building of rail roads had been the most fertile source of the abuse, to restrict it especially in reference to that, by requiring the previous sanction of the people.

The same reasons which made it proper for us to consider the constitutionality of the Act of 30th January, 1869, in reference to the section of the Constitution just discussed,

induce us to consider it also as affected by Section 1 of the same Article. Section 1 says: "The General Assembly shall levy a capitation tax on every male inhabitant of the State" between certain ages, "which shall be equal on each to the tax on property valued at $300 in cash," "and the State and County capitation tax combined, shall never exceed two dollars on the head." It is too plain to admit of an argument, that the intent of this section was to establish an invariable proportion between the poll tax and the property tax, and that as the former is limited to two dollars on the poll, so is the latter to two dollars on the three hundred dollars valuation of property. The motives for such a limitation may be inferred from the provisions of the Constitution itself, without looking at the debates in the Convention, to which we were referred. The Constitution admitted to the suffrage a class of persons who had never been entitled to it before, equal in numbers to about one half of the former voting population, and this class was at that time almost universally destitute of property. It was foreseen as at least possible in the somewhat unnatural condition of things then existing, that whichever of these two powers should obtain a majority in the Legislature, might attempt to put on the other an undue portion of the public burdens through taxation; to prevent the confiscation of property by numbers, a proportion was established; to prevent the oppression of numbers by property, the poll tax was limited. This proportion and this limit apply equally to all State taxes whatever, but not with equal force. As to some, it is absolutely imperative, and a tax laid contrary to its provisions would be void. As to others, from the nature of the objects of the tax, and from the provisions of the Constitution, it seems to me to be merely directory; that is to say, addressed to the discretion of the Legislature, and to be regarded, if possible, consistently with the attainment of the great objects of the Constitution, but if these cannot be attained within the limits and proportions prescribed, then to be disregarded. And of this possibility the Legislature must necessarily be the exclusive judge. The important question is, what are the exceptions from the general rule:

1. It seems to me that the interest and principal of the public debt which existed at the adoption of the Constitution, and which was not repudiated as having been incurred in support of the rebellion, is clearly an exception. The Constitution, in respect to the debt of the State, shows a manifest intention that what was then owing should be secured and finally paid, and that it should not be increased for any but the most necessary purposes, (or such as were supposed to be so,) and then only under such guards and restrictions as would, it was believed, suffice to insure economy and moderation. Section 6 of the Declaration of Rights renews the pledge of the faith of the State to the payment of the existing debt; and Sec. 4, of Art. V, provides for the prompt payment of the interest, and the eventual payment of the principal, by a tax on the property of the State. When we consider the uncertainty which must necessarily have existed as to whether taxation within the limits prescribed by Sec. 1 would suffice for these cherished purposes, and that the tax to effect them is to be laid on property alone, thereby entirely disregarding the proportion established by Section 1 between property and polls, we are forced to the conclusion that Sec. 4 was intended to be in all respects independent of Sec. 1, if it should be found necessary to render it so, in order to give it due effect. If due effect can be given to it consistently with the general mode of taxation by *ad valorem* prescribed in Sec. 3, and with the limit, prescribed in Sec. 3, and in Sec. 1, then those general provisions were to be observed; but if that could not be done, then, on the principle that a special provision overrides, in the particular case provided for, all merely general rules, the general rule must be disregarded. I cannot concur, therefore, with Mr. Haywood in his view of the meaning of the word "specific" in Sec. 4. He considers it as contradistinguished from *ad valorem*. That may be its technical and usual meaning in Acts of Congress relating to duties on imported goods, but in this place it means merely a tax devoted to the specified purpose. The accomplishment of the purpose proposed in Sec. 4 does not require any deviation

from the general rule of uniform *ad valorem* taxation, and, therefore, none can be admitted.

2. Sec. 5 permits the Legislature to contract new debts in behalf of the State: 1st. To supply a casual deficit, or to suppress insurrection or invasion, whether the bonds of the State are at par or not, without levying a special tax to pay the interest. 2nd. For the ordinary and legitimate purposes of State government; if the bonds are at par, without levying such a tax. 3rd. To aid in the completion of such Rail Roads as were begun and unfinished at the adoption of the Constitution. For all other purposes they are forbidden to contract any new debt without submitting the question to a vote of the people. These objects of permitted taxation are distinguished from each other by the character of the conditions imposed on them respectively, and by the greater facility with which debts may be incurred for one of the purposes than for another. To suppress invasion, &c., the Legislature may contract a debt without levying a tax to meet the interest: for other legitimate but not equally pressing uses of the State (including the aid to unfinished Rail Roads) it cannot. But all these objects are embraced in the same section, and as respects their liability to come within the operation of the limitation in Sec. 1, they all stand on the same footing. No distinction in this respect is made; if the State cannot exceed the limitation for one of the objects, it cannot for another. We can scarcely suppose that the Constitution intended to cripple the power of the Legislature in borrowing money to suppress invasion. The limit of taxation might have been already reached; and in that case it would be impossible for the State to borrow, as it could not tax to pay either the interest or the principal, and there is no provision in such a case for leaving the question to the people. This consideration of itself will suffice to prove that as to the taxation permitted by this Section, the limitation in Sec. 1, is not applicable. It must be noted however that in this Section, (5) there is no such command, as there is in Sec. 4, that the tax raised for the objects embraced shall be levied on property

alone. On the contrary, the Legislature is left at liberty to levy the tax as it may think best, either on property, or po lls or on purchases, &c., or on all combined, subject only to the qualification, which there is no power to dispense with, that the tax on property shall be uniform and *ad valorem*. I am therefore of the opinion that the limitation of taxation prescribed by Sec. 1, is not imperative as respects taxes laid for the purposes contemplated in Sec. 5: that it must of necessity be construed as only directory or monitory to the Legislature, and that its observance cannot be enforced by the Courts.

The view which I take of the constitutional powers of the Legislature may possibly be unsatisfactory to two classes of persons; to those who are interested in the construction of new rail roads, and those who imagined that the Constitution had imposed an absolute limit to taxation for all purposes. By both it should be remembered that it is not the duty, or within the power of the Judges of this Court to make the law, but simply to declare it as they may conscientiously find it to have been made by the legislative representatives of the people. To the first class it may be further suggested, that if the roads in question are so necessary to the welfare of the State as to make their construction at this time, and under the present circumstances, wise and judicious, it is not probable that the people will refuse that sanction which they have retained the right to give or refuse, and which, if given, avoids all further question. To the second class it may be suggested, that the attempt to limit the legislative power of taxation in the manner of this Constitution is altogether novel, and if a short experience has shown it to be wise, it is entitled to the credit of being original; that no constitutional restrictions, however skilfully drawn, can ever form an effectual barrier to the effects of legislative folly or venality; that if legislators necessarily are entrusted with great powers over the estates of their constituents, the possession of such power should lead to an increased care in selecting them; and finally that by the construction which I have endeavored to maintain, the two chief objects of the Constitution in reference to this subject will

have been attained,—the security of the existing State debt, and (except under the most extraordinary circumstances) an absolute and certain limit to its future increase.

I have purposely refrained from discussing any of the questions which in the arguments of counsel were suggested as possible, arising out of the possible priority of passage of tax bills for purposes not of primary importance, over those which were, and also of questions which might arise in case the Legislature should wantonly absorb the full limit of taxation for State purposes, leaving no margin to the counties for their necessary objects. These do not naturally arise out of this case. With the wise and patriotic legislation which we may hope for, and with that due obedience to the monitory, as well as to the imperative parts of the Constitution, which the people have a right to expect, it is scarcely possible that such questions can ever arise. It would be unwise and not in conformity with the practice of this Court, to undertake to decide them in advance.

In my opinion the judgment of the learned Judge below should be reversed and the complaint dismissed.

DICK, J. The important questions which are involved in this case were ably discussed by counsel, at the bar, and they have been maturely considered by the Court. I concur with the other Justices in believing that the act incorporating the University Rail Road Company, is unconstitutional, and the reasons for such opinion are fully stated by Chief Justice Pearson and Justice Rodman. The difference of opinion upon the Legislative power of taxation has caused some delay in the decision of this case. I think it proper to state the conclusions at which I have arrived, without attempting any elaborate argument on the subject.

The power of taxation is one of the chief attributes of sovereignty, and no constitutional government can exist without it. In republican governments the usual safe-guard against the abuse of this power, is the responsibility of the legislature to its constituents. Until the formation of our present gov-

ernment no other safe-guard against unjust and oppressive taxation was placed in the Constitution of this State.

When the Convention of 1868 met to re-model our State government, it saw proper to impose some constitutional restrictions upon the Legislature in relation to the exercise of this power.

We must suppose that the framers of our government did not intend by these restrictions to limit the Legislature in such a manner as to prevent it from sustaining the honor and credit of the State, providing for the exigencies of the government, and advancing the best interests of the people. We ought to consider the circumstances by which the Convention was surrounded, and construe these restrictions with due liberality. It seems to me that the Convention in framing that part of the Constitution which relates to taxation had several objects in view.

The first object was to secure the honor and credit of the State. There was a large State debt which had been incurred in developing the resources of the State; and not only common honesty, but good policy required that it should be secured, and the accruing interest promptly paid. For the purpose of gaining public confidence, the solemn assurance was placed in the Declaration of Rights (Art. 1, Sec. 6,) that the State debt "shall be regarded as inviolable and never be questioned;" and then to meet this obligation the imperative duty was imposed upon the General Assembly to make provi sion for its payment "by appropriate legislation and adequate taxation." (Art. 5. Sec. 4.) Upon a question in which the honor and credit of the State are involved, we cannot believe that any restrictions are placed upon the Legislature which would in any manner prevent it from promptly performing an imperative duty.

The object of the Convention in Art. 5, Sec. 1, was to provide a system of general taxation for the ordinary expenses of the government, which is to operate with a just equality upon the citizens and property of the country. The capitation tax is limited to two dollars on the head, and for the pur-

poses of general taxation, the tax on three hundred dollars worth of property cannot exceed that amount. Sections 1, 2, and 3, establish a general revenue system for the State; and sections 4, and 5, provide special taxes for the State indebtedness, unexpected exigencies, and for the completion of unfinished railroads.

The object of section 5, was to place a restriction upon the increase of public debt until the bonds of the State shall be at par. This restriction cannot, under any circumstances, extend to a debt incurred for a casual deficit, or for suppressing insurrection or invasion; and when the bonds of the State are at par, the restriction ceases as to all new debts *in behalf of the State.*

The restrictions in this section require the Legislature to provide for the payment of the interest of any new debt incurred by a special tax. As to this tax the Legislature becomes directly accountable to its constituents, and this is, in general, a sufficient security against improper legislation in a republican government where elections are free and frequent. This section does not regulate taxation, but provides the manner in which new debts are to be incurred for the general welfare of the people. The Convention evidently contemplated the necessity of incurring new debts, outside of the ordinary expenses of the government; and if the State credit had been at par no restriction would have been placed on the Legislature in this respect. The debts to be incurred are to be "in behalf of the State," and for the benefit of all citizens, and not for any special locality or section.

When the State can get par value for its bonds, and expends the money for the equal benefit of all its citizens, then there can be no impolicy or danger in using it credit for such purposes. The debt is incurred by all for the benefit of all. The special tax mentioned in this section must be *adequate* for the purposes intended, and cannot be regulated and restricted by Section 1.

In my opinion, no new rail road can be built with State aid unless the subject is submitted to a vote of the people, &c. (Art. V, Sec. 5.)

If it was intended that the special taxes mentioned in Sections 4 and 5 were to be restricted by the equation established in Sec. 1, then we must believe that the Convention either greatly over estimated the sources of taxation, or was not honest in its solemn pledge, "to maintain the honor and good faith of the State untarnished," and was so unwise as not to provide for emergencies which might arise in the administration of the government. I am not disposed by a narrow construction of Article V of the Constitution, to cast such imputations upon the framers of our government. I cannot believe that the Convention intended to make the very existence of the government dependent upon a certain equation of taxation.

The power of the Commissioners of a County to levy taxes, is limited and regulated by Art. V, Sec. 7, and Art. VII, Sec. 7, as follows:

1st. County taxes shall be levied in the same manner as State taxes.

2d. Such taxes shall never exceed the double of the State taxes, except for a special purpose.

3d. Taxes for a special purpose must have the special approval of the General Assembly.

4th. If this special purpose is for necessary expenses, and is approved of by the General Assembly, then the extent of the necessity is the only limit of the tax.

5th. No debt, &c., can be incurred by a County, except for necessary expenses, unless by a vote of the people.

6th. Necessary expenses are such as are incurred by the Commissioners in the general supervision and control of County affairs, as specified in Art. VII, Sec. 2.

The wisdom of the policy of placing restrictions upon the representatives of the people as to the subject of taxation, has been greatly doubted by the wisest statesmen. It is not my purpose to question the policy, but to construe the instrument which contains it. The consideration of the great interests of the State, as connected with a liberal and enlightened system of internal improvements, belongs not to the judicial forum. Judges must construe the law as it is written.

I concur in the opinion that the proceedings in this case must be dismissed.

SETTLE J. I do not propose to discuss all of the questions involved, but merely to state my conclusions upon some of the most important points. I concurred in the dissenting opinion of Justice READE, filed at the last term of this Court, in *Galloway* v. *Jenkins*, *ante* 147, which case covers some of the questions involved in this. Regarding them, however, as *res adjudicatæ*, I have not sought to disturb that opinion, but have acquiesced in its conclusions.

In this case, I am of the opinion that the first objection presented by the Chief Justice is fatal, and that the motion for a mandamus must be dismissed.

This brings us to the consideration of a still more important question, to wit; The power of taxation under the Constitution. It was contended upon the argument that Art. 5, Sec. 1, of the Constitution, establishes an equation between the tax on the poll and property, which cannot be disturbed for any purpose. The reply is, that it is not to be presumed that the sovereign intended to part with this vital power, and we cannot construe vague and uncertain language so as to produce that result.

It is apparent that this construction would effectually destroy the most cherished objects of the Constitution. It would virtually *repudiate* the old debt, notwithstanding the Declaration of Rights solemnly pledges the honor and good faith of the State for its payment, and proclaims to the world "that it shall be regarded as inviolable and never be questioned;" and notwithstanding the further fact that the General Assembly is required by the 4th section of the same Art. of the Constitution, to provide for the prompt and regular payment of the "interest on the public debt," and after 1880, to "lay a specified annual tax," to be devoted to the payment of the public debt. This is a solemn injunction, but not more so than many others in the Constitution. The demands of the present and future are equally as binding upon us as those of the past. I acknowledge them all to their full extent.

The Constitution, Art. 9, Sec. 2, requires the General Assembly to "provide by taxation and otherwise, for a general and universal system of public schools, wherein tuition shall be free of charge to all the children of the State, between the ages of six and twenty-one."

This provision of the Constitution, involving as it does the honor and prosperity of the State, must become a dead letter, ignorance and vice must take the places of intelligence and virtue, and this promise made to the ear but intended to be broken in the heart, must stand as a perpetual reproach. The Constitution, it is true, in Art. 11, Sec. 3, imposes upon the General Assembly the duty of providing for the "erection and conduct of a State's Prison or Penitentiary." And in Sec. 10, of the same Art., it is declared that the General Assembly "shall provide that all the deaf mutes, the blind and insane of the State shall be cared for at the charge of the State. But the erection of the Penitentiary, now in progress, must cease; and our Asylums must drive out their afflicted inmates and close their doors upon them. Bread is asked, but a stone is given.

These beneficent provisions of the Constitution are all to go down, in order to preserve "the equation of taxation," as it is called. But the mischief does not stop even here. It is admitted that the government itself cannot exist twelve months under this construction of the Constitution. Are we to say that the framers of that instrument intended such results, and incorporated into it one provision overriding all others, and before which everything else must bow, even the government itself? By no means. The established rules of construction require us to look to the whole instrument; by doing so, in this instance, all the parts may be reconciled, and each perform its proper functions.

I conclude that the "equation of taxation" applies only to the ordinary expenses of the State government. It does not apply to the public debt.

Having discarded the "equation of taxation," except for limited purposes, I mst go where the principle carries me.

I am unable to see how a line can be drawn leaving the *old debt* and the debt in behalf of *unfinished* roads on one side, and everything else on the other. This establishment of the line appears to me to be arbitrary. I understand the term public debt, to include, not only the old debt, as it is called and known, and the debt contracted, or to be contracted, in behalf of unfinished roads, but also the debt incurred or to be incurred by the Legislature, in the exercise of its "power (1) to contract new debts, provided par value is obtained for them, without levying any tax; and (2) to contract new debts even if its bonds are below par, provided it lay a tax in the same bill to pay the interest."

I believe there is no diversity of opinion as to the power of the Commissioners to levy taxes for county purposes.

I will not repeat the position, as it is asserted in the Opinions of the Chief Justice and Justices READE and DICK.

PER CURIAM.

SARAH HILL *v.* TOBIAS KESSLER.

The provisions of the State Constitution giving a Homestead and other Exemptions, apply to pre-existing contracts, as well as to such as were entered into afterwards; and do not thereby violate the provisions of the Constitution of the United States in regard to the obligation of contracts.

PEARSON, C. J. *dissenting.*

(*Dean* v. *King*, 13 Ire. 20; and *Jacobs* v. *Smallwood*, *ante* 112; cited and approved.)

RULE upon plaintiff, heard by *Cloud, J.*, at Spring Term 1869 of the Superior Court of Rowan.

The plaintiff had sued the defendant to Fall Term 1867 of that Court, and for the prosecution of his suit had given bond on the 3d day of August 1866, with one Hodge as surety. At Spring Term 1869 this rule was obtained, to show cause why

other and better security should not be given, upon an affidavit that Hodge, since the preceding Term had had his homestead and personal property exemption laid off in pursuance of Art. 10, of the State Constitution, "and now has no property either personal or real, which is not embraced in the exemption as aforesaid."

His Honor being of the opinion that the exemption in the Constitution did not apply to a contract created before the adoption of that Constitution, discharged the Rule; and the defendant appealed.

Blackmer & McCorkle, for the appellant.
Boyden & Bailey, contra.

READE, J. The question involved in this case is, whether the provision in our State Constitution exempting certain property from execution sale, impairs the obligation of pre-existing contracts.

The provision in the Constitution is as follows:

Art. X, Sec. 1. The personal property of any resident of this State to the value of five hundred dollars, to be selected by such resident, shall be and is hereby exempted from sale under execution or other final process of any Court, issued for the collection of any debt.

SEC. 2. Every Homestead and the dwelling and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the owner thereof &c., shall be also exempted."

There has been suitable legislation to carry out said provision.

We concede that if this exemption impairs the obligation of contracts, either expressly or by implication, it is against the Constitution of the United States, and therefore void.

The obligation of a contract is the duty of its performance according to the terms thereof. Any act which alters its terms, or enables either party, without the consent of the other, to alter or evade its terms, impairs its obligation, and is therefore void. A promises to pay to B $100 on a given day. An

act requiring him to pay a day earlier, or allowing him to pay a day later, would alter the terms as to time, and impair the contract. So an act requiring him to pay $101, or allowing him to discharge the debt with $99, would alter the terms as to the amount, &c.

We concede, also, that a contract must be understood to be made with reference to existing laws for its enforcement. And if, at the time of the contract, there are laws in existence for its enforcement, it is the same as if the State were to say to the parties, there are now and so there shall continue to be, laws to enable each party to enforce the contract. And after such assurance, if the State abolish, or injuriously change the remedy, it would be violative of the Constitution of the United States, and therefore void.

The contract in this case was made before the constitutional exemption, and, therefore, when the debtor agreed to pay the creditor a certain sum, we are to enquire what was the remedy for the enforcement of that contract?

It was to sue him, get judgment, issue a *fi. fa.*, levy upon and sell such property as he might have subject to execution. Observe, not levy upon and sell any particular property, or all he might have; but only such as might be *subject to execution.* What is his remedy now under the Exemption Law? It is to sue him, get judgment, issue execution, levy upon and sell such property as he has subject to execution. What is the difference in the remedy then and now? There is not only no injurious alteration, but there is no alteration at all, so far as the proceedings are concerned.

It was formerly the case that, when a creditor got his judgment he had two remedies; one, the levy upon and sale of property, and the other, the imprisonment of the debtor. The Legislature abolished the remedy by imprisonment, which often brought the money when nothing else would, leaving only the remedy against the property. And then it was contended that the abolishment of the remedy of imprisonment, impaired the contract. But the Courts, in repeated cases, decided otherwise. The true import of the law being, not

that the parties should have any particular or specific remedy, but a substantial and convenient one. In what way does the Constitutional exemption alter or impair the contract which these parties made? How is the remedy changed? What was the law at the time of the contract, and which became a part of it? Was it that all or any portion of the property which the debtor had at the time of the contract, should be liable to execution sale? Was that the creditor's security for his debt? Certainly not. The contract was personal and was a lien upon nothing. Else, how would it be if the debtor had no property? Or if he had any, how would it be, if he should sell it? Or, how would it be with property acquired after the contract? Or how, if a subsequent and more vigilant creditor should get ahead, and take the whole in execution? Or, in case of the debtor's death, how would the widow get dower, or a year's provision? Or, how would funeral expenses have the preference over all other debts? These considerations make it plain, that no such element enters into the contract, as, that any particular property which the debtor has at the time of the contract, or which he may subsequently acquire shall be liable to execution, sale, &c., or that any particular remedy is guaranteed. The guaranty is that the contract shall never be altered by law, and that there shall be a remedy to enforce it: and the contract is made, not only with reference to the remedy existing, but also to such reasonable changes, as the interests of society require, and the State may think proper to make.

Against this view, it is contended, that there are express decisions to the contrary. If there be such by the Courts of our sister States, they are entitled to respectful, and if by the Supreme Court of the United States, or by our own Court, they are entitled to the highest consideration.

The cases most pressed upon our attention in favor of the creditor are *Bronson* v. *Kinzie*, 1 How. 311, and *McCracken* v. *Haywood*, 2 How. 608, both decided by the Supreme Court of the United States. *Bronson* v. *Kinzie*, was a case where it was provided in a mortgage deed, that if the money

secured was not paid at a given time, the mortgagee might enter and sell; and the Legislature of Illinois passed an act to the effect that the mortgagee should not enter and sell, as the contract said he might, but that he might enter and sell, upon certain conditions, not specified in the contract. This was clearly an alteration of the contract, and impaired its obligation. *It changed the contract of the parties.* But, how is the contract changed in our case? Not at all. It stands word for word, as the parties made it. And so too, the remedy, as we have seen, stands word for word.

The other case, *McCracken* v. *Haywood*, arose under an act of the Legislature, which allowed the contract to stand, and the remedy to stand, except that it provided, that when the property levied on should be offered for sale, it should not be sold unless it brought two thirds of its appraised value. The property was offered for sale and would not bring the price. What, then, was the Court to do? The act applied to all the property the debtor had, and to all he might ever acquire. So that, whether he had much or little property, it could not be sold, and by no possible means could the creditor make his money. Clearly here was a deprivation of all remedy. But, how is it in our case? The exemption does not cover all, but only *so much* of the debtor's property, and does not exempt his future acquisitions. It does not clog the execution sale with unusual terms, which was the ground upon which *McCracken* v. *Haywood* was decided, but leaves it unembarrassed. And if it should happen, as in our case, that all the debtor's property falls under the execution, it was not within the purview of the Constitution that it should, but is only the "*accident*," of the debtor's property, and does not affect the law. In the case of *McCracken* v. *Haywood*, the Court ordered the property to be sold for what it would bring, as the *only* remedy left to the creditor.

Our attention was called also to an elaborate opinion of Judge Carpenter, of the Circuit Court of South Carolina, *Purcell* v. *Whaley*, reported in the newspapers, declaring the exemption laws of South Carolina, which are substantially the same as ours, unconstitutional

and void. The authorities relied on by the learned Judge were, among others of less importance, the aforesaid cases of *Bronson* v. *Kinzie* and *McCracken* v. *Haywood;* and we have seen they do not sustain him.

Another case cited by him, and directly in point for him, is *Dank* v. *Quackenbush*, 3 Denio 594, decided first by the Supreme Court, and then by the Court of Appeals of New York. But the attention of the learned Judge was not called to the fact that, in that case, the Judges in the Court of Appeals were equally divided, and, therefore, the decision in the Court below stood; nor to the more important fact that, in a subsequent case, in 1854, in the same Court, *Morse* v. *Gould*, 1 Kernan 281, the case of *Dank* v *Quackenbush* was reviewed and overruled. Again, the case before Judge Carpenter did not involve the point whether the Exemption Laws impaired the obligation of contracts, and, therefore, his opinion upon that question is only a *dictum*. He states the principles involved in the case as follows: "The judgment was by law a vested right, a lien, a contract. Had the State the Constitutional power to divest the plaintiff of his right, and vest them in the defendant? Upon the principles involved in the case, there is no difference between rights by mortgage, and by judgment; the former are specfic the latter general; but both are vested, legal rights," &c. It will be seen, therefore, that the question involved, was not that of impairing the obligation of contracts under the Constitution of the United States, but of destroying liens and invading vested rights, under the Constitution of South Carolina. There is nothing, therefore, in that decision against our position, but the *dictum* of the learned Judge; for it is not pretended that in our case there was any lien or vested right. We are not, therefore, interested to inquire further into the learned Judge's decision, that "liens" and "vested rights" cannot be abolished by the State Convention in framing their organic law.

Our attention was called also to a decision of Judge Orr, of the Circuit Court of South Carolina, reported in the newspapers, sustaining the South Carolina Exemption Laws.

We are not aware of a single decision, except as before

stated, either in the Courts of our sister States, or of the United States, in which general exemption laws have been held to be an infringement of the Constitution of the United States. There being no decision against them, let us see if there are any in their favor.

The Legislature of New York, in 1842, passed an act, exempting from execution, in addition to former exemptions, "necessary household furniture, working tools and team, not exceeding $150 in value." The creditor obtained a judgment upon a debt existing before the act, and levied on the debtor's team, a pair of horses, and the question was, whether the exemption was good against pre-existing debts. The opinion of the Court was elaborate and able, and that the exemption was good—*Morse* v. *Gould, supra.* The opinion is the more important, as it reviewed and overruled a former case in the same Court, *Dank* v. *Quackenbush*, cited by Judge Carpenter.

It also reviewed the cases of *Bronson* v. *Kinzie*, and *McCracken* v. *Haywood*, and indeed all the cases bearing on the subject, and distinguished them from that, as we have from this. In a late case in 9 Wisconsin, 559, *Baumbach* v. *Bade*, the case of *Morse* v. *Gould, supra*, is reviewed and approved. And in *Bronson* v. *Kinzie*, Taney, C. J., says: "A State Legislature may, if it think proper, direct that the necessary implements of agriculture, or the tools of a mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments; and regulations of this kind have always been considered in every civilized community as properly belonging to the remedy, to be exercised or not, by every sovereignty, according to its views of policy or humanity. It must reside in every State to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits, which are necessary to the existence and well being of every community."

And in a subsequent case, *Planter's Bank* v. *Sharp*, 6 How. 301, Mr. Justice Woodbury, in delivering the opinion of the Supreme Court of the United States, enumerated exemption laws, among the examples of legislation, which might be

constitutionally applied to existing contracts. And in *Bigelow* v. *Pritchard*, 21 Pickering, the Supreme Court of Massachusetts decided that the Legislature might lawfully diminish the creditor's remedy to enforce judgment, by exempting a part of the property of the debtor from attachment on mesne process, or levy of execution; for example, articles of furniture, bed and bedding, &c., necessary for a debtor and his family. And in *Morse* v. *Gould*, *supra*,, it is said that general exemption laws are valid, "though a case might happen, possibly, where the exempt property would constitute all that the debtor possessed." And in a late case, *Stephenson* v. *Osborne*, 41 Miss. 119, reported in the April number of the American Law Review, p. 476, the Supreme Court of Mississippi decided that the Mississippi exemption law "was constitutional as to contracts existing at the time of its passage." We have a decision of our own Court directly in point. In *Dean* v. *King*, 13 Ire. 20, the Court decides, Ruffin, C. J. delivering the opinion, that the exemption of "a mare and five hogs," under the act of 1848, was good against a debt contracted in 1846.

The case of *Dean* v. *King* was this: The exemption laws of 1844 applied to debts contracted after 1st July, 1845, and it was insisted that the debt in that case was *contracted* before 1st July, 1845, although the bond for the contract was not executed until 1846. The Court said the exemption was not made under the law of 1844, because "a mare" was not embraced in that law, but was made under the Act of 1848, and that it was valid. It is true that it does not appear that it was objected, that the Exemption Act of 1848 could not apply retrospectively, but it could not have escaped the attention of the Court, nor of the two eminent counsel who argued the case that an exemption law of 1848, applied to a debt of 1846, did operate restrospectively as to the debt affected by it.

We have, too, our legislative construction, and the practice of our Courts under it, for the last twenty years. The Revised Code, adopted in 1856, makes the exemption of "one cow and calf, ten barrels of corn or wheat, fifty pounds of bacon, beef or pork, or one barrel of fish, all necessary farm-

ing tools for one laborer, one bed, bedstead and covering for every two members of the family, and such other property as the freeholders may deem necessary for the comfort and support of such debtor's family; such other property not to exceed fifty dollars," apply to all debts contracted since July 1st, 1845. It is true that, by the Act of 1844, some of these Articles were exempted, but the bulk of them were not embraced in any exemption act until 1848, and yet they were made to apply to debts as far back as July 1st, 1845.

So in 1866–'67, our Legislature passed an Act exempting "All necessary farming and mechanical tools, one work horse, one yoke of oxen, one cart or wagon, one milch cow and calf, fifteen head of hogs, five hundred pounds of pork or bacon, fifty bushels of corn, twenty bushels of wheat, and household and kitchen furniture, not exceeding $200 in value." And this was not restricted to subsequent contracts. Which is the more significant, as by the same Act a Homestead of one hundred acres without regard to value, was restricted to subsequent debts. So that exemptions applying to antecedent debts have had the sanction of our Legislature and of this Court, and of the practice of all the Courts, for the last twenty years.

But then it is said that while that may have been so in regard to *necessaries*, yet our exemptions are too large; they are not necessaries. If it be conceded that the Legislature has power to exempt any thing as to existing debts, then what are necessaries, is a question for the Legislature and not for the Court. But our exemption laws heretofore have not been restricted to mere necessaries, but have looked to the "comfort and support of the debtor's family," Revised Code, *Supra;* and the exemptions have been repeatedly and considerably increased, to keep pace with the change of manners and customs, and the condition of our people. It will readily appear that the late exemptions of personal property, in many instances, might greatly have exceeded $500. If the Legislature can exempt personal property, it is not pretended that it may not in like manner exempt real estate—a homestead.

It is objected that the Homestead law ought not to be con-

strued to operate restrospectively. We admit that this is the general rule of construction; with an exception, however, in favor of remedial and, as sometimes called, beneficial laws. All our laws in regard to remedies and procedure, have been lately altered by the new Code of Civil Procedure, and made to act retrospectively. No debt, no matter when contracted, can be sued for and recovered now as before the Code. Even the Courts themselves have been changed.

By the act of 1808, a summary remedy, by motion for judgment on ten days' notice was given against Sheriffs for collecting money and failing to pay over. A motion was made against a Sheriff for an antecedent liability. It was objected that the act did not operate retrospectively. But this Court held the contrary, saying that, "when an act takes away from a citizen a *vested right*, its constitutionality may be inquired into; but when it alters the remedy or mode of proceeding as to rights previously vested, it certainly runs in a constitutional channel. These acts are beneficial and should be favorably construed." *Oats* v. *Darden*, 1 Murphy, 501.

So a State Legislature may discharge a party from imprisonment upon a judgment in a civil action, without infringing the Constitution; for this is but a modification of the remedy; 3 Story on the Con. 251, *Mason* v. *Hiate*, 12 Wheaton, 370.

A Statute changing the rules of evidence may be applied to pending suits. Cooly, Con. L. 381.

So a statutory privilege is not a vested right; as exemptions of persons or property from taxation, or exemptions of property from being seized by attachment, or execution, *Ib.* 383.

So homesteads, or other property which are now exempt under the Constitution, may be made liable by a subsequent Convention, *Ib.* N.

If, therefore, the homestead laws were not retrospective *in terms*, yet, as they are remedial, beneficial laws, interfering with no vested rights, and are a part of the fundamental law of the land, they ought to be liberally construed in favor of the person to be benefited. But we think they do not depend upon *construction*. The plain words are that they shall apply to "any debt"—all debts. And it is only by construction,

and we think an erroneous construction, that they can be restricted to any particular class of debts.

But really the homestead and exemption laws, although affecting antecedent debts, are not retrospective in the proper sense of that term. What would be a prospective homestead law? Evidently that which should allow a homestead *to be laid off hereafter*. What, as contra-distinguished from that, would be a retrospective homestead law? Evidently that which makes valid a homestead which *has been laid off heretofore*. The great error is in supposing that the homestead law is a law to defeat debts. That is no part of the object of the law. The laying off a homestead is the sole object, and is prospective altogether. If any debt is affected by it, it is merely incidental. It may be conceded, therefore, without affecting the homestead, that any law, the purpose of which is to defeat a debt, is void. But the homestead law declares its object upon its face to be, not to defeat debts, but, to allow to every resident of the State, "and his children," and his "widow," a home, and the means of living, if they have them. It is a question, not of defeating debts, but, in the language of Chief Justice TANEY, "it is a question of policy and humanity, which every civilized community regulates for itself."

Its wisdom or folly, justice or injustice, is a question for the law making power, and not for the Courts. In our case, the law has the sanction of the Convention and of the Legislature, and of the direct vote of the people in adopting the Constitution, and of the Congress of the United States which approved the Constitution. And, as it is not in contravention of the Constitution of the United States, it would be an assumption of extraordinary power for us to declare it void.

With the policy of these exemptions this Court has nothing to do. If they are within the power of the Legislature, then it is sufficient for us that, "thus it is written."

We have not thought it necessary to notice the suggestion, that inasmuch as the sale of lands under the execution is by Statute, so it may be exempted by Statute.

No question arises in this case as to the interference with

vested rights under our State Constitution, because the exemption is a provision in the Constitution itself. The only question is, whether it impairs the obligation of contracts, under the Constitution of the United States. We think it does not. *Jacobs* v. *Smallwood, ante*, 112. This will be certified, &c.

RODMAN, J. I concur in the conclusions of a majority of the Court—but not entirely in the reasoning of the Opinion of my learned brother, Justice Reade. I prefer to rest my judgment on the course of reasoning followed by me heretofore, in my Dissenting Opinion in *Jacobs* v. *Smallwood, ante* 112; that is to say, upon the ground that the Homestead Act affects *the remedy* merely, and that *the remedy* (except in certain extreme cases adverted to in that Opinion) is wholly within the jurisdiction of the States.

PEARSON, C. J., *dissentiente.* The express prohibition of "*ex post facto* laws" is confined to criminal offences, but the broad principle of justice on which it rests extends as well to civil rights, and it is a settled rule of construction that a retroactive effect is never to be given to a law, unless the words used admit of no other meaning, and show beyond question that past transactions are within its operation. "General and vague words have never been allowed to have that effect." Broom's Legal Maxims, 41.

In our case the words, in the Constitution, are, shall be exempt from sale under execution "for any debt." Very comprehensive, but at the same time very indefinite. The statutes carrying out this ordinance adopt the same words without explanation. Giving to them the meaning of "any debt" hereafter contracted there is no injustice, for people will know who is to be trusted; giving to them the meaning of any debt, as well debts heretofore as debts hereafter contracted, there is gross injustice, and a violation not only of the ordinary notions of honesty, but of a fixed principle of the common law, reaffirmed by statute law, 13 Elizabeth, "All gifts and voluntary conveyances of his property by a debtor are void as

against existing creditors," on the ground of *fraud*. I hesitate to give to these indefinite words a construction which imputes to the law makers a fraud in this; it makes a gift or voluntary conveyance to the debtor himself, in fraud of existing creditors, of property, on the faith of which he received credit, and of which he cannot by law make a voluntary conveyance to another. Courts are to be governed not by what the draftsman of a law is supposed to have meant, but by what the words used mean, according to the settled rules of construction. This maxim should especially be adhered to, when the law is submitted to a vote of the people, for it is not decent to suppose that indefinite words were used, that some might vote for it giving one meaning, and others another.

II. "No State shall pass any law impairing the obligation of contracts." These comprehensive words are not confined to a prohibition against altering the terms of a contract, but, also forbid impairing its obligation. What is the obligation of a contract? The means of compelling performance, according the laws in force, at the time the contract is made; by these laws the parties agree to abide; by these laws their rights are fixed. This is the obligation which must not be impaired by a State, whether acting in Convention or in General Assembly.

We are told: "There are now, and so there will continue to be, laws to enable each party to enforce the contract, and after such assurance, if the State abolish, or seriously change the remedy, it would be in violation of the Constitution of the United States, and therefore void."

In this I fully concur, and the question is—not confusing the subject with a multitude of cases or with many words—does or does not, the "Homestead exemption" of $500, personal property and $1,000 value of land, injuriously change the remedy, and alter the laws in force at the time the contract was made. In other words, is not the *obligation* of this contract impaired by the Homestead exemption? It is set out in the record, that besides the property exempted this debtor has nothing. So the contract cannot be enforced, and its obligation is *destroyed*, not simply impaired.

It is said, "the remedy is not at all changed, for the creditor can take judgment and issue a writ of *fieri facias*, just as he could have done when the contract was made." All this is very true, and it is equally true, that in nine cases out of ten the Sheriff will return on the *fieri facias*, "nothing found except property exempted by homestead law." This is the shadow, but not the substance. The creditor trusted to the property which the debtor had, at the time of the contract, as the means of enforcing it, and to that law by which a voluntary conveyance is declared fradulent and void—that was the obligation, or the thing that binds—and yet it is held, as I think under the unconscious bias of pressing circumstances, that a law which bestows this property on the debtor, to the injury of existing creditors, does not impair the obligation of contracts.

It was urged on the argument: By the common law, wearing apparel, arms for muster, tools of a tradesman, and a bed and furniture, are exempted: (and these articles were not looked to and were not included in the obligation,) then, by Statute, certain other articles, i. e., Bible, hymn book, and school books, and finally a horse, not to exceed in all the value of $200, were exempted. Now, because creditors did not choose to make a point about these small matters, that is relied on as fixing the power of the General Assembly to make exemptions against existing debts; and the power being thus established, the extent of its exercise is a matter of legislative discretion! "Give an inch, and take an ell!" First, assume the power to exempt a Bible, hymn book and school books; then a horse may be added, then $200 worth of property, then $500, then $1,500 including land, then $5,000, and then exempt everything, for there is no limit, save Legislative discretion! Indeed, the Statute under consideration, I believe, exempts every thing owned by debtors, in nine cases out of ten.

In reply to the argument drawn from Legislative sanction, one fact counterbalances the whole. In 1822, the Legislature deemed it wise to modify the law of imprisonment for debt as an obligation of contracts. After full discussion the act pro-

vides: "Any person arrested under *capias ad satisfaciendum* for any debt contracted after the 1st day of May next, may give bond to appear, &c., and shall not be confined in jail, as before."

I am aware, that in several of the States decisions have been made sustaining homestead laws. These cases all rest on the fallacy of assuming the power to make exemptions to some extent, and then, on the idea of Legislative discretion, the amount is swelled up to thousands; and it is justified on the ground of "keeping pace with the progress of the age," a progress in this particular, I fear, of dishonesty and fraud. I choose to rely on the cases in our own Court. *Jones* v. *Crittenden*, 1 Car. Law Rep. 385. *Barnes* v. *Barnes* 8 Jones 366.

PER CURIAM. Order below reversed;
Let this be certified.

THE STATE *v.* WESLEY HAIRSTON and PUSS WILLIAMS.

The provisions of the Act (Rev. Code, c. 68, s. 7) declaring intermarriages between whites and persons of color to be *void*, are still in force in this State; not having been affected by recent changes of the Constitution of the State, or of the United States; or by the Civil Rights Bill.

(*S.* v. *Underwood*, *ante* 98, cited and approved.)

INDICTMENT for Fornication and Adultery, tried before *Cloud*, J., at Spring Term 1869 of the Superior Court of FORSYTHE.

Upon the trial it appeared that the defendant Hairston was a colored man, and the defendant Williams a white woman; and that they were cohabiting as man and wife at the time of the finding of the bill. The defence was that they had been duly married. The facts established a marriage, if such relation could exist between parties, one of whom is colored and the other white.

His Honor instructed the jury, that by the law of the State the alleged marriage in this case was a nullity.

Verdict, Guilty; Rule for a New Trial; Rule discharged; Judgment, and Appeal by the defendants.

Attorney General for the State.

No counsel, *contra*.

READE, J. The only question in this case is, whether the intermarriage of whites and blacks is lawful.

By our Marriage Act, "All marriages since the 8th of January, 1839, and all marriages in future between a white person and a free negro, or a free person of color to the third generation, shall be void."—Rev. Code, c. 68, s. 7.

Late events, and the emancipation of the slaves, have made no alteration in our policy, or in the sentiments of our people. And lest it might be supposed that there was, or would be, a change, the Legislature, in 1866, re-enacted the marriage act. And thus the law stood at the time of the adoption of our new Constitution. The Constitution was adopted by a large popular vote, both whites and blacks voting. In the Constitution it is provided that, "the laws of North Carolina, not repugnant to this Constitution, or to the Constitution and laws of the United States, shall be in force until lawfully altered." Art. IV, S. 24.

It thus appears that we have not only the plain letter of the acts of the Legislature; but the sanction of the Constitution, that the intermarriage of whites and blacks is against public policy, and is unlawful. And as this is a matter affecting the social and domestic relations, it is gratifying to know that the law has the sanction of both races. It is no discrimination in favor of one race against the other, but applies equally to both. At the last term, in the case of the *State* v. *Underwood*, *ante* 98, we decided that the act forbidding persons of color to be witnesses, except against each other, was repealed by the Constitution, as being repugnant to its spirit, and inconsistent with our altered condition. But that was because there was a discrimination between the races in civil rights. Here there is no discrimination. The law operates upon both

races alike; neither can marry the other; nor is it repugnant to the spirit of the Constitution, or subversive of civil rights, but is in consonance with both.

It was insisted that the Civil Rights Bill has declared a different policy, and has changed the law. It is not necessary that we should decide whether the operation of that bill ended with the cessation of our Provisional relations with the United States, or whether it is operative now; for by its terms it has no application to the social relations. Its object was, and its terms are, to declare equality between all citizens without regard to race or color, in the matters of making business contracts, suing in the Courts, giving evidence, acquiring property, and in the protection of person and property. And this is nothing more than our own State Constitution has done. But neither the Civil Rights Bill, nor our State Constitution was intended to enforce social equality, but only civil and political rights. This is plain from their very terms; but if the terms were doubtful, the policy of prohibiting the intermarriage of the two races is so well established, and the wishes of both races so well known, that we should not hesitate to declare the policy paramount to any doubtful construction.

The marriage relation is a peculiar and important one. The Courts treat it as a contract, only in the sense that contract—consent of parties—precedes it, and is essential to its validity. But when formed, it is more than a civil contract, it is a *relation*, an *institution*, affecting not merely the parties, like business contracts, but offspring particularly, and society generally. And every State has always assumed to regulate it, and to declare who are capable of contracting marriage,—what shall be the ceremony, what shall be the duties and privileges, and how it shall be dissolved. These things have never been left to the discretion of individuals, but have been regulated by law. Among other things, our marriage law declares that the white and colored races shall not intermarry. The pretended marriage in this case was, therefore, invalid, and the parties guilty of fornication and adultery.

Let this be certified, &c.

PER CURIAM. No Error.

S. S. HARRELL, Administrator, &c. v. MEREDITH WATSON and others.

Bonds require no consideration.

The sale of a slave in September 1864, in North Carolina, constituted *a valuable consideration* for any promise made to pay for the same.

The Emancipation Proclamation of President Lincoln, and the Act of Congress of July 1862, by their terms operated only upon particular slaves, and did not affect *the institution of slavery*; So also, the order of General Schofield, made after the Surrender.

The buying and selling of slaves in the ordinary course of business, in North Carolina, in 1864, was then against neither good morals, nor public policy; and no retroactive effect to that end can be attributed to the subsequent emancipation of slaves, and abolition of the institution of slavery by law.

(*Buie* v. *Parker, ante* 131, *Hooker* v. *Phillips*, Phil. Eq. 193, *Woodfin* v. *Sluder*, Phil. 200, cited and approved.)

DEBT, tried before *Pool, J.*, at Spring Term 1869 of the Superior Court of HERTFORD.

The plaintiff declared upon a plain bond, "for value received" promising to pay to him one thousand dollars, with interest from date, and dated the 26th day of September, A. D. 1864.

The defendants pleaded General issue, Payment and Set off.

The bond had been given in part payment of the price of a slave, purchased by Watson at an Administrator's sale by the plaintiff, in Hertford county on the day of the date. The terms of sale were, that purchasers might pay in Confederate currency, to the amount of $1,000; and, for any sums in excess payment would be required in notes of the banks of this State, and for such excess bonds must be given with good security, bearing interest from the day of sale. At the sale Watson purchased a negro boy under 21 years of age, for the sum of $2,000, and having paid one-half thereof, gave bond for the other half, according to the terms of sale. The value of bank notes, in gold, was shown to be 25 per cent., or, as one to four.

Upon the above case, the Court instructed the jury that the

plaintiff was entitled to recover the value of the bond in gold, and accordingly there was a verdict and judgment for $250 *in gold*, with damages for detention, &c.

The defendants excepted to the ruling, and having moved for a new trial, &c., appealed.

Yeates and *Barnes*, for the appellants.

1. The consideration of this bond may be inquired into. Acts of Assembly of 1866, chs. 38 and 39.

2. The bond was given after the Emancipation Proclamation of President Lincoln, a war measure vital to the Government. See also Acts of Congress of 1862, ch's. 40, 111, 195, 201, Milligan's case, 4 Wall. 2, and C. J. Chase's dissenting opinion therein.

3. The particular result of the war instead of discontinuing this war measure, actually ratified and maintained it *ab initio*.

4. The negro here was under age, and if the construction be that the Proclamation was limited to such as availed themselves of it and escaped into the lines, the Courts will give infants all the benefits of a presumption that they would have escaped if of full age. Laches will not be imputed to them.

5. As matter of public history the military forces of the United States frequently invaded and at one time overran the district where this boy resided previously to the sale.

6. The Courts of North Carolina being wrongful when Harrell was appointed administrator, he was not such at the sale, and so could not sell, or take a valid bond, and the Convention of 1865 had not the power to create a contract by the defendants without their consent.

7. A debt created in purchasing a slave, is an incident to slavery, and disappears with its principal.

8. Under the Act of the Legislature the recovery should have been limited in amount by the value of the thing bought, which here is to be measured by the time of actual service. At all events the verdict and judgment *for gold*, are incorrect: and should have been for United States currency.

They cited *Hayley* v. *Hayley*, Phil. Eq. 180, *Ex parte* Hughes, Phil. 57, *Buie* v. *Parker*, *ante* 131, *Blossom* v. *Van Amringe*, Phil. Eq. 133, *Wiley* v. *Worth*, Phil. 171.

9. When were the slaves in North Carolina emancipated? Would the sale of one after the surrender and before the passage of the ordinance of emancipation, have been valid? If not, why?

Smith Contra.

The proclamation of the President of the United States emancipating the slaves in this State on the first day of January 1863, was an exercise of force called for by the exigencies of war, and finding its justification in the principles of law applicable to a state of war. It is valid so far and no farther than it can be made effectual by force. The slave in question was not in fact set free by force, and therefore never legally became free until the adoption of the ordinance of emancipation by this State. Dana's Wheaton, Sec. 347, Note 8, latter part.

This view is sustained by,

1. The requirement by the Executive of the United States of an ordinance of emancipation.

2. The condition inserted in the amnesty proclamation, and the special pardons issued.

This Court has virtually so held in reference to the hire of a slave in 1865. *Woodfin* v. *Sluder*, 1 Phil. 200. But, if without consideration, the bond is valid, and no defence is available in this action.

PEARSON, C. J. We listened with pleasure to the argument of Mr. Yeates. He was candid, and seems to have investigated the subject with much diligence; but we cannot concur in his conclusions.

He says, the bond is void for want of a consideration. The reply is: 1st. A bond needs no consideration. The solemn act of sealing and delivering is a *deed, a thing done*, which, by the rule of the common law, has full force and effect, without

any consideration. *Nudum pactum* applies only to simple contracts—deeds need no consideration, except such as take effect under the doctrine of uses, or such as are made void by the statutes of Elizabeth as against creditors and purchasers for valuable consideration, but are valid, as at common law, between the parties.

This is a misapprehension of the law into which many of the profession seem to have fallen by reason of inaccuracy in Blackstone's Commentaries, who, we take occasion to say, is a popular, and not an accurate text writer, like Coke or Fearne. For instance, Blackstone adopts the definition given by Coke of a deed—"an instrument of writing, on parchment or paper, sealed and delivered"—and yet he afterwards goes on to say, "a deed must be supported by a sufficient consideration." His remark is evidently to be understood, as having reference to deeds taking effect under the doctrine of uses, and to the statutes of Elizabeth. For, beyond all question, a deed is binding between the parties without any consideration. 2nd. There was, in our case, a valuable consideration. The slave bargained for, was delivered to the defendant at the date of sale in September 1864, and he had his services until 1865; and upon the supposition that the thing sold, to-wit: the negro, was in fact a freeman, and not the subject of sale from and after the proclamation of Jan. 1, 1863, the defendant had notice of this fact, as well as the plaintiff, and according to the rule of law and of equity, and of justice in its ordinary sense, "he who is to have the gain should bear the loss," as is said, *Buie* v. *Parker*, *ante* 131. The matter depended upon future contingencies, and the defendant gave his bond for the price, and took the chances.

The reference made by Mr. Yeates to the law authorizing an inquiry in regard to contracts payable expressly or impliedly in currency, and allowing a jury to fix the value thereof, has no application to our case, for it turns not on the value, but on the *validity* of the obligation sued upon.

In the second place, Mr. Yeates took the position that the bond was void as against the policy of the law, in this: By the proclamation of the President, of January 1st, 1863, all slaves

are set free from and after that date. So that at the time of the sale, the person sold was not a slave, but a free man.

Admitting the premises, we do not see how the conclusion follows. Say, according to the view of President Lincoln, the person sold was a free man at the time of the sale, how could it obstruct his policy, that the supposed title to the person as a slave was afterwards transferred from A to B. Certainly it could make no difference in legal effect, whether the individual was held as a slave by the one or the other, provided, under the existing state of things, the individual was to be held as a slave in the same locality.

But we do not admit the premises, to-wit: that by force of the proclamation of the President, all slaves are set free from and after January 1st, 1863.

By the act of Congress of July, 1862, "The slaves of persons who shall hereafter give aid to the rebellion, taking refuge within the lines of the army," and "all slaves captured from such persons, or deserted by them, and coming under the control of the government of the United States," and "all slaves of such persons, found or being within any place, occupied by rebel forces, and afterwards occupied by the forces of the United States, shall be deemed captives of war, and shall be forever free of their servitude, and not again held as slaves."

This act of the *legislative* branch of the government of the United States is, by its terms, confined to slaves personally, and applies only to such individuals as may come under the control of the government. It recognizes the existence of slavery, and cannot, in any point of view, have the effect of *abolishing and making unlawful the institution of slavery* in the States where the institution then existed and was recognized by law.

The proclamation of the President is simply a war measure of the *executive* branch of the government, called for in order to announce what States were in rebellion, and to what localities the act of 1862 was applicable. It does not, perhaps, and indeed the President, without the concurrence of the legislative branch of the government, could not arrogate to him-

self the power, as a war measure, to abolish and make unlawful the institution of slavery in the States declared by him to be in rebellion. So far from assuming power to do so, the proclamation is, by its terms, confined to slaves personally, and in its practical effect it was limited to such slaves individually as should come under the control of the armies of the United States. So the *institution of slavery* was not abolished or made unlawful, either by the act of 1862, or by the proclamation of the President. See "Whiting on the War Powers of the President," 5–6.

In like manner the military Order of Gen. Schofield, after the Surrender, simply had the effect of announcing, that the whole State was then under the control of the army of the United States, and that by force of the act of 1862, and the proclamation of the President, and the order of Gen. Schofield, as military commander, all persons then held as slaves in the State of North Carolina were free and should be so treated. This operated upon persons then held as slaves in the State of North Carolina. But surely a military order could not have effect of abolishing or making unlawful the institution of slavery. That was left as an act that could only be done by the *government* of the United States, or by an ordinance of a convention of the people of the State. Apart from the action of the *government* of the United States, and the convention of the State, there could have been, in legal contemplation, no more wrong in procuring other slaves to supply the place of those taken from us by the results of the war, than in buying other property to put in the place of that taken from us by the armies of the United States and of the Confederate States.

So our case comes back to this point; in April, 1864, the plaintiff, as administrator, in the county of Hertford, which was not within the lines or under the control of the army of the United States, offers for sale, according to the laws of the State, and does sell at auction, a negro man slave. The defendant becomes the purchaser, pays a part of the price, takes the slave, and executes his bond for the balance of the price. In what point of view can this transaction be considered

against public policy, or as so violating good morals as to authorize a court of justice to refuse to enforce the contract? As is said *Phillips* v. *Hooker*, Phil. Eq. 193 "the transaction was one in the ordinary course of business, done without any reference to the operations of the government of the United States, or of the Confederate States, without any criminal intent to aid the rebellion, and to hold the contract void, will simply have the effect to encourage dishonesty."

It was not against the public policy of the State of North Carolina, according to the laws then existing and recognized both by the wrongful government then in power, and the rightful government which was, for the time, deprived of its power. It was not against the policy of the act of Congress of 1862, nor of the proclamation of the President; for, as we have seen, it could not affect that policy, in localities not under the control of the armies of the United States, whether a person was held as a slave by A or B, provided, under the circumstances, he was to be the slave of some person. So far as good morals are involved, the matter is not to be viewed, as we conceive, from a standpoint, where the institution of slavery is deemed wicked and in violation of the laws of God and of the rights of man, but from a standpoint where the institution was considered as established and made lawful by the laws of the State, and recognized and protected by the Constitution of the United States, and had been handed down and acted upon from father to son among our people, from the first settlement of the colony of Carolina.

The Court is unable to see any ground, either on the score of public policy or of good morals, upon which it should refuse to enforce this contract, and allow the defendant to escape the payment of a just debt.

Woodfin v. *Sluder*, Phil. 200, is in point. True, the question was not made, but that proves that it had not entered into the head of any one to conceive that the act of hiring a slave or of selling a slave in North Carolina outside of the lines of the United States Army, was against public policy, or against good morals.

The idea, that the subsequent action of Congress and the

ordinance of our Convention, can have the effect by relation, or by *post-liminy*, to enlarge the operation of the act of 1862 and of the proclamation, so as to give to those measures the effect of abolishing slavery, and making the institution unlawful at the date of this transaction, and consequently, making the act of the parties wicked and against good morals, has, in our opinion, nothing sound to rest on, either in law, ethics, or good sense. "Coming events cast their shadows before," and "events accomplished" do not cast a shade *behind*, so as to make unlawful that which, at the time it was done, was not against law. This would violate the immutable principle of justice adopted in our Constitution, by which *ex post facto* laws are fobidden.

PER CURIAM. Judgment affirmed.

C. N. McADOO *v.* D. W. C. BENBOW, Administrator, &c.

The Act of March 16, 1869, "Suspending the Code of Civil Procedure in certain cases," is not unconstitutional, in requiring writs in civil cases to be "returned to *the regular term* of the Superior Court," &c., instead of, the Clerk's office, as heretofore.

The phrase "Superior Court" in Art. 4, Sec. 28, of the State Constitution, does not mean the Court of the Clerk.

RODMAN, J., dissenting.

MOTION to dismiss a writ of Summons, heard before *Tourgee, J.*, at the Superior Court of GUILFORD, at Chambers, on the 1st day of July, 1869.

The plaintiff, on the 14th day of June 1869, had issued a writ of Summons, asking "for a judgment according to the prayer of the complaint," returnable at the office of the Clerk, &c. Upon the 18th of June 1869, a motion to that effect having been made by the defendant, the Clerk dismissed the Summons, on the ground that it should have been made returnable to the regulor term, &c.

Upon an appeal to the Judge of the Superior Court for the

7th Judicial District, His Honor reversed the Clerk's judgment, upon the ground "That the Act of Assembly requiring the Summons in all cases to be made returnable only to the regular term of the Superior Court is in direct conflict with Art. IV, Sec. 28, of the Constitution of this State. The making up of issues is certainly part of the "business" for the transaction of which the Courts are "at all times open." The provision making the Summons returnable only at term would close the Courts for this "business" for *eleven months* in each year."

Thereupon the defendant appealed to this Court.

Battle & Sons, for the appellant.

Phillips & Merrimon, contra.

Pearson, C. J. His Honor decides that the statute entitled, "An act suspending the Code of Civil Procedure in certain cases," is unconstitutional in respect to the enactment: "Writs of summons shall be returnable to the regular terms of the Superior Courts," because, as he claims, it violates Art. IV, Sec. 28, of the Constitution.

No Court should declare a statute to be void, except in a clear case, for it is supported by the presumption of intelligence in the legislative branch of the government.

The Court is of opinion that, in the particular now under consideration, this statute does not violate the Constitution, and that his Honor erred in holding that the General Assembly has not power to repeal, suspend, modify or change, the Code of Civil Procedure, in respect to the judicial functions conferred by it upon the Clerks of the Superior Courts, other than those conferred by the Constitution itself.

The question is, does the Constitution divide the Superior Court so as to confer certain of its functions upon the Judge proper, and certain other of its functions upon the Clerk, as Judge subordinate: among others, "jurisdiction to hear and decide on all questions of practice and procedure, arising in actions brought to this Court;" and "on all other matters,

whereof jurisdiction is hereby given to the Superior Court, unless the Judge of said Court, or the Court at the regular term thereof, be expressly referred to." C. C. P. Sec. 108.

Is this so ordained by the Constitution? There is no express provision to that effect. So we come to the point: Is this power conferred on the Clerk by the Constitution, or only by the Code?

It is claimed that Art. IV, Sec. 28, of the Constitution, confers these judicial functions on the Clerk. The section is in these words: "The Superior Courts shall be, at all times, open for the transaction of all business within their jurisdiction, except the trial of issues of fact requiring a jury." By itself, the section confers no jurisdiction on any one to act as a Judge, either expressly or by implication. It may as well point to the Sheriff or any one else, as to the Clerk, and only by taking it in connection with Sec. 12, can there be any ground whatever, for any implication. Sec. 12 divides the State into twelve Judicial Districts, for each of which a Judge shall be chosen, who shall hold a Superior Court in each County of said District, at least twice a year, to continue for two weeks, unless," &c. These Dictricts, severally, comprise some seven or eight Counties. The argument is in this wise: Sec. 12 requires the Judges to hold a Superior Court, to continue for two weeks, in each County twice every year: By Sec. 28, "the Superior Court shall be, at all times, open for the transaction of all business," &c: This is impossible if the Judge is to hold the Courts, for he is required to be absent holding Courts in other Counties nearly half of the year: *Ergo*, the Constitution confers on the Clerk of the Superior Court judicial functions, to be exercised in place of the Judge!

Non sequitur! It only follows that Sec. 28 cannot be construed literally. It seems to be a provision taken from the Constitution of a Stat e which appoints a Judge of the Superior Court for *every County*. There it may work well enough. But it must be trimmed down in some way, in order to make it fit in a Constitution which appoints only one Judge of a Superior Court, for Districts of seven or eight Counties. One way is to construe it to mean that the Superior Courts shall

be at all times open for the transaction of such business as can be done in the absence of the Judges, for instance, issuing writs of summons, taking undertaking for appeals, special proceedings for arrests, injunctions, &c., and taking probate of deeds, granting letters testamentary, letters of administration, appointing guardians, &c., where the Clerk acts as Surrogate. Allow that this does not fully satisfy the words of Sec. 28, the question again comes up, what is there in the *Constitution* to confer the judicial functions under consideration upon the Clerks? And that, too, in face of the express enumeration of the judicial functions conferred on them, and set out in Sec. 17. (*Expressio unius exclusio alterius !*)

Sec. 17 is in these words: "The Clerks of the Superior Courts shall have jurisdiction of the probate of deeds, the granting of letters testamentary, and of administration," &c., "and *of such other matters as shall be prescribed by law.*"

This enumeration of the subjects of jurisdiction divides the Superior Court only to the extent of conferring on the Clerk subordinate jurisdiction in respect to certain matters, which had been before exercised by the County Court, and most of which, in other States, is exercised by the Surrogate Court, and in England by the Court of the Ordinary. If it was intended to make a further division of the functions of the Superior Courts in the Constitution, by conferring on the Clerks jurisdiction to hear and decide on all questions of practice and procedure arising in actions brought to said Courts, why was not that set out in the Constitution, like the jurisdiction to grant letters testamentary and of administration, and the other matters enumerated?

Here it may be remarked, in putting a construction upon an instrument the question for the Court is, not what the draftsman meant, but what the words of the instrument means. It sometimes happens for this reason, that the draftsman is less to be relied on than almost any other person to construe an instrument, whether it be a constitution, statute, deed or will.

All difficulty, however, is removed by this clause in Sec. 17: "The Clerks of the Superior Courts shall have jurisdiction "of

such other matters as shall be prescribed by law." Under this clause the General Assembly had power to enact the Code of Civil Procedure, by which the functions of the Superior Court is, to some extent, divided between the Judge and the Clerk; and under this same clause the General Assembly has power to repeal, suspend, modify or change its enactments, so as to make writs of Summons returnable to the regular terms of the Superior Courts.

In this view, the next clause of Sec. 17, "All issues of fact joined *before them* shall be transferred to the Superior Courts for trial," harmonizes; and everything is made to fit. "Issues of fact joined before them:" Whom? The Clerks of the Superior Courts, whether exercising the jurisdiction conferred on them by the Constitution as Probate Judges, or the jurisdiction which may be conferred on them by the General Assembly in its wisdom, under the words, "all such other matters as shall be prescribed by law." As in this particular, the Code of Civil Procedure is a creature of the General Assembly, the Court cannot allow it to be greater than its maker.

RODMAN, J., *dissentiente.* On the 14th of June, 1869, the plaintiff caused to be issued by the Clerk of the Superior Court of Guilford County, a summons to the defendant to appear at the office of the said Clerk within twenty days after its service, to answer the complaint of the plaintiff filed therein, &c. The defendant appeared by his attorney in due time, and moved to dismiss the action, on the ground that the summons was returnable before the Clerk, not in term time, when it should have been before the Clerk in term time. The Clerk dismissed the action, from which the plaintiff appealed to the Judge, who reversed the judgment of the Clerk; and the defendant appealed to this Court.

The summons in this case was issued in conformity to the Code of Civil Procedure, Sec. 73. But by an act entitled, "An act suspending the Code of Civil Procedure in certain cases," ratified March 16th 1869, the Legislature enacts (Sec. 2,) that the summons shall be returnable to the regular term

of the Superior Court of the County where the plaintiffs, or one or more of them, or the defendants, reside," &c. By Sections 4, 5 and 6, the pleadings are to be made during the term, and the issues, whether of fact or law, are to be tried at the next succeeding term of the Court. The other provisions of this act it is unnecessary to notice.

The questions are:

1. Whether the provisions of the Code (§73) requiring summons to be returned before the Clerk, and giving him jurisdiction to decide in the first instance on all questions of practice and procedure, &c, (§ 108) are contrary to the Constitution.

2. Whether the provisions of the Act of Assembly above referred to, in respect to the return of mesne process, and the making up of the pleadings, are contrary to the Constitution.

The importance of these questions can scarcely be overrated, as upon their decision depends the success of the effort made by the Constitutional Convention of the State, to destroy the uncertain and dilatory practice formerly in use, and to restore private credit and a regard for the sanctity of contracts, by giving a speedy remedy.

On the first point: It is contended by the defendant that the Constitution does not sanction the Act of the Legislature in giving to the Clerk the jurisdiction given by sections 73 and 108 of the Code of Civil Procedure, but that such jurisdiction is confined to the Judge of the Court; and that the Code of Civil Procedure in declaring that the Clerk of the Superior Court was to be regarded for the subordinate purposes therein specified as the Court, (§ 9), mistook the meaning of the Constitution.

Art. IV, Sec. 4, of the Constitution, declares in what courts the judicial power of the State shall be vested; it mentions among the courts, Superior Courts, but it does not mention Probate Courts; hence, although there may be courts possessing probate powers, there are no such courts known to the law as Probate Courts. A deduction will be attempted to be drawn from this presently.

Art. IV treats of the Constitution and jurisdiction of Courts of Impeachment and of the Supreme Court: it then comes to the Superior Courts. Section 12 divides the State into twelve judicial districts, for each of which "a Judge shall be chosen, who shall hold a Superior Court in each county in said district at least twice in each year." Section 15 prescribes that "the Superior Courts shall have exclusive original jurisdiction of all civil actions, whereof exclusive original jurisdiction is not given to some other Courts." It will be noted that jurisdiction of probate causes, which are civil actions, is here given to the Superior Courts: the Superior Court is deemed a Probate Court, or else there can be no Probate Court of original jurisdiction at all. Section 16 enacts: "The Superior Courts shall have appellate jurisdiction of all *issues* of law or fact determined by a Probate Judge or a Justice of the Peace, where the matter in controversy exceeds twenty-five dollars; and of matters of law in all cases."

Up to this point it will be seen that the Superior Courts are Probate Courts of original and also of appellate jurisdiction. How is this anomaly reconciled?

Section 17 says: "The Clerks of the Superior Courts shall have jurisdiction of the probate of deeds, the granting of letters testamentary and of administration, &c., and of such other matters as shall be prescribed by law."

Evidently, therefore, the Clerk of the Superior Court is regarded as an essential component part of that Court, and to him, as representing the Court, original jurisdiction over certain matters is given, the appellate jurisdiction over which is given to another component part of the same Court. The phrase in section 17, that the Clerks of the Superior Courts shall have jurisdiction "of such other matters as shall be prescribed by law," it is admitted would ordinarily and apart from their particular connection, give the Legislature the power to confer on the Clerk any jurisdiction not inconsistent with the particular provisions, or the general purview of the Constitution. But in this case it is contended that those

words are limited to a grant of jurisdiction over matters *ejusdem generis;* that is to say, of a character similar to those above recited, which would confine it to probate matters, and exclude the powers over the returns of process and over the pleadings, given by § 73 and § 108, Code of Civil Procedure. This rule of construction is usually applied to a statute limiting a general right, or imposing penalties for certain offences, or to conveyances or contracts relating to a particular class of subjects. In all these cases it is properly held that general words superadded to those of special description are only intended to embrace matters of the same general character with those previously specified. Dwarris on Statutes 737, 9 Law Library, 69.

But in this case that rule cannot apply. Section 17 and the previous sections have established the Superior Courts as of a complex organization; they are to consist of a Judge who is to hold terms of the Court, and of a Clerk; to the Court, as a whole, jurisdiction has been given over all civil actions, and the object of this clause is not to grant powers, but to distribute among the component parts of the Court the powers previously granted to it as a whole.

That the Court is of this complex character must be clear from a consideration, that jurisdiction of all civil actions is given to it, (§ 15) and this must include probate jurisdiction; for no special Probate Court is provided for in the exhaustive enumeration of the Courts in Sec. 4, and unless this jurisdiction be included in the general grant to the Superior Courts, it cannot exist anywhere. Yet section 17 proceeds to give it to the Clerk of the Superior Court, which upon any other construction than that of a complex Court, would be to establish a new Court, not enumerated in section 4.

As was said by the Counsel for the plaintiff, this complex organization of Courts is not unusual. He cited the instance of the English Court of Chancery and the Master of the Rolls; but a more familiar instance may be found in the powers usually exercised by Masters in every Court of Chancery. The Master is habitually the referee and accountant of

the Court, and in such matters performs its functions subject to review on exception taken.

So under the present Bankrupt Act, the Register is deemed the Court for all orders which are expressly required to be made by the Judge, or at a term of the Court.

From these considerations I conclude, that the words "such other matters as shall be prescribed by law," have in this place their proper, independent and full signification, and that it was competent to the Legislature to give to the Clerks under these words the jurisdiction given by § 73 and § 108 Code Civil Procedure. This view is strengthened by a consideration of the following words in section 17: "All issues of fact *joined* before them (the Clerks), 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." This Court has held in the case of *Heilig* v. *Stokes*, decided at this term, that the phrase "issues of fact joined, &c." has a technical meaning: that it does not mean simply disputed questions of fact, but what are technically known as "issues joined" by the parties to an action, by their pleadings. If this be the proper meaning of the phrase, the inference would seem to be inevitable that the pleadings in all actions must be made up before the Clerk for in no other way can "*issues of fact be joined*" before him, to be transferred to the Superior Court, or issues of law, to be taken there on appeal. And it deserves to be noticed, that in the clause granting probate jurisdiction, every possible object of that jurisdiction is exhausted—the subsequent clause therefore, requiring issues of fact to be joined before the Clerks, must either be held to confer *additional and different* jurisdiction, or else to be meaningless. This phrase cannot be confined to issues of fact joined in matters of probate; for in such matters no issues are *joined* at all, except by statutory enactment in the case of a contested will. It is only in proceedings at common law, as distinguished from those in the Chancery or Ecclesiastical Courts, that issues are *joined*. In the common law Courts the parties themselves make up the issues by their averments or denials, and finally

come to some single and simple issue which determines the case. In the Chancery and Ecclesiastical Courts, on the contrary, issues are never joined by the parties, but the Court makes up the issues from their contrary averments. The phrase "issues joined" technically understood is confined to proceedings in the course of the common law, and does not include such questions of fact as may occur in the course of probate proceedings: in such proceedings issues may be made up by the Court, but they are never joined by the parties. This consideration compels the conclusion that this clause has no reference to probate jurisdiction.

Moveover, the Constitution (Art. IX, Sec. 28) enacts that "the Superior Courts shall be at all times open for the transaction of all business within their jurisdiction, except the trial of issues of fact requiring a jury." A Judge is elected for a district composed of six or more counties; a Clerk is elected in each county; how can this mandate of the Constitution be complied with, how can the Court be kept open in each county at all times, except by authorizing the Clerk, who, as has been seen, is a component part of the Court, to take jurisdiction in the first instance of all things preliminary to the trial of issues of fact by a jury? The filing of pleas and the joinder of issues upon them, is a matter which must be done in the Court which has jurisdiction of the cause; that is to say, in the Court for the county in which the action is brought; it is a matter over which the Superior Court has jurisdiciion; it must be allowed to be done at all times. This cannot be done except by giving to the Clerk the powers given to him by §§73 and 108 C. C. P.; and when we further see that the issues of fact joined before the Clerk shall be transferred to the Superior Court for trial (Scc. 17,) it seems to me impossible to escape the conclusion that all pleadings must be made before the Clerk, and only before him.

On the second point: The consideration of the first question has nearly exhausted all that can be said upon the second. If the view which I have taken of the fourth Article of the Constitution be correct, its requirements are plainly violated by the Act of March 16th, 1869.

By that act, issues of fact can never be joined before the Clerk; they can never be transferred to the Superior Court for trial; appeals from his judgment in matters of law can never be taken to the Superior Courts, for he can never make any. The Courts, instead of being at all times open for the transaction of all business within their jurisdiction, except trials by jury, are open only four weeks in the year. The Act seems to me to have been intended to subvert the whole judicial reform which the Constitution contemplated, and to restore the former practice which the Constitution condemned and intended to do away with. It seems to me to violate alike the letter and the spirit of the Constitution.

"Statutes which oust delay, and are for expedition of justice, shall be benignly construed, and are extended by equity," Dwarris on Statutes, 728; and on the same principles those which delay justice, cannot be regarded favorably.

For these reasons I am of opinion that the judgment below should be affirmed.

PER CURIAM. Judgment reversed.

STATE v. JOHN PALIN.

The obligation to give bond for the maintenace of a bastard, under an order of Court, is not *a debt*, within the provision of the State Constitution (Art. 1, Sec. 16) abolishing imprisonment for debt.

Therefore, a Court may imprison a putative father who refuses to give such bond. Such imprisonment is to be effected now under the act of April 10. 1869, in regard to *contempt*.

BASTARDY, tried before *Pool*, J., at Fall Term 1868, of the Superior Court of PASQUOTANK.

There was an issue made up in the said Court to determine whether the defendant was the father of the bastard child of one Nancy Harvey, with which he stood charged. The jury found in the affirmative; and the solicitor for the State moved for an order of affiliation, which was granted.

He also moved that the defendant be committed into the custody of the Sheriff until he should give bond for the maintainance of said bastard child, in the usual form, according to the act of 1866.

The defendant moved to be discharged from custody upon ground that the Constitution of the State abolishes imprisonment for debt, and repeals the act of 1866 in relation to the maintenance of bastards. His Honor held that under the Constitution of the State he had no power to imprison the defendant, and ordered his release; from which order the Solicitor prayed an appeal. Appeal granted.

Attorney General, for the State.

No counsel *contra*.

SETTLE, J. Section 16 of the Declaration of Rights declares that "there shall be no imprisonment for debt in this State except in cases of fraud."

Is the duty of maintaining a bastard child, imposed by our statute upon the father, such a debt as is contemplated by this provision of the Constitution? We think not.

It is a police regulation, the object of which is to compel the father of a bastard child to support his own offspring and save the public from the burden of its maintenance.

It is certainly a moral duty resting upon the father to support his offsping, whether they be legitimate or illegitimate; and the law enforces this duty. In the one case by recognizing the marriage contract, and enforcing the reciprocal duties of parent and child; in the other it cannot recognize the relation of parent and child through the marriage contract, but seizes upon the fact of parentage, and enforces the natural duty both for the good of the child and the protection of the public. The statute provides "that the father of such child or children, shall stand charged with the maintenance thereof, as the Court may order, and shall give bond with sufficient security, payable to the State of North Carolina, to perform said order, and to indemnify the county where such child or children, shall be

born, from charges for his, or their maintenance, and may be committed to prison, until he find sureties for the same, &c. "This is an enforcement of a duty, and cannot be said to be a *debt* due to the mother or any other person, but only a charge of maintenance.

Suppose the father takes the child under his own roof, or elsewhere, and maintains it in a suitable manner, keeping it off of the county, and the Court assents to and approves of the arrangement: This certainly does not answer our idea of *debt*. Or suppose the child should die: The obligation ceases at once.

It will be observed that the first step under our statute, is to be taken by a magistrate, and its object is to compel the mother to declare on oath, the father. If she refuses to do this, she shall pay a fine of five dollars, and give bond &c., but if she will do neither, "she shall be committed to prison until she shall declare the same, or pay the fine and give bond &c." Here the duty is in the alternative.

When she is committed to jail for a failure to declare the father, can it be pretended that it is an imprisonment for *debt?* But if she shall upon oath accuse any man of being the father, he shall enter into recognizance with sufficient security for his appearance, &c., otherwise he shall be committed to prison until he enter into such recognizance.

We must not confound the duty of giving the bond for indemnifying the county from charges for maintenance, with the remedies which arise upon the breach of the bond. If the Court has the authority to require of the father, the bond prescribed by statute, it follows that in case he refuses or fails to give the same, obedience can be enforced by imprisonment.

Disobedience to a legal order of a Court falls within the provisions of the act of the General Assembly, ratified the 10th day of April A. D. 1869, authorizing proceedings, as for contempt, to enforce civil remedies.

After the Court has charged the reputed father of a bastard child with its maintenance, if he shall neglect to pay the same, then the Court "after notice &c., may order an execu-

tion against the goods, chattels, lands and tenements of the father, for such sums as the Court shall adjudge sufficient for the maintenance of the bastard child or children."

This provision of our law contemplates these sums as *debts*, and they can only be collected as such.

We are to presume that the public will have ample protection from the Courts who will see that the bonds for maintenance are sufficient to save the Counties harmless, and we must not suppose that it was the intention of the framers of our Constitution, to break down the safeguards of society, by discharging men from the performance of moral and natural duties.

His Honor erred in holding that he had no power to imprison the defendant, until he should give the bond for maintenance.

Let this be certified &c.

PER CURIAM. Error.

DAVID PARKER *v.* SUSAN FLORA.

Want, or failure of consideration, is no defence to an action upon a sealed instrument.

DEBT, tried before *Pool, J.*, at Spring Term 1869, of the Superior Court of GATES.

The plaintiff declared on a bond at six months, endorsed to him by one John P. Jordan. The execution of the bond was proved; and its assignment to the plaintiff for full consideration, without notice of any claim of the defendant. The defendant offered to prove that the bond sued on was executed to the plaintiff's assignor on a contract for professional services, *to be rendered*, and in payment therefor; that such services were not rendered, and, therefore, that there was no consideration, or a failure of consideration.

His Honor rejected the evidence, and to this the defendant excepted. Verdict and judgment for the plaintiff. Appeal by the defendant.

No counsel for appellant.
Smith, contra.

SETTLE, J. The question presented by the pleadings does not admit of an argument. We observe that the case was tried before the decisions of the last term of this Court were published, and we presume that the counsel for the defendant was of the opinion that the Code of Civil Procedure applied to this suit, and that defences might be introduced as counter-claims, which had heretofore been excluded. We do not intimate that the defence here attempted to be set up, would avail under the provisions of the Code; we only say that it certainly could not be entertained in the present suit. There is no allegation of fraud in the *factum*, and the bond was "assigned to the plaintiff for full consideration and without notice of the claim of defendant; and we are to take it that it was assigned before it fell due.

The evidence in regard to the *consideration* of the bond was properly rejected by His Honor.

PER CURIAM. Judgment affirmed.

DANIEL VALENTINE *v.* W. D. HOLLOMAN, Ex'R.

Where the plaintiff in a suit upon an account, assigned his interest therein *bona fide* and for value: *Held*, that he thereby became *a trustee* of such claim for the assignee, and that his subsequently becoming bankrupt, during the pendency of the suit, did not affect his rights to recover as trustee.

Suits pending at the time of the adoption of the Code of Civil Procedure are not governed in practice by such Code; therefore any *set off* claimed by a defendant therein must be a legal one, and such as could have been enforced in Courts of law heretofore.

An endorsement of a note to a deceased person, (made with intent to invest such person's personal representative with the legal property therein) is a nullity.

(*Teague* v. *James ante* 91. *Gaither* v. *Gibson Ibid* 98, cited and approved.)

VALENTINE *v.* HOLLOMAN.

ASSUMPSIT, tried before *Pool, J.*, at Spring Term 1869 of the Superior Court of HERTFORD.

This action was commenced in the Court of Pleas and Quarter Sessions, and carried by appeal to the Superior Court. At Spring Term 1869, the defendant obtained leave to suggest the Bankruptcy of the plaintiff, and to enter it as a Plea since last continuance; to this there was a replication, that the plaintiff held the claim in trust for another.

It was proved that the plaintiff furnished the goods and board declared on to Harriet Anderson, the testatrix of the defendant, at the prices alleged. After the institution of the suit the plaintiff assigned his account and claim to a party, for a full and valuable consideration, and afterward filed a petition in bankruptcy, was adjudged a bankrupt, and obtained a final discharge.

There was exhibited in evidence, by the defendant, as a set-off or counter-claim, a bond executed by the plaintiff to one John Anderson, for an amount exceeding the plaintiff's claim. John Anderson died leaving a will and appointing the plaintiff and one J. A. Vann as his executors, who qualified and delivered the bond to the defendant's testatrix, (who was the widow of Anderson,) as part of her legacy under the will; and she held the bond when the debt to the plaintiff was contracted. Harriet Anderson thereafter died, leaving a will and appointing the defendant her executor, who duly qualified as such. After her death and previous to the bringing of the suit, the executors of Anderson endorsed the bond to the testatrix.

It was insisted for the plaintiff,

1. That the proceedings in bankruptcy were unavailing to arrest the proceedings in the Superior Court or defeat the action.

2. That the claim sued on, after its assignment was held in trust only, and would not pass to the assignee in bankruptcy.

3. That the attempted endorsement of the bond was void, and was not available to the defendant as a set-off or counter claim.

His Honor charged the jury that the effect of the proceedings in bankruptcy was to defeat the action, and, secondly, that under the present state of the law, the defendant's equitable interest in the bond, under the first delivery, could be used as a set-off.

Verdict for the defendant; Rule for a new trial; Rule discharged; Judgment and appeal.

Smith for the plaintiff, cited Bankrupt act. secs. 14, 16, 21. *Teague* v. *James*, 63 N. C. R. 91. *Gaither* v. *Gibson*, *Ib.* 93.

Yeates and *Barnes*, *contra*, 1 Chitty, Plead. 24, 15 East 622. *March* v. *Thomas*. 63 N. C. R. 87, 1 Dev. Eq. 396, 2 Dev. Eq. 358, 6 Jon. Eq. 42., 2 Dev. Eq. 68.

DICK, J. The plaintiff after the commencement of this suit, for a full and valuable consideration, assigned his claim to a purchaser. This assignment gave an *equity* to the purchaser in the *chose in action* sued upon, and authorized him to continue the suit in the name of the plaintiff. The plaintiff became a trustee of the purchaser, and his subsequent bankruptcy did not affect the rights of the *cestui que trust*. The assignee in bankruptcy has no interest in the suit, and no right to be substituted as plaintiff. The assignment in bankruptcy does not pass trust estates, but only such property as the bankrupt has an equitable as well as a legal title in, and which is applicable to the payment of his debts. Bankrupt Act, sec. 14, Eden on Bank. 244.

As this suit was commenced before the adoption of the Code, the note offered in the defence can not be allowed as a counter claim. *Teague* v. *James*, *ante* 91, *Gaither* v. *Gibson*, *Ib.* 93. It can not be allowed as a set-off, as in a Court of law the right of set-off only exists as to mutual debts subsisting between the parties to the action. The endorsement of the note to the testatrix of the defendant was void, as she was dead at the time and could not be a party to the contract of endorsement. The doctrine of equitable set-off, so much insisted on in the defence, is not applicable to suits at law, and

can be administered only in Courts of Equitable jurisdiction. The Code has now made ample provision for the adjustment of the equitable as well as the legal rights of parties to a civil action, but this case was an action commenced and founded on a contract made prior to the ratification of the Code, and does not come within the operation of the new system of procedure. C. C. P. sec. 8, sub. 4.

The judgment of the Court below is reversed, and a *venire de novo* awarded.

Let this be certified &c.

Per Curiam, *Venire de novo.*

JOHN Y. McADEN *v.* J. BANISTER.

A judgment given by a magistrate in one county cannot be docketed in another, unless previously docketed in the former county; and what is allowed to be docketed in the latter county is, the transcript of judgment as docketed in the former.

Where a docketed judgment is relied upon as authority for an arrest of the person by process of execution thereunder, it is necessary that the *affidavit* and *order of arrest* in the Court of the Magistrate shall be docketed with the judgment. *Aliter*, if such judgment is to be enforced by execution against land only.

Upon an appeal from an order of the Clerk to the Judge, the latter *may* hear any evidence that would have been competent before the former, although in fact not introduced.

In a case where the question before the Clerk (or Judge) of the second county is as to the right to issue process of execution *against the body* of the defendant, it is not competent for him to hear parol evidence, to show that an affidavit and an order of arrest were in fact made before the magistrate in the first county, although the transcript shows none.

The judgment as actually docketed is the only authority for the execution named; the form of the docketed judgment depends upon that of the transcript actually sent.

A judgment may be properly docketed from the original papers before the magistrate, instead of from a transcript of them.

Amendments of the judgment before the magistrate, or of the transcript, can be made only before the tribunal, which gave it, rendered the one, or issued the other.

Where a Sheriff has notice that there is a dispute as to his right to collect from the defendant certain money, and afterwards pays such money to the plaintiff, pending the controversy, *Held* that upon its being decided that such money was improperly collected, the order to return it to the defendant is properly directed against the Sheriff.

MOTION to set aside an execution against the person, heard before *Logan J.* at Spring Term 1869, of the Superior Court of LINCOLN.

The Judgment under which the execution issued had been obtained before a magistrate in Mecklenburg County in October 1868. Without being docketed in that county it was sent to Lincoln county and docketed, from the original papers, there. After an execution against the property of the defendant had been issued from the Clerk's office of Lincoln, and had been returned *nulla bona* &c., the plaintiff's attorney made oath before the Clerk that an affidavit and order of arrest had been made in the proceedings before the magistrate in Mecklenburg county; and thereupon the process in question was issued, and the defendant arrested. There was no docket of an affidavit and order of arrest, nor were such proceedings upon the transcript or the papers.

While the defendant was under arrest, the Sheriff allowed him to go into the Clerk's office and move to set aside the execution. This motion was disallowed. The defendant thereupon paid the amount of the judgment to the Sheriff, who paid it to the plaintiff. The defendant then appealed to the Judge of the district.

His Honor, having heard other affidavits as to the circumstances under which the judgment was taken, reversed the order of the Clerk, and ordered the Sheriff to return the money to the defendant. The plaintiff then appealed to this Court.

Bragg, for the appellant.
Hoke, contra.

Rodman, J. In this case the defendant moved before the Clerk of the Superior Court of Lincoln county to set aside an execution against his person, issued from the Superior Court, at the instance of the plaintiff.

It is objected to the execution, 1st, That the Clerk of the Superior Court of Lincoln had no jurisdiction to issue it, the judgment having never been lawfully docketed in that county; 2nd, No sufficient cause was shown for issuing it under the Code of Civil Procedure.

The action commenced by warrant issued by a Justice of the Peace for Mecklenburg county, commanding any Constable, &c., of that county "to take the body" of the defendant, &c.

The plaintiff recovered judgment and docketed it, (but not any affidavit or order of arrest,) in the Superior Court of Lincoln, without having first docketed it in the Superior Court of Mecklenburg. If the proceedings before the Justice of the Peace had been in all respects regular, his judgment could not be docketed in any other county than Mecklenburg, without having been first docketed in that county. C. C. P. sec. 503. In that section the words "A certified transtript of *such* judgment may be filed and docketed in the Superior Court Clerk's office of any other county," &c., evidently refer to the judgment as docketed in the Superior Court of the Justice's county. The Clerk of the Superior Court of every county is supposed to know who are the acting Justices of his own county, as is shown by sec. 509, but not who are the justices of any other county. The docketing in Lincoln being beyond the jurisdiction of the Clerk of that county and void, all his subsequent proceedings were so also. The first objection to the execution is therefore sustained. The Judge was bound to set aside the execution, and inasmuch as the money had been collected from the defendant by an abuse of the process of law, it was equally his duty to have it restored. As the Sheriff had notice that the payment was disputed, he paid it to the plaintiff at his peril. The order of restoration was properly made against the Sheriff.

Here we might stop, but as it is desirable for the more certain administration of the law, that the opinion of the Court shall be expressed on all questions of practice which are presented, we proceed to consider those presented here. Was the Judge right in hearing evidence outside of that contained in the statement of the case made to him by the Clerk of Lincoln Superior Court?

The application to the Clerk to set aside the execution was under C. C. P. sec. 108. By the subsequent section either party is at liberty to appeal from the decision of the Clerk upon a question either of fact (C. C. P. § 115) or of law, to the Judge of the District. An appeal upon a matter of fact implies the rehearing of the question by the appellate tribunal, if desired. Section 110 shows how that desire may be expressed. We think therefore that, on this appeal, the Judge was bound to hear any evidence which would have been competent before the Clerk of the Superior Court. But we are also of opinion that, in this particular case, the Clerk should have received no evidence but such as was of record in his own office, and that the Judge was limited in like manner. Upon the application to the Clerk the whole question was as to the legality of the issuing of the execution. An execution against the person can only issue upon a docketed judgment of a Justice of the Peace, when it is authorized by sec. 260, C. C. P., of which it is unnecessary to say anything as not being in question here, or, when it appears to the Clerk that the defendant had been arrested before judgment for one of the causes stated in sec. 512, upon an order of arrest (§ 513) obtained on affidavit (§ 514). It was alleged that such an affidavit had been made, and such an order duly obtained in this case, the record of which had been lost or destroyed; but we are of opinion that the Clerk could receive no parol evidence of such lost record. We do not deny that ordinarily, when a question arises incidentally as to the contents of the record of another Court which is shown to have been destroyed, parol evidence is competent. But sec. 503 requires the Justice of the Peace, "on the demand of a party in whose favor he has rendered judg-

ment, to give him *a transcript* thereof, which may be filed and docketed in the office of the Clerk of the Superior Court of the county where the judgment was rendered." The transcript must be in writing; the Clerk could docket nothing but what appeared in the transcript; and his execution must be based on what appears on his docket and nothing else. It may be asked, was a copy of the affidavit and order of arrest a material part of the Justice's judgment, and therefore required to be docketed with it? We are of opinion that, for the purpose of enabling him to issue a personal execution, they were; for this purpose they materially qualified the judgment, and gave it an effect it otherwise would not have. For the issuing of an execution against the lands of the defendant they are not material parts of the judgment, as for this purpose they neither added to nor impaired it. A Justice's Court, like every other Court, can amend its own records, under which is embraced the power to restore the record when it has been destroyed or lost: this must be done on proper notice to all parties and on proper proof; but no Court has original power to amend the records of another Court, and the only proof which the Clerk of Lincoln could receive of the proceedings of the Justice was his transcript, or the original, which would have been of the same effect as a transcript. In connection with this case, we call the attention of the District Judges to sec. 241, C. C. P., which requires them to make a statement of the facts found by them, and of the conclusions of law, separately: their decision on the facts is final, (§ 115).

Per Curiam. Judgment affirmed.

STATE v. T. R. LUPTON.

No one is to be regarded as a *prosecutor*, under the Statute rendering prosecutors liable to pay costs, unless his name is *marked as such* on the bill of indictment.

MISDEMEANOR, in altering the mark of cattle, tried before *Jones, J.*, at Spring Term, 1869, of the Superior Court of BEAUFORT.

After a verdict of "not guilty," the defendant's counsel moved that Thomas R. Lupton, as prosecutor, be made to pay the costs. It was objected on the part of Lupton that he was not marked as prosecutor, and his Honor was asked to inspect the record and pronounce whether or not he was so marked. Upon inspection his Honor declared that the Governor was not marked as prosecutor, as is usual; but declined to say whether Lupton was so marked or not; holding that as Lupton's name appeared marked on the back of the bill of indictment first *under* the word "Pros.," as he had gone before the grand jury which found the bill, and as he had employed counsel to aid the Solicitor for the State in prosecuting, he would be recognized as prosecutor and held liable to pay the costs.

To this ruling Lupton excepted; the exception was overruled, and he appealed.

Carter, for appellant.
Attorney General, contra.

DICK, J. Previous to the adoption of the Code of Civil Procedure, the power of the Court to order the prosecutor in criminal cases to pay costs, was regulated by Statute, and limited to a certain class of cases (Rev. Code, ch. 35, sec. 37,) and the construction of this Statute has been well settled by the adjudication of this Court.

Prosecutions for public offences are now defined as criminal actions (C. C. P., sec. 5,) and no person is regarded as a prosecutor unless he is so marked on the bill of indictment.

When a prosecutor is thus made party to an action for *any* kind of criminal offence he becomes liable under certain circumstances to pay all costs of the action. Amendment to ch. 21, C. C. P., sec. 559.

His Honor in the Court below did not determine the question, whether or not the witness Lupton was marked as prosecutor. This was a preliminary question which he was bound to decide in the affirmative before he had the power to render judgment against the witness as a prosecutor.

The judgment below must be reversed, so that his Honor, after deciding the preliminary question referred to, may exercise his discretion in the matter. Let this be certified.

PER CURIAM. Judgment reversed.

WILLIAM PALIN, *et. al. v.* JOHN G. SMALL.

Where an oral contract was made with the three members of a partnership personally, *Held*, that they could recover upon it in their joint names, without regard to *the style* of their partnership, although this had been set forth in the writ.

ASSUMPSIT, tried before *Pool, J.*, at Spring Term 1869 of the Superior Court of PASQUOTANK.

The writ was in the name of "William Palin, John Palin and Joseph Palin, partners, trading under the firm and style of Palin & Brothers;" but the declaration was in their joint names only, and was for a breach of warranty of soundness of certain articles, and a failure to deliver other articles according to an oral contract made by the defendant with the three plaintiffs jointly and in person.

The defendant asked the Court to instruct the jury that, as the writ was in the name of "William Palin, John Palin and Joseph Palin, partners, trading under the firm and style of Palin & Brothers," it was necessary for the plaintiffs to prove

that they were partners and trading as alleged; and that the plaintiffs, having failed to introduce any evidence of that fact, could not recover.

His Honor declined so to charge, but reserved the point.

Verdict for the plaintiffs. Rule for a new trial upon the point reserved.

Rule discharged. Judgment and Appeal.

No counsel, for the appellants.

Phillips & Merrimon, contra.

SETTLE, J. Had the writ in this case been issued in the firm name of "Palin & Brothers," without reciting the individual names of the persons composing the firm, the defect would have been fatal; for it is well settled that the writ must set forth accurately the name of each plaintiff and defendant.

But here the writ does set forth the full names of all the plaintiffs, with the addition that they are "partners trading under the firm and style of Palin & Brothers."

It is not pretended that the contract was not made with the plaintiffs William Palin, John Palin and Joseph Palin, but the defendant insists that as the writ recites that they were "partners trading under the firm and style of Palin & Brothers," the fact of partnership under such name should have been proved upon the trial.

His Honor held this to be unnecessary, and was of the opinion that these words in the writ should be regarded as surplusage. In this we concur. The addition of the firm name to the individual names composing the firm was not necessary, but being added it can do no harm, and will not subject the plaintiffs to any additional proof.

PER CURIAM. Judgment affirmed.

JOHN W. MARTIN *v.* A. B. McMILLAN Adm'r, *et. al.*

Where the plaintiff sold mules to an agent of the Confederate government, at a reduced price, giving as his reason for thus selling them, that they were to be used in the military employment of such government;

Held, that the contract was against public policy, and, therefore, that no recovery could be had on a bond given for the payment of the purchase money.

(*Phillips* v. *Hooker*, Phil Eq. 193, cited and approved.)

COVENANT, tried before *Mitchell, J.*, at Spring Term, 1869, of the Superior Court of ALLEGHANY.

The action was brought upon a bond in the usual form, for the payment of eight hundred and eighty dollars, bearing date May 1862, signed and sealed by the defendant Edwards, and by A. B. McMillan, dec'd, the intestate of the other defendant.

It was in evidence that, before and at the time of executing said bond, the defendant Edwards was an agent for the Confederate government, for the purpose of buying horses and mules to be used in the military service; that he had instructions from the Quarter Master, under whose directions he was acting, to buy horses and mules on his own credit, as he, the Quarter Master, did not then have on hand any funds of the government, and that money would be furnished him to pay off the debts so contracted. It was further in evidence that Edwards, in pursuance of these instructions, went to the plaintiff and told him that he, Edwards, wanted to buy some mules for the Confederate government. The plaintiff replied that he had a lot of mules for sale, and though he could get more for them than the defendant offered, as he wanted them for the Confederate government, he might have them at that price. Edwards bought the mules, gave the bond declared on with A. B. McMillan as his surety, took the mules to Virginia, and there delivered them to the Confederate authorities, receiving from the Quarter Master payment th erefor

The defendants' counsel asked his Honor to charge that if the plaintiff knew, when he parted with the mules, the purpose for which they were to be used, that he could not recover; and that as the contract was against public policy he could not enforce it. His Honor refused the instructions prayed for, but told the jury that if they believed the transaction to have been as stated above, the plaintiff was entitled to recover.

Verdict for the plaintiff; Rule for a new trial; Rule discharged; Judgment and Appeal.

F. H. Busbee, for the appellants.

From the plaintiff's declaration, the "inducement to the sale" was an illegal employment of the mules; hence the contract cannot be enforced. *Phillips* v. *Hooker*, Phil. Eq. 193. *Dater* v. *Earl*, 3 Gray (Mass.) 482. *Briggs* v. *Lawrence*, 3. T. R. 454. The Prize Cases 2 Black 635.

Bragg, contra.

Knowledge of the purpose for which the mules were to be used will not invalidate the bond. *Holemon* v. *Johnston* Confer. 341, *Robinson* v. *Bland*, 2 Beer. 1077. *Hodgson* v. *Temple*, 1. E. C. L. R. 67.

READE, J. The case before us sets forth that, "The defendant, Edwards, told the plaintiff that he wanted to buy the mules for the Confederate Government. The plaintiff replied that he could get more for them than the defendant offered, but as the defendant wanted them for the Confederate Government, he might have them at that price." The principle involved in this case is so fully discussed in the late case of *Phillips* v. *Hooker*, Phil. Eq. 193, that it need not be labored here. It is there said "that if the illegal use to be made of the goods enters into the contract, and forms the motive or inducement in the mind of the vendor, then he cannot recover, provided the goods are actually used to carry out the contemplated design; but bare knowledge on the part of the vendor that the vendee intends to put the goods to an ille-

gal use, will not vitiate the sale and deprive the vendor of all remedy for the purchase money." Here the vendor said, "as you want them for the illegal purpose, you may have them at a reduced price." And the goods were in fact used for the illegal purpose.

There was error in his Honor's ruling. Judgment below reversed, and judgment here for the defendants.

PER CURIAM. Judgment reversed.

R. P. DICK, *et al v.* R. D. DICKSON.

A Court after allowing an irregular judgment by default final, taken at a previous term, to be amended into a judgment by default and enquiry, *has power* at the same term to strike out such judgment altogether, and permit the defendant to plead; *therefore*, no appeal lies to the Supreme Court from such action.

(*Davis v. Shaver*, Phil. 18, cited and approved.)

MOTION, to set aside a judgment by default, made before *Buxton, J.*, at Spring Term 1869, of the Superior Court of CUMBERLAND.

This is the case reported in *ante* 185. Upon return of the case, the plaintiffs obtained leave to amend their writ by striking out the names of all of the defendants, except that of R. D. Dickson, as to whom judgment final by default had been irregularly entered at Spring Term, 1867. The plaintiffs were also allowed to amend the final judgment of 1867, so as to make it a judgment by default and inquiry. Thereupon, R. D. Dickson, then left sole defendant, made it appear to the satisfaction of the Court that he had employed counsel to appear and plead for him at the Appearance Term, who had omitted to do so; and moved that the judgment by default be set aside, and that he be allowed to plead as of the appearance Term. His Honor being of the opinion,

that he had control of the case and could shape it by such direction at the present term as he thought justice required, granted the motion of the defendant.

From this order the plaintiffs craved an appeal, which, upon their giving bond, was granted.

Jno. W. Hinsdale, for plaintiff, cited, Revised Code ch. 31, sec. 57 (2), *Dick* v. *McLauren*, 63 N. C. R. 185. *Dunn* v. *Batchelor*, 2 Dev. & Bat. 52. *Keaton* v. *Banks*, 10 Ire. 381; and argued that the motion to vacate comes too late, as it should have been made in a reasonable time after the entry of judgment—or at the next succeeding term.

Strange and *W. McL. McKay*, *contra*.

The Court had the power to set aside a judgment by default and inquiry, rendered at a previous term, even after the inquiry has been executed, upon proper cause shown. *Anderson* v. *Devane*, 2 Hay. 373, *Cogdell* v. *Barfield*, 2 Hawks, 332.

No appeal lies from a matter of discretion, or from a finding by the Court of a matter of fact. *State* v. *Lanier*, 3 Hawks 175; *State* v. *Raiford*, 2 Dev. 214; *Davis* v. *Shaver*, Phil. 18.

SETTLE J. The record shows that at the last term of the Superior Court of Cumberland County, after this case had been pending for two years, and had been before this Court, upon another point, *ante* 185, the plaintiffs come before the Court, asking favors, and are permitted to amend in two particulars. In the first place, by striking from their writ all of the defendants except Dickson; and in the second place, by amending the record *nunc pro tunc*, so as to make it appear that a *judgment by default and inquiry*, had been entered at Spring Term 1867, instead of the "*judgment by default final*," which was set aside at Spring Term, 1868.

We were informed upon the argument by the counsel for the plaintiffs that these amendments were allowed without terms. It will be borne in mind that at Spring Term 1868 of Cumberland Superior Court, when the "*judgment by default final*" was set aside as irregular, upon the motion of the defendants *McLaurin and Dickson*, the plaintiffs appealed to this Court, and it does not appear that they moved to have their judgment entered as a *judgment by default and inquiry*, as of Spring Term 1867, until the last term of the Court, to-wit: Spring Term 1869, when it was granted. And thereupon the statement of the case recites, "R. D. Dickson, now left sole defendant, made it appear to the satisfaction of the Court that he had employed counsel to appear and plead for him at the appearance term, who had omitted to do so until now, and moved that judgment by default against him be set aside and that he be allowed to plead as of the appearance term." This His Honor allowed, "being of the opinion that he had control of the case, and could shape it, by such directions as he thought justice required."

In this opinion we concur.

As to the power of the Court to set aside judgments by default, we entertain no doubt, and we have nothing to do with the exercise of its discretion. Both parties asked favors and though His Honor changed his orders, in part, it was all done during the same term of the Court, while the matter was *in fieri* and under the control of the Court. It is unnecessary to discuss the questions made before us, upon the argument, as to the effect of regular or irregular judgments, and of the power of the Courts over them; the learning on this subject may be found in the report of this case at the last term, and in *Davis* v. *Shaver*, Phil. 18, and the cases there cited.

Courts are clothed with a large discretion, in amending any process, pleading, or proceeding in any action, and even defects in judgments and executions, for the furtherance of justice. And they have power for the same purpose, to set aside all irregular proceedings, from the leading to the final process. And while questions as to the power of other Courts

may be brought in review before this Court, we have no jurisdiction to review the exercise of discretion in those matters, where Courts are clothed with discretionary powers.

Let this be certified, &c.

PER CURIAM. Affirmed.

STATE *v.* WILLIS HAUGHTON.

Petit larceny being a felony in this State, the Special Court established for the City of Wilmington has no jurisdiction of it.

LARCENY, tried before *Cantwell*, J., at January Term 1869, of the Special Court of WILMINGTON.

The defendant was indicted for stealing "one axe, of the value of five cents," and thereupon demurred on the ground that the Court had not jurisdiction. The Court sustained the demurrer, and directed the defendant to be discharged. From this order the Solicitor appealed.

Attorney General, for the State.

No counsel, *contra*.

DICK, J. The jurisdiction of the Special Court established in the city of Wilmington is limited to the trial of misdemeanors committed within the corporate limits of said city. Acts 1868, ch. 12.

The defendant in this case was indicted in said Court for petit larceny, and the question presented for our consideration is, whether the said Special Court has jurisdiction of the offence charged.

Petit larceny is a felony at common law, and occasioned a forfeiture of goods and chattels, and rendered a person convicted infamous, and incompetent as a witness in a court of justice. C. Lit. 391, a. 4 Black. 94, 3 Chit. Crim. Law, 928.

In an indictment for this crime at common law, it is necessary to allege that the goods were taken *feloniously*, 1 Hawkins, P. C. 152. In this State we have established the common law by statute, so far as it is adapted to our form of government; Rev. Code, ch. 22.

Forfeiture of lands and goods (and not capital punishment) is the chief characteristic at common law distinguishing felonies from misdemeanors; 4 Black. 94.

Forfeiture and corruption of blood for crime are unknown in this State, yet the distinction between felonies and misdemeanors is a part of the common law which we have adopted, and in some respect the distinction is still important. The ordinary common law punishment for felonies is death by hanging, and the idea of capital punishment is usually associated with such crimes. The influence of christianity upon the legislation and judicial proceedings of our ancestors greatly mitigated the severities of the common law, by allowing the benefit of clergy in many cases of felony.

Petit larceny was never a capital felony, and at common law was only punishable with whipping, imprisonment, or other corporal punishment, and a forfeiture of goods and chattels. The distinction between grand and petit larceny, although formerly of great importance, has been entirely abolished, both in England and in this State. In England petit larceny has been elevated to the degree of grand larceny by Stat. 7 and 8, Geo. IV, Ch. 29, and in this State simple larcenies are all punished as petit larceny. R. C. ch. 34, s. 26. In many of the States of the Union, petit larceny has been made a misdemeanor by statute, and as the common law punishment for the offence has been recently so greatly changed, we see no good reason why larceny should any longer remain in the list of felonies. It may have been the intention of the framers of the statute above referred to (R. C. ch. 34, s. 26) to make larceny a misdemeanor, but we do not feel authorized by a forced judicial construction to abolish a long established rule of the common law, and thus by implication to enlarge the authority of a Court of limited jurisdiction.

There is no error in the ruling of his Honor in the Court below, and the judgment is affirmed.

Let this be certified, &c.

PER CURIAM. No Error.

THE STATE *v.* JOHN CHERRY and SALLY CHERRY.

It is within the discretion of the Judge presiding at a trial to admit or exclude evidence which, at the stage of the case when it is tendered, is irrelevant, even although the counsel tendering it promises to connect it with the case by subsequent testimony; *therefore*, no appeal to this Court lies from a ruling which excludes such evidence.

Where an imputation against the character of a witness is made by the very question which is put to him, evidence in support of that character becomes competent.

A witness called merely to sustain or impeach the character of another witness in the cause, may himself be either impeached or sustained.

A building of hewn logs (twenty-six feet by fifteen,) divided by a partition of the same, upon one side of which were horses, and upon the other, corn, oats and wheat, (threshed and unthreshed,) also hay, fodder, &c., having sheds adjoining, under which were wagons and other farming utensils, is a "barn" within the meaning of that word in the Rev. Code, c. 34, s. 2, punishing with death the burning of barns having grain in them.

(*State* v. *Laughlin*, 8 Jon. 455, *S.* v. *Garrett*, Bus. 359, cited and approved.)

ARSON, tried before *Logan, J.*, at Spring Term 1869 of the Superior Court of GASTON.

Upon the trial it was shown that the building charged to have been burned, was of hewn logs closely fitted together, twenty-six feet by fifteen in size; that a partition of hewn logs ran through it, cutting off eight or nine feet from the length, for stables, in which were kept his horses; that the other part (having an upper and a lower room,) usually held fodder, hay, and (in the room below) oats, rye, and wheat, in the straw and threshed; also, sometimes corn; that there were sheds adjoining on three sides, in which were kept the owner's buggy wagon, threshing machine, wheat-fan, ploughs, farming tools,

&c.; and that when burned the building contained two horses, sixty bushels of threshed oats, ten bushels of corn, and a few bushels of rye.

Upon the trial the State introduced one Louisa Costner, and upon cross-examination for the prisoner, she was asked if "she did not have a bedstead in her house?" The question having been objected to as irrelevant, the Court asked what was its object. The counsel declined to answer in the presence of the witness, as it would enable her to evade it, but added that they expected to connect it with the case. Thereupon the Court excluded the question, and the prisoner excepted.

The prisoner introduced one James Davis as a witness to character only, who testified that the character of certain State witnesses was bad for virtue and truth. He was afterwards asked by the State if the character of those witnesses was not as good as his own, both for virtue and truth. The prisoner's counsel told the witness that he need not answer that question. The Solicitor did not insist upon an answer, and none was made.

The prisoner then introduced a witness, and proposed to prove the character of James Davis; the State objected, and the objection was sustained. Thereupon the prisoner excepted.

Verdict, Guilty; Rule for New Trial; Rule discharged; Judgment, and Appeal.

PEARSON, C. J. Whether Louisa Costner "had a bedstead in her house" was a fact irrelevant to the case at the time she was asked the question, so far as then appeared, and of course the evidence was inadmissible and ought to have been rejected, unless the statement of the prisoner's counsel that "they expected to connect it with the case" made it an exception to the general rule. The prisoner's counsel had no legal right to put the question, so it was no error to reject it. Under the circumstances it was a matter within the discretion of the Judge, and this Court has no power to review his decision.

Haigh v. Belcher, 32 E. C. L. R. 553, was relied on in the argument before us. There Coleridge, Judge, admitted the evidence, saying, "This is clearly a fact, but from aught that

now appears, quite irrelevant. I must receive the evidence on Mr. Estis' undertaking to show the relevancy hereafter by evidence." This authority would have warranted the Judge in receiving the evidence in our case, but it was clearly a matter of discretion, and is so treated by all the text writers who comment on the case: Roscoe 95, 96. "Circumstances alter cases." In England the barrister who conducts the case in court, is furnished by the attorney who prepares the case out of court, with a "brief," in which is set forth all of the evidence that the party can obtain, and the attorney is held responsible for the accuracy of the brief, which he prepares after a careful examination of the witnesses. In this State the barrister is not assisted by an attorney; he undertakes both offices. Gentlemen of the bar on the circuit do not usually prepare very full briefs, or examine very carefully into the evidence, but rely on what is whispered to them by their clients. This authorizes, if it does not call for, a different exercise of the discretion.

II. The question put to the witness James Davis, was an imputation on his character, and was calculated to degrade him before the jury. His Honor rejected evidence as to his character. In this there is error. Why should the jury have been kept in the dark as to what kind of man this witness was? Why should the case go to them with a cloud over it by reason of "a fact transpiring in the course of the trial, which was a proper subject for remark both by the counsel and the Court?" Garrett's case, Bus. 359.

It was said on the argument, that his Honor rejected the evidence on a supposed rule of law, "an impeaching witness cannot be impeached," and we are told this supposed rule of law is acted upon in that circuit, and is based on the ground of avoiding the inconvenience of an endless process. If the impeaching witness can be impeached, the last witness may also be impeached, and so on *ad infinitum*. This inconvenience cannot occur very often, or be very serious, for the general practice is to call only the most respectable men in the community, as to character, and the instance of calling a witness

of doubtful character, to prove character, is exceptional. Let it be understood that an impeaching witness cannot be impeached, and the exception will soon be the general rule. But be this as it may, *truth* should not be excluded to avoid inconvenience; and it is enough to say that no case, or dictum, or sentence from a text writer was cited to support this supposed rule of evidence; on the contrary, it is laid down by the text writers, that an impeaching witness may be impeached by proof of general character, or on cross-examination, and when that is done the impeaching witness may be supported by proof of general character. Roscoe 96, 2 Phillips 432.

We imagine this supposed rule of evidence had its origin in a misapprehension of the rule, "When a witness on cross-examination is interrogated as to a collateral fact, his answer concludes the matter, and no further evidence of particular facts is admissible, to avoid getting off on a side issue." But the matter is open to evidence of general character; so the error to which we have adverted seems to have been caused by not attending to the distinction between evidence of particular facts, and evidence of general character.

III. The building described by the witness is a barn, both according to the legal acceptation of the word, and also its popular meaning. Ask any man if this building is a barn. He will reply: "If it is not one, I don't know what you would call a barn." The circumstance that a part of the building was used as a stable, does not affect its character as a barn. Indeed, that is usually the case in the middle and western parts of the State. Some people are not fortunate enough to have a barn; as an old out-house used to keep shucks, peas and nubbins in, does not rise to the dignity of a barn in legal acceptation or in common parlance. Laughlin's case, 8 Jon. 454. But in our case there was a substantial building, large enough to hold the horses, and the hay and grain, in the straw and after it was threshed, and also the wagons and other utensils of the farm. It matters not whether the house was built of logs or of stone, or was a frame-house and weather boarded, such a building is a barn, and is under the protection of the

law. The prisoners were not convicted according to the rules of law. Judgment reversed.

This will be certified, &c.

PER CURIAM. *Venire de novo.*

Doe on demise of ASHFORD GAINEY and wife *v.* DEMPSEY HAYS.

The declarations of a grantor made previous to the execution of a deed are inadmissible to control or explain the meaning of language used in such deed.

(*Patton* v. *Alexander*, 7 Jon. 603, cited and approved.)

EJECTMENT, tried before *Buxton, J.*, at Spring Term 1869, of the Superior Court of CUMBERLAND.

The land in dispute consisted of about six acres, and was included between two roads or sections of roads, both leading from "Smith's ferry to Bass's ferry." The deed of the lessor of the plaintiff called for "the main road from Smith's ferry to Bass's ferry on Neuse," as one of its boundary lines. The question submitted to the jury was the proper location of this line. The defendant introduced one Whitfield Wood, who testified that the grantor in the deed under which the plaintiff's lessor claimed, told him eleven days before the execution of the deed, that "he intended to make Ashford Gainey a deed giving him all of the land north of the thoroughfare" (which was the line contended for by the defendant.) To the admission of this evidence the plaintiff excepted.

Verdict for the defendant; Rule for a new trial for error in the admission of the testimony objected to; Rule discharged; Judgment and Appeal.

Strange, for the appellants.

N. McKay, contra.

DICK, J. The question of difficulty in this case, is the proper location of the boundary line described in the deed of the lessor of the plaintiff as "the main road from Smith's ferry to Bass's ferry on Neuse." The termini of said boundary line are agreed upon by the parties, and it is unnecessary for this Court to express any opinion on that question. There are two roads running between said termini, and it is a question for the jury, to determine which road fits the description of said deed. The deed must speak for itself, and parol evidence is inadmissible to show the intention of the grantor by his declarations made previous to the execution of said deed.

His Honor in the Court below erred in admitting the testimony of the witness Whitfield Wood, as to the declarations of the grantor made eleven days before the execution of the said deed as to the boundary line in controversy. *Patton* v. *Alexander*, 7 Jon. 603.

For this error there must be a *venire de novo*. Let this be certified.

PER CURIAM. *Venire de novo.*

JAMES A. JOHNSON *v.* JOHN T. JUDD, *et al.*

Writs of summons issued in January 1869, should have been returnable before the Clerk, and therefore if made returnable before the Judge at Spring Term 1869, on motion by the defendant to that effect, should have been dismissed. Since then the act of April 1 1869, "to amend certain irregularities" &c., allows such errors to be cured by amendment &c.

MOTION to dismiss a summons, heard before *Buxton, J.*, at Spring Term 1869 of the Superior Court of HARNETT.

The facts are sufficiently set forth in the opinion.

N. McKay, for the appellants.

No counsel, *contra*.

JOHNSON *v.* JUDD.

RODMAN, J. This action was commenced by a summons, dated 5th January 1869, which required the defendants "to appear before the Judge of our Superior Court of Law at a Court to be held for the county of Harnett, at the Court House in Lillington, on the second Monday of Febuary &c." This was erroneous: Section 73 C. C. P., says, the summons shall require the defendant "to appear at the office of the Clerk of the Superior Court" within a certain number of days after the service &c." The difference is material, as was pointed out in *Smith* v. *McIlwaine ante* 95, because there is no day in which the pleadings can be made up before the Judge. The pleadings are to be filed in the Clerk's office, and jurisdiction is given to him to decide, in the first instance, on all questions of practice and procedure arising in the course of coming to an issue. Sec. 108. C. C. P.

At Spring Term 1869, the defendants appeared and moved to dismiss the summons," on the ground, as the case states, "that it was not a summons," by which we understand to be meant, that it was not in conformity to the Code; the Judge refused to dismiss, and the defendants appealed to this Court. It seems to us clear that, as the law stood at that time, the Judge should have dismissed the summons or have imposed upon the plaintiff the alternative of amending it. After the appeal however, the Legislature, by an act entitled "An Act to amend certain irregularities in the mode of commencing certain actions" &c., ratified 1st April 1869, enacted that "in all civil actions heretofore commenced, in which the process has been or shall be made returnable "before the Judge," no advantage shall be had or taken by reason thereof, but the same shall be held regular, and may be amended as to the process and pleadings at any time, without costs, but upon such other terms as to the Judge of the Court shall seem just" &c. The error committed by the Judge makes it necessary to reverse his decision, but in consequence of the statute, this Court cannot dismiss the case, nor can it allow the summons to be amended, and the pleadings to be made up here; it is necessary therefore to send the

case back to the Judge of the Superior Court, in order that he may proceed as required by the statute.

PER CURIAM. Order accordingly.

STATE *v.* BENJAMIN DOUGLASS.

Objection to the manner of summoning the grand jury, can only be taken before trial; and such objection to the petit jury or special venire, by challenging the array.

Judgments can be *arrested* only for some matter which appears, or for the omission of some matter which ought to appear, upon *the record.*

(*State* v. *Martin*, 2 Ire. 101, *State* v. *Davis*, 2 Ire. 153, *State* v. *Underwood*, 6 Ire. 96, *State* v. *Barfield*, 8 Ire. 344, *State* v. *Ward*, 2 Hawks 443, *State* v. *Patrick*, 3 Jon. 443, *State* v. *Roberts*, 2 Dev. & Bat. 540; cited and approved.)

MURDER, tried before *Buxton, J.*, at Spring Term 1869, of the Superior Court of MOORE.

The jury having returned a verdict of guilty, there was a rule upon the State to show cause why a new trial should not be granted for the following reason, viz:

That K. H. Worthy, who as Sheriff of Moore county summoned the regular jury, grand and petit, for the term as well as the special venire in the case, was not the lawful Sheriff of the county of Moore, being disqualified under the XIV Amendment of the Constitution of the United States. (See *Worthy* v. *Barrett*, *ante* 199.)

Rule discharged; Motion in arrest of judgement for the same grounds as those taken for a new trial; Motion overruled; Judgment and Appeal.

Attorney General, for the State.

No counsel *contra*.

SETTLE, J. We have examined this case with the care which its importance demands, and have considered not only the points made upon the trial below, but have looked to the record to see if anything more could be suggested *in favorem vitæ*. We have found no error in the record.

Let us consider the points relied upon by the prisoner.

After a verdict of guilty, the prisoner obtained a rule upon the State to show cause why a new trial should not be granted, for the reason that K. H. Worthy, the person who, as Sheriff of Moore county, summoned the regular jury, grand and petit, for said term of the Court, as well as the special *venire* in this case, was not the lawful Sheriff of the county of Moore.

The facts in regard to the office of Sheriff are fully set forth in the statement of the case made by his Honor, the presiding Judge. But we are relieved from their consideration and from all inquiries as to the validity of the acts of the Sheriff in regard to the grand jury which found the bill, and the petit jury which tried this case. Whether he was Sheriff *de facto*, or *de jure*, it is immaterial to inquire; for the objection, if it ever had any force, comes too late. Objection to the grand jury can only be taken before plea in chief, or at all events before trial. *State* v. *Martin*, 2 Ire. 101, *State* v. *Davis*, 2 Ire. 153, *State* v. *Underwood*, 6 Ire. 96, *State* v. *Barfield*, 8 Ire. 344.

If the prisoner had wished to take advantage of this objection to the petit jury and special venire, he should have done so by challenging the array. After he had waived his right of challenge, and had taken his chances of an acquittal before the jury, he could not go back and "take a double chance," by impeaching the very jury upon whom he had put himself for a safe deliverance. *State* v. *Ward*, 2 Hawks 443, *State* v. *Patrick*, 3 Jon. 443.

The different defences in criminal pleadings, as in civil, must be brought forward" in apt time, due form and proper order."

A Judge it is true has discretion to set aside a verdict, and grant a new trial, at the instance of the prisoner in all cases

where justice may require it; but the exercise of that discretion cannot be reviewed. The rule was discharged, and the prisoner thereupon moved to arrest the judgment for the same reason set forth as ground for a new trial. This motion was also overruled. Judgment can only be arrested for some matter appearing, or the omission of some matter which ought to appear, upon the face of record. This matter was not brought forward until after trial and conviction, and formed no part of the record in a legal sense. Indeed, as said in reference to the rule for a new trial, this objection if it ever had any force, will avail nothing by motion in arrest of judgment. *State* v. *Roberts*, 2 Dev. & Bat. 540. Whart. Crim. Law, § 3043. The judgment of the Superior Court is affirmed.

Let this be certified &c.

PER CURIAM. No error.

JAMES MURPHY *v.* ALEXANDER H. MERRITT.

A regular final judgment can not be set aside at a subsequent term on motion, even although it was entered under a misapprehension of counsel.

An appeal from an order to vacate a judgment, leaves such judgment, and any execution issued under it, in full force.

MOTION to set aside a judgment, heard by *Russell, J.*, at Spring Term 1869 of the Superior Court of SAMPSON.

The defendant's counsel moved to set aside a judgment rendered in an action of *trover*, at Fall Term 1867 in favor of the plaintiff. The judgment had been entered by consent of the defendant's counsel. It appeared to the Court that one Merritt had represented to the defendant's counsel that the defendant would be satisfied with this arrangement, provided the costs did not exceed twenty-five dollars; and that, acting upon this statement, the counsel consented to the judgment. It

appeared further that the costs exceeded twenty-five dollars, and that the defendant had never authorized Merritt to instruct his counsel to consent to the judgment.

The Court ordered the judgment in this case to be vacated, and the case to be reinstated on the docket. From this order the plaintiff appealed.

Strange, for appellant.
No counsel *contra*.

READE, J. It is settled that a regular final judgment can not be set aside at a subsequent term on motion. The judgment in this case was regular, and had the additional force of being by consent of parties. The fact that the defendant's counsel consented under the false representation of a third person that his client was willing to pay it, makes no difference.

The effect of the appeal from the order vacating the judgment, was to leave the judgment and execution in full force; and the money raised under the execution will be paid over to the plaintiff. There was error. Judgment here for the plaintiff for costs.

PER CURIAM. Judgment accordingly.

STATE v. SANDY RATTS.

When the punishment for a common law offence has been mitigated by statute, it is not proper that the indictment shall conclude "against the form of the statute."

LARCENY, tried before *Cloud, J.*, at Spring Term 1869, of the Superior Court of ROWAN.

The defendant was convicted of the larceny, whereupon he moved that the judgment be arrested for the following reason: that as the punishment of the offence had recently been altered

by statute, the indictment should have concluded "against the form of the statute, &c."

Motion overruled. Judgment and appeal.

Boyden & Bailey, for the appellants.
Attorney General, contra.

DICK, J. Where an offence exists at common law, and only the punishment is altered by statute—in such cases it is not necessary for the indictment to conclude "against the form of the statute," as it is the offense which is the subject of the indictment, not the punishment.

If an offence at common law is made an offence of a higher nature by statute, then the indictment must conclude against the statute, 2 Hale P. C. 189, 1 Saund. 145, 1 Moody 402—404, 1 Bish. Cr. Law, Ch. XI.

The offence alleged in the indictment in this case, is petit larceny at common law, and the punishment for such offence was whipping, imprisonment, or other corporal punishment. This punishment has been mitigated to imprisonment at hard labor, by a recent statute, Acts 1868, ch. 44, sec. 5.

The indictment is properly drawn according to the common law, and his Honor was right in inflicting the statutory punishment. There is no error.

Let this be certified, &c.

PER CURIAM. No Error.

R. L. MYERS Adm'r., *v.* W. D. CREDLE.

Where the defendant in a writ of replevin was not in possession of the thing sued for at the time the writ was issued, and refused to give bond, no recovery can be had against him.

Third persons, who after the issuing of a writ of replevin come forward and give the bond and receive possession of the thing sued for, from the plaintiff, are not liable to a recovery in such action.

MYERS *v.* CREDLE.

REPLEVIN, tried before *Jones, J.* at Spring Term 1869 of the Superior Court of BEAUFORT.

At the time when the writ was served upon the defendant Credle, the schooner, the subject of the suit was in the possession of Respass, a Constable, who had seized it by virtue of an execution; and Credle refused to give bond. It remained in the possession of the Sheriff, or of the plaintiff, for several weeks afterwards, when one J. R. Selby and one Robert Lupton appeared and claimed it as their property, and it was delivered up to them by the plaintiff's attorney, upon their giving bond. The plaintiff claimed a verdict against Credle, and also against Selby and Lupton.

The Court charged the jury that if Credle refused to give any replevy bond, and abandoned all claim to the vessel, and that, if afterward the plaintiff, by himself or his attorney, voluntarily surrendered the vessel to Selby and Lupton upon their giving the bond referred to, the plaintiff could recover neither against Credle, nor against Selby and Lupton in this suit.

The plaintiff's counsel excepted. Verdict for defendant; Rule for a new trial; Rule discharged; Judgment and appealed.

Carter, for the appellant.
Phillips & Merrimon, contra.

READE, J. I. The plaintiff cannot recover against the defendant Credle, because at the time the writ was issued he was not in possession of the property, and did not have the control of the same, Rev. Code, ch., 98, sec. 1.

II. The plaintiff cannot recover agaist Selby and Lupton, because they are not parties to the suit. The fact that the plaintiff surrendered the property to them upon their entering into bond "to perform the final judgment in the suit" did not make them parties. Whether there is any remedy against them upon their bond, in some other proceeding against them, is not before us.

There is no error. There will be judgment here for defendant.

PER CURIAM. Judgment affirmed.

STATE v. JAMES CREDLE.

Error in the charge of the Court, on a trial for crime will not give the State a right to appeal after a verdict of not guilty.

(*State* v. *Taylor*, 1 Hawks 462, cited and approved.)

MISDEMEANOR, in killing live-stock, tried before *Jones*, *J.*, at Fall Term 1868, of the Superior Court of BEAUFORT.

The defendant, was indicted for killing a steer: in the first count alleged to be property of one James Edwards, and in the second, of some person unknown.

His Honor charged the jury that they must be satisfied that the defendant did kill the steer, and that it was the property of James Edwards, as charged in the first count of the indictment; and that, if they were not so satisfied, they could not convict on the second count. To this part of the charge the Solicitor excepted. There was a verdict of "not guilty," and the Solicitor for the State appealed.

F. H. Busbee, for the State.

No counsel *contra*.

SETTLE, J. "*Nemo debet vis vexari, pro una et eadem causa*," is a principle of the common law, as well as of humanity.

The bill of indictment upon which the defendant was put to trial contained two counts, and there was a general verdict of not guilty.

Admitting that there was error in his Honor's charge, as to the second count, it cannot be reviewed upon appeal by the

State; *State* v. *Taylor*, 1 Hawks 462—for, while the humanity of our law gives the right of appeal to the accused in all cases, the class of cases in which the State has that right, is very small. A legal acquittal in any Court of competent jurisdiction, if the indictment be good, as we think it was in this case, will preclude any subsequent proceedings before every other Court.

PER CURIAM. Appeal dismissed.

STATE, *ex. rel.* DONALDSON *v.* WALDROP.

Justices must recognize defendants in bastardy cases to appear before the Superior Courts. County Commissioners have no jurisdiction of such cases, nor any judicial powers whatever.

MOTION to vacate a recognizance, heard before *Cannon, J.*, at Spring Term 1869, of the Superior Court of CHEROKEE.

This was a proceeding commenced in the usual form before a Justice of the Peace, in which the relator charged the defendant with being the father of her bastard child. The Justice bound him over to the next term of the Superior Court for the County, when he appeared and moved to vacate the recognizance, on the ground that it should have been returnable before the County Commissioners, and that the Superior Court had no jurisdiction of the case.

The Judge refused the motion, and the defendant appealed.

Attorney General, for the State.
No counsel *contra*.

RODMAN, J. (After stating the case as above.) It is difficult to imagine a reason for supposing that the County Commissioners, had any jurisdiction in the premises. They have

no judicial powers at all. Proceedings in bastardy are in the nature of a civil action. *State ex. rel. Adams* v. *Pate*, Bus. 244. The Superior Court have exclusive original jurisdiction in all cases when it is not given to some other Court. Const. Art. IV, Sec. 15. Chapter 12 of the Revised Code concerning bastardy is still in force, except so far as it has been incidentally modified by the change in the system of Courts. The Judge was right in refusing the motion. Judgment that the State recover costs in this Court.

Let this opinion be certified.

PER CURIAM. Order accordingly.

STATE *ex. rel.* D. H. MCNEILL *et. al. v.* JOHN MORRISON, *et. al.*

Whenever the Clerk of a Court is appointed to make sales, &c., it is to be taken that he is appointed in his official capacity, unless the order of appointment expressly negatives the idea; and for default under such appointment the Clerk and his sureties are liable upon his official bond.

(*Broughton v. Haywood*, Phil. 380, cited and approved.)

DEBT, tried before *Warren, J.*, at Fall Term 1867 of the Superior Court of MOORE,

The action was brought on the bond of one Currie, (deceased) Clerk of the County Court of Moore. The bond was given at October Term 1854 of the County Court, and the defendants are the sureties thereto. At July Term 1854 of the County Court, a petition had been filed by the plaintiffs in this suit, praying for the sale of a slave for division, said slave belonging to the plaintiffs as tenants in common. At October Term 1854, there was this entry upon the trial docket: "Prayer of petition granted. Ordered by the Court that A. C. Currie be appointed commissioner to sell the slave, and report to the next term of the Court. For decree, see minutes." The parts of the decree

necessary to be stated are as follows: "It is therefore ordered, adjudged and decreed that Alexander C. Currie be appointed a commissioner to make sale of said slave on a credit of six months, &c." "It is further ordered that the said commissioner make his return to the next term of this Court." At January Term 1855 a report was made, signed "A. C. Currie, Commismissioner," and confirmed. It set forth that the slave was sold on the 29th day of December, 1854, to Cornelius Dunlap, on a credit of six months, and that Dunlap gave his bond for $1,026, the purchase money. It was in evidence that Currie received the money on this bond before it became due, less some ten or fifteen per cent. upon the amount, and surrendered the bond to Dunlap, and shortly thereafter died. There was also evidence of a demand before the commencement of this suit.

It was insisted that upon this evidence the sureties on the bond of Currie were not liable, but the Court was of a different opinion, and there was a verdict for the plaintiff.

Rule for a New Trial; Rule discharged; Judgment, and Appeal.

Person for the appellants, cited *Sanders* v. *Bean*, Bus. 318.

Manning, and *N. McKay contra*, cited *State* v. *Bradshaw*, 10 Ire. 229, *Broughton* v. *Haywood*, Phil, 380.

READE, J. The statute authorizes the Court to appoint the Clerk, or some other fit person, to make sales, &c.

Whenever the person who is Clerk is appointed, it is to be taken that he is appointed in his official capacity. Especially is this so, when in the order appointing him, he is designated as "Clerk."

The words "some other fit person" mean some other person than he who is acting as Clerk. It may be that if the order of appointment negatived the idea that he was appointed in his official capacity, he might fall under the words, "other fit person," but that is not this case.

It is to be taken that the bond was payable to A. C. Currie, Clerk, &c., and reported to Court and filed in his office, and that upon it he received the money.

The Clerk, then, and his sureties are liable upon his official bond, *Broughton* v. *Haywood*, Phil: 380.

There is no error. Judgment will be entered here for the plaintiff.

PER CURIAM. Judgment affirmed.

ROBERT W. GLENN *v.* THE CHARLOTTE & SOUTH CAROLINA R. R. COMPANY.

Where a Carrier, upon being applied to by the owner to deliver certain cotton, (then at its depot and in its possession for transportation) to another Rail Road Company, declined to do it, or to allow the owner to do it—promising to deliver it, itself, within three days; *Held*, that it was *gross negligence* for such Carrier to allow the cotton to remain undelivered for several months afterwards and until it became rotten by exposure to the weather.

If a jury decide correctly a question of law improperly left to them by the Court, the verdict cures the error of the Court.

Semble, That a *Common Carrier for hire*, can protect himself by an *express contract*, to such extent only as will render his liability no greater than that of a *Special Carrier for hire; also*, that to render a parol contract to that effect binding upon the other party, there should be *a consideration* therefor; and that otherwise it would be *nudum pactum*.

(*Craton's* case, 6 Ire. 164, cited and approved.)

CASE, tried before *Tourgee, J.*, at Spring Term 1869 of the Superior Court of GUILFORD.

The plaintiff declared against the defendant as a common Carrier, Warehouseman and Forwarder, for damages sustained in the loss of certain cotton received by the defendant at Columbia S. C., for transportation to High Point in Guilford County.

The cotton was received by the defendant in February 1864, under a special contract in writing, by which it was

claimed that it was liable for gross neglect only. It was carried to Charlotte, and the damage sustained by it was received at the depot there, where it was left upon the ground exposed to the weather for several months, until the larger portion of it had rotted. It had reached that point about the first of March 1864, and remained there until August.

It was shown for the plaintiff that he had gone to Charlotte about the first of April 1864, and after some negotiation with officials upon both Roads, had been imformed that the N. C. R. R. Co., would receive and transport the cotton immediately, the cotton being then in fair order, lying as above described, at the depot; that upon applying at the office of the defendant to have it delivered at once, he was told that their hands were absent upon some other employment; and upon his offering to hire hands himself in order to deliver the cotton, he was also told that the defendant would not permit freight that was in its hands for transportation, to be interfered with in that way—the official adding that the cotton would be delivered to the North Carolina R. R. Co., during the next three days. The plaintiff being satisfied with these assurances returned to his home in Guilford.

The defendant introduced evidence tending to show that its Road was then greatly embarrassed and encumbered by military orders freight and passengers; and, with regard to the cotton, that on the next day after the plaintiff had visited Charlotte (as above) the defendant had offered to deliver the cotton to one Keisler the receiving and loading clerk of the N. C. R. R. Co., at that place, and that he had refused to receive it, on the ground of military orders freight, &c.

Afterwards one Scott, a witness for the plaintiff testified that Keisler was not authorized to receive, or refuse freight for the N. C. R. R. Co.

The view of the case taken by the Court renders it unnecessary to set forth more of the facts.

His Honor instructed the jury that the defendant was bound to ordinary diligence in storing and forwarding the

cotton, and that if they should find that it had failed to exercise such diligence, then the plaintiff should recover.

Verdict for the plaintiff; Rule for a new trial; Rule discharged; Judgment and Appeal.

Fowle & Badger, for the appellants.

Phillips & Merrimon, contra.

PEARSON, C. J. We are of opinion that the evidence, taking it most favorably for the defendant, makes out a case of gross negligence, and that the Judge ought to have instructed the jury that the plaintiff was entitled to a verdict.

When the plaintiff went to Charlotte in April 1864, and found his cotton in the condition it was in, he had a right to "quicken the diligence" of the defendant's employees. As one who puts process into the hands of an officer, may tell him that he has reason to fear the defendant will "slip out of the county" and the matter should be attended to without delay: if this requisition for prompt action be not complied with, and harm comes of the delay, the officer is liable.

The plaintiff had made arrangements by which the cotton would have been received by the N. C. R. R. Co. in two hours; of this he gave the defendant notice, and showed to the employee an order under which the cotton would have been received and shipped to High Point "instanter," and required him to deliver the cotton during that evening. Whether the hands of the defendant were out of the way doing something else, or whether this was a pretext to *exact a bonus of the plaintiff*, is immaterial to the question before us. It was the duty of the defendant, when his diligence was thus quickened by a special request, to have had the necessary hands on the spot, and failing in this, it was gross negligence to refuse to allow the plaintiff to have the cotton moved at his own expense. This refusal, whether upon rail road etiquette, or for other motives, put the defendant in the wrong, and created an absolute duty to make good the assurance then given to the plaintiff to deliver the cotton within three days.

As the plaintiff acted upon this understanding, and went home relying on it, its legal effect was an assurance that the thing would be done; and the defendant cannot escape liability by proof that he offered the cotton to Keisler the receiving and loading *Clerk* of the N. C. R. R. Co., who refused to receive it, saying "they had received a military order requiring government freight to be shipped;" because, in the first place, the defendant was fixed with the responsibility of an insurer, by the absolute promise made to the plaintiff; and, in the second place, there was no proof that this clerk, Keisler, had any control over the matter, or was the right man to apply to. On the contrary, Scott swears that Keisler was merely a loading clerk and had no authority to accept or refuse goods to be carried, and that the employees of the defendant had notice that this was exclusively the business of the witness Scott.

Taking all of the evidence, gross negligence is proved. For this reason we do not feel at liberty to express an opinion upon the question so fully argued, *i. e.* whether a rail road company can restrict its liability to cases of gross negligence, by special contract. We are the less inclined to do so in this instance, because the contract sets out special circumstances that might take it out of a general rule, to-wit: the fact, that "the Government required for its transportation almost entirely the whole equipment of the road, and the damaged condition of the cars, caused by the transportation of troops, munitions of war, etc." As the idea of the exemption of a rail road company from the liability imposed by the common law on common Carriers, is put on the footing of a discharge by special contract, it would seem that the liability cannot be less than that of a bailee to carry for hire, which is for ordinary neglect: for the distinction is, that the one depends on a special, the other on a general contract. And it would also seem that this special contract should be supported by some consideration to take it out of the doctrine of *nudum pactum*. So the question will be, can the mere doing of that which the party is bound to do any how, or subject himself to an action, amount to a consideration; or will it fall under the principle,

that payment of a part of a debt, the whole of which the party is *then and there* bound to pay, is no consideration to support a promise of a discharge of the balance of the debt. These suggestions are thrown out, with no intimation of an opinion, but as "food for reflection," and to show that we have considered the argument with which the Court was favored.

The error of the Judge in leaving a question of law to the jury, is cured by the verdict. "*Craton's case*," 6 Ire. 164.

PER CURIAM. Judgment affirmed.

P. W. BROWN, Adm'r., &c. *v.* THE COMMISSIONERS OF WASHINGTON.

The fact that the officers of a corporation make a contemporaneous minute for their own information, of a parol contract, in the absence of the other party, does not render oral evidence by that party of the terms of such contract, incompetent.

Where the case transmitted to this Court shows that one party, in order to establish his title to land, tendered evidence of a *parol lease* thereof, and that it was rejected by the presiding Judge, *Held*, that it will not be presumed, in the absence of any reason assigned, for the purpose of supporting the ruling below, that the lease was one which the Statute of Frauds requires to be in writing.

In order to make out *error* in the directions of the Judge below, it is not necessary to show that the evidence excluded would have made a good case for him who offers it—but, that by its exclusion he was prevented from *developing his case*.

TRESPASS, Q. C. F., tried before *Jones*, *J.*, at Spring Term, 1869, of the Superior Court of BEAUFORT.

Upon the trial a question arose as to the rights of the plaintiff under an alleged lease of the premises to him by the defendant. He offered evidence of a parol contract of lease,

which was objected to by the defendant upon the ground that there was a record of such contract made at the time by the defendants in the books of the corporation, as was shown by a witness, who also stated that the plaintiff was not then present.

His Honor sustained the objection, upon the ground that the plaintiff should have produced the record, or have given notice to the defendant to do so, &c., before introducing parol proof. The plaintiff excepted.

Verdict for the defendant; Rule for a new trial; Rule discharged; Judgment and Appeal.

Carter, for the appellant.

Phillips & Merrimon, contra.

RODMAN, J. The case does not state the reason which induced the Judge below to reject the parol proof of the alleged contract of lease between the parties, and we are somewhat uncertain what it was. He probably considered the entry of the contract on the books of the Commissioners as forming a written contract between the parties, in which the entry would be the primary evidence of the contract, and secondary would not be admissible until the absence of the primary was excused. We think this view cannot be sustained. The case states, indeed, that the entry was proved to have been made at the time of the contract; but it also states, somewhat inconsistently, that the plaintiffs were not present when the entry was made, and they do not appear to have had any knowledge of it before the trial. It seems to have been a memorandum of a past transaction made by the Commissioners for the information of themselves and their successors. As to the plaintiffs, it was *res inter alios acta*, and did not bind them. They ought to have been allowed to prove the alleged lease in any lawful way; instead of which the Judge denied all other modes of proof but the entry.

It is said, however, that leases for more than three years are invalid unless in writing; (Rev. Code, ch. 50, sec. 11) and

that it does not appear that the alleged lease was not for more than three years; and that consequently it does not appear, as it must to entitle the plaintiffs to a *venire de novo*, that they were wronged by the ruling of the Judge. The Judge does not put his exclusion of the plaintiff's evidence on the ground that the contract must necessarily be in writing under the Statute, but on the ground that as it was in writing it could only be proved by the writing. The plaintiffs offered to prove a parol lease which might be good; it could only be known whether it was good or not after the evidence was heard. It is not necessary for an appellant to show here that he has a good cause of action, but only that he was prevented from developing his case by testimony, through an erroneous ruling of the Court. That we think sufficiently appears here.

Judgment below reversed.

PER CURIAM. *Venire de novo.*

STATE *v.* HENRY C. DARR.

The prosecutor upon an indictment for stealing a mule, found at Fall Term 1867 and tried at Spring Term 1869, may upon proper certificate by the Judge below, be ordered by him to pay the costs of the case.

(*State* v. *Lumbrick*, 1 Car. L. R. 543, and *State* v. *Lupton*, at this term, cited and approved).

ORDER to pay costs, made by *Cloud, J.*, at Spring Term 1869, of the Superior Court of FORSYTH.

The defendant was endorsed as prosecutor on a bill of indictment for larceny of a mule, found at Fall Term 1867. On the trial there was a verdict of "not guilty," and the prisoner was discharged. Afterward, his Honor the Judge presiding having certified that there was not reasonable ground for the prosecution, and that it was not required by the public inter-

est, but was frivolous and malicious, on motion, it was ordered that the prosecutor Henry C. Darr, pay all costs of the cause, to be taxed by the Clerk, including all the witnesses sworn for the defendants, as the Judge certified that all of them were necessary witnesses.

From this order Darr appealed.

Phillips & Merrimon, for the appellant.
Attorney General, contra.

READE, J. The offence charged, larceny, was one "of an inferior nature" within the meaning of the statute, Rev. Code ch. 35 sec. 37, which authorizes the Court to make the prosecutor pay the costs where the defendant is acquitted, and the prosecution "appears to be frivolous or malicious." *State* v. *Lumbrick*, 1 Car. L. R. 543.

It appeared to his Honor that "there was not reasonable ground for the prosecution, and that it was not required by the public interest, and was 'frivolous and malicious.'" If then the case were governed by the law as it stood when the offense was charged to have been committed, or when the indictment was found, as was contended for by the prosecutor, he might properly be made to pay the costs. But the case falls under the C. C. P. § 560, which was in force at the time of the trial, and which provides that in any criminal action, for whatever grade of offense, the prosecutor, if one is marked on the bill, may be ordered to pay costs, "when the Judge shall certify that there was not reasonable ground for the prosecution, and that it was not required by the public interest" *State* v. *Lupton*, at this term. It was therefore proper in this case to make the defendant, who was the prosecutor in the case in which the order was made, pay the costs. There was no error in the judgment appealed from.

This will be certified, &c.

PER CURIAM. Judgment affirmed.

STATE *v.* LAWRENCE BRANTLEY AND WESTON WATKINS.

The rule "*falsum in uno falsum in omnibus*" is not a rule of law in this State; and the jury may believe all, or a part, or none, of the testimony of a witness to whose evidence that rule is applicable, as they think best.

A Judge is not bound to follow the very words used by counsel in a prayer for instructions, provided that he is substantially correct in the language which he does use.

An omission of the word "county" before the words "of Wake" is immaterial in the record of the trial below, as the Court is bound to know what are the counties of the State.

(*State* v. *Neville*, 6 Jon. 423, *Burton* v. *March*, Ib. 409, *State* v. *Smith*, 8 Jon. 132 cited and approved).

ROBBERY, tried before *Watts*, *J.*, at Spring Term 1869, of the Superior Court of WAKE.

The bill of indictment was found at Spring Term 1869, of the Superior Court of Franklin, and upon the affidavit of the defendants, the cause was removed to Wake. The facts sufficiently appear in the opinion.

Sharp, for the appellants.
Attorney General, contra.

RODMAN, J. The prisoners were indicted for robbery and larceny. Upon their trial one Dampier, an accomplice, was examined as a witness for the prosecution. The counsel for the defendants asked the Court to charge the jury that if they believed any witness or witnesses had wilfully sworn falsely to any material fact in the case, they were authorized to reject the whole of the evidence of such witness or witnesses. The learned Judge declined to charge as requested, but told the jury that the rule "*falsum in uno falsum in omnibus*," does not now prevail in this State: that the jury could believe a part, all or none of the testimony, and that it was a question of credit, of which they were the sole Judges. The defendants were convicted and appealed, and now assign the Judge's

refusal to charge as requested, for error. No ground is laid for the instruction asked for: it does not appear that any witness was alleged to have sworn falsely: for aught that appears, the instruction was wholly an abstract one, and not pertinent to the case. But waving this, and admitting for the present that the instruction asked for was entirely correct, both in substance and lnnguage, then the Judge did give the instruction substantially; and we are not aware of any rule requiring a Judge in instructing the jury, to use the very words of the counsel asking the instruction. If the instruction asked for be correct in law, and framed in perspicuous and intelligible language, there can be no reason why the Judge should not use the very words of counsel, as they may be supposed to have been carefully chosen: but if the Judge thinks that by altering the words without altering the sense, they can be made more intelligible or clearer to the jury, he certainly must be allowed the liberty of doing so. *State* v. *Neville*, 6 Jon. 423, *Burton* v. *March*, Ib. 409. The Judge was especially entitled to such a liberty in this case, as we think that the terms in which the instructions were asked to be given, were either incorrect or ambiguous, and might have misled the jury. The jury might have understood by it, that if they believed that a witness had wilfully sworn falsely to any material fact, they were bound to, or at least authorized to reject all the rest of his testimony, although they believed it to be true. The law is stated clearly and correctly in the instruction given by the learned Judge: *State* v. *Smith*, 8 Jon. 132; and the prisoners have no reason to complain.

The prisoners moved in this Court in arrest of judgment, because the record of the trial reads thus: And afterwards, to wit, at the term of said Court, begun and held for the of Wake &c.", omitting the word, "county." But we think we are bound officially to know that Wake is a county of the State.

There is no error in the record and the judgment is affirmed. Let this opinion be certified, &c.

PER CURIAM. No error.

STATE *v.* WILLIAM D. PATTERSON.

Evidence having been given that a person then upon trial for larceny, had been charged with the crime by the prosecutor, face to face, on being arrested under a State's warrant: it is competent for the defendant to show what his reply was to such accusation.

(*State v. Swink*, 2 D. & B. 9, cited and approved.)

LARCENY, tried before *Cannon, J.*, at Spring Term, 1869, of the Superior Court of TRANSYLVANIA.

The defendant was indicted for stealing a hog, the property of one Lydey. It was shown on the part of the State that a warrant was issued against the defendant at the instance of the prosecutor, Lydey, and that when it was being served, Lydey charged the defendant with the theft. The counsel for the defendant then asked the witness (Lydey) what was the reply of the defendant to this accusation? To the reception of this evidence the Solictor objected; and the Court sustained the objection.

Vedict, guilty; Rule for new trial; Rule discharged; Judgment, and Appeal.

No counsel for the appellant.

Attorney General, contra.

SETTLE, J. From the statement of the case sent to this Court, it appears that while the warrant was being served at the house of the defendant, the prosecutor, Lydey, charged the defendant with stealing his hog. This evidence was introduced by the State.

Had the defendant remained silent, it would have been a circumstance which the jury might have taken into consideration in passing upon his guilt. *State* v. *Swink*, 2 Dev. & Bat. 9; for there is no doubt but that admissions implied from the conduct of a party are evidence against him, as well as express admissions. Surely, then, the State ought not to object

to hearing what the defendant had to say in reply to a charge called out by the prosecution, when his silence would have been prejudicial.

The general rule is, that a person's own declarations are not admissible for him, except under a few peculiar circumstances. But it would be unfair to receive what others said to the accused, and refuse to hear what he said in reply. This opinion is not based upon the idea that the declarations of the defendant were a part of the *res gestæ*, as was contended for upon the trial below, but it rests upon the familiar principle, that when a party calls for a statement made at a given time and place, the opposite party is entitled to all that was said in the same conversation. This rule applies both to civil and criminal cases.

There is error which entitles the defendant to a *venire de novo*. Let this be certified, &c.

PER CURIAM. *Venire de novo.*

E. G. HAYWOOD *v.* J. S. BRYAN and J. B. SUGG.

The "Act to suspend the Code of Civil Procedure in certain cases," ratified March 16th 1869, does not repeal § 116, C. C. P., so as to allow of "pleas" *without verification*.

COMPLAINT, tried before *Watts, J.*, at Spring Term 1869 of the Superior Court of Wake.

The summons was made returnable in Term time, in accordance with the provisions of the Act of March 16th 1869. When the case was called, the defendants, having no real defence, offered to put in the plea of "payment and set off," *without verification* and only for the purpose of delay.

To this the plaintiff objected, and the Court sustained the objection. Judgment for the plaintiff in default of a plea; from which the defendants appealed.

Fowle & Badger, for the appellant.
Whiting, and *Batchelor*, *contra*.

READE, J. When any pleading is verified, every subsequent pleading, except a demurrer, must be verified also. C. C. P. § 116.

The defendant shall appear, and demur, plead or answer, at the term to which the summons shall be returnable; otherwise the plaintiff may have judgment by default, as is now allowed by law: Act to suspend the Code in certain cases, March 16th 1869.

It is admitted by the defendant, that if he had answered, he would have been obliged to verify the answer, under the Code, § 116; but he says that under the Act of March 16th 1869, he is permitted to defend by "plea," instead of by "answer" as provided in the Code, and that a plea need not be verified.

We doubt whether "plead" in the act of March 16th 1869 means anything more than the common defence by "answer" in the Code; but if it does, it still requires to be verified, for a plea as well as an answer, is a part of the pleadings; and when the complaint is verified, all the other "pleadings" must be verified also. There is no error. Judgment here for plaintiff.

PER CURIAM. Judgment affirmed.

SMITH TURNER *v.* THE NORTH CAROLINA R. R. COMPANY.

Where an officer in the military service of the Confederate States, whilst absent from such service contracted with a Rail Road Company to transport him to the headquarters of the army in order to report to the Commander-in-Chief, and received personal injury on the route by the negligence of such Company; *Held*, that because then and there engaged in an act of hostility to the United States, he was not entitled to recover damages.

Such defence arises upon the plea of the General Issue.

(*Martin* v. *McMillan*, *ante* 486 cited and approved.)

TURNER *v.* N. C. R. R. Co.

CASE, tried before *Tourgee, J.*, at Spring Term 1869 of the Superior Court of ALAMANCE.

The plaintiff showed that at the time of the occurrence (April 21st, 1865) he was a citizen of Virginia, and an officer of the Confederate army; and that upon the fall of Richmond, a few days previously, he had escaped from a Confederate hospital there, without having been captured or paroled; that he came from Richmond to the neighborhood of the Company Shops in Alamance County, and on the 21st of April, 1865, took passage in a train belonging to the defendant for Greensboro; and that his object in going to Greensboro was to report to General Joseph E. Johnston, commanding the Confederate forces in this department at that time.

The personal injuries of which he complained were received upon that train, through the alleged negligence of the officials of the Company.

The Court thereupon, at the instance of the counsel for the defendant, intimated an opinion that the plaintiff could not recover, by reason of the unlawfulness of the errand on which he was going at the time of the alleged injury: he then and there being an officer of the Confederate army, in the line of his duty as such, upon his way to report to his superior, and so, engaged in an act of hostility to the government of the United States.

Thereupon the plaintiff submitted to a non-suit, and appealed.

Graham, for the appellant.

1. The defence made requires to be set forth by a Plea in abatement; and is not competent under the General Issue. 1 Chitty 446, 448, 2 Abbott p. 25.

2. The defendant, being *in pari delicto*, cannot set up such a defence. Does civil war dissolve society, and destroy the legal remedies of insurgents against each other?

3. As matter of public history, at the time the injury in question was inflicted, there were negotiations for peace on foot between General Sherman and General Johnston; and a truce covered the country between the Shops and Greensboro;

and peace was proclaimed by those parties on the 26th of April thereafter. The presumption therefore is, that the plaintiff did not intend hostility to the United States by his action, but only to place himself in a situation to be surrendered.

4. The Ordinance of 18th October 1865, proclaimed the whole body of laws in North Carolina (except so much as was intended to support the civil war) to be and to have been in force; and as matter of common observation, the greater part of the litigation now existing arises from torts and contracts that arose during the war,

Phillips & Merrimon, contra.

The only question is, whether an officer of the Confederate States army, can, in a Court under the United States, enforce against the party transporting him *to the field*, the ordinary duties of diligence as to speed or safety of carriage, demandable by passengers? Would such Courts entertain suits for failure to transport safely Confederate regiments, which thereby failed to be at a certain battle; or, say, Confederate ammunition or army stores which by not arriving crippled an army? We do not speak of cases of trespass, much less of breaches of the peace, against such persons, nor in any manner of their personal rights, except for damages occasioned by *negligence of their right to personal security whilst engaged in an act of hostility*. Whether this be by loyal persons or by persons *in pari delicto* these Courts may well say, "Look *ye* to it, we will be judges of no such matters!

The character of the act by which an officer of the army of Virginia, which at that time had been surrendered, who found himself in a district covered by a truce, was seeking an opportunity to increase the strength of another, and that the only considerable Confederate army then in the field, need not be enlarged upon. *Prima facie*, it was hostile. If it *might* have been explained by evidence, it was not.

It may not always be necessary, in order to recover damages for injury, that the passenger shall have paid or engaged to pay

fare; but it is necessary that he shall plead and prove that he was "lawfully" on the Road. *Darby* v. *R. R. Company*, 14 How. U. S. 468, 4 Rob. Pr. 785, *Lygo* v. *Newbold*, 34 Eng. L. and E. 507.

READE, J. The Court in which the plaintiff seeks redress for an alleged injury, is a Court of the Government of one of the States of the United States. The plaintiff was engaged in a rebellion against the Government of the United States, and having for a time absented himself from the service of the Rebellion, he contracted with the defendant to convey him to the field of active operations, that he might report for such service again; and he complains that the defendant was guilty of negligence in transporting him, and that thereby he was damaged; and thereupon he asks that the Court will enforce his claim, and help him to redress.

If the Rebellion had been successful, and a government had been founded upon that success, it would doubtless have been legitimate for the courts of such government to adjust the rights of those who had been engaged as its agents in establishing the government. But will the Courts of the government which was attempted to be destroyed, interfere to redress one of the insurgents who was disabled in the very act of hostility to the government whose aid he now seeks? If the defendant, who is alleged to have committed the injury, was a friend of the United States, it would seem to be an ungenerous discrimination to subject him to damages for an act of which his government had the benefit; and if the defendant was a co-rebel with the plaintiff, and they were *in pari delicto*, the government would consult its dignity, and not interfere in their dispute.

But this must be understood to be restricted to acts clearly rebellious, or intimately connected with the Rebellion, and in aid of it; for, very clearly, the present Courts will take cognizance of all matters of a civil nature between rebels, not intimately connected with and in aid of the rebellion. In the view of the Courts of the present Government, the service in

which the plaintiff was engaged was illegal. The act of going to the field of operations was illegal, and the contract of the defendant to aid him by carrying him to the field, was an illegal contract, and upon the supposition that both parties were rebels,—the most favorable one for the plaintiff—there can be no recovery upon it. *Martin* v. *McMillan*, *ante* 468.

The objection was properly taken on the plea of the general issue. There is no error.

PER CURIAM. Judgment affirmed.

NOTE.—As some misapprehension exists as to the extent of the principle administered by the presiding Judge upon the trial of the case, below, the Reporter adds that during the same term of Alamance Court, in the case of *Ireland v. The N. C. R. R. Company*, (being a suit for damages occasioned by the same negligence that injured the plaintiff in the case above,) the plaintiff, who was also shown to be an officer of the Confederate States army, under the instruction of his Honor recovered a verdict for $2,000, the defendant having failed to show that *he* was then going in order *to report to General Johnston*; also, that at the same term, in the case of *Clark, Adm'r., &c.*, v. *The Raleigh & Gaston R. R. Company*; it was shown that the intestate was an officer of the Confederate States army at home on furlough, and that he was killed by the negligence of officials of the defendant, whilst returning home from a visit to friends. Under the instructions of his Honor, the plaintiff recovered a verdict for $3,000.

All these cases were conducted by the same counsel.

EXUM FUTRELL, *et al v.* HENRY SPIVEY, Adm'r.

Where a rule was served upon a plaintiff to justify his security for the prosecution of a suit, or to give other, and he failed to do so by the required time, whereupon the suit was dismissed; *Held*, that the refusal of the Judge to accept a bond subsequently tendered, is not subject to review.

MOTION to dismiss, heard by *Watts, J.*, at Spring Term 1869 of the Superior Court of NORTHAMPTON.

On Tuesday of the first week of the term a rule was taken upon the plaintiffs to justify their security for the prosecution of the action, or to give other security. The plaintiffs failed to do either, and the defendant's counsel having stated that the plaintiffs were bankrupt and their sureties insolvent, without contradiction from the counsel for the plaintiffs, on motion, the action was dismissed.

Subsequently the plaintiff's counsel tendered a sufficient bond, and moved the Court to accept the same, and set aside the order of dismissal, which was refused, whereupon the plaintiffs appealed.

Peebles & Peebles, and *Conigland*, for the appellants.
Bragg, contra.

READE, J. The case is considered by us upon the record and the Judge's case as signed by him and certified by the Clerk, and not upon the loose paper purporting to be a statement of the case by the appellant, which is not certified. We may say however, that our decision would be the same if we had put it upon the appellant's statement.

The plaintiff had had a day in Court to justify the security for the prosecution of the suit, or to give other; and upon his failing to do either, it was proper that the suit should be dismissed. After it had been dismissed, whether his Honor would allow the plaintiff further time or accept a bond subsequently tendered, was a matter of discretion which we can not review.

PER CURIAM. No Error.

MARY McLAURINE, *Ex Parte.*

Neither a Justice of the Peace, nor the Judge of the Special Court of the City of Wilmington, has jurisdiction over larceny.

The power of the Judge of the Special Court of Wilmington to issue writs of *habeas corpus*, is confined to criminal cases falling within his jurisdiction.

(*State* v. *Haughton*, *State* v. *Jarvis*, and *City of Wilmington* v. *Davis*, at this term, cited and approved.)

HABEAS CORPUS, heard by *Cantwell, J.*, at April Term 1869, of the Special Court of the City of WILMINGTON.

The petitioner was brought before a Justice of the Peace on the charge of larceny, convicted and sentenced to be fined and imprisoned. She afterwards sued out a writ of *habeas corpus* before Judge Cantwell, and was discharged; his Honor being of the opinion that the Justice had no jurisdiction, or had exceeded his jurisdiction. From this the Solicitor for the State prayed an appeal, which was allowed.

Attorney General, for the State.

Bragg, contra.

DICK, J. A Justice of the Peace has no jurisdiction to try a person charged with the offence of larceny. *State* v. *Jarvis*, at this term.

The defendant was, therefore, improperly convicted and imprisoned. But she has mistaken her remedy. She ought to have appealed to the Superior Court from the judgment of the Justice; or have applied to a Judge of the Superior Court or a Justice of the Supreme Court for a writ of *habeas corpus*, as they have general jurisdiction in all cases of unlawful imprisonment: Act of April 6th 1869. The jurisdiction of the Special Court of Wilmington is limited to the trial of misdemeanors committed within the corporate limits of said city. *City of Wilmington* v. *Davis*, at this term. The power of the Judge of said Special Court to issue writs of *habeas corpus*, conferred

by Act of 1868, ch. 12, sec. 17, is confined to criminal cases within his jurisdiction, and cannot be extended by implication to cases which he cannot hear and determine, and he has no jurisdiction in cases of larceny. *State* v. *Haughton*, at this term.

His Honor therefore had no power to issue the writ of *habeas corpus* in this case, and the proceedings are dismissed.

PER CURIAM. Petition dismissed.

THE STATE *v.* WILLIAM PRINCE, GEORGE PRINCE and JOHN McKINLEY.

Where, upon trials for capital offences, questions arise as to the propriety of discharging the jury without a verdict: whether a *necessity* exists for such discharge is a matter to be decided by the Judge presiding at such trial; and it is his duty to ascertain the facts which constitute such necessity.

The exercise of such discretion in any particular case of discharge may be appealed from, and in such case the finding of the *facts* in the Court below is conclusive, leaving the law as deduced from such facts, to be reviewed.

In a case where three persons were upon trial for murder, the prisoners proposed that they should be examined as witnesses for each other. The State objected, but the Court allowed the motion; thereupon the Solicitor appealed, and the Court, to allow him such appeal, against the objection of the prisoners withdrew a juror and made a mistrial; *Held*, to have been an erroneous exercise of discretion, and that thereupon the prisoners were entitled to a discharge.

(*State* v. *Rose*, Phil. 406, cited and approved; *State* v. *Garrigues*, 1 Hay. 241, Spier's case, 1 Dev. 491, *State* v. *Ephraim*, 1 D. & B. 162, considered, and doubted.)

MURDER, tried before *Cannon, J.*, at Spring Term, 1869, of the Superior Court of CHEROKEE.

The facts appear sufficiently stated in the Opinion.

Attorney General, for the State.

No counsel *contra*.

RODMAN, J. This was an indictment found at Spring Term 1869 of the Superior Court of Cherokee, against William Prince, for murder, and against two other prisoners, as being present aiding and abetting. The prisoners pleaded not guilty; the jury were sworn and empanelled; the witnesses for the prosecution and the defence were sworn. Before any of them had been examined, "the prisoners' counsel proposed that they should be examined as witnesses for each other;" the Solicitor objected, but the Judge decided that each was entitled to be examined for or against the others. From this decision the Solicitor for the State appealed, and his appeal was allowed. On motion of the Solicitor and against objections by the prisoners, the Judge ordered the withdrawal of a juror and a mistrial, and that the jury be discharged. Thereupon the counsel for the prisoners moved for their discharge, which was refused; and the prisoners appealed.

The record makes it necessary to consider what is the effect of the discharge of a jury charged with a capital case, without their having rendered a verdict. At the outset we are met by four decisions of this Court, or of the Judges of this Court, all made after full argument and deliberation, and all substantially coinciding.

The cases alluded to are: *State* v. *Garrigues*, 1 Hay. 241, *In the matter of Spier*, 1 Dev. 491, *State* v. *Ephraim*, 1 Dev. & Bat. 162, and the case of *Slaughter*, cited in that case.

Our great respect for the eminent Judges who decided those cases should not prevent us from reviewing with freedom their opinions on so important a question; and we do so the more readily, because in a more recent case in England, the whole subject has been ably and thoroughly examined, and a conclusion come to materially different from that asserted by our Court. We by no means propose to trace the doctrine on this subject, or to refer to the authorities any farther than may be necessary; all the English are cited in *Newton's case*,

13 A. & E. N. S. 717, (66 E. C. L. R. 716); and the most important American are referred to in the note to that case in the American edition, and in the cases in our own reports cited above.

That no person for the same offence can be twice put in jeopardy of life or limb, is a sacred principle of the common law. As a consequence of this principle, it was held in England at an early period, that "a jury, sworn and charged in case of life or member cannot be discharged by the Court or any other, but they ought to give a verdict." Coke Litt. 227–6, and 3 Inst. 110. If in such a case the jury should be discharged, and separate, as the prisoner could not be tried again, he was entitled to be at liberty. But it was soon seen to be necessary to make exceptions to the general rule: cases occurred in which the benefit of the prisoner required the rigor of the rule to be departed from; and others in which an inflexible adherence to it would have resulted in a palpable and discreditable failure of justice. Some of the exceptions will be found discussed in *the Kinlochs' case*, Foster ,22. The question first came before this Court in *State* v. *Garrigues* in 1795, and for the second time in *the matter of Spier*, in 1828. In this last case in which the jury separated by reason of the expiration of the term of the Court, *Hall, J.*, limits the exceptions to "such as are under no human control, but are the offspring of necessity; as where a juror is taken suddenly sick, where a woman is taken in labor, where the prisoner becomes insane, or where the jury are discharged by consent of the prisoner." *Taylor, C. J.*, limits the exceptions in very similar language, and the Judges unanimously refused to add to them the cause of discharge which existed in that case.

In *State* v. *Ephraim*, RUFFIN, C. J., says: "We think there is no such discretion (that is in the Judge to discharge the jury,) and that the jury cannot be discharged without the prisoner's consent, but for evident, urgent, overruling necessity, arising from matter occurring during the trial, which was beyond human foresight and control."

It is admitted by Foster, C. J., (in the *Kinlochs'* case), and by Taylor, C. J., (in *Spier's* case) that it is impossible to lay down a general rule which may be applicable to all cases that may occur. However imposing the expression "evident, urgent and overruling necessity" may appear at first sight, the qualifying adjectives therein add to the noun with which it closes, little of certainty or force. It must be left to the Judge in each case to pass on the existence of the "necessity," and whether it is "evident, urgent and overruling."

As remarked by Coleridge, J., in *Newton's* case, "When once you qualify the word 'necessity' by speaking of it as more or less pressing, you admit that the word is not accurately used. A power to be exercised in case of a more or less pressing necessity, is in truth a discretionary power not to be exercised without strong reasons." Again, he says: "The use of the word 'necessity' has been sanctioned by such high authorities that it is almost presumptuous to remark on it: I think however it cannot be taken to mean necessity in the strict, absolute sense of the word. The true question I think in all cases is, whether the whole circumstances of the case were such as to make the act of the Judge in discharging the jury, a proper exercise of his judicial discretion." Erle says: "I think it (necessity) means not an absolute impossibility to avoid discharging the jury; but merely need in a high degree," of which the Judge is to decide. The principle, like many others in law, being incapable of adequate definition, can only be derived by laying down the general rule, and then excepting from it all such cases as there is sufficient reason for, as they occur. We would make such necessity as existed in the case of Spier an exception. As the law now stands, the same cause cannot again occur in a capital case, for the Court may be continued beyond the term: but there is no such provision as to other felonies, and as respects them, although a Judge should take proper care to avoid such a necessity, yet if it shall arise notwithstanding, we think it would justify the discharge of the jury, and that the prisoner might be tried again. It was held in several cases cited in

Newton's case, contrary to the holding in *State* v. *Ephraim*, that the illness of a juror was a sufficient necessity; and in that case, the prisoner being on trial for murder, the jury being unable to agree after a deliberation of about thirty-six hours, were discharged; and it was held that the cause was sufficient, and that she might be tried again.

But while we agree that the power of the Judge must from its nature be exercised at his discretion, we must not be understood to mean a capricious discretion, or one for which no sufficient reasons are assigned. The discharge of the jury is an act of judicial discretion, and the facts which induce it must be set forth on the record, so that the decision may be made the subject of review on appeal. In *Newton's* case, the Judges generally doubted whether an exercise of the power could be reviewed. We think clearly it may: every decision implies the finding of a state of facts, and the conclusion of law upon it: the finding of the Judge upon the first is final; (*State* v. *Ephraim*, 2 Dev. & Bat. 175;) on the latter it may be appealed from.

We have to consider then whether there was any sufficient cause for the discharge of the jury in this case. None at all is assigned by the Judge. True, the Solicitor had attempted to appeal from the ruling of the Judge on a question of the competency of the prisoners as witnesses for each other—a ruling which we may say in passing, was admitted in this Court by the Attorney General to be correct, *State* v. *Rose*, Phil. 406—but whether he could have appealed for such a cause after final judgment or not, it is clear he could not at that stage of the trial, nor with the effect of stopping the trial until his appeal was decided. Such a practice is unknown, and if it prevailed, trials would be procrastinated indefinitely, and infinite wrong would result.

We think the prisoners, having been once put in jeopardy and the jury discharged without cause, cannot be tried again, and are entitled to their discharge.

Let this opinion be certified.

PER CURIAM. Order accordingly

ROBERT SIMPSON *v.* W. H. SIMPSON.

The plaintiff in a *Sci. Fia.* under sec. 29, ch. 45 of the Rev. Code, must show himself to be the party aggrieved by the default in question: *Therefore*, where the defendant therein pleaded, *nul tiel record*, and the presiding Judge having found that the writing upon record was as follows; "that the defendants [to the original suit] are the tenants of the plaintiff [therein], and are guilty of the trespass declared upon in the declaration of ejectment, and assess the plaintiff's damage to a penny, and that the Clerk's office have judgment and execution for the plaintiff's costs;" thereupon, also found *the issue* in favor of the plaintiff in the *sci. fa.*: *Held*, to be error, as the record showed no judgment in favor of such plaintiff.

The issue *nul tiel record*, includes two questions; *one*, of fact, from the decision of which in the Court below there is no appeal, *the other*, of law, deducible from such fact, from the decision of which below there is an appeal.

(A form of *sci. fa.* in Eaton's Forms, p. 386 recommended).

(*Trice* v. *Turrentine* 13 Ire. 212 cited and approved.)

SCIRE FACIAS, tried before *Buxton*, *J.*, at Spring Term 1869 of the Superior Court of UNION.

The facts necessary to an understanding of the Opinion are to be found therein.

Judgment having been rendered for the plaintiff, the defendant appealed.

Wilson, for the appellant.

Ashe, contra.

RODMAN, J. The Statute under which the plaintiff seeks to recover (Rev. Code ch. 45, sec. 29) gives the penalty to *the party aggrieved.* The *scire facias* before us recites "that it was made to appear that William H. Simpson, (the defendant in this case) Clerk of the said Court, failed to issue a writ of possession in the case of *Doe on demise* of Robert Simpson against Sarah Simpson and others, upon a judgment rendered at, &c.", for which failure he was amerced, &c. Evidently the

sci. fa. is defective, in that it does not state who recovered the judgment in the case recited, and thereby fails to show that the plaintiff was the party aggrevied. A good form in such cases is found in Eaton's Forms, 386. The defendant however did not demur, and we assume therefore that the *sci. fa.* recited a judgment that the plaintiff in ejectment recover his term and damages; and was sufficient. As the judgment was not the foundation of the action, but merely inducement, the defendant might have pleaded *nil debet*, which would have put in issue the plaintiff's whole case. 1 Chit. Pl. 517, 521. But he was at liberty also by a special plea to put in issue solely the existence and legal effect of the alleged judgment in the ejectment suit; this he did by his plea of "*nul tiel record.*" He further pleaded that he had duly issued the execution, but as the jury found against him on this plea, his failure to do so must be conclusively assumed, and no question arises on that issue. The Judge found for the plaintiff on the issue made by the plea of *nul tiel record.* This finding involves a decision on two distinct issues:

1st That a certain alleged writing existed as of record:

2d. That the legal effect of that record was to impose on the defendant the duty of issuing an execution on the judgment so found to exist. From the first finding, being a question of fact, the defendant could not appeal; from the second he could. All these principles are settled in *Trice* v. *Turrentine*, 13 Ire. 212. In the case stated by the Judge he sets forth so much of the writing submitted to his inspection as the record in the case of *Doe ex dem. Simpson* v. *Simpson*, as he deems material, and after referring to that case he says: "The verdict and judgment therein were in the words 'that the defendants were the tenants of the plaintiff, and are guilty of the trespass declared upon in the declaration of ejectment, and assess the plaintiff's damages to a penny: and that the Clerk's office have judgment and execution for the plaintiff's costs.'"

Obviously there is no judgment here in favor of the plaintiff; and therefore he could not be a party aggrieved by the laches of the defendant in failing to issue an execution upon

the judgment: the defendant had no right to issue such an execution. Without noticing here any of the numerous points presented in the arguments of counsel, we rest our opinion on this.

Let this opinion be certified.

PER CURIAM. Judgment reversed.

STATE v. JAMES G. WISEMAN.

Where the transcript of the record of an indictment, &c., for a misdemeanor, which had been removed by affidavit from another county, failed to show that the defendant had pleaded, and thereupon, the Solicitor for the State having suggested a diminution of the record therein, this was admitted by the defendant who stated that he had pleaded Not Guilty, and was willing that the record should be amended so as to show it; *Held*, to have been competent for the Court to make such amendment, and that the Solicitor had no right to appeal from the order.

AMENDMENT of a transcript, ordered by *Henry, J.*, at Spring Term 1869, of the Superior Court of MCDOWELL.

The defendant had been indicted in Mitchell County for cheating; and upon his affidavit, the case was removed at Fall Term 1866, to McDowell, for trial. At the last term the Solicitor for the State suggested a diminution of the record, in that the transcript from Mitchell did not show that issue had been joined. This was admitted by the defendant; who also agreed that he had pleaded to the indictment, Not Guilty, and consented that the record might now be amended accordingly.

His Honor permitted the amendment, and the Solicitor, being dissatisfied with such order, appealed.

Attorney General, for the State.

No counsel, *contra*.

PEARSON, C. J. The alteration made in the record by the consent of the defendant answered every purpose that could have been effected by the *certiorari*, and we are at a loss to see what more the Solicitor for the State expected or desired. We are not at liberty to suppose that the object was to gain a continuance.

At all events the appeal was improvidently allowed by his Honor. Let it be dismissed.

PER CURIAM. Appeal dismissed.

ANNIE W. MILLER. *v.* THOMAS ATKINSON.

A devise and legacy to "Bishop Thomas Atkinson, Bishop of North Carolina, and his heirs," "in trust for the poor orphans of the State of North Carolina, and the said Bishop and his successors to have the right to select such orphans," &c., "and he shall direct and control said trust in the best way for the support of said orphans, and the formation of their morals and education," creates a trust for a specified object, in behalf of a definite class, and is valid, at all events during the life of Thomas Atkinson.

The difficulties suggested as likely to occur on the death of Thomas Atkinson, in reference to the exercise of a choice of beneficiaries among the "poor," &c., may be obviated by intervening legislation; the distinction being that where the trust is void because its objects are too indefinite there can be no aid by legislation; but where the objects are sufficiently definite and the trust is valid, the Legislature may interfere to remove any difficulty in regard to limiting the number and selecting the "orphans"—that being merely secondary and rendered necessary by the proportions of the fund given.

(*Griffin* v. *Graham*, 1 Hawks. 96, *State* v. *McGowan*, 2 Ire. Eq. 9, cited and approved.)

CASE-AGREED between the parties, adjudged by *Russell, J.* at Spring Term 1869, of the Superior Court of NEW HANOVER.

The case stated that the defendant was in possession of certain land described therein, and claimed a right to certain moneys by virtue of the following clause in the will of the late T. J. Hill:

"I give and bequeath unto Bishop Thomas Atkinson, Bishop of North Carolina, and his heirs and assigns, my house and lot in the town of Wilmington, North Carolina, my present residence, together with the tract of land of twenty acres, purchased from James S. Green, from and after the death of my wife, and from and after the term of her natural life, in trust for the use and benefit of the poor orphans of the State of North Carolina; and the said Bishop and his successors to have the right to select such orphans as shall receive benefit under this trust and bequest; and he shall direct and control said trust in the best way for the support of said orphans, and the formation of their morals and education as to him may seem best. And I do also give and devise and bequeath unto the said Bishop Thomas Atkinson and his executors and administrators, for the same trust and purposes as above set forth, the sum of ten thousand dollars, to be paid to him or to his successors to this trust by my executors, from and after the death of my wife aforesaid, and not till then, and no right or interest is to accrue to the same for and during the term of her natural life, but to be paid from and after the termination thereof and not till then."

The question submitted to the Court was, "whether the defendant holds said real estate, and is entitled to said legacy of ten thousand dollars in trust and for the purposes set forth, or whether the trusts are void?"

His Honor having decided in favor of the defendant, the plaintiff appealed.

Strange, for the appellant, cited and remarked upon *Griffin* v. *Graham*, 1 Hawks, 96, *State* v. *Gerard*, 2 Ire. Eq. 210, *Holland* v. *Peck*, *Ib.* 255, *White* v. *University*, 4 Ire. Eq. 19, *Bridges* v. *Pleasants*, *Ib.* 30, *McCauley* v. *Wilson*, 1 Dev. Eq. 276, 1 *Baptist Association* v. *Hart's Ex'rs.*, 4 Wheat. 1,

—and submitted, that as the devisee in trust, as described in the will, was neither a natural person nor a corporation, the Court could not deal with him; and further, that as the class of cestury que trusts was indefinite, and depended for identification upon the discretion of the trustee as described; they did not constitute such a party as could appeal to the Court for the substitution of a proper trustee.

Person, Moore and *W. H. Battle & Sons, contra*, cited, besides the cases mentioned in the brief for the appellant, *State* v. *McGowan*, 2 Ire. Eq. 9, *Witman* v. *Lex*, 17 Serg. & R. 88, *Ex parte Cassell*, 3 Watts 440, *Morrice* v. *Bishop of Durham*, 10 Ves. 522, *Girard will case*, 2 How. U. S. 127, Const. of N. C., Art. 11, Sects. 7 and 8, *McDonough's Ex'rs.* v. *Murdoch*, 15 How. U. S. 367, *Person* v. *Cary*, 24 How. U. S. 486, *Stanly* v. *Colt*, 5 Wall. 119.

PEARSON, C. J. The legal estate being in the defendant, (see *Davis* v. *Atkinson*, *ante* 210,) there is no difficulty on that head; so the case turns on the validity of the trust.

It is insisted that the trust is so indefinite that it cannot be executed, and is for that reason void. Without taking upon ourselves the labor of discussing all of the cases on "charitable trusts," and determining whether there is not some conflict, we think it enough to say, that if there be any seeming conflict, it is in reference to the application of the principle, not to the principle itself; for it is taken to be settled in all of the cases, from the leading case of *Griffin* v. *Graham*, 1 Hawks 96, to the end of the list, that a charitable trust is not too indefinite, *provided the objects* of the trust are certain, or can be made so; and provided the *purposes of the trust* are indicated with enough certainty to enable the Court to see that there may be "ways and means" to give effect to them.

1. The objects of this trust are "The poor orphans of the State of North Carolina." This is a class of persons. The individuals who compose it can be identified, so it is a *definite* class, and the first condition is met. Inasmuch as the fund

was not adequate for the support of the whole class, power is given to Thomas Atkinson, Bishop of North Carolina, and his successors, to select such orphans as shall receive benefit under the trust, and thus limit the number according to the fund. It is objected, "Thomas Atkinson and his successors" is not a corporation known to the law, and cannot take this agency and control in reference to the fund. This objection may be disposed of in two ways. The provision is secondary and ancillary merely, in reference to the objects of the trust. So, supposing it inoperative, still there is the definite class as objects of the trust, and the trust itself is not void on that ground. But at most, the objection can have no application during the natural life of Thomas Atkinson. He may make his selection, and limit the number of orphans during his administration of the fund. It will be time enough at his death to make the objection that his successor cannot exercise the power, because he is not known to the law, and his heirs cannot do so, because the testator has not entrusted them with it.

As suggested by the learned counsel for the defendant, this difficulty may be removed by legislative action, as was done in respect to the "Griffin fund," and the "Rex fund." Such legislation may reasonably be counted on, this trust being in furtherance of the injunction set out in the Constitution, Art. XI, sec. 7 and 8, for "the establishment of one or more orphan houses, where destitute orphans may be cared for, educated and taught some business or trade."

But it is said the General Assembly has no power to give such aid, because it will defeat vested rights of the heirs, or of the residuary legatees. That doctrine has no application to our case. The distinction is this: When the trust is void because the objects are too indefinite, there can be no aid by legislation; but when the objects are sufficiently definite and the trust is valid, the Legislature may interfere to remove the difficulty in regard to limiting the number and selecting the orphans; because that is secondary, and aid is needed only by reason of the fact that the fund is not large enough to benefit all of the objects. But the heirs-at-law and residuary legatees

as we have seen, have no interest; and because all "poor orphans" cannot take benefit, it by no means follows that some of them should not; indeed it would seem *the Courts* have power to give this aid, without resorting to the exploded doctrine of "*cy pres*" in cases of void trusts. However, the point will not be presented in the life-time of Bishop Atkinson.

In *Griffin* v. *Graham*, *supra*, the objects of the trust are "orphan children," or the "children of poor and indigent parents who are unable to educate them." So the class is broader than in our case, and there was the same difficulty, that after the death of the trustees named, no provision was made for limiting the number of children or making selections, yet the trust was held to be valid, notwithstanding the fact that this secondary or auxiliary provision fell short of the duration of the trust.

In *State* v. *McGowen*, 2 Ire. Eq. 9, a trust for "the poor of the County of Duplin" was held valid, although no secondary or auxiliary provision was made at all, because it came within the principle that the objects of a trust are sufficiently certain when they constitute a class composed of persons who can be identified.

2. The *purposes* of the trust are "the support of said orphans and the promotions of their morals and education." This is as definite as the nature of the subject admits. "Support" means to furnish food, clothes and a place to sleep—there can be no indefiniteness as to the promotion of their morals and education. In short, the purposes of this trust are much the same as those set forth in the Griffin will.

The plaintiff's counsel takes a distinction in this: there, *a place* was designated, "two acres of land to be selected in some convenient part of the town of Newbern,"—here, no place is designated. We are unable to see how the want of a designation in respect to the place can affect the principle. Suppose Griffin's will had said "two acres at some convenient place in the county of Craven," or "in the State of North Carolina;" that would not have made the purposes of the trust less definite. But it seems to us, that in our case a place is designated: The

house and lot in the town of Wilmington; or if that be not suitable for the purpose, then a suitable building may be erected on the "20 acres of land, east of the town of Wilmington, on the plank road."

The Court declares its opinion to be, that the trust mentioned in the pleadings is valid. There will be a decree to this effect, and the plaintiffs will pay the costs.

PER CURIAM. Decree accordingly.

C. W. BESSENT *v.* HARRIS & HOWELL.

Where a factor receives goods with instructions to ship them to a certain port, and makes an advance upon them; nothing more appearing, it is not to be taken that he engages (as a common carrier) to ship them thither *at all hazards;* but only, *if by ordinary diligence he can.*

A factor residing at W., who, being under instructions to ship goods from that place to A., ships them to B., renders himself liable therefor; but if his principal, upon being informed of such breach of instructions, ratifies the act, expressly or impliedly, he thereby waives his right to complain of it.

If there were no such ratification, the measure of damages (in case, that, using ordinary diligence, the factor could not ship to A.,) is the difference between the prices at W., and at B., not such difference at A., and at B.

Factors have a right to definite instructions from their principals, and in case instructions are obscure or contradictory, they may exercise their honest and diligent discretion upon the subject matter, without becoming liable.

Whether a factor is entitled to a discount for advances made to his principal, is ordinarily a question of fact to be decided by a jury.

ASSUMPSIT, tried before *Cloud, J.*, at Spring Term 1869 of the Superior Court of ROWAN.

The facts appear sufficiently stated in the Opinion.

Verdict for the plaintiff; Rule for a new trial; Rule discharged; Judgment, and Appeal.

Boyden & Bailey, and *Person*, for the appellants.
Wilson and *Bragg*, *contra*.

RODMAN, J. This action was commenced on the 12th of March 1867, by writ returnable to the Superior Court of Davie County. On the trial the jury found for the plaintiff; judgment was given accordingly, and the defendants appealed.

From the statement of the case made by the Judge, it appears that the plaintiff declared in assumpsit: in one count, that the defendants were factors residing at Wilmington, and on March 1st 1866 received from the plaintiff certain tobacco, and undertook to carry the same to New Orleans, and sell it for the benefit of the plaintiff; which undertaking the defendants refused to perform, but on the contrary shipped the tobacco to New York, and there sold the same, to the damage of the plaintiff, &c.; the plaintiff also declared in the common counts, and that the defendants had not shown ordinary diligence, whereby, &c.

It appeared from the testimony:

That on March 1st 1866, the plaintiff delivered the tobacco to the defendants, who made an advance upon it, with instructions to ship to New Orleans for sale. And a witness for the defendants testified that the latter made every exertion in their power to ship the tobacco to that place, up to the time of shipping it to New York in April 1866, without success, and also that from the 1st of April 1866 to the 31st of December 1866 no vessel left Wilmington for New Orleans. It cannot be understood from the evidence, and in the argument here it was not insisted, that the defendants undertook to ship to New Orleans at all events. They were not carriers, but only factors, and the extent of their undertaking could only have been to ship it if by ordinary diligence it could be done. On March 4th the plaintiff telegraphed to the defendants repeating his instructions to ship to New Orleans. It is not necessary

to notice the correspondence respecting certificates of the payment of taxes. Omitting several repetitions of the instructions to ship to New Orleans, on April 6th the defendants wrote to the plaintiff that they had been disappointed in shipping the tobacco, but hoped to do so in a few days. On April 24th the defendants wrote to the plaintiff that they had been unable to ship his tobacco to New Orleans, but had shipped it to New York. If the evidence of the defendants is to be believed, they had exercised due diligence in endeavoring to ship to New Orleans, and were unable to do so; but this inability gave them no excuse for shipping to New York. It was their duty to have informed the plaintiff of their inability, and to have awaited his directions: at this point the plaintiff might well have declined any further interference, and have thrown upon the defendants the consequences of their disobedience of his orders. He does not, however, do this, but by his letter of April 30th, ratifies the shipment to New York and waives the disobedience. It is true that he still directs them to ship to New Orleans, if the market will justify the expense: he also directs them, if they think it advantageous, to delay sales, and requests an advance. All this leaves the defendants a discretion. This letter was substantially repeated on the 25th of May. On the 29th of May the defendants sent to the plaintiff the New York prices, and requested instructions whether to sell in New York, or to ship to New Orleans, and declined to make a further advance. On July 7th the defendants wrote to the plaintiff substantially to the same effect. On July 20th the defendants having received no reply, wrote again for prompt instructions. On August 11th, still having received no reply, they wrote again, urging instructions or payment of advances. The defendants having still received no reply, on August 31st 1866 sold the tobacco in New York, for a sum which paid their advances and expenses, and left a small balance which was paid to a brother of the plaintiff. As the brother was not the agent of the plaintiff for this purpose, this sum or any other balance in the hands of the defendants, could be recovered on the common counts; but

t does not appear to be claimed, it being considered as hav ing been paid to the plaintiff without prejudice.

The Judge told the jury:

1st. That the defendants had no right to delay sales till August 31st without making a further advance &c.

Remark. The complaint was that the defendants had not shipped to New Orleans; and this instruction therefore had no reference to the case; but if it had, we think the defendants were justified in delaying the sale. The tobacco reached New York in the latter part of April. Had the plaintiff clearly instructed the defendants to make an immediate sale, it would have been their duty to do so; but though repeatedly urged to give instructions he failed to do so: consequently the defendants were left to act on their own discretion, and there is no evidence that they acted faithlessly, or without ordinary diligence. The making the advance was not a condition precedent to the authority to delay sales, given by the letter of April 30th.

2d. That defendants were not entitled to a credit for 5 *per cent.* discount on their advance.

Remark. That was more a question of fact than of law. If the plaintiff agreed to pay it, or if there was a custom so general and notorious that the plaintiff must be presumed to have known it and to have contracted in reference to it, the charge could be maintained. The existence of the agreement should have been left to the jury.

3d. That if the defendants contracted to send the tobacco to New Orleans and sent it to New York, they were in the wrong and liable to damages; unless the plaintiff modified the contract.

Remarks. We think the proper instructions would have been, that the defendants were in the wrong in shipping to New York, but that if the jury believed that the subsequent letters from the plaintiff, put in evidence, were written by him, he ratified the act of the defendants, and waived his claim to damages by reason of it. The genuineness of the letters being

admitted or found, their effect was matter of law on which the Court should have pronounced.

4. That if the jury believed the witnesses, the defendants did not act according to the plaintiff's instructions in his letters of April 30th and May 25th.

Remarks. The letter of April 30th contained no positive or definite instructions for the government of the defendants. The letter of May 25th, positively directs the defendants if they can sell for anything like the prices they had mentioned, to do so; but otherwise to ship to New Orleans: but it professes only to recite what he had written on April 30th, and thereby leaves it doubtful whether his intentions were not to be construed by his letter of that date. A factor is bound to obey instructions if they are definite, but a principal cannot impose uncertain liabilities on his agent by obscure or contradictory orders. In such cases he leaves him to the exercise of his own judgment honestly and diligently exerted.

5. That if the jury find, that the defendants were instructed to sell in New Orleans, and actually sold in New York, the damages were the difference between the prices in New Orleans and that obtained in New York.

Remark. This was erroneous, because it wrongfully assumed that the shipment to New York had not been ratified. But assuming that the breach of orders in sending to New York was not waived, we think the Judge mistook the rule of damages. If the defendants, with due diligence, were unable to ship to New Orleans, it was their duty, in the absence of other instructions, to have retained the tobacco in Wilmington, and in case the plaintiff failed within a reasonable time after request to repay the advance, they might have sold it in Wilmington. If therefore on this hypothesis the plaintiff is entitled to any damages, it is, to the difference between what the tobacco might have sold for in Wilmington, and what it did sell for in New York, as to which there was no evidence.

As the case stands on the present pleadings, it seems to us that the main questions to be submitted to the jury were:

1. Did the defendants exercise ordinary diligence in endeavoring to ship from Wilmington to New Orleans? If the jury believe the evidence, they did.

2. Did the defendants act with ordinary diligence after the arrival of the tobacco in New York; considering the instructions of the plaintiff? If the jury believe the evidence, they did.

3. Was there an agreement for a discount on the advance; or a custom to charge such discount known to the plaintiff, or so notorious that it must be presumed to have been known and assented to?

The judgment is reversed, and there must be a *venire de novo*.

PER CURIAM. *Venire de novo.*

STATE *v.* ALEXANDER REINHARDT and ALICE LOVE.

White persons, and persons of color, cannot intermarry in North Carolina.

(*State* v. *Hairston*, at this term, cited and approved.)

FORNICATION AND ADULTERY, tried before *Logan, J.*, at Spring Term 1869, of the Superior Court of LINCOLN.

The jury returned the following special verdict:

The jury find that Alexander Reinhardt is a person of color within the third degree, and Alice Love is a white woman; that on or about the 27th of December last, both being at the time single persons, the rites of matrimony were celebrated between them in due form of law by a licensed minister of the Gospel; that they then resided in the county of Lincoln, and at the time of the finding of the bill of indictment they lived in said county as man and wife. Whether from this state of facts the defendants are guilty of fornication and

adultery, the jury are ignorant and pray the advice of the Court.

The Court being of the opinion that the defendants had a right under the law, to enter into a contract of marriage, ordered a verdict of not guilty to be recorded.

Whereupon the Solicitor prayed and obtained an appeal.

Attorney General, for the State.

No counsel *contra*.

READE, J. The principles involved in this case are the same as in the case of *State* v. *Hairston*, decided at this term, and therefore the opinion in that case will be certified in this, to the end, &c.

PER CURIAM. Order accordingly.

W. H. HUGHES, ADM'R. &c., *v.* THOMAS J. PERSON and others.

Where an affidavit, made to obtain an order of arrest, and an attachment, is based upon an apprehension by the affiant of some *future* fraudulent act by the defendant, such affidavit must specify the grounds of the apprehension; but where the affidavit relies upon an act already done, it need state it only in general terms; as, *here*, "That the said P. has disposed of and secreted his property with intent to defraud his creditors."

MOTIONS, to vacate an order of arrest, and to discharge an attachment, made before *Watts, J.*, at NORTHAMPTON, at Spring Term, 1869.

The allegation upon which the order, and attachment had been granted, was (so far as material here) as follows:

"That the said Thomas J. Person has disposed of and secreted his property, with intent to defraud his creditors."

His Honor allowed the motions, and the plaintiff appealed.

Barnes and *Peebles & Peebles*, for the appellants.
Bragg, Conigland and *Ransom, contra.*

The affidavit to obtain a warrant of attachment, must be explicit; and made, in general, upon positive knowledge of the deponent so far as to establish a *prima facie* case, Hoff. Prov. Rem. 14, 419 to 422, and at p. 48. Where it appears that it has been repeatedly held in N. Y., that an affidavit using the *words* of the Statute merely, without stating any facts, is insufficient, 1 Whitaker, 505 and Seq.

The affidavit for an arrest, must state the facts and circumstances, from which the officer granting the order, can draw his own conclusion respecting the sufficiency of cause for arrest, 1 Tiff. 241—2.

It must make out a *prima facie* case, 1 Tiff. 243.

READE, J. His Honor "vacated the order of arrest, and discharged the attachment" "in consequence of the insufficiency of the affidavit upon which they were issued." and from this there was an appeal.

There were many points presented in the argument at this bar, but we consider that only upon which the case was disposed of below,—the sufficiency of the affidavit.

The words in the Code are "removed or disposed of," &c. The words in the affidavit are "disposed of and secreted, &c." It was objected, not that the change of the words would make any material difference, but that it would not be sufficient if the affidavit were in the very words of the Code; for, that it is necessary that the affidavit should state the *facts* which are supposed to make out the case, so that the Court can see from the facts set out, whether there has been a fraudulent disposition. The cases from the New York Courts seem to support the objection; and we follow these cases so far as to declare that when the plaintiff in his affidavit for the attachment or arrest, relies upon his apprehension of what the defendant is

about to do,—as if he declare that he has reason to believe and does believe that the defendant *is about to dispose* of his property, &c., he must state why he thinks so; in order that the Court may judge of the reasonableness of his fears. But where he swears that the thing *has been done*, we do not see the propriety of requiring him to specify *how* it has been done, although it would be prudent for him to do so when the facts are known. But it might be impossible for him to do so; for in fraudulent dispositions, concealment and deception are common. It might therefore operate to the prejudice of the plaintiff to require him to specify; for, while he might be satisfied of the fact generally, he might be unable, for want of time, to state particulars. And if he should undertake to specify, and should be mistaken, he might be confined to his specifications, when he could prove other particulars. On the other hand, there can be no hardship upon the defendant; for if the plaintiff swears generally that the defendant has fraudulently disposed of his property, when he has not, the plaintiff may be indicted for perjury; and upon the defendant's general denial of a general allegation, he would be entitled to a discharge unless the plaintiff would then tender particulars and join issue. There is error.

Let this be certified, &c.

PER CURIAM. Error.

NOTE.—The same decision was made in *John J. Long* v. *Thomas J. Person*, and *W. T. Stephenson* v. *Thomas J. Person;*—argued by the counsel in the case above.

THE STATE on the relation of ELIZA MERRITT *v.* Z. G. McQUAIG.

A bastard, born in this State of a mother who has not resided in it "for twelve months," is chargeable for maintenance upon the County in which it is born.

STATE *ex. re.* MERRITT *v.* MCQUAIG.

BASTARDY, before *Mitchell, J.*, upon a motion to quash the proceedings, at Spring Term 1868, of the Superior Court of MECKLENBURG.

It was admitted that the mother was from South Carolina, and at the time of the child's birth had resided in Mecklenburg County for but a few days.

His Honor directed the proceeding to be quashed, whereupon the State appealed.

Attorney General, for the State.

Wilson, contra.

SETTLE, J. The difficulty in the case before us does not arise under our statute entitled "Bastard Children," Rev. Code, ch. 12, but it grows out of a provision of our law in relation to the settlement of the poor, Rev. Code, ch. 86, sec. 12. The two acts, however, are parts of the same system, and are to be construed together.

Do the provisions of the act in relation to the settlement of the poor apply to a case where the mother has emigrated from another State to a county in North Carolina? They do not.

The purpose of this act evidently was to fix each county in the State with the responsibility of supporting its own poor. Provision is made by section 13, of the same chapter, for sending paupers to counties within the State, where they properly belong, the object being to regulate the question of settlement between the counties as to those paupers who had acquired a settlement somewhere in the State.

In the case before us, the mother and her bastard child cannot be sent back to South Carolina, nor can they be sent to any other county in this State. Mecklenburg, therefore, being the county of birth is liable to become charged with the maintenance of this bastard. The decisions in our own reports afford no light, as the ques tion of settlement is only discussed as between different counties.

Since our act did not contemplate the case of foreign paupers, the question of settlement is left as at common law, and in

a case like ours, is the place of birth. Com. Dig. Tit. Justice of Peace, B. 71—"A settlement in a parish may be acquired by birth, for wherever the child is first known to be, that is always *prima facie* the place of settlement, until some other can be shown. This is also generally the place of settlement of a bastard child; for a bastard having in the eyes of the law no father, cannot be referred to his settlement, as other children may." 1 Bl. Com. 363.

There was error in directing the proceedings to be quashed. Let this be certified, &c.

PER CURIAM. Error.

ALEXANDER JOHNSON, JR. *v.* E. L. WINSLOW.

The Statute of limitations, in actions upon unsealed contracts, has been suspended since September 1st, 1861, and by present legislation, is to remain so until January 1st, 1870.

A Statute may be in part constitutional, and in part unconstitutional.

(*McCubbins* v. *Barringer*, Phil. 554, *Neely* v. *Craige*, *Ib.* 187, *Morris* v. *Avery*, *Ib.* 238, *Hinton* v. *Hinton*, *Ib.* 410, cited and approved.)

ACTION upon a promissory note, begun by warrant, tried before *Buxton, J.*, at Spring Term 1869, of the Superior Court of CUMBERLAND.

The defendant pleaded, "the Statute of Limitations."

His Honor having given judgment for the plaintiff, the defendant appealed.

The facts are stated in the Opinion.

No counsel for the appellant.
Hinsdale, contra.

READE, J. The action is upon a note dated and due in January, 1860.

The time within which an action might be brought upon said note under the Statute of Limitations was three years. The action was not brought until May 1869; so that the action was barred, unless there was something to prevent the operation of the Statue.

In 1861 an Act was passed, suspending the Statute of Limitations "so long as this Act shall continue in force," ch. 10, sec. 18. This provision is part of an Act usually denominated the "Stay Law;" and it is insisted that as a Stay Law it was unconstitutional and therefore never was in force at all. But this does not follow, for an act may be constitutional in part, and unconstitutional in part, *McCubbins* v. *Barringer*, Phil. 554, and we have decided that so much of said act as suspends the Statute of Limitations, is valid. *Neely* v. *Craige*, Phil. 187; *Morris* v. *Avery*, *Ib.* 238; *Hinton* v. *Hinton*, *Ib.* 410; and the provision that the Statute of Limitations shall be suspended "so long as this Act shall remain in force" must be understood to mean, until it shall be repealed.

Again, in February 1863, an Act was passed suspending the operation of the Statute of Limitations from 20th May, 1861, until the end of the war, ch. 50.

The Ordinance of June 1866, repealed all laws suspending the operation of the Statute of Limitations, and re-enacted (sec. 19) that the time passed since 1st September, 1861, barring suits, &c., should not be counted. And by Act 1867, ch. 17, sec. 8, the Statute is suspended from 1861, to January 1st, 1870. So that during all the time since 1861, there has been a Statute in force suspending the Statute of Limitations.

Although it were true that the Legislature has no power to revive a right of action after it has been barred, *i. e.* to suspend the operation of the Statute of Limitations retrospectively, after it has operated (Cooley on Con. Lim. 391, note), yet it is clear that the Legislature has the power to suspend the operation of the Statute prospectively, so as to prevent its barring rights. This does not impair the obligation of contracts, nor interfere with vested rights. "He who has satisfied a demand, cannot have it revived against him; and he

who has been released from a demand by operation of the Statute of Limitations, is equally protected. In both cases the right is gone; and to restore it would be to create a new contract for the parties," *Ib.* 369.

There is no error in the record. The judgment below is affirmed. Judgment will be entered here for the plaintiff.

PER CURIAM. Judgment affirmed.

HENRY D. ROBESON, Adm'r. &c. v. SAMUEL BROWN and ANOTHER.

The Constitution of the United States does not forbid a State from altering the rule of evidence which heretofore excluded parol evidence offered to contradict or vary the terms of a written contract.

The rule for applying the *Scale*, under the ordinance of Oct. 18th 1865, and the acts of 1866, cc. 38 and 39, is:

1. Money contracts are presumed to be solvable in Confederate money, and the value thereof must be estimated by the jury *in coin*, according to the legislative scale, and then the depreciation of United States Treasury notes must be added to the amount as estimated in coin:

This division applies only to contracts where Confederate money was the consideration.

2. In all other cases of contracts, the value of the property, or other consideration, may be shown in evidence, and the jury must estimate such value in U. S. Treasury notes.

(*Woodfin* v. *Sluder*, Phil. 200, cited and approved.)

DEBT, tried before *Jones, J.*, at Spring Term 1869 of the Superior Court of MARTIN.

The plaintiff declared on a bond for $250,00, dated 22d Dec. 1862; and on the trial offered to prove that it was given for a mule, worth $250,00.

His Honor excluded the testimony, upon the ground that the parties had themselves fixed the value, by the bond; and

he instructed the jury that they must apply the *scale* prescribed by the Legislature, and give the plaintiff the value of the contract by that rule.

The plaintiff then asked his Honor to instruct the jury further, that after ascertaining the value *in gold* according to the rule laid down, they should add to that sum the present depreciation of national currency, which he offered to show was 33 per cent. This also his Honor declined to do.

Verdict and Judgment, for $102,40 and $33,38 damages, &c.

The plaintiff thereupon appealed.

Stubbs and *Battle & Sons*, for the appellant.

No counsel *contra*.

DICK, J. The principle is well settled that parol evidence is inadmissible to contradict or vary the terms of a written contract. But this is only a rule of evidence, and may at any time be changed by the Legislature without impairing the contract. The Convention and Legislature have seen proper to change this rule of evidence in regard to certain classes of contracts, and in so doing they did not come in conflict with the Constitution of the United States, *Woodfin* v. *Sluder*, Phil. 200.

We have carefully considered the ordinance of Oct. 18th 1865, and the acts of 1866, ch. 38 and 39, and think that they establish the following rules as to the contracts to which they apply:

1. Money contracts are presumed to be solvable in Confederate money, and the value thereof must be estimated by the jury *in coin*, according to the legislative scale, and then the depreciation of United States Treasury Notes must be added to such nominal amount of coin. The Legislative scale only applies to contracts where Confederate money was the consideration.

2. In all other kinds of contracts the value of the property or other consideration may be shown in evidence, and the jury must estimate such value in United States Treasury Notes.

His Honor in the Court below erred in his construction of the ordinance and acts referred to, and the judgment must be reversed, and a *venire de novo* awarded.

Let this be certified &c.

PER CURIAM. *Venire de novo.*

STATE *v.* ALEXANDER JARVIS.

If a servant, entrusted with the custody of goods by his master, fraudulently take them to convert them to his own use, he is guilty of larceny.

A motion to quash an indictment will not be allowed after a verdict.

Indictments found (*here*, at Spring Term, 1867,) under the late Provisional Government of the State, are valid, and are to be heard and ended under the present Government.

Justices of the Peace have no jurisdiction of Larceny. This offence remains under the cognizance of the Superior Courts.

LARCENY, tried before *Mitchell, J.*, at Spring Term 1869 of the Superior Court of BURKE.

The defendant was charged with stealing certain bacon, &c.; and it was shown that the things taken by him were upon the premises occupied by the owner, which had been placed in his custody by such owner, who was also his master, when about to be absent from home for a few days. During that absence the things were removed from the house in which they had been left by the master, to another some three hundred yards distant, occupied by the defendant, and another person.

The defendant objected that he could not be convicted of larceny, even if he intended to *convert* the goods; being guilty only of a breach of trust in regard to things committed to his care. He also, after verdict, moved to quash the indictment;

and also, upon that motion not being allowed, to arrest the judgment: (1) because the indictment had been found at Spring Term, 1867, and therefore under the Military Government; and (2) because the Court had no jurisdiction over the offence.

This motion was also overruled, and judgment having been pronounced, the defendant appealed.

Furches, for the appellant.

Attorney General, contra.

DICK, J. The goods alleged in the indictment to have been stolen by the defendant, belonged to the prosecutor, and had been in his actual possession. He entrusted them for a few days to the custody and care of the defendant, his servant. In contemplation of law the goods were in the possession of the owner, and the taking of them by the defendant, with the fraudulent purpose of converting them to his own use, was larceny, and the defendant was properly convicted, 2 East P. C. 564, sec. 14.

The motion to quash the indictment, could not be entertained after verdict, and it was properly disallowed by his Honor.

The grounds for the motion in arrest of judgment are untenable:

1. The Court in which the prosecution was instituted was authorized by the laws of the Provisional Government, and invested with the necessary power of administering public justice, and such laws and judicial proceedings are recognized as valid, and are continued in our present government. Const. Art. IV, Sec. 24.

Our present government was formed under the same authority which organized and sustained the Provisional Government. The two governments are parts of the same system, and the laws of the preliminary government are properly continued until they are altered by the legislation of the permanent government.

2. The jurisdiction of Superior Courts in cases of larceny is not altered by the recent Act regulating "Proceedings in

Criminal Courts." That Act, in ch. IV, sec. 5, gives jurisdiction to Justices of the Peace in cases "for receiving stolen goods, where the value of the property received does not exceed five dollars." This jurisdiction cannot be extended to cases of larceny by an implication arising from ch. IV, sec. 7, of said Act.

There is no error in the ruling of his Honor in the Court below, and the judgment must be affirmed.

Let this be certified, &c.

PER CURIAM. No error.

WILLIAM STANLY *v.* ROBERT MASSINGILL.

The Superior Courts have power to amend, and to supply, records in the former Superior Courts of Law and Equity, and also in the former County Courts, upon proper notice to persons interested.

Where a lost execution was alleged to be a link in the title of a plaintiff in ejectment, *Held*, that such facts did not render an application under an independent motion, made without notice to the other party, a correct method of supplying the loss; *also*, that what was required of the plaintiff was only, to notify the defendant that on the trial of the ejectment the loss would be proved, and on doing so, to prove its contents by parol.

(*Harris* v. *McRae*, 4 Ire. 81, cited and approved.)

MOTION to supply a lost record of the late Superior Court of Law and Equity for Johnston County, made before *Watts, J.*, at Spring Term 1869 of the Superior Court of JOHNSTON.

An action of ejectment between the above named parties, was pending in the same Court, and in that the plaintiff claimed title through a Sheriff's sale under a certain execution which had issued from the former Superior Court of Law and Eqity for Johnston County, and which was now said to be lost.

His Honor allowed the motion, and gave judgment accordingly; thereupon the defendant appealed.

Rogers & Batchelor, for the appellant.
No counsel *contra*.

DICK, J. The plaintiff here is the lessor of the plaintiff in an action of ejectment against the defendant, pending in the Superior Court of Johnston County.

He purchased the land in controversy at a sale made by a Sheriff under an execution from the County Court of said County, and it is alleged that said execution is lost or destroyed; and the motion of the plaintiff is "to supply said execution as one of the records of the Court."

The Superior Courts under our new system have possession of the records and papers of the County Courts, and the Superior Courts of Law and Equity, which have been abolished, and must necessarily have the power of making amendments to such records, and of supplying lost papers, &c., upon proper notice to persons interested.

The motion in this case ought not to have been entertained. The execution under which the land was sold, was an important link in the chain of title, and such lost execution was the primary evidence on the question. The loss of the primary evidence ought not to have been supplied without reasonable notice to the defendant.

But there was no necessity for the motion here, as on the trial of the ejectment the plaintiff, by giving due notice to the defendant, and proving the loss of the execution, could have given secondary evidence as to its contents, which would have been sufficient for the purpose of his action. 1 Green. Ev., sec. 509; *Harris* v. *McRae*, 4 Ire. 81.

The ruling of his Honor in the Court below is reversed.

Let this be certified, &c.

PER CURIAM. Ordered accordingly.

JOHN W. CARR *v.* JOHN J. FEARINGTON and others.

The *bill* given to creditors, "without obtaining judgment at law," by the Ordinance of June 16th 1866, sec. 18, creates a right, whether it be a lien or merely a *lis pendens*, in favor of such creditors, from the time of its filing, which is not disturbed by the fraudulent vendor's subsequent bankruptcy.

(*Rountree* v. *McKay*, 6 Jon. Eq. 87; *Tabb* v. *Williams*, 4 Jon. Eq. 352; *Kirkpatrick* v. *Means*, 5 Ire. Eq. 220; *Wheeler* v. *Taylor*, 6 Ire. Eq. 225; *Freeman* v. *Hill*, 1 Dev. & Bat. Eq. 389; and *Polk* v. *Gallant*, 2 Dev. & Bat. 395, cited and approved.)

BILL, to set aside a conveyance alleged to be fraudulent as against creditors, transmitted from CHATHAM Court of Equity, Fall Term 1868.

The facts are stated in the Opinion.

On the argument of the case at January Term 1869, upon its being suggested that the vendor had been adjudicated a bankrupt since the filing of the bill, the Court ordered the cause to be continued, and notice served upon the assignee in bankruptcy to come forward and make himself a party, or waive his rights to do so. In consequence thereof such assignee elected at this term to be made a party defendant, and was admitted as such.

Phillips & Merrimon, for the plaintiff.
Bragg, Battle & Sons and *York, contra.*

RODMAN, J. This is a bill in Equity, filed returnable to Spring Term 1867, of the Court of Equity for Chatham. It alleges that complainant is a creditor of John J. Fearington by several bonds made in 1862 and 1863; that on September 11th, 1866, Fearington conveyed to D. A. Mebane, certain personal property; that about the same time he conveyed to David A. Mebane certain land on which his mother had resided, and (by a separate conveyance) certain enumerated articles of personal property; that about the same time he conveyed to John Atwater, his son-in-law, his New Hope tract

of land, at the pretended price of $500; and prays that all these conveyances may be declared void and the property applied to pay the debts to the complainant, &c.

At Spring Term 1867, the Court ordered that the personal property conveyed to Mebane, and then in the possession of Fearington, be sold, and the proceeds retained subject to the order of the Court; and it was sold by the Master accordingly.

The answer of John J. Fearington admits the debts to complainant stated in the bill, and the conveyances alleged, but denies all fraud. The answers of the other defendants also admit the conveyances stated, but they deny the imputed fraud.

This brief statement of the pleadings will suffice to render the Opinion of the Court intelligible. Much testimony was taken: upon the whole it appears to us that the conveyance to Atwater was fraudulent and void as to the creditors of John J. Fearington; that the conveyance of the land to David A. Mebane was *bona fide* and for value, and was valid; and that the conveyance of personalty to Mebane was a mortgage to secure an actual debt, that it was *bona fide* and duly registered, and was therefore valid as against the creditors of the mortgagor to the extent of securing the mortgage debt. Sometime after the filing of the bill the defendant John J. Fearington was adjudicated a bankrupt on his own petition; and at this term of the Court the assignee, having been notified of the pendency of the suit, appeared and made himself a party defendant, and claimed whatever right he might be entitled to in that character.

We are now prepared to state and consider the questions of law arising in the case. The Convention of the State, by an Ordinance entitled "An Ordinance to change the jurisdiction of the Courts and the rules of pleading therein," ratified June 23rd, 1866, provided for a considerable retardation in the process for the collection of debts in the common law Courts, and by section 18 enacted that "any creditor attempted to be defrauded as set forth in section 1, chapter 50, Revised Code, may without obtaining judgment at law, file

his bill in equity, and said Court is hereby authorized and empowered to direct proper issues to be made up and tried, and to make such orders and decrees as to right and justice may appertain;" and the creditor is allowed to proceed at the same time at law. The section of the Revised Code referred to is the well known Statute of 13 Eliz., for avoiding alienations of lands and goods, made to defraud creditors, and need not be further stated. Prior to this Ordinance it was a settled principle in this State, that before a creditor could apply for the aid of a Court of Equity, either to subject equitable property to his debt, or to avoid a fraudulent conveyance made by his debtor, he must have established his debt at law, *Rountree* v. *McKay*, 6 Jon. Eq. 87; *Tabb* v. *Williams*, 4 Jon. Eq. 352; and that unless it appeared from the pleadings that the debtor had no property liable to execution at law, the creditor must not only show that he had obtained a judgment, but that he had taken out execution which had been returned *nulla bona*. *Kirkpatrick* v. *Means*, 5 Ire. Eq. 220; *Wheeler* v. *Taylor*, 6 Ire. Eq. 225.

It is contended by the plaintiff in this case, that the effect of the Ordinance was to put a creditor filing his bill, in the same situation that he would have been in, had he obtained his judgment and issued his execution, and had it levied on the property fraudulently conveyed: in other words to give him a lien by the filing of the bill on the property sought to be subjected. The Convention, it is said, intended by its dilatory provisions to give time to honest debtors, but not to fraudulent ones; and to prevent this effect, section 18 was inserted: having prevented the creditor from recovering at law, it allowed him to go at once into equity with all the advantages of a recovery at law, to have the fraud investigated. To invite the creditor into equity, which is naturally slow, and leave the debtor free to sell his property for value, and perhaps flee the country, or to confess it away to other creditors, would be only to ensnare the creditor. We think these views are correct. The Bankrupt Act expressly protects and reserves from its scope, liens previously existing, and

the assignee can have no right to any thing beyond the surplus remaining after payment of the plaintiff's debt, if he has that; but this point not being necessary for present decision, we express no opinion on it.

But if this view should be incorrect, the plaintiff places his claim on the doctrine of *lis pendens*, by which any one purchasing from a defendant after the filing of the bill, will take subject to the equities claimed in the bill, (*Le Neve* v. *Le Neve*, 2 Lead. Cases in Eq., Am. Notes, p. 129.) But it is said that the assignee in bankruptcy is not a purchaser, that he comes in by operation of law and represents all the creditors. We do not see how his coming in by operation of law exempts him from liability to any equities which would weigh against other assignees. We think the best position in which he can stand is that of a purchaser at an execution sale. Yet it is clear law in this State, that such a purchaser takes subject to all equities affecting the thing purchased, whether he has notice of them or not, *Freeman* v. *Hill*, 1 Dev. & Bat. Eq. 389; *Polk* v. *Gallant*, 2 Dev. & Bat. Eq. 395; while it is everywhere held, that he takes subject to those of which he had notice, *Jackson* v. *Town*, 4 Cowen 509. The plaintiff is entitled to have the land conveyed to Atwater, sold and applied to the payment of his debt, and also the surplus of the personal property mortgaged to Mebane.

There will be also a decree for the necessary accounts.

PER CURIAM. Decree accordingly.

JOSEPH R. MASON and another *v.* SAMUEL MILES.

Where a judgment by default has been taken against a principal and his surety, the fact that no process in the suit had been served upon the former, affords no ground for vacating such judgment as against the latter.

Under the new practice in this State, by analogy to the old, relief against a judgment, sought *because the defendant had not been served with process in the case*, is not to be made the subject of a *quasi* equitable proceeding, but must be applied for by a motion incidental to the judgment impeached.

The new Superior Courts have power to vacate judgments improperly or irregularly taken in the former Superior or County Courts.

(*Keaton* v. *Banks*, 10 Ire. 381; *Hunter* v. *Kirk*, 4 Hawks, 277; *Morris* v. *Clay*, 8 Jon. 21; and *Rogers* v. *Holt*, Phil. Eq. 108, cited and approved.

INJUNCTION, tried before *Watts*, *J.*, at the Spring Term 1869, of NORTHAMPTON Superior Court.

On the 15th of April, 1869, the plaintiffs filed a complaint against the defendant alleging that the latter, at Fall Term 1867, had obtained a judgment by default final against them, for more than $590.00, upon a bond in which Mason was principal and Palmer surety. After stating the consideration of the bond, and that the bond, in renewal of which it had been given, had been paid, Mason stated that he was insane when the renewal was made; also that no process in the suit upon the bond had even been made upon him, &c.

Thereupon an injunction in favor of both plaintiffs was ordered.

The defendant filed an answer upon the 17th of May, 1869, denying that the bond had been given for the consideration in the complaint set forth, or that it had been paid.

His Honor having refused to order the injunction to be dissolved, the defendant appealed.

Ransom and *Peebles*, for the appellant.

Barnes, *contra.*

DICK, J. The injunction order in this case was improvidently granted to the plaintiff, Palmer. He executed the note on which the defendant obtained judgment, and the due service of process upon him is not denied. As to him the judgment was taken according to the due course of the Court, and is in all respects regular. He does not set forth in his complaint any equitable right which would be infringed by the execution of said judgment, and of course is not entitled to injunctive relief. It appears from the record in the former case that the plaintiff Mason was duly served with process, and that the judgment was taken according to the course of the Court. It is, however, insisted by Mason in his complaint, that he was not served with process, and had no opportunity to make defense. If this be so, the judgment against him is void, for there can be no valid judgment against a person not in Court. His remedy by a motion in the cause is clear, simple and speedy.

The Superior Courts, under our present judicial system, must necessarily have the jurisdiction, in administering justice between parties, to vacate judgments which were irregularly or improperly taken in the late County and Superior Courts. The case in which the judgment of the defendant was taken, has been regularly transferred to the Superior Court, and the plaintiff Mason may find adequate relief from the errors complained of, by a motion in the cause, founded upon affidavit. Upon such motion he may obtain a rule upon the Sheriff. to make him amend his return so as to make it speak the truth.

If the Sheriff, in answer to such rule, were to state that process was duly served, then the contrary may be shown by parol evidence. *Keaton* v. *Banks*, 10 Ire. 381.

As the Sheriff is a sworn officer of the law, a single affidavit will not be sufficient to set aside his return; *Hunter* v. *Kirk*, 4 Hawks. 277. If upon sufficient proof the judgment be vacated, then the plaintiff Mason may plead his insanity in defense to the action; *Norris* v. *Clay*, 8 Jon. 216.

As the Courts are now always open, the remedy of the plaintiff, as above indicated, is speedy and complete. Mason has chosen to seek his remedy by another action, which is in the

nature of an equitable proceeding; and it is a well settled principle of equity, that where a person can have adequate relief by an order in a cause pending in the same Court, he shall not be allowed to seek his remedy by a separate suit. *Rogers* v. *Holt*, Phil. Eq. 108.

This rule of equity must be enforced in our present system of Civil Procedure.

If the plaintiff's action were properly constituted in this Court, the injunction ought to be vacated as the answer of the defendant fully and positively denies all the allegations in the complaint. It is unnecessary for us to consider the other errors assigned in the case made up by appellant's counsel and signed by his Honor. There is error in the ruling of his Honor in the Court below, and the injunction must be vacated.

Let this certified, &c.

PER CURIAM. Order accordingly.

JONATHAN NEWLIN *v.* ALBERT MURRAY.

If the collection of the money due upon the execution of oldest *teste*, be *enjoined*, such execution is not to be considered in applying the proceeds of a sale made whilst it and other executions were in the hands of the Sheriff.

Process of execution issued during the pendency of an injunction against the collection of the money due upon the judgment, is without effect; and, even if the injunction be dissolved by consent after the sale and before the return of the process, such process will not share in the proceeds.

(*Edney v. King*, 4 Ire. Eq. 465, cited and approved.)

RULE upon a sheriff to bring the proceeds of an execution sale into Court, &c., granted by *Tourgee, J.*, at ALAMANCE, Spring Term 1869.

The plaintiff was an execution creditor of one Faucette,

against whom the defendant as Sheriff had sundry executions, under which he had levied and sold, and received the money in dispute.

The reason assigned by the defendant for not applying the money to the execution of the plaintiff, was that at the time of the sale he had in his hands an execution of older teste, in favor of one Lea, and that he had applied the money to that. It was admitted that the collection of this execution had been enjoined, that it was in the hands of the Sheriff by the inadvertence of the Clerk, and that the injunction was pending at the day of sale; but that subsequently, and before the return of the process, by consent, the injunction was dissolved by an order of the Court.

His Honor, considering that this state of facts was no answer to the claim of the plaintiff, made the rule absolute to apply the money to the execution of the plaintiff; and the defendant appealed.

Phillips & Merrimon, for the appellant.
Graham, contra.

PEARSON, C. J. The clerk or sheriff should not be made parties to a bill for an injunction; they are mere ministers of the law, and have no interest in the controversy. *Edney* v. *King*, 4 Ire. Eq. 465.

If Lea had been attached in contempt for suing out the writs of *ven. ex.*, he could have excused himself by the averment, that the writs had been issued without his instruction or privity. The effect of the injunction was to "tie his hands." He has the injunction bond to look to for any damage in consequence of being put in this condition; and as he could not have been made responsible for, he is not at liberty to take benefit from, the accident that the writs happened to be issued without his knowledge.

The injunction would have protected the sheriff in making a return, "not executed, by order of the Court of Equity," so the writs had no legal effect.

We are unable to perceive how the fact, that after the sale the injunction was dissolved by a *consent* order, can have any effect upon the rights of the parties to this proceeding. It would be a novel application to the doctrine of relation to allow this consent order to have the effect of giving validity to writs, which before had none, against *bona fide* creditors, who had taken judgments and sued out writs of execution.

PER CURIAM. Order below affirmed.

L. V. CAMPBELL *v.* JOHN ALLISON and others.

Cases brought to this Court by appeals taken without *notice*, (C. C. P. § 301) will be dismissed upon motion.

An appeal being now the act of the appellant alone, no presumption of regularity arises because of its having been taken *during a term* of the Court from which it comes.

MOTION to dimiss an appeal from the Spring Term of the Superior Court of IREDELL, made at this term of the Court.

The action had been commenced by a writ in debt issued returnable to Spring Term 1867; and, and at the late term, the plaintiff recovered judgment. The transcript sent up to to this Court, after stating the proceedings up to and including judgment, added—"with which judgment the defendants being dissatisfied pray an appeal to the Supreme Court, to be held at Raleigh, and it is allowed upon their giving bond according to law with &c., as sureties. Said bond is duly executed and is herewith sent."

Clement, for the motion.
Boyden & Bailey, contra.

RODMAN, J. This is a motion by an appellee to dismiss the

appeal for want of notice. Section 301 C. C. P., requires a notice of the appeal to be given: the manner of serving notices is prescribed elsewhere in the Code. The judge below has nothing to do with the granting of an appeal; it is the act of the appellant alone. On his docketing his appeal and giving the required undertakings, it is the duty of the Clerk to send it up. Hence there is no presumption of regularity, such as would exist in the case of a judgment rendered by a Judge; nor can notice be presumed merely because the appeal was taken during a term of the Court. See General Rule adopted at this term. The motion is allowed, and the appeal is dismissed with costs.

PER CURIAM. Appeal dismissed.

NOTE. Simil ar motions to that in *Campbell* v. *Allison* (above), and for the same reason, were made at this term in the two following cases, the appeals in which accordingly were dismissed:

C. C. CARLTON *v.* SAMUEL HART.

Furches, for the motion.
Boyden & Bailey and *Page & Busbee*, *contra*.

JAMES HAMPTON, Adm'r. *v.* NOAH SPAINHOUR.

Battle & Sons, for the motion.
No counsel *contra*.

STATE *v.* HENRY BULLOCK and NELLY BULLOCK.

The facts occurring at the trial, alleged as ground for a new trial, must appear affirmatively upon the record transmitted from the Court below.

It is permitted to the presiding Judge to order a special *venire* only for the trial of persons charged with capital offences, and therefore the refusal to make such an order upon a trial for *arson* is correct.

A juror who is a non-resident of the County in which the trial is had, is liable to be challenged therefor.

It is a matter of discretion with the presiding Judge to discharge a jury upon a trial for crime, before they have rendered a verdict; and *semble*, that in all cases an appeal may be had (see *Prince's* case, *ante* 529) from the decision of the Judge upon *the law* involved in such discharge.

Quaere, Whether the common law rule of carrying a jury around the circuit in case of its disagreement, do not still exist in this State.

(*Prince's* case, *ante* 529. cited and approved.)

ARSON, tried before *Watts, J.*, at Spring Term 1869 of the Superior Court of FRANKLIN.

The facts appear in the Opinion of the Court.

Verdict, Guilty; Rule for a New Trial; Rule discharged; Motion in arrest of judgment; Motion overruled; Judgment, and Appeal.

Solomon, for the appellants.

Jenkins, for the State.

RODMAN, J. The prisoners were indicted at August Term 1868 of Warren Superior Court, for arson, in burning a dwelling house, "against the form of the statute," and pleaded not guilty. At the same term they were put on trial, and the jury not being able to agree, the Court ordered, "that they be taken in charge of the sheriff of this County, and kept together until Monday next, when the sheriff shall bring them before the Court, at the Court House of Franklin County, at Louisburg, &c.," and that the sheriff bring also the prisoners, &c., for further proceedings; and the Court of Warren was there-

upon adjourned. According to the order, the Sheriff of Warren brought the jury and the prisoners before the Superior Court for Franklin at Louisburg. where the jury, being still unable to agree, were discharged. The counsel for the prisoners moved for their discharge, but this was refused, and they were continued in the custody of the Sheriff of Warren. At the next term of Warren Superior Court, the prisoners moved their trial to Franklin, where they were tried and convicted. They then moved for a *venire de novo*, on the following grounds:

1. That they were denied a special *venire de novo* from which to obtain a jury, although it was duly asked for.

Answer. It does not appear affirmatively, from the record, or otherwise than from the prisoners' exception, that a special *venire* was asked for or refused. Moreover, the ordering of a special *venire* is in no case imperative; it is permitted when the Judge "shall deem it necessary to a fair and impartial trial of any person charged with a capital offence." Rev. Code, ch, 35, s. 30. Arson was a capital offence by Rev. Code, ch. 34, s. 2, but by an act ratified August 22nd 1868 (Acts 1868, ch. 44, p. 60,) the punishment was commuted to hard labor for not less than twenty, nor more than sixty years. This act was in force before the second trial. This exception therefore fails.

2. That the State was improperly allowed to challenge a juror upon the gronnd of his being a non-resident of Franklin County.

Answer. The cause of this exception, like that of the first, does not appear affirmatively upon the record; but waiving this, we think the Judge committed no error in allowing the challenge. It does not appear whether the person challenged was of the original panel, or a talesman; and it would make no difference, for the talesmen must be such as the original panel. By the common law the jurors must be returned from the county wherein the fact was commited, 2 Hawk. 559; and by Rev. Code, ch. 31, s. 25, they must be returned from the county in which they reside.

The prisoners then moved in arrest of judgment, by reason of the discharge of the jury without their having agreed, on

the first trial. As the whole matter appeared upon the record, this manner of presenting the defence was proper; it was taken without objection in *the Kinloch's* case. Fost. 22. But the rule that a jury sworn and charged cannot be discharged (without the prisoner's consent) till they have given a verdict, was never supposed to apply to any but capital cases, (2 Hawk. P. C.,) which it has been seen this was not. It was, therefore, within the rightful power of the Judge, in the exercise of a judicial discretion, to discharge the jury. In the case of *Prince*, decided at this term, we have indicated that in a capital case, an exercise of this discretion combines a decision on the fact and the law, and that from such a decision, so far as it includes a question of law, an appeal lies to this Court. We do not think it necessary to determine now whether this principle would apply to all felonies, (although we are inclined to think it would), inasmuch as we think the facts sets forth in the record in this case sufficiently justify the discharge of the jury.

As to the course taken by the learned Judge in requiring the jury from Warren to be carried into Franklin County: Such was the authority of the Judge at common law, (2 Hale P. C. 297;) but it never has been a usual practice in this State, and the act authorizing a Court to be kept open beyond its regular term, in case of the disagreement of a jury charged with a capital case, (Rev. Code, ch. 31, s. 16) may be considered as intended to discourage such a practice by making it unnecessary; we are not disposed, however, unnecessarily to say that it absolutely destroys the common law power.

After the argument in this case, Mr. Solomon filed a brief for the prisoners, in which in addition to the exceptions above discussed, he takes the exception that the prisoners were not allowed to challenge twenty-three jurors. It will be sufficient to say that the record discloses no ground for such an exception, nor does it appear that any such exception was taken by the prisoners in the Court below.

There is no error in the record, and the judgment must be affirmed. Let this opinion be certified, &c.

PER CURIAM. No Error.

JOHN PATRICK, Adm'r. *v.* WILLIAM JOYNER, Adm'r.

Inasmuch as the Code requires injunctions to be issued at the time of commencing the action or at any time afterwards before final judgment; and as by that Code all civil actions must be commenced by summons: *Held* that an injunction ordered by the Judge upon reading the complaint, coupled with an order at the same time to issue a copy of the complaint, and a summons to the defendant, was irregular and premature, and therefore should be dissolved.

(*Smith* v. *McIlwaine, ante* 73, and *Johnson* v. *Judd, ante* 498, cited and approved.)

MOTION to dissolve an injunction, heard by *Jones, J.*, at Spring Term 1869, of the Superior Court of PITT.

The facts are stated in the Opinion.

His Honor having disallowed the motion, the defendant appealed.

Johnson, for the appellant.

Hilliard, contra.

RODMAN, J. We regret that we are precluded from considering this case on its merits, by reason of the irregularity of the proceedings. Sec. 70, C. C. P. requires that all civil actions shall be commenced by the issuing of a summons. Sec. 190 says: "The injunction may be granted at the time of commencing the action, or at any time afterwards before judgment," &c. In this case the action was attempted to be commenced, by a writing in the nature of a bill in Equity, sworn to on 26th Nov. 1868, and presented to the District Judge, who on the 30th Nov. 1868, ordered that on the plaintiffs giving bond before the Clerk of Pitt Superior Court "the said Clerk will issue the injunction prayed for, and also a copy of the complaint and affidavit with a summons to the defendant, returnable to the next term of the Superior Court, of Pitt." Thereupon an injunction issued enjoining "from further proceedings, under and by virtue of the judgment referred to in

plaintiff's complaint," &c., until further order; and also a summons dated 7th December, 1868, requiring the defendant to appear before the Judge at the next regular Term of Pitt Superior Court. At that time the defendant appeared and moved to dissolve the injunction, which was disallowed, and he appealed. The injunction issued irregularly and prematurely, and the Judge for that reason should have dissolved it, allowing, however, to the plaintiff the liberty of amending it, if he thought it just to do so. Not only was the injunction issued before the action had been commenced, but it was irregular in form, as was explained in *Smith* v. *McIlwaine*, *ante* 95, and in *Johnson* v. *Judd*, at this Term.

The latter defect, however, was cured or amendable by the Act ratified 1st April, 1869, referred to in that case, but the former was not. The opinion of this Court is that the injunction be dissolved, and the case remanded for such further action by the Superior Court of Pitt, as may be proper. The defendant will recover costs in this Court.

Let this opinion be certified.

PER CURIAM. Injunction dissolved.

THE STATE *v.* ALLGOOD LOCUST and HAWKINS PEARSON

Heretofore, the Superior Courts have had no power to give judgment for such of the costs upon a State warrant as accrued before the magistrate, who tried it and failed to give judgment for such costs. *Now*, the matter is regulated by Act of 10th April, 1869, "Proceedings in criminal cases," giving them control thereof.

Cases sent up on *pro forma* judgments will not hereafter be considered. (Wilson's case, 1 Jon., 550, cited and approved.)

MOTION to tax defendants with costs, heard by *Thomas, J.*, at WILSON, Spring Term 1869.

The defendants had been bound before a magistrate to keep the peace towards one Hagan, &c., until that Term of the

Court. At that Term the defendants appeared, but Hagan did not. Thereupon they moved to be discharged, and the Solicitor moved besides to have them taxed with costs.

The Court declined to tax the defendants with the costs because of a want of power so to do, and discharged them. The Solicitor appealed.

Attorney General, for the State.

Strong, contra.

DICK, J. A proceeding upon a "peace warrant" is now declared to be a criminal action, Code Civil Procedure, sec. 5 subdivis. 2, and it is regulated by a Statute entitled, "Proceedings in criminal cases," ratified the 10th day of April, 1869. Previous to the ratification of the C. C. P., and the Statute aforesaid, such proceedings were regulated by the common law, and the learning upon the subject will be found in Bacon's Abridgement, Tit. "Surety of the Peace," 1st Durn. and East. 696, 13 East. 171; Wilson's case, 1st Jon., 550.

Such proceedings must be summary and conclusive to render them effectual for the protection of the complainant and to secure the public peace, and generally there is no appeal from the action of the Justice or Judge in the matter.

This case was commenced after the ratification of the C. C. P., and is therefore a criminal action. At the time this case was heard in the Court below, there was no Statute regulating costs in such matters, but provision has since been made in the Statute above referred to, ch. 2, sec. 14. The Justice who acted upon the complaint in this action did not enter up judgment for the costs of the proceedings before him, and the Judge of the Superior Court had no power to render judgment for such costs, *State* v. *Wilson, ubi supra.* The rule has since been altered by the Act defining "Proceedings in criminal cases," and the Judges of the Superior Courts are now invested with a large discretion upon questions of costs in criminal actions. We think his Honor had the power to render a judgment against the defendants for the costs of the

Superior Court, and as he did not exercise his discretion in the matter, on the ground of a want of power, the judgment is overruled, but without costs in this Court against the defendants. We take occasion to remind the Judges of the Superior Courts, that we will not hereafter consider cases sent to this Court upon *pro forma* judgments, as this Court is entitled to the benefit of their well considered opinions upon questions of law, which may arise in such cases.

Let this opinion be certified.

PER CURIAM. Judgment reversed.

YOUNG, WRISTON & ORR *v.* W. R. McLEAN and others.

Where an obligation had been given for $788, "payable in currency or in gold, at the rate $145 in currency for $100 in gold, at the option of the holder;" *Held* that the holder might maintain a suit upon it without making any determination of his *option* previous to that contained in the summons or complaint.

ACTION for the recovery of money only, tried before *Logan, J.*, at MECKLENBURG, Spring Term 1869.

The complaint was for non-payment of a bond as follows:

$788.16. Twelve months after date we promise to pay Young, Wriston and Orr, seven hundred and eighty-eight dollars and sixteen cents, with interest from date, payable in currency or in gold, at the rate of $145 in currency for $100 in gold, at the option of the holder of the note.

The defendants demurred because "the plantiffs do not aver that the defendants have been notified of the option of the holder of said note."

His Honor overruled the demurrer and gave judgment for the plaintiff for $788.16 with interest and costs.

The defendants appealed.

Boyden & Bailey, for the appellants.

An omission to aver performance of a condition precedent, or an excuse for non-performance, is fatal on demurrer, or in case of judgment by default. Chit. Pl. 1. 360.

Where any option remains to be exercised by the plaintiff, notice of his having determined that option ought to be given before sueing. Pars. Cont. 2, 182, n. (v) Selwyn N. P., 1, 113, Chit. Cont. 731.

Wilson, contra.

SETTLE. J. It is contended that there is a fatal objection to a recovery in this case, because the plaintiff failed to notify the defendants of his option in respect to the currency in which he would accept payment, before suit brought.

There is a marked distinction between this case, and those cited by the defendants' counsel, upon the argument. Indeed we have not been able to find any authority in point. We admit the general rule that the performance of a condition precedent must be alleged in the complaint, and it is also clear that where the price of an article sold depends by the contract on some collateral fact, exclusively within the knowledge of the plaintiff, he must notify the defendant before he can recover. But we do not see how these principles conflict with the conclusion at which we have arrived. Contracts must be construed so as to carry out the intention of the parties. This is a fundamental principle. Can there be a doubt that it was the intention of the parties, in framing the bond in this manner, to give to the plaintiff whatever advantage might arise from the fluctuation of the currency, and that the defendants entered into the contract with their eyes open?

If the terms are hard, which we do not admit, the defendants made them so, and they ought not to complain of the form in which the plaintiff seeks redress.

Even supposing that the obligation was an alternative one, and that the option was to be made and notified by the plain-

tiff, either within a reasonable time before, or at the maturity of the bond, but if not made by that time the benefit of it was lost, and the obligation became an absolute one for the amount payable in currency, the defendants cannot complain, for the demand here is for currency, and the action was all the notice that was required.

But shall the defendants be allowed to say that the terms, which they submitted to, and which were intended for the benefit of the plaintiff, shall operate as a condition precedent and defeat that intention; and that, as the plaintiff did not make known his election before the bond fell due, or at all events, before suit brought, he now has no remedy?

It is the debtor's duty to seek the creditor, but this construction would shift the burden from the debtor to the creditor, and make what was intended as a benefit, operate as a hardship upon the creditor.

PER CURIAM. Judgment affirmed.

THE STATE v. NERO DAVIS.

On a trial for murder, the confessions of the prisoner having been offered in evidence, their reception was objected to as having been induced by fear or hope, but was allowed; Thereupon the prisoner asked the Court to instruct the jury, that "whether confessions are admissible at all as evidence, is, as in case of other evidence, solely a question for the Judge, but how far they are to be believed, or whether entitled to credence at all is a question solely for the jury:" His Honor gave such instruction, but added, "But the confessions of the prisoner come before the jury untainted with fear or hope, and are entitled to all the weight to which such evidence is entitled, and the fear or hope which vitiates confessions must be such as to produce an impression that punishment or suffering may be lightened or avoided by confession;" *Held*, (*Rodman* and *Dick*, *JJ.*, *dissenting*,) that such addition was not objectionable.

What constitutes fear, or hope, in case of confessions, is a matter of law, in respect to which the ruling of the Court below may be reviewed; whether such fear, or hope existed in a particular case is a question of fact, the decision of which *below* cannot be reviewed.

(*State v. Andrew*, Phil. 205, cited and approved.)

THE STATE *v.* DAVIS.

MURDER, tried before *Tourgee, J.*, at CHATHAM, Spring Term, 1869.

Upon the trial, one Andrew Turner, a witness for the State, testified that he, with the deputy sheriff and several others, arrested the prisoner; that the deputy seized him, and immediately commenced binding him with ropes; that the prisoner was greatly agitated and frightened, and trembled like a leaf, and that his eyes glared; that just at this time, the witness asked the prisoner, "How is this, tell me all about it, Nero; you had better have taken my advice;" and that thereupon the prisoner confessed, &c.

The counsel for the prisoner here objected that the confessions were not admissible. His Honor, however, admitted them.

Afterwards, the counsel for the prisoner asked his Honor to instruct the jury as follows: "Whether confessions are admissible at all as evidence is, as in case of other evidence, solely a question for the Judge, but how far they are to be believed, or whether entitled to credence at all, is a question solely for the jury." His Honor gave this instruction, but added, "But the confessions of the prisoner come before the jury untainted with fear or hope, and are entitled to all the weight to which such evidence is entitled; the fear or hope which vitiates confession must be such as to produce an impression that punishment or suffering may be lightened or avoided by such confession."

To this the prisoner's counsel excepted, and asked his Honor further to instruct the jury that whether evidence is competent or not, is a question for the Judge; but whether it is to be believed or not, is a question solely for the jury. His Honor declined so to charge, remarking that he had substantially so charged before.

Verdict, Guilty; Rule, &c. Judgment, and Appeal.

York, for the appellant.

Attorney General, contra.

READE, J. Whether confessions are voluntary or are induced by fear or hope, is, of course, a question of fact; yet it is not for the jury, but is a question for the Judge. Before they can be heard by the jury, the Judge must decide that they were not induced by fear or hope. What is meant by fear or hope, and what sort of fear or hope will exclude them, is also a question for the Judge; but it is a question of law. We cannot review his finding of the fact that there was or was not fear or hope, but we can review his decision of the law, as to what constitutes fear or hope. So that the admissibility of confessions is a mixed question of law and fact, and is to be passed upon by the Judge, and not by the jury. In this case his Honor decided the fact that the confessions were not induced by fear or hope. There was no exception to his Honor's opinion as to what constituted such fear or hope as would exclude the confessions; and therefore there was nothing in regard to his Honor's admitting the confessions as evidence which we can review. *State* v. *Andrew*, Phil. 205.

The prisoner asked for special instructions, which were given by his Honor with a qualification, and the qualification was excepted to. The whole taken together is as follows: "Whether confessions are admissible at all as evidence is, like other evidence, solely a question for the Judge; but how far they are to be believed, or whether entitled to credence at all, is a question solely for the jury; but the confessions of the prisoner come before the jury untainted with fear or hope, and are entitled to all the weight to which such evidence is entitled; and the fear or hope which vitiates confessions must be such as to produce an impression that punishment or suffering may be lightened or avoided by confession."

The first exception to this instruction was, that the Judge told the jury that the confessions were "untainted with fear or hope." The objection is unfounded. Whether they were tainted with fear or hope was a question for the Judge, not for the jury; and he did no more than tell them that he had decided that question, and it was not for them to look behind

his decision to see whether they were voluntary or involuntary; that they were to take them as voluntary, but whether they would believe them was a question for them.

The second exception is, that his Honor expressed an opinion upon the weight of the evidence. No; he only instructed the jury that the confessions were voluntary and they were entitled to all the weight of voluntary confessions; but he expressed no opinion, as to their weight in this particular case, but told the jury that their credibility, their weight, was a question solely for them. It is true he went further and told the jury what sort of fear or hope would exclude confessions, which was not necessary for him to do, but what he said was correct, and it could have done the prisoner no harm, for he had before told the jury that this was a question for him and not for them, and that he had decided it. What he said was simply an explanation to the jury of the law in regard to the admissibility of confessions, and the rule by which he had been guided in admitting them.

The second instruction asked for was right in itself, but there was no propriety in asking it a second time, as it was embraced in the first instruction. His Honor did not deny the correctness of the instructions asked for, but, on the contrary, admitted it, by the declaration, that he had already given them, which was the same as to repeat them. His refusal to repeat them in terms was not error, but was a mild toleration of the importunate zeal of the prisoner's counsel.

The whole charge taken together was, (1) that the admissibility of the prisoner's confessions was a question for the Judge, and not for the jury; (2) that they were admissible; (3) that whether the jury should believe them was a question for them; (4) that he had himself decided that they were not induced by fear or hope, and that the jury could not look behind his finding, and exclude them from consideration as competent evidence, untainted by fear or hope, which, if they had existed, would have induced him to exclude them altogether.

The only matter which has given us any trouble is the

doubt whether his Honor decided the question of fact correctly as to the confessions being voluntary. The evidence is set out in the case, and was uncontradicted, and we can see that it tended to show fear or hope; but it was a question of fact which we cannot pass upon.

There is no error. This will be certified to the Court below to the end that the sentence of the law may be executed.

RODMAN, J., *dissentiente.* I dissent from the opinion of the majority of the Court in this case. I agree that the Judge below was right in admitting the evidence of the confession. But as I understand the words which he added to the prayer for instructions made by the counsel for the accused, their effect was to impair the unqualified power of the jury to pass on the weight of the confession as a part of the evidence. Probably the Judge did not so intend, but it seems to me that such is the natural meaning of his words. If this be so, it is clear that the Judge went too far.

DICK, J. I concur with Justice Rodman.

PER CURIAM. Judgment affirmed.

THE CITY OF WILMINGTON *v.* JOHN R. DAVIS.

By the Constitution of the State original jurisdiction of civil actions is vested exclusively either in the Superior Courts or in Justices of the Peace; and Justices of the Peace are required to be elected by the several townships; *therefore*, the act of Dec. 10th 1868, (amending the charter of the City of Wilmington), so far as it gives to the Judge of the Special Court jurisdiction of certain penalties and fines, and the general powers of a Justice of the Peace, is void.

ACTION, to recover a penalty, brought before *Cantwell, J.*,

at April Term 1869 of the Special Court of the City of WILMINGTON.

No statement of facts here is necessary.

Judgment for the plaintiff, from which the defendant appealed.

No counsel for the appellant.

Attorney General, contra,

RODMAN, J. This was an action brought before the Special Court of the City of Wilmington, to recover the penalty for a violation of an ordinance of that city in keeping open a barber shop on Sunday. A question of jurisdiction meets us on the threshold, which cannot be avoided: Has the Special Court of the City of Wilmington any civil jurisdiction? Being a Court of limited and special jurisdiction, its jurisdiction must appear in all cases, and cannot be presumed, as it might be of a Court of general jurisdiction. By an act ratified Aug. 11th 1868 (Acts of 1868, ch. 12, p. 13), the Legislature established a Special Court in the City of Wilmington, and gave it jurisdiction over misdemeanors committed in that City. By an act ratified Dec. 18th 1868, entitled "An Act to amend the charter of the City of Wilmington," the Legislature (sect. 2,) made all penalties and fines imposed by any ordinance of the City Government, recoverable before the Judge of the Special Court; and also (sect. 5) gave him all the powers of a Justice of the Peace.

It is by virtue of these acts that the Special Court claims the jurisdiction in question. Are they consistent with the Constitution?

Article IV, Sect. 4, of the Constitution enumerates Special Courts as one of the classes of Courts in which the judicial power of the State is vested. Section 19 says, "The General Assembly shall provide for the establishment of Special Courts for the trial of misdemeanors in cities and towns, when the same may be necessary." Perhaps if this section stood alone, it might be contended that the Legislature, by virtue of its

general power to legislate where not forbidden, might nevertheless confer civil jurisdiction on the Special Courts. However convenient this might be, it seems to us to be expressly forbidden. Section 15 of Article IV says: "The Superior Courts shall have exclusive original jurisdiction of all civil actions whereof exclusive original jurisdiction is not given to some other Court;" and section 33 gives to the Justice of the Peace exclusive original jurisdiction of all civil actions founded on contract, wherein the sum demanded shall not exceed two hundred dollars &c. An action for a penalty is a civil action, and is technically classed among those which are *ex contractu:* hence it would seem clear that a Justice of the Peace must have exclusive jurisdiction of it, when the amount claimed is within the constitutional limit.

The attempt by section 5 of the act of Dec. 18th 1868, to confer the power of a Justice of the Peace on the Judge of the Special Court cannot avail, for Art. VII, sec. 5 of the Constitution requires Justices of the Peace to be elected by the several townships, and the Legislature cannot change the mode of their appointment. With this view of the jurisdiction of the Special Court, it is unnecessary to consider the effect of the two city ordinances, the more especially as the mayor and aldermen can so easily clear them of any obscurity. Action dismissed.

Let this opinion be certified, &c.

PER CURIAM. Action dismissed.

FANNIE E. MITCHENER *v.* THOMAS H. ATKINSON and others.

A legacy of $20,000 to the testator's widow,—upon a survey of the whole will and the state of his family and estate at his death,—declared to be a charge upon the whole estate and also upon the yearly produce of the land of his former wife, until the legacy is discharged or her children come of age; and in this latter respect, such children put to an election between their interest under the will, and their intetest as heirs to their mother.

(The former decree in this case modified. See Phil. Eq. 23.)

PETITION to rehear a decree made at June Term 1866 of this Court.

The case is reported in Phil. Eq., 23.

The decree declared that the legacy of $20,000 given to the plaintiff was not chargeable upon the real estate of the testator, and it was upon this point that a rehearing was prayed for.

The important facts in the case were that one Agrippa Mitchener had died in Johnston County in 1860, leaving an estate of some $80,000 in land, slaves and other property. The plaintiff was his second wife. Two children survived him, who were by his first wife. The deceased at the time of his death cultivated two farms: his home place, and a place at Smithfield Station which had been his first wife's maiden land. The former of these was worth some $8,000, and the latter was more valuable; at the former were employed five horses and fourteen good hands, at the latter ten horses and twenty good hands; the slave women and children being divided between the two places in the like proportion.

The parts of the will that are material are:

Item: I leave to my beloved wife, Fannie E. Mitchener, my dwelling house and all my household and kitchen furniture, except such part as may herein be disposed of, with the outhouses, and a sufficiency of cleared land next adjoining for a

NOTE.—This case was decided at the last term, but inadvertently was not then reported.

three horse farm, with free access to all my wood lands for fuel, timber, &c., for and during her natural life or widowhood, with this express condition, that my said wife continue to reside upon the premises as her home. But if my said wife, Fannie E. Mitchener, should choose to marry, or remove her residence from this State, then and in that case my will, wish and desire is, that the furniture and other property thus loaned, shall return to my estate and be kept together for the benefit of my children. In like manner and on the same conditions, I leave unto my beloved wife the following negro slaves, to wit: Buck, Tanner, Debroe, Amy, Caution, Sophronia, Sarah, Wesley, Simon and Eliza; also two mules, my carriage and harness and carriage horses, buggy and harness, twenty head of stock hogs, four milch cows and calves, one yoke of oxen, one year's support for herself and family. I give to my beloved wife, Fannie E. Mitchener, as her own right and property the sum of twenty thousand dollars, to be paid by my executor or the guardian of my children, as the case may be, in eight annual installments, the first to be due twelve months after the date of my death, and to be paid as follows, to wit: One note of hand on Ethaniah M. Secor for the sum of one thousand dollars, and one on the same for five hundred dollars, each of them bearing interest at seven per cent—the balance of said installment to be paid in money at any time when my said wife may desire; the remaining installments to be paid annually thereafter from the proceeds arising from the sales of the produce of my farm.

* * * * * * *

All the rest and residue of my estate, whether real or personal or mixed, I give and bequeath unto my two children, John A. Mitchener and Alice Constantia Mitchener, to be equally divided between them, share and share alike, including all the personal property herein loaned to my wife, to them and their heirs forever. And I do hereby appoint and earnestly request my trusty friend Thomas H. Atkinson to be guardian for my said children, and that he, the said Thomas H. Atkinson, as such guardian, shall cause my farms to be carried on from year

year, and that my estate in all respects be continued as if I were still living, until my said children arrive at the age of twenty-one years or marry, as the case may be, my intention being not to have my negroes scattered or hired, nor my estate deranged in any respect.

By the results of the war the personalty had been so reduced in value, that the legacy of $20,000 could not be paid unless the land were liable therefor.

Fowle & Badger and *Haywood*, for the petitioner.

Moore, contra,

PEARSON, C. J. When this case was before us at June Term 1866, (Phil. Eq. 23,) the plaintiff's counsel took the position that a widow was to be looked upon as a purchaser for valuable consideration, and the legacy of $20,000 was entitled to preference over all other legacies and devises. He rested the case on that position, and supported it by many authorities and very forcible reasonings. Without giving an opinion on the first part of this proposition, the Court held that as the widow took under the will, she was put to her election, and was not allowed also to claim against the will, so as to disappoint the intention of the testator.

The attention of the Court was then turned to the position assumed by the counsel for the defendant, that this was a general pecuniary legacy, *demonstrative* in reference to the fund out of which it was to be paid, and although the first turned out to be inadequate, resort could not be had to any other part of the estate for its payment. The Court held that it was a general pecuniary legacy, with reference to a fund for its payment, and so far demonstrative; yet it was not confined to the fund indicated for its payment in *the first instance*, and must be paid out of the property embraced in the residuary clause.

Having decided these two points, the case was taken to be disposed of, and no attention was given to the question whether the part of the home place not devised to the widow,

was, or was not subject to the payment of the legacy, and the matter is put off by the single expression, "of course this remark does not apply to the real estate."

We find now that there was an intermediate ground between the extreme position taken by the plaintiff's counsel, and that taken by the counsel of the defendant, on the former argument; and we are glad to have an opportunity for its consideration under the petition to rehear.

For the plaintiff, it was contended: This legacy is a charge on all of the home place not covered by the devise to the widow; for after the first instalment, the remaining seven are to be paid annually out of the proceeds arising from the sales of the produce of the farm, and as the legacy can never be discharged in this way, as the proceeds of the sale of such produce will not keep down the interest, the plaintiff is entitled to have the land sold, and applied to the payment of her legacy.

For the defendant, it was contended: The idea of this legacy of $18,000 being a charge on the home place is out of the question, for the whole tract is not worth $8,000, and the notion that the testator intended or expected this large sum to be paid off by the sales of the annual produce of this two-horse farm, is absurd.

We are satisfied that it was not the intention of the testator to have this large amount paid by the proceeds of the sales of the annual produce of his home-place, after cutting off the part allotted to his widow; but looking at the whole will in connection with the condition of the testator's affairs as disclosed by the answer, we think his intention was to charge not only the crops made at the home place, but also the crops made at the "Smithfield Station place," with the payment of this legacy to his widow. There was nothing absurd in this. On the contrary, it was a very reasonable expectation, and an arrangement which would have been for the interest of his children, except for the happening of an unforeseen event, to-wit: the war and the emancipation of his slaves. He was worth some sixty or eighty thousand dollars, owned upwards of one hundred slaves, worked at his home

place five horses, and at the "Smithfield Station place," ten horses. In concluding his will, he gives "all the rest and residue of his estate to his two children, appoints Thos. Atkinson their guardian, and directs him "to cause my farms to be carried on from year to year, and my estate in all respects to be continued, as if I were still living, until my children arrive at the age of twenty-one or marry; my intention being not to have my negroes scattered or hired, nor my estate deranged in any respect." In a former part of the will he had given his wife a part of the home place, including the dwelling house, furniture, &c., and $20,000, to be paid by his executor, or the guardian of his children, in eight annual installments. For the first, due twelve months after his death, he makes provision: "the other seven installments to be paid annually from the proceeds arising from the sales of the produce of my farm."

In the "Smithfield Station" farm he had only a life interest as tenant by the courtesy, and it belonged after his death to his children; but connecting the residuary clause with the clause giving the $20,000 to his wife, the intention is obvious. If not moved by affection, he was obliged to give his wife, who was not the mother of his children, this large legacy, a child's part of his estate, to prevent a dissent, and to effect his purpose "not to have the negroes scattered or hired, nor his estate deranged in any respect;" and the arrangement he made for its payment by installments, was a very reasonable one. Let the guardian of my children work the farms as I have been doing from year to year: by the time my eldest child comes of age this legacy can easily be paid off by the crops, and the children will then have all of my negroes to work their mother's land.

Assuming, then, that the testator charged the crops made at the "Smithfield Station place," as well as the crops made at the home place, with the payment of this legacy, the case presents a question of election. The children cannot in conscience take anything under their father's will, if they refuse

to allow the rents and profits of their Smithfield Station plantation to be annually applied to the discharge of this legacy, for if so, they disappoint their father's intention. They cannot claim under the will and also against it. If they elect to claim against the will, the plaintiff is entitled to a decree for the sale of so much of the home place as is not devised to her, and also all of the personal property not given to her absolutely or bequeathed to the children, to be applied to the payment of her legacy; and also to an account of the services of the slaves up to the time of their emancipation, and of the horses, stock, farming utensils, &c., handed over to the guardian, by the executor, and of the rents and profits of the home place. If they elect to claim under the will, they must account for the profits, to-wit: the use of the land and the slaves on the farm at Smithfield Station, and also the remnant of the farm at the home place, up to the emancipation of the slaves; and after that date, the plaintiff will be entitled to the rents of the land until her legacy is satisfied, or the children arrive at age, and the question as to a sale of the home place will stand on further directions. To enable them to make their election with a full understanding of the facts, the defendants are entitled to a reference.

The former decree is reversed so far as it is not consistent with the opinion now declared by the Court. The cause will stand for further directions.

PER CURIAM. Order accordingly.

N. R. CROOM and others *v.* J. K. MORRISEY.

Writs signed in blank by Clerks, and handed to attorneys for their use, if subsequently filled up by the latter are regular and sufficient writs. At all events, such writs when returned and received by the Clerk are regular as against him. Prosecution bonds taken by the Attorneys in such cases are as if taken by the Clerks, and will prevent the incurring of the penalty for not taking such bonds, even although not *returned* at the first Court with the writ.

(*Wright* v. *Wheeler*, 8 Ire. 184, cited and approved.)

DEBT for a penalty in not taking a prosecution bond, tried before *Buxton, J.*, at MOORE, Spring Term 1869.

The plaintiffs here had been defendants in the suit in which, as was alleged, no prosecution bond had been taken. It appeared that the writ in the former case had been handed in blank signed by the Clerk, to an Attorney, who afterwards in the Clerk's absence filled it up; and that subsequently it was executed, returned and filed. It was also shown that the Attorney, before issuing it, had taken a prosecution bond, but that it was not filed in Court until the second term after the return of the writ.

Upon this state of facts the jury, under the instructions of his Honor, found a verdict for the defendant.

Rule &c., Rule discharged, Judgment, and Appeal by the plaintiffs.

Dowd and McIver, for the appellant, cited *Shepherd* v. *Lane* 2 Dev. 148, and *Wright* v. *Wheeler*, 8 Ire. 184.

No counsel *contra.*

PEARSON, C. J. We are of opinion that the act of the Clerk in signing the blank writ and handing it to the Attorney, was sufficient authority for him to fill the blanks; and that after the blanks were thus filled, it became a regular and and sufficient writ, like endorsing a note in blank, or signing a promissory note in blank, with authority to insert the true amount.

But at all events, as this paper was returned to the Clerk and received by him and regularly docketed by him as the writ or leading process in the case, by these acts he recognized and adopted the writ as regularly issued, and is concluded from the defence that it was done by one not authorized by him. *Wright* v. *Wheeler*, 8 Ire. 184.

The only question then is—did the Clerk take a sufficient prosecution bond before issuing the writ?

Qui facit per alium, facit per se. Had the bond taken by the Attorney been returned at the same time with the writ, we presume no question ever would have been made about it: so the real objection is that the bond was not filed with the writ. But as the bond was filed in time for the purposes of the defendant, we are of opinion that the delay did not vacate the bond, or have the legal effect to prevent the acts done from amounting to a compliance with the requirements of the law.

PER CURIAM. Judgment affirmed.

JOHN W. ATKINSON, *Qui tam*, *v.* GEO. W. WILLIAMS and D. R. MURCHISON.

The penalty for selling rosin in Wilmington without having it weighed, given by act of 19th March 1869, is not incurred where the rosin when sold was *in transitu* from Wilmington to New York, although the parties to the sale were both at the time in Wilmington.

ACTION for a penalty, tried by *Russel, J.*, at NEW HANOVER, Spring Term 1869.

The rosin, in the sale of which it was alleged that the penalty had been incurred, had left Wilmington the day before by steamer for New York, and was then *in transitu*. The parties to the sale both resided in Wilmington, and the transaction was *bona fide*.

His Honor having given judgment for the plaintiff, the defendant appealed.

Person, for the appellant.

No counsel *contra*.

READE, J. "All rosin sold in the city of Wilmington shall be weighed," &c.; and "Any person selling rosin in the city of Wilmington without its having been weighed as aforesaid, shall forfeit," &c., act 29th March, 1869. The seller and buyer in the present case lived in Wilmington, and the sale was made there, but the rosin was not there, but was *in transitu* to New York.

The question is, are the sellers liable to the penalty:

They are not. The act was intended to regulate the local market of Wilmington, in regard to things present and sold there. How could the rosin be weighed when it was not there?

Whether if the rosin had been sent out of the market and then sold to avoid the operation of the act the penalty would have attached, is a question not before us, because it is stated that the transaction was *bona fide*.

The judgment below is reversed, and judgment here for the defendants.

PER CURIAM. Judgment reversed.

JAMES H. GREENLEE *v.* T. Y. and J. M. GREENLEE.

The act of March 16th 1869. (Stay Law) does not profess to authorize the continuance of causes then pending on issues regularly joined upon the ordinary pleas for delay.

DEBT, before *Henry, J.*, at MCDOWELL, Spring Term 1869.

The defendant having moved, under the act of 16th March 1869, for a continuance of the cause then pending upon the usual pleas for delay, His Honor allowed the motion. The defendant excepted, and appealed.

Phillips & Merrimon, for the appellant.
No counsel *contra*.

SETTLE, J. The writ was returned to Spring Term 1867, counsel appeared upon both sides and marked their names, and the case was continued from term to term, until Spring Term 1869.

The statement of the case sent here recites, that "dilatory pleas having heretofore been entered by defendants, and the cause standing upon the trial docket at this term (Spring Term 1869), the attorney for the plaintiff moved for judgment, &c., which motion was refused by the Court, and the cause ordered to be continued under the act of the legislature, ratified March 16th, 1869." Admitting for the sake of argument, the validity of this act, we find nothing in it to warrant the conclusion at which his Honor seems to have arrived. It provides, "that all civil actions in which issues have been joined, shall stand for trial at Spring Term 1869; provided, that issues of law or fact which have been joined in pursuance of laws and ordinances heretofore passed, and known as Stay Laws, shall be considered as having been illegally joined," and the pleadings in such cases are to be regulated according to the provisions of this act, &c.

In this case issues had been joined upon pleas entered according to the regular course of the Court, and it stood for trial upon the docket at Spring Term 1869.

How does it appear that issues had been joined in pursuance of any law or ordinance passed and known as *Stay Laws?*

The Stay Laws gave further time to plead upon the payment of certain installments, &c., and it was not the practice to enter pleas or join issue when these terms were complied with. If

not complied with, but only pleas entered according to the regular course of the Courts before the introduction of Stay Laws, judgments were entered at the proper terms as a matter of course, and no one supposed these cases to be embraced or in any wise affected by the provisions of the Stay Laws.

There is error. Let this be certified &c.

PER CURIAM. Order accordingly.

THE STATE v. JOHN HORTON.

If a bill of indictment be endorsed "a true bill," by mistake, when the Grand Jury had ordered their Clerk to endorse it "*not* a true bill," the defendant may show that fact by affidavit or otherwise, either upon a motion to quash or upon a plea in abatement, and thereupon the indictment should be quashed.

(*State* v. *Cain*, 1 Hawks, 352, *State* v. *Roberts*, 2 D. & B. 542, and *State* v. *Barnes*, 7 Jon. 20, cited and approved.)

AFFRAY, before *Henry*, *J.*, at WATAUGA, Spring Term, 1869.

The defendant moved to quash the indictment, and offered to show that the endorsement, "a true bill," was entered by a mistake of the clerk of the grand jury, the finding having really been "*not* a true bill."

His Honor directed the defendant to file a plea in abatement to that effect, which having been done the Solicitor demurred.

Judgment for the defendant, and Appeal by the State.

Attorney General, for the State.

No counsel *contra*.

READE, J. Undoubtedly one can not be put on trial for a crime before a true bill has been found against him by the

grand jury; and whether a true bill has been found, is, of course, a question of fact to be determined by the Court before the defendant can be required to appear and make defense. The indictment itself, with the endorsement of the grand jury, returned in open Court, is the usual evidence of the fact; and when the Court receives the indictment with the endorsement, it becomes a part of the judicial proceedings in the case, and the defendant is put on trial before the petit jury. But the defendant has a right first to enquire whether he has been charged by the grand jury. The indictment endorsed "a true bill," is *prima facie* sufficient, but it would be strange if that which was done in his absence were conclusive. He has the right to allege and to prove that no true bill has been found, and to have that which falsely purports to be such, quashed, and to be discharged. In Bishop's Criminal Law, sec. 448, it is said: "It has sometimes been laid down, and it is the doctrine which seems to prevail in some of our States, that the motion to quash can be founded only on some defect apparent on the face of the indictment. Indeed, this is everywhere a sort of general rule; but the better doctrine is, that the Court in its discretion will look into what is brought to its attention outside the indictment, and even outside the record in the cause. Thus the prosecuting attorney may admit the existence of a fact, or the fact may be made to appear on affidavit; and in either case, the extrinsic matter will be considered in connection with the indictment, as constituting the basis for a motion to quash." In support of this the author quotes *State* v. *Cain*, 1 Hawks, 352; in which case the indictment was quashed on a motion of the the defendant, upon the admission of the prosecuting attorney that the bill was found upon the testimony of one of the grand jurors who had not been sworn in Court and sent in as a witness. In the subsequent cases of *State* v. *Roberts*, 2 Dev. & Bat., 542; and *State* v. *Barnes*, 7 Jon. 20, the doctrine is sustained, and it is said that a motion to quash, or a plea in abatement will lie.

In the case before us, therefore, the matter might have been

heard either upon the motion to quash, or upon the plea, and upon the fact appearing to be that the grand jury had really found "not a true bill," the defendant ought to have been discharged. But as the indictment was against the defendant and another, and as quashing it as to one might have affected it as to the other, and, indeed, in all cases where such a defect as in this case appears, it would be better practice to call the foreman of the grand jury, and let him make the return speak the truth. In the absence of the foreman, proof might be made in any other legitimate mode, the correction made, and the defendant discharged. In this case the fact being as alleged, the defendant was entitled to be discharged, and as that would have been the effect of his Honor's ruling, there is no error.

This will be certified, &c.

PER CURIAM. No error.

FREEMAN HURDLE *v.* JOHN F. LEATH.

Where doubts as to the propriety of an investment by a guardian are sought to be removed by him by false swearing, the question will be decided against him.

If a bond with two obligors, of whom the principal is solvent and the surety doubtful, be accepted by a guardian, he is liable if the money be lost.

Depreciated bank notes produced by a guardian on settling his accounts, are not to be allowed him at par; and *quære* if they should be allowed at all unless some satisfactory explanation accompany their production.

(*Boyett* v. *Hurst*, 1 Jon. Eq. 167, cited and approved.)

EXCEPTIONS to the report of the Clerk made under the order at last Term, *ante* 366.

The whole matter appears in the Opinion.

Bailey, for the exceptions.
Bragg, contra.

SETTLE, J. This case was before us at the last term, *ante* 366. We have examined with care the voluminous papers which accompany it, and find that the investigation is much simplified by the elaborate report of the Clerk of this Court, to whom the case was referred.

It was argued at this term upon exceptions to his report. We will consider them in their order.

The defendant excepts:

1. "Because the Clerk disallows as a voucher and credit to the defendant, the single bill signed by J. L. Garrison as principal, andFreeman Walker, F. Garrison, Susan P. Ector, and Eliza J. Ector, as sureties, for the sum of $2435, due one day after date, and dated June 5th 1860."

This exception isoverruled.

The defendant states distinctly in his answer, that he had "continued the money of his wards in the hands of the *original borrowers*, who were regarded by the community as amply solvent." He states further that he "has now the aforesaid bonds, taken for the loan of his ward's money, on the *following persons*, and at the *following times*, to wit: one on J. L. Garrison, and as sureties, Freeman Walker, F. Garrison, Susan P. Ector and Eliza J. Ector, for $2435, and *executed June 5th* 1860." The proof puts it beyond all doubt that the bond was executed originally by J. L. Garrision and Freeman Walker only, and that F. Garrison, Susan P. Ector and Eliza J. Ector did not execute it on the 5th of June 1860. They added their names to the bond some time in the year 1866; upon what consideration or for what purpose, the defendant does not feel called upon to explain. It is to be observed that this important disclosure did not come from the defendant; on the contrary, he concealed it, and examined all of his witnesses as to the solvency of J. L. Garrison, Freeman Walker, F. Garrison, Susan P. Ector and Eliza J. Ector, in June 1860. He put himself upon this issue in his answer, and he tried to maintain it by proof. Shall he be permitted to change front

and say that the fact, that the three last named obligors signed in 1866, when he had sworn that they did so in 1860, is an immaterial circumstance? It is a circumstance which suggests forcibly that he was aware of the insufficiency of the original bond, and of his negligence in respect to the same; and that this was a contrivance to give it the appearance of being amply good, and thereby enable him to palm it off as a payment upon his wards.

"Where the profits of any ward's estate shall be more than sufficient to maintain and educate him, the guardian shall lend the surplus and all other sums of money in his hands belonging to such ward, upon bond with sufficient security, to be repaid with interest annually; and all bonds, notes and other obligations which he shall take as guardian, shall bear compound interest, for which he shall account; and when the debtor or his sureties are likely to become insolvent, the guardian shall use all lawful means to enforce the payment thereof, on pain of being liable for the same; and he may pay the same to the ward on settlement with him." Rev. Code, ch. 54, sec. 23.

Has the defendant used all lawful means to enforce the payment of this bond? No. On the contrary, he claims credit for prudence in having kept the fund in the hands of the "original borrowers."

There was much discussion at the bar as to the legal effect of this alteration of, or rather addition to, the bond. We will not trouble ourselves with the consideration of that question; for it is admitted by all, that if the bond was altered for a fraudulent purpose, the guardian ought not to be allowed to use it in a settlement with his wards. Courts will not countenance, much less encourage, bad faith. We entertain no doubt of a fraudulent purpose: the facts admit of no other construction.

2. "The defendant also excepts to the disallowance of the single bill signed by Frances Hornbuckle, as principal, and E. F. Watson, as surety, dated April 3rd 1861, for $2135."

This exception is overruled.

There is a mass of conflicting testimony as to the solvency of Dr. Watson, the surety, in 1861.

We will not attempt to review it here, being satisfied that it justifies the report of the clerk, in the assertion, that "while the evidence shows that the principal obligor was solvent and good for the sum named, it also shows that there was great doubt as to the solvency of the surety, E. F. Watson; that while the said Watson was reputed to have a large estate at the time he signed the bond, he was also reputed to be greatly involved and *doubtful* at the same date." Our statute makes it the duty of the guardian to lend the money of his ward upon "bond with *sufficient security*." This language has received judicial interpretation, and means that not only the principal in the bond must be *sufficient*, but the surety also must come up to this high standard. In *Boyett* v. *Hurst*, 1 Jon. Eq. 167, we fined this position stated in the following strong language: "Suppose a guardian lends the money of his ward to a person who has property in possession to the value, say, of $100,000, and is not at all embarassed, nor engaged in any business of a hazardous nature, and it should happen that the borrower suddenly fails; the loss will undoubtedly fall upon the guardian: for, although he took a good note, yet he neglected to take good and sufficient security, and has not complied with the spirit of the statute; the policy of which is to require the investment to be secured by the bond or note of some person in addition to the borrower."

3. "The defendant excepts to the report of the clerk, because he has not allowed the defendant any commissions, either on his receipts or disbursements."

This exception was abandoned; as it appeared from the report that the clerk had allowed the defendant five *per cent.* commissions on all his receipts and disbursements.

4. "The defendant excepts also because the clerk has charged the defendant with an excess of disbursements over interest, in the account of George D. Hurdle."

This exception was not pressed upon the argument, and being untenable, we dismiss it without comment.

5. "The defendant also excepts to the report, because the

clerk disallows the bank notes received by this defendant and on file here, at par."

This exception is overruled.

We are inclined to think that there was more ground for an exception by the plaintiff than by the defendant, on this point. It was the duty of the guardian as we have seen, to lend this money on bond with good security. Had he done so? On this point he leaves us without light. But supposing that he had performed his duty in this respect, why did he change the investment *just before* the Surrender, and take in payment of a good bond in currency which was greatly depreciated? What were the circumstances which rendered this change necessary or even prudent? This requires explanation, but the defendant has not seen fit to give us any.

The Clerk allows the defendant the value of the bills at the time they were received, to-wit, twenty-five cents in the dollar. He certainly has no right to complain.

Let a decree be drawn in conformity with this Opinion.

PER CURIAM. Decree accordingly.

Ex parte DAVID SCHENCK.

Where a *prima facie* case is made, either upon affidavit or other sufficient proof, a rule *nisi* is granted, as of course.

(Certain expressions in an affidavit—relied upon as impairing its effect, *Held* to be surplusage.)

(*Ex parte* Moore, *ante* 369, cited and approved.)

AFFIDAVIT, for a rule against a sheriff, before *Logan, J.*, at LINCOLN, Spring Term 1869.

The facts are stated in the Opinion.

His Honor discharged the rule, and the affiant appealed.

Bragg, for the appellant.

Hoke, Bynum, Fowle & Badger, and *Phillips & Merrimon*, by leave, for other parties interested.

PEARSON, C. J. When a *prima facie* case is made, either upon affidavit or other sufficient proof, a rule *nisi* is granted as of course, *Ex parte Moore*, at this term.

The affidavit sets out that regular executions were in the of hands King, as sheriff, under which he levied upon, advertised and sold at public auction, the land in question, according to law; that the affiant was the last and highest bidder, and the land was knocked down to him, and that he prepared a regular sheriff's deed, and tendered it to the sheriff for execution, and offered to pay the amount of his bid. Had the affidavit stopped here, the affiant, on a *prima facie* case, was clearly entitled to the rule.

But the affidavit goes on to set out that the land had been "divided into smaller tracts as the law provides," and a portion of 218 acres, valued at $13.75 per acre by freeholders chosen by the parties, as provided by statute, was after due advertisement, offered for public sale, &c., "and knocked down to the affiant, as purchaser, at the price of $2.00 per acre. This caused the difficulty. Should it be allowed the effect of so impairing the *prima facie* case as to warrant the Judge in refusing the rule; or should it be treated as surplusage, under the maxim "*utile per inutile non vitiatur ?*"

It was an attempt to elicit the opinion of the Judge upon a grave constitutional question, before the sheriff could be heard, and without allowing him the aid of a full argument. We think it ought to have been treated as surplusage. In this Court the constitutional question was argued by counsel for the affiant, and counsel was heard in reply as *amicus curiae;* but we are satisfied the question is not before us, and we will not prejudge it.

The ruling of his Honor is reversed, and a *procedendo* will issue in conformity to this opinion. The affiant will pay the costs of this Court. No attorney's fee to be taxed.

PER CURIAM. Judgment reversed.

S. DIXON, DAVIDSON & CO., *v.* JAMES PACE.

Where an agent received money from his principal with specific instructions to pay it to a certain creditor, which he failed to do, but made a different application of it for the principal's benefit, and the creditor made no demand upon such agent until after he had parted with the money, and accounted for it with the principal; *Held* that the creditor could not look to the agent for such money.

(*Strayhorn* v. *Webb*, 2 Jon. 199, *Draughan* v. *Bunting*, 9 Ire. 10, and *Ingram* v. *Kirkpatrick*, 6 Ire. Eq. 463, cited and approved.)

ASSUMPSIT, tried before *Tourgee, J.*, at Spring Term 1869 of the Superior Court of CHATHAM.

The plaintiffs declared for goods sold and delivered, and also for money had and received to their use.

It was in evidence that certain castings suitable for mills had been furnished in Febuary 1859 to one Evans by the plaintiffs, at the instance of the defendant professing to act on behalf of Evans. The parties differed as to the right of the plaintiffs to charge the defendant with the value of said goods in this action, but as no exception is taken to the ruling of the Court upon those questions, the evidence is here omitted.

Upon the second count it was shown that the defendant, who as wheelwright had superintended the erection of the mills, had received from Evans on account of the plaintiffs, about March 1866, the sum of two hundred and fifty dollars; that in November 1860 he had rendered an account to Evans by which it appeared that the latter owed, on account of work and materials about said mill, to himself the amount of $185; to the plaintiff, more than $700.00, and to one Whitney $400.00. Credit was then given for $250, (without stating to whom paid), and also for $80, as having been paid by Evans, and a general balance struck of more than $1,000; that in February 1861, Evans sent to the defendant upon that account, $600, of which the latter paid to the plaintiffs $250; this was all the money paid to the plaintiffs by the defendant, upon behalf of Evans, at any time.

It was also in evidence that the defendant out of the $850 received from Evans as above, had paid (besides the $250) to Whitney about $330, to other persons having claims against Evans on account of the mill, more than $80, and had retained his own debt of $185; and upon being introduced as a witness he testified that he had accounted to Evans for the whole of that amount.

Some time after the payment of the $250, the plaintiffs demanded of the defendant the payment of their account for castings, and for any moneys received for them by him because of such account, and on his denying any liability to them, this suit was brought.

Upon this part of the case the plaintiffs asked the Court to instruct the jury that if they believed that the defendant had received $250 in March 1860 from Evans, with specific directions to apply it to the account of the plaintiffs, and he had failed to do so, the latter could recover in this action notwithstanding that the defendant previously to a demand by the plaintiff, had paid out upon account of Evans all the money that he had received from him; and that the voluntary payment subsequently by the defendant of the $250, out of a sum not specifically appropriated to the plaintiffs, did not cure his previous default.

His Honor declined to give this instruction, and told the jury that if they believed that at the time of the demand upon the defendant by the plaintiffs, the former had accounted with Evans for all of the $850 received from him, they should find for the defendant.

The plaintiffs excepted.

Verdict for the defendant; Rule for a New Trial; Rule discharged; Judgment, and Appeal.

York, for the appellants.

Phillips & Merrimon, contra.

PEARSON, C. J. There is no error. As the plaintiffs' counsel has not filed a brief, we are at a loss to see on what grounds the ruling of his Honor is excepted to.

To give the plaintiff a cause of action against Pace, it was necessary to notify him that the plaintiffs accepted him as their debtor, and had discharged Evans by giving him credit for the amount. This it was in the power of the plaintiffs to do at any time while the defendant had the money in hand, but it was too late to do so after the defendant had applied the money to the use of Evans in other ways.

True, the defendant received $250 from Evans with specific instructions to pay it to the plaintiffs, but the plaintiffs did nothing to vest in them a right of action against the defendant. Their condition was not changed, and they paid no consideration whatever, by which they could acquire this supposed right of action. The defendant was the agent of Evans, the money was subject to his control, until the plaintiffs did something by which to acquire a right to it, and the fact that the defendant made a different application of the money from that which he was directed to make, was a matter between him and his principal, in which the plaintiffs had taken no steps to acquire a right to interfere. *Strayhorn* v. *Webb*, 2 Jon. 199.

In *Draughan* v. *Bunting*, 9 Ire. 10, the plaintiff had paid the debt to the bank, and that was the consideration by which he acquired a right of action for the money in the hands of the defendant. In *Ingram* v. *Kirkpatrick*, 6 Ire. Eq. 463, it is held that creditors secured by a *deed of trust* acquire rights under it without any act on their part, on the ground that the *property passes by deed*, and the maker may declare trusts without consideration, and it is expressly distinguished from a mere agency like the case we have before us.

In such agency the Court say the matter is between the principal and his agent, until third persons do something by which to give them rights.

PER CURIAM. Judgment affirmed.

CITY OF NEWBERNE *v.* JAMES W. JONES.

Where persons mutually contested the claims of each other to be regarded as Mayor &c., of a municipal corporation, and one party had brought an action in the name of the corporation, in order to test the question, *Held*, that upon the case coming by appeal to this Court, an Attorney, claiming to be counsel for the plaintiff and authorized under its seal, although perhaps appointed by the other party, had a right, even against the protest of the Attorney who brought the action and had been recognized up to that time as the Attorney upon record although without authority under seal, to have the action dismissed.

(*Day* v. *Adams*, *ante* 254, *Walton* v. *Suggs* Phil. 98, cited and approved).

ACTION for a penalty under a city by-law, tried before *Thomas, J.*, at CRAVEN, Spring Term 1869.

The action began by summons before a magistrate, charging the defendant with violation of a city by-law in regard to tying horses to shade trees within its limits.

The complaint set forth elaborately the right of the plaintiff to bring the action, and the answer set up as a defence, at length, the claim of other parties to be the rightful city government.

Judgment before the magistrate was given for the plaintiff; but in the Superior Court this was reversed, and the plaintiff appealed.

The manner in which the case went off in the Superior Court appears in the opinion.

Green, and *Seymour & Haughton*, for the respective parties.

SETTLE J. It is obvious that the purpose of this action is to obtain a decision as to the rights of the two parties who claim the powers of government in "the City of Newberne."

However desirable it may be to have the question settled, we think that we are cut off from a consideration of the merits, by a motion which has been submitted in the cause.

When the case was called, Mr. Green presented himself and claimed to be the Attorney of "The City of Newberne," insist-

ing that this appeared from the record of the case now before the Court. Mr. Seymour, with whom was Mr. Haughton, moved the Court to substitute his name (Mr. Seymour's) for that of Mr. Green on the record, as Attorney for "The City of Newbern," and that he be allowed to dismiss the suit. In support of this motion Mr. Seymour produced a power of attorney under the common seal of the corporation of "The City of Newberne," authorizing him to act as attorney generally, and specially directing him to take steps to dismiss this suit.

Mr Green cited several authorities as to the rights and duties of an attorney of record, and called our attention particularly to *Day* v. *Adams*, *ante* 254, and to *Walton* v. *Sugg*, Phil. 98, but we think that the principle of those cases does not apply to the case before us.

It is admitted that after an attorn ey has entered an appearance and has been recognized by the Court as attorney in the cause, no written authority can be required of him at a subsequent time. But this evidently means that the opposite party shall not call in question his authority, unless he does so within the time, and in accordance with the provision of the statute.

It is also true that after such appearance and recognition an attorney cannot quit the cause or be discharged by his client, without leave of the Court. But this proposition is based upon the idea that there had once been a privity between the client and his attorney. It would be strange, indeed, if a plaintiff should not be permitted to dismiss a suit prosecuted in his name, and at his risk, which had been instituted without his knowledge or consent

The only question before us at present is, who is entitled to represent the corporation known as "The City of Newberne?"

It was formerly held that a corporation, not being capable of a personal appearance, could only appear by attorney appointed under the common seal; but this rule has been discarded, and later authorities establish the principle that a corporation may by vote, or other corporate act not under seal, appoint an agent whose acts and contracts, within the scope of his authority, will be binding upon the corporation.

The cases which establish this principle are those in which other parties have sought to fasten responsibility upon corporations; but here the trouble seems to be a domestic one, and is confined to the house of the plaintiff. The question recurs, has "The City of Newberne" by any corporate act either with or without seal, authorized the institution of this suit?

Mr. Green claims to be the attorney of record, and says that we ought not to look behind that fact. Mr. Seymour produces a general power of attorney, under the common seal of the corporation of "The City of Newberne," with special directions in regard to dismissing this suit.

In a contest between attorneys claiming to represent "The City of Newbern," we do not feel at liberty to look behind the common seal of that corporation.

The motion is allowed, and the action must be dismissed at the cost of the plaintiff.

PER CURIAM. Action dismissed.

WILLIAM SALMS, Ex'r., &c. *v.* J. M. & J. A. MARTIN and others.

A deed, the consideration of which is the prospective support of the bargainor, is valid as a bargain and sale; and if the vendor be proved to be the mother of the vendees, also, as a covenant to stand seized.

Semble, that under the provisions of ch. 37, sec. 1, of Rev. Code, a conveyance of land in North Carolina does not require a *consideration* (except so far as required by the policy in favor of creditors, and purchasers for value), but ordinarily is valid if executed and registered, as there required, without the addition of any of the former ceremonies.

(*Jackson* v. *Hampton*, 8 Ire. 457, cited and approved.)

PETITION to sell land for assets, tried before *Logan, J.*, at GASTON, Spring Term 1869.

In this case a question arose as to the title to the land sought to be sold: whether the testatrix had conveyed it by a deed duly executed, and registered, and made "in consideration of her support during her natural life by the vendees."

It was contended by the plaintiff that the deed was invalid, for want of a proper consideration.

It appeared in evidence that the vendor was mother of the vendees; that at the time of making the conveyance she retained property enough to pay her own debts; that the vendees had previously for several years supported her, and that they continued to do so until her death.

His Honor being of opinion that the deed was void, gave judgment accordingly, and the defendant appealed.

Bragg, for the appellant.

Hoke, contra.

DICK, J. The defendants, by accepting the deed mentioned in the pleadings, incurred the responsibility of maintaining for life the testatrix of the plaintiff. If they had at any time failed to comply with the terms of this contract, they would have been liable in an action at law for damages. The testatrix at the time of the execution of her deed, acquired a certain and fixed right of maintenance against the defendants. For the land conveyed she received a *quid pro quo*, a valuable consideration, which was sufficient to support her deed. If she had made merely *a contract* for the sale of her land founded upon such a consideration, a court of equity would have enforced it specifically upon the application of either party. We think that it may be stated as a general principle, that any consideration in a contract which would induce a court of equity to exercise its discretionary power of specific performance, will be sufficient to give effect to a deed of bargain and sale; which, having its force and operation by virtue of the statute of uses, requires a valuable consideration to support it. 2 Co. Inst. 671, 2 Christian's Black. 336, Note, 4 Kent. 495.

There seems to be some diversity of opinion among the text writers as to the consideration necessary to support a deed of bargain and sale. It is admitted by all that a valuable consideration is necessary to raise a use, but some insist that by a bargain and sale of land no use arises, unless there is a *money* consideration; inasmuch as *a sale, ex vi termini*, implies a transfer of property for money. The rule requiring a consideration to raise a use, has become merely nominal and a matter of form, and it is now generally agreed among lawyers, at least in this country, that a valuable consideration, *i. e.*., "money or money's worth," is a sufficient consideration to support a bargain and sale. *Jackson* v. *Hampton*, 8 Ire. 457. The law is very liberal in assisting deeds in the matter of consideration, and when none is expressed, or sufficiently expressed, one may be proved on any trial where the validity of such deed is called into question.

It would not require a strained construction to make the deed before us operate as a covenant to stand seized to uses. It is in evidence that the grantees are the children of the grantor, and that for more than five years before the execution of the deed they had lived with the grantor, and kindly performed the filial duty of maintaining and taking care of their old and infirm mother; and it is but natural to suppose that in making the deed she was in some degree influenced by maternal affection. But it is unnecessary to consider this question further, as the grantees faithfully performed their contract of maintenance until the death of the grantor, and thus have a valuable as well as a good consideration to support their deed.

The deed cannot be invalidated on the ground of constructive fraud as to creditors, for it is admitted that the grantor at "the time of making the deed retained property fully sufficient and available for the satisfaction of her then creditors." Rev Code, ch. 50, sec. 3. If this deed had been a voluntary one, it would have been good as to creditors, but the grantees are purchasers for a full and valuable consideration, and their

vested rights cannot be interfered with for the benefit of the creditors of the grantor.

There is another question arising in this case, which we desire to suggest to the profession for their mature consideration. The statute of uses was in existence as a modification of the common law at the time of the settlement of this country by our ancestors, and consequently became a part of our law. Conveyances deriving their force and operation from that statute have always been regarded as effectual in this State; in fact, a bargain and sale has been almost universally used in the conveyance of our lands. But it is a question worthy of consideration, whether the statute of 1715, ch. 7, (Rev. Code, ch. 37, sec. 1,) has not done away with not only the ceremonies of the old common law conveyances, but also those which operate upon the technical theory of raising a use, under the statute of uses. It seems to us, upon a fair construction of said statute, (Rev. Code, ch. 37, sec. 1,) that a deed executed and registered as required, will be valid, and pass an estate in lands, even without a consideration, when it does not come in conflict with Rev. Code, ch. 50, sec. 1 and 2, (13 and 27 Eliz.) Why should not the solemn and deliberate act of the grantor import a sufficient consideration, and give validity to his deed? And why should he be compelled to use a pepper-corn, or some other merely nominal consideration to set in operation the old machinery of the statute of uses? We are inclined to think that our statute has swept away not only livery of seisin, but the other technical ceremonies of the common law in the execution of conveyances.

We do not decide the question suggested, as it is unnecessary to do so in the case before us. The judgment in the court below must be reversed, and the petition dismissed.

PER CURIAM. Judgment reversed.

P. N. HEILIG and others *v.* THOMAS STOKES and J. N. PENNINGTON.

That a provisional injunction is granted *before* the issuing of a summons in the case, is a mere irregularity, which if waived by the defendant, the Court will not notice *sua sponte*.

The Constitutional prohibition (Art. 4, Sec. 10,) of trials of "issues of fact" by the Supreme Courts extends to *issues* of fact as heretofore understood, and does not hinder that tribunal from trying, (*ex. gr.*) such questions of fact as may be involved in a consideration of the propriety of continuing or vacating an order for a provisional injunction.

The common injunction (as distinguished from the special) is directed against a *party* to some suit that involves an *equity* which it is desired to protect; and therefore does not include a provisional injunction (as here) in favor of a creditor, against his debtor and a third person who are alleged to be conspiring to defraud him.

Therefore, in such a case the injunction will be continued, if it appear reasonably necessary for the protection of the plaintiff's rights until the trial.

(*Patrick* v. *Joyner*, *ante* 573, *Capehart* v. *Mhoon*, Bus. Eq. 30; *Thigpen* v. *Pitt*, 1 Jon. Eq. 49, *Monroe* v. *McIntire*, 6 Ire. Eq. 65, cited and approved.)

INJUNCTION, before *Buxton*, *J.*, upon a motion to vacate the order, at STANLY, Spring Term, 1869.

The facts are stated in the Opinion.

His Honor declined to vacate the order, and the defendants appealed.

Ashe, *Montgomery* and *Battle & Sons*, for the appellants.

Blackmer & McCorkle, *Phillips & Merrimon* and *W. A. Moore*, *contra*.

RODMAN, J. The Code of Civil Procedure, Sec. 70, requires that every action shall be commenced by issuing a summons: Sec. 188, abolishes the writ of injunction as a provisional remedy, and substitutes an injunction by order. Sec. 190 says

that the injunction may be granted at the time of commencing the action or at any time afterwards before judgment; and the cases in which it may be granted are defined in Sec. 189. This action was not commenced by summons, but by a complaint in the nature of a bill in equity for injunction and relief, and the summons issued after the granting of the injunction. The defendants however appeared and answered, and moved to vacate the injunction, taking no exception on account of the irregularity and thereby waiving it. We are therefore not precluded in this case, as we were in *Patrick* v. *Joyner*, *ante* 573, from considering the case on its merits.

The plaintiff alleges, in substance, that he is a creditor by bond of the defendant Pennington, that Pennington, conspiring with Stokes, fraudulently and with the intent to defeat the plaintiff's claim, made his bond to Stokes without any substantial consideration, and shortly aftewards permitted him to recover judgment, and to levy an execution upon all or nearly all of the property of Pennington, which he threatened to sell. The debt to the plaintiff is admitted, but the defendants deny all the allegations of fraud. Many affidavits were read. As the issues must be tried by a jury, and we do not wish in any way to prejudice the question of fact, we will only say of these, that they leave the matter in doubt. The Judge continued the injunction until the trial of the issues of fact, and the defendants appealed.

This Court has no jurisdiction under the Constitution to try "any issue of fact" (Art. IV, Sec. 10), and it is contended by the plaintiff that inasmuch as the order of the Judge below is based upon his decision upon facts which are in issue, a review of that order here, necessarily involves the trial of an issue of fact by this Court; and therefore cannot be made. We think the words of the Constitution have no such extensive meaning as is contended for. If they were held to have, it would follow that there could be no appeal from the order of a Judge, granting or continuing an injunction, and also that this Court has no power to decide any question of fact, which may come incidentally before it. Seeing how mate-

rially such a construction would cripple the usefulness of the Court, and add to the expenses of litigation, and what grave inconvenience would follow from the adoption of such a principle; we would be reluctant to do so unless constrained by words plainly indicating the intention. In this case the words instead of plainly indicating such an intention, are naturally susceptible of a more limited signification. The words are not, questions of fact, but, "issues of fact." These are technical words—they mean such matters of fact as are put in issue by the pleadings, and a decision of which would be final, and conclude the parties upon the matters in controversy in the issue.

Under the former jurisdiction of the Supreme Court as a Court of Equity, it heard appeals from both interlocutory and final decrees both on the law and the facts, and moreover, suits in equity were sent to it for original hearing. The practice was acknowledged by all to be subject to many disadvantages. A Court trying facts upon written depositions, is destitute of the benefit which a jury derives from seeing the personal bearing of the witnesses, and which is so great an aid to a just estimation of their credibility; and hence, when it became necessary to disentangle the truth from a mass of conflicting testimony, some of which must necessarily be false or mistaken, the result was often unsatisfactory. The mode in which it was attempted to remedy this disadvantage, by sending down issues to be tried by a jury, was dilatory and expensive. This was the mischief which the Constitution intended to remedy, and has remedied, by requiring the "issues of fact" to be ascertained, before a case can come before this Court for final adjudication. In the present case, even if the Court should undertake to weigh the testimony on each side, and to find the facts in issue, the finding would not be final, it would only conclude the parties as to the present motion; the issue must still be tried by a jury, and upon their finding, the case will be brought to final judgment unprejudiced by any *prima facie* and interlocutory decision. It is in the limited

signification above stated, that we understand the language of the Constitution.

It is contended by the defendants that the order in this case is in the nature of a common injunction; as to which the rule is well settled, that if the equity set up in the bill be denied in the answer, it will be dissolved. *Capehart* v. *Mhoon*, Bus. Eq. 30. We do not think that this is a common injunction, which is an auxiliary decree made to restrain *parties* from litigation at law, where equitable elements are involved in the dispute, Adams Eq. 194, 359. The plaintiff in this case is no party to the action at Law between the defendants; he set up no equitable element involved in their dispute; his case is based on the idea that he has a claim against one of the defendants, which is likely to be materially impaired by the fraudulent dealing of the two. *Thigpen* v. *Pitt*, 1 Jon. Eq. 49. The injunction is special in its nature. In such a case the practice is to continue it, if in the opinion of the Court it appears reasonably necessary to protect the rights of the plaintiff until the trial. *Monroe* v. *McIntire*, 6 Ire Eq. 65, Sec. 189, C. C. P. In this case we are of the opinion that it is, and we the more readily come to the conclusion, because it does not appear that the defendants can be materially injured by a delay.

The order continuing the injunction until the trial of the action, is affirmed, with costs in this Court to the plaintiff.

Let this opinion be certified.

PER CURIAM. Order affirmed.

NOTE.—Two other cases, *James M. Reid*, and *R. J. Holmes* being plaintiffs, and the same persons as above defendants, were decided in the same way at this term.

SAMUEL T. STANCILL *v.* SAMUEL CALVERT.

Trespass for mesne profits cannot be maintained by the lessor of the plaintiff in a previous *ejectment*, unless he go into actual possession of the premises after their recovery in such previous action.

Neither confession of lease, entry and ouster in the previous action, nor the fact that pending such action the plaintiff's interest in the premises was destroyed, affects this rule.

(*Poston* v. *Henry*, 11 Ire. 301, *Miller* v. *Melchor*, 13 Ire. 539, *Carson* v. *Smith*, 1 Jon. 106, cited and approved.)

TRESPASS. Q. C. F., tried before *Watts*, *J.*, at NORTHAMPTON, Spring Term 1869.

The declaration was for *mesne profits*, supplemental to a suit in ejectment between the parties (1 Winst. 104) for an easement in certain premises valuable mainly because of a steam saw mill and fixtures located thereupon.

It now appeared that during the pendency of the ejectment the defendant had removed the mill and fixtures out of the State, and that after the determination of that suit in favor of the plaintiff, he was not put in possession of the premises, and had made no entry upon them before the bringing of this suit.

Thereupon his Honor intimated an opinion that the plaintiff could not recover, and the latter submitted to a non-suit.

Rule, &c.; Rule discharged; Judgment, and Appeal.

Bragg, *Barnes* and *Peebles & Peebles*, for the appellant.

In *Poston* v. *Henry*, 11 Ire. 301, and *Carson* v. *Smith*, 1 Jon. 106, it is held that in actions for mesne profits after ejectment, plaintiff must be put in possession or let into possession of the premises to sustain the action.

In looking into the authorities, the above cases seem not to be sustained, except where there is judgment by default against the casual ejectors. Buller N. P. 87, Sel. N. P. 568 and note 51, 2 Sellon's Pr. 226, Adams Eject. 336 and note, Remington Eject. 167, 2 Roscoe, on Real Actions, 708, (Law Lib.), 2 Green. Ev. 299, Esp. N. P. 77, *Aslin* v. *Parkin*, 1 Sm. L. C.,

610, *Jackson* v. *Combs*, 7 Com. 36, *Morgan* v. *Varick*, 8 Wend. 587. But if the general rule be as decided in cases in this State, the peculiar circumstances of our case dispense with it. See *Stancill* v. *Calvert*—1 Wins. 104. The right which Jordan, (under whom plaintiff and defendant claimed) had in the premises, had ceased—the *locus in quo* had been taken possession of and enclosed by Stephenson, the owner, and had plaintiff entered after defendant abandoned possession, he would, as to Stephenson, have been a trespasser.

Ransom and *Conigland*, *contra*.

PEARSON, C. J. This is an action of trespass, *quare clausum fregit*, for mesne profits and damages for converting parts of what constituted an easement, supplemental to an action of ejectment. See 1 Winston, 104.

His Honor was of opinion that the action could not be maintained, without proof that after the judgment in ejectment, the lessor of the plaintiff had either under a writ of possession, or by entry (the premises being abandoned by the defendant) taken possession, so that the after acquired possession could be a point upon which to rest the right of relation or *jus postliminii*, and from which to connect with the original possession. In this opinion his Honor is sustained by the authority of three cases decided by this Court, which, to use a familiar expression, are "on all fours" with this case, *Poston* v. *Henry*. 11 Ire. 301, *Miller* v. *Melchor*, 13 Ire. 439, *Carson* v. *Smith*, 1 Jon. 106.

This ruling is excepted to on two grounds:

1. Admit the general rule—Trespass *quare clausum fregit*, with a *continuando* to cover the time of the pendency of the action of ejectment, cannot be maintained unless possession has been taken under a writ of possession or by entry—there is an exception when the tenant in possession has confessed "lease, entry and ouster." For this is cited a passage in Buller's N. P. 87, in which after stating the general rule, it is said: "If there be judgment by default against the casual ejector, to maintain trespass for the mesne profits there must

be proof of possession after the judgment in ejectment; but *it seems* that if the tenant in possession appears and confesses lease, entry and ouster, the judgment in ejectment, without further proof, will be sufficient to support the action." This suggestion is adopted, and B. N. P. 87 is quoted, by all text writers, both English and American; and one or two American cases were cited, in which this suggestion is acted on. But no English case to that effect was cited on the argument; probably for the reason given in Sanders' Pleading, 181: "A re-entry must be proved, to entitle the party to recover mesne profits. Some doubts seems to exist as to what proof of entry will be sufficient. The plaintiff should prove the writ of possession executed, in case the defendant does not voluntarily let him into possession, or where the judgment has been by default against the casual ejector, B. N. P. 87. Where the defendant has entered into the common consent rule, it does not appear to be necessary, though it is very usual, and perhaps prudent, to have the writ of possession executed; and it appears to be sufficient to prove that the defendant entered into it. B. N. P. 87. By entering into the rule to confess, the defendant is estopped, both as to the lessor and the lessee, from disproving the entry." How can this estoppel *supply proof* that the plaintiff had taken possession after the judgment in the action of ejectment!

The opinion in *Poston* v. *Henry*, *supra*, was delivered by Chief Justice Ruffin. He cites *Aslin* v. *Parkin*. It cannot be supposed that the attention of a Judge so learned and so diligent, had not been called to this passage in Buller, and to the fact that it is copied by all of the text books. So his silence in regard to it must be accounted for on the ground that it was considered by the Supreme Court of our State that a different practice was well established, or that the suggestion in Buller was not sustained by principle, and need not be noticed. How can the confession of entry by the lessee at the date of the demise, have the effect of giving either the lessor or the lessee possession after the termination of the action of ejectment, by the magic of estoppel, or in any con

ceivable manner; so that it can by relation connect itself with the possession at the date of demise, and thus give constructive possession for the intermediate term?

Again, the fiction of lease, entry and ouster, which the tenant in possession is required to admit as a condition precedent to his being allowed to be made defendant in place of the casual ejector, was adopted merely to save the trouble and expense of making an actual lease and entry. Why should it be carried further than is necessary to answer the purpose for which the fiction was devised!

There is this further objection to the suggestion in Buller: Suppose after the judgment in ejectment the defendant continues in possession, can trespass be maintained against him on the supposed effect of the confession of entry at the date of the demise? We will not pursue the subject further. It is enough that the ruling of his Honor is supported by three cases in our Court; and "the reason of the thing" is certainly not so strong against these decisions as to justify the Court in overruling them. Indeed, we are the less inclined to elaborate the matter, because, by the Code of Civil Procedure we are forced to take leave of our old friends "John Doe and Richard Roe," and to look upon all of the nice points about confessing lease, entry and ouster, as things that have been. Hereafter in an action for land or an easement in land, actual damages will be recovered, and there will be no elongation or supplemental action.

2. It was insisted that an after acquired possession should be dispensed with in this case, because the defendant had by his own wrong in removing and converting the saw mill, &c., made it impossible to take possession.

It appears by the facts agreed, that this removal and conversion took place in the Spring of 1860, and that the action of ejectment was tried at Spring Term 1863, so at the trial the plaintiff ought to have urged his right to have actual damages assessed, instead of nominal damages as in ordinary cases. This is the practice in cases where the title of the lessee has expired, so that a writ of possession cannot be executed;

Miller v. *Melchor*, *supra*: or the plaintiff should have brought an action of trover for the saw mill, which was made personally after severance. It does not, in the opinion of this Court, form a sufficient ground for departing from principle and allowing an action of trespass *quare clausum fregit* to be maintained, when there has been no injury to the plaintiff's possession, except that done by the orignal entry.

PER CURIAM. Judgment affirmed.

JOANNA M. SMITH *v.* W. P. MITCHELL and another.

A rule having been made in the County Court upon the plaintiff, to justify the security on her prosecution bond on or before Tuesday of August Term 1868 or such suit to be dismissed, that term was not held, as the justices were of opinion that their offices had terminated. At Fall Term 1868 the papers in this case with others, were delivered by the Clerk of the County Court to the new Superior Court Clerk, but the civil docket was not taken up at that term for want of time: At Spring Term 1869, on Wednesday of the second week, being the first day of taking up the civil docket, the defendant moved to dismiss the case because of the rule in the County Court—but upon the plaintiff's offering to give security then, she was allowed so to do: *Held*, to have been a matter within the Judge's discretion, and to have been properly decided.

(Illustration of the maxim *Actus legis nemini facit injuriam.*)

MOTIONS, to dismiss an action for want of a prosecution bond, and to give new security, heard by *Pool*, *J.*, at BERTIE, Spring Term 1869.

The action had been brought in the County Court at May Term 1868, and there was then a rule taken against the plaintiff, to justify the prosecution bond on or before Tuesday of the next August Term, or the suit to be dismissed.

The latter Term was not held, because the Justices considered that their offices had terminated.

The County Court Clerk delivered the papers in this case (with others) to the Clerk of the Superior Court at Fall Term 1868. At that term the civil docket was not reached, for want of time. At Spring Term 1869, on Wednesday of the second week, being the first day of the civil docket, defendants moved to dismiss, because the above rule had not been complied with, and at the same time the plaintiff offered to give good security.

The Court refused to dismiss, and allowed the security to be given; and thereupon the defendants appealed.

Yeates, for the appellants.

Smith and *Gilliam, contra.*

PEARSON, C. J. The position that the suit was out of Court by the force and effect of the rule, the condition not having been complied with, may be disposed of in two ways.

1. It is familiar learning, that when the performance of a condition subsequent becomes impossible by the act of God or of the public enemy, or by the act of law, the condition is saved.

In our case the performance of the condition was made impossible by the act of law, for by reason of the construction given to the law by the justices, no Court was held, and whether this construction was well warranted or not, is immaterial, as the plaintiff was in no default.

2. The purpose of requiring a prosecution bond, is to secure the defendant's costs in case the plaintiff fails in the action, and rules of the kind we are considering, are conditional, and at all times under the control of the Court, to be so shaped and modified at its discretion as to answer the purpose of securing the defendant without causing unnecessary injury or inconvenience to the plaintiff.

We consider that the matter was in the discretion of his Honor. We are satisfied that it was exercised in a way to promote the ends of justice.

PER CURIAM. Judgment affirmed.

W. P. SHUFORD & WIFE *v.* THEODORE & JULIA RAMSOUR, Exr's. of C. H. RAMSOUR.

Where the agent of an infant loaned its money in 1858 to a firm of which he himself was a member, and in April 1863 collected it in Confederate money, the firm being entirely solvent, *Held*, that he was liable to such infant for the consequent loss.

EXCEPTIONS to a report, tried before *Logan, J.*, at CATAWBA, Spring Term 1869.

The facts appear in the Opinion.

His Honor overruled the exception, and the defendants appealed.

Bragg, for the appellant.

Bynum, contra.

SETTLE, J. The two exceptions filed by the plaintiff to the report of the master, were properly abandoned in this Court.

All of the exceptions by the defendants are overruled:

On the 14th day of September 1858 David Ramsour, the grandfather of the complainant Emma E. Shuford, then an infant of tender years, paid into the hands of his son, C. H. Ramsour, the sum of six hundred and thirty dollars for the benefit of the said Emma; and the said C. H. Ramsour gave his receipt for the same, and signed it as agent of the said Emma. On the same day the said C. H. Ramsour, loaned the said six hundred and thirty dollars to the firm of C. H. Ramsour & Co., and took their note for the same, and it is admitted that the note was then, and continued to be "perfectly good" until it was paid off on the 14th day of April 1863.

The question very naturally occurs, why did C. H. Ramsour collect of C. H. Ramsour & Co., Confederate money, in April 1863, in payment of a note admitted to be perfectly good, given in 1858 for good money? He accepted the trust of managing this fund, and it seems that he did so by letting his house have

the use of it for four years and seven months. This was all very well, for their note was perfectly good.

But no satisfactory reason is given for changing the investment so late as 1863. It is not even suggested that the firm of C. H. Ramsour & Co., had quit business, or were closing up their accounts, or that other members of the firm insisted upon paying the said note. The change may have been a prudent one for C. H. Ramsour as a member of the firm of C. H. Ramsour & Co., but it cannot be contended that it was so for C. H. Ramsour as agent of the complainant Emma.

This case is easily distinguished from others which have been before this Court, involving questions as to the receipt of Confederate money. We need not say, for the purpose of charging the defendant with this fund, that the facts presented suggest bad faith, it is sufficient to say that a prudent man would have exercised better care in relation to his own affairs.

We see no error in the ruling of his Honor.

PER CURIAM. Exceptions overruled.

S. B. HYMAN, Ex'r., &c. *v.* JOHN DEVEREUX and others.

An answer overrules a demurrer.

If a bond secured by mortgage, be renewed, the new bond retains the same security.

A provision, in a mortgage deed conveying various articles of real and personal estate, that: When any amount, or any note is due, the mortgagee shall call on the mortgagor for the same, and if payment be made, nothing shall be done, otherwise the mortgagee shall advertise and sell enough to pay what is due, and the mortgagor shall direct what shall be sold,—is a sufficient power of sale.

Where a mortgage contains a provision like the above, it is not according to the course of Courts of Equity to interfere with a proposed sale in compliance with the terms of the deed; especially where the security is deficient in amount, and the mortgagor probably insolvent.

The assignee of a bond secured by mortgage, is entitled (nothing more appearing) to the benefit of the mortgage.

An order directing the surplus proceeds of a sale of morgaged lands into Court, cannot be made in a cause to which the assignee of the bond secured has not been made a party.

(*Anthony* v. *Smith*, Bus. Eq., 188, *Avirett* v. *Ward*, *Ib.* 192, *Fleming* v. *Sitton*, 1 D. & B. Eq., 621, *Green* v. *Crocket*, 2 *Ib.* 390, and *Ingram* v. *Smith*, 6 Ire. Eq., 97, cited and approved.)

CIVIL-ACTION, including a provisional injunction, before *Watts*, *J.*, at HALIFAX, Spring Term 1869.

The complaint alleged, that in 1857, the defendant Devereux, sold to the defendant Clark, a piece of land, and took from him six bonds for the purchase money, and a mortgage on the land and a large number of slaves, to secure the bonds. The mortgage contained the following stipulations respecting a sale of the property, in case of non-payment:

"Secondly, when any amount, principal or interest, on any one of the said six notes shall be due and payable, then said Devereux shall call on the said Clark for the amount so due, and if the said Clark shall make payment, no step shall be taken, but if he shall fail to make the payment, the said

Devereux shall advertise twenty days, and sell enough of the estate herein conveyed to him, to pay said amount then due, and the said Clark shall have the right to direct what shall be sold," &c.

In 1866, the defendant Clark, with the assent of the defendant Devereux, agreed to sell the land to John H. Hyman, the testator of the plaintiffs, in consideration that he would discharge the unpaid residue of the mortgage debt, which had been previously assigned by Devereux to Elizabeth Jones, and the testator accordingly made some payments to her, and in March, 1867, took up from her the former bond, and gave his bond payable to her for the unpaid residue, amounting to $8,180.23. The plaintiffs in their complaint insisted that by this transaction the mortgage was satisfied, and the land freed from its incumbrance. The complaint further alleged, that the agents of Devereux threaten to sell the land under the mortgage, and demanded judgment that they convey absolutely to the plaintiffs, and in the meanwhile be enjoined from selling.

The defendants demurred to the whole complaint, and also answered the whole.

At Halifax Spring Term, 1869, a motion was made to dissolve the injunction theretofore obtained, and thereupon his Honor allowed the same, and also ordered that upon a sale of the land the excess if any should be paid into Court for the use of the plaintiff, under the direction of the Court.

The plaintiff appealed.

Conigland, for the appellant.

1. The execution of a new note by Hyman to Mrs. Jones, and the transfer by her of that new note to her son,—she parting with the entire interest therein,—is a re-lease of the security acquired in the first instance by the mortgage, or in other words, a satisfaction of the debt thereby secured.

2. The assignee of the debt, without having an assignment of the mortgage, (Hyman, who succeeded to the estate of

Clark, being dead,) cannot proceed to sell the land, without coming into Court in an action to foreclose, and making all proper parties.

3. The Court will not sustain any proceeding which will deprive the mortgagor of the power to redeem. Green. Cruise, vol. 1, p. 557, of Am. ed.

4. By the Act suspending the Code of Civil Procedure, 16th March, 1869, there can be no sale until the debt is reduced to judgment.

Walter Clark, contra.

The renewal of the note without a clear intention of releasing the security, does not destroy the mortgage. The statements in the answer not controverted by the plaintiffs, show there was a clear intention *not* to surrender the security. *Maryland and N. Y. Coal and Iron Company* v. *Wingart*, 8 Gill, 170,—in which *Teed* v. *Carruthers*, 2 Younge & Colliers' Rep. 31 (English) is cited and approved; also *Matthews* v. *Zollicoffer*, 20 Md., 248, 275; *Glenn* v. *Smith*, 2 Gill & Johnson 493; *Morrison* v. *Welty*, 18 Md., 169, 175.

2. The plaintiff prays for an injunction, and for the execution of the title to them by the mortgagee. A Court of Equity will in no case decree an execution of title till the purchase money has been paid. *Oliver* v. *Dix*, 1 D. & B. Eq., 605; *Simmons* v. *Spruill*, 3 Jon. 9, *Chase* v. *Abbott*, 20 Iowa.

3. Where a deed of trust to secure a debt provides for the time and terms of a sale, a law altering or delaying the time therein provided for, is unconstitutional. *Taylor* v. *Stearns*, 18 Grat. 244; see *Penrose* v. *Erie Canal Co.*, 56 Penn. St., 46, 49.

RODMAN, J. (After stating the facts as above). The demurrer to the whole complaint, coupled with an answer to the whole is irregular, but the latter must be understood *to overrule* the former. In this case it is unimportant which be taken, as in either alternative the same questions are presented: the want of a right on the part of the plaintiffs to the

relief demanded, upon the facts stated in the complaint, is a defence always open to the defendants, until passed on by judgment. The answers do not deny any of the facts stated in the complaint; they insist that the lien of the mortgage was not discharged or intended to be, and that a proposition to substitute other property in lieu of the land, was made and rejected. They also state that the bond had been assigned by Elizabeth Jones to William F. Jones; he, however, was never made a party.

On the main point made in the complaint, that the taking of the new bond by Elizabeth Jones in 1867 was a novation, and a discharge of the mortgage, the counsel for the plaintiffs in this Court, properly conceded that the proposition could not be maintained. When a new note or bond is given for an antecedent debt, the presumption is that it was not intended as an extinguishment, unless there be proof that such was the intention: still less can it be presumed, in the absence of proof, that a creditor who takes a note in the place of a former one secured by mortgage, intends to discharge the mortgage. Story on Prom. notes §§ 104, 105, *Teed* v. *Caruthers*, 2 Younge and Coll. 31, and cases cited in note to American reprint, *Maryland & N. Y. Coal and Iron Co.*, v. *Wingart*, 8 Gill. 170, *Chase* v. *Abbott*, 20 Iowa, 154, 1 Pothier Ob., by Evans, 195. *Anthony* v. *Smith*, Bus. Eq. 188, to which we were referred by the defendant's counsel, though it does not depend on exactly the same principle, is analogous. In this case there is no allegation in the complaint that such was the intent of the parties, except so far as it may be inferred from the legal effect of their act.

The counsel for the plaintiffs, however, contended that there was error in the judgments below, because:

1st. The mortgage contained no power of sale in default of payment, and therefore the mortgagee could not sell without an order of Court.

2d. If it does contain such a power, or if the Court, on the present pleadings, can make an order for sale at all, it is not in conformity with its practice to do so in the first instance;

but that it will give the mortgagor a day to redeem, and only on his failure, order a sale.

3d. That William F. Jones, although an assignee of the note, is not an assignee of the mortgage, and is therefore not entitled to require a sale by the mortgagee.

1. We think that there is a sufficient power of sale given in the deed.

2d. The general rule in England is, that on a bill to foreclose a mortgage, the Court will not decree a compulsory sale; but the rule is not universal: there may be a decree for sale where the estate is deficient to pay the incumbrance, and in some other cases, 3 Powell on mortgages 1015. Mortgages with powers of sale, were of novel introduction in England, when that work was published (1822), and their validity was doubted, 1 Pow. Mort. 12 note K; but it has been established there, and in this State they have long been in general use unquestioned. The English practice as above stated, has been greatly modified in this State, and in most if not all the others. In *Fleming* v. *Sitton*, 1 Dev. & Bat. Eq. 621, Ruffin, C. J., says: "Of late years a beneficial practice has gained favor until it may be considered established in this country, not absolutely to foreclose in any case, but to sell the mortgaged premises, and apply the proceeds in satisfaction of the debts; if the former exceed the latter, the excess is paid to the mortgagor." See also *Green* v. *Crocket*, 2 Dev. & Bat. Eq. 390, *Ingram* v. *Smith*, 6 Ire. Eq. 97, *Averett* v. *Ward*, Bus. Eq. 192. This practice, however, is of course subject to the exception that if the mortgagor, by a bill to redeem, or by his answer upon a bill for foreclosure, or in any other proper way, offers to redeem, he shall be at liberty to do so. We know of no authority for saying that in the absence of such an offer, the Court will of course give the mortgagor a time within which to redeem; and in a case like this, where the property is alleged to be deficient, and the mortgagor insolvent and perhaps in possession, such a practice would seem to be unreasonable. In this case the representatives of the mortgagor, so far from offering to redeem, deny the existing validity of

the mortgage, and demand an absolute conveyance of the estate. The slaves, which formed a part of the mortgage security, have been emancipated, nothing but the land remains, and the estate of Hyman is alleged to be insolvent. The amount of the debt is admitted, and no account is necessary. We can see no reason therefore why the mortgagee should be enjoined from selling the land. It has been suggested, indeed, in this Court that the mortgagee is a bankrupt. If William F. Jones, the present holder of the bond, were a party to this suit, and should make that objection, or if the plaintiffs had suggested that the land would probably sell for more than the debt, and that their surplus would be endangered, and had asked that the sale should be made by an officer of this Court, such an application would be granted. But there is no such demand made in any part of the pleadings, and the Court cannot assume what nobody alleges, and order a sale by its officer when nobody desires it. As Devereux is a naked trustee without interest, his estate does not pass to his assignee under the Bankrupt Act.

3. When a debt is secured by a mortgage, the debt is the principal, and the mortgage only the incident: an assignment of the debt passes all the rights of the creditor in the mortgage.

William F. Jones, who is the present holder of the bond secured by the mortgage, is no party to this action. For that reason and for the further reason that there is no demand by any party for any judgment or order for the application of the proceeds of the sale, the Court can make none. The order of the Judge below vacating the injunction, is affirmed; but that part of his order which directs the surplus to be paid into Court, is reversed. The case is still in the Superior Court, having been brought here by appeal from an interlocutory order: if any of the parties desire the payment of the surplus into Court, and will amend the pleadings so as to make such an order possible, it will remain with the Judge to act as he may think proper in that event.

Let this opinion be certified, &c.

The defendants will recover their costs in this Court: the defendants Clark and Winston might have joined in their answers, and can recover but one set of costs.

PER CURIAM. Order accordingly.

CYRUS CULVER *v.* JOEL EGGERS.

The right of a *de facto* officer to hold his office, cannot be questioned collaterally—as, *here*, by objecting to an answer purporting to have been sworn to before him.

Semble, that a bill for the specific performance of a contract to convey land cannot be sustained by a vendee, where the memorandum in writing relied upon, identifies the tract merely as "a certain tract of land where he [the bargainee] now lives," and the bill avers that such tract was sold fraudulently as containing 328 acres, but in truth contained only 100 acres, and thereupon proceeds to ask an account of what has been paid by the plaintiff, and a conveyance of the 100 acres, with compensation; the principle of the class of cases nearest to this being, that a *vendor* may ask for specific performance offering compensation for a failure in the title to some *small and immaterial part* of the land.

(*Williams* v. *Somers*, 1 Dev. & Bat. 60, cited and approved.)

INJUNCTION, dissolved upon motion, by *Henry, J.*, at WATAUGA Spring Term 1869.

The bill set forth that the plaintiff had bargained with the defendant for a tract of land which the latter described as containing 328 acres, showing the bargainee the boundary of it; that the boundary was falsely stated, and the tract contained only 100 acres; that the defendant had received from the plaintiff money enough to pay for the 100 acres—although not all that he had agreed to give for the 328 acres; the prayer was for a specific performance in regard to the 100 acres, an account, and an injunction against the defendant's selling or

collecting the balance due upon the notes given for the purchase money by the plaintiff.

The memorandum of the contract, was as follows:

"STATE OF NORTH CAROLINA,

WATAUGA COUNTY.

Know all men by these presents I, Joel Eggers, have this day sold to Cyrus Culver, a certain tract of land where he now lives for the sum of $1,000, on the waters of Elk Creek. The above obligation is such, &c. August 21st, 1865.

JOEL EGGERS, seal."

The defendant's answer denied the facts alleged in the bill as to the fraud.

This answer was sworn to before one Critcher, Clerk of the Superior Court.

The plaintiffs "in reply" to the plea, alleged that Critcher was not Clerk and so could not administer an oath, &c.

The defendant demurred.

His Honor gave judgment allowing the demurrer, and dissolving the injunction; and the plaintiff appealed.

No counsel for the appellant.

Battle & Sons, contra.

PEARSON, C. J. The replication, or plea, of the plaintiff, as it is indifferently called in the transcript, seeks to put in issue the validity of the appointment to the office of Clerk of the Superior Court, of Will. J. Critcher, who certifies to the signature and oath of the defendant to his answer. The title to an office cannot be determined in this collateral way. It must be done in some direct proceeding, to which Critcher is a party, as by *quo warranto*. *Williams* v. *Somers*, 1 D. & B. 61.

His Honor very properly treated the answer as duly certified by a Clerk *de facto*, and was well warranted in passing over the "replication or plea" as of no effect or legal signifi-

cance. We concur in his ruling upon the motion to dissolve the injunction, for the answer is responsive to the allegations of the complaint, and fully denies all of the allegations by which the plaintiff attempts to set up ground for relief. Indeed, we are inclined to the opinion that the injunction was imprudently granted, because the complaint does not make a case:

1. The memorandum in writing of the agreement, describes the land as "a certain tract of land where he now resides." We admit that this vagueness may be aided by an averment in the complaint. The averment is that the tract of land on which he resided was a tract of one hundred acres; so the description is not made to fit the subject-matter of the contract set out in the complaint, to-wit, Three hundred and twenty-eight acres, of which two hundred and twenty-eight is averred to be vacant land.

2. The allegations make a case for the *rescission* of the contract, on the ground of fraud: but the relief asked for is a *specific performance*, and that not of the contract set out, but of a contract which the Court is asked to make for the parties, by letting the plaintiff have the tract of one hundred acres on which he resides, at a fair valuation, and putting the two hundred and twenty-eight acres aside, as land "the title to which was outstanding in the State of North Carolina."

There is no precedent for this relief in any judicial proceeding: a vendee is never required to take a defective title with warranty, although a vendor is sometimes allowed to have a specific performance upon making compensation for a defective title to some small part, which does not materially affect the value of the subject matter of the contract.

In this case the *vendee* asks that the vendor may be compelled to make compensation for more than two thirds of the land.

The ruling of his Honor is affirmed.

PER CURIAM. Judgment affirmed.

W. S. BROADDUS & S. W. EDWARDS, partners, &c. *v.* W. J. EVANS.

In an action for the value of lumber delivered by a firm, the acceptance thereof by the defendant is evidence of privity of contract between the parties.

One partner cannot, without the consent of his co-partner, agree to receive payment for goods sold by the firm in debts due by himself individually.

ASSUMPSIT, tried before *Jones, J.*, at PITT, Spring Term 1869.

The plaintiffs declared as partners, for the price of certain lumber by them delivered to the defendant.

It appeared upon the trial that the plaintiff Edwards, before he became a member of the firm, had contracted to deliver a quantity of lumber to the defendant, in payment of a debt due him. The lumber was being sawed at the mill then belonging to the plaintiff Broaddus, and before it was entirely delivered the partnership was formed. Broaddus agreed, at Edwards' instance, that the mill should continue to furnish lumber as before.

Evans also agreed to receive the lumber as before—and it was delivered.

The partnership continued but a short time, and on its dissolution the effects were assigned to Broaddus, he agreeing to pay the debts.

On the account being presented to Evans, he claimed that it had been paid by a credit given to Evans, as by agreement. Broaddus thereupon denied having anything to do with paying Edwards' individual debts.

There was other evidence not material to be stated.

His Honor instructed the jury that there was no privity of contract between the parties to the suit.

Verdict for the defendant. Rule, &c. Rule discharged. Judgment and Appeal by the plaintiffs.

Johnson, for the appellants.

Hilliard, contra,

READE, J. His Honor instructed the jury that, to entitle the plaintiff to recover there must be "privity of contract." That is unquestionably true. He then instructed them that according to the evidence there was no privity. Of course that was an end of the case, and was the same as to say that they must find for the defendant.

In this there was error: for, the fact that the plaintiffs furnished the lumber and the defendant received it, raised an implied promise on the part of the defendant to pay the plaintiffs for it.

This implied promise was, however, subject to be controlled by any express contract which may have existed between the parties, and evidence was offered to show that there was an express contract between one of the plaintiffs, Edwards, and the defendant, to the effect that the defendant was not to pay the plaintiffs, but was to pay him, Edwards, by crediting the amount of the lumber on an individual claim of the defendant's against Edwards. This contract, supposing it to have existed, was no defence in this action, because it was a fraud upon the partnership—the plaintiffs. A creditor of one of several partners has no right, even under an express contract with such partner, to apply partnership effects to the satisfaction of a debt against such partner. This is, however, subject to the exception, that if the other partner consents to the contract, then it is valid, and will control the implied contract.

Was there any evidence in this case that the other partner, Broaddus, consented to the express contract between Edwards and the defendant? Broaddus, who was examined as a witness, said that his partner, Edwards, had made the contract with defendant, and informed him of it. and asked him if the mill of the partnership would furnish the lumber, and that he "assented thereto." Edwards, who was also examined, said that Broaddus assented to the contract, and was to look to him, Edwards, to settle for the lumber with the firm. This evi-

dence ought to have been submitted to the jury, with proper instructions, as tending to show that the partnership assented to the express contract made by Edwards and the defendant, and that the implied contract was controlled by the express contract.

There must be a *venire de novo.*

PER CURIAM. *Venire de novo.*

JESSE W. MILLER *v.* JAMES B. GIBSON.

The provisions in *the Magistrate's Stay Law*, (22nd March 1869, s. 8) which allows magistrates to set aside judgments, executions, &c.,— destroys vested rights, and therefore is unconstitutional, (Const. of N. C., Art. I, s. 17.) and void.

(*Murphy* v. *Merritt*, *ante* 502, cited and approved.)

APPEAL, from a motion to set aside a judgment, heard by *Cloud, J.*, at ROWAN, Spring Term 1869.

The action in which judgment had been given, commenced by a warrant before a Justice of the Peace. The defendant appeared and confessed judgment, on the 13th of March 1869. On the 15th, execution was issued and levied upon personal property. On the 27th of March, and before the sale, the defendant again appeared before the Justice and moved to set aside the judgment and execution, and to be allowed to plead according to the provisions of an act of the Legislature, ratified March 22nd 1869, entitled, "An Act in regard to proceedings before Magistrates." His motion was allowed, and the plaintiff appealed to the Superior Court, The case was heard by consent of parties, before his Honor, who being of the opinion that the action of the Justice was unwarranted by law and void, and without any other or further effect than the act of any other person, declared the case "*coram non judice*;" and, on the ground that there was no judgment

appealed from, dismissed the appeal. Whereupon the plaintiff appealed to this Court.

K. Craige, for appellant.

W. H. Bailey and *McCorkle, contra.*

READE, J. It is not insisted that there was any irregularity in entering judgment—it was by confession—or in the issuing or levying of the *fi. fa.* After ten days from the rendition of the judgment, the whole matter was beyond the control of the magistrate; he had no power to set it aside, or to grant an appeal. Rev. Code, ch. 62, s. 26.

But it is insisted that while that was so under the law as it existed at the time of the rendition of the judgment (March 13th 1869), yet that on the 22nd March 1869, the Legislature passed an act commonly called the magistrate's stay-law which (s. 8) authorized the magistrate, on application of the defendant, to set aside the judgment and *fi. fa*, and stay proceedings, &c. This provision in said act is void, for the reason that it directs the magistrate to destroy vested rights. Constitution, Art. I, s. 17. The levy of the *fi. fa.*, which was prior to the passage of the act, created a lien upon the debtor's property in favor of the creditor, and it was not in the power of the Legislature to destroy the lien. We agree with his Honor below. The appeal will be dismissed, and judgment here against the defendant for costs. See *Murphy* v. *Merritt* at this term.

PER CURIAM. Appeal dismissed.

ROBERT H. SMITH *v.* WILLIAM SMITH and others.

Where a person, being *in extremis,* and conscious of it,—sent for a friend with whom he had often talked on the subject of a will,—and told him what disposition he wanted to make of his property, and then such friend replied that if he wanted to do anything of that kind he had better have some other person in the room, and thereupon the speaker went out and brought in another person, and in the presence of the sick man repeated the proposed disposition of the property, to which the latter assented; *Held* to be a sufficient *rogatio testium* to satisfy the requirements of a nuncupative will.

(*Harden* v. *Bradshaw,* 1 Win. 263, cited and approved.)

CAVEAT of a nuncupative will, tried before *Cloud, J.,* at ROWAN, Spring Term 1869.

Upon the trial the jury found the following special verdict:

"That Charles D. Smith, the alleged testator, died on the 8th day of October, 1867—that shortly before his death he had talked with one John J. Shaver about his property—that on the day the last conversation took place, to wit, on the 6th day of October 1867, he sent for said Shaver, and after Shaver got to his room there was a negro boy in the room, whom the said C. D. Smith directed to leave the room. The said C. D. Smith then remarked to said Shaver that he wanted to make some disposition of his property—that Shaver told him if he wanted to do anything of the kind he had better have some other person in the room—that thereupon the said Shaver went down and told Theodore Klutts to come up—that before Shaver went down for Klutts, the said C. D. Smith said to Shaver he wanted a tomb-stone over his father, mother, wife and two children, and himself, and the balance of his property of every description he wanted to go to his brother, Robert H. Smith, who is the propounder—that when Shaver returned he remarked to the said C. D. Smith, "here is Theodore Klutts"—that Shaver also told him he could now go over what he wanted done—then Shaver went over in the presence of the said C. D. Smith and Klutts what the said C. D. Smith had before told as to the disposition he desired made

of his property—nothing more was said or done; they further find that when Theodore Klutts got into the room, Shaver told him, Klutts, in the presence and hearing of said C. D Smith, what disposition he wanted made of his property—that the next thing that occurred was, that Shaver stated that said C. D. Smith wanted tomb-stones put over his father, mother, wife and two children, and the balance of property to go to his brother Robert—that said C. D. Smith interrupted Shaver and said, "and over myself, also"—that Shaver went back and repeated it all over to said C. D. Smith—that when he, Shaver, got through, he remarked, "is that right, or is that all?" he, said C. D. Smith, nodded his head, or said, yes—that said Klutts then went down stairs. The jury further find that all this occurred in the last sickness, at his usual place of residence, and the said C. D. Smith was then of sound and disposing mind and memory—that the alleged testamentary words were reduced to writing before 8th October, 1867, as follows:

STATE OF NORTH CAROLINA, }
ROWAN COUNTY. }

We, the undersigned, being called on to witness what disposition Charles D. Smith wanted made of his property in case of his death: "First, he wanted tombstones put over his father, mother, wife and two children, and himself, and the balance of estate of every description to go to his brother, Robert H. Smith." August 6, 1867.

JNO. J. SHAVER,
THEO. KLUTTS.

That during the time Shaver and Klutts were present together, the said C. D. Smith said but one word or made but one gesture, except about reminding Shaver of putting tombstone over himself—that the said C. D. Smith had some time before spoken to one Caldwell an attorney, to draw a will making some disposition of his property, which was not done—that some days after the time that Shaver and Klutts were together as aforesaid, the said C. D. Smith stated to a Mrs.

Utzeman that he had made his will, and willed all of his property to his brother Robert. That said Smith had been residing at the place over ten days, and that the estate in controversy is worth over two hundred dollars. But the jury being ignorant of the law, say that if the foregoing facts amount in law to a nuncupative will, they so find; and if not they so find."

His Honor being of opinion that the foregoing facts did not constitute a nuncupative will, gave judgment for the caveators, and the propounder appealed.

Kerr Craige, for the appellants.

Boyden & Bailey, contra.

DICK, J. The statutory provisions (Rev. Code, ch. 119, sec. 11) in relation to nuncupative wills, have existed in this State since 1784, and they are substantially the same as those in the statute of frauds, 29 Car. 2, ch. 3, sec. 19, 20; and these provisions have always been strictly construed and enforced by the Courts, both in this State and in England.

Previous to the enactment of the Statute of frauds, nuncupative wills of personal estate were admitted to probate by the English Ecclesiastical Courts, when it was shown that the testator at the time of nuncupation was *in extremis*, and unable to have a written will prepared, and the present strict formalities were not required. The same liberality as to such wills may now be shown in this State, where the estate bequeathed does not exceed the sum of two hundred dollars in value.

The provisions of the Statue of frauds in regard to nuncupative wills were enacted to prevent "fraudulent practices," &c., and since that time it has generally been held by the Court that all the requirements of the statute must be strictly complied with, before such wills can be admitted to probate. In the case before us the testamentary capacity, the *animus testandi* at the time of the alleged nuncupation, and all the other requisites of the statute, except the *rogatio testium*, are established by the special verdict. There is not the slightest

suspicion raised by the testimony, of any "fraudulent practice," and we think the facts found in the special verdict show a sufficient *rogatio testium.* The testator was conscious of his condition, and was very anxious to make a disposition of his property. Some time before his nuncupation, he had applied to a lawyer to prepare a written will, which had not been done, and he had frequently talked with witness Shaver on the subject. When he was almost *in extremis*, he sent for the witness Shaver, and told him (Shaver) what disposition he wished to be made of his property, and assented to another witness being sent for. In our opinion this was a sufficient *rogatio testium* as to witness Shaver, and meets the requirement of the statute in this respect, *Harden* v. *Bradshaw*, 1 Win. 263. The testamentary words were afterwards repeated twice in the presence of two witnesses, and were fully understood and assented to by the tesiator. The facts in this case in relation to the *rogatio testium* are certainly as strong and conclusive as those in the case of *Harden* v. *Bradshaw.*

The judgment in the Court below must be reversed, and judgment rendered in this Court upon the special verdict. This will be certified to the Court below, to the end that a *procedendo* may issue to the Probate Judge, &c.

PER CURIAM. Judgment reversed.

THE STATE *ex. rel.* WILLIAM FAIRCLOTH *v.* R. K. FERRELL and others.

It is not necessary that a writ of execution shall be made returnable to *the next term* after that at which it was tested.

(*Ledbetter* v. *Arledge*, 8 Jon. 475, cited and approved.)

CIVIL ACTION, submitted upon a case agreed, to *Watts, J.*, at WAKE, Spring Term 1869.

The case recited that a judgment in favor of the plaintiff, against one Cunningim, was obtained at Fall Term 1867, of the Superior Court for the County of Greene, which was held on the second Monday after the fourth Monday of September in that year; and that an execution was issued on said judgment, tested of said term and made returnable to the Fall Term of the said Court, in the year 1868. This execution reached the hands of the Sheriff of Wake on the 30th of March 1868, and was levied upon a certain lot and houses thereon, in the City of Raleigh. Several executions in behalf of other parties, came to the hands of the Sheriff, before the 30th of March 1868; but it wasadmitted, that the plaintiff's execution was of prior teste to any other in the hands of the Sheriff on the 18th day of May 1868, the time when the sale was made.

The Sheriff however, applied the proceeds of sale to what he termed "older judgments, having priority of this execution."

Upon this state of facts his Honor gave judgment for the defendants, and the plaintiff appealed.

Battle & Sons, for the appellant.

Bragg, contra.

SETTLE, J. (After stating the case as above.) Since the case of *Green* v. *Johnson*, 2 Hawks, 309, there can be no question, that an execution bearing the first teste, will be satisfied before one of a younger teste first delivered and levied upon property, which is not sold, before that of the first teste comes to the Sheriff's hands.

But the plaintiff's execution was doubtless considered void, because it bore teste of Fall Term 1867, and was made returnable to Fall Term 1868, taking no notice of Spring Term 1868, which intervened.

In *mesne* process, if a term be omitted, the writ is void in personal actions; but it is not so in *final* process.

It is not necessary, at common law, that a writ of execution should be made returnable to the next term after that in which it is tested; if a term intervene it is not material. We are not aware that the point has ever been presented before in this State, but we consider it determined, upon the authority of *Shirley* v. *Wright*, 2 Ld. Raym, 775; especially as this case is cited, with approbation, by so many text writers. 2 Bacon's Abr, tit Execution, c 1; 1 Archbold's Pr. 25 Sellon, 551; 2 Tidd, 1028.

Our statute, Rev. Code, ch. 31, sec. 50, has no application to *executions*, (*Ledbetter* v. *Arledge*, 8 Jon. 475,) and, in cases where it does apply, is only in affirmance of the common law, for it directs that "all writs, &c., shall, unless otherwise directed, be returned the first day of the term, *to which the same shall be returnable, &c.*"

Sales made under junior executions, are supported in favor of innocent vendees, and creditors must look to the fund, or to the Sheriff, in case there has been a misapplication of the fund.

True, the lien of the first execution may be destroyed by laches or fraud, but it cannot be contended that such is the case here, for doubtless the Clerk of the Superior Court of Green county issued the execution in question under what he supposed to be provisions of the so called Stay Law.

We are of the opinion that the plaintiff is entitled to recover.

Let it be certified that there is error, &c.

PER CURIAM. There is error.

A. A. MITCHELL *v.* JAMES A. HENDERSON and another.

In an action of assumpsit, the rule of damages in a suit upon a note for $107 payable "in gold, or its equivalent in the currency of the country," is—such amount in U. S. Treasury Notes, as, at the time the note became due, was worth $107 in gold.

Judgments given now are solvable in Treasury Notes of the United Strtes.

(*Gibson v. Groner, ante* 10, cited and approved.)

ASSUMPSIT, tried before *Cilley, J.*, at CASWELL, Spring Term 1868.

The plaintiff declared upon a note for $107, payable "in gold, or its equivalent in the currency of the country;" and requested the Judge to instruct the jury that he was entitled to collect in dollars and cents as much as the sum called for in gold, was worth at the time the note became due, (January 1st 1867.)

The Court declined so to do, and instructed the jury that the measure of damages was $107 with interest, &c., from January 1st, 1869.

Verdict accordingly; Rule, &c.; Judgment, and Appeal.

Bailey, for the appellant.

No counsel *contra*.

DICK, J. The principle involved in this case, was fully considered, and decided at the last term of this Court; *Gibson* v. *Groner, ante* 10.

As the distinctions between the common law forms of action *ex contractu* are now abolished, (Const. Art. IV, Sec. 1,) and the remedy for the enforcement of all kinds of contracts, is a "civil action," there ought to be an uniformity as to the currency in which judgments are to be entered.

Both in England and in this country the currency and the method of counting it, are established by law, and all legal proceedings are to be kept in conformity to such regulations.

In England judgments are entered in pounds, shillings and pence; and in this country, they must be entered in dollars and cents, Act of April 2nd, 1792. Sec. 20.

In this country we have two kinds of currency differing in value, *i. e.*, coin, and Treasury notes.

We have been unable to find any authority to warrant a judgment in coin, in one action for a money demand, and in another action of the same kind a judgment for Treasury notes; or in the same action an alternative judgment for coin or Treasury notes.

At common law in the action of debt in the detinet for goods, and in the action of detinue, a judgment may be rendered in the alternative, "that the plaintiff recover the goods, or the value thereof if he cannot have the goods, &c," but we remember no other judgments of like character. We think that the law does not authorize two such forms of judgment for money demands; and therefore hold that the value of all contracts, whether simple contracts, or specialties, must in a civil action be estimated in United States Treasury Notes, and judgment be rendered for such amount, solvable in currency.

Where there is an express contract for the payment of coin, the depreciation of Treasury notes must be ascertained and added to the nominal amount of coin agreed upon.

We adopt this rule of law for uniformity and convenience, as coin is now practically an article of commerce, and is rarely used as currency, and as the Act of February 25th 1862 makes Treasury notes a legal tender in the payment of debts. The technical objections to this rule of law, arising from the nature and form of the common law actions, no longer exists, and the civil action substituted by the Code is sufficiently broad in its operation to give adequate remedy for the enforcement of all contracts.

The case before us, is an action of assumpsit, and even at common law, there was no difficulty in the jury assessing damages in treasury notes for the non-performance of the coin contract. There was error in the ruling of his Honor in the

Court below, but as he acted in conformity with a Military order then in force, each party must pay his own costs in this Court. (C. C. P. Sec. 278). *Venire de novo* awarded.

Let this be certified.

PER CURIAM. *Venire de novo.*

THOMAS ROBINSON, Ex'r., &c. *v.* HENRY McIVER and others

1. General pecuniary legacies are not chargeable upon or to be preferred to, specific devises of land, although the latter be found in a *residuary clause* which also includes personalty.
2. A legacy in contemplation of emancipation and removal, to one who was a slave when the will was written, is valid; and a bequest made in trust for the removal of such slave, with balance if any to him, is, under the results of the war, payable to him without abatement.
3. An Executor not expressly charged with such, has no official duty in connection with bequests of annuities charged upon land.
4. Upon the death (before the testator's) of a residuary legatee (a nephew and one of the heirs of the testator,) the real and personal estate given to him lapses for the benefit of the testator's heirs and next of kin.
5. In case of such lapse, an annuity charged upon the land in favor of one of the heirs, will abate *pro rata.*

(*Whedbee* v. *Shannonhouse*, Phil, Eq., 283, *Hayley* v. *Hayley*, *Ib.* 180, cited and approved.)

CIVIL-ACTION to obtain the construction of a will, tried by *Buxton*, *J.*, at RICHMOND, Spring Term 1869.

The testator, Henry W. Harrington, published his will in due form in December 1860, devising and bequeathing amongst numerous relatives and friends a large estate in lands, slaves and other personal property. The will was elaborate, including 28 *sections*, and some twenty or more copy sheets. The

testator died March 2d, 1868, and his will was duly proved before the Judge of Probate for Richmond county, Nov. 6th, 1868.

The results of the war, in emancipating the slaves and rendering insolvent many of the debtors of the testator, had raised the questions now brought before the Court, and they render it necessary to set out the following portions of the will, either in substance, or at length.

By the first *section* the testator provided for the payment of his debts by crop and money on hand, so far as necessary. The following six sections disposed of certain books, &c., as mementoes. The next following sections, to 17 inclusive, gave considerable pecuniary legacies to various persons, without charging them on land, or any other fund.

Section 18 gave to trustees, for Mrs. Cynthia Cole, the plantation and tract of land whereon he resided, also certain slaves, and farming stock, &c., for her use, &c., during her life; and on her death to go into the residue of the estate.

Section 19 provided an annuity of $300 for Mrs. Cole.

Section 20 gave to Stephen W. Covington a slave named Alexander Hambleton, his wife and family, in trust to be removed to Mexico where they might be free, but if on account of the disturbed condition of that country, or for other reason that could not be done, then to Ohio; but if that should be impracticable, then to St. Domingo. And then, by section 21, $1,000 was given to said Alexander, upon his arrival and settlement in either of those places; and $500 to Mr. Covington, in trust for payment of expenses attendant upon the removal, with balance after such payment to said Alexander, and $500 to himself, for his trouble, &c.

Section 22 provided that if the project in the two immediately preceding sections, should be impracticable, the slaves therein mentioned should fall into the residue, and the matter left to the consideration of the residuary legatee.

By section 23, certain mementoes were given to his sister Harriet H. Strong.

By section 24 an annuity of $1,000 was given to his sister

Harriet; and by section 24 this annuity and that to Mrs. Cole were made "a charge upon, and to be paid out of, the residue of my estate hereafter to be disposed of."

Section 26 directed an executor to sell certain lands in Sumner county, Tennessee, and the testator's interest in certain tracts and parts of tracts in Richmond county, N. C., called "Speculation" or "Big Survey" lands, and that the proceeds should fall into the residue of his estate.

Section 27, "I give, devise and bequeath to my nephew, Henry W. Harrington, all the rest and residue of my estate, both personal and real, of every description whatever, (not hereinbefore devised or bequeathed,) including the remainder in all the property hereinbefore devised and bequeathed to my friend Cynthia Cole after the consummation of her life estate therein, and consisting principally of about sixteen or seventeen thousand acres of land, in divers tracts and parts of tracts on Pedee river, Edward's creek, &c., &c., also the following negro slaves, to-wit:" &c., &c.

Section 28 gave a legacy of $200 to one Mary Lucas.

A paragraph followed in which certain persons, including the plaintiff, were appointed executors.

After setting forth the will the complaint stated that a large number of the legatees, among others Mrs. Strong and the residuary legatee, were also heirs of the testator; and that a number of them, including such residuary legatee, died (the latter leaving children,) before he did.

The questions asked of the Court, were:

1. Whether the pecuniary legacies were to be charged on the land, in the absence of other property to pay them; and if so, whether any distinction as to order of application, were to be made between the *proceeds* of the land ordered to be sold, and the other land?

2. Whether the executor were chargeable with any duty in respect of the pecuniary legacies chargeable on the land?

3. Whether the land and personal estate devised to Henry W. Harrington, jr., lapsed, or devolved upon his children?

4. Whether if any land lapsed, the legacy to Mrs. Strong (an heir) would abate in part, or be paid in full.

5. Whether the legacy of $1,000 to Hambleton, be valid?

6. Whether the two legacies of $500 to Covington be demandable now, and if so, to whom are they to be paid: Covington or Hampton ?

7. Out of what fund are the debts to be paid?

8. As the residuary legatee is dead, is it the executor's duty to make sale, as required in section 26?

Proper parties having been made, &c., his Honor gave a judgment, which it is not necessary to state, and from that decree, in order that the matter might be permanently disposed of, all parties appealed to the Supreme Court.

Ashe, for the plaintiff.

Hinsdale, for some of the defendants.

1. The provision for Harrington lapsed, and is void, and the land goes to the heirs; 3 Cruise 128, &c., 2 Ire. Eq. 330. *Hume* v. *Wood*, 8 Pick. 478. Rev. Code, ch. 119, sec. 28, does not apply.

2. The pecuniary legacies are not chargeable upon the land given in the residue, 2 Atk. 626, 3 P. Wms. 323, Ambler 173, *Lupton* v. *Lupton*, 2 Ire. ch. 614, 1 Roper Leg. 671, That there is a mixed fund of realty and personalty is not enough, *Nyssen* v. *Gretton*, 2 Y. & C. Exc. 222, and *Reynolds* v. *Reynolds*, 16 N. Y. 257.

Battle & Sons, for others.

Where the land is not specially devised, but blended with personalty in a residuary clause, it is charged thereby with the legacies *Mirehouse* v. *Scaife*, 14 Eng. Ch. Rep. 696, *Francis* v. *Clemow*, 23 Eng. L. & E. 125, *Lewis* v. *Darling*, 16 How. U. S. 1, *Givens* v. *Givens*, 1 Mur. 192.

They also cited Gallager's Appeal, 48 Pa. 121, and *Moore* v. *Beckwith*, 14 Ohio, 129.

PEARSON, C. J. 1. Are the pecuniary legacies a charge on the real estate embraced by the residuary clause?

To decide this question it is necessary to determine what real estate is embraced by the residuary clause.

The land devised to Mrs. Cole, to wit, the plantation on which the testator resided, is embraced, subject to her life estate; The sixteen or seventeen thousand acres in divers tracts on Pe Dee River, &c., are embraced: *Id certum est quod certum reddi potest*, by reference to the title deeds: And the proceeds of the sale of the tract of land in Sumner County Tennessee, and of "the Speculation" or "Big Survey" land in Richmond County, are embraced.

But these are *specific devises*, although set out in the residuary clause, and are expressly charged with the annuities of $300 to Mrs. Cole, and $1000 to Mrs. Harriet H. Strong. This, of itself, is enough to show that the general pecuinary legacies cannot be a charge by implication, on the land or the proceeds of that directed to be sold. The expression of one excludes the other: it might be that if the land was subjected to the pecuniary legacies, there would not remain a sufficiency to secure the annuities.

We concur in the position taken by the learned counsel, for which he cited many authorities, that when, in a residuary clause, land and personality are made a mixed fund, the land as well as the personalty is made subject to the payment of pecuniary legacies. This, however, is not on the footing of a *charge on land*, like the annuities in this case, but on the ground that in order to ascertain what is embraced in the residuary fund, it is necessary to take out the specific legacies, and then to deduct the pecuniary legacies, and only what remains is "the rest or residue of the estate." The residuary legatee takes only *what is left*.

Sometimes the residuary fund is treated as a matter of not much importance, as where a testator, after disposing of the bulk of his estate, adds, "the rest of my estate not herein before disposed of" &c., like the words "and other articles too tedious to mention" in a constable's advertisement of sale.

Sometimes the residuary clause is the substance of the will; as when a testator, after giving a few specific and pecuniary legacies, gives the bulk of his estate as the residue. In both of these cases the residue is ascertained by first taking out the specific and pecuniary legacies; and the residuary legatee is entitled only to what may be over and above, whether it be land or personalty. In this sense all of the cases are to be understood: not as allowing the property to go to the residuary legatee, *subject to a charge*, but as taking the amount of the pecuniary legacies out of the fund, as something which he is not entitled to, because it does not come under the discription.

Our case does not fall under either of these two classes, in respect to the land or the proceeds of the sale of the other land, but only in respect to such property or funds as do not pass by it specifically, and fall under the description of "what is left," after taking out the specific, and the payment of the pecuniary legacies.

This is an exceptional case, for in the residuary clause the testator makes specific devises and specific bequests. These are fixed with sufficient legal certainty, and are not included or left to depend upon the general words "what may be left," or "things too tedious to mention," or "such as may have been overlooked."

This same residuary clause sets out a specific legacy of many slaves, with particular instructions in regard to them. No one who reads it can for a moment suppose it was the intention of the testator, that these slaves should in any event be sold in order to paythe pecuniary legacies.

2. The pecuniary legacy to Alexander of $1000, and of $500 to pay expenses of removal are now absolute; the condition and purposes being met by emancipation; so this legacy takes grade with the other pecuniary legacies. *Whedbee* v. *Shannonhouse*, Phil. Eq. 283; *Hayley* v. *Hayley ib* 180.

3. The executor has no concern with the annuities: he will sell the Tennessee land, and the "Speculation land" (unless the heirs-at-law elect to take the land), and the proceeds of sale

together with the other land, descend to the heirs *cum onere*, and it is his duty to see that all other property not specifically bequeathed, is applied to the satisfaction of the pecuniary legacies, *pro rata*.

In the event of a lapse by the death of a legatee or devisee, the legal effect is the same as if the name had been left blank; and the party becoming entitled takes the property in the same manner, plight and condition, that the legatee or devisee would have taken. In our case, for instance, the heirs-at-law and next-of-kin take the real and personal estate, charged with the annuities; and what constitutes the fund will be ascertained in the same way as it would have been in respect to the residuary legatee had he been living. Mrs. Strong being one of the heirs, the annuity given to her will be subject to abatement *pro rata*.

We have disposed of all of the practical questions that now arise under the will. The loss of the slaves and the destruction of other personal property during the war, as appears from the pleadings, render the decison of the other points into which his Honor has entered with great minuteness, unnecessary.

The decree will be reversed in so far as it does not conform to this opinion, and a decree in these respects will be drawn in conformity thereto. The other parts of the decree below need not be referred to. The costs will be paid out of the fund.

PER CURIAM. Decree accordingly.

JOSEPH CROCKER and others, *ex parte.*

A testator desired his property, real and personal, after the death of his widow, to be divided among his heirs; except that A should have $50 and B, C, D, and E $10 each, above their distributive shares; *Held*, that these sums were to be made good out of the real estate, if the personalty proved insufficient.

PETITION to sell land for a division between the petitioners, filed in Wake Court of Equity, 1866, and brought to this Court by an appeal from a decree at WAKE, Spring Term 1869.

The petitioners were tenants in common under the will of one John Crocker, who died in said county in 1853, devising as follows:

"I give and bequeath unto my beloved wife, Penny Crocker, all of my property, both real and personal, &c., and after her death to be equally divided among all of my heirs, except five, namely, one of them, Martha Ann Crocker, I give and bequeath to her $50, over and above her distributive share; also I give and bequeath to my four little sons, namely, William, Matthew, Sidney and Henry C. Crocker, $10 each, over and above the distributive shares above named."

The question was as to the distribution of the proceeds of the sale, i. e., whether the gifts of money mentioned above failed with a failure of the personal assets of the deceased, or were charged upon the realty devised, and its proceeds.

The matter having been referred to the Clerk and Master, he reported that those gifts had failed, and there was a decree below in accordance therewith; from which the parties interested took an appeal.

Battle & Sons, for the appellants.

Haywood, contra.

DICK, J. The exception to the report of the Clerk and Master is sustained. The intention of the testator is manifest, although not expressed in his will with technical accuracy. The general rule of law, that where technical words are used

they are to be construed in a technical sense, is controlled by the manifest intention of a testator. In this case there can be no doubt as to the wishes and purposes of the testator in the disposition of his estate. The whole estate is given to the widow for life, and at her death it is to be divided among the children of the testator. In the division, five of the children, viz: Martha, William, Matthew, Sidney and Henry, are to have the legacies mentioned in the will, and then all the children are to have equal shares of the residue. These pecuniary legacies are a charge upon the whole estate, and their payment does not depend upon the sufficiency of the personal estate.

There must be a decree for the payment of said legacies out of the proceeds of the land, to the said legatees or their representatives; and for a division of the residue among all the children of the testator or their representatives, according to their legal rights. The costs must be paid out of the common fund.

PER CURIAM. Decree accordingly.

THOS. K. HARRIS and others *v.* RICKS, HILL & Co., and others.

The provision of the Code C. P. giving plaintiffs having judgment, *three years* in which to issue execution, applies to judgments pending at its adoption: *therefore,* a plaintiff in such a judgment which at the time of application was more than a year old, had a right to have it docketed.

Quare whether a creditor by prior docketed judgment, who places execution in the Sheriff's hands *after* a sale, can intercept its proceeds, to the prejudice of creditors by subsequent docketed judgments, whose executions were in the Sheriff's hands at the sale?

RETURN by Sheriff, asking advice as to the application of the proceeds of sales under execution, to the process in his hand, made to *Watts, J.*, at HALIFAX, Spring Term 1869.

The principal points of difference between the parties were:

1. Whether a creditor by judgment, which was pending when the C. C. P. was adopted, and, at the time of applying to have it docketed, was more than a year old (and so, by the previous laws, would have been dormant), could have it docketed, so as to be preferred to other judgments taken under the code, and docketed subsequently;

2. Whether creditors (Pullen, Pierce & Co.,) whose judgment was docketed before the sale, could intercept the proceeds of such sale by placing an execution in the Sheriff's hands *after* it had occurred, to the prejudice of creditors by judgment, docketed after his, executions under which were in the Sheriffs, hands at the sale.

The amount in the hands of the Sheriff rendered the former question the only one of practical importance.

His Honor decided it in favor of the creditor with oldest docketed judgment, and other creditors appealed.

Rogers & Batchelor, and *Conigland*, for the appellants.

Barnes and *Walter Clark, contra.*

READE, J. Under the Code, (§ 255,) execution may issue as of course, at any time within three years from the rendition of the judgment; and this applies to judgments existing at the time of the adoption of the Code.

When the execution comes to the hands of the Sheriff, he is required "to satisfy the judgment out of the personal property of the debtor; and if sufficient personal property cannot be found, out of the real property belonging to him *on the day when the judgment was docketed* in the county, or at any time thereafter. C. C. P. § 361.

The judgment is a lien upon land at, and from the time of its being docketed. C. C. P. § 254.

The funds in the Sheriff's hands must be applied to the satisfaction of the executions, according to the priority of the docketing of the judgments. There are six of the judgments which were docketed prior to the 4th day of January 1869,

which was the day on which the judgment in favor of Pullen & Pierce was docketed, and therefore those six are to be satisfied before that of Pullen & Pierce. This would be so, even if Pullen & Pierce's execution had been in the Sheriff's hands at the time of the sale, which was not the fact; it came to his hands after the sale.

A question is presented whether the execution of Pullen & Pierce, whose judgment was docketed 4th January 1869 but did not reach the Sheriff's hands until after the sale, has priority over several other executions which did reach the Sheriff's hands before the sale, but were issued upon judgments docketed after January 4th 1869. It would seem that a judgment creditor prior in the order of docketing his judgment, who negligently fails to sue out execution, ought to be postponed to a judgment creditor subsequent in the order of docketing, but who sues out execution and sells. Especially would this seem to be so, if the prior judgment creditor had notice of the subsequent judgment creditor's levy and purpose to sell. But we suppose from what was said at the Bar, that the funds in the Sheriff's hands will not be sufficient to satisfy the first six executions; so that the question is of no practical importance in this case, and therefore we do not decide it. If it should turn out to be necessary, the point can be presented hereafter. There will however be General Rules adopted at this term and publised with the Reports, which will cover the case. The case of *Allen* v. *Plummer*, at the last term, was before the Code.

There is no error in his Honor's ruling. The costs will be paid by the appellants.

PER CURIAM. Judgment affirmed.

JESSE W. PEEBLES *v.* JOSEPH A. PEEBLES and CHARLES H. HORTON.

Courts of Equity in this State will not grant new trials of issues, sent by them to be tried at law, merely because the verdict was against the weight of evidence.

Where the issue sent for trial was, whether a certain conveyance from A to B was in fraud of C, a creditor of A, and with the direction that C should be plaintiff in the issue, and A and B co-defendants; and upon the trial declarations made by A previous to the conveyance and whilst he was in possession of the land in regard to the state of the accounts between himself and B, were allowed to be given in evidence; *Held* that such declarations were not competent as against B; also, that to prevent complications on a new trial, A's name should be struck out of the issue.

ISSUE, sent from the Supreme Court sitting in Equity at January Term last, to be tried at WAKE, tried by *Watts, J.*, at Spring Term 1869.

The plaintiff, as creditor of Joseph Peebles, had filed a bill against the defendants, charging fraud in a certain conveyance of lands from such debtor to Horton, in February 1865. The defence was that Joseph Peebles owed Horton also, and had conveyed the land *bona fide* to pay the debt. Upon the case being opened in the Supreme Court at last term, an issue was ordered to be tried at law between Jesse Peebles as plaintiff, and Joseph A. Peebles and Charles H. Horton as defendants, involving the question of fraud.

Upon the trial the plaintiff was allowed to prove what Joseph had said several years before, whilst in possession of the land in controversy, as to the state of accounts betwixt himself and Horton, for the purpose of showing that the allegations as to the extent of indebtedness between them in 1865 was not true. The defendant excepted.

Verdict for the plaintiff.

In this Court the defendant moved for a new trial:

1. Because the verdict was against the weight of evidence.

2. Because of the admission of the declarations of Joseph Peebles.

Haywood, and *Rogers & Batchelor*, for the motion.

Phillips and *Battle, contra.*

1. The practice in regard to new trials of "issues" in North Carolina differs from that in England, 2 Hawks, 432, 1 Jon. Eq. 142, and *ante* 261. Here, however, even the English practice has not been pursued on the other side, 6 Madd. 58, 3 Russ. 318. There is no such rule in England in "issues" involving the title to land, as that a second trial is given, as of course. That rule is confined to issues involving the title to an inheritance upon the issue *dev. vel non*, for the reason that such issue *cannot be tried in equity*, and therefore when sent to law, the former Court feels bound by the analogy in ejectment. Here the issue is one to the trial of which is equity is competent; and as it was a matter of discretion to order even one trial at law, much more so a second. See *Van Alst* v. *Hunter*, 5 J. Ch. 1 52, which collects all the authorities Adams' [249], Smith's Ch. Pr. 2, 74 *et seg.*

2. Peebles' testimony was competeut, for he is a party to the record; and were he not, it was so by analogy to, *Satterwhite* v. *Hicks*, Bus. 105, *Marsh* v. *Hampton*, 5 Jon. 382, *Askew* v. *Reynolds*, 1 D. and B. 367. See also *Ward* v. *Sanders*, 6 Ire. 382, *Willie* v. *Farley*, 14 Eng. C. L. 307, Phil. Ev. (Hill and Cowen's notes,) Pt. 1, 271, and cases cited.

PEARSON, C. J. There has been no instance since the institution of the Supreme Court of the State of North Carolina, in which the Court has ordered a new trial in a case at law, or a second trial of an issue directed by the Court acting in equity, upon the ground that the first verdict was against the weight of the evidence.

In a case at law, the Judge of the Superior Court who presides at the trial, and can see and know everything connected with it, and all of the surroundings, has a discretion to order a new trial, if, in his opinion, the verdict be the result of prejudice, or of surprise, or of inadvertence. In an issue directed by the Court sitting in equity, the very reason for referring

the matter to a jury is, that, because of the imperfect manner of taking depositions, and the impossibility of the Court's deciding on the weight of evidence, when the statement of one witness looks as good on paper as that of another, the Court feels its incompetency to decide between conflicting testimony, and chooses rather to rely on the common sense of a jury, who have the witnesses before them and are supposed to be capable, by observing their looks, demeanor and the effect of cross-examination which can in that mode only be made to have its full force, to arrive at the truth.

So it would be labor lost and a confounding of confusion, should this Court take upon itself the task of going over all of the depositions, and of the statement of the Judge in the Court below (supposing him to be able from his notes to present a full expose of the entire evidence, and of the incidents of the trial) in order to decide the question whether the verdict be against the weight of the evidence.

The fact that this never has been attempted by the Court under its organization as a Supreme Court, and that all of the cases brought before it for review of the "trial of issues," have turned on the admissibility of evidence, or the instructions of the Judge to the jury, (*Jones* v. *Zollicoffer*, 2 Hawks, 492, *Reid* v. *Barnhardt*, 1 Jon. Eq., 142,) settles our practice, and we are not disposed to depart from it, as by the Constitution and the Code of Civil Procedure provision is made to prevent the question from being again presented. In regard to the practice in England, and how far this Court has felt itself bound by the analogies furnished by the decisions in that country, we refer to the brief of plaintiff's counsel and to the authority and reasoning there cited and relied on, with the remark that the most fruithful source "of issues sent out of chancery," to-wit: cases of devises where the inheritance is in question, has from an early day in this State been regulated by Statute.

The declarations of Joseph Peebles were competent evidence against him. But we can find no authority or principle on which to hold these declarations competent against his co-de-

fendant Horton. In fact Joseph Peebles has no substantial interest in the result of this suit. So the question is, ought his declarations, in his own favor at the time when made, to have been allowed to go to the jury to the prejudice of Horton; who, although he claims under him, by a deed subsequently made, has no joint interest with him in the land, and is directly concerned to prove that the declarations were untrue. The cases cited by the plaintiff's counsel do not sustain the competency of this evidence, and it is clearly against principle to allow it to affect Horton.

For error in allowing it to affect the issue as against Horton, there will be a new trial; and to avoid a like complication of evidence, competent as to one and not competent as to the other defendant, the issues will be made as between the plaintiff and Horton, omitting Joseph Peebles.

PER CURIAM. New trial.

MARY NELSON and others *v.* ALEXANDER BLUE, Ex., &c.

The expression "lawful heirs," in a will, applied to describe those who are to take a bequest of personalty, means such as take that sort of property in cases of intestacy.

Personalty given by a testator who died in 1854, "to be equally divided among all my lawful heirs," in a case where there were no lineal descendants, and the next of kin are nephews and neices, together with the children of a deceased nephew; is to be confined to the nephews and neices.

[NOTE.—Since then *aliter*, by Act of 1862–3 ch. 49; and Act of April 6 1869, "Estates of deceased persons."]

(*Johnson* v. *Chesson*, 6 Jon. Eq. 146, and *Skinner* v. *Wynne*, 2 Jon. Eq. 41.)

(Final decree of distribution postponed, owing to the state of the record, and the lapse of time since the bill was filed.)

BILL, filed in 1857 and transmitted to this Court at Fall Term 1867 of the Court of Equity for ROBESON.

The suit was for an account and settlement of the estate of Barbara Cade, who died in 1854, leaving a will.

No statement of facts here, is necessary.

McKay and *Fowle & Badger*, for the plaintiffs.

No counsel *contra.*

RODMAN, J. By the will of Barbara Cade, proved in 1854, she gives to Mary, Evelina and Nancy Wilkerson, six hundred dollars, to be equally divided between the three. About this legacy there does not appear to be any controversy. She then gives "the balance of my estate to be divided among all my lawful heirs." The estate consisted altogether of personalty. In a will of personalty, "my lawful heirs" means those who at the death of the testatrix are entitled to distribution under the Statute. Who are these, in the present case? The testatrix left no lineal kin and no brother or sister; she left numerous children of brothers and sisters, who are the plaintiffs; and some children of the children of a brother who died, as did his children, before the testatrix. The main question made by the pleadings, is whether these last, that is the grand neices and nephews, taking anything under the legacy. We are of the opinion that they do not; the Statute, Rev. Code ch. 64, sec. 1, sub-division 5, says, "If there be neither widow nor children nor any legal representative of children, the estate shall be distributed equally to any of the next of kin of the intestate who are in equal degree, and to those who legally represent them," and sec. 2, says: "Provided further, that in the distribution of the estate, there shall be admitted among collateral kindred, no representative after brother's and sister's children. *Johnson* v. *Chesson*, 6 Jon. Eq. 146.

It follows also that as the persons who take are all in equal degree, there is no occasion for the application of the doctrine of representation, and they all take equally *per capita*. *Skinner* v. *Wynne*, 2 Jon. Eq. 41.

This Court however cannot make any decree in this case for several reasons:

1. The answer alleges that Peggy, daughter of Neil Little and wife of Sauls, survived the testatrix, in which case she would be entitled to a share; her representative is no party to the suit; replication was taken to the answer, but there is no testimony on this point.

2. In 1862 the death of the original defendant Jacob Alford was suggested, and a *sci. fa.* was executed on his executor Alexander Blue: an account was taken and confirmed of the assets of the testatrix in the hands of Alford, but none has been taken of those in the hands of Blue.

3. The three Wilkerson girls, to whom the first legacy was given, are not parties.

4. In proceeding to a final decree in a cause which has been pending so long, we might do injustice.

There will be a decree declaring the rights of the parties, and the case is remanded to the Superior Court of Robeson county, to proceed therein according to law.

Neither party will recover costs in this Court.

PER CURIAM. Remanded.

THE STATE *v.* HENRY BURWELL and others.

Where a landlord, whilst engaged in collecting his *advancements*, out of a crop in a field, that, by agreement with the cropper, was to remain his "till he was reimbursed," on being assaulted by the latter with a deadly weapon, knocked him down with a stick, *Held*, that he was not thereby guilty of an assault and battery.

An agreement by him who cultivates land that the owner who advances "guano, seed-wheat," &c., shall out of the crop be repaid in wheat for such advancements, constitutes the former a *cropper*, and not a *tenant*.

(*Denton* v. *Strickland* 3 Jon. 71 and *Lewis* v. *Wilkins* Phil. Eq. 303, cited and approved.)

STATE *v.* BURWELL AND OTHERS.

ASSAULT AND BATTERY, tried before *Watts, J.*, at GRANVILLE, Spring Term 1869.

On the part of the State, one Boyd, the prosecutor, testified that in 1867 he rented a piece of land from the defendant Burwell for the purpose of raising a crop of wheat; that the "*bargain*" was that Burwell was to furnish a certain quantity, of guano, and seed wheat, and the land; that he (Boyd) was to sow, reap and gather the wheat, and that out of the crop Burwell was first to have the value in wheat, of the guano and seed furnished by him, and the remainder was to be divided between them in the proportions respectively of $\frac{1}{4}$ and $\frac{3}{4}$. He further stated that Burwell came on a certain Friday to his house making enquiries as to the wheat then being threshed; that Burwell came again on the following Saturday, when he (Boyd) declined threshing any more wheat 'till Monday—that thereupon Burwell proposed to thresh the balance himself which Boyd declined—that Burwell then attempted to carry his wagon into the field, in which attempt Burwell committed on him Boyd the assault &c., complained of. That subsequently Burwell went into the the field, threshed the remaining wheat and carried off his share.

Upon his cross examination Boyd stated that Burwell was first to take out of the crop raised on the field the value of his advancements in guano and wheat, "if it took all the crop."

On the part of the defendant, Thos. Parham testified that he went with Burwell to Boyd's on the Friday and Saturday spoken of by the latter; that Boyd was threshing the wheat; that there was some difficulty between Boyd and Burwell as to the division of the wheat, when the latter offered the former $95 to *settle* the matter, which Boyd declined; that Burwell then started his wagon into the field, when Boyd threatened to kill or cut the horses and wagon, and injure them driving, that he [Boyd] cut at Burwell several times with an axe, that the latter finally struck Boyd with a stick, from the effect of which blow Boyd fell; that Boyd's sons participated in the fight, and by one of them Burwell was severely stricken with a hoe.

Defendant also introduced one Short, who testified that

Burwell the defendant stated to him that the bargain as between himself and Boyd was that he Burwell was to furnish a quantity of guano and seed wheat and the land, and that the crop made on the land was to be his [Burwell's] till he was reimbursed for his advancements &c. The Court intimated that the defendant was guilty on his own showing, and thereupon the defendant submitted to a verdict of guilty.

Rule &c., Rule discharged, Judgment and Appeal.

Young, for the appellant.

Attorney General, contra.

SETTLE, J. The defendant furnished the land, the wheat and the guano, and the prosecutor, Boyd, testified upon the trial that the defendant "was to first take out of the crop raised in the field, the value of his advancements in guano and wheat, if it took all the crop." What remained after paying for these advancements, was to be divided in a certain proportion between the defendant and the prosecutor.

There is a marked distinction between a *lessee* and a *cropper*. *Denton* v. *Strickland*, 3 Jon. 61, *Lewis* v. *Wilkins*, Phil. Eq. 303. This contract clearly makes the prosecutor a mere cropper, and the defendant had a right to enter the field, for the purpose of getting his share of the crop. This is the view of the case as presented by the prosecution, but we need not consider it, as it was withdrawn from the jury, and another view taken by his Honor, which, we think, placed it in even a stronger light for the defendant. The defendant introduced a witness who testified, that when he, Burwell, started his wagon into the field, the prosecutor, Boyd, "cut at the defendant several times with an axe, that the latter finally struck Boyd with a stick, from the effects of which blow Boyd fell, that Boyd's sons participated in the fight, and that by one of them Burwell was severely stricken with a hoe."

Another witness on behalf of the defendant, testified that the defendant stated to him, that the bargain was that, "he, Burwell, was to furnish a quantity of guano and seed wheat

and the land, and that the crop made on the land was to be his (Burwell's) till he was reimbursed for his advancements, &c." Here "the Court intimated that the defendant was guilty upon his own showing," and a verdict was entered accordingly.

As the case was disposed of in submission to this intimation from his Honor, we can only consider it as presented by the evidence on behalf of the defendant. We cannot concur in the view taken by his Honor; on the contrary, it appears from this evidence that the prosecutor assaulted the defendant with a deadly weapon while he was engaged in collecting his advancements, out of a crop which was "to remain his till he was reimbursed &c."

It was insisted upon the argument here, that the defendant was guilty because he had not complied with the requirements of the act of 1866-7 ch, 67, entitled "An Act to protect landlords against insolvent debtors." This act does not take away any rights that the landlord had before, but it gives others; and it would be strange if we were to construe a remedial "act to protect landlords," so as to diminish their remedies, and leave them in a worse condition than they were before its passage.

There is no error. Let this be certified, &c.

PER CURIAM. *Venire de novo.*

RULES OF PRACTICE

ADOPTED AT JUNE TERM, 1869.

I. Appeals will be docketed for their proper districts in the order in which the papers are filed with the Clerk.

II. The Clerk will docket no appeal in a civil action, unless it appears that the appellant has filed in the Court below an undertaking payable to the appellee, with sufficient surety, and in a sufficient sum, for the payment of all costs which may be adjudged against him in the Court; or has made a deposit in lieu of such undertaking; or unless, by leave of this Court, he shall file such an undertaking, or make such deposit with the Clerk here. This rule shall apply, notwithstanding an appeal bond shall be waived by the appellee.

III. The preceeding rule shall not apply: 1st, If the Judge below shall have allowed the appellant to appeal as a pauper, or: 2nd, where the State is the appellant in its own interest, or: 3rd, where an officer of the State is the appellant, in his capacity as such, and the interest of the State alone is concerned.

IV. Appeals from a county in which a Court shall be held during a term of this Court, if filed before the expiration of the time assigned to the District, will be called during that week, if not filed by that time, they will be called at the end of the docket.

V. The Judicial Districts shall be arranged and assigned in the following order:

1st week, First and Second Districts.
2d week, Fourth and Fifth Districts.
3d week, Third and Seventh Districts.
4th week, Eighth and Ninth Districts.
5th week, Tenth and Eleventh Districts.
6th week, Twelfth and Sixth Districts.

VI. The cases from each District will be called in their proper order; if either party is not ready, the case may be put to the end of the District, by consent or for cause shown, and be called in that place; otherwise the first call is peremptory. In like manner, by consent or for cause, a case may be put to the end of the docket, or continued. If no counsel appear for either party at the first call, the case will be put to the end of the District, and if none appear at the second call, it will be continued.

VII. Cases not prosecuted for two terms, will be dismissed at the cost of the appellant, unless continued for cause; with liberty however to either party to move at the next term to re-instate it; or afterwards, upon sufficient cause.

VIII. The appellant is entitled to open and conclude the argument.

IX. When an appeal shall be taken after the commencement of a term of this Court, the judgment and teste of the execution shall have effect from the time of the filing of the appeal.

NOTE.—The only difficulty in the adoption of this rule was the case of *Farley* v. *Lea*, 4 Dev. & Bat., 169; for, the idea of allowing a judgment in a case which in fact was not tried below until after the commencement of a term of this Court, to relate back and take effect from the first day of the term, was out of the question. We are relieved from the difficulty by *Whitaker* v. *Wesley*, 74 E. C. L. R. 48,

decided in 1852, in which all the cases on the subject were fully reviewed, and the conclusion is, "that a mere form or fiction of law introduced for the sake of justice, shall not work a wrong contrary to the real truth and substance of the thing." We consider *Farley* v. *Lea*, (decided in 1838) overruled by the authority and reasoning of this case. The judgments of this Court (as between themselves and without reference to the judgments of other Courts) relate to and take effect from the first day of the term, except in the case above referred to, in such cases the judgments take effect from the filing of the record of appeal.

X. The Clerk of this Court will keep a judgment docket, with an alphabetical index of the names of the defendants. On this docket he will enter a brief memorandum of every final judgment of this Court affecting the right to real property, and of every judgment requiring, in whole or in part, the payment of money; stating the names of the parties, the term of the judgment, its number on the docket of the term, and if for the payment of money, the amount of the judgment; and when it shall appear from the return on an execution or from an order for an entry of satisfaction by this Court, that the judgment has been satisfied in whole or in part, the Clerk, at the request of any person interested in such entry, and on payment of the lawful fee, shall make a memorandum of the time of such satisfaction, whether in whole or in part, and refer briefly to the evidence of it.

XI. Executions from this Court may be directed to the proper officers of any county in the State: the manner of their teste is prescribed in Rule IX preceding: at the request of the party in whose favor execution is, it may be returnable on any specified day after the commencement of the term of this Court next ensuing its teste. In the absence of such request executions shall be made returnable on the first day of the term next ensuing their teste; and on motion, for special cause, execution may be taken out during the term.

XII. The Court will not regard any agreement alleged

between Attorneys or Counsel, unless it be admitted, or shall be in writing and filed in this Court.

XIII. Memoranda of pleadings will not be received in this Court as pleadings, even by consent of parties, but will be disregarded as frivolous or impertinent.

XIV. On motion of either party, or, in a gross case, of its own motion, the Court will refer it to the Clerk, or to some member of the Bar, to report whether pleadings in a cause, are scandalous and impertinent, and if they be found so, the Court will order the scandal or impertinence to be stricken out at the cost of the party.

XV. A motion to dismiss an appeal for want of notice of the appeal, can only be made at or before the calling of the cause. On the hearing of such motion, the notice must be shown, or be shown to have been waived. Notice will not be presumed merely because the appeal appears to have been taking during a term of the Court.

XVI. Any party, within two terms after a judgment of this Court, may file a petition to have the cause reheard upon any matter of law. To such petition shall be attached a certificate, signed by two Counsellors of this Court who did not appear in the cause at its first hearing, stating their opinion that the judgment was erroneous. It must also appear that the judgment has been performed, or that its performance has been properly secured; or some sufficient cause must be shown for dispensing with these conditions. Such petition must also assign the errors complained of.

XVII. Appeals from judgments rendered one or more days before the commencement of a term of this Court, must be filed within the first eight days of the term, or before the calling of the district to which the case belongs, otherwise they will be continued until the next term.

XVIII. All judgments recovered during any term of a Superior Court, which shall be docketed during the term, shall be held and deemed to be docketed on the first day of the term.

XIX. If any plaintiff shall have docketed a judgment and failed to sue out execution against the lands of the defendant, any other plaintiff who has docketed a judgment, and shall take out execution, may give notice of his execution to creditors having prior docketed judgments, which shall be served at least twenty days before the day of sale, and any creditor so notified, who shall fail to sue out execution and put it in the hands of the sheriff before the day of sale, shall lose his lien on the lands sold, provided that this rule shall not apply to any creditor who cannot take out execution.

XX. In all cases where the land is sold under execution, in due course of law, the purchaser shall be deemed to have acquired, by power of the sheriff's deed, all of the estate of the defendant in the execution, and all of the rights in respect to the land conveyed, of the several creditors by docketed judgments, who either have issued executions, or who, having been notified, shall have failed to issue executions.

XXI. Writs of execution issued from a Superior Court shall not be tested of any term; they shall be dated on the day of their issue; and shall state when the judgment was docketed in the County from the Court of which the execution issues.

INDEX.

At Fall term 1868 the papers in this case with others, were delivered by the Clerk of the County Court to the new Superior Court Clerk, but the civil docket was not taken up at that term for want of time: At Spring Term 1869, on Wednesday of the second week, being the first day of taking up the civil docket, the defendant moved to dismiss the case because of the rule in the County Court—but upon the plaintiff's offering to give security then, she was allowed so to do: *Held*, to have been a matter within the Judge's discretion, and to have been properly decided. *Smith v. Mitchell*, 620.

(Illustration of the maxim *Actus legis nemini facit injuriam.*) *Ibid.*

See JUDGMENT, 5; NUL TIEL RECORD; CONFESSION 2; CERTIORARI. CRIM. PROCEEDINGS 21.

APPRENTICE.

1. Where a father so acts as to render his house no longer habitable by his children, it is a desertion of them by him, within the meaning of Rev. Code, c. 5, s. 1. *Stout v. Woody* 37.
2. One who seduces away and employs the apprentice of another, is liable to the master for the value of his services during the time that he is so seduced and employed. *Ibid.*

ARBITRATION AND AWARD.

1. Arbitrators are no more bound to go into particulars, and assign reasons for their award, than a jury is for its verdict. Their duty is best discharged by a simple announcement of the result of their investigations. *Blossom v. Van Amringe*, 65.
2. Where arbitrators award that the personal property for which a suit has been brought, belongs to the defendant, and that the plaintiff shall pay the costs, *Held* to be *final* as regards such suit. *Ibid.*
3. An award as to *the arbitration fee*, *held* to be valid, where the order of reference expressly entrusted the arbitrators with its determination. *Ibid.*

ARREST.

Where an affidavit, made to obtain an order of arrest and an attachment, is based upon an apprehension by the affiant of some *future* fraudulent act by the defendant, such affidavit must specify the grounds of the apprehension; but where the affidavit relies upon an act already done, it need state it only in general terms; as *here*, "That the said P. has disposed of and secreted his property with intent to defraud his creditors. *Hughes v. Person*, 548.

ASSAULT.

1. Where one was going down the steps which led from a Court room, and another who was before him in striking distance, stopped, turned about, clenched his right hand (the arm being bent at the elbow but not drawn back) and said, I have a good mind to hit you, whereupon

(c.) By PEARSON, C. J., The proportions and limitations upon taxation, required by Art. 5, Sec. 1 of the State Constitution, have not been observed.

(d.) By RODMAN and DICK, JJ., *Conceding* that *an inchoate corporation* is created by the acts in question, the "Directors" required for its consummation have not as yet been duly appointed, inasmuch as to such appointment the State Constitution renders a *confirmation by the Senate*, indispensable. *University R. R. Co. v. Holden*, 410.

ARGUENDO:

7. By the Court.

(a.) *Galloway v. Jenkins*, ante 147, cited and approved. *Ibid.*

(b.) The *proportions* and *limitations (ubi supra,)* do not apply to taxes laid for the purpose of paying either the interest or the principal of the public debt, as it existed at the adoption of the Constitution, or for *special county purposes*, (as in Art. 5, Sec. 7, of the Constitution.) *Ibid.*

8. By READE, DICK and SETTLE, JJ. The *proportions* and *limitations (ubi supra,)* apply only to taxes laid for the ordinary and current expenses of the State, and include none of the objects of expenditure referred to in Secs. 4 and 5, of the same Article. *Ibid.*

By PEARSON, C. J. They apply in all cases of State or County taxation, except provisions, (1) for the public debt as it existed when the constitution was adopted, (2) for casual deficits, insurrection and invasion, and (3) for county taxation for *special purposes*. *Ibid.*

By RODMAN, J. They apply (except in regard to the public debt as it existed at the adoption of the Constitution) equally in regard to all State taxes whatever, but not with equal force to all; being, in some matters, *imperative;* in others, only *directory* to the Legislature,—whose decision in such case is conclusive, and cannot be reviewed by the judiciary. In this latter class are included, taxes, (1.) to supply casual deficits, to suppress invasions and insurrections; (2.) for the ordinary and legitimate purposes of the State, and (3.) to construct unfinished Rail Roads. *Ibid.*

9. By PEARSON, C. J., and RODMAN and DICK, JJ. (*Dissentiente*, READE, J.) As the Legislature cannot give or lend the credit of the State to others for the purpose of constructing new Rail Roads, without the sanction of a vote of the people, *so, a fortiori*, it cannot without such sanction, engage in such construction *directly*. *Ibid.*

10. The Act of March 16, 1869, "Suspending the Code of Civil Procedure in certain cases," is not unconstitutional in requiring writs in civil cases to be "returned to *the regular term* of the Superior Court," &c., instead of to the Clerk's office as heretofore. *McAdoo v. Benbow*, 461.

11. The phrase "Superior Court" in Art. 4, Sec. 28, of the State Constitution, does not mean the Court of the Clerk. *Ibid.*

12. A Statute may be in part constitutional, and in part unconstitutional. *Johnson v. Winslow*, 552.

DISSENTS.

EXPERT.

FACTORS.

JUDICIAL SALE.

JURISDICTION.

3. The act of May 26th 1864, by which persons "*while engaged* in the manufacture of saltpetre" are required "to enclose their works with a good and lawful fence," under penalty of double the value of all cattle that are destroyed by the liquid saltpetre, does not apply after the operations are discontinued. *Ibid.*

See PUBLIC LAW, 2.

NEGOTIABLE PAPER.

Endorsements by third persons of a note payable by A to B,—if made at the time of its execution, bind them, according to the intention of the parties, either as joint principals or as sureties. *Baker v. Robinson*, 191.

NUL TIEL RECORD.

The issue *nul tiel record*, includes two questions; *one*, of fact, from the decision of which in the Court below there is no appeal, *the other*, of law deducible from such fact, from the decision of which below there is an appeal. *Simpson v. Simpson*, 534.

OFFICERS.

1. A Justice of the Peace has no power to *depute* a special officer to execute civil process. *Marsh v. Williams*, 371.
2. The right of a *de facto* officer to hold his office, cannot be questioned collaterally—as, *here*, by objecting to an answer purporting to have been sworn to before him. *Culver v. Eggers*, 630.

See CONSTITUTION 7, 8, 9, 10; MAMDAMUS; TAXES.

ORDINANCES.

1. A note given to C in 1866, by A as principal, and B as surety, in payment for certain notes made in 1864 by B to C, which in 1866 were purchased by A from C, is a *new* contract by A and B, and not one "in renewal of or a substitute for" the contracts of 1864, within the 5th section of the Ordinance of March 14th, 1868. *Hood v. Froneberger*, 35.
2. A surety to a note made in 1861 having paid it off in 1866; *Held*, that his claim on that account against his principal was not included in the Ordinance of June 1866, which conferred exclusive jurisdiction on the Superior Courts in regard to all actions on contracts made *prior to May* 1, 1865. *Smith v. Moore*, 138.

See JURISDICTION 2; LIEN; STAY LAW; WIDOW 4.

PARENT AND CHILD.

Although the law allows to a person *in loco parentis* the broadest latitude in governing, it is not necessary to prove *express* malice on his part in order to convict of murder, if the facts show such cruelty and inhumanity in whipping, as exclude the idea of passion. *State v. Harris*, 1.

See APPRENTICE 1.

See APPEAL; ARREST; EQUITY; INJUNCTION; JUDGMENT, 1; JUDICIAL SALES; PLEADING; PROCESS; RETURN, 1; WIDOW, 3.