NORTH CAROLINA REPORTS
VOL. 65

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

JANUARY AND JUNE TERMS, 1871.

BY

J. M. McCORKLE,

REPORTER.

ANNOTATED THROUGH VOL. 256.

RALEIGH

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

JANUARY TERM, 1871.

GEORGE L. JOHNSON v. B. E. SEDBERRY AND OTHERS.

Where two or more plaintiffs had, prior to the adoption of the new Constitution and the Code of Civil Procedure, obtained judgments at the same term of the County Court of a County, and then after such Constitution and Code had been adopted, transferred them to the docket of the Superior Court, at different times, but all within six months as required by the sections 400 and 403 of the C. C. P., and had then issued executions on them at different times, but all came to the Sheriff's hands before the sale of the defendant's land: *it was held* that under Art. 4, Sec. 25, of the Constitution, which ordains that "actions at law, and suits in Equity, pending when this Constitution shall go into effect, shall be transferred to the Courts having jurisdiction thereof, without prejudice by reason of the change," the proceeds of the sale under the executions shall be applied *pro rata* to all of them.

RETURN of the Sheriff of Cumberland County, asking instructions from the Court as to the application of a sum of money raised by virtue of sundry executions in his hands, brought before *Buxton, J.*, at Spring Term, 1870, of the Superior Court of CUMBERLAND County.

It appeared that the money was raised out of the land of the same defendant, one T. J. Johnson, under executions in favor of the present plaintiff and the present defendants, B. E. Sedberry and Barrett, Stephens & Co. These parties had all obtained judgments against the said T. J. Johnson at the December Term, 1867, of the County Court of Cumberland. The judgments all remained unsatisfied (2) until after the adoption of the Code of Civil Procedure, when those of the present defendants were docketed in the Superior Court on the 22nd January, 1869, and that of the present plaintiff on the

29th day of the same month. Executions in favor of Sedberry and Barrett, Stephens & Co., were issued on their judgments the 13th April, 1870, and in favor of George L. Johnson, on the 20th day of the same month, all returnable to the same Term of the Court. Sedberry and Barrett, Stephens & Co., claimed the whole proceeds of the sale, upon the ground that their judgments were first docketed in the Superior Court, while G. L. Johnson contended that he was entitled to participate with them because all the judgments had been obtained at the same December Term, 1867, of the County Court of Cumberland, and were then all *transferred* under the law to the Superior Court docket, and not merely docketed as contended for by the other parties.

Upon consideration and comparison of Sec. 403, of the C. C. P., with the rules of practice adopted by the Supreme Court, (see 19 and 21 Rules, published in 63 N. C. Rep. 669), his Honor came to the conclusion that no lien had been acquired by any of the executions previous to the ratification of the C. C. P., and that the priority of the executions would have to be regulated by the dates of their being docketed in the Superior Court, decided that the Sheriff ought to apply the proceeds of the sale in his hands to the executions of Sedberry and Barrett, Stephens & Co., to the exclusion of that of G. L. Johnson. From this order, G. L. Johnson appealed to the Supreme Court.

At the June Term, 1870, of the Supreme Court, the following opinion of the Court was filed by Rodman, J.

"The sections of the Code, cited by Mr. Hinsdale, give a priority of lien to the judgments that were first docketed, and the fund must be decided accordingly. There is no error."

(3) At the present Term of the Court a petition to re-hear the judgment rendered at the last Term was filed, and was argued by

W. McL. McKay for the plaintiff.
Hinsdale for the defendant.

PEARSON, C.J. At the last term, Mr. McKay put the case upon the ground that the judgments in the County Court had a lien on the land. We thought the position untenable. A short opinion was filed, and the order made, without any special reference to the fact that the judgment had been rendered in the County Court under the old system. The purpose of the petition to rehear, is to present the point that there is a distinction between judgments rendered under the old system, and judgments rendered under the C. C. P.

The position now taken by Mr. McKay is this: By the Constitution, *Art.* 4, *Sec.* 25, it is ordained, "Actions at law, and suits in equity, pending when this Constitution shall go into effect, shall be transferred to the Courts having jurisdiction thereof, *without prejudice by reason of the change.*" The three judgments being rendered at the same term of the County Court, stood in that Court upon an equal footing, and no one of the plaintiffs could have gained priority by having his execution issued before the others, for all the executions would have related to the *teste*, and stood on equal footing; and if, by reason of the transfer, one plaintiff can, because of having his judgment actually transferred and put on the docket in this new Court a few days before the others, gain priority, notwithstanding the other judgments are transferred and put on the docket within the time allowed by law, to-wit: six months, (*Secs.* 400, 403, *C. C. P.*,) the latter would, without laches on their part, be prejudiced by the change of the Court system, contrary to the meaning of the Constitution. (4)

This is a strong position, and upon consideration we have come to the conclusion it is well taken. Under the old system neither party was exposed to the chance of a footrace, as it was termed on the argument, as to who should have his execution issued first; and if, under the new system, he is exposed to the chances of a race as to who should have his judgment transferred first, although the judgments were all transferred within the time allowed by law, the change of system would be attended by this prejudice, and yet no laches can be attributed to any of the plaintiffs. The only way to avoid this result is, to hold that judgments standing on the same footing in the County Courts, remain on the same footing in the new Superior Court, provided all are transferred within time, and are followed up by executions taken out and put in the hands of the sheriff before a sale under an execution issued before upon one or more of such judgments — which is our case. The maxim, *"leges vigilantibus non dormientibus subvenient,"* at the common law, was not intended to encourage an indecent rush, or foot-race, to see who can, by adroitness, manage to be first in point of time; but was intended to secure reasonable diligence, and prevent laches; so when a plaintiff is within time, he is not to be prejudiced by the fact that some other had been a little quicker in his motions. Upon this principle is based the rule that all judgments rendered at the same term relate to the first day of the term, and stand on equal footing. *Norwood v. Sharp*, 64 N.C. 680.

It is true, the Code of Civil Procedure has, to some extent, departed from this view of the maxim, *"Leges vigilantibus,"* etc., and in many cases gives priority to the plaintiff who is the swiftest in his motions;

but the Court is not authorized to extend that idea so as to make it apply to judgments rendered before the adoption of the Code, in the face of a constitutional provision for making the transfer without prejudice. Indeed, the operation of the new rule seems to
(5) work so badly in respect to several matters, in cases where judgments are taken under the C.C.P., as to result in positive mischief, and a temptation to unfair dealing. The Justices of this Court consider they have power to apply the remedy by prescribing rules of practice and procedure in the Superior Courts. *Sec.* 394.

One instance is this: Judgments docketed in a county, other than that in which they are rendered, have a lien from the time the transcript is delivered to the clerk. Suppose, during the term a judgment is rendered—say in Person county, on Tuesday, the plaintiff takes a transcript and hastens to the county of Granville and has it docketed, another judgment is rendered on Thursday. In Person both judgments relate to the first day of the term, but the judgment docketed in Granville by the plaintiff who has made hot haste, has priority as to the lands in Granville. The remedy for this mischief is an order that the clerk shall not make out transcripts of judgments to be docketed in another county until after the expiration of the term, and a provision that all judgments in one county at the same term, and sent to another county to be docketed, shall be equal in respect to lien, provided they be docketed in reasonable time, say twenty days after the end of the term.

Another instance is this: Several writs of summons are returned before a Justice of the Peace on the same day; it depends upon the Justice which case he will take up first; and should he take up one, he may hold it under consideration and give judgment in another. The plaintiff takes a transcript and in hot haste has it docketed, and thereby acquires a preferable lien. Here a door is left wide open for fraud —the Justice is led into temptation—to say nothing of the indecent rush to get the first judgment. Clerks are relieved from temptation by the ruling, that judgments are presumed to be docketed the mo-
(6) ment a transcript is handed to him. There is no such relief for a Justice of the Peace. The man in whose favor he renders the first judgment makes out a transcript, hurries off to the clerk, and gets the first lien.

The remedy for this mischief will be a rule, that all judgments rendered by a Justice of the Peace upon writs of summons returnable on the same day, shall, when docketed, stand on the same footing in respect to lien, provided such judgment be docketed within reasonable time, say twenty days. These rules and provisions will be in accord

with our decision, that judgments rendered at the same term of a County Court, if transferred to the Superior Court in reasonable time, which the C.C.P. fixes at six months, stand on the same footing, provided execution be sued out before a sale on any one of them.

The only difficulty which stood in the way of the conclusion to which we have arrived, is the fact that the words of the Constitution are: "Actions at law and suits in equity pending when this Constitution shall go into effect, shall be transferred without prejudice," etc. Are these words broad enough to include judgments rendered before? We think the words are broad enough. In ordinary acceptation, an action pending means a case going on before judgment; but after judgment, until it becomes dormant, the action is still pending until the judgment be satisfied, for it is still open for execution, which issues upon a presumed motion to that effect; hence the *teste* of an execution is the first day of the preceding term, at which time it is presumed to be moved for; and the judgment is still open for motions to vacate, and the like. So, in contemplation of law, the action is pending until the plaintiff has the fruits of his recovery, or suffers it to become dormant. If this be not so, the Constitution will furnish a striking instance of *"casus omissus,"* for there was surely as much occasion for the transfer of unsatisfied judgments to the new Courts, as for the transfer of actions in which there had been no trial, there is a like reason, (7) and in construing an instrument, which is not supposed to descend to minute particulars and distinctions, the rule is to adopt a liberal construction in aid of all remedial provisions.

The Court is sustained in this construction by the action of the General Assembly. Sec. 403 of the C. C. P., provides: "Existing judgments and decrees not dormant, may in like manner be entered," etc. This is a legislative construction by which the Constitution is taken to provide for the transfer of judgments to the execution docket, as well as for the transfer of actions not tried, to the trial docket, in such a manner as not to prejudice the rights of the parties by reason of a change in the judicial system.

Having concluded that the judgments transferred under the provision of the Constitution and the C.C.P., acquired lien, and stand on the same footing in that respect, we are at a loss to see any ground upon which judgment No. 1 can claim priority, from the fact that a *fi. fa.* had been issued before, for *fi. fas.* upon the three judgments were in the hands of the sheriff at the time of the sale, and under the new order of things the lien has no reference to the *teste* of the *fi. fas.*

The former order will be reversed, and the fund be divided rateably.

Cited: Bates v. Hinsdale, 65 N.C. 425, *Ross v. Alexander,* 65 N.C. 579, *Baldwin v. York,* 71 N.C. 466, *Lord v. Beard,* 79 N.C. 12, *Cheek v. Watson,* 90 N.C. 307, *McKinney v. Street,* 165 N.C. 516.

(8)

BENJAMIN AYCOCK TO USE OF B. M. ISLER v. J. M. F. HARRISON AND OTHERS.

Where there is a judgment, and a *fi. fa.* or *vend. expo.* issues during the life of the defendant, the Sheriff may proceed to sell, although the defendant dies before the sale; and so he may, when the *fi. fa.* or *vend. expo.* issues after the death, if *tested* before. But if the Sheriff, for any cause, return the process without a sale, no *alias* can issue *tested* after the death of the defendant without a *sci. fa.* against his heirs.

THIS was a motion to set aside an execution made before his Honor, *Clarke, J.,* at the last Term of the Superior Court of WAYNE County.

The material facts were, that at the August Term, 1861, of the County Court of Wayne County, the plaintiff obtained a judgment against the defendants. Successive executions were duly issued thereupon, and previously to May Term, 1866, a levy had been made upon the lands of the defendant J. M. F. Harrison, who resided in the County of Craven. This defendant died in November, 1864, leaving a last will and testament, which was proved by John D. Flanner, who duly qualified thereto as executor. From May Term, 1866, a *vend. expo.* was issued, and at the August Term thereafter, it was returned "no sale on account of the stay law." After the adoption of the new Constitution and the Code of Civil Procedure, the judgment was transferred to and docketed in the Superior Court of Wayne County, and on the 27th June, 1870, an *alias vend. expo.* was issued from that Court to the Sheriff of Craven County, commanding him to sell the lands of the said J. M. F. Harrison, so previously levied on, which the Sheriff advertised for sale.

The motion to set aside the execution was made by the executor, J. D. Flanner, and his Honor having sustained it and ordered
(9) the execution to be set aside, the plaintiff appealed to the Supreme Court.

Manly & Haughton for the plaintiff.
No counsel for the defendants.

READE, J. A *fi. fa.* issued after the death of the plaintiff, and when he had no representative in Court, must be set aside as having been erroneously issued. *Wingate v. Gibson,* 5 N.C. 492.

So, a *ven. ex.* to sell land, tested after the defendant's death without a *sci. fa.* against the heirs, is null and void. *Samuel v. Zachary,* 26 N.C. 377.

Where there is a judgment, and a *fi. fa.* or *ven. ex.* issues during the life of the defendant, the Sheriff may proceed to sell, although the defendant die before the sale. And so he may, when the *fi. fa.* or *ven. ex. issues* after the death but is *tested* before. But if the Sheriff, for any cause, return the process without a sale, no alias can issue tested after the death of the defendant without a *sci. fa.* against the heir.

The reason is, that when the process issues or is tested before the defendant's death, the ministerial officer can take no notice of his death but must obey the process, which being tested before the death binds the land.

But when the Sheriff returns the process without a sale an *alias* cannot issue, without the supposed or actual adjudication of the Court, and if an *alias* issue it will be supposed that the Court ordered it in ignorance of the fact of the death, and it will be set aside on motion, unless the heir or other person interested be made a party. The reason for which is, that the heir or other person in interest ought to have an opportunity to show any defense which he may have—as that he had a debt against his ancestor of equal dignity with the creditors, or that he has paid other liens of prior *teste,* or that the widow is entitled to dower and the like. *Samuel v. Zachary, supra.* (10)

These principles are decisive of his case: Judgment was obtained in 1861. The defendant, J. M. F. Harrison, died in 1864. And in 1866, the execution issued and bore *teste.* It is to be taken that the Court ordered its issue in mistake of the fact of the defendant's death, and when that fact came to the knowledge of the Court it was proper to set it aside and to refuse any other process until the party in interest was brought in.

When this case was before this Court heretofore (63 N.C. 145,) it did not appear to the Court that the defendant was dead.

There is no error. This will be certified.

Per curiam.

Cited: Grant v. Newsom, 81 N.C. 38, *Halso v. Cole,* 82 N. C. 164, *Grant v. Hughes,* 82 N.C. 218, *Sawyers v. Sawyers,* 93 N.C. 323, *Benners v. Rhinehart,* 107 N.C. 706.

DOE EX DEM. JOHN D. WILLIAMS AND OTHERS v. JOHN T. COUNCIL.

The Supreme Court cannot determine between conflicting records of a Superior Court, nor will it pass on an opinion of a Judge, which proceeds upon a state of facts different from that agreed to by the parties, and different from that certified as of record to this Court.

It is the privilege of an appellant to make up his case, and it is his duty to do it, so as intelligibly to exhibit the error in the judgment, of which he complains; and the rules of practice give him all the necessary power to do so. Ordinarily, if he fails to do so, the only course open to the Supreme Court is to confirm the judgment below, not because it is thought to be right, but because it cannot be seen to be wrong.

THIS was an action of ejectment commenced before the adoption of the Code of Civil Procedure, submitted to His Honor, *Buxton, J.*, at the Spring Term, 1870, of MOORE Superior Court, upon a case agreed.

The fact upon which the case was considered in the Supreme
(11) Court will be found to be sufficiently stated in the opinion filed.

In the Court below the Judge decided in favor of the lessor of the plaintiff. And the defendant appealed.

Manning and B. Fuller for the plaintiff.
N. McKay, Phillips & Merrimon for defendant.

RODMAN, J. It is impossible to give any judgment in this case, except on a mere conjecture between the accuracy of inconsistent statements, each of which by itself would be conclusive.

The whole dispute seems to turn upon the date of the commencement of the present action. Two writings, professing to be records in the present action, are certified to this Court; both contain the declaration of the plaintiff; the plea of the defendant; the case agreed, and the opinion of the Judge below. In one, the date of the issuing of the declaration is stated to be 29th December, 1857. In the other, the 14th January, 1858—the case agreed says, the present case is the same that is reported in 49 N.C. and in 53 N.C. One of the certified copies of the case agreed, states that the present action was commenced on the third, the other on the thirteenth of July, 1853. The opinion of the Judge states, (contrary to the case agreed,) that the cases reported in 49 N.C., and in 53 N.C., were different actions: the first of which was commenced 30th July, 1853, and the latter on the 29th December, 1857.

He further says, that in the first suit there was a final judgment, in obedience to the opinion of this Court, at December Term, 1856, of Moore Superior Court; and that the present action, although commenced on the same day with that, is a difierent suit from that, as well as

from that in 53 N.C. The Judge may have obtained this information from the records of his Court; but it is contradicted by both the mutually contradicting records sent to us, and we do not know upon what ground His Honor substituted the result of his own (12) search among the records, for the statement of facts agreed on by the parties, self-contradictory as that was. We do feel justified in deciding a case where we must necessarily proceed upon a mere calculation of probabilities, as to a matter of fact, which, we must presume, can be so easily made certain. We cannot determine between conflicting records of a Superior Court. We cannot pass on an opinion of a judge which proceeds upon a state of facts different from that agreed to by the parties, and different from that certified as of record to us. It is the privilege of an appellant to make up his case; it is his duty to do it, so as intelligibly to exhibit the error which he complains of in the judgment: and the rules of practice give him all necessary power to do so. Ordinarily, if he fails to do so, the only course open to this Court, is to confirm the judgment below—not because we think its right, but because we cannot see it is wrong.

If we were at liberty to consider the case upon the facts as assumed by His Honor, the Judge below, we should probably decide the case as he has done, and for the reasons given, and the authority cited by him. But if the date of the commencement of the present action be taken from either of the two inconsistent records sent up with his opinion, it would make a material difference.

Either party is at liberty, at any time before the expiration of the second week of the next term of this Court, to move for a *certiorari* to bring up a more perfect record.

If no such motion be made, the judgment below will be affirmed.

Cited: Chasteen v. Martin, 84 N.C. 395; *McDaniel v. Pollock,* 87 N.C. 505.

(13)

NATHANIEL BOYDEN v. THE PRESIDENT AND DIRECTORS OF THE BANK OF CAPE FEAR.

The ordinary relation subsisting at common law between a bank and its customers on a general deposit account is simply that of debtor and creditor. A deposit by a customer, in the absence of any special agreement to

the contrary, creates a debt, and the payment by the bank of the customer's checks, discharges such debt *pro. tanto*. The bank or the customer may at any time discontinue their dealings, and the balance of the account between them can be easily ascertained by a simple calculation.

The general rule in adjusting a running account between a bank and its customer is "the first money paid in, is the first money paid out." The first item on the debit side is discharged or reduced by the first item on the credit side. But this rule is not strictly applicable to a case where the account commenced before the late civil war, and was continued during it, as that part of the account which was in Confederate currency is not to be governed by the principles of the common law, but by the ordinance of the 18th Oct., 1865, and the Acts of 1866, Chs. 38 and 39. The account must be divided, and the amount due Oct. 1st, 1861, must be estimated in par funds. To give full effect to the payments of the bank, and allow to the plaintiff, the proper value of his deposits, each payment ought to be deducted from the next preceding deposit or deposits, and when the deposits are in excess of the payments, a balance ought to be struck, and the value of such excess ought to be ascertained according to the scale, and form a part of the general balance due the plaintiff. In this way the nominal amount of the payments will be deducted from the nominal amount of the preceding deposits. The value of the excess of the various deposits at the time they were made with the premium added, will constitute the true balance in the Confederate currency transactions; and this sum added to the amount of the par funds due Oct. 1st, 1861, will constitute the amount due the plaintiff at the time of the demand made.

Where a bank, during the late civil war, adopted a new usage and custom with its customers, with regard to their deposits in Confederate currency, proof of it cannot be admitted to affect one who had been a regular customer before the war, and continued such during the war, unless it be shown that he had notice of the change in the ordinary usage and custom of the bank as to general deposits.

The fact that a regular customer sometimes made special deposits of bank bills with a bank, has no tendency to show that he had notice of change in the ordinary usage and custom of the bank as to general deposits, for a special deposit constitutes a contract essentially different from that which arises by implication of law from a general deposit.

A special deposit is a naked bailment, and on demand of the bailor, restitution must be made of the thing deposited. And as the bank acquires no property in the thing deposited, and derives no benefit therefrom, it is bound only to keep the deposit with the same care that it keeps its own property of a like description.

THIS was a civil action brought by the plaintiff to recover
(14) from the defendant the balance of a general deposit account kept between him and the branch bank of the defendant at Salisbury.

On the trial at the last Term of the Superior Court of the County of ROWAN, before his Honor, *Henry, J.*, it appeared that the plaintiff,

in March, 1864, carried a notice, published by the defendant in the "Carolina Watchman," for all its depositors to withdraw their deposits by a certain time, exhibited it to the Cashier, and demanded of him his deposit as it appeared on the bank book of the plaintiff, kept by an officer of the bank, and offered to check for the same. The Cashier offered to pay the plaintiff in Confederate money, and refused to pay in any other. The plaintiff offered to take payment in specie or bills of the defendant, which was refused. It was proved that the plaintiff, besides his general deposits of Confederate currency, sometimes made special deposits of bank notes in the bank. The defendant offered to prove what was the custom and usage of its branch at Salisbury, as to the re-payment of deposits made in Confederate currency to depositors, other than the plaintiff, for the purpose of showing that the undertaking of the defendant in regard to deposits of that character, was not that of a debtor to the depositor, but only as a bailee, and the fact of the plaintiff having sometimes made special deposits in bank notes was relied on for the same purpose. His Honor refused to admit the testimony in the absence of proof, that such usage and cus- (15) tom was known to the plaintiff.

The plaintiff offered in evidence, his bank book, kept by an officer of the bank, the debits and credits of which were admitted to be correct, and the general balance and final balance corresponded with the entries on the books of the bank, except as to the form of making the entries. The defendant offered to put in evidence the books of its branch at Salisbury, but it was objected to by the plaintiff and excluded by the Court.

The counsel for the defendant asked his Honor to charge the jury, that the charges in the debit side of the account current offered by the plaintiff, had to be appropriated in the discharge of the first items in the credit side of the account, continuing the appropriation or application in that way *seriatim,* until the debit side of the account was exhausted, then find the balance over the credits of which the balance consisted, and that the scale would be applicable to the last balance struck; to this his Honor replied that the plaintiff was entitled to receive back in good money, the value of any deposit made by him, and which might be still due and owing, as announced by the defendant himself, from time to time, by striking the balance on plaintiff's book, with premium added.

It was in evidence, that there was no Confederate money issued until Sept., 1861, and none deposited before 1st Oct., 1861.

There was a verdict for plaintiff for $....., and interest on $..... as principal money, and from the judgment rendered thereon, the defendant appealed; and there was an appeal also by the plaintiff.

Bailey for the plaintiff.
Blackmer & McCorkle and Wilson for the defendant.

DICK, J. There was an ordinary deposit account running between the plaintiff and defendant before and during the war, and this action was brought to adjust the matter, and recover the net balance due him. (16)

If the mutual dealings between the parties had been in par funds, there would have been no difficulty in ascertaining the proper balances, as the books of the Bank and the Bank book of the plaintiff correspond in items and amounts.

The ordinary relation subsisting at common law between a bank and its customers, on a general deposit account, is simply, that of debtor and creditor. Grant on Banking, 2.

The deposits are regarded as loans without interest to the bank, and the money goes into the general fund, and is used by the Bank for its own benefit in its usual financial operations. As a compensation for such benefit, there is an implied obligation on the part of the Bank to honor and pay on presentation the checks and drafts of the customer until his deposits are exhausted; and also, repay on the demand of the depositor, any balance which may be due on the settlement of the deposit account. The deposit, in the absence of any special argument to the contrary, creates a debt, and the payment of the checks of the customer discharges such debt *pro tanta*. The bank or the customer may at any time discontinue their dealings, and the balance of the account between them can be easily ascertained by a simple calculation.

In our case different principles are involved, which complicate the matter, as par funds and depreciated currency, of ranging values, entered into the transactions of the parties.

It was in evidence, that previous to the 1st of October, 1861, there were no deposits of Confederate currency, and the balance then due the plaintiff was in par funds. Subsequent to that date, the dealings between the parties were in Confederate treasury notes, which soon commenced to depreciate in value, and that fact was fully known and acted upon by both parties. (17)

These transactions in depreciated currency are, therefore, to be settled according to the Ordinance of the 18th of October, 1865, and

the Acts of 1866, ch. 38 and 39, as construed by several decisions of this Court. These deposits were in Confederate currency, and the plaintiff is entitled to their value at the time of deposit, to be ascertained by the scale. Acts of 1867, ch. 44. The payment of the checks and drafts of the plaintiff discharged, *pro tanto,* the debts created by his deposits. *Brown v. Foust,* 64 N.C. 672.

When the final balance was struck in March, 1864, the defendant was not authorized by law to pay the balance due "in notes of like character and amount as those received;" but its implied contract was to pay funds equivalent in value to the funds deposited. *Marine Bank v. Chandler,* 27 Ill. 525; Story on Bailments 66, 28 Ill. 90, 360-463. *Marine Bank v. Fulton Bank;* 2 Wallace 252.

The general rule in adjusting a running account between a bank and its customers, is, "the first money paid in, is the first money paid out." The first item on the debit side is discharged or reduced by the first item on the credit side. This rule is not strictly applicable to this case, as that part of the account which was in Confederate currency is not to be governed by the principles of the common law, but is regulated by the legislation above referred to, which was enacted to meet such cases. The account must be divided, and the amount due October 1st, 1861, must be estimated in par funds. To give full effect to the payments of the defendant, and allow to the plaintiff the proper value of his deposits, each payment ought to be deducted from the next preceding deposit, or deposits, and when the deposits are in excess of the payments, then a balance ought to be struck, and the value of such excess ought to be ascertained according to the scale, and form a part of the general balance due the plaintiff. In this way the nominal amount of the payments will be deducted from the nominal (18) amount of the preceding deposits, and this process can be continued until all the payments are allowed as credits. The value of the excess of the various deposits at the time they were made, with the premium added, will constitute the true balance of the Confederate currency transactions; and this sum added to the amount of the par funds due October 1st, 1861, will constitute the amount due the plaintiff at the time of the demand made in March, 1864.

The defendant cannot justly complain of this arrangement, for the currency was rapidly depreciating, and his payments are taken out of previous deposits, which were of higher value. The plaintiff ought to be satisfied as the payments were made at his request, and accepted in Confederate currency.

The rules established by the Ordinance and Acts referred to, were not intended for executed contracts and completed transactions, but

are only applicable to executory contracts and business matters entered into during the war, which a party seeks to adjust and enforce by an action at law.

His Honor properly excluded the evidence offered by the defendant to "prove" what was the "usage and custom of the bank at Salisbury, as to the re-payment of deposits to depositors, other than the plaintiff, made in Confederate currency, for the purpose of showing that the undertaking of defendant in regard to deposits of that character, was not that of debtor and creditor, but only as bailee."

The dealings between the defendant and plaintiff had been as debtor and creditor under rules and usages well established in law, and any arbitrary change in such rules and usages made by the defendant cannot injuriously affect the rights and interests of the plaintiff without bringing home to him positive notice of the change. Until he had been sufficiently notified to the contrary, he had the right to expect the ordinary course of dealing to be continued. Moss on Banking, 384.

(19) The fact that the plaintiff made special deposits of bank bills with the defendant has no tendency in showing that the plaintiff had notice of a change in the ordinary usage and custom of the bank as to general deposits. The receiving of special deposits falls within the general scope of the banking business, and constitutes a contract essentially different from that which arises by implication of law from a general deposit. A special deposit is a naked bailment, and on demand of the bailor, restitution must be made of the specific thing deposited. As the bank acquires no property in the thing thus deposited, and derives no benefit therefrom, it is bound only to keep the deposit with the same care that it keeps its own property of a like description.

The plaintiff may have had some particular object in view, in making a special deposit in bank bills, and in so doing he followed the ordinary and well known rules and usages of banks.

The plaintiff knew that Confederate notes were continually depreciating, and it is not reasonable to suppose that he would have allowed the bank to use his funds, and afterwards pay him back the nominal amount in a currency which had greatly depreciated. This refusal, in March, 1864, to receive said currency, clearly shows that he had no notice of the new usage and custom which the bank alleges it had established with its customers at Salisbury. No such usage and custom was established by the Parent bank at Wilmington, in its immediate dealings, or there would have been no necessity for the notice which was published March 2nd, 1864, and which is filed as exhibit A, in this case.

The demand made by the plaintiff in March, 1864, was sufficient to entitle him to bring this action and recover the balance due him at that date, with interest.

As the instructions of his Honor were not in accordance with the rules established for the adjustment and settlement of transactions in Confederate money during the war, there must be a (20) *venire de novo,* and the plaintiff is entitled to costs.

Per curiam.

Judgment reversed.

Cited: Hall v. Craige, 65 N.C. 53; *Clerk's Office v. Bank,* 66 N.C. 214; *Keener v. Finger,* 70 N.C. 52; *Vick v. Smith,* 83 N.C. 83; *Lester v. Houston,* 101 N.C. 609; *Hawes v. Blackwell,* 107 N.C. 200; *Bank v. McNair,* 114 N.C. 342; *Wallace v. Grizzard,* 114 N.C. 495; *Perry v. Bank,* 131 N.C. 118; *Reid v. Bank,* 159 N.C. 101; *Bank v. Walser,* 162 N.C. 62; *Trustees v. Banking Co.,* 182 N.C. 304; *Graham v. Warehouse,* 189 N.C. 535; *Corporation Com. v. Trust Co.,* 193 N.C. 699; *Corporation Com. v. Trust Co.,* 194 N.C. 128; *Bank v. Bank,* 197 N.C. 533; *Roebuck v. Surety Co.,* 200 N.C. 201; *Bright v. Hood, Comr.,* 214 N.C. 420; *Lipe v. Bank,* 236 N.C. 331.

C. E. LUTE AND OTHERS v. JOHN REILLY, SHERIFF.

When the owner of land does not petition for a homestead, it is the duty of the Sheriff, or other officer who has an execution against him, to have it laid off under the Act of 1868-'9, ch. 137, at the expense of the creditor, and if he refuse to pay or tender the fees of the officer, he will, by virtue of the Code of Civil Procedure, Sec. 555, be justified in refusing to execute the process.

THIS was a motion made at the Fall Term, 1869, of CUMBERLAND Superior Court to amerce the sheriff of that county for failing to execute process, and for making an insufficient return to a writ of *fi. fa.* against one John W. Matthews. It was continued until the Spring Term, 1870, when coming on to be heard before his Honor *Buxton, J.,* it appeared that at the time when the process was placed in the hands of the sheriff, the plaintiffs paid him sixty cents, and he afterward made the following return: "Defendant does not petition for homestead, and the plaintiffs refuse to pay homestead fees. No action, the necessary fees not paid. (Signed) John Reilly, Sheriff."

His Honor being of opinion that the sheriff was not bound to execute the process, unless his fees were paid for laying off the homestead, and that his return on the process was not insufficient, refused the motion to amerce. From this order the plaintiff appealed.

Hinsdale for plaintiffs.
J. C. McRae for defendant.

SETTLE, J. This was a motion to amerce the sheriff for fail-
(21) ing to execute process, and for making an insufficient return.

The case states that a *fi. fa.* for costs, duly issued and came into the sheriff's hands in full time. At the time the process was placed in the sheriff's hands, a fee of sixty cents was paid him by the plaintiffs.

The return of the sheriff is as follows, to-wit: "Defendant does not petition for homestead, and the plaintiffs refuse to pay homestead fees. No action, the necessary fees not paid." An officer cannot be required to execute process unless his fees be paid or tendered by the person in whose interest the service is to be rendered. C.C.P., Sec. 555.

If the homestead is laid off at the instance of the owner, he is liable for the sheriff's costs; if not so claimed by the owner, the fees must be taxed in the bill of costs. Acts 1868-'9, ch. 137, sec. 16.

Before levying upon any homestead, owned and occupied, the sheriff or other officer charged with such levy, shall summon three appraisers, whose duty requires them to value and lay off the homestead exemption of the owner; and the levy can only be made upon the excess of homestead not so laid off.

If the homestead is laid off at the instance of the creditor, to ascertain if there is an excess, out of which his debt may be made, the services are rendered in his interest, within the meaning of C.C.P., Sec. 555.

And this seems reasonable, for since the law guards the homestead with such jealous care that it will not permit the debt itself to be collected out of it, surely it was not the purpose to allow the costs, which are but a mere incident, to exhaust the homestead.

If it be said that it is a hard measure to make the creditor pay the costs in such cases, the reply is, *ita lex scripta est.*

The judgment of the Superior Court is affirmed.

Per curiam.

Judgment affirmed.

Cited: Taylor v. Rhyne, 65 N.C. 531; *Lambert v. Kinney,* 74 N.C. 350; *Whitmore v. Hyatt,* 175 N.C. 118.

(22)

A. C. OSBORNE v. ELI F. JOHNSTON.

Where the call of a deed was for a boundary on the north by the land of J. R. and J. R., had a tract of land belonging to himself, part of the southern boundary of which was north of the land described, and had, as tenant in common with another person, another tract, lying also north of the land in question, it seems to be erroneous in a Court to charge the Jury merely that the call in the deed, which was for the land of J. R., meant the land of J. R., lying north of the land in dispute.

Where the *locus in quo* was a peninsula formed by the bend of a river, and the question was as to the adverse possession of that land by the defendant, and it appeared that he ran a fence partly on his own land and partly on that of another person, across the neck of the peninsula, so that it excluded the cattle of other persons from ranging upon it, except by crossing the river, and opened a gate in his fence for his own cattle to get upon it, *it was held* that the defendant had no adverse possession of the land in the peninsula, unless he had made the fence across the neck for the avowed and unequivocal purpose of taking possession of the peninsula, and using it for a pasture as his own land.

THIS was a civil action brought by the plaintiff against the defendant under the C. C. P., to recover possession of the tract of land described in the complaint, tried before *Mitchell, J.,* at the last term of the Superior Court for the county of ALLEGHANY.

The facts material to a proper understanding of the case were as follows: The land in dispute consisted of about forty acres, lying in a peninsula formed by a bend in New River. The western side of the land abutted on the river, but it extended only a part of the way to the river on the east. The plaintiff claimed under a grant from the State, dated in the Spring of 1870, and offered evidence tending to show that it was vacant at the date of the entry; and the defendant claimed under a deed made in 1823 from William Reeves to Jesse Reeves, which described the land as "my home place, bounded on the west by New River, on the south by the lands of James Wellborn, on the east by the lands of James Toliver, and on the north by Jesse Reeves' own land." The western, southern and eastern boundaries of this (23) land were proved to be as described, but as to the western boundary, the proof was that Jesse Reeves owned the land lying north

of the disputed land next to the river in the inner end of the peninsula, which was also north of the said land so granted by William to Jesse Reeves; and it was further in proof that at the date of the deed there was another tract of land called the Jesse Reeves land, but in fact owned by him and another as tenants in common, which extended a part only of the way along the northern boundary of the land granted by William to Jesse Reeves. It was admitted that if the deed for this tract of land from William to Jesse Reeves called for both of these tracts, or for only the first mentioned, it would cover the land in dispute, but if it called for the last only, it would not cover the disputed land. The plaintiff contended that the call of the deed from William to Jesse Reeves would be satisfied by holding that it should be confined to the last mentioned tract of Jesse Reeves, and asked his Honor so to instruct the Jury, but he declined to do so, and told the Jury, "that the call in the deed from William to Jesse Reeves, which called for Jesse Reeves' own land on the north, meant the land of Jesse Reeves lying north of the land in dispute."

During the progress of the trial a question arose as to the occupation of the disputed land by a person under whom the defendant claimed, as to which it was testified that he had no actual occupation of it, except that his cattle ranged upon it. It was also testified that about the year 1837, in fencing his fields on the old Reeves tract, he fenced all the way across the peninsula above the disputed land, leaving a lane into the peninsula, across which he had a gate, through which he turned his own cattle into the disputed land in the peninsula, and the effect of the fence was to exclude from the disputed land the cattle of all other persons except such as could cross the river at certain
(24) fords which were shallow enough to allow of such ingress. The plaintiff contended that no such adverse possession had been proved as to ripen the title of the defendant under the doctrine of possession under the color of title, even if the deed under which defendant claimed did cover the land in dispute, and requested his Honor so to instruct the Jury, but he refused such instruction, and told the Jury that if defendant's fence ran across the whole peninsula, and he used the land below his said fence on the peninsula as a range for his own cattle, exclusive of other cattle, although the river around the peninsula would, at places, be crossed by cattle, and other people's cattle actually did cross over and intermingle among defendant's cattle, still his possession of the disputed land would be such as would ripen a color of title into a good title.

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

Folk for the plaintiff.
No counsel for the defendant.

PEARSON, C.J. What are the boundaries of a tract of land, is a question of law, to be decided by the Court, in putting a construction upon the deed. Where the boundaries are, is a question of fact for the jury.

By the statement of the case, it is agreed, that if the boundaries of the deed of William to Jesse Reeves be the line of a *certain* tract, owned by Jesse, the deed does not include the *locus in quo*. If the boundary be the line of a certain other tract, owned by Jesse, or if the boundary be the lines of both of the tracts, then the deed does include the *locus in quo*. As far as we are able to understand the case, we incline to the opinion that it was the duty of the Judge to have decided this question, and to have instructed the jury, either that the line of one tract, or of the other, or of both, was the boundary of the deed. The effect of his decision one way or the other, being agreed on as a matter of fact, in reference to the *locus in quo;* there would have been nothing for the jury on that point. It seems to us to be error, to leave the jury to grope their way in the dark, without any instruction save "that the call in the deed from William to Jesse Reeves which called for Jesse Reeves' own land, meant the land of Jesse Reeves lying north of the land in dispute." It would have been more satisfactory, had the case been accompanied by a diagram, and copies of the deeds, to enable this Court to see that the point was presented. Assuming that this part of the case turned upon the question as to whether the boundary was the line of the one tract or of the other or both; that certainly was a question of law, dependent upon the construction of the deed, which from the confused manner of stating the case, is so hard of solution, that we should have remanded the case for a second trial. (25)

The defendant being entitled to a *venire de novo* on another point, prevents the necessity of remanding it.

Upon the other point, according to our understanding of the facts, we differ with his Honor; although in this particular, likewise, the statement is not as clear and satisfactory as could be desired. It is set out, that Doughton in fencing his fields, on the old Reeves tract, ran the fence across the neck of a peninsula formed by the bend of the river, and thus closed access to the peninsula, except by crossing the river, and to avail himself of the peninsula which was thus closed, as a pasture for his cattle, Doughton fixed a gate in the fence, where it crossed the peninsula. It is also set out, that a portion of the penin-

sula was owned by another person; so Doughton's fence across the neck was partly on his own, and on the land of another, and thus closed access to the land of the latter in the peninsula as well as to the
(26) other part of it, which is the *locus in quo*.

If Doughton made the fence across the neck, for the avowed and unequivocal purpose of taking possession of the peninsula, and using it for a pasture as his own land, it may be such a possession would ripen the title.

But if he made the fence for the purpose of "fencing in" a field on the old tract lying north of the peninsula, the circumstance, that by reason of the river a part of his fence had the additional effect of closing the peninsula, except by crossing the river, would not constitute such a possession as to ripen the title. To have that effect, the possession must be adverse, uninterrupted, open, and unequivocal; so as to expose the party to an action. This is the teste. Suppose a grantee of the state had sued Doughton for making the fence across the neck, and thereby taking possession of the peninsula, he could in this view of the case have said, "I made the fence in order to enclose the field on the old Reeves tract and turned my cattle out in the range through that part of my fence, and the accident that the river happened to run in such a manner as to exclude the cattle of other people, no more makes me a trespasser than if I had turned my cattle into the range at any other place." If this view of the facts be the true one, he did not expose himself to an action.

The matter ought to have been submitted to the jury with this explanation, as to what constitutes such a possession as will ripen color of title. It was error simply to say "If Doughton's fence ran across the whole peninsula, and he used the land below, as a range for his own cattle exclusive of other cattle, etc., his possession would be such as would ripen color of title into a good title."

There is error.

Per curiam.

Venire de novo.

Cited: School Comm. v. Kesler, 66 N.C. 325; *Mobley v. Griffin,* 104 N.C. 115; *McLean v. Smith,* 106 N.C. 178; *Dargan v. R. R.,* 113 N.C. 601; *Boomer v. Gibbs,* 114 N.C. 85; *Hamilton v. Icard,* 114 N.C. 536; *S. v. Suttle,* 115 N.C. 788; *Shaffer v. Gaynor,* 117 N.C. 21; *Hamilton v. Icard,* 117 N.C. 478; *Everett v. Newton,* 118 N.C. 923; *Lewis v. Covington,* 130 N.C. 544; *Christman v. Hilliard,* 167 N.C. 7; *Waldo v. Wil-*

son, 174 N.C. 628; *Patrick v. Ins. Co.,* 176 N.C. 666; *Alexander v. Cedar Works,* 177 N.C. 147; *Moore v. Miller,* 179 N.C. 397; *Geddie v. Williams,* 189 N.C. 336.

(27)

SOLOMON ROBERTS AND OTHERS v. THOMAS ROBERTS AND OTHERS.

An administrator who procures the sale of the land of his intestate for the payment of debts, and has himself appointed commissioner to make the sale, is subject to the rule which prohibits a trustee from purchasing the land, either personally or by an agent.

A trustee can purchase at his own sale only when he does so without fraud, and with the consent of the *cestui que trust* at the time, or by his subsequent sanction.

THIS was a bill filed prior to the adoption of the new Constitution and the Code of Civil Procedure, in the Court of Equity for the County of CALDWELL, for the purpose of having the sale of two tracts of land, sold by the defendant Thomas Roberts, as the administrator of his father, William Roberts, set aside upon the ground of fraud and that he had, through an agent, purchased at his own sale. The defendants filed their answers, to which the plaintiffs put in a replication, and much testimony was taken on both sides. The cause came on for hearing before his Honor, *Mitchell, J.,* at the last Term of the Superior Court for Caldwell County, when the plaintiffs obtained a decree, from which the defendants appealed.

A sufficient statement of the facts of the case will be found in the opinion of the Court.

Malone for the defendants.
Folk for the plaintiffs.

READE, J. We are satisfied that the defendant Thomas Roberts, administrator of William Roberts, contrived to have the lands of the estate sold by himself, as administrator and commissioner, to make the proceeds assets, fraudulently for the purpose of buying the lands himself.

In his petition for the order of sale, he overstated the amount of the debts of the estate by nearly double, and he described the lands so as to conceal from the Court their value. There was really (28) but $47.13 of debts to be paid, and two of the tracts sold for $48.

And there was no need to sell the home tract, which brought $445, to pay a few dollars cost of the order of sale. Two witnesses testify that he procured the home tract to be bid off for himself, and he has been in the enjoyment of the rents and profits ever since the sale, except, probably, for one year. The evidence connecting W. F. Deal, the purchaser, with the fraud of Thomas Roberts, is satisfactory. If he had contemplated buying a tract of land for his own use, it would probably have been the subject of conversation with his family, but it evidently took them by surprise; for, when he went home from the sale his wife asked him, who bought the land? He answered that he "bid it off." "What did you do it for?" she said. He answered, "Thomas Roberts will take it off my hands." And Thomas Roberts has ever since enjoyed the rents and profits. We cannot suppose that Deal bought it as an investment, for it sold for more than its worth. And it does not appear that he had any other inducement to buy, as, "to keep off bad neighbors." Whereas it does appear that Thomas Roberts had such inducement.

The authorities cited in the brief of plaintiff's counsel, fully establish the doctrine, that a trustee cannot buy at his own sale, either by himself, or by another. Indeed it is common learning. There are some qualifications of the general rule as, where he does so without fraud and with the consent of the *cestui que trust,* or their subsequent sanction. *Pitt v. Petway,* 34 N.C. 69. There is nothing in this case to take it out of the general rule. And, therefore, the plaintiffs have the right to treat the sale as a nullity, and to have a re-sale.

There is no error in the interlocutory order. Let this be certified.

Per curiam.

Decree affirmed.

Cited: Froneberger v. Lewis, 79 N.C. 432; *Stradley v. King,* 84 N.C. 638; *Tayloe v. Tayloe,* 108 N.C. 73.

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(29)

THOMAS H. FOSTER v. NICHOLAS W. WOODFIN AND OTHERS.

Whenever, by any accident, there has been an omission by the proper officer to record any proceeding of a Court of record, the Court has the power, and it is its duty on the application of any person interested, to have such proceeding recorded as of its proper date; and such amendment should be made, even though the rights of third persons may be affected thereby.

FOSTER *v.* WOODFIN.

An amendment supplying an omission in the record of a Court differs materially from one made for the purpose of putting into a process, pleading or return, something which was not in it originally; as an amendment for that purpose will not be allowed to the injury of third persons.

Upon a motion to amend a record of a Court, it is not regular or convenient, collaterally to consider what the effect of the amendment will be, or whether the Court had the right to do what it is alleged that it did. These questions must be decided in some proceeding directly for that purpose.

A motion to amend the records of the County Courts which existed prior to the adoption of the present Constitution and the Code of Civil Procedure, in any matter relating to the appointment of an administrator, or qualification of an executor must now be made to the Judge of Probate, and not to the Superior Court of the County.

THIS was a motion to amend the record of the County Court of BUNCOMBE, at its January Term, 1860, made before *Henry, J.*, at the last Spring Term of the Superior Court of that County. The facts are sufficiently stated in the opinion of this Court. His Honor allowed the amendment, and the defendants appealed.

Battle & Sons for the defendants.
Phillips & Merrimon for the plaintiff.

RODMAN, J. This was a motion to amend the record of the County Court of Buncombe, of January Term, 1860. The plaintiff says that Thomas Foster died in that county in December, 1858, leaving a will, in which he appointed one Alexander, and the plaintiff, his (30) executors. The will was proved at January Term, 1859, and Alexander qualified as executor. At the death of the testator, the plaintiff was, and continually since, has been a resident of Tennessee. So far there appears to be no dispute about the facts. The plaintiff further says that at January Term, 1860, he entered into a bond as was supposed to be required by the Revised Code, ch. 46, sec. 12, which was approved and accepted by the Court, and that he then, with the sanction of the Court, qualified as executor, but the clerk of the Court omitted to record those proceedings. The amendment he desires is to put them on the record now as of the Term when they were had. The motion was made before the Judge of the Superior Court for that county, and is brought to this Court by an appeal from his decision.

Whenever, by any accident, there has been an omission by the proper officer to record any proceeding of a Court of record, the Court has the power, and it is its duty on the application of any person interested, to have such proceeding recorded as of its proper date.

Philipse v. Higdon, 44 N.C. 380. Such an amendment differs materially from one for the purpose of putting into a process, pleading, or return, something which was not in it originally. An amendment for that purpose will not, in general, be allowed where the rights of third persons will be affected. But no subsequent dealings by third parties can impair the right of a party to have the record of a past proceeding made to speak the truth as to what was done. A Court cannot admit that any one can acquire a legal right to perpetuate a falsehood on its records, whether it be one of assertion, or of omission only. A material fact may always be proved. The proceedings of a Court not of record may be proved as other similar facts are. The proceedings of Courts of record can be proved by their records only; this is by reason of the vagueness and uncertainty of parol proof as to such matters, and of the
(31) facility which the record affords of proving them with certainty. Public policy and convenience require the rule, and a necessary consequence from it is the absolute and undeniable presumption that the record speaks the truth. This presumption, however, would be inconsistent with justice, if it were held to mean anything more than that the record may not be impeached collaterally. It may always be impeached by a direct proceeding for its amendment. We do not think therefore, that the amendment should be refused in a case like this, on the ground that the rights of third persons will be affected. We do not wish to be understood, however, as denying that the parties to the record by their dealings with third persons may not have made themselves subject to estoppels or other equities which would prevent their taking any advantage from the amendment.

We do not think it regular or convenient upon this motion, collaterally to consider what the effect of the amendment will be, or whether the county Court had the right to do what it is alleged it did. These questions must be decided in some proceeding directly for that purpose. We conceive that in the proper Court the only question on the hearing of this motion will be, whether in fact the alleged proceeding was had in the county Court of Buncombe.

It is objected to the motion, that it should have been made in the Probate Court of Buncombe. On this point, we concur with the defendants. The clerk of the Superior Court is made by the Constitution and C.C.P., a Probate Judge. Section 142, C.C.P., requires the clerks to receive from the clerks of the late county Courts the records of their offices; but they receive and keep that part of the records which relates to matters now within their jurisdictions as probate judge, in that character. One Court cannot alter the records of another; as for example, the Superior Court, the records of the Probate Court; except in the

exercise of its appellate and supervisary power; and in fact not then, although it may compel the inferior Court to make the alteration. An appeal from the Probate Judge, to the Superior Court, of course carries up the whole matter. (32)

The motion is dismissed. Let this opinion be certified.

Per curiam.

Motion dismissed.

Cited: Forsyth v. Blackburn, 68 N.C. 408; *Walton v. Pearson,* 85 N.C. 49; *McDowell v. McDowell,* 92 N.C. 230; *Mobley v. Watts,* 98 N.C. 286; *Dallago v. R. R.,* 165 N.C. 272; *R. R. v. Reid,* 187 N.C. 327; *Oliver v. Hwy. Comm.,* 194 N.C. 384; *S. v. Norris,* 206 N.C. 195; *S. v. Tola,* 222 N.C. 409; *S. v. Cannon,* 244 N.C. 403.

SAMUEL T. CARROW v. JOHN Q. ADAMS.

Where no replication is filed to an answer in equity, and the cause is set down to be heard upon bill and answer, the bill must be dismissed when the allegations in it are not admitted in the answer.

Where an equity is disclosed in an answer different from that which is alleged in the bill, the plaintiff ought to have his bill amended to meet such state of facts and to obtain the appropriate relief.

THIS was a bill filed under the old practice to which the defendant filed his answer, and the cause was set for hearing upon the bill and answer without any replication having been taken. Upon the cause coming on to be heard before his Honor, Judge *Jones,* at the last term of the Superior Court for BEAUFORT County, the plaintiff obtained a decree and the defendant appealed.

The facts of the case are sufficiently stated and explained in the opinion of the Court.

Battle & Sons for the defendant.
Warren & Carter for the plaintiff.

DICK, J. The allegations in complainants' bill are not supported by proofs, or admitted in the answer.

The complainant alleges that the note which he seeks to have cancelled was given without any consideration, and was intended

(33) to benefit the defendant by enabling him to secure certain cotton from seizure, etc.

The answer alleges that the defendant sold said cotton to complainant and the said note was given in part satisfaction for the purchase money; and the non-delivery of the cotton was caused by the default of complainant, etc.

The complainant, by replying to the answer, could have introduced proofs in support of his allegations. As no replication was taken, the defendant had no opportunity of verifying his allegations and according to the rules of equity pleading, his answer must be taken as true at the hearing of the cause.

If any equity different from that alleged in the bill was disclosed in the answer, the complainant ought to have amended his bill to meet such state of facts, and to obtain the appropriate relief.

There is error in the ruling of his Honor in the Court below.

Per curiam.

Bill dismissed.

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(34)

GEORGE W. SWEPSON AND RUFUS Y. McADEN v. JOSHUA ROUSE AND WIFE.

A vendor, who has contracted to sell his land, is in equity a trustee for the purchaser, but if he has not received the whole of the purchase money, he is not a mere naked trustee, and upon becoming a bankrupt, his interest in the land will, by proper assignments, pass to the assignee in bankruptcy under the 14th section of the Bankrupt Act.

To a bill for a specific performance of a contract to convey land, the assignee of the vendor, who has not received the whole of the purchase money and who has become bankrupt, must be made a party.

Where a defendant to a bill for the specific performance of a contract to convey land, alleges and relies upon his certificate of discharge as a bankrupt, the fact of a proper assignment of his estate to his assignee will be presumed though it is not specifically alleged, where there is no allegation or proof to the contrary.

When a bill is filed for the specific performance of a contract to convey a tract of land, and the defendant alleges that the tract consists of two parts, of which he admits that he is the owner of one, but avers that the other belongs to his wife, and sets up a defence, which if good, applies to the whole contract, it is erroneous to make a decree in favor of the plaintiff as to the part of which the defendant admits he is the owner, and to reserve the question as to the other part.

SWEPSON *v.* ROUSE.

THIS was a bill filed by the plaintiffs in the Court of Equity for the County of ALAMANCE in 1864 against the defendants, Joshua Rouse and his wife, for the specific performance of the following contract in writing:

"Know all men by these presents that I acknowledge myself indebted to George W. Swepson and Rufus Y. McAden, of Alamance County, State of North Carolina, in the sum of thirty thousand dollars, for the payment of which I bind my heirs and assigns. The conditions of the above obligation are such that whereas I have this day sold to G. W. Swepson and R. Y. McAden the tract of land on which I live, containing five hundred and fifty acres, more or less, adjoining the lands of Wm. L. Phillips, the heirs of Lewis Whitfield and others, for which land the said Swepson and McAden have this day paid me seven thousand five hundred dollars, and are to pay in Confed- (35) erate Treasury notes seven thousand five hundred dollars, when the conditions of this bond are complied with, which conditions are that as soon as possible I am to execute to them jointly with my wife a lawful title in fee simple, with all necessary forms of deed, etc., to the land above described with the appurtenances thereto belonging, then this obligation to be void, otherwise to remain in full force and effect. This 13th August, 1863.

JOSHUA ROUSE, [SEAL."]

TESTE: F. W. FIELDS.

At the Spring Term, 1867, the defendant, Joshua Rouse, filed a separate answer, in which he admitted that he had executed the obligation set forth in the bill, but alleged that it had been obtained from him by imposition and false representations of one of the plaintiffs. He stated in one part of his answer that he owned only one-half of the tract of land in controversy, the other half belonging to his wife; and in another part, he said that a road passed through the tract of land, and that all on one side of the road belonged to him and the other to his wife, without stating that the parts were of equal value, or in what proportion the value of one stood to the other. He stated further that his wife refused to join in a conveyance of her part of the land.

After the adoption of the new constitution and the consequent change in the judiciary system of the State, the case was transferred to the Superior Court of the County of Alamance, and at the Spring Term, 1869, the defendant filed a supplemental answer in which he alleged that he had become a bankrupt, and had obtained a certificate of discharge in bankruptcy, a copy of which he filed as an exhibit. No alle-

gation was made that a deed of assignment had been executed to his assignee.

At the Fall Term, 1870, the cause came on to be heard before his Honor *Tourgee, J.*, when a decree was made "that the defendant,
(36) Joshua Rouse, as soon as practicable after notice of this decree, shall execute and deliver to the plaintiffs, a proper title conveying to them jointly in fee simple, the one-half of said tract of land, with covenants of warranty of title and quiet enjoyment, of which he admits in his answer that he is the owner in fee simple, under penalty of a contempt of this Court. And of the other moiety of the said tract of land of which defendant denies title in himself and alleges the same to be in his wife (as to which fact no proof has been offered in the cause,) the Court doth order that the clerk of this Court, after notice to the parties, make enquiry and report to this Court at its next ensuing term, in whom the title of the said land may be, to the end that further directions may be moved for in this cause."

From this decree the defendants prayed for and obtained an appeal to the Supreme Court.

Howard and Dillard & Gilmer for the defendants.
W. A. Graham for the plaintiff.

RODMAN, J. The defendant, Joshua Rouse, by his supplemental answer alleges his discharge as a bankrupt subsequent to the commencement of this suit. Can the Court proceed to hear and decide the case in the absence of the assignee? It is a general rule in equity that all persons having an interest in the subject of the suit should be parties to it. Has not the assignee an interest in this case which must necessarily be passed on by any decree? Against the view that he has such an interest it is said that the Bankrupt Act (S. 14,) provides that where the bankrupt is a trustee his estate shall not pass to the assignee; and that in a Court of equity a vendor who has contracted to convey land is a trustee for the vendee. Admitting the latter part of the proposition as generally true, we think that the trustee meant in that section of the Act, can only be a mere naked trustee, who holds
(37) the legal title but has no beneficial interest in the subject of the trust. It seems to us that, upon the plaintiff's bill and assuming his rights to be such as he conceives them, Rouse is not a mere naked trustee. Assuming that he owned the entire tract which he agreed to convey; yet he could not be required to complete his contract except on the payment by the plaintiff's of the unpaid residue of the purchase money, (whatever the proper amount might be—a question not perti-

nent at present.) To secure this residue Rouse had a lien on the land, which was an assignable interest upon his bankruptcy, and necessarily passed to his assignee. If the Court were of opinion with the plaintiff on the merits of the case, and this residue were paid into Court, it would be necessary to make some disposition of it, and to whom could the Court decree that it should be paid? not to the bankrupt of course, and not to the assignee, because he is no party, and may have sold the interest. Assuming the plaintiff's right to the principal relief which he seeks, it seems to us that it is impossible for the Court to decide the matters in controversy in the absence of the assignee. The amount of the unpaid residue of the purchase money is a matter in controversy, and we could not bind the assignee by any decree made in his absence.

But it is said that the plaintiff does not at present claim a conveyance of the whole land covered by the contract, but only of that part to which Rouse by his answer admits that he had a title. We think in this view the same reasons for the presence of the assignee would be applicable. The defendant in his answer says that the land which he agreed to convey as a single tract, was in fact two tracts, one of which belonged to himself, and the other to his wife. It is true, that in one part of his answer, he speaks of his wife's owning half the land; but in another part of it he distinctly states, that a road runs through the land, and that he owned the portion on one side of the road and she the portion on the other side. It nowhere appears that these (38) two portions are of equal value; and it is certainly possible that when upon the final hearing of the case, it becomes necessary to adjust the compensation or deduction from the agreed price which Rouse is to make by reason of his inability to convey a part of the land agreed to be conveyed; it may be found that the plaintiff ought to pay Rouse something beyond the payment which he actually made, and this sum would go to the assignee.

2. It is also said that the Bankrupt act requires a written assignment from the Register to the assignee in order to pass the bankrupt title, and that no such assignment is alleged in the supplemental plea. As this assignment is required to be made in all cases as a matter of course, we think the maxim that in Courts of general jurisdiction "*omnia presumuntur rite esse acta,*" will apply; and that at least in the absence of any allegation or proof to the contrary, and in the present stage of the case, we must assume such an assignment to have been made.

For these reasons the case would be sent back to the Court below in order that the plaintiff by a supplemental bill might make the proper parties.

But besides that, and apart also from what may be considered the main questions, we think there are fatal objections to the decree. The Judge assumes (for the purpose of the decree) the fact alleged in the answer, that the defendant owned a part of the land, which he seems also to consider to be an exact moiety in value, (for which supposition we can not find any ground in the pleadings) and undertakes to decree a conveyance of this moiety, leaving the question as to the plaintiff's right to a conveyance of the other moiety to be afterwards passed on. We think this method of dealing with a case by piece-meal, irregular and inconvenient. It is true, that when in any Court a defendant admits his liability to a part of the demand which may be severed from
(39) the rest, as that he owes a certain sum of money, it is not unusual for the Court to order, that he pay the admitted sum into Court, and to proceed afterwards to deal with the disputed part of the plaintiff's demand. We suppose it was upon that idea that the Judge acted in this case. But the defendant disputes every part of the plaintiff's demand, he does not admit the plaintiff's right to the relief asked for, as to any part of the land; and he puts his denial upon grounds which if applicable to any part are equally applicable to the whole. The contract charged is to convey land which is regarded as a single piece, to every part of which the defendant had or claimed the same right; and it seems to us the plaintiff's right to the relief claimed (so far as it relates to a conveyance of the defendant's estate) is as good or as bad as to the whole as to any part; and the defendant's right to resist the relief is the same as to every part of the land. The decree is necessarily wrong as giving to the plaintiff either more or less than he was entitled to. If the plaintiff is entitled to specific performance by a conveyance from the defendant, it is of his whole estate in the lands described in the contract. The Court would afterwards inquire to what portion, if any, his title was defective; but that would be only for the purpose of ascertaining the value of that portion, and making a compensation to the plaintiff by a deduction from the purchase money. The injury to the defendant is, that by this mode of proceeding he is deprived of his lien on the part which he is directed to convey, for the unpaid portion of the purchase money, and left for his security, only to that part which may be of comparatively little value, and to which the decree assumes that his title is, or may be, defective. For these reasons we think the decree below must be reversed.

In considering the case as a whole, it will be seen that several important questions are presented. Among them there is one upon
(40) which we believe there is in our sister States some contrariety of decision. 1st. Whether considering the peculiar but well settl-

ed principles on which a Court of Equity acts in decreeing a specific performance, it will do so, where Confederate money was the consideration on an executory contract to convey land, even when there has been a partial payment. 2d. Whether it will do so, when there is any evidence tending to prove that the contract was conditional, e. g. as alleged in this case, upon the condition of the wife's consenting to join: although such condition does not appear in the contract. There may be others to which it is unnecessary to allude. Should we undertake to pass on these questions in the present state of the case, it might perhaps be a surprise on the parties, and we therefore forbear.

Judgment below reversed, and the case is sent back to the Superior Court of Alamance, for such further action as may be just.

Per curiam.

Judgment reversed.

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(41)

JANE D. HOUSTON TO THE USE OF J. W. WORDSWORTH v. JOHN M. POTTS.

In an action of debt upon a bond for a certain sum of money, to which the defendant has plead the general issue, usury and fraud, if the jury render a verdict, which is received by the clerk in the absence of the Court, that they find all the issues in favor of the plaintiff, and assess his damages at (the sum mentioned in the bond) principal money without interest, the only redress which the judge can give the plaintiff, is to set aside the verdict and grant a new trial. He cannot render a judgment upon such verdict for the principal of the bond and the lawful interest thereon.

If a jury persist, in the presence of the Court, in rendering an irregular and improper verdict, the judge may set it aside and fine the jury for contumacy.

THIS was an action of debt under the former system upon a bond in the following words:

"PLEASANT VALLEY, S. C.

$900. One day after date, we or either of us promise to pay Jane D. Houston or order nine hundred dollars for value received. As witness our hands and seals.

R. C. POTTS, [SEAL.]
J. M. POTTS, [SEAL."]

The defendants plead general issue, usury and fraud.

On the trial at the Fall Term, 1870, of the Superior Court for MECKLENBURG County before his Honor Judge *Logan*, J. M. Potts, R. C. Potts and Jane D. Houston testified as upon the trial of the same cause, which is reported in 64 N.C. Rep. 33. The jury returned the following verdict which was received by the clerk in the absence of the Judge: "Find all issues in favor of the plaintiff and assess his damages at $900, principal money without interest." The plaintiff's counsel moved that as all the issues had been found in favor of the plaintiff, the Court direct judgment to be entered accordingly for the principal and interest of the bond sued on, which motion was refused. The counsel for plaintiff then moved the Court to set aside the verdict as
(42) insensible and not responsive to the issues and to grant a new trial, which motion being likewise refused, and a judgment entered upon the verdict for the principal money without interest, the plaintiff appealed.

Vance & Dowd and J. H. Wilson for the plaintiff.
Guion and R. Barringer for the defendant.

PEARSON, C.J. The usury act, Rev. Code, ch. 114, provides, no person shall take more than six per cent. by way of interest.

The Court act, Rev. Code, ch. 31, sec. 90 and 91, provides, all sums of money due by contract shall bear interest, etc., and when a jury shall render a verdict, they shall distinguish the principal from the interest, and the principal sum shall bear interest until paid. When a judgment is taken by default according to specialty or note filed the clerk shall ascertain the interest due by law, etc.

By force of these statutes, it has been acted upon as law, by the judges, the members of the bar and the people—that six per cent. is the regular rate of interest, in the absence of any stipulation, for a lower rate. So, we hold the law to be, that upon a money contract in this state, the plaintiff is entitled to have six per cent. by way of interest, to be ascertained either by the jury or by the clerk, as a mere matter of calculation.

It is very unusual, except in capital cases, for the Judge to direct the clerk to take the verdict, in his absence from the bench.

This, however is, upon the supposition, that the verdict is rendered in the usual form.

Whenever a jury seeks to depart from it, the clerk is expected to refuse to accept such a verdict, and to inform his Honor, that his presence in Court is called for.

Had the clerk pursued this course in our case, the complication growing out of the very singular verdict in this case, would (43) have been avoided, for it would have been the duty of his Honor, to tell the jury that they had no right to attempt to force the plaintiff into a compromise; and it was their duty after finding all of the issues in favor of the plaintiff to assess damage by way of interest at the rate of seven per cent. provided they were satisfied by the evidence that the contract was made in the State of South Carolina, and that the legal rate of interest in that State was seven per cent., otherwise it was their duty to assess damages by way of interest at the rate of six per cent., the rate of interest in North Carolina.

If the jury had persisted in rendering a different verdict, it would have become his duty, to set aside the verdict and fine the jury for contumacy.

As his Honor was not present when the verdict was rendered, so as to have an opportunity to prevent the irregularity—the only course open for him, was to set the verdict aside, and order a new trial, and this not as a matter of discretion on his part, but as a matter of right, on the part of the plaintiff.

There is error, in refusing to allow the motion to set aside the verdict.

This will be certified, to the end that proper action may be had in the Court below, in order to prevent juries from interfering with, the due course of law.

Per curiam.

Judgment reversed.

Cited: Willoughby v. Threadgill, 72 N.C. 439; *Petty v. Rousseau,* 94 N.C. 363; *S. v. Austin,* 108 N.C. 786; *Mitchell v. Mitchell,* 122 N.C. 334; *S. v. Bazemore,* 193 N.C. 339.

(44)

J. B. ALLISON v. D. G. BRYSON.

Referees appointed by an order of Court need not have a formal or written notice of their appointment. It is sufficient that they are appointed, meet and make an award.

A reference may be made, by consent of the parties, to persons who are interested in the subject matter of the suit. *Quere* whether it would make any difference if the parties or either of them were ignorant of the fact of interest in the referees?

ALLISON *v.* BRYSON.

Referees are not obliged to report the evidence upon which their award is founded.

An exception to an award that it is contrary to law is too indefinite. In the absence of fraud, or the mistake of law, where they intend to decide according to law and mistake it, the arbitrators are a law unto themselves.

THIS was an action of debt, commenced prior to the adoption of the Code of Civil Procedure, which after issue joined upon the defendant's pleas, was, by an order of Court, referred in the following terms: "This cause, together with all other matters in difference between the parties, is referred to J. Keener and J. Ramsay Dills, with leave to choose an umpire and their award, or that of a majority of them, to be a rule of Court."

At the Spring Term, 1870, of JACKSON Superior Court, before his Honor, *Cannon, J.*, the referees returned an award in favor of the defendant, to which the plaintiff filed the following exceptions:

1st. Because the award was made by the referees when they had not been notified of the order appointing them, and were ignorant of the terms of the reference.

2nd. Because the referees took into consideration items of account on both sides, which were foreign to the object of the reference in this case.

3rd. Because J. Keener, one of the referees at the time the case was heard before them, was a party interested in the settlement of the matter in difference between the parties, and that the matter
(45) ought not to have been referred to him.

4th. Because the referees have not reported to the Court the evidence on which their award is founded.

5th. Because the award is contrary to law.

His Honor overruled the exceptions, confirmed the award and gave a judgment for the defendant, from which the plaintiff appealed.

Phillips & Merrimon for the plaintiff.
No counsel contra.

READE, J. The first exception is overruled. There was no necessity that there should have been any formal or written notice to the referees of their appointment. It is sufficient that they were appointed and met and had the parties before them and made their award.

2. The second exception is overruled. There are no facts found to sustain it. If the facts had been found to be as stated in the exception,

that the referees passed upon matters not referred to them, the exception would have been sustained.

3. The third exception is overruled. The fact is not found to be true as alleged, that one of the referees was interested in the subject matter of the reference; but if it were true it would make no difference; because the reference was by the parties, and the parties may refer their disputes to interested persons if they choose to do so. It is not alleged that the reference was made in ignorance of that fact, if indeed that would make any difference.

4. The fourth exception is overruled. Referees are not obliged to report the evidence upon which their award is founded.

5. The fifth exception is so vague that we are unable to appreciate it; it is not specified in what the award is contrary to law. In the absence of fraud or the mistake of law where they intend to decide
(46) the law and miss it, arbitrators are a law unto themselves. *Jones v. Frazier,* 1 *Hawks,* 379.

No error.

Per curiam.

Judgment affirmed.

Cited: Smith v. Kron, 109 N.C. 104; *Herndon v. Ins. Co.,* 110 N.C. 283.

WILLIAM A. LEMLY v. JOHN T. ATWOOD AND OTHERS.

If a guardian, or his personal representative after his death, for his own benefit dispose of a bond which was on its face payable to him as guardian, the ward may follow the bond or its proceeds in the hands of the assignee or holder. And in such case, the face of the bond will be of itself express notice to the assignee or holder of the breach of trust by the guardian, or by his executor or administrator.

The cases of *Exum v. Bowden,* 4 Ire., Eq. 281, cited and approved.

THE plaintiff obtained a judgment against the defendants, John T. Atwood, Charles Atwood and Mary Atwood, upon which he had an execution issued. He then instituted supplementary proceedings against the defendants Robert Gray and H. A. Holder to subject them to the payment of the judgment as being debtors of the said

John T. Atwood under the following circumstances: One Jesse W. Atwood was the guardian of the said John T. Atwood, while he was a minor, and as such took from the defendants, Gray and Holder, a bond in these words: "One day after date, we, Robert Gray and H. A. Holder, jointly promise to pay J. W. Atwood, guardian of John T. Atwood, the sum of two hundred dollars, value received, witness our hands and seals, Oct. 10th, 1859.

R. GRAY, (SEAL.)
H. A. HOLDER, (SEAL.)

The said Jesse W. Atwood died and one C. L. Banner administered upon his estate, and having as he alleged accounted with the estate for the amount of the principal and interest of the said bond, he appropriated it to the payment of his own individual debt to one Solo-
(47) mon Mickey, with the assent and concurrence of the said Gray and Holder. These facts being found by his Honor, *Judge Cloud,* at Chambers, in the County of FORSYTHE, on the 28th day of May, 1870, he gave judgment against the said Gray and Holder, ordering them to pay the plaintiff the amount of the principal and interest of the said bond, and also the costs and disbursements of the plaintiff in the supplementary proceedings, and from this judgment the said defendants, Gray and Holder, appealed.

No counsel for the defendants.
Masten and T. J. Wilson for the plaintiff.

READE, J. The only question is, whether the assignee of a trust fund—in this case a bond—with notice of its character, who takes it for purposes other than the trust, is liable to the *cestui que trust* who suffers loss. It is settled that he is. *Exum v. Bowden,* 4, 39 N. C. 281.

Jesse Atwood, guardian of John T. Atwood, held a bond payable to him as guardian on its face. Jesse Atwood died and C. L. Banner administered on his estate, accounted to the estate for the bond, took it as his own, and assigned it to the defendant, in an individual transaction with the defendant; and John T. Atwood, the ward, by reason of the insolvency of the estate of his guardian, lost the amount of the bond. It is said that Banner had the right in equity to assign the bond, because he accounted to Jesse Atwood's estate for it, and, therefore, committed no fraud. But then the bond was not Jesse Atwood's and both Banner and the defendant had expressed notice, as the bond, upon its face, was payable to Jesse Atwood *as guardian.* The ward hav-

ing suffered loss had the right to follow the fund in the hands of the defendants.

No error.

Per curiam.

Judgment affirmed.

Cited: Ruffin v. Harrison, 90 N.C. 571; *Dancy v. Duncan,* 96 N.C. 117; *Lathem v. Wilcox,* 99 N.C. 373; *Lavecchia v. Land Bank,* 215 N.C. 74; *Jarrett v. Green,* 230 N.C. 107.

(48)

SAMUEL G. H. JONES, ADMINISTRATOR, v. E. A. GUPTON.

Under the C. C. P., Sec. 75 and 555 a Sheriff is not required to *execute* process until his fees are paid or tendered by the person at whose instance the service is to be rendered; but this does not excuse him for a failure to make a return of the process. A writ of summons is a mandate of the Court and must be obeyed by its officer, and if he has any valid excuse for not executing the writ, he must state it in his return.

The duties and liabilities of a Sheriff in relation to the execution of process are nearly the same under the C. C. P. as under the old system, (see C. C. P. Sec. 354) but the mode of procedure for enforcing a judgment *nisi* against him is changed from a *scire facias* to a civil action, as prescribed in C. C. P. Sec. 362, and the summons must be in the same Court as the judgment, and must be returned to the regular term thereof.

THIS was a civil action tried at the Fall Term, 1870, of the Superior Court of CALDWELL County, before his Honor *Judge Mitchell.* For the plaintiff it was testified by the Clerk of the Court that he placed in the mail at Lenoir, enclosed in a stamped envelope, the summons in question directed to the Sheriff of Franklin County, and that he had no other evidence of its having come to the hands of the defendant, who was the Sheriff of that County. For the defendant, the Clerk proved that he did not send the fees for executing the process to the Sheriff, and that he did not know that any fees were paid or tendered to him. The defendant's counsel asked the Court to charge the jury that the defendant, as Sheriff, was not bound to execute the summons in question unless the fees were paid or tendered him. His Honor told the jury that the failure to pay the fees to the defendant might excuse him for not serving the summons, but would not excuse the failure to return the process. There was a verdict and judgment for the plaintiff, and the defendant appealed.

Malone for the defendant.
Folk for the plaintiff.

DICK, J. By the common law it was the duty of a Sheriff to
(49) do execution of all the kings' writs without any reward.

The fees and emoluments of a Sheriff, and the manner in which they are to be paid, are regulated by statute, but many of the rules which define his powers, duties and liabilities are derived from the common law.

Before the adoption of the C. C. P., a Sheriff as an officer of the law was bound to execute the process of the Courts according to the exigency thereof, and make due return, and he could not refuse to execute a writ until his fees were paid. 1 Salk, 333, Strange 814.

Under the C. C. P., Sec. 75, 555, he is not required to *execute* process until his fees are paid or tendered by the person at whose instance the service is to be rendered; but this does not excuse him for a failure to make a return of process. A writ of summons is a mandate of the Court and must be obeyed by its officer, and if he has any valid excuse for not executing the writ he must state such matter of excuse in his return. Watson on Sheriffs. 73.

The duties and liabilities of a Sheriff in relation to the execution of process are nearly the same under the C. C. P. as under the old system; C. C. P. 354; but the mode of procedure for enforcing a judgment *nisi* is changed from a *scire facias* to a civil action. C.C.P. Sec. 362.

When this point was before this Court in the case of *Thompson v. Berry,* 64 N.C. 79, the line of distinction between civil actions and special proceedings was not clearly defined, as was done afterwards in the case of *Tate v. Powe,* 64 N.C. 644.

A *scire facias* is a writ founded upon some matter of record. In general it is a judicial writ issuing out of the Court where the record is made; and as the defendant may plead thereto, it is considered
(50) in law as an action and in the nature of a new original; 2 Sand p. 6, note 1, p. 71, note 4, Tidd 1090. There are many forms of this writ found in the Register of original writs. 8 Bac. Ab. 598.

As the record of the judgment *nisi* was made in term time by the Judge—the process to make the judgment absolute ought to be returned before the same jurisdiction. In the present case, if a *sci. fa.* could be used, it would be in the nature of an original writ. Where it was used to revive a final judgment it was only a continuation of the original action and was returnable into the Court where such action was pending. In this case the action was properly brought to the Court in term as it comes within the line marked out in *Tate v. Powe supra.*

The evidence shows that the process was delivered to the defendant in due time, but without his lawful fees, and there was no service or return of the writ.

The instructions of his Honor were correct in law, and the judgment must be affirmed.

Per curiam.

Judgment affirmed.

Cited: McDowell v. Asbury, 66 N.C. 449; *Johnson v. Kennedy,* 70 N.C. 436.

(51)

E. PAYSON HALL AND WIFE AMANDA v. BURTON CRAIGE AND JOSEPH W. HALL.

Under the C. C. P., Sections 244 and 245, a compulsory reference cannot be ordered by the Court in a suit on a judgment confessed by the defendants as executors before the late civil war, where the only matters of defense are payments made by them in confederate currency during the war, and alleged counter claims for notes due from the plaintiffs to them as executors. Such a case does not require "the examination of a long account on either side," nor is the "taking of an account necessary for the information of the Court."

Payments made on a debt contracted before the late civil war, in confederate currency during the war, are to be taken according to their face values. Having been accepted by the creditor, they amount to a discharge to the extent of their nominal value, notwithstanding the fact that they were made in depreciated currency.

A judgment confessed by executors will bind them in their individual capacity, though they style themselves as executors in making such confession.

THIS was a civil action upon a judgment confessed by the defendants as executors of one Solomon Hall upon the compromise of a suit in which the will of the testator was caveated by the plaintiffs. By the terms of the compromise the will was admitted to probate, and upon the confession of the judgment, it was agreed that the amount of it ($13,000) should not bear interest for twelve months, and that execution should be stayed for two years. The judgment was confessed before the commencement of the late civil war, to-wit, in June, 1860, and the pleadings showed several payments during the year 1862, and alleged counter claims about the same period. When

the case was called for trial at the Fall Term, 1870, of ROWAN Superior Court before his Honor *Judge Henry,* the defendants' counsel moved the Court for an order of reference, suggesting that a large number of payments had been made on the judgment, and that much time
(52) could be saved by an ascertainment of said payments, and also a number of counter claims, the value of which was to be ascertained, and also an account of the execution by the defendants of the provisions of the will of the testator. The motion was resisted by the counsel for the plaintiffs upon the ground that they did not seek to charge the defendants *en autre davit,* as executors, but personally. His Honor granted the motion and appointed John T. Henderson, Esq., as referee. The plaintiffs' counsel thereupon moved to strike out of the answer those parts of it, which purported to set up a defence for the defendants as executors, as being irrelevant and impertinent. His Honor declined to grant the motion, saying that it might be renewed when the report of the referee was filed. The plaintiffs appealed from the order granting the motion of the defendants, as well as from that which refused their own.

Boyden & Bailey for the plaintiffs.
Blackmer & McCorkle for the defendants.

SETTLE, J. There was error in the ruling of his Honor, appointing a referee. The Code of Civil Procedure, sec. 244, provides that "all or any of the issues in the action, whether of fact or law, or both, may be referred, upon the written consent of the parties;" but a compulsory reference can only be ordered in the cases specified in section 245 of the Code.

The case states that the motion of the defendants for a reference was resisted by the plaintiffs. We are of opinion that this case does not require "the examination of a long account on either side," nor that "the taking of an account is necessary for the information of the Court."

The allegation that a large number of payments have been made on the judgment, which is the subject of this action, is not sufficient to justify a reference.

No question can arise as to the value of the several payments, for according to the decisions of this Court, they are to be taken at
(53) their face values. They have been accepted by the plaintiffs, and amount to a discharge, to the extent of their nominal values, notwithstanding the fact that they may have been made in depreciated

currency. *Brown v. Foust,* 64 N.C. 672. *Boyden v. Bank of Cape Fear, ante,* 13.

Nor does the further allegations, that the defendants have in their hands counter claims against E. Payson Hall, in promissory notes, to them as executors, justify the order of reference. Whether these notes be counter claims or not, is a question of law for the Court, and if they are, and be subject to scale, that matter is regulated by Statute, and the law can be readily administered by the Court.

Therefore this case involves only a simple matter of computation of figures, and has none of the elements of a long account, with charges and discharges, such as is contemplated by the Code, when providing for compulsory references.

His Honor might well have stricken out all those parts of the answer, which insist that the defendants cannot be charged *de bonis propriis,* but only *de bonis testatoris;* for the whole case shows that the judgment upon which this action is brought, was the result of a compromise, by which the will of Solomon Hall was admitted to probate, the defendants confessing the judgment to the plaintiffs, in consideration of the fact that they withdrew their opposition to the establishment of said will. Of course then the judgment does not rest upon anything occurring in the life time of the testator, but it is a debt created by matter occurring wholly in the executor's time. *Kesler v. Hall,* 64 N.C. 60. "It is not possible to conceive how a debt of the testator can be created by matter occurring wholly in the executor's time." *Hailey v. Wheeler,* 49 N.C. 159.

Let it be certified that there was error, to the end that the Superior Court may proceed according to law.

Cited: Sc., 68 N.C. 305; *Norment v. Brown,* 79 N.C. 366; *Kerchner v. McRae,* 80 N.C. 223; *Tyson v. Walston,* 83 N.C. 95; *Duke v. Williams,* 84 N.C. 77; *McLean v. McLean,* 88 N.C. 396; *Banking Co. v. Morehead,* 122 N.C. 323; *Lee v. Thornton,* 176 N.C. 211; *Finance Co. v. Culler,* 236 N.C. 760.

(54)

J. W. COUNCIL, C. M. E. v. JAMES G. RIVERS AND OTHERS.

A civil action to recover the amount of a bond given for the purchase of a tract of land sold by the Clerk and Master under an order of the late Court of Equity, will not be sustained, because the Superior Court has, under the present system, succeeded to the jurisdiction of the Court of

Equity and has plenary power, by an order in the cause, to compel the purchaser to pay such a sum as the Court may, under the circumstances, deem right and proper.

The objection that another action can not be sustained, because the Court can give the desired relief by orders in a cause still pending, though not taken in the Superior Court by demurrer or otherwise, may be taken *ore tenus* in the Supreme Court, or the Court may take it *mero motu* to prevent multiplicity of suits and the accumulation of costs but in such case the action will be dismissed without costs.

THIS was a civil action brought to recover the amount of a bond given in January, 1867, by the defendants to the plaintiff, as Clerk and Master, for the purchase money of a tract of land sold under an order of the Court of Equity, for the County of Watauga. The defendants demurred to the complaint and assigned several grounds therefor, but did not assign for cause that the action was unnecessary because full relief might be given by orders in the suit in which the sale was made and confirmed. The demurrer was overruled at the Fall Term, 1870, of the Superior Court for WATAUGA County, by his Honor *Judge Cloud,* and a judgment given for the plaintiff, from which the defendants appealed.

Folk for the defendants.
Malone for the plaintiff.

PEARSON, C.J. "It is a well settled principle of equity, that when 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." *Mason v. Miles,* 63 N.C. 564.

"These cases assert the power of the Court of Equity upon pe-
(55) tition for the sale of lands for the benefit of infants to compel the purchaser by *orders made in the cause,* to perform specifically his contract, etc. With such plenary power over the subject, we cannot doubt that the Court of Equity for Alamance, can by proper orders to be made in the suit, now pending there, compel the purchaser of the land to pay the full amount of his bids, or such other sum as the Court under the circumstances may deem right and proper. If this be so, the present bill is unnecessary, was improperly filed, and being objected to by demurrer must be dismissed." *Rogers v. Holt,* 62 N.C. 108.

These two cases are decisive of our case. Indeed the opinion in the latter, with a change of names and substituting "action" for "bill in equity," might be filed as the opinion in this case. Here is a judicial sale of land for the benefit of infants. The proceeding is still pending,

the purchase money not being paid, and the order to make title not having passed.

So, the Court where the proceeding is pending has plenary power by an order in the cause to compel the purchaser to pay such a sum as the Court under the circumstances may deem right and proper. It follows, this action must be dismissed.

This objection is not assigned, as one of the grounds of demurrer. But an objection of this nature may be taken *ore tenus* or may be taken by the Court *mero motu* in furtherance of the administration of justice, in order to prevent the Court from being incumbered and the useless accumulation of cost, by having two actions, when the latter is unnecessary and its purpose can be effected better, by a motion in the first. As the objection was not taken in the Court below, the action will be dismissed without allowing cost.

Cited: Mann v. Blount, 65 N.C. 101; *Lord v. Beard,* 79 N.C. 10; *Hoff v. Crafton,* 79 N.C. 595; *Murrill v. Murrill,* 84 N.C. 183; *Grant v. Moore,* 88 N.C. 78; *Hudson v. Coble,* 97 N.C. 263; *Lackey v. Pearson,* 101 N.C. 654; *Holmes v. Davis,* 122 N.C. 269; *In re Propst,* 144 N.C. 566; *Lyman v. Coal Co.,* 183 N.C. 586.

(56)

G. V. HARDEE, ADMINISTRATOR OF J. R. J. DANIEL v. R. E. WILLIAMS AND OTHERS.

If a petition be filed by an administrator for the sale of land for the payment of the debts of the intestate, and the heir-at-law be made a party defendant, and the Court adjudges that the sale is necessary and orders it, the heir-at-law will be estopped to deny the title of his ancestor, whether the order was made after a defense, or by confession or default; but, if the heir die insolvent, so that it becomes necessary to sell his land to pay his debts, then as the estoppel could only operate as a conveyance and would be liable to be impeached by creditors as voluntary and therefore fraudulent as to them, his administrator as representing creditors, has the right to impeach it on the same ground as not binding on him.

A proceeding to restrain the operation of a judgment to sell lands for the payment of the debts of an intestate as an estoppel against the administrator of an heir-at-law whose land is required for the payment of his debts should be commenced in the Superior Court. But if such personal representative had commenced proceedings for the sale of the land in question for the payment of the debts of the heir in the Court of Probate and the administrator of the ancestor plead his judgment as an estoppel, the plaintiff may in that Court reply the fraud which would be produced

by allowing the judgment to operate as an estoppel; and the Court of Probate might thus retain the jurisdiction of the cause which it had originally acquired.

THIS was a special proceeding by an administrator for the purpose of obtaining an order to sell land for the payment of the debts of his intestate, commenced in the Court of Probate for the County of HALIFAX. A question of law having arisen in the course of the proceedings, it was sent to his Honor Judge *Watts*, who having decided in favor of the plaintiff, the defendants appealed to the Supreme Court. The case will be found to be sufficiently stated in the opinion of the Court.

Rogers & Batchelor for the defendants.
Bragg & Strong for the plaintiff.

RODMAN, J. This is an action commenced in the Probate
(57) Court of Halifax, in which the plaintiff, Hardee, as administrator of J. R. J. Daniel, alleging that the personal estate of his intestate is insufficient to pay his debts, and that he was seized at his death of a certain piece of land called the "Rich Neck Farm," demands judgment that the plaintiff be allowed to sell the same to pay the debts.

The heirs-at-law of the intestate either consent to the sale or make no answer.

The defendant, R. E. Williams, answers and pleads as an estoppel, to-wit: that he is administrator of W. A. Daniel, who died sometime in 1866 or 1867, and that, as such administrator, he filed his petition in the County Court of Halifax, returnable to February Term, 1868, in which he set forth that the said W. A. Daniel died seized in fee of the said lands ("Rich Neck Farm"); that his brother, Junius Daniel, was his heir; that Junius died intestate before the filing of the petition; that the above named J. R. J. Daniel, the father both of W. A. Daniel and of Junius Daniel, was the heir of Junius; that the said lands descended upon him as heir; that the personal estate of W. A. Daniel was insolvent; and prayed for process against the said J. R. J. Daniel; and for an order allowing him (R. E. Williams) to sell said lands to pay the debts of his intestate, W. A. Daniel; that the said J. R. J. Daniel admitted in writing service of process in that action; that he made no answer to the petition, but permitted judgment to go by default, and that at February Term, 1868, the said County Court ordered the said Williams, as administrator of W. A. Daniel, to sell

said lands as prayed for; that he accordingly sold the same to one Solomon Williams; afterwards the said J. R. J. Daniel died intestate as above stated; R. E. Williams, administrator, reported the sale to the Court, but the same has not yet been confirmed, and process has issued to bring in the heirs of J. R. J. Daniel.

The facts of the plea were proved, or admitted, and the question is, whether they constitute an estoppel against the plaintiff, (58) the administrator of J. R. J. Daniel, from setting up title to the land. In the view we take of the case, no question is presented as to who was the owner of the land independently of the estoppel.

The general principle that the judgment of a Court of record estops matter which was put in issue and adjudged in the action; (notes to Duchess of Kinston's case, 2 Smith's L. C. 442,) is not denied. But all parties to the action, and their privies afterwards, to deny any the plaintiff contends that he is not in privity with J. R. J. Daniel in respect to his real estate, and therefore he is not estopped from showing that the title to the land was not in W. A. Daniel, as adjudged in the former action, but was in his intestate J. R. J. Daniel.

Privies are divided by Lord Coke into four classes: 1, Privies in estate; 2, Privies in blood; 3, Privies in representation, as executors of the testator; 4, Privies by tenure. 2 Thomas, Coke, 506. "The doctrine of estoppel, however, so far as it applies to persons falling under each of these three denominations, applies to them on one and the same principle, namely: that a party claiming *through* another is estopped by that which estopped that other, respecting the same subject matter." 2 Smith's L. C., 442.

"The term privity denotes mutual or successive relationship to the same rights of property." 1 Greenleaf's Ev. 189.

We consider that an administrator is a privy in representation as to the lands, whenever the circumstances exist which entitle him to file a petition for the sale of them. Rev. Code, chap. 46, sec. 44, etc., authorizes an administrator, upon the insolvency of the personal estate, to file a petition against the heirs, and a sale made by him under the order of the Court passes to the purchaser the estate which had in the meanwhile descended to the heirs. The administrator acts under a statutory power, and the purposes of the statute require that he as well as the heirs should be bound by the acts of the intestate (59) respecting the land, with a single exception only, presently to be noted. That this would be true in the case of a conveyance of the land by the intestate, cannot be doubted, and it seems equally clear in the case of an estoppel which (if the title was not really in the party estopped) has the effect of a conveyance.

In the case of the judgment here pleaded as an estoppel, the ownership of the land by W. A. Daniel and its descent to J. R. J. Daniel, were necessarily alleged in the petition of the plaintiff in that action, (the present defendant Williams,) and were necessarily passed on by the Court.

The judgment it is true was by default; but we cannot conceive that a party is less estopped by a judgment confessed, or which he permits to go by default, than he would be by a judgment rendered on a verdict. All the elements required to constitute an estoppel as between parties and privies seem to exist here, and we think that the administrator of J. R. J. Daniel cannot, so long as the judgment against his intestate stands, collaterally deny or impeach the facts declared by such judgment; subject, however, to what we now proceed to say.

The plaintiff contends, that the estoppel set up by the plea operates in the nature of a conveyance, and that like any other conveyance which had been made by J. R. J. Daniel, it must be open to be impeached by his creditors as being voluntary, and therefore fraudulent as to them; and that by virtue of Rev. Code, ch. 46, sec. 53, it is open to the administrator of J. R. J. Daniel as representing his creditors to impeach it on the same ground. In this we agree with the plaintiff. Of course we do not mean to express any opinion as to whether fraud existed in this case or not; that question is not before us. But while we concede the general principle for which the plaintiff contends, it seems clear to us that he cannot avail himself of it in the present state
(60) of the pleadings. No fraud of the nature now suggested is alleged in the complaint in this action. Perhaps it could not have been in a proceeding before the Probate Judge whose jurisdiction, although it extends to the case made by the plaintiff; probably would not extend to a proceeding begun directly for that object, to restraining the operation of the judgment pleaded, on the ground of fraud. We are inclined to think that any direct proceeding for that purpose must be in the Superior Court. The object of such an action in the Superior Court would not be to set aside or vacate the judgment in the County Court for any irregularity in the rendering of it, but to restrain the parties to it, from using it inequitably against the creditors of J. R. J. Daniel, or against his administrator representing them. We think also, it would have been competent to the plaintiff in the present proceeding, to have replied to the plea of the defendant, Williams, alleging the estoppel; that the judgment pleaded was fraudulent as to the administrator of J. R. J. Daniel. The Probate Judge having jurisdiction of the principal matter, must necessarily have had jurisdiction of any incidental questions necessary to its determination. This principle was consid-

ered settled under our former system of Courts as applicable to Justices of the Peace. *Haines v. Dalton,* 14 N.C. 91. *Garrett v. Shaw,* 25 N.C. 395.

But the plaintiff does not reply the fraud. It is not anywhere alleged, and the defendants have had no opportunity to controvert it. On application to the proper Court the plaintiffs may be allowed to amend their pleadings.

There is error in the judgment below, which is accordingly reversed.

Let this opinion be certified to the Superior Court of Halifax, that it may proceed, etc.

Per curiam.

Judgment reversed.

Cited: German v. Clark, 71 N.C. 421; *Baker v. Carter,* 127 N.C. 94; *Clark v. Homes,* 189 N.C. 711.

(61)

STATE ON THE RELATION OF D. A. JENKINS, PUBLIC TREASURER v. B. A. HOWELL, SHERIFF OF ROBESON COUNTY AND HIS SURITIES.

After a judgment has been given summarily on motion under the act of 1869-'70, ch. 225, sec. 34, against a defaulting Sheriff and his surities, it should not be vacated upon a mere motion founded upon the allegation that the Sheriff's bond did not appear to have been accepted by the County Commissioners and registered by their order, when it did appear to have been registered.

Under the act of 1869-'70, ch. 225, sec. 34, which, in the case of a defaulting Sheriff, authorizes a summary judgment on motion against him without other notice than is given by the delinquency of the officer, the word "him" ought to be construed, in connection with other provisions of the act, to mean "them" so as to authorize the judgment to be taken against the Sheriff and his sureties.

MOTION for a summary judgment against the defendant, Howell, as Sheriff of Robeson County, and the sureties on his official bond made before his Honor, *Watts,* Judge at the Fall Term, 1870, of WAKE Superior Court.

The motion was granted and a judgment rendered which the defendants, at a Special Term of the said Court, held in January, 1871, moved to have set aside and vacated upon the following grounds:

1. Because the act of Assembly, 1869-'70, ch. 225, did not authorize the motion made at Fall Term, 1870, as against the sureties of the Sheriff.

2. Because the report of the Auditor did not set out any such bond as the law required, but only a paper writing purporting to be a bond, which did not, from the said report, appear to have been ever accepted and approved by the County Board of Commissioners, or registered by their order.

His Honor overruled the motion of the defendants, and from this order the defendants appealed.

Rogers & Batchelor for the defendants.
Attorney General, Battle & Sons and Phillips & Merrimon contra.

READE, J. This was a motion to vacate a judgment against
(62) the Sheriff and his sureties, rendered summarily on motion under Act 1869-'70, chap. 225, sec. 34, upon the grounds,

1. "That the bond on which the motion for judgment was founded, did not appear to have been accepted by the County Commissioners, and registered by their order; although it did appear to have been registered." Whatever force would have been due to this fact if it had been taken at the time judgment was moved for, or if it had been supported by an affidavit of merits—as that they did not execute the bond—we think his Honor did right in refusing to vacate the judgment for this cause, on a naked motion.

2. "That the statute, *supra,* does not authorize judgment on motion against the sureties, but only against the Sheriff." The statute provides, that when a Sheriff fails to settle with the Auditor, the Auditor shall furnish the Treasurer a copy of the bond of the Sheriff and his sureties, and the Treasurer shall, on motion, recover judgment against *"him."* We are satisfied that "him" ought to be read them—that the true intent and meaning of the Act is, to authorize a judgment as upon the bond against the Sheriff and his sureties. It is indispensible to the Government that its revenues shall be promptly paid. And the bond of the Sheriff and his sureties is the security to the Government that this shall be done. And a summary remedy, not against the Sheriff alone, for that might be little worth, but upon the bond against the Sheriff and his sureties was intended. It is objected that while the Sheriff has notice of his default, his sureties have not, and that they ought to be notified so that they might pay without cost. The answer

is, that it is their duty to know whether the Sheriff makes default or not, and they slumber at their peril. It is not to be ex- (63)
pected that the Government will be delayed to run down delinquents. "Him," used in the statute instead of "them," is only bad grammar; which does not vitiate.

There is no error.

Per curiam.

Judgment affirmed.

DAVID LEWIS v. DANIEL MCNATT AND ANOTHER.

The crude turpentine which has formed on the body of the tree, and is called "scrape," is personal property, and belongs to the lessee of the trees, who has the right of ingress and egress to take it away after his lease has expired, provided that he does so in a reasonable time, which must be before the sap begins to flow in the subsequent Spring of the year.

Where an action of trespass *vi et armis* was commenced before the adoption of the C. C. P., and tried since that time upon the plea of the general issue, it was held that the defendant, not having availed himself of the right of objecting to the non-joinder of a plaintiff by demurrer or plea under the 95th and 98th sections of the C. C. P., cannot do so under the plea of the general issue.

THIS was an action of trespass, *vi et armis,* commenced in the year 1860, and tried before his Honor, *Judge Russell,* at the Spring Term, 1870, of the Superior Court of BLADEN County, upon the issue joined on the plea of not guilty.

The plaintiff declared for the loss of certain turpentine, some in barrels and some on the trees, and for an injury to his slaves, caused by the defendant in going upon a tract of land which the plaintiff held under a lease, and driving off his slaves and seizing the turpentine. The testimony disclosed the fact that the plaintiff was engaged in making turpentine with another person, and that they were (64)
partners, that the turpentine which had been lost was the property of the partnership, and that the slaves alleged to have been injured were the property of the plaintiff alone, and the injury to them was his individual loss, and not that of the partnership. The defendant contended that the plaintiff could not recover because of the non-joinder, but the Court held that the defendant could not take advantage of the non-joinder under the general issue, and that the plaintiff could re-

cover his proportional share of the loss, and to this ruling the defendant excepted.

The defendant also contended that the plaintiff could not recover both for the injury to his slaves, and for the damage sustained as a partner for the loss of the turpentine, but the Court held otherwise and the defendant again excepted.

There was evidence that a large part of the turpentine consisted of what is called "scrape," being that portion which does not run into the box but remains on the face of the tree, and which is removed after it has formed in sufficient quantity, by scraping it from the tree. It was proved that the lease under which the plaintiff held, had expired before the trespass was committed, and the defendant contended that the plaintiff could not recover for the scrape turpentine remaining on the trees.

His Honor charged the jury that if the plaintiff had cultivated the trees and manufactured the scrape it was his property, and was not a part of the tree going with the realty, and that the plaintiff had a right to remove it, although his lease might have expired, and if the defendant drove away his slaves and prevented them from removing it the plaintiff could recover for the loss of it.

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

W. McL. McKay for the defendants.
Bragg & Strong for the plaintiff.

(65) DICK, J. Crude turpentine which has formed on the body of a tree, and is usually known as "scrape," is personal property, and belongs to the person who has lawfully produced it by cultivation. *State v. Moore*, 33 N.C. 70. It is an annual product of labor and industry, and although it adheres to the body of the tree it is not a part of the realty. The turpentine crop may be properly classed with *fructus industriales*, for it is not the spontaneous product of the trees, but requires annual labor and cultivation. Upon a similar principle, hops which spring from old roots have long been regarded as emblements.

A lessee of turpentine trees, even after the expiration of his lease, has the right of "entry, egress and regress" to remove the "away going crops" which he has produced by his labor, provided he does so within reasonable time. He has a right to the occupation of the premises for that purpose, and if this right is refused by the owner of the land, the

lessee is entitled to recover the value of the property detained. *Brittain v. McKay*, 23 N.C. 265.

The scrape must be removed before the sap begins to flow in the subsequent spring, for then the new turpentine mingles with the old "scrape" which cannot be taken away without interfering with the rights of the owner of the trees.

In this case, it appeared, that the lease of the plaintiff had terminated, but there was no evidence as to the time when he entered for the purpose of removing the scrape.

The charge of his Honor was, therefore, too general in its terms, as the plaintiff had no right of entry after the new turpentine had begun to flow, and for this error there must be a *venire de novo*.

The question of pleading raised on the trial by the defendant's counsel is attended with some difficulty on account of the change (66) in our system of procedure. At common law in actions in form *ex delicto*, and which are not for the breach of a contract, if a party who ought to join, be omitted, the objection can only be taken by a plea in abatement, or by way of apportionment of damages on the trial; and the defendant cannot, as in actions in form *ex contractu*, give in evidence the non-joinder as a ground of non-suit on the plea of the general issue. 1 Chitty, P. 76.

Under the C. C. P., sec. 8, par. 1, all civil actions pending in the Courts when the present Constitutions was approved by Congress, and which were not founded on contract, are to be governed by the C. C. P., "as far as may be according to the state of the progress of the action, and having regard to its subject and not to its form." A different provision is made as to actions founded upon contracts made previous to the C. C. P. *Merwin v. Ballard*, post 168.

The C. C. P., sec. 62, provides that the parties who are united in interest must be joined as plaintiffs or defendants, etc. If a necessary party to an action be omitted, and the defect appears upon the face of the complaint, the non-joinder must be taken advantage of by demurrer. C. C. P., sec. 95. If it does not appear upon the face of the complaint the objection may be taken by answer. C. C. P., sec. 98. "If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same." C. C. P., sec. 99. It does not appear from the transcript at what term of the Court the issues were joined in this case, and the defendant might have put in a plea in abatement at any time before pleading in bar of the action. If the issues were not joined when the case was transferred to the Superior Court, he would have been entitled to have objected to the non-joinder of a necessary party by answer, as the defect does not appear in the

pleadings. As the defendant went to trial without taking any
(67) such objection, the charge of his Honor must be sustained.

Venire de novo awarded. Let this be certified.

Per curiam.

Venire de novo.

Cited: Mining Co. v. Smelting Co., 99 N.C. 463; *S. v. Green,* 100 N.C. 423; *Lanier v. Pullman Co.,* 180 N.C. 410; *Chauncey v. R. R.,* 195 N.C. 417.

JOSHUA MILLER AND OTHERS, DEACONS OF THYATIRA CHURCH v. GEO. T. BURNEST AND KATE C. BARNES.

Though the Court of Probate has exclusive original jurisdiction of special proceedings to recover legacies and distributive shares, yet, if the executor has so assented to a pecuniary legacy as to amount to an express or implied promise to pay the legacy, it must be recovered by a suit in the Superior Court.

THIS was a civil action brought in the Superior Court of ROWAN County, for the recovery of a pecuniary legacy of $5,000 bequeathed to the plaintiffs by Samuel Kerr, the testator of the defendant. In their complaint the plaintiffs alleged that the defendants, as executors of the testator, had assented to the legacy and had in their hands sufficient assets wherewith to pay it. The defendants filed an answer to the complaint, in which they denied that they had assented to the said legacy. At the Fall Term, 1870, of the Court, his Honor *Henry, J.,* presiding, the defendants moved to dismiss the suit for want of jurisdiction, which motion was sustained by his Honor, and from the order dismissing the suit the plaintiffs appealed.

Blackmer & McCorkle for the plaintiffs.
J. H. Wilson for the defendants.

SETTLE, J. The only question which is presented by the
(68) record for determination is one of jurisdiction. In deciding this we are not to consider the answer of the defendants, for their motion to dismiss puts them in the same position as if they had demurred.

Taking then the complaint to be true, the plaintiffs have a right to bring their action to the Superior Court, upon the ground that the legacy has been assented to, that is, provided the assent amounted to an express or an implied promise to pay the same. The assent of the executors to the legacy is distinctly alleged in the complaint, and it takes this case out of the general rule laid down in *Hunt v. Snead,* 64 N.C. 170, and *Heilig v. Foard,* 64 N.C. 710, that the Probate Court has exclusive original jurisdiction of special proceedings for legacies and distributive shares.

The assent is alleged in broad terms, and if the proof shall show that it amounted to an express or implied promise to pay the legacy, it became a debt to be recovered like any other debt in the Superior Court. There was error in dismissing the action.

Let this be certified, etc.

Per curiam.

Judgment reversed.

Cited: Bidwell v. King, 71 N.C. 287; *Hodge v. Hodge,* 72 N.C. 617; *Hendricks v. Mayfield,* 74 N.C. 632; *Clark v. Holmes,* 189 N.C. 711.

(69)

JAMES F. KORNEGAY AND ANOTHER v. GEORGE COLLIER AND OTHERS.

Where there is a lease for years, and before the end of the term, the interest of the lessor in the lands is conveyed to a third person, or is sold under execution and purchased by such person, the rent reserved, which is not due at the time of the conveyance, or sale and Sheriff's deed, passes with the reversion to the purchaser, and cannot, therefore, be subjected afterwards to the debts of the lessor.

The doctrine of the different kinds of rents in England, and of rent in this State discussed and explained.

THIS was a bill filed under the former system in the Court of Equity for the County of WAYNE.

The defendants filed their answers, whereupon the case was set for hearing upon bill and answers, and transmitted to be heard in this Court. The facts and pleadings in the cause will be found sufficiently stated in the opinion of the Court.

Bragg & Strong, and Fowle & Badger for the plaintiffs.
Moore & Gatling for the defendants.

PEARSON, C.J. The scope of the bill is to subject the rent reserved upon a lien of five years by Collier to Miller & Co., to the satisfaction of the plaintiff's judgment against Collier. The right to relief in equity is put on the assumption that the several amounts due, and that will become due as rent are "choses in action," which can only be reached by an equitable *fi. fa.*

The defendant Dortch alleges that he is assignee of the reversion by a deed of Collier, and also by a deed of the Sheriff under an execution in favor of one Barnes, and also by a deed of the Sheriff under an execution in favor of one Adams, and the equity of the plaintiff is
(70) contested on the assumption that the rent is not a "chose in action" but rent service incident to the reversion which passed with it to him as assignee.

The rent accrued at the date of the deed of Collier to Dortch, it is agreed, did not pass with the reversion but that was paid before the filing of the bill, and is out of the case. The controversy is, as to the rent accrued after the execution of the deed to Dortch. Did it pass with the reversion, or was it a chose in action, belonging to Collier, which can be reached only by an equitable *fi. fa.?*

When there is a reversion the rent reserved is rent service. We are of opinion that rent service is incident to the reversion, and passes to the assignee. This principle of the common law seems to us to be so well settled, that in *Rogers v. McKenzie,* post 218, we assume it to be familiar learning, and the opinion in that case, which turned on the question, had been written out, ready to be filed, but upon the opening of this case, seeing that the counsel for the plaintiff intended to make the point, and desired to argue it, the filing of the opinion was deferred.

It seems the question has never been directly before the Courts of this State for decision; whether it was because we have had so few leases for long terms, or because it has been taken for granted by the profession, that the rule of the common law obtained is immaterial, so it is, the question is an open one; on the argument such was admitted to be the law in England, but it was contended that this rule of the common law had never been "in force, and in use," in this State.

The argument is put mainly on the ground that the remedy by distress not having been adopted in this State, (*Dalylish v. Granby,* Con. Rep. 22,) it follows that all rent is rent seck, and there was no longer any such thing as rent service; this is a *non sequiter.* It appears by the full brief of Messrs. Moore & Gatling that in many of the States
(71) where the remedy by distress has been abolished, still the rule that rent service passes to the assignee of the reversion as an

incident thereto, is fully established and acted upon. Indeed, the rent is deemed rent service because of the tenure between lessee and lessor, and in no wise depends upon the circumstance of the right to distrain.

Another argument urged by Mr. Strong was drawn from the position taken in *State v. Yarrell,* 34 N.C. 135. "In this State we are all tenants in capite, our tenure is that of free and common socage, yielding fealty, doing suit to Court and paying such taxes as the General Assembly may from time to time assess." Hence he inferred there is no tenure between lessor and lessee of a term of years, and consequently there is no service on the one side, and no implied warranty on the other. On examination it will appear that the position is restricted to tenants in fee simple, and has no reference to tenants of particular estates. In regard to the latter, no reason can be suggested why the tenure between the tenant and revisioner does not obtain in this State, and should not be attended by the common law incidents of tenure, i. e. fealty and rent on the part of the tenant, and warranty on that of the reversioner, the only modification being that fealty as now understood means only that the tenant shall not dispute the title of the reversioner, but that it is an incident of the tenure, and the rent is payable as part of the service. The statute *quia emptores* applied to estates in fee simple only, and abolished the tenure between feoffor and feoffee. Hence when the entire estate passes, and rent is reserved, it is necessary to insert a clause of distress to make it rent charge, otherwise it is rent seck, and to insert an express warranty, otherwise there will be none, for there is no tenure from which a warranty can be implied. So that statute gave rise to rent charge and also to express warranty; but as between a particular tenant and the reversioner the tenure is not affected by any statute. The rent reserved follows the reversion as rent service, and warranty is implied, by reason (72) of the tenure. See 2 Blackstone.

An effort was also made, to support the position that all rent in this State is seck, to-wit, a naked "chose in action" from the case *Deaver v. Rice,* 20 N.C. 431, in which it is held a landlord has no lien on the crop for the rent, although reserved to be paid by a part of the crop. It is not perceived how that case affects the question; at all events, soon after the decision, the Legislature enact or declare the law to be that the landlord shall have a lien on the crop for the rent.

Our conclusion is, that the rent not accrued at the date of the deed was not a mere chose in action to Dortch, but passed to Dortch with the reversion as incident thereto. It follows, that the plaintiff fails in the only purpose with a view to which, his bill was framed—that is, to subject the rent. The ground taken by the counsel for the plaintiff—

to-wit, as it appears from *the answers,* that Collier had a resulting trust, under the deed to Dortch, the purchases made by him (he being a trustee) at the sales of the Sheriff, will be deemed in equity to have been for the benefit of the trust fund, to relieve it from incumbrances, leaving the resulting trust in Collier, unaffected except by the additional charge of the outlay deemed necessary by the trustee in aid of the trust fund; and consequently such resulting trust is subject to the creditors of Collier, and may be reached by the present bill, under the prayer for general relief, and the plaintiff is entitled to a reference to fix the amount due of the debts secured by the deed to Dortch, and the additional charges to disencumber the title, *minus* the rents received from lessees, and the rents and profits received by Dortch after the expiration of the term, to the end that the land may be sold and the proceeds of sale after satisfying the amount charged, be applied to the satisfaction of the plaintiff's judgment, is fit for consideration.

(73) Without intimating an opinion upon this question, it is enough for us to say the bill does not make allegations to raise the question, and it cannot be helped out by the facts set forth in the answers, there must be, *allegata* as well as *probata.* Although the facts set out in the answers may show that Collier is entitled to a resulting trust, still as these facts are not alleged in the bill there is no rule by which the plaintiff can avail himself of them under the general prayer for relief.

When the answers came in he might have amended his bill, so as to strike at the resulting trust of Collier if he has one. But in the shape the case now comes on for hearing he does not entitle himself to an equity against such resulting trust.

As the bill was filed under the old mode of procedure, and the cause was set for hearing on bill and answer and sent to this Court for hearing, the plaintiff, if so advised, may have an order to remand the case with a view to amendment, upon paying all the cost, as in case the bill stood dismissed, otherwise the bill will be dismissed at plaintiff's cost.

A decree to that effect may be filed, unless the motion to remand be made during the term.

Cited: Bullard v. Johnson, 65 N.C. 439; *Holly v. Holly,* 94 N.C. 674; *Pate v. Gaitley,* 183 N.C. 263; *Mercer v. Bullock,* 191 N.C. 217; *Jennings v. Shannon,* 200 N.C. 3; *Bank v. Sawyer,* 218 N.C. 146; *Perkins v. Langdon,* 231 N.C. 390.

(74)

R. C. PLOTT v. THE WESTERN NORTH CAROLINA RAILROAD COMPANY.

A Rail Road Company may dispense with the assessment of damages by commissioners for passing over the land of a proprietor, by promising to settle and pay it without assessment, and the land owner may recover upon the special promise.

The statute of limitations was suspended in this State by different acts of the Legislature from the 11th May, 1861, to the 1st day of January, 1870, and hence a parol contract which was not barred by the said statute on the said first mentioned date could not have been so prior to the 1st day of January, 1870.

THIS was a civil action commenced in 1869, and tried before his Honor, Judge *Mitchell,* at the Fall Term, 1870, of the Superior Court for IREDELL County.

The claim was for damages caused by the defendant, taking and using the plaintiff's land for its road. It was in evidence that the plaintiff applied verbally to the defendant, through its officers for an assessment of the value of his land over which the road had been located, and that this application had been made within two years after the location of the road, and had been repeated in the summer or fall of 1858 just before the expiration of the said two years, and that the defendant put him off by assurances that the damages should be paid him.

The defendant's counsel contended that the plaintiff could not recover, because he had not made a legal application within two years from the location of the road according to the provisions of the defendant's charter, and that applying verbally was not sufficient. And further that the action was barred by the statute of limitations. His Honor charged the jury otherwise and the plaintiff had a verdict and judgment, and the defendant appealed.

Caldwell and Busbee & Busbee for the plaintiff.
Boyden & Bailey and Furches for the defendant.

READE, J. The plaintiff was not obliged to pursue the remedy prescribed in the defendant's charter to recover damages for (75) the way over his land, to-wit: assessment by commissioners within two years from the time the road was located, because the defendant dispensed with it, and assured the plaintiff that it would be settled without. And the plaintiff may recover upon that special promise.

The promise was in the summer or fall, 1858, and the action was commenced in 1869, and the statute of limitations three years, is

pleaded. The plea cannot avail, because, on 11th May, 1861, before the lapse of three years from the promise, the Legislature passed an act suspending the statute of limitations, and a series of statutes since then have kept the statute of limitations suspended up to 1st January, 1870. *Johnson v. Winslow,* 63 N.C. 552.

Per curiam.

Judgment affirmed.

Cited: S. v. Galbraith, 65 N.C. 411; *Benbow v. Robbins,* 71 N.C. 339; *Lippard v. Troutman,* 72 N.C. 552; *Barringer v. Allison,* 78 N.C. 80.

(76)

JOHN F. GRIEL AND OTHERS v. WILLIAM VERNON AND OTHERS.

The Judge, and not the Clerk of the Court, has jurisdiction under the C. C. P., sec. 133, to relieve upon motion a party from a judgment taken against him through his mistake, inadvertence, surprise or excusable negligence.

A judgment taken by default for want of a plea is a surprise upon a party under the C. C. P., sec. 133, when he has employed an attorney to enter his pleas and such attorney has neglected to do so; and the neglect of the client to examine the records to see whether his pleas have been entered is an excusable one.

The finding by the Judge of the Superior Court of the facts which, under the C. C. P., sec. 133, are alleged to constitute surprise and negligence, is conclusive and cannot be appealed from, but whether such facts when found constitute surprise or excusable negligence is a question of law, and from the decision of the Judge upon it an appeal may be taken.

MOTION to vacate a judgment made before his Honor, Judge *Clarke,* at the Fall Term, 1870, of WAYNE Superior Court.

His Honor refused to grant the motion and the defendant, Oliver, appealed. The case is sufficiently stated in the opinion of the Court.

Rogers & Batchelor for the defendant.
Bragg & Strong for the plaintiff.

RODMAN, J. This was a motion by the defendant, Oliver, administrator of Wallace, made at Fall Term, 1870, of Wayne Superior Court, to vacate a judgment recovered against Vernon and himself as administrator. The facts found by the Judge are as follows:

The action was assumsit and was commenced against the defendants by writ returnable to Spring Term, 1867. Vernon at the request of Oliver retained an attorney to plead for Oliver that he (77) had fully administered the estate of his intestate, and had no assets. The Attorney from some cause not stated, failed to do so; at the return term a judgment by default was taken against the defendants; and at the ensuing term (Fall, 1867,) the damages were assessed by a jury and final judgment was entered. The defendant had no information that judgment had been rendered against him until within twelve months before he made his motion to set aside the judgment; and he has a meritorious defence, in that he has no assets. The Court refused the motion and the defendant Oliver appeals. Two questions are made.

1. It is contended by the plaintiff that the Clerk alone has jurisdiction to set aside a judgment under sec. 133, C. C. P. We think there is no ground whatever for this. "The *Judge* may" "relieve a party from a judgment, etc." The word Judge is no where used in the Code to mean the Clerk. Sec. 108 says that *Court* in certain cases means the Clerk, and in others the Judge. Moreover, sec. 345, subdivision 5, clearly implies that the jurisdiction is in the Judge. Many cases are reported in 63 and 64, N.C. of applications to set aside judgments, all of which were made to the Judge. It is true this question was not suggested in any of them; we have therefore considered it as *res integra,* and the Code is clear. We were referred to the case of *McAden v. Banister,* 63, N.C. 478; but that case is not in point. It was an application to a Clerk to set aside an execution upon a Justice's judgment which he had improperly docketed; an act of his own which the Judge neither actually or by intendment of law had done. Clearly the case did not come within either of sections 133 or 345.

2. It is contended that the mover, Oliver, has not brought his case within the terms of sec. 133. That says that, the Judge may, "at any time within one year after notice thereof, relieve a party from any judgment order or other proceeding taken against him (78) through his mistake, inadvertance, surprise, or excusable neglect, and may supply an omission in any proceeding." The words used are somewhat comprehensive, and would seem intended to enlarge the class of cases in which Courts heretofore gave similar relief. In this case the party retained an attorney to enter a plea for him; that an attorney should fail to perform an engagement to do such an act as that, we think may fairly be considered a surprise on the client: and that the omission of the client to examine the records in order to ascertain that

it had been done, was an excusable neglect. This case does not resemble, *Waddell v. Wood,* 64 N.C. 624, where the neglect was justly held excused. In *Staples v. Moring,* 26 N.C. 215, the plaintiff had employed no attorney. It was further contended that no appeal could be taken from the decision below, as the granting of the motion was discretionary. We think the decision of the Judge involved a question of law. He finds first the truth of the facts alleged as constituting the excuse; his decision on this point is final: secondly he declares whether in law those facts are a sufficient excuse; this is a question of law, just as malice, probable cause, reasonable time, etc.

The judgment below is reversed, and the case is remanded to be proceeded in, in conformity to law.

Per curiam.

Judgment reversed.

Cited: Johnson v. Duckworth, 72 N.C. 245; *Wade v. New Bern,* 73 N.C. 319; *Bradford v. Coit,* 77 N.C. 75; *Hyman v. Capehart,* 79 N.C. 512; *Mebane v. Mebane,* 80 N.C. 40; *Cobb v. O'Hagan,* 81 N.C. 295; *Nicholson v. Cox,* 83 N.C. 52; *McLean v. McLean,* 84 N.C. 368; *Henry v. Clayton,* 85 N.C. 374; *Wynne v. Prairee,* 86 N.C. 75; *English v. English,* 87 N.C. 498; *Kivett v. Wynne,* 89 N.C. 42; *Winborne v. Bryd,* 92 N.C. 10; *Wiley v. Logan,* 94 N.C. 566; *Whitson v. R. R.,* 95 N.C. 387; *Gwathney v. Savage,* 101 N.C. 107; *Taylor v. Pope,* 106 N.C. 271; *Ice Mfg. Co. v. R. R.,* 125 N.C. 24; *Sircey v. Ree's Son,* 155 N.C. 299; *Schiele v. Ins. Co.,* 171 N.C. 431; *Grandy v. Products Co.,* 175 N.C. 513; *Sutherland v. McLean,* 199 N.C. 348; *Moore v. Deal,* 239 N.C. 226; *Brown v. Hales,* 259 N.C. 484.

(79)

A. H. ERWIN v. WESTERN NORTH CAROLINA RAIL ROAD COMPANY.

Where it appeared that the plaintiff on the 1st of January, 1865, hired his slaves to the defendant upon the express understanding that he was to take Confederate money in advance, or whenever he should apply for it, and the defendant was always ready to pay the Confederate money, but the plaintiff never applied for it, it *was held* that he was not entitled to recover the value of the hire of the slaves.

Williams v. Rockwell, 64 N.C. Rep. 325, cited and approved, and distinguished from the present case.

ERWIN *v.* R. R.

THIS was a civil action tried before his Honor, *Judge Mitchell,* at the Fall Term, 1870, of BURKE Superior Court.

The action was brought to recover the worth of the hire of three slaves for the year 1865, and it was in evidence that the defendant hired the slaves of the plaintiff on the first day of January, of that year, for the full term of one year at the price of two thousand dollars each, in Confederate currency; and that the company refused to hire the slaves unless the plaintiff would agree to take Confederate currency in advance for the hire; that he did agree to do so, with the understanding that he was to get the money whenever he should apply for it; that the defendant had the money in hand to pay whenever the plaintiff should apply, but he never did apply for it.

The defendant's counsel contended and asked his Honor to instruct the jury, that the plaintiff could not recover upon the contract as proved, or if entitled to recover at all, he could get only the value of the Confederate currency at the time of the contract. His Honor declined to give the instruction asked for, but charged the jury that the plaintiff was entitled to recover what the slaves were reasonably worth. There was a verdict and judgment in accordance with his Honor's charge and the defendant appealed.

Boyden & Bailey and Furches for the defendant.
No counsel for the plaintiff.

DICK, J. If the plaintiff had hired his negroes to the defendant on the 1st day of January, 1865, for Confederate currency, (80) under an ordinary contract of hiring—then this case would come within the decision in *Williams v. Rockwell,* 64 N.C. 325—and the plaintiff would be entitled to recover the value of the services of his negroes.

But this contract differs materially from an ordinary contract of hiring when payment is to be made at a future day.

It was in evidence "that the defendant refused to hire said negroes unless plaintiff would agree to take Confederate money in advance for the hire. Plaintiff did agree to do so with the understanding that he was to get the money whenever he would apply for it." This agreement constituted mutual and dependant contracts between the parties, founded upon concurrent considerations.

The defendant promised that upon receiving the negroes he would pay Confederate money for the hire, or be ready to make payment when the plaintiff should apply. The evidence shows that the defendant kept funds ready to comply with his contract.

The plaintiff agreed to receive such money in advance, or make application for payment within a reasonable time. As the plaintiff did not perform his contract by offering to receive the money, he is not entitled to recover. Chit. on Con. 738, 1 Salk 170 n (a) 1 Saund. 320 n (4) 57.

There was error in the ruling of his Honor and there must be a *venire de novo*.

Let this be certified.

Per curiam.

Judgment reversed.

Cited: Terrell v. Walker, 66 N.C. 250; *Simmons v. Cahoon,* 68 N.C. 394.

(81)

ISAAC BATES v. BANK OF FAYETTEVILLE.

The 503rd section of the C. C. P., which provides for the docketing of a Justice's judgment in the office of the Clerk of the Superior Court of the County, so as to make it a judgment of the Superior Court, from the time of its being docketed, is not repealed by the Act of 1868-'9, ch. 76, entitled "An Act suspending the Code of Civil Procedure in certain cases."

MOTION to vacate a judgment and set aside an execution issued thereon, made before his Honor *Judge Russell,* at Fall Term, 1870, of CUMBERLAND Superior Court.

The facts were that the plaintiff obtained a judgment before a justice of the peace against the defendant on the 4th day of April, 1870, for the sum of $195 and costs, and on the same day a transcript thereof was filed and docketed in the office of the Clerk of the Superior Court of Cumberland County, that being the County in which the judgment was rendered. Executions were afterwards issued on the judgment under which the defendant's property, personal and real, were levied upon and sold. The defendant, after due notice to the plaintiff, moved to vacate the said judgment of the Superior Court and set aside the execution which had been issued thereon, for the following reason:

That on the 4th day of April, 1870, which was in vacation, the Clerk had no right to make the judgment of the Justice a judgment of the Superior Court, because the Act of March 22nd, 1869, (see Acts of 1868-'9, ch. 76,) entitled "An Act suspending the Court of Civil Pro-

cedure in certain cases" applied to and repealed section 503 of the C. C. P.

His Honor declined to grant the motion to vacate the judgment and set aside the execution, and the defendant appealed.

B. & T. C. Fuller and Phillips & Merrimon for the defendant.
Hinsdale and McRae for the plaintiff.

SETTLE, J. We are of opinion that the act ratified the 22nd day of March, 1869, entitled "An Act suspending the Code of (82) Civil Procedure in certain cases," does not repeal or suspend section 503 of the Code of Civil Procedure. This section enacts that "a Justice of the Peace on the demand of a party in whose favor he has rendered a judgment, shall give a transcript thereof, which may be filed and docketed in the office of the Superior Court Clerk of the County where the judgment was rendered. The time of the receipt of the transcript by the Clerk shall be noted thereon and entered on the docket; and from that time the judgment shall be a judgment of the Superior Court in all respects," etc.

In rendering the services required by this section the Clerk performs no judicial act, he gives no judgment of his own, but simply records the judgment of the Justice of the Peace, just as he records the judgment rendered in some other county, and sent to him to be entered upon his judgment docket. *Norwood v. Sharpe,* 64 N.C. 682. And thereupon by operation of law, the Justice's judgment becomes a judgment of the Superior Court in all respects.

There is nothing in *McAdoo v. Benbow,* 63 N.C. 461, which militates against this view. The general policy in regard to the collection of claims within the jurisdiction of a magistrate has been to give a speedy remedy, but if the construction contended for by the defendant be adopted, it will virtually destroy the jurisdiction of Justices of the Peace, and as was said upon the argument, if a Justice's judgment cannot be docketed except in term time, then there is no way for a judgment creditor to secure his lien upon land, and it is in the power of the debtor to dispose of his land at any time before the term, and thus defeat the judgment. It cannot be that the Legislature intended such results. If such had been their purpose, they would (83) undoubtedly have used plain terms to express it. On the contrary the Legislature, during the same session, and a few days after the ratification of the act suspending the Code of Civil Procedure in certain cases, (ratified the 22nd day of March, A.D., 1869,) expressly recognized the existence and binding effect of the C. C. P., sec. 503, by

repealing the last clause only of said section. The Act of 1868-'9, ch. 95, sec. 1, ratified the 1st day of April, A.D., 1869, enacts "that the last clause of section five hundred and three of the Code of Civil Procedure, in the following words, to-wit: 'But no Justice's judgment, for a less sum than twenty-five dollars, exclusive of costs, shall be so filed and docketed in the office of the Clerk of the Superior Court,' be and the same is hereby repealed," thus recognizing and leaving in full force all other provisions of the said section. And again by the 13th section of an Act to create a mechanics, and laborers, lien law, ratified the 6th day of April, A.D., 1869, section 503 of the Code of Civil Procedure, is expressly recognized as being in full force.

The judgment of the Superior Court is affirmed.

Per curiam.

Judgment affirmed.

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(84)

B. K. POND, ADM'R. OF L. E. HORNE v. JAMES E. HORNE.

A bond given for money lent upon usurious interest during the existence of the statute against usury, Rev. Code, ch. 114, was made void *ipso facto* by that statute, and was not revived when it was repealed by the act of 1866, ch. 24.

In an action upon a simple contract, usury may be given in evidence under the general issue, treating the contract as void. And though, in a suit upon an usurious bond, it is necessary to plead the statute, it is not to bar the action, but to put the Court in possession of the facts whereby it is shown that the contract was wholly void.

THIS was a civil action tried before his Honor, *Russell, Jr.*, at the last Fall Term of the Superior Court of ANSON County.

The complaint was founded upon a bond executed by the defendant to the plaintiff's intestate in the year 1861. The defendant admitted the execution of the bond, but relied as a defence upon the statute of usury, Rev. Code, ch. 114. It was admitted that the bond was given in consideration of money lent at the rate of ten *per cent.* interest *per annum*, and it was contended for the defendant that the illegal consideration made the instrument void, while the plaintiff insisted that he had a right to recover, upon the ground that the statute had been repealed by the act of 1866, ch. 24. His Honor ruled in favor of the plaintiff and he had a verdict and judgment, and the defendant appealed.

Blackmer & McCorkle for the defendant.
Battle & Sons for the plaintiff.

PEARSON, C.J. A perusal of the enacting clause of the statute under consideration, shows clearly that it has no reference to contracts made before its passage. The wording and whole scope looks ahead and has in contemplation contracts that may be entered into in future. So all of the learning in respect to the retroactive effect of statutes has no bearing. (85)

The case turns upon the effect of the repealing clause. The old usury act is repealed absolutely, and the Courts can give no further effect to it, but so far as the act has already had an effect, that, of course, is not disturbed by the repeal.

This rule as to the effect of the repeal of a statute is settled by the cases both in England and in this country, and it is so consonant with the reason of the thing, that discussion is not called for.

The question is, was the bond sued on, made void by force of the old statute, or was the effect of the statute merely to make the bond voidable by plea? If the former, and nothing was left to be done, the repeal of the statute has no operation in regard to a matter "passed and closed." Dwarris on Statutes, 676. If the latter, and something was to be done in order to give effect to the statute, the repeal stops its further operation.

By way of illustration, seven years adverse possession of land under color of title, ripens it, and makes it a good title; so three years adverse possession of personal property confers a good title by force of the statute, and that result having been effected, a repeal of the statute would not divest the title; "the fact is accomplished" and the matter "passed and closed." On the other hand, the repeal of a statute which simply *bars the right of action* will prevent the bar of an action brought after the repeal, and even, of an action pending at the date of the repeal, for, the matter was not passed and closed, but something is to be done, in order to give effect to the statute; and nothing can be done under it, after its repeal. So, in respect to statutes making certain acts indictable, it is settled that a repeal of the statute at any time before judgment puts an end to the prosecution, (unless there be a saving clause,) on the ground, that the statute had not had its full effect, and something remained to be done, for, to sustain a proceeding *criminalitur*, the act must be an offence both at the time it is (86) committed, and at the time it is *to be punished*. For the like reason, a penalty cannot be recovered after the repeal of the act by which it is given—the recovery of the penalty is something which re-

mains to be done, and although as was ingeniously argued by Mr. Battle, the loss of the debt, is in one sense a penalty, yet it is a penalty enforced at the time the usurious contract is made, and is the same, as if the penalty of double the amount of the money lent, had been sued for and recovered before the repeal of the statute. The idea of sueing to recover it back would not be entertained for a moment.

Our case then, is narrowed to this, is a usurious contract made void by force of the old statute *per se*, or is it necessary to plead the statute in order to give it full effect? In other words, is the contract void by force of the statute, or is the statute only a bar to the action? We are entirely satisfied that the former is the true construction. The words are plain, "all contracts, bonds, etc., shall be void."

In an action upon a simple contract usury may be given in evidence under the general issue treating the contract as void.

In an action upon a bond, the plea alleges a usurious consideration, "contrary to the form of the statute in such case made and provided, by means whereof, and by force of said statute the said writing *was, and is,* wholly void in law," 3 Chitty, 966.

So, it is seen, that the office of the plea is not to bar the action, but to put the Court in possession of facts, whereby the "contract is wholly void in law." Such being the case the repeal of the statute has no effect. The reason for requiring the matter to be set out specially by plea, is that a deed (unless it be void *ab initio*) because of its solemnity, can only be defeated in a manner equally solemn, *"eo ligamine quo ligatur;"* under this maxim payment was not a discharge of a
(87) bond until 4th Ann, a release or acquittance under seal, being necessary. When the deed is void at common law—as a bond executed by a married woman, or a bond for a consideration *malum in se* —such matter may be given in evidence under the plea *"non est factum,"* for, it is void, *ab initio,* and never was a deed even for an instant; but when a statute assumes the existence of a bond in the first instance, and declares it to be void, such matter, as we have seen, must be set out by special plea, for the technical reason referred to, but when the matter is so set out, a bond given upon a usurious consideration is void in the same sense to all intents and purposes, as a bond given for a consideration *malum in se.* In either case if the bond be renewed, the second bond is void, or if the bond be transferred to a purchaser for a valuable consideration and without notice, it is equally void in the hands of the innocent holder.

In short, the contract as alleged in the plea of usury by force of the statute "was, and is wholly void in law" and the subsequent repeal of

the statute does not give vitality to that which was dead, for in the words of Dwarris the effect of the statute is "passed and closed."

There is error.

Per curiam.

Venire de novo.

Cited: Williams v. Smith, Post, 87.

HARPER WILLIAMS TO THE USE OF JOSEPH PEARSALL, ET. AL. v. ZACH. SMITH AND IVEY SMITH.

W. A. Allen for the plaintiff.
Rogers & Batchelor for the defendants.

PEARSON, C.J. The same opinion in this case, as in *Pond v. Horne,* ante 84.

But as the jury find the usury specially and his Honor gave judgment for plaintiff, upon that finding, the judgment is set aside, and judgment for defendant that he go without day, and re- (88) cover his cost.

J. C. HALYBURTON AND OTHERS, EX'RS OF JACOB HARSHAW v. JOHN DOBSON.

Where the testator of the plaintiffs and the defendant went, in the life time of the testator, to a third person and had a conversation with him in relation to the subject of the controversy, and at the trial both the testator and the said third person were dead, *it was held* that according to the true intent and meaning of the *proviso* to the 343rd section of the Code of Civil Procedure, the defendant could not testify to the conversation between the testator and such third person.

THIS was a civil action tried before *Mitchell, J.,* at the Fall Term, 1870, of BURKE Superior Court. The plaintiffs were the executors of Jacob Harshaw and sued in that capacity. On the trial, it became material to ascertain whether the testator of the plaintiffs had received from the defendant certain Confederate money voluntarily, or under

fear and coercion. The defendant offered himself as a witness to prove that the testator and the defendant by agreement went to the office of R. C. Pearson, in the town of Morganton, to obtain his advice, as to the propriety of receiving the money; that the testator and Mr. Pearson held a conversation in the office in which the testator, the defendant and Mr. Pearson were assembled, in which Mr. Pearson advised the testator to take the money, and gave it as his opinion that the money could be profitably used. The plaintiffs objected to the testimony, because both the testator and Mr. Pearson were then dead, but his Honor admitted the defendant state what had passed in the
(89) conversation between the testator and Mr. Pearson. A verdict and judgment were given for the defendant, and the plaintiffs appealed.

Folk for the plaintiffs.
No counsel for the defendants.

READE, J. The C. C. P. sec. 343, provides, that a party to an action may be a witness in his own behalf, *"Provided,* that no party, etc., shall be examined in regard to any transaction or communication, between himself and a person, who, at the time of the examination is dead."

The reason for the exception is apparent. There could never be a recovery against an unscrupulous party, if he were permitted to testify where it would be impossible to contradict him. The statute ought to be construed in view of this mischief.

His Honor held, properly, that the defendant could not testify as to what passed between himself and the deceased testator, Harshaw. But his Honor permitted him to testify as to what passed between said Harshaw and Pearson, both of whom were dead at the time of his examination. This was, doubtless, upon the idea that the defendant was not a party to the conversation—that it was not "between himself and them." And, in that was his Honor's error. The case states, that defendant and Harshaw, by agreement, went to Pearson to advise with him about the matter in dispute, that they were all together, but Harshaw and Pearson carried on the conversation, and Pearson gave his advice, and Harshaw acted upon it. It is striking in the dark to say that this transaction was not "between the defendant and Harshaw." It was a transaction between them, and the defendant ought not to have been allowed to speak of it.

The question will, doubtless, frequently arise in practice, whether a party who offers himself as a witness, can testify to a transaction or

communication not directly between himself and a person deceased, but between two other persons, both of whom are dead (90) — as for instance, whether if in this case he had overheard Harshaw and Pearson talking together. The mischief intended to be guarded against, is, a party's testifying in regard to a matter where it is impossible to contradict him if he swears falsely. That is often allowed to witnesses who have no interest in the matter; and the ordinary presumption in favor of human veracity is the safeguard; but, whether an interested witness, the party to the suit, is to be allowed the same privilege is a grave question. It is not necessary to be decided in this case, and we leave it for discussion and future consideration.

In the cases of *Peoples v. Maxwell,* 64 N.C., 313, and *Whitesides v. Green, Ibid* 308, kindred questions to the one involved in this case were decided, and these cases are approved.

There is error.

Per curiam.

Venire de novo.

Cited: Dobbins v. Osborne, 67 N.C. 260; *Bryant v. Morris,* 69 N.C. 448; *Barlow v. Norfleet,* 72 N.C. 539; *Lockhart v. Bell,* 90 N.C. 504; *McRae v. Mallory,* 90 N.C. 525; *Rush v. Steed,* 91 N.C. 229; *Loftin v. Loftin,* 96 N.C. 99; *Vester v. Collins,* 101 N.C. 118; *Carey v. Carey,* 104 N.C. 174; *Sawyer v. Grandy,* 113 N.C. 45; *Johnson v. Rich,* 118 N.C. 269; *Blake v. Blake,* 120 N.C. 180; *Wilson v. Featherston,* 122 N.C. 749; *Smith v. Moore,* 142 N.C. 284; *Brown v. Adams,* 174 N.C. 494, 502.

(91)

JOHN C. TERRELL, ASSIGNEE v. J. W. WALKER AND OTHERS.

When a debtor tenders money in payment of his debt to the creditor, who says he has no use for it, and thereupon the debtor concludes to retain the money awhile longer and does so, he thereby waives the tender.

To make a tender effectual, the debtor must be ready, willing and able to pay, and must so inform his creditor and must also produce the money, unless such production be waived by the absolute refusal by the creditor to receive it.

A note given for money borrowed during the late war was, by force of the Acts of 1866, chs. 38 and 39 and the Act, 1865, presumptively payable in Confederate money in the absence of any evidence to rebut it, yet the acts did not so far interfere with the contract as to change it into one for

the delivery of specific articles; it is still to be treated as a money contract, solvable in money, and not in specific goods.

A tender of Confederate Treasury notes in payment of a debt solvable in such notes, will not, upon the refusal to receive them, vest in the creditor the property in any certain Confederate notes, so that by virtue of such ownership, he will become liable to their depreciation. But such tender will prevent the recovery of interest after that time.

If a creditor cause his debtor to desist from making a tender in payment of a note at a particular time in the Confederate currency in which it was then solvable, by a promise that he will receive it at a future time, and then refuses to receive it, it will not be such a fraud (if a fraud at all) for which damages would be allowed to defeat the action on the note, or be used, as a set off or recoupment.

THIS was an action of debt tried before his Honor, *Tourgee, J.*, at the Spring Term, 1870, of the Superior Court for the County of PERSON. The suit was upon a promissory note made by the defendants, Walker & Co., to the defendants, Wade & Co., for the sum therein mentioned, dated 24th July, 1862, with interest from the 16th July, 1862, and assigned to the plaintiff in April, 1867. The defendants pleaded, payment, set off, tender and refusal, and the statutes for scaling debts solvable in Confederate currency.

It was proved that the note sued on was given for one which
(92) Wade & Co. had theretofore given to the plaintiff for money lent, all of which was in Confederate money, except about fifty dollars in North Carolina bank notes. In March, 1863, the defendants, Walker & Co., offered to pay the sum due the plaintiff, informing him that they had the amount in their safe at that time. The sum offered was in Confederate currency, and the plaintiff objected to taking it then, but said he would do so in the ensuing Fall, and thereupon the defendants, Walker & Co., concluded to retain the money for awhile longer and did so. In September, 1863, one of defendants of Walker & Co., having in his possession and upon his person the amount of said note in Confederate currency, met the plaintiff in the street and told him that he wanted to pay off the note, to which plaintiff replied, "that note will be among my papers at the close of the war." The Confederate money was not produced nor shown to the plaintiff at this time. The witness, who proved the above, said he had the same amount in Court at the time of the trial, but there was no evidence that it was the identical package which he had on his person at the time of his conversation with the plaintiff.

His Honor instructed the jury that there was no evidence to prove a tender either in March or September, 1863, and that the plaintiff

was entitled to recover the amount of the note with interest from its date according to the scale of depreciation at that date.

The defendants' counsel asked the Court to instruct the jury that if they believed that the plaintiff had evaded the offer of payment in March, 1863, by a promise to receive the Confederate money in the Fall of that year, and thereby relaxed the efforts of the defendants in providing otherwise for the payment of the note, and in the Fall, refused to accept said currency, it was fraud on his part, which entitled the defendants to the application of the scale of the said currency established for said currency. The Court refused the instruction. First, because there was no evidence to show that the (93) plaintiff had agreed to accept such currency in payment of the note. Secondly, because the plaintiff was not originally a party to the note, and no fraud on his part could affect the time at which the scale should be applied. Thirdly, because fraud could not be enquired into in this form of action.

The jury returned a verdict in favor of the plaintiff in accordance with the instruction of the Court, upon which a judgment was rendered, and the defendants appealed.

W. A. Graham for the defendants.
Phillips & Merrimon and Fowle & Badger for the plaintiffs.

RODMAN, J. The note sued on was made by Walker & Co. to Wade & Co., on the 24th July, 1862; the consideration was Confederate money loaned by Wade & Co. to Walker & Co., which the former held as the agent of the plaintiff. We see nothing in the circumstances attending the making of the note to prevent a recovery by the plaintiff according to the legislative scale for Confederate currency of July, 1862. Even if there were no evidence (as we think there was) tending to show an agreement by the plaintiff, personally, or by his agent Wade, to receive Confederate money, yet the Act of 1866 creates such a presumption when the consideration was a loan of such money, and there is nothing in evidence to repel it. Acts 1866, ch. 38, ch. 39, also Act 1865.

The defendants contended that Walker & Co. tendered payment to the plaintiff in March, 1863, which he refused. We do not think the evidence on this point sufficient to prove a tender at that time. Walker offered to pay the note and had the ability to do so, which would have been under the circumstances a sufficient tender, but when the plaintiff said that he would have no use for the money until the fall, when he would receive it, Walker assented to the delay; in the (94)

language of the case, he "thereupon concluded to retain the money awhile longer, and did so." We think this was a clear waiver of the previous tender.

The defendants contend that a tender was proved in September, 1863, and in this we agree with them. The substance of a tender is that a debtor should be ready and willing and able to pay, and so inform his creditor, and also produce the money, unless the production be waived as it was on this occasion by an absolute refusal to receive it. But what was the effect of this tender? To stop the interest, it is admitted. 2 Pars. Cont. 639. But the defendants contend that it should have either been considered as simply a tender, or when taken in connection with the consideration, that the refusal was a breach of the defendants promise, made in the previous March, which the defendants say was a fraudulent one, made with the intent to deceive; the further effect either to defeat the recovery of the plaintiff altogether, or to throw on the plaintiff the loss from the subsequent depreciation of the Confederate money. We cannot see how in either aspect it can have that effect. First, as simply a tender, it cannot have the effect of making the money tendered the property of the creditor so as to impose on him the burden of its subsequent depreciation. That result only follows a tender when the contract is to deliver certain goods at a certain time and place, in which case it is held that a tender vests the property in the goods in the vendee. *Patton v. Hunt,* 64 N.C. 163. *Mingus v. Pritchett,* 20 N.C. 78.

In this case the note was to pay money: and although by the Act of 1866 it was presumptively solvable in Confederate Treasury notes, yet the act did not so far interfere with the contract as to change it into one for the delivery of specific articles; it is still to be treated as a money contract, solvable in money, and not in specific goods. 2
(95) Pars. Cont. 638. Second. Assuming, according to the defendant's contention, (which we do only for the sake of the argument,) that the plaintiff's promise in March to receive Confederate money in the fall was a fraud for which damages could be recovered; or was a contract for the breach of which damages could be recovered; it was not a contract which equity would specifically enforce, and we do not see how unliquidated damages could be set off, or recouped in any way in this action on the note. Further, upon what principle would the damages be assessed? The defendants, Walker & Co., used, or might have used, the money they proposed to tender, and may have made a profit on it. Will it be said that they would be liable for such profit to the plaintiff? The proposition of the defendants assumes that the tender which they made and afterwards waived in March, had the effect to

vest in the plaintiff the property in some certain Confederate notes, by virtue of which ownership he became liable to their depreciation. We do not think this view can be sustained.

I have omitted to notice the fact that neither in March or in September, 1863, was the plaintiff the legal holder of the note declared on. We consider that of no importance, as it was held by Wade as his agent under a contract known to, and acted on, by all the parties.

We have also omitted to notice, that a plea of tender is incomplete unless accompanied by a payment of the sum tendered into Court; because that objection was not made by the plaintiff, and perhaps, also, the doctrine would be inapplicable in a case like this.

We think the Judge should have told the jury that the plaintiff was entitled to recover the value of the principal of the note with interest from 16th July, 1862, to the date of the tender in September, 1863, assessed according to the legislative scale.

There was error. Judgment reversed, and *venire de novo*. Let this be certified. (96)

Per curiam.

Venire de novo.

Cited: Wooten v. Sherrard, 68 N.C. 336; *Love v. Johnson,* 72 N.C. 420; *Parker v. Beasley,* 116 N.C. 6; *Headman v. Comrs.,* 177 N.C. 263.

JOHN D. HYMAN, ADMINISTRATOR OF WILLIAM TAYLOR v. J. JARNIGAN AND WIFE AND OTHERS.

Where proceedings are taken, upon a petition by an administrator to sell land for the payment of debts, before the Judge of Probate, and he orders a sale of the land and it is sold, and the purchaser, upon the confirmation of the sale, gets a deed for the land before the purchase money is paid, though the proceedings may be very irregular, yet the heirs-at-law cannot have the sale set aside by the Judge of the District at the regular term of the Superior Court.

A petition by an administrator to sell land for the payment of debts is a special proceeding, and belongs to the original jurisdiction of the Probate Court; and parties injured by such proceeding ought to apply to the Judge of Probate for relief, and if he refuse to act, or acts erroneously, in the matter, an appeal will lie to the Judge of the District in Court.

On a petition to sell land by an administrator for the payment of debts, it is erroneous for the Judge of Probate to make an order for the sale of the land before the parties defendant have been served with process by

publication when they were non-residents: or, bfore he had adjudged upon the proofs required by the C. C. P., sec. 89, that the defendants had been regularly served with process by publication.

On a petition by an administrator to sell land for the payment of debts, where the heirs are minors, it is erroneous for the Judge of Probate to make an order of sale, where there is no order for the appointment of the person who appears as guardian *ad litem;* and no order for such appointment can be made until the summons be properly served, and the other requirements of the C. C. P., sec. 59, be complied with.

It is erroneous for a Judge of Probate to order a deed to be made to a purchaser of land sold by an administrator to pay debts, until the purchase money has been paid.

THIS was a petition filed by the plaintiff as administrator for
(97) the sale of the land of his intestate for the payment of his debts, before the Judge of Probate, for the County of HENDERSON.

Such proceedings were had that the land was sold, the sale confirmed and a deed ordered to be made to the purchaser, which was done before the purchase money was paid. Afterwards, some of the heirs applied to *Judge Cannon,* at the last Spring Term of the Superior Court of the County, and moved to set aside the sale upon the ground that the land had been sold at a very inadequate price. The purchaser resisted the motion, and his Honor refused to act in the matter for the reason that the action of the Judge of Probate was final, because it was not objected to nor appealed from at the time. From the order of his Honor refusing their motion, the heirs appealed to the Supreme Court. The proceedings before the Judge of Probate was very irregular, as will sufficiently appear from the opinion filed in this Court.

Phillips & Merrimon for the plaintiff.
No counsel contra.

DICK, J. The proceedings in this case are very irregular, and the sale of the land, and the order upon which it was made ought to be set aside—but the appellants have not chosen the proper remedy.

A petition by an administrator to sell land for the purpose of paying debts, is a special proceeding and belongs to the original jurisdiction of the Probate Court.

Parties injured by such proceedings ought to apply to the Judge of Probate for relief, and if he refuses to act in the matter, or acts erroneously, an appeal will lie to the Judge of the District.

According to the transcript there are many errors in the proceedings but we will notice only a few.

1. The order of sale was granted on the 5th of Nov., 1869, the day the petition was filed, and before the parties defendant (98) had been served with process by publication.

2. The Judge of Probate at the time he granted the order of sale, did not upon the proofs required in C. C. P. 89, adjudge that the defendants had been regularly served with process by publication.

3. There was no order appointing Gulick guardian *ad litem* of the infant defendants. The Court had no right to appoint a guardian *ad litem* until the summons was properly served—and the appointment must be made as prescribed in C. C. P., sec. 59. The act of Gulick on the day the petition was filed was unauthorized, and as the infant defendants were not represented by a guardian, the proceedings are void as to them.

4. The Judge of Probate acted erroneously in ordering a deed to be made for the land before the purchase money was paid. Such an order is contrary to the course and practice of Courts of Equity in directing judicial sales.

We make these suggestions in order that the proceedings may be properly corrected in the Probate Court and further litigation avoided.

His Honor acted properly in refusing to take cognizance of the matter and his judgment must be affirmed.

Per curiam.

Judgment affirmed.

Cited: Shearin v. Hunter, 72 N.C. 496; *Wahab v. Smith,* 82 N.C. 233; *Baker v. Carter,* 127 N.C. 94; *Clark v. Homes,* 189 N.C. 711; *Burton v. Smith,* 191 N.C. 602; *Welch v. Welch,* 194 N.C. 635.

(99)

SAMUEL M. MANN, EX'R. v. JOHN G. BLOUNT, AND ANOTHER.

The proper mode of obtaining relief under the act of 1868-'9, which makes bank bills a set off against judgments and executions already obtained, is by a rule upon the plaintiff in the judgment or execution, which is sought to be enjoined, founded upon proper affidavits, requiring him to show cause why he shall not accept the bills of the bank in payment of the debt, and have satisfaction of the judgment entered of record. And a notice of the rule served upon the Sheriff, who has the execution in hand, will operate as a *supersedias.*

It is the rule of a Court of Equity, or of any other Court whoch proceeds upon the same principles, not to entertain a bill or actions, which

seeks no other relief than that which can be had by orders in a cause then pending.

The person to whom the effects of a bank have been assigned for the purpose of winding up its affairs, and every person claiming under him, has no higher or better rights than the bank itself would have had.

THIS was a civil action in which the plaintiff applied for an order for an injunction, tried before his Honor *Jones, J.*, at the last term of HYDE Superior Court.

The complaint alleged in substance that the present defendant, John G. Blount, as assignee of the Bank of Washington, had in 1869 obtained a judgment against one Adams, and himself as executor of Marcus Swindell, that after a payment of a part of it, the plaintiff had obtained bank bills of the Bank of Washington, and tendered them in payment of the residue of the judgment, an execution on which had been issued and was then in the hands of the Sheriff, and that the attorney of the plaintiff in the execution and the sheriff had refused to receive it. An order for a preliminary injunction was obtained on the 7th March, 1870, and at the Fall Term, 1870, of the Superior Court, the defendant filed an answer, in which it was stated, among other grounds of defence, that after the assignment of the effects of the Bank of Washington to the defendant, the judgment was obtained, and (100) that the money due thereon did not belong to the Bank of Washington, nor to the stockholders thereof, but to certain creditors of the said bank, whose claims had been established and settled by the judgment and decree of the Superior Court of Beaufort County. It was further stated that the corporation known as the Bank of Washington had had no legal existence since the year 1867. Upon his answer, the defendant Blount moved for a dissolution of the injunction, which was refused by the Court, and he appealed.

Warren & Carter for the defendant.
Battle & Sons for the plaintiff.

SETTLE, J. The defendant as assignee of the Bank of Washington, which went into liquidation in 1867, is seeking to collect of the plaintiff in this action, "lawful money of the United States" in payment of a judgment obtained upon a debt made to the Bank—having refused to accept the bills of the Bank of Washington is satisfaction of said judgment.

The Act of 1868-'9, ch. 77, declares, "That an Act entitled an act to make bank bills a set off, ratified the twenty second day of August, A. D. 1868, be so amended as to apply to judgments and executions

which may have been obtained on any debt due any of the banks mentioned in the aforesaid act."

These words are broad enough to embrace the case under consideration. But it is contended that the corporation, known as the Bank of Washington, has had no legal existence since 1867, and that the debt upon which the execution, which is now the subject of controversy is founded, is not due to the Bank of Washington; since all the property of said Bank has been assigned to the defendant, for the benefit of such of the creditors of the Bank as proved their debts. (101)

We are unable to perceive how these facts can affect either the justice or the law of the case.

We are of opinion that the assignee and all who claim under him, have no higher nor better rights than the Bank itself would have had. The assignee is simply winding up the affairs of the Bank, and so far as its debtors are concerned, it can make no difference whether the stockholders or the creditors are to be benefited.

We have thought proper to say this much upon the merits of the case, but we think that the present plaintiff has mistaken his remedy.

A suit in Court is not ended by the rendition of a judgment, but it is a pending suit until the judgment is satisfied.

Therefore, the relief to which the plaintiff in this action is entitled may be obtained by a rule upon the plaintiff in the execution which is sought to be enjoined, founded upon proper affidavits, requiring him to show cause why he shall not accept the bills of the Bank of Washington, in payment of the debt and have satisfaction of the judgment entered of record. A notice of the rule upon the Sheriff who has the execution in hand will operate as a *supersedias*.

Thus the present plaintiff can obtain relief in the cause of *Blount v. Adams, et. al,* which is still pending; and it is a rule of Courts of Equity not to entertain a bill which seeks no other relief than that which can be had by orders in a cause then pending. *Rogers v. Holt,* 62 N.C. 108. *Mason v. Miles,* 63 N.C. 564. *Council v. Rivers, ante* 54.

The judgment of the Superior Court must be reversed, and the action dismissed.

Per curiam.

Judgment reversed.

Cited: Foreman v. Bibb, 65 N.C. 129; *McDowell v. Asbury,* 66 N.C. 448; *Bank v. Tiddy,* 67 N.C. 174; *Blount v. Windley,* 68 N.C. 3; *Clement v. Foster,* 71 N.C. 37; *Finance Co. v. Trust Co.,* 213 N.C. 372.

(102)

STATE ON THE RELATION OF THEODORE KLUTTS v. M. S. McKENZIE AND OTHERS.

If a suit which involves the taking an account, be referred, it is the duty of the referees to state distinctly in their report their conclusions both as to matters of fact and matters of law, so that the Judge may review their findings both as to the facts and the law, and that the Supreme Court may, in case of an appeal, review his decision upon questions of law.

In a case involving the settlement of a complicated account, the C. C. P. (see sections 245 and 246) requires that it be referred to referees to state an account, and objections to their report must be made by way of exceptions to it, and neither party has the right to require the facts to be passed upon by a jury.

THIS was a civil action upon a guardian bond brought in the Superior Court of ROWAN County, which was upon the motion of the plaintiffs attorneys referred to T. G. Haughton and D. H. Davis for an account and report. The referees having acted and returned a report to the Fall Term, 1870, of the Court, each party filed exceptions to it, which it is unnecessary to state. The referees, in their report, set out all the evidence, but did not find the facts upon which their conclusions were based. The exceptions were argued by counsel on both sides, when his Honor, *Judge Henry*, without finding the facts distinctly, but referring to portions only of the evidence, gave a judgment for the relators of the plaintiff, from which the defendants appealed.

Boyden & Bailey and Bragg & Strong for the defendants.
Blackmer & McCorkle and Battle & Sons for the plaintiff.

PEARSON, C.J. We feel satisfied, from the manner in which this case is now brought up, that it cannot go off upon its merits.

The referees set out the evidence, but do not find the facts, and it is impossible to see the principles of law on which they base
(103) their conclusions; seemingly, the results arrived at, is upon the idea of making a fair compromise.

His Honor does not find the facts distinctly, but leaves them to be inferred by reference to portions of the evidence, and the difference in the result, is so material, to-wit: near $10,000, as to cause this Court to hesitate, and decline to grope its way in the dark, for fear a decision upon the matter as now presented will not meet the merits of the case. Indeed it is impossible for us to come to any satisfactory conclusion in regard to it. The report of the referees will be set aside and

the cause be remanded—to the end, that the referees may distinctly set out their conclusions, both as to the facts and the law—and that his Honor may review their finding in regard both to facts and law, and that this Court may review his conclusion in matters of law.

It was suggested on the argument that the parties would be entitled to have the facts passed on by a jury. We do not concur in that view. In a case involving complicated accounts, the mode of trial under the C. C. P., is by reference, and the proceeding is in analogy to a reference to the Clerk and Master in the old mode of Equity procedure, and his report is to be finally disposed of on exceptions. Otherwise, we shall let in all of the inconveniences that attended the old action of account, which caused it to be disused and its place to be taken by a bill in equity for an account, for, in that action, whenever an issue of fact was joined, the Auditor was obliged to return the case to Court, to have the issue passed on by a jury, and whenever there was an issue of law, he had to stop and take the opinion of the Judge, thus cause such delay and impediments to the administration of justice, as to induce the Chancellor to take jurisdiction in his Court of Equity, of matters of account, not because there was any peculiar equity involved, but on the express ground that the mode of trial in the Courts was defective and the merits of the case could not be reached by a jury trial. The C. C. P. does not intend to revive this antiquated and impracticable mode of trial in regard to matters of complicated ac- (104) counts. The mode adopted is by a reference to a referee, who gives his judgment on both facts and law, and then by the judgment of this Court on the questions of law.

This opinion will be certified and the cause be remanded without costs.

Per curiam.

Case remanded.

Cited: Keener v. Finger, 70 N.C. 43; *Lovinier v. Pearce,* 70 N.C. 171; *Earp v. Richardson,* 75 N.C. 85; *Atkinson v. Whitehead,* 77 N.C. 419; *Grant v. Reese,* 82 N.C. 74; *Cooper v. Middleton,* 94 N.C. 93; *Carr v. Askew,* 94 N.C. 211; *Battle v. Mayo,* 102 N.C. 435; *Driller Co. v. Worth,* 117 N.C. 519; *Tucker v. Satterthwaite,* 120 N.C. 121.

B. A. SELLARS AND OTHERS, ADMINISTRATORS OF THOMAS SELLARS v. THOMAS D. JOHNSON.

When the terms of a contract are in writing, or otherwise ascertained, the construction of the contract is for the Court and not for the jury. Hence, where it appeared that a person having pork to sell in the year 1863, wrote to the buyer as follows: "Owing to the great fluctuation in Confederate currency, I prefer not selling for that money. Therefore let me know what you will pay in N. C. bank notes, or check on the Cape Fear Bank at Greensboro'," and the buyer took the pork, and sent a check in the following words:

"YANCEYVILLE, N. C., 3rd Dec., 1863.

$3688. Cashier of the Bank of Cape Fear, Greensboro', N. C., pay to the order of Thomas D. Johnson, thirty-six hundred and eighty-eight dollars.

(Signed,) JOS. J. LAWSON, Cash'r,.

and endorsed "Pay Thomas Sellars or order.

(Signed,) THOMAS D. JOHNSON."

It was held, that the contract did not require the buyer to send a check payable in N. C. bank notes, and the check he sent was a compliance with the terms of it.

If a seller receives a check drawn on a bank, which is endorsed to him, and which he might have refused as not being in accordance with his contract, but kept it, presented it to the bank for payment, and sued upon it, instead of repudiating it and returning it to the buyer, it amounts to an acceptance of the check in satisfaction of the article sold, and the liability of the buyer is then only upon his endorsement.

THIS was an action of assumpsit under the former system
(105) tried before his Honor *Tourgee, J.*, at the Fall Term, 1869, of the Superior Court of RANDOLPH County. The plaintiffs declared in three counts. 1. upon a check, in the following words and figures:

"BANK OF YANCEYVILLE,

$3688. *Yanceyville, N. C., 3d Dec.,* 1863.

Cashier of the Bank of Cape Fear,, Greensboro', N. C., pay to the order of Thomas D. Johnson, thirty-six hundred and eighty-eight dollars.

No. 2262. JOS. J. LAWSON, Cashier.

With the following endorsement—Pay Thomas Sellars or order.

THOMAS D. JOHNSON."

2. For 1844 lbs. pork, sold and delivered by the plaintiffs' intestate to the defendant at $2 per lb. in North Carolina money.

3. Upon a *quantum valebat* for 1844 lbs. pork sold and delivered by the plaintiffs' intestate to the defendant on or about the 2d December, 1863.

The facts as they appeared on the trial will be found sufficiently stated in the opinion of the Court. The jury under the charge of his Honor found a verdict for the defendant, and from the judgment rendered thereon, the plaintiffs appealed.

Gorrell for the plaintiff.
Scott and Hill for the defendant.

READE, J. Where the terms of a contract are in writing, or other wise ascertained, the construction of the contract is for the Court, and not for the jury. All that passed between the parties in this case was in writing, and all the writings were in evidence except a letter from the defendant to the plaintiff, in regard to which there was contradictory evidence. If, therefore, that letter would alter the contract as it appears from the other writings, then its contents would have been a question for the jury, but we are of the opinion, that taking (106) its contents to be as alleged by the plaintiff, it would not alter the case. The case may be considered, therefore, as if all the evidence of the contract was in writing, and the terms ascertained.

The plaintiffs' intestate wrote to the defendant as follows:

DECEMBER 2D, 1863.

Dear Sir: I send you about nineteen hundred pounds of pork to your request. Please give me a check on the Bank of Cape Fear, at Greensboro', for the pork, at two dollars per pound, by the boy.

(Signed:) THOMAS SELLARS.

The defendant received the pork, and sent to the plaintiffs' intestate, by the boy, the following check:

BANK OF YANCEYVILLE,

Yanceyville, N. C., 3d December, 1863.

$3688. Cashier of the Bank of Cape Fear, Greensboro', N. C., pay to the order of Thomas D. Johnson, thirty-six hundred and eighty-eight dollars.

(Signed:) JOS. J. LAWSON, *Cashier.*

The said check was endorsed as follows:

Pay Thomas Sellars or order.

(Signed:) THOMAS D. JOHNSON.

The question is, did the defendant comply with the letter of the plaintiffs' intestate?

We think he did, in letter and spirit.

But the plaintiff says, that, admitting it to be so, if the letter and check were all, yet, there are other portions of the correspondence which explain the letter and check, and show that the defendant was either to pay N. C. bank notes, or send a check payable in N. C. bank notes. And he relies upon the following letter:

NOVEMBER 17TH, 1863.

Mr. Thos. D. Johnson: If you wish to buy a lot of pork, let me know forthwith. * * * * Owing to the great fluctuation in Con-
(107) federate currency, I prefer not selling for that money. Therefore, let me know what you will pay in N. C. bank notes, or a check on the Cape Fear bank at Greensboro'.

(Signed:) THOS. SELLARS.

The plaintiff insists that the proper construction of this letter is, that the defendant was to pay in N. C. bank notes, or give a check payable in such notes. We do not think so. So far from its being required that the check should specify the funds in which it should be paid, it might have been properly rejected if it had. We do not know, nor is it necessary to enquire, why Sellars wanted a check on the bank. It may be that he thought he could at some time make the bank pay coin; or that he could trade it to some person who owed the bank; or otherwise use it to advantage; at any rate he proposed a simple check upon the bank, and just such a check was sent him.

The plaintiff further insists, that the defendant's letter in answer to the above, shows that the check was to be for N. C. bank notes.

That letter was lost and contradictory evidence was given as to its contents. A witness for the plaintiff testified that the letter promised to "give $2 per pound in N. C. money." If this would make any difference, supposing it to be true, then it ought to have been submitted to the jury to determine its contents. But we do not think it would alter the case. We must therefore consider the case as if that letter was as testified to by plaintiffs' witness, although we are satisfied both from what was testified to by other witnesses, and by the answer of the plaintiffs' intestate thereto it was not. But we say it makes no differ-

ence, because if it were so, yet the plaintiff's intestate, in two subsequent letters, to-wit: 26th November and 2nd December, varied the terms back again to a simple check on the bank—such as was sent to him by the defendant. In answer to the letter which was lost, the plaintiffs' intestate wrote to the defendant as follows: (108)

NOVEMBER 26TH, 1863.

Mr. Thomas D. Johnson: In answer to your note, I can say, if nothing prevents, I shall send you on next Thursday or Friday, 3rd or 4th of December, some 18 or 19 hundred pounds of pork, and accept your proffered terms of the check.

(Signed:) THOS. SELLARS.

Nothing is said in this letter about the defendant's having offered in his letter to pay in N. C. money as testified to by the plaintiffs' witness, but the contrary, that he had proffered to pay in a check. And the plaintiffs' intestate said he would send the pork and take the check.

And again in his letter of 2d December, accompanying the delivery of the pork, he says, "please give me a check on the Bank of Cape Fear." And the defendant did give him a check. So that, no matter what the defendant may have offered to do theretofore, in the last letter, he strictly complied with the last terms offered by the plaintiffs' intestate, and with his first terms as well.

It is true, his Honor did not decide the case precisely upon this ground, but, as we understand his decision, it was, that no matter what had been the understanding of the parties before the pork was sent, yet, if the plaintiffs' intestate received the check, and kept it, and presented it to the Bank for payment and sued upon it, instead of repudiating it and returning it to the defendant, that this amounted to an acceptance of the check in satisfaction for the pork, and that the defendant was then only liable upon the check as endorser.

We do not think that the defense was driven to that view of the case, because, as we have said, we think the contract throughout was that the defendant was to pay in a check; but still, we think his Honor was right, even in the view of the case which he presented.

It appeared in the case, that neither the Yanceyville Bank which drew the check, nor the defendant had any funds in the (109) Cape Fear Bank except Confederate treasury notes, and as it was clearly understood that plaintiffs' intestate was not to receive such notes, it was a fraud in the defendant to send the check.

Suppose it be so, still the defendant's liability is not upon the original contract for the pork, but upon his endorsement after the plain-

tiffs' intestate had accepted the check. And the plaintiffs' intestate might have presented the check to the Bank for payment in bank notes, or even in coin, and upon refusal and protest and notice, might have sued the defendant upon his endorsement.

The plaintiffs' counsel properly admitted in this Court that if the check was a compliance with the contract, then it ought to have been presented within a reasonable time, and the defendant notified of its non-payment; and that this was not done.

The objection that the check was not stamped, was decided at the last term of this Court, *Haight v. Grist*, 64 N.C. 739. The United States Rev. Act forbidding unstamped instruments to be used in evidence, etc., is to be administered in the U. S. Courts only.

There is no error.

Per curiam.

Judgment affirmed.

Cited: Delafield v. Construction Co., 118 N.C. 108; *Ratliff v. Ratliff*, 131 N.C. 427; *Davis v. Evans*, 133 N.C. 321; *Young v. Mica Co.*, 237 N.C. 649; *Bishop v. DuBose*, 252 N.C. 161.

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(110)

ALFRED ROWLAND AND WIFE v. JOSEPH THOMPSON, GUARDIAN.

The Judge of the Court of Probate has jurisdiction of a complaint by a ward against his guardian, demanding an account and payment. From his judgment an appeal will lie to the Judge of the Superior Court, who having thus obtained jurisdiction of the cause will retain it, until it is finally disposed of.

The Judge of the Court of Probate has no jurisdiction of a suit on a guardian bond. Such suit must be brought in the Superior Court.

Where a suit for the settlement of a guardian account is before the Judge of Probate, his deputy cannot perform any functions in taking an account but only such as are merely ministerial, such as recording testimony, swearing witnesses, calculating interest and the like. He cannot decide upon the competency of testimony, or upon any other legal question, and if he do so, the adoption and confirmation of his decision by his principal afterwards will not make it good.

THIS was a petition filed by the plaintiffs against the defendant before the Judge of Probate, of ROBESON County, for an account and settlement of the defendant's account as guardian of the feme plaintiff.

The plaintiffs having obtained a judgment, the defendant appealed to the Superior Court, and at the last term thereof, before his Honor, *Russell, J.*, the following statement of the case was made out and filed by him:

"This case came up by appeal of the defendant from the judgment rendered in the Probate Court. In the Superior Court, it appeared that the only qualification of the Deputy Clerk was what purported to be an oath of office taken before the Register of the County. The defendant moved to dismiss the case for the reason that the record showed that the proceedings were had before one who was neither the Judge of Probate, Clerk of the Superior Court, nor Deputy Clerk. The Court overruled the motion to dismiss, from which the defendant in open Court craved an appeal to the Supreme Court, which is granted upon the filing the appeal bond according to law in the sum of $500."

Leitch for plaintiffs.
N. A. McLean, R. S. French and W. McL. McKay for defendant.

RODMAN, J. On the 5th March, 1870, the plaintiffs filed their petition before the Probate Judge of Robeson County, alleging (111) that the defendant had been guardian of the feme plaintiff, etc., and demanding an account and payment, etc.

The defendant answered, admitting that he was guardian and his liability to account. The Probate Judge (or some other person with his sanction—as to which more will be said presently) proceeded to take an account, and gave judgment against the defendant, from which he appealed to the Judge of the Superior Court, who declined to hear it in vacation, and assigned it for a regular term of the Court. On an appeal from this order this Court held (64 N.C. 714) that he had a right to do so. At Fall Term, 1870, of the Superior Court, the defendant moved to dismiss the action for want of jurisdiction in the Probate Court, which the Judge refused, and the defendant appealed to this Court.

Therefore the only question presented to this Court by the record is, whether a Probate Court has jurisdiction of a complaint by a ward against his guardian demanding an account and payment. We think it has. The several cases lately decided as to the jurisdiction of Courts of Probate are familiar to the profession, and need not to be specially cited here; none of them bears very directly on the present question, and nothing in the present opinion is inconsistent with any of them. Art. IV, sec. 17, of the Constitution prescribes the jurisdiction of the Clerks of the Superior Courts as Probate Judges. It says, "Clerks of

the Superior Courts shall have jurisdiction,"—"to audit the accounts of executors, administrators and guardians," etc. The C. C. P., sec. 481, provides that any guardian may be required "to file an account at any time after six months from the wards coming of full age, or the
(112) cessation of the guardianship," and that whether the proceeding be voluntary or compulsory, it shall be audited and recorded by the Probate Judge." The Act of 1868-'9, ch. 201, further prescribes the duties of Probate Judges in reference to guardians. We think these acts consistent with the Constitution, and proper to carry it into effect.

The phrase "audit an account," used in the Constitution is a familiar one in the law. It means something more than the statement of an account by an unauthorized person: properly it means the act of a Court, and therefore, obligatory. "And there are auditors assigned by the Court to audit and settle accounts in actions of account and other cases, who are proper judges of the cause, and pleas are made before them," etc. Tomlins. Law Dict., Auditor. Under the acts of Congress regulating the different departments, auditors are provided to audit the accounts of officers and others becoming indebted to the United States, and the accounts certified by them are conclusive between the parties unless appealed from. We think it clear that the Constitution intended to confer this jurisdiction on the Probate Courts; it naturally accompanies that of auditing the accounts of executors and administrators; in the majority of cases no difficult questions occur, and a speedy decision is eminently desirable. Our opinion does not extend the jurisdiction of a Probate Judge to an action on a guardian bond; that must be brought in the Superior Court.

The defendant in this case further contends that the account returned by the Probate Judge was not in fact audited by him, but by a person who was, or claimed to be, his deputy. That would be no ground for dismissing the action which was properly brought; but would be ground for a motion to set aside the account. The record does not show that any such motion was made. Nevertheless as the question was argued before us by both counsel, as if such motion had been made
(113) and refused by the Judge, we think ourselves at liberty to consider it in that light. It is a familiar principle that judicial power cannot be delegated; ministerial may. In some cases it may be difficult to draw the line between functions which are judicial and those which are merely ministerial. In this case the Probate Judge reports that one W. A. Dick did rule on matters of law during the taking of the account but that such rulings were afterwards considered and confirmed by him. We are not told the nature of the ruling on matters of law made by the deputy; they may have been as to the competency or

pertinency of testimony, or as to its effect. In either case it was the act of an unauthorized person; the exercise of a judicial power which cannot be delegated. The confirmation by the Judge afterwards cannot give it validity: the parties are entitled to be heard by the Judge in person, and cannot be forced to transmit their statements and reasonings through the channel of another; they are entitled to have his decision unbiassed by the previous decision of his deputy. Nor is it at all material whether Dick was regularly appointed and qualified a deputy of the clerk or not. For his judicial functions a clerk can have no deputy. It is surely unnecessary to say that there are many things in the course of a judicial investigation which any person appointed by the Probate Judge may do under his supervision; for example; he may record the testimony, but the Judge only can decide its competency; if a regularly qualified deputy he may swear the witnesses; he may calculate interest, and add up columns of figures; these are all ministerial acts.

We think the Judge of the Superior Court should have set aside the account as irregularly taken. But as was intimated in this case when last before us, (64 N.C. 710) having acquired jurisdiction by the appeal, he will not send it back to the Probate Judge; he may refer it to him as Clerk of the Superior Court, or to any other person to take the account and the case will afterwards be proceeded in, according to the course of the Court. It may be asked here, if the (114) Judge of the Superior Court can refer the taking of the account to a referee or auditor, why cannot the Probate Judge do the same thing? The answer is, to audit the account is the special jurisdiction and duty of the Probate Judge; he has not a general jurisdiction as the Superior Court has, and the power to refer is not only given to the Superior Court by C. C. P., sec. 245, but by the usage of all Courts of general jurisdiction from the earliest times.

The judgment below is affirmed, and the case remanded to the Superior Court of Robeson County to be proceeded in.

Per curiam.

Judgment affirmed.

Cited: Suddreth v. McCombs, 64 N.C. 714; *Suddreth v. McCombs,* 65 N.C. 187; *Larkins v. Murphy,* 68 N.C. 384; *Bratton v. Davidson,* 79 N.C. 426; *Yeargin v. Siler,* 83 N.C. 350; *Houston v. Howie,* 84 N.C. 354; *S. v. Knight,* 84 N.C. 793; *McNeill v. Hodges,* 105 N.C. 54; *Donnelly v. Wilcox,* 113 N.C. 409.

M. P. PEGRAM v. COMMISSIONERS OF CLEVELAND COUNTY.

The Board of Commissioners of a County have a perpetual existence, Continued by members who succeed each other, and the body remains the same notwithstanding a change in the individuals who compose it. Hence, when a writ of *mandamus* is obtained against a Board of Commissioners, and there is a change in the individual members between the time when the writ is ordered, and when it is served, those who compose the Board at the time of service must obey it.

THIS was the case of an application for the writ of *mandamus* tried before *Logan, Judge,* at the Spring Term, 1870, of the Superior Court of MECKLENBURG County, decided against the plaintiff and taken to the Supreme Court by his appeal. At June Term, 1870, this Court decided that the writ should be issued as prayed for, (See 64 N.C. Rep. 557.) At an election held in August, 1870, an entirely different set of individuals were elected Commissioners of Cleveland County, (115) and afterwards qualified as such according to law. At the Fall Term of the said Superior Court of Mecklenburg, before the same Judge, the plaintiff moved a peremptory writ of *mandamus* according to the order of the Supreme Court, which was refused by his Honor, because the Commissioners had been changed, and the latter members of the Board "had not had a day in Court." From this order of refusal the plaintiff appealed.

Jones & Johnston for the plaintiff.
J. H. Wilson for the defendants.

DICK, J. This case was before the Court at last Term, (64 N.C. 557,) and "it was declared to be the opinion of this Court, that the writ of *mandamus* should be issued as prayed for."

His Honor in the Court below, declined to order the writ to be issued, because the individuals who comprised the Board of Commissioners, had been changed, and they "had not had a day in Court."

The County of Cleveland is a municipal corporation, and "its power can only be exercised by the Board of Commissioners," etc. "All acts or proceedings by or against a County in its corporate capacity, shall be in the name of the Board of Commissioners. (Acts 1868, ch. 20.) As all the corporate functions of a county are thus to be exercised, the Board of Commissioners must necessarily have a perpetual existence, continued by members who succeed each other, and the body remains the same notwithstanding a change in the individuals who compose it.

The County is a public corporation, and has certain public duties to perform, and according to the provision of the statute above referred

to, the writ of *mandamus* must be directed to the Board of Commissioners who exercise the corporate powers (Tapping on Man. 317,) and the individuals who compose the Board at the time of service, must obey the writ. (116)

There was error. Let this be certified.

Per curiam.

Judgment reversed.

Cited: Askew v. Pollock, 66 N.C. 50.

NATHANIEL WOODY, ADMINISTRATOR v. B. N. SMITH AND OTHERS.

An administrator, whose sale of the personal property of his intestate has been, after due public notice, conducted fairly and without any connivance with the widow, shall not be held responsible because of her having purchased many articles at a nominal or very low price on account of the by-standers forbearing to aid against her.

THIS was a petition by the plaintiff as the administrator of William A. Britt for the sale of land to pay the debts of the intestate upon which a reference was made to the Clerk for a report, and it came on to be heard before *Tourgee, Judge* at the Spring Term, 1870, of the Superior Court of ALAMANCE County, upon exceptions by the defendants to the report which was returned.

The exceptions were sustained, and the plaintiff appealed. A sufficient statement of the case will be found in the opinion of the Court.

J. A. Graham for the plaintiff.
Scott & Scott for the defendants.

SETTLE, J. This was a petition, by the plaintiff, as administrator, to sell the lands of his intestate for the payment of debts, alleging that the personal property had been exhausted and was insufficient for that purpose. The defendants resist it upon the ground that the plaintiff has committed a devastavit, in that he permitted the (117) widow to purchase property, at the sale, at nominal prices. There was a reference to the Clerk, who reports that many articles sold too low, but he goes on to say "from the evidence I am satisfied that the administrator was not in fault, he had advertised and gave the

usual notice to the public. On the day designated there was a large crowd present and the sale was conducted with perfect fairness, the widow bid off many articles at very low figures. It is a common custom in this country, when a person dies intestate leaving a widow, that at the sale of the property, she bids it off at her own figures." He further reports that there is no means to pay the indebtedness without a sale of the real estate. To this report the defendants except, for the reason already assigned. His Honor sustained the exceptions and the plaintiff appealed.

The law gives the widow a year's support and a child's part of the estate. This appears liberal enough, when we consider the rights of the next of kin, the heirs and creditors, especially since all the estate of the wife, both real and personal, is secured to her absolutely by Art. 10, sec. 6, of the Constitution. But there is nothing prohibiting the widow from bidding at the sale of the effects of her deceased husband, and if the administrator is guilty of no laches, and enters into no combination to suppress bidding or otherwise unduly influence the sale, we are aware of no law that requires him to insure the value of the property. He had given the notice required by law, and a larger number of persons than usual (according to one witness) were present at the sale, and everything was conducted fairly. Why did not the heirs and creditors run the property up to its full value? Was it because it was more agreeable to their feelings not to encounter public sentiment by bidding against the widow, but afterwards to hold the administrator responsible for the full value of the property, notwithstanding the fact that he was
(118) prohibited by law from bidding at his own sale?

But it is suggested that he should have stopped the sale. Suppose he had done so, and after due advertisement had exposed the property to sale a second time; have we any assurance that the sympathies of the public for the widow would have abated in any degree, or that the resolution of the heirs and creditors would have sufficiently matured to enable them to make the property bring its full value? In the meantime, we must remember that the property if perishable may have been wasted, or the expense of keeping stock, etc., may have consumed the whole estate.

By a recent statute an executor or administrator may bid in, at any auction sale, real property and take a conveyance to himself as executor or administrator, for the benefit of the estate, when in his opinion this is necessary to prevent a loss to the estate. Acts 1868-'9, ch. 113, sec. 77.

But there is no change in the well established law, in respect to personal property—that an administrator cannot bid at his own sale, and

surely he cannot be required to exhaust the estate, by repeated sales merely because the heirs, the creditors, and the public will not bid against the widow.

The defendants rely upon the authority of *Johnston v. Eason,* 38 N.C. 330, in which *Nash, J.,* in delivering the opinion of the Court commences by saying—"it is impossible to read this testimony without being entirely satisfied that a great fraud has been attempted," and he closes with the remark that we "see so much of trick and contrivance, as satisfies us that the whole was a base fraud." In our case, we think that the evidence sustains the report of the clerk, that the administrator was in no default, and that the sale was conducted with perfect fairness. And we may say of him, as is said in *Beale v. Darden,* 39 N.C. 76, an administrator, like other trustees, is not to be held liable as insurers or for anything but *mala fides* or want of reasonable diligence. It is both plain justice and plain policy to hold them chargeable out of their own estates, only on that principle, in (119) order to get responsible and honest men to undertake burdensome trusts.

Let it be certified that there was error in the ruling of his Honor, sustaining the exception and ordering the report to be reformed.

Per curiam.

Judgment reversed.

Cited: Marshall v. Kemp, 190 N.C. 493; *Pearson v. Pearson,* 227 N.C. 33.

JOHN PATTERSON v. ORLANDO HUBBS.

A civil action, in which the plaintiff in his own name sets forth in his complaint that he is the tax collector for a certain county, and that the defendant has usurped the office, and has unlawfully received the fees and emoluments thereof, cannot be brought under the 189th section of the C. C. P., and thereby obtain an injunction to restrain the defendant from acting in said office.

The 189th section of the C. C. P., which provides as to a civil action that "when, during the litigation, it shall appear that the defendant is doing or threatens, or is about to do, or procuring or suffering some act to be done in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act," does not apply to cases of the

usurpation of a *public office*, but is confined to cases where some *private right* is a subject of controversy, and the act sought to be restrained would produce injury to the alleged right of the plaintiff during the litigation.

When the subject of a controversy is the right to a public office, the action should be brought by the attorney-general under the 366th section of C. C. P., in the name of the people of the State, and if it be against a person for usurping a public office, the attorney-general, in addition to the statement of the cause of action, "may also set forth in the complaint the name of the person rightfully entitled to the office with a statement of his right thereto; and in such case upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by a Judge of the Supreme Court for the arrest of such defendant, and holding him to bail;" as in other civil actions where the defendant is subject to arrest.

THIS was an action in which the plaintiff, claiming that he
(120) was tax collector for the County of Craven, applied for an order for an injunction against the defendant, who alleged that he was Sheriff of the said County, and as such had the right to collect the taxes of the County, embracing those the collection of which was claimed by the plaintiff. A temporary injunction was granted upon the filing the complaint, and upon the trial before *Clarke, J.*, at the last term of the Superior Court for the County of CRAVEN, the injunction was ordered to be continued, and the defendant appealed. The facts are sufficiently stated in the opinion of the Court.

Seymour & Green for the defendant.
Manley & Haughton for the plaintiff.

PEARSON, C.J. It is provided (C. C. P., sec. 366,) "an action may be brought by the Attorney General in the name of the people of the State," etc., "when any person shall usurp, intrude into, or unlawfully hold or exercise any public office" etc. Sec. 369, "whenever such action shall be brought against a person for usurping an office, the Attorney General may also set forth the name of the person rightfully entitled to the office, and in such case upon proof by affidavit, that the defendant has received fees and emoluments belonging to the office, an order may be granted by a Judge of the Supreme Court, for the arrest of the defendant, and holding him to bail," etc.

The case made by the pleadings falls within the words and meanings of these two sections. The plaintiff alleges that the defendant has usurped the office of tax collector, and has unlawfully received the fees

and emoluments of the office. The defendant claims to be entitled to the office, and to the fees and emoluments thereof. (121)

The action is not instituted under this provision, but under sec. 189, C. C. P. We are of opinion the action as instituted cannot be maintained.

It is provided, (sec. 189,) "when it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission, or continuance of some act, which would during the litigation, produce injury to the plaintiff—or when during the litigation it shall appear that the defendant is doing some act in violation of plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, temporary injunction may be granted to restrain such act."

We have seen that our case is covered by the provisions of secs. 366 and 369. The question is, does sec. 189 embrace the case? It is not easy to conceive a reason for embracing a case under both of these provisions so as to make the remedy cumulative, and give to the plaintiff an election to proceed in the one mode or the other.

We are of opinion that sec. 189 does not apply to cases of the usurpation of a public office, but is confined to cases where some private right is a subject of controversy, and the act sought to be restrained would produce injury to the alleged right of the plaintiff during the litigation. In such cases the appropriate remedy is a temporary injunction to prevent the commission or continuance of the act, for no one is affected by the injunction, save the parties to the action.

But when the subject of controversy is the right to a public office, an injunction to prevent the exercise of the office would produce general inconvenience; for instance, an injunction against one who it is alleged, has usurped the office of the Clerk of a Court, forbidding him to discharge the duties of the office, would stop all judicial proceedings and the public would be made to suffer by this mode (122) of contesting the right to the office, and to the fees and emoluments. Hence, in this, and the like cases, the appropriate remedy is not an injunction, but an order, holding the defendant to bail as a security for the fees and emoluments, if it turns out that he has usurped the office, and wrongfully received the fees and emoluments, leaving him until the right can be adjudicated to, go on in the discharge of the duties, so that the public service may have no detriment from the contest in regard to the right to the office, this objection is fatal.

The Act of 1865, chap. 32, has no bearing on the case. In *Brodnax v. Groom,* 64 N.C. 244, it is held "the act includes only cases which involve the constitutional power to impose the tax, or to authorize it to

be done, and the remedy by injunction against the collection of State and County taxes does not embrace questions as to the mode of valuing property, the sufficiency of the Sheriff's bond, and the like, which may be called matters of detail. No question of this character is involved in the case now under consideration; it is simply a controversy in regard to the office of tax collector and the fees and emoluments thereof.

The judgment in the Court below is reversed, and this Court proceeding to give such judgment as ought to be rendered; it is adjudged that the action be dismissed, and the defendant go without day and recover his cost.

Per curiam.

Judgment reversed.

Cited: People v. Heaton, 77 N.C. 21; *Jones v. Comrs.,* 77 N.C. 281; *Sneed v. Bullock,* 77 N.C. 283; *Sanders v. Gatling,* 81 N.C. 301; *Eliason v. Coleman,* 86 N.C. 239; *Cozart v. Fleming,* 123 N.C. 554; *Hargett v. Bell,* 134 N.C. 395; *Rogers v. Powell,* 174 N.C. 389; *Motor Service v. R. R.,* 210 N.C. 39; *Transit Co. v. Coach Co.,* 228 N.C. 772; *Edwards v. Bd. of Education,* 235 N.C. 251; *Dare County v. Mater,* 235 N.C. 181.

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(123)

B. F. SUTTON v. THOMAS L. OWEN AND DAVID M. CARTER.

A bond to pay money, and also to clothe a slave is not negotiable, and before the adoption of the C. C. P. would not be sued on in the name of the assignee.

The assignor of a note not negotiable is liable only as guarantor, and as such is entitled to notice of the default of the principal debtor.

THIS was an action of debt commenced before the adoption of the C. C. P., and brought by the plaintiff as endorsee of the following instrument of writing:

$140. On the first day of January, 1862, I promise to pay David M. Carter or order one hundred and forty dollars for the hire of his negro Jim, for the year 1861, and to furnish said negro with good and sufficient clothing.

(Signed and sealed.) FRANCIS L. OWEN, (Seal.)

WASHINGTON, March 12th, 1861.

On the back of this note is the following endorsement:

I guarantee the payment of the within note to Junius D. LaRoque or bearer.

June 13th, 1861. D. M. CARTER.

The defendant Carter plead specially, 1st. That he is a guarantor, and not an endorser. 2nd. That the bond beclared on is not negotiable.

At the trial at the last Superior Court for the County of LENOIR, before his Honor, *Clarke, J.*, the plaintiff obtained a judgment against the defendants, from which Carter appealed.

Faircloth for the defendants.
No counsel for the plaintiff.

READE, J. This suit was instituted before the C. C. P., and is governed by the law then existing. C. C. P., sec. 4.

The objection that the bond sued on is not negotiable (being for the payment of money and to do something else) and there- (124) fore did not authorize the plaintiff to sue in his own name, is well taken. *Knight v. Wilmington & Manchester Railroad Co.*, 46 N.C. 357.

Under the C. C. P., sec. 55, the "real party in interest may sue."

The fact being that the bond is not negotiable under the Rev. Code, ch. 13, sec. 1, the endorsement of the obligee, Carter, did not make him liable as *surety*, but he is liable only as guarantor and in that capacity he was entitled to notice of the default of the principal debtor.

There is error. Judgment reversed and judgment here for defendant Carter.

Per curiam.

Judgment reversed.

Cited: Johnston v. Henderson, 76 N.C. 229; *Johnson v. Lassiter*, 155 N.C. 53.

T. G. HAUGHTON v. T. J. MERONY.

A bond given in March, 1864, for Confederate money borrowed at that time payable the 1st of October of the same year "in four *per cent.* Confederate bonds or certificates, or in Confederate currency to be issued after the 1st April, 1864," is not illegal and void, and a recovery may be had upon it for an amount in United States currency to be estimated according to the legislative scale.

THIS was a civil action tried before his Honor, *Henry, J.*, at the Fall Term, 1870, of ROWAN Superior Court, when the plaintiff obtained a verdict and judgment and the defendant appealed. The pleadings and facts of the case are sufficiently stated in the opinion of the Court.

Boyden & Bailey for the defendant.
Blackmer & McCorkle and A. Jones for the plaintiff.

RODMAN, J. This is an action brought on a bond made by (125) defendant, dated 30th March, 1864, by which in consideration of $6,200, in Confederate money paid to him by the plaintiff, he promises to pay to the plaintiff, on demand, the like sum in four per cent. Confederate bonds or certificates by the 1st of October, 1864, or in Confederate currency to be issued after 1st of April, 1864.

The defendant answered denying the execution of the covenant declared on, and alleging that the covenant was illegal and void.

The jury found that he did make the covenant and assessed the plaintiff's damages at $251.08, being the value of the Confederate bonds in October, 1864, according to the legislative scale for Confederate money, leaving it to the Judge to say whether in law the consideration was illegal. His Honor was of the opinion that it was not, and gave judgment according to the verdict, from which the defendant appealed.

The question whether a contract in which Confederate treasury notes or currency, was the consideration, would be enforced, came before this Court at June Term, 1867, in the case of *Phillips v. Hooker*, 62 N.C. 193. The case was considered by the Court with great care, and it was held upon reasons which appear to us solid, that such a contract was not illegal. The principle of this case has since then been repeatedly approved, and we consider that it is not now an open question.

The defendant, however, endeavors to distinguish this case from that, on the ground, that here the payment was to be made in four per cent. Confederate bonds or certificates, or in what was known as the "new issue" of Confederate treasury notes. We cannot perceive any substan-

tial distinction. The only difference between the treasury notes and the bonds, was, that the latter bore interest and the former did not. Both were payable on the condition of the ratification of a treaty of peace between the United States and the Confederate States, both were issued by the Confederate government for the purpose (126) of aiding it to carry on the war; and they must stand on the same footing as subjects of traffic. The value of the Confederate bonds was calculated by the legislative scale, and we think that was right. The scale was intended to be applicable to all Confederate securities which were substantially similar.

There is no error.

Per curiam.

Judgment affirmed.

WILLIAM CRISP v. M. H. LOVE AND OTHERS.

Where two persons are appointed as arbitrators, and it is provided in the submission, or rule of Court, that they may select an umpire, it must appear on the face of the award that the appointment of the umpire was the act of the will and concurring judgment of both the arbitrators.

THIS was an action of trespass *vi et armis* brought under the old practice in the Superior Court of Law for the County of CHEROKEE, and after issue joined was removed for trial to the County of MACON, and was placed upon the docket of the Superior Court of that County. At the August Term, 1869, of that Court, it was referred by a rule of Court, "to N. G. Howell and Dr. Lyle, with power to choose an umpire, and their award or the award of a majority to be a rule of Court." An award was returned to the Spring Term, 1870, of the Court, by A. M. Lyle, one of the arbitrators, and D. C. Hardin, as umpire, in favor of the plaintiff against one of the defendants, and in favor of all the other defendants. To this award was annexed the following protest by the other arbitrator, N. G. Howell:

"The undersigned, one of the persons to whom this cause was referred, has had the award of A. M. Lyle, the other referee, and one D. C. Hardin (who styles himself umpire) submitted to (127) him, that he respectfully declines to adopt the same, as in his opinion the defendants are liable to the plaintiff for the property taken.

He therefore enters his protest against said award in that the same is against the testimony taken in the cause." N. G. HOWELL.

The counsel for those defendants in whose favor the award was made, moved for judgment thereon, which the counsel for the plaintiff objected to, and filed several exceptions to the award, one of which was that the umpire was not chosen by the joint action and consent of the two referees.

The exceptions were overruled by his Honor, *Cannon, J.*, and a judgment given according to the award, from which the plaintiff appealed to the Supreme Court.

M. Erwin for the plaintiff.
Phillips & Merrimon for the defendants.

DICK, J. An arbitrator is a person selected by the mutual consent of the parties, to determine matters in controversy between them, whether they be matters of law or fact. He is invested with judicial functions, limited by the terms of the submission, and he must be incorrupt and impartial, and not exceed or fall short of his duty, and if he acts otherwise, his award may be set aside.

The award on its face ought to show that the arbitrator has acted upon all the matters submitted, and his judgment must be expressed with clearness and certainty.

When two persons are appointed as arbitrators, and it is provided in the submission, or rule of Court, that they may select an umpire, if they cannot agree, it must appear on the face of the award, that the appointment of the umpire was the act of the will and concurring judgment of both the arbitrators. Russell on Arbitration, 220.

In the case before us, it does not appear in the proceedings of the arbitrators how and under what circumstances the umpire was (128) chosen.

As the arbitrator Howell, in his protest against the award speaks of Hardin as one "who styles himself umpire," we conclude that the appointment was made without his consent.

The judgment of his Honor was erroneous, and the award must be set aside.

Let this be certified.

Per curiam.

Venire de novo.

Cited: Keener v. Goodson, 89 N.C. 276.

WILLIAM J. FOREMAN v. JAMES H. BIBB AND ANOTHER.

A proceeding by a motion supported by affidavits after a notice to the opposite party, to have satisfaction of a judgment entered of record upon the ground that it has been paid since its rendition, is the appropriate remedy in such a case, but is neither a special proceeding nor a civil action. It is only a motion in a cause still pending.

THIS was a motion made by the defendants, after notice to the plaintiff, to have satisfaction of a judgment which the plaintiff had obtained against them in the Superior Court of PITT County entered of record, upon the ground that they had paid it since it was rendered. It came on to be heard before his Honor *Judge Jones,* at the Fall Term, 1870, of the Court of that County upon affidavits taken and filed by both parties, when his Honor found the fact to be, that the judgment had been paid by one of the defendants, and ordered and adjudged that satisfaction thereof be entered of record, whereupon the plaintiff appealed.

Battle & Sons for the plaintiff.
Moore & Gatling and G. W. Johnston for the defendants.

SETTLE, J. There was a motion by the defendants, supported by affidavits, before his Honor the Judge of the 2d Judicial Dis- (129) trict, after due notice to the plaintiff, to have satisfaction of the judgment theretofore obtained in the Superior Court against them, entered of record, upon the ground that it had been paid since its rendition.

The learned counsel for the plaintiff concedes that this was the mode of proceeding, in such cases, both in England and in this State, prior to the adoption of the Code of Civil Procedure, and that it is still the appropriate remedy. *Mann, Ex'r. v. Blount,* ante 99.

But he insists that it is either a special proceeding, which the Act of 1868-'9, ch. 93 requires to be brought before the Clerk of the Court, or a civil action which must be brought before the Judge of the Superior Court, at a regular term of the Court. And he argues, upon the authority of *Tate v. Powe,* 64 N.C., 644, that it must be a special proceeding, and was therefore improperly moved before the Judge. The error consists in supposing it to be either a civil action or a special proceeding, as defined in *Tate v. Powe. Supra.*

It is neither, but only a motion in a pending cause, arising incidentally in its progress.

The idea that a party must be subjected to the additional costs of a civil action or special proceeding, in order to have the benefit of a

simple motion in a cause still pending, is inadmissable. This was a judgment of the Superior Court, and as that Court is always open for the transaction of all business, except the return of process and the trial of issues requiring a jury, the motion was properly made before the Judge of the District.

In this case there was due notice, but even without notice the Judge may issue a restraining order, staying proceedings for twenty days. C. C. P., sec. 345. In the meantime notice can be served and all hardships which might arise for the want of speedy remedies can be averted.

(130) The Judge finds the fact that the judgment in controversy has been paid, and thereupon he ordered that payment and satisfaction of the same be entered of record.

The judgment must be affirmed.

Per curiam.

Judgment affirmed.

Cited: Moye v. Cogdell, 66 N.C. 404; *Isler v. Murphy,* 71 N.C. 438; *Coates v. Wilkes,* 94 N.C. 174.

NEIL McKAY, ADM'R OF ANN B. McKAY v. HENRY A. GILLIAM AND OTHERS.

The Act of 1861, ch. 4, sec. 12, which provides "that all deeds of trust and mortgages hereafter made, etc., to secure debts shall be void as to creditors, unless it is expressly declared therein that the proceeds of sale thereunder shall be appropriated to the payment of all the debts and liabilities of the trustor or mortgagor equally *pro rata*," was confined to pre-existing debts, and did not apply to a transaction when there was no debt, save that which grew out of the transaction itself, and formed a material part of it.

If a person lend money, and to secure the payment, take a mortgage instead of personal security as a part of the transaction, it is a valuable consideration under the statute of 27th, Elizabeth, as against prior donees, and he stands on the footing of a purchaser for a valuable consideration; but, if he have a pre-existing debt only and take a mortgage or a deed in trust to secure his debt, although it is valid under the 13th Elizabeth as against other creditors, it is not valid as against prior donees.

When one sold land and retained the title to secure the purchase money, or made title and took a mortgage to secure the purchase money, the legal effect was the same; and in neither mode did the security taken fall within the operation of the Act of 1861, ch. 4, sec. 12.

McKAY *v.* GILLIAM.

THIS was a civil action brought by the plaintiff as the administrator of his deceased wife, Ann B. McKay, against the defendants.

The facts set forth in the complaint were substantially as follows: Ebenezer Pettigrew died in 1848, leaving a will, in (131) which he bequeathed to his daughter Ann, the intestate of the plaintiff, twelve thousand dollars, which was charged upon a valuable tract of land called the Magnolia place, devised to her brother, William S. Pettigrew; that William S. Pettigrew afterwards, in 1861, conveyed to his sister another tract of land which his father in his life time had given him, called the Belgrade place, in payment of the aforesaid legacy of $12,000; that in the year, 1863, she being then of full age, and about to marry the plaintiff, it was agreed between her and her brother, that the arrangement made between them in 1861, should be rescinded, and that for the amount (about $14,000) then due of the legacy, and the interest thereon, he should give his bond and execute a mortgage on the said Belgrade place to secure it, which was accordingly done, and the mortgage duly registered in the proper county; that the contemplated marriage took effect, and in 1864 the wife died, and the plaintiff took out letters of administration on her estate; that afterwards, in 1868, William S. Pettigrew, being very much indebted to many persons, executed to the defendants, Gilliam and Latham, a deed in trust for the payment of all his debts, and that they took possession of the Belgrade place, and offered it for sale under the provisions of the said deed in trust.

The plaintiff demanded judgment: 1st, that the defendant, William S. Pettigrew should pay to him, what was due upon the bond aforesaid; 2nd, that such bond should be declared to be a lien upon the Belgrade place mortgaged to the plaintiff's intestate and then in the hands of Gilliam and Latham.

The defendants Gilliam and Latham, the trustees, and Williams, one of the *cestui que trusts,* demurred to the complaint; assigning as a principal cause of demurrer that by the Act of 1861, ch. 4, sec. 12, the mortgage by William S. Pettigrew to his sister, the plain- (132) tiff's intestate, was void because it did not provide for the *pro rata* payment of all the debts of the mortgagor.

At the Fall Term, 1870, of the Superior Court of the County of CHOWAN, before his Honor *Judge Pool,* the demurrer was overruled, and a judgment given for the plaintiff, from which the defendants appealed.

Phillips & Merrimon and Smith for the plaintiffs.
Bragg & Strong for the defendant.

PEARSON, C.J. The effect of the deed, William to Ann Pettigrew, in 1861, for the Belgrade place, etc., was to satisfy the legacy of $12,000, and to relieve the "Magnolia place" from the charge of its payment.

The question is, as to the effect of the arrangement entered into between them, and of the deeds executed in pursuance thereof, in May, 1863, in contemplation of her marriage.

The arrangement was, that the deed of 1861, should be set aside, and the legacy of $12,000 be revived, to be secured by the Belgrade place, etc., instead of the Magnolia place; which was charged with the legacy by the will of the testator.

This arrangement could have been effectuated in two ways—a note of William, for the payment of the legacy, at the time agreed, and a bond of Ann, to make title to the Belgrade place, upon the payment of the legacy and annual interest, or a deed by Ann to William, for the Belgrade place, and a note of William for the amount of the legacy, secured by a mortgage on the Belgrade place.

The latter mode was adopted. But it is objected, that it was not carried out, for the mortgage is void, under the provisions of the Act 1861, ch. 4, sec. 12. If the mortgage be valid, that ends the mat-
(133) ter. If the mortgage be void, it will be necessary to consider the subject further.

We are of opinion that the mortgage is valid; and that mortgages of this nature do not come within the operation of the statute referred to. The words, mortgages, etc., to secure debts, shall be void against creditors, unless payment *pro rata,* of all of the debts of the mortgagor be provided for, evidently should be confined to pre-existing debts, and was not intended to embrace transactions of this kind, when there is no debt, save that, which grows out of the transaction itself, and forms a material part of it. For, the sole purpose of the statute, is to take from debtors the right to give preference to some creditors, to the exclusion of others, by requiring that all creditors shall share *pro rata,* under the provisions of a mortgage or deed of trust.

The distinction between pre-existing debts and a debt growing out of the very transaction is well settled. The former do not constitute a valuable consideration in favor of a purchaser under 27th Eliz. The latter does. If one lends money and to secure the payment, takes a mortgage instead of personal security as a part of the transaction it is a valuable consideration under the statute 27th Eliz., as against prior donees, and he stands on the footing of a purchaser for valuable consideration. But, if one, having a pre-existing debt, takes a mortgage or a deed of trust to secure his debt, although valid under 13th Eliz. as

against other creditors, it is not valid as against a prior donee—for, the relation of creditor and debtor existed before, and in truth, the creditor pays nothing which can support the deed on the idea, that he had parted with his money, in order to become a purchaser of the land out and out, or to have the land as a security for money then advanced, as a part of the transaction. *Donaldson v. Bank Cape Fear,* 16 N.C. 103. From this case, we learn, that if a creditor takes a mortgage to secure a pre-existing debt, although the mortgage is valid under the 13th Eliz., it is not allowed the effect of putting him in the (134) condition of a purchaser for valuable consideration, within the operation of the 27th Eliz. It is clear that when the vendor takes the note of the vendee for the purchase money and gives a bond for title, retaining the legal estate as security—the case does not fall under the operation of the Act of 1861, although the legal effect is to create the relation of Trustee, and he holds the land in trust to secure the purchase money, and then in trust for the vendee, such must likewise be the legal effect should the vendor make title, and the vendee as a part of the transaction, re-convey by way of mortgage, to secure the purchase money.

In our case, the legacy of $12,000 must be considered as revived, when in 1863, Ann Pettigrew executed the deed for the Belgrade place, etc. to William, or else there is no consideration for the deed save the nominal sum inserted, to raise the use; so in fact, the transaction amounted to a sale by her to William, of the Belgrade place, etc., in consideration of $12,000, and the accumulated interest—whether she retained the title to secure the purchase money or made title, taking a mortgage to secure the purchase money, is the same in legal effect, and in neither mode does the security taken fall under the operation of the Act of 1861, although in the latter, a mortgage is taken, while in the former, the more simple plan is adopted of retaining the title.

The judgment of the Superior Court is affirmed.

Per curiam.

Judgment affirmed.

Cited: Reese v. Cole, 93 N.C. 90; *McDowell v. Lockhart,* 93 N.C. 194; *Gibson v. Barbour,* 100 N.C. 198; *Jones v. Pullen,* 115 N.C. 473; *Farthing v. Carrington,* 116 N.C. 324; *Slingluff v. Hall,* 124 N.C. 401; *Councill v. Bailey,* 154 N.C. 58; *Lynch v. Johnson,* 171 N.C. 618.

(135)

THEODORE COLLINS, ADMINISTRATOR OF CLARA V. COLLINS v. L. W. GILBERT.

Where the right of a party to a *recordari*, as a substitute for an appeal from a justice's judgment, depends upon the facts proved or admitted before the Judge of the Superior Court, it is his duty to find and state the facts upon which he proceeds to act, and if, upon an appeal to the Supreme Court, such facts do not appear to have been found and stated, that Court must overrule the decision of the Court below, because the Supreme Court cannot try any "issue of fact."

Where, but for errors alleged, the record would sustain the judgment given in the Court below, it must be sustained by the Supreme Court, unless the errors are shown. But the case is otherwise when there is nothing in the record to sustain the judgment of the Court below.

THIS was an application made to the Judge of the Superior Court of CALDWELL County, for a *recordari*, as a substitute for an appeal from a Justice judgment. The petitioner was the defendant in the judgment, and stated fully the grounds upon which her application was based. The writ of *recordari* was ordered to be issued, and upon the return of the record and proceedings, the plaintiff in the judgment appeared and filed an answer to the petition in which many of its allegations were denied; and at the Fall Term, 1870, his Honor, *Judge Mitchell*, presiding, the following is the only entry of the proceedings in the cause: "Motion to dismiss. Motion overruled. Ordered that a new trial be granted, and the cause placed on the trial docket, from which motion and order, the plaintiff appealed to the Supreme Court."

Malone for the petitioner.
Folk contra.

READE, J. This was an application for a writ of *recordari* as a substitute for an appeal from a Justice's judgment.

The record shows no evidence, except the complaint and ans-
(136) wer, which we suppose were treated as affidavits.

The only question is, whether a writ of *recordari* ought to have issued. This depends upon the facts. No facts are found by his Honor, and, therefore, we cannot tell whether he decided right or wrong. Nor can we look into the evidence and find the facts; because the Constitution forbids us to try any "issue of fact." As the case is presented to us, it appears, that his Honor granted the writ without finding any fact at all. And, therefore, we are obliged to overrule him.

It was suggested that we ought to presume that his Honor found such a state of facts as would sustain his judgment. If we adopt that rule we would always have to sustain his Honor when he fails to state the facts. And this would make his decision the last resort. It is true that where, but for errors alleged, the record would sustain the Judge, he must be sustained, unless the errors are shown. But here there is nothing to sustain him. His action was arbitrary so far as it appears to us.

As to the necessity for the Judge to state the facts, see *Cardwell v. Cardwell,* 64 N.C. 621. As to distinction between "questions of fact" and "issues of fact," see *Heileg v. Stokes,* 63 N.C. 612.

There is error. This will be certified.

Per curiam.

Judgment reversed.

Cited: Perry v. Whitaker, 77 N.C. 104; *King v. R. R.,* 112 N.C. 322; *Hunter v. R. R.,* 161 N.C. 505; *Freeman v. Bennett,* 249 N.C. 183.

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P. C. HARKEY v. W. P. HOUSTON AND OTHERS.

A civil action to recover the possession of land under the new Constitution and the Code of Civil Procedure, abolishes the fictitious proceedings of the old action of ejectment, but does not surrender its advantages. Hence, in such action no more is put in issue than the right of entry, or the right to the present possession. This is so, at least, when no certain estate is alleged and claimed in the complaint, and put in issue by the pleading. *Quaere,* whether a judgment, where a certain estate is alleged and demanded, would be an estoppel between the parties as to the right to the estate alleged

Under the Code of Civil Procedure, section 61, a landlord may be joined as a defendant with his tenant; and by the Act of 1869-'70, ch. 193, the tenant and landlord thus defending must each give bond with good security to pay costs and damages if the plaintiff recovers, or if he be not able to give such bond, he must make affidavit of that fact, and get the certificate of an attorney practicing in the Court that, in his opinion the plaintiff is not entitled to recover.

When the tenant fails to give such bond, or to swear to his answer when the plaintiff has sworn to his complaint, the plaintiff may take a judgment against him, but he cannot have an execution against him, until the further order of the Court which will not be made until after the trial of the issues between him and the landlord defendant, and the damages

against the tenant will be matter of enquiry on the trial of such issue with the landlord, or separately as the Court may determine.

THIS was a civil action, brought by the plaintiff to recover the possession of a certain tract of land from W. P. and J. A. Houston, as the tenants in possession. E. A. Flow was afterwards made a defendant as the landlord, but being unable to give bond and security for the damages and costs, made an affidavit of that fact, and filed a certificate of an attorney practicing in the Court, in the following words: "I have examined the above case, and am of opinion that the defendants have a good defence to the action." The other defendants gave no bond, and failed to file an affidavit and certificate of an attorney instead thereof. The complaint was sworn to, and so was the answer of the defendant Flow, but the answer of the other de-
(138) fendants was sworn to by only one of them.

At the last term of the Superior Court for the County of MECKLENBURG, before his Honor *Logan, J.*, the plaintiff moved for judgment against the two Houstons, the tenants in possession, for a failure to give a bond with security as required by law, which motion was refused by his Honor, and the plaintiff appealed.

Wilson for the plaintiff.
Barringer and Phillips & Merrimon for the defendant.

RODMAN, J. The fictitious proceedings by which a claimant to the possession of land was formerly in the habit of asserting his claim, have often been the subject of ridicule or reproach by those who either did not understand, or would not appreciate, the reasons upon which they were founded. The forms in the now abolished action of ejectment, are yet too familiar to the profession to need to be recited, except in the briefest manner, in order to show the purposes which they had in view, and the difficulties they were designed to avoid. The claimant made a fictitious lease to John Doe, who was supposed to have entered on the land, and to have been ejected by Richard Roe, who was known as the casual ejector, and thereupon Doe brings suit against Roe for the trespass and ejectment, and Roe by notice served on the tenant in possession, advises him to appear at Court and defend the action. This notice was regarded as the summons or process to obtain an appearance in the action. The object of the fictions was to avoid certain inconveniences which had been found to attend the real actions, and actions *ejectione fiomae,* formerly in use. 1 Roscoe, Real Act. 1, 2 *Ibid* 481.

1. It often happened that by some slip or accident, one of the parties obtained a judgment not upon the merits of his case, and unless set aside by the Court, which there might be no ground for do- (139) ing, the judgment was a perpetual estoppel against the other party, by which he was deprived of his freehold or inheritance in the lands. To avoid this harsh result, it became necessary to have an action in which the possession alone could be considered as in controversy, and the judgment in which would not finally bind the parties and their privies. This it was at last found could be best accomplished through the device of a fictitious lease and ouster, which was accordingly introduced through Rolle, C. J., during the protectorate.

2. Where a title to the land was asserted, and a judgment according to that title demanded, it was necessary to describe both the land and the title of the demandant, with a particularity which frequently exposed a just right of some sort to be lost through technicalities.

When our Constitution abolished the forms of actions at law, and prescribed that there should be but one form of action (Art. IV, sec. 1.) and the C. C. P. sec. 93, prescribed what the complaint should contain; by which the fictitious proceedings in ejectment were abolished; it was never contemplated to surrender the advantages which had been gained by so much labor and experience, and to return to the old real writs with all their *inevitable* attendants of particularity, and consequently of technicality, or that a single accidental or partial verdict, should forever estop a party from asserting a just claim.

To preserve those advantages, we must consider that by an action in which the plaintiff demands the possession of land under the Code, nothing more is put in issue than a right of entry or a right to the present possession. At least we must so consider it, when no certain estate is alleged and claimed in the complaint and put in issue by the pleadings; whether a judgment in an action alleging and demanding a certain estate, would be an estoppel between the parties as to the right to the estate alleged, is a question of too much nicety and importance to be the subject of observation until the case shall (140) occur. We consider that the judgment in an action to recover the possession, is in the nature of a judgment in the former action of ejectment; that the Constitution and C. C. P. intended only to abolish the fictitious part of that action, and that the summons in the present action, takes the place of the notice from the casual ejector to the tenant in possession.

The recognition of this construction of the Code seemed indispensible to any decision of the questions of practice arising in this case.

Under the former practice in ejectment, when a tenant in possession was sued, his landlord might come in and be made a party, either alone or with a tenant, in the discretion of the Court. C. C. P. sec. 61, prescribes that, in actions generally, all persons may be made defendants, who claim interests adverse to the plaintiff; and that, in an action to recover the possession of real estate, the landlord and tenant may be joined as defendants.

In this case, Flow, the landlord, was allowed to join as a defendant, upon making an affidavit and exhibiting an opinion of counsel, as required by the Act of 1869-70, ch. 193, p. 241. He answered. The two defendants Houston, also answered, but they gave no security for costs, neither did they swear that they could not do so, so as to bring themselves within the exception of the Act of 1869-'70; and one of them only swears to the answer, the complaint having been verified. The plaintiff moves for those reasons to set aside the answers of both the Houstons, and for judgment against them for want of an answer under sec. 217, C. C, P. By sec. 248, C. C. P., the Court may give judgment against one or more of several defendants, and leave the action to proceed as to the others.

We think the plaintiff is entitled to judgment against both
(141) the Houstons, by reason that they have not given bond and security under the Act of 1869-'70. Had Flow given bond and security, we think it would have satisfied section 1, of that Act, and that it could not have been required of any of the other defendants in a case of this sort. But although his affidavit and opinion, dispense with the bond as to him personally under the proviso to sec. 4; it does not dispense with it, as to his co-defendants.

But the plaintiff, although entitled to judgment against the Houstons, cannot have an execution against them until the further order of the Court, which will not be made until after the trial of the issues between him and Flow, because to give him possession now, would be to deprive Flow of it before a hearing. This is in accordance with the former practice. *Do. Dem. Lucy v. Bennett*, 4 Barne and Cress., 897, (10 E. C. L. R.)

The damages against the Houstons, will be matter of inquiry on the trial of the issues with Flow, or separately as the Court may deem convenient.

There is error in the proceedings below, and this case will be remanded for further proceedings according to this opinion.

Per curiam.

Judgment reversed.

Cited: Falls v. Gamble, 66 N.C. 463; *Rollins v. Rollins,* 76 N.C. 266; *Alford v. McCormac,* 90 N.C. 152; *Johnson v. Pate,* 90 N.C. 336; *Brittain v. Daniels,* 94 N.C. 784; *Collingwood v. Brown,* 106 N.C. 368; *Hood v. Suddreth,* 111 N.C. 221; *Grimes v. Lexington,* 216 N.C. 736.

(142)

JAMES T. GOOCH v. JOHN T. GREGORY.

When the clerk of a Court refuses to issue an execution to which a plaintiff is entitled on his judgment, he has two remedies for enforcing his rights. He may obtain a rule on the clerk as an officer of the Court to compel him to perform his duty, or be subject to an attachment for a contempt; or he may sue the clerk on his official bond. He is not entitled to a writ of *mandamus* against the clerk.

A plaintiff who has obtained a judgment against a county is not entitled to an execution against it. His remedy is by a writ of *mandamus* against the board of commissioners of the county to compel them to levy a tax for the satisfaction of the judgment.

THIS was a petition for an alternative *mandamus,* heard before *Watts,* Judge at the Fall Term, 1870, of HALIFAX Superior Court.

The petitioner had sued the Board of Commissioners of Halifax County upon a claim against the County, and obtained a judgment against them. He afterwards applied to the Clerk and directed him to issue an execution thereon against the defendants, but he refused to do so, alleging as a reason for such refusal that the plaintiff had no right to have such execution issued. His Honor being of a contrary opinion, gave judgment for the plaintiff and ordered a peremptory *mandamus* to issue, and the defendant appealed.

Moore & Gatling and Conigland for the defendant.
Batchelor for the plaintiff.

DICK, J. As a general rule, a party who has obtained a judgment, is entitled to have an execution to enforce it.

An execution is a judicial writ issuing from the Court where the judgment is rendered, and in contemplation of law is issued under the order of the Court. It is the duty of a Clerk, as a ministerial officer of the Court, to issue execution at the request of the (143) plaintiff in the judgment, and if he fails to perform such duty,

the plaintiff has two remedies for enforcing his right. He may obtain a rule on the Clerk, as an officer of the Court, to compel him to perform his duty, or be subject to an attachment for a contempt; or the Clerk may be sued on his official bond.

In the case before us, if the plaintiff had a legal right to have an execution issued against the County, he had a legal remedy adequate to enforce it, and therefore a mandamus will not lie against the Clerk. *State v. Justices of Moore,* 24 N.C. 430, Tapping Mandamus, 18.

But the plaintiff has no right to have an execution issued against the County. A County is a municipal corporation created by law for public and political purposes and constitutes a part of the government of the State. Its powers are expressly defined by law, and where they are not fixed by the Constitution, they may be enlarged or modified at any time by the Legislature.

Its power to contract debts and levy taxes is set forth in the Constitution, Art. VII. Under the Act of 1868, chap. 20, a County may "purchase and hold land within its limits and for the use of its inhabitants;" "may purchase and hold such personal property as may be necessary to the exercise of its powers," and "make such orders for the disposition, or use of its property as the interests of its inhabitants require." Thus it appears that a County can only acquire and hold property for necessary public purposes, and for the benefit of all its citizens, and the plainest principles of public policy prevent such property from being sold under execution for the advantage of an individual. Bouv. Inst. 176.

These rules of law are not applicable to a municipal corporation created by a charter which is voluntarily accepted by the corporation for private emolument and advantage. Such corporations are sometimes charged with the performance of public duties, but so far
(144) as the grant is for private purposes and advantage they are regarded as private corporations and subject to like liabilities. *Bailey v. Mayor of New York,* 3 Hill 531. *Dartmouth College v. Woodward,* 4 Wheaton 518.

The plaintiff in this case is not without a remedy. He has established his debt against the County by a judgment, and as he cannot avail himself of the ordinary process of law to enforce payment, he is entitled to a writ of *mandamus* against the Board of Commissioners to compel them to levy a tax for the satisfaction of said judgment. *McKay v. Justices of Harnett,* 51 N.C. 488. *Winslow v. Commissioners of Perquimans,* 64 N.C. 218.

There was error in the ruling of his Honor, and the judgment is reversed and the proceedings dismissed.

Per curiam.

Judgment reversed.

Cited: Lutterloh v. Comrs., 65 N.C. 405; *Hawley v. Comrs.*, 82 N.C. 24; *Hughes v. Comrs.*, 107 N.C. 604; *Vaughn v. Comrs.*, 118 N.C. 639; *Electric Co. v. Engineering Co.*, 128 N.C. 201; *Hardward Co. v. Schools*, 151 N.C. 511; *O'Berry v. Mecklenburg Co.*, 198 N.C. 363; *Casualty Co. v. Comrs.*, 214 N.C. 238; *Daniels v. Yelverton*, 239 N.C. 59.

MARTHA A. KIRKLAND v. WILLIAM J. HOGAN.

A summons in a civil action before a justice of the peace does not require to be executed by leaving a copy with the defendant; the C. C. P., secs. 82 and 504, Rule 15, not embracing such process returnable before a magistrate.

THIS was a petition to the Superior Court of ORANGE County for a *recordari* in the lieu of an appeal to take up a number of cases in which the defendant had obtained judgments before a Justice of the Peace against the petitioner. The petition set forth the reasons why appeals had not been applied for and obtained in the proper manner and in due time, and among others that the constable who cited her to appear before the Justice did not leave any copies of the summonses with her.

His Honor *Judge Tourgee*, at the Fall Term, 1870, of the said Court, being of opinion with the plaintiff, ordered the judgments (145) to be reversed, and the cases be placed upon the trial docket, and the defendant appealed.

Phillips & Merrimon for the defendant.
W. A. Graham for the plaintiff.

SETTLE, J. We have carefully examined the provisions of the Code cited by the plaintiff's counsel to establish the proposition that "a summons before a magistrate cannot be executed without leaving copies, as in the case of the same process returnable to the Superior Court," but we have arrived at a different conclusion, and are of opinion that the judgment below must be reversed.

C. C. P., sec. 82, prescribes the manner in which the summons, in civil actions in the Superior Courts, is to be served. And C. C. P., sec. 504, Rule XV, enacts that the provisions of C. C. P. respecting forms of actions, parties to actions, the times of commencing actions, and *the service of process upon corporations* shall apply to Justices' Courts.

Now when we bear in mind that C. C. P., sec. 82, prescribes the manner of serving process. 1. When the suit is against a corporation. 2. When it is against a minor. 3. When it is against a person judicially declared to be of unsound mind, etc., and, 4. In all other cases; and see that the Rules of proceeding in Justices' Courts only adopt the provisions of sec. 82, as to the *service of process upon a corporation,* we must conclude that in all other cases, it was intended that the manner of service should, or at least might be, different from that prescribed for the Superior Courts. *Expressio unius exclusio alterius.*

We are confirmed in this opinion by reference to Rule II of the same section, which enacts that the pleadings before a Justice's Court may be either oral or written.

We can see no good reason for such nicety in the service of
(146) process, as to require a *written summons* to be left with the defendant, when the pleadings before the Court may be *oral.*

Judgment reversed, and petition dismissed.

Per curiam.

Judgment reversed.

SAMUEL H. JOHNSON v. ADDISON MANGUM AND OTHERS.

Though it may be that a note payable to a testator may be assigned by one of three executors, yet a note payable to three persons as executors of their testator cannot be assigned by one of them without the concurrence of the others, so as to enable the assignee to sue the makers either for the whole amount of the note, or for any part of it; the Code of Civil Procedure, sec. 55, not being applicable to such a case.

THIS was a civil action upon a bond held by the plaintiff for $1760, executed by the defendants Mangum and Webb to the other three defendants, executors of H. Parker, deceased, for the purchase of lands of their testator, sold by them under license from Court. The bond was dated January 4th, 1868, payable twelve months after date, and endorsed by E. M. Holt, one of the defendants, as executor to the plaintiff and delivered to him in payment of judgments, bonds and notes

against the estate of the testator, held by him to the amount of $900, and the further sum of $200 due to him from the said Holt, there being this sum due to the said Holt for commissions as executor. There was an agreement between Holt and the plaintiff that the latter should collect the note and return the balance remaining after paying his aforesaid claims, to the said executors.

The answers of the defendants did not deny the assignment of the bond as alleged by the plaintiff, nor the justice of his demands against the estate, to the amount of $900; but the two executors, (147) J. W. Parker and D. Parker, denied the claim of Holt to commissions, alleging that nothing was due on that account. These executors also alleged that there was an agreement between all the executors, that the money due on the bonds given for the land should be appropriated to pay only the debts of the estate on which the executors were bound as sureties of the estate; one of them alleging that they were to be applied, where any of the executors were liable, and the other insisting that they were to be paid only on debts in which all of them were bound.

The answer of the defendant Holt admitted the delivery of the bond, and that he endorsed it in payment of debts due to the plaintiff, in judgments, bonds and notes, and stated that he had been the active executor who had transacted nearly all the business of the estate, and that the amount of commissions claimed was due to him.

On the issues thus made, the case was submitted to the jury at the Fall Term, 1870, of the Superior Court of ORANGE County before his Honor, *Tourgee, J.* His Honor being of opinion that the action could not be maintained, so instructed the jury, who returned a verdict for the defendants, upon which a judgment was rendered, and the plaintiff appealed.

W. A. Graham for the plaintiff.
Phillips & Merrimon for the defendants.

PEARSON, C.J. The action is brought upon the assumption that a note payable to three persons, (expressing, that they are executors of a person deceased,) can be assigned, by endorsement according to the "law merchant" and the statute 4 Ann, and the statute in this State, adopting 4 Ann, by any one of them.

This position is not tenable. It may be, that a promissory note, to the testator, can be assigned by the endorsement of one (148) of three persons acting as executors; on the idea of representation, and that each executor represents the testator, and can do all that

he could have done; but such is not the law in regard to a promissory note, made after the death of the testator, payable to three persons jointly, although it be set out on the face of the note, that the three persons are the executors of the deceased person, for, it cannot be a contract made with a dead man, and it is in fact, a contract made with the three jointly, and all of them are responsible individually, for the amount of the note. So, it is not in the power of one, who may happen to have the note in his possession, to pass the legal title by his endorsement without the concurrence of the other two. No authority was cited in support of the position, and it is so manifestly against the reason of the thing, that we feel warranted in rejecting it, without further discussion.

But it is said, the plaintiff by his dealing with Holt, one of the executors, acquired a beneficial interest in a part of the note, and is entitled under the provisions of the Code of Civil Procedure, sec. 55, to maintain the action, to the extent of his interest.

We are unable to see how this mode of procedure can be allowed in our case, and are clear in the conviction, that it does not come within the meaning and provision of C. C. P. It is absurd to suppose that a contract, entire and indivisable, made with three men as payees, can be subdivided *ad libitum*, and that every one of the three may pass to third persons, a beneficial interest, to some part of the note, and thus subject the obligors to a multiplicity of actions. So much in respect to the rights of the obligors. But look at it in respect to the rights and liabilities of the payees, can any one of them, without the concurrence of the others and against their interests, because of a joint liability, to say nothing of the alleged understanding between them, as to the application of the proceeds of the note, pass to a third
(149) person a beneficial interest to a part of the note in satisfaction of certain debts of the testator and of an individual debt of the party concerned and take his word, that he will collect the whole and pay over the excess to such party? We think not. In the old mode of equity procedure it was a maxim, "a man must come into equity with clean hands." This maxim is alike applicable to the new mode of procedure; where the plaintiff, failing in his legal right to maintain the action as endorser, falls back on his equity, he is met by the fact of notice that the executor with whom he dealt was acting in bad faith towards his co-executors, and that the arrangement was without their concurrence, against their interest, and subjected them to liability in regard to the whole note.

The plaintiff's hands are not clean.

We concur with his Honor, in the opinion, that the action cannot be maintained.

Per curiam.

Judgment affirmed.

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(150)

WILLIAM RICHARDS v. FRED. SCHLEGELMICH.

The true meaning of a contract in the following words: "Twelve months from date, with interest from date, I promise to pay William Richards $6,662 in the event the Rhodes Gold mine continues to prove at the expiration of said time a good gold mine," is that the mine, which may be proved to have been before opened and worked, continued to be as good a mine at the end of the year as it was at the beginning, and not that it was a good mine in the estimation of miners, without reference to its quality at the time the contract was made.

In putting a construction upon a deed or other written instrument, facts existing at the time to which the words used point, may be proved as a key to the meaning; just as the condition of a testator's family and estate at the date of his will, may be proved to aid in arriving at his meaning.

THIS was a civil action tried before his Honor, *Logan, J.*, at the Spring Term, 1870, of the Superior Court for GASTON County.

The complaint was founded upon a promissory note for the payment of money in the following words:

Twelve months after date, with interest from date, I promise to pay William Richards six thousand, six hundred and sixty-two dollars, in the event the Rhodes gold mine continues to prove at the expiration of said time a good gold mine.

[Signed.] FRED. SCHLEGELMICH.

March 16th, 1868.

The defendant alleged that the said "gold mine had not continued to prove, nor was it at the expiration of the time of payment, a good gold mine, nor is it so at this time." It was in evidence that the mine had been previously worked, and that the defendant had possession of it and worked it during the time specified in the note. Testimony was given on both sides as to the quality of the mine, and as to how much per ton the ores yielded. His Honor charged the jury that according to

the terms specified in the note, there was a condition precedent,
(151) and it was for the plaintiff to satisfy them of its performance before he would be entitled to recover; that if from the evidence they believe he had proved the mine to be a good gold mine he would be entitled to recover, otherwise they should find for the defendant. There was a verdict and judgment for the defendant, and the plaintiff appealed.

Guion and Hoke for the plaintiff.
Bynum and J. H. Wilson for the defendant.

PEARSON, C.J. It was the duty of the Judge to put a construction upon the instrument sued on. His Honor performed this duty in part, by holding, "there was a condition precedent, and it was incumbent on the plaintiff to prove its performance." He then leaves it to the jury to find whether it was or was not a good gold mine at the time the note was payable.

From this we assume his opinion to be, that by the true construction of the instrument, it was for the plaintiff to satisfy the jury, that it was a good gold mine, according to the estimation of miners, at the time referred to; in other words, that the meaning of the instrument was, the defendant is not to pay, unless the mine proves to be a good gold mine, at the end of the year; treating the word "continues" as surplusage and giving to it no force; so, as in effect to make the plaintiff undertake to guarantee that the mine at the end of the year would prove to be a good one, absolutely, and without reference to any other consideration, save what is a good gold mine according to the estimation of miners.

This Court is of opinion that such is not the meaning of the instrument, having regard to well settled rules of construction, e. g., "Every word of an instrument should (if possible) be made to have
(152) some operation." "Words are to be taken most strongly against the party using them." For self interest prompts a man to select words that do not run to his prejudice, outside of his own intention.

The mine was not a new one, but had been previously opened and worked by other persons; the plaintiff and defendant both had access to this means of information, and the words "continues to prove a good gold mine at the end of twelve months" amount to this; the mine has proved to be a good gold mine so far, in the estimation of the parties. Now in the event it continues to prove a good gold mine at the end of the year, the price is to be paid, otherwise not; thus making the plaintiff guarantee that the mine will not turn out to be any less good,

at the end, than it was at the beginning; so that should the vein give out, or prove, on being followed, of less thickness, or the ore be of less richness than it has now proved, the defendant is not to pay for it.

This construction gives full force to the word "continues," and to the word "proves" by having reference to the fact that the mine had been previously worked. It is well settled that in putting a construction, facts existing at the time to which the words used point, may be proved "as a key to the meaning." The condition of a testator's family and estate may be proved to aid in arriving at his meaning. The mischief which a statute is intended to remedy may be taken into consideration by the Court, in order to fix the meaning of the words used, so as to correct the mischief, and avoid carrying the operation of a statute too far, or stopping short of the mischief.

In our case the word "continues" would not have been inserted, unless the parties intended to convey some meaning by the use of it; what that meaning was is made clear by the fact that the mine had been previously worked, and as miners say "tested." But for this fact, the word "continues" would be senseless and unmeaning, and of course would not have been used; connected with this fact, it is (153) pertinent and controlling. To give effect to it, his Honor ought to have submitted to the jury the question: Did the mine continue to be as good a mine at the end of the year as it was at the beginning, or did it fall off and prove to be worse to such a degree as not to be worth working?

There is error.

Per curiam.

Venire de novo.

Cited: Miller v. Parker, 73 N.C. 60; *Carpenter v. Midford,* 99 N.C. 500; *Edwards v. Ins. Co.,* 173 N.C. 616.

JAMES S. LANE, ET. AL. v. E. A. STANLY AND OTHERS.

Under the Constitution and Act of 1868-'9, ch. 165, townships have not the power of taxation for school purposes either through their trustees or committees. Nor have the Commissioners of a county the power to levy a township tax as distinguished from the general county tax for school purposes. And in laying the county tax for school purposes, the equation of taxation must be observed.

LANE *v.* STANLY.

THIS was a civil action brought by the plaintiffs on behalf of themselves and the other tax payers of Township No. 3, in the County of CRAVEN, against the Commissioners and the tax collector of the said County to restrain them by injunction from collecting certain taxes levied for school purposes in the said township.

The complaint alleged that the school committee of the township made an estimate of the expense necessary to provide for schools to be taught during the year 1870, which estimate was reported to the Board of Trustees of the township, and was thereupon submitted to a vote of the qualified voters of the township, a majority of whom voted against it; that after the election, the estimate was forwarded by the trustees of the township to the County Commissioners, who proceeded to
(154) levy a tax for the expenses of a school in the township upon the property therein, and placed the tax lists in the hands of the tax collector, who is one of the defendants, and that he was proceeding to collect it; that in levying the said tax, the Commissioners, who are also defendants, violated the State Constitution in Art. 7, sec. 7, because first, the levy had not received the vote of a majority of the qualified voters of the township, and secondly, in laying it, the equation of taxation was disregarded.

Upon the filing of the complaint verified by affidavit, an order of the Judge was made requiring the defendants to appear at a certain time and place to show cause why an injunction should not be issued to restrain the collection of the said taxes, and in the meantime a temporary injunction was granted.

The defendants answered the complaint and averred that in levying and collecting the tax mentioned in the complaint they had acted in pursuance of the State Constitution, and the Act of 1868-'69, ch. 165, which was enacted to carry out its provisions; and that the tax in question did not require the vote of a majority of the qualified voters of the township, nor the equation of taxation, because it was a necessary expense. The counsel for the defendants, upon the filing of their answer, moved his Honor, *Judge Clarke*, at Chambers, on the 12th day of November, 1870, for a dissolution of the temporary injunction, which was granted, his Honor being of opinion that the plaintiffs were not entitled to the relief which they sought, and thereupon the plaintiffs appealed.

Battle & Sons and Manly & Haughton for the plaintiffs.
Lehman & Seymour and Green for the defendants.

READE, J. Have township trustees the power to collect taxes for public schools? (155)

The Constitution, Art. 7, sec. 4, confers upon townships "corporate powers for the necessary purposes of local government." What is to be the "local government" we suppose was left to be prescribed by legislation. The "act concerning townships," Acts 1868-'69, chap. 186, sec. 14, prescribes that the Board of Trustees shall have authority to lay out, alter, etc., highways, to establish ferries, bridges, cartways, appoint overseers of roads and to allow toll bridges and gates across highways. The only other authority given them is to provide a township house, with a vote of the people. Sec. 11. It will be noticed that all these are purely local. And no mention is made of schools or of the poor. Of course revenue is necessary for every government, and therefore, what the Board of Trustees are authorized to do, in sections 14 and 11, they are authorized to pay for; and so, in sec. 19, they are empowered to levy a tax for the necessary expenses of the township.

We have already seen that public schools are not one of the enumerated subjects over which Township Trustees have control. But it is insisted that, as education is necessary to good government, they have implied power over it. This would be entitled to much consideration, if public schools were not otherwise provided for. They are otherwise provided for. The school law, Acts 1868-'69, chap. 165, sec. 15, provides a School Committee for each Township, who shall establish and maintain for four months in each year, one or more schools. And sec. 18, makes them corporations. This Committee, and not the Township Trustees, have the management of the public schools. This Committee provide the school house, employ the teachers, make rules, etc., and have the immediate management of all school matters in the Township. And unless it was intended to give two bodies control over the same thing, it would seem to exclude the Township Trustees (156) altogether.

The Township Trustees have a Treasury and Treasurer; but they are not allowed to have the possession, or the disbursement, of the school fund, or anything else connected with schools.

But even the School Committee have only the local management of the schools. The Constitution, Art. 7, sec. 2, gives the *"supervision of schools"* to the County Commissioners; they levy the school tax, and in their Treasury is kept the school fund, and their Treasurer disburses the fund, upon the order of the School Committee.

The only thing that militates at all against this view of the case, is sec. 25, of the School Act, which provides, that, "In case any Township,

at the annual meeting, shall fail to provide for schools," etc. "the School Committee shall immediately forward to the County Commissioners an estimate of the necessary expenses, and a tax, equal to the amount of such estimate, shall be levied on the Township by the County Commissioners, at the same time that the County taxes are levied," etc. This would seem to indicate that the Township Trustees are to levy school tax on the Township property; and upon their failure to do so the County Commissioners shall do it.

It will be observed, however, that it does not say so in terms. It does not say, Township Trustees, but simply "Townships"—if any "Township" shall fail, etc. And this may refer to the Township *School Committee*, instead of Township *Trustees*. And as it relates to school matters, with which the *Trustees* have nothing to do, it ought to be understood as referring to the School Committee.

But even with that explanation, it must not be understood that the school committee, any more than the township trustees, have any taxing power for school purposes. The 25th section will be further explained by reference to sec. 28, which makes it the duty of the
(157) school committee annually to report an estimate of what is needed for schools, to the township trustees; and the township trustees are to report to the County Commissioners, and to the Superintendent of Public Instruction. And we suppose that section 25 means, that if the township trustees fail to make such report, then the School Committee shall make the report directly to the County Commissioners

The object of the report to the County Commissioners being that they may know what County taxes to lay for school purposes. The school tax is to be general for the County; and then to be apportioned out among the townships according to the number of children in each. And the whole fund is to be in the hands of the County Treasurer, and he is to open an account with each township, and disburse the money upon the orders of the school committee.

But it is to be further considered that not even the County Commissioners have the entire control of public schools.

On the contrary, it was considered a matter of such paramount importance, that its supervision is reserved to the State itself.

The Constitution, Art. IX, declares that "religion, morality and knowledge are necessary to good government, and the happiness of mankind," and makes it the duty of the "General Assembly to provide by taxation and otherwise for a general and uniform system of public

schools." It also provides for a State board of education and a superintendent; and the General Assembly has made a liberal appropriation of the taxes, and an additional $100,000 for school purposes. So it will be seen that the Constitution establishes the public school system, and the General Assembly provides for it, by its own taxing power, and by the taxing power of the counties, and the State board of education, by the aid of School committees, manage it. It will be observed that it is to be a "system," it is to be "general," and it is to be "uniform." It is not to be subject to the caprice of localities, but (158) every locality, yea, every child, is to have the same advantage, and be subject to the same rules and regulations.

But would this be if every township were allowed to have its own regulations, and to consult its own caprices?

In some townships there would be no Schools; in others, inferior ones, and in others extravagant ones, to the oppression of the tax payers.

There would be no "uniformity" and but little usefulness, and the great aim of the government in giving all of its citizens a good education would be defeated.

It is a mistake to regard the public system as a mere charity. It is a great governmental consideration. The Constitution *requires* that every child "shall attend" school, and one is not generally *required* to accept charity. It is a great truth, that knowledge is necessary to good government; without it, the laborer is nothing but muscle, with neither skill nor contrivance, consuming what he produces and adding nothing to general prosperity. The soldier is stolid and impairs the nation's strength; the voter is ignorant of men and measures, and exercises his right and duties at a venture; art and science languish; and the whole nation is imbecile, and must rank low with the powers of the world, to say nothing of the interest of morality and religion.

Therefore it is, that, looking only to its own existence and prosperity, the State must take charge of the education of its citizens.

The conclusion is that townships have not the power of taxation for School purposes, either through their Trustees or Committees. Nor has a county the power to lay township taxes, as distinguished from the general county tax for School purposes. And in laying the County tax for School purposes, the equation of taxation must be observed.

There was error in dissolving the injunction. The order is reversed and the injunction is made perpetual. (159)

Per curiam.

Judgment reversed.

Cited: Graded School v. Broadhurst, 109 N.C. 232; *Stephens v. Charlotte,* 172 N.C. 566; *Frazier v. Comrs.,* 194 N.C. 61; *Fletcher v. Comrs.,* 218 N.C. 11.

NOTE.—The case of *Slover and others v. Berry and others,* from CRAVEN, involved the same questions and was decided in the same way.

STATE ON THE RELATION OF D. A. JENKINS, PUBLIC TREASURER v. B. F. BRIGGS, SHERIFF, AND OTHERS.

A plea of tender is of no avail unless it is accompanied by a payment into Court of the amount admitted to be due.

The revenue act of 1869-'70, ch. 225, makes by implication in the 34th section, the auditor's certificate evidence of the amount of taxes due from the sheriffs, but it is only *prima facie* evidence and may be rebutted.

The Act of 1869-'70, ch. 71, which repealed certain acts in relation to appropriations for railroads and directed that the taxes which had been collected under them for paying interest, etc., should be "credited to the counties of the State upon the tax to be assessed for the year 1870 in proportion to the amounts collected from them respectively," justified the sheriffs in retaining the amount of such taxes in their settlements with the public treasurer, until it was repealed by an act passed the 21st December, 1870.

THIS was a motion made before *Watts,* Judge, at the Fall Term of WAKE Superior Court, at the instance of the Public Treasurer of the State, for judgment against the defendant, B. F. Briggs, as Sheriff of Wilson County, and the other defendants, as his sureties, upon his official bond for the collection of taxes. His Honor gave judgment for the plaintiff for the amount claimed and for costs, and the defendants appealed. No other statement of the case is necessary than (160) what will be found in the opinion of the Court.

Bragg & Strong for the defendants.
Attorney General and Battle & Sons and Phillips & Merrimon for the plaintiff.

RODMAN, J. This action was commenced under sec. 34, of chap. 225, of the Acts of 1869-'70, p. 287, against the Sheriff of Wilson County for a failure to account for and pay the public taxes.

His defense was, that he did tender all the taxes which had been or ought to have been collected by him, except certain special taxes, which under the Act of 1869-'70, ch. 71, p. 119, he was authorized to pay to the Treasurer of his County.

The defendant can derive no benefit from his plea of a tender because it is not accompanied by a payment into Court of the amount admitted to be due.

An Act ratified 8th March, 1870, (Acts 1869-'70, ch. 71, p. 119,) repeals certain acts passed at the preceding session making appropriations for certain railroads, and directs that the moneys in the Treasury which had been collected under these acts, for the purpose of paying the interest of the bonds issued to the Companies, should be appropriated to the uses of the government, "and shall be credited to the Counties of the State upon the tax to be assessed for the year 1870, in proportion to the amounts collected from them respectively."

The Auditor refused to credit the County of Wilson for the special taxes which had been collected from it, and certified for the whole amount levied for 1870.

The plaintiff contends: 1. That the Auditor's certificate is conclusive evidence of the amount due.

We do not think it is: Section 34 of chapter 225 of the Acts of 1869-'70, does not expressly or in terms make it evidence at (161) all, but by implication it does.

But there must be some opportunity allowed a Sheriff to show an error either of fact or of law in the Auditor's account, otherwise the Auditor would be a despot over the Sheriffs. It can never be presumed that the Legislature intended to exclude any set of men from the benefit of the Courts of Justice. We think, therefore, that the certificate of the Auditor is only *prima facie* evidence, and may be rebutted.

2. That the Act of 1869-'70, ch. 71, has been repealed. It is admitted that it has not been expressly repealed, except by an act ratified since the trial of this action below, viz: on 21st December, 1870. But it is contended that it was repealed by implication. We have examined the acts of Assembly, to which we are referred by the plaintiff's counsel, and we do not think that any of them are so inconsistent with the Act in question as to repeal it, and the Legislature must be of the same opinion, or why pass the Act of 21st December, 1870, expressly repealing it? We think as the law then stood the Sheriff was entitled to retain a sum equal to the special taxes of his county. But as the law has been since changed and nothing is in controversy but the costs, we do not consider that there is any question demanding an elaborate discussion.

Judgment below reversed, and case remanded to Superior Court of Wake County for further proceedings.

Per curiam.

Judgment reversed.

Cited: Parker v. Beasley, 116 N.C. 6.

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(162)

WILLIAM RICHARDS v. JACOB BAURMAN AND WM. SLOAN.

Where an injunction is issued under an order that the plaintiff shall give an undertaking with sufficient sureties in a certain sum as prescribed in the C. C. P., sec. 192, it seems that a deposit in money of the sum named, will be sufficient, but whether so or not, the giving by the plaintiff of the required undertaking before the hearing of a motion to vacate the injunction for the want of it, will supply the alleged defect and prevent the injunction from being vacated on that account.

Where a partnership is formed for a definite term which has not expired, the Court will not decree a dissolution except under special circumstances; neither will it, where circumstances render a dissolution inconvenient, as where a large operation has been commenced, which cannot be arrested without serious loss. But, where the Court does order a dissolution, it will appoint a receiver upon a disagreement between the partners in the course of the winding up; and the same rule must apply, where a dissolution has taken place by consent or otherwise, and a serious disagreement arises afterwards.

THIS was a civil action for a dissolution of a partnership, an injunction and the appointment of a receiver, heard upon various motions before his Honor, *Judge Logan,* at the last term of the Superior Court of MECKLENBURG. The injunction having been previously granted, a motion to dissolve it was made by the defendants and refused by the Court. A motion for the appointment of a receiver was then made by the plaintiff and ordered by the Court, and the defendants appealed from both orders. The pleadings and proceedings in the case are sufficiently stated in the opinion of the Court.

Guion and Vance & Dowd for the defendants.
Bynum and R. Barringer for the plaintiff.

RODMAN, J. The complaint alleges that a partnership for buying and selling goods was formed between the parties in the Spring of 1870,

(which is probably a mistake for 1867, the date given in the answer,) on certain terms as to the division of the profits which (163) it is not now material to specify; the agreement was oral merely; and it does not appear to have been distinctly understood, at least it is not stated with precision, whether the partnership included the store in Gaston and the gold mine, or only the store in Charlotte; that the defendant Baurman was the active partner at Charlotte; that among other acts of misconduct, he refused to permit the plaintiff to have access to the books of the concern; that he was making way with the assets and was insolvent; and prays a dissolution of the partnership, an account, an injunction against the defendant Baurman, and the appointment of a receiver to wind up the partnership. The answer of Baurman denies or explains the acts of misconduct alleged, and imputes others to the plaintiff; he admits the partnership on the terms alleged; that he has the exclusive possession of the property in Charlotte, as partner, and as bailee of the Sheriff who had levied an execution against the plaintiff on his interest in the goods; that he has refused to permit the plaintiff to carry a part of the goods to Gaston County; he says that in July, 1870, it was agreed that the partnership should be dissolved in January, 1871. It is not necessary to refer particularly to the answer of Sloan.

The affidavit of one Welsh, exhibited in support of the complaint, tends to prove that Baurman put little or no money in the concern. On hearing the complaint on 26th November, 1870, the Judge granted the injunction on condition that the plaintiff should give an undertaking such as the Code requires, in the penal sum of one thousand dollars. The plaintiff instead of entering into an undertaking with sureties, deposited one thousand dollars with the Clerk of the Court in lieu of it. Afterwards he filed an undertaking with suretics dated on the day on which the injunction order was made. The defendants on 4th December, moved to vacate the injunction, which the Judge refused, and appointed a Receiver, from which order the defendants ap- (164) pealed.

1. The defendants contend that the injunction order should be vacated, because the plaintiff did not comply with the condition. It is true that an undertaking on obtaining an injunction, is not one of those for which the letter of C. C. P. allows a deposit of money to be substituted.

We are inclined, however, to think, that it would come within the spirit of the Code, inasmuch as we know of no reason why it could not be as effectual a security to the defendant as an undertaking with

sureties. But we are not called upon to decide this question, as an undertaking with sureties was filed before the order of the Judge refusing to vacate the injunction, which is the one appealed from. For what end should the original order have been vacated when the plaintiff was in a condition to have immediately applied for another?

2. The more important question, however is, whether considering the allegations in the pleadings, and taking them along with the affidavit of Welsh at what they may fairly be supposed to be worth, they establish such a case as entitles the plaintiff to the relief demanded. The first demand of the plaintiff is for a dissolution of the partnership; and as it was not entered into for any fixed period of time, it was dissoluble at the will of either. Pothier on Partnership, 149. Moreover, it was actually agreed to be dissolved at a time which has now passed. We think, therefore, the plaintiff is entitled to that. His right to an account also, and to an order for the sale of the partnership property and a winding up of the affairs, is not disputed.

In respect to the circumstances under which a Court of Equity will take the partnership effects out of the hands of the individual partners and appoint a receiver, respectable text writers seem to have drawn somewhat different conclusions from the same authori-
(165) ties.. Story's Eq. Jur. S. 672, a, says: "But the Court will not appoint a receiver or manager, at the instance of one of the partners in a suit which does not seek to dissolve the partnership; nor in one which does upon an interlocutory application, and merely upon evidence that the partners do not co-operate in the management of the business. *To justify such an appointment it must be shown that one partner has interfered so as to prevent the business being carried on.*" This section is by the editor, Mr. Redfield. Parsons says, (1 Pars. Cont. 197,) "If the bill seeks to correct in some way the proceedings of a firm, but not to dissolve it, it is not usual to appoint a receiver, although this might be done. But if the prayer is to dissolve the partnership, it is usual to appoint a receiver."

In considering the passage quoted from Story, it is difficult to conceive what application the last sentence can have in a case where the partnership is already dissolved, and the only business to be carried on is the winding up. It seems almost certain that the learned editor did not have in his mind a case like this. The conclusion we have come to, upon a consideration of many of the numerous cases bearing indirectly on the particular question before us, is this.

When a partnership is formed for a definite time, which has not expired, the Court will not decree a dissolution except under special cir-

cumstances; neither will it where circumstances render a dissolution inconvenient, as where a large operation has been commenced which cannot be arrested without serious loss. (See Pothier on Partnership, 149-157.) But when the Court does grant a dissolution, it will appoint a receiver upon a disagreement between the partners in the course of the winding up; and the same rule must apply where a dissolution has taken place by consent or otherwise, and a serious disagreement arises afterwards. It is true that none of the cases go in distinct and positive terms quite as far as this. They all stand on their particular facts, and in most of them, either the plaintiff desired a continu- (166) ance of the partnership, and for the Court to enforce the performance of its terms by the aid of a receiver, or circumstances made a dissolution inopportune and inequitable, and the Courts *for these reasons* declined to decree one, or to appoint a receiver, leaving it to be implied that in the absence of these reasons, they would do so. The following authorities may be consulted: *Clement v. Foster,* 38 N.C. 213; *Hall v. Hall,* 3 E. L. & E. R. 191; *Roberts v. Eberhart,* 23 Id. 245; *Littlewood v. Caldwell,* 11 Price 97, 3 Daniel, ch. Pr. 1965; *Speight v. Peters,* 9 Gill (Md.) 472; *Martin v. Van Schaick,* 4 Paige, ch. R. (N.Y. 479;) *Law v. Ford,* 2 Paige 310; *Williamson v. Wilson,* 1 Bland 423; *Birdsall v. Colie,* 2 Stock, ch. R. (N.J.) 63; *Harding v. Glover,* 18 Ves. 281.

In *Martin v. Van Schaick,* the partnership was in a political newspaper, and had been dissolved by consent. The Chancellor says "if the partners cannot agree among themselves, it is a matter of course to appoint a receiver, upon a bill filed to close the partnership concerns, on the application of either party." In *Renton v. Chaplain,* 1 Stock ch. R. 70. "On a dissolution by death (and the principle is the same on any dissolution) the surviving partner settles the affairs of the concern, and the Court of Chancery will not arrest the business from him and appoint a receiver, *unless confidence be destroyed* by his mismanagement or improper conduct."

In *Speight v. Peters,* the Court say, "In a variety of instances, especially in partnership transactions, where the parties, after a dissolution of their connection, cannot agree upon the adjustment, and the property or funds in dispute are in the hands of one partner alone, each having an equal right to the control of the property, cases must necessarily arise where the interest of both can only be properly secured by the intervention and appointment of a receiver." And, further, that it is not necessary that the fund should be in imminent peril. "But in respect of a fund which is claimed and is *prima* (167)

facie the proceeds of a partnership, it is but a provident exercise of equity power to place the property under the care of the Court."

In the case before us it sufficiently appears that there has been an entire loss of confidence between the parties, and that mutual feelings are such as to render co-operation in the winding up of the business impracticable. From the affidavit of Welsh it appears, sufficiently for the present decision, that the defendant Baurman put but little capital into the concern; he has the exclusive possession of the effects at Charlotte, and denies to the plaintiff an equal control over them. We think these circumstances justify the appointment of a receiver who will proceed to wind up the partnership under the direction of the Court.

The judgment below is affirmed, and this opinion will be certified to the Superior Court of Mecklenburg, in order that it may proceed to take an account between the partners and give other proper relief according to its course.

Per curiam.

Judgment affirmed.

Cited: Young v. Rollins, 90 N.C. 133.

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(168)

JOSEPH MERWIN v. JOSEPH L. BALLARD.

The enactment in the Revised Code, ch. 31, sec. 84, that "in all cases of joint obligations or assumptions of co-partners in trade or others, suits may be brought and prosecuted on the same against all or any number of the person making such obligations, assumptions or agreements," is repealed in effect as to suits upon parol contracts made after the adoption of the C. C. P., by the 62d section of that Code, but such contracts made before that time are exempted from its operation by section 8, sub. div. 2 of the same.

In a suit upon a contract made prior to the adoption of the C. C. P., if the defendant demur for want of parties in the Superior Court, and the demurrer be sustained and the plaintiff appeals to this Court, the plaintiff will be entitled to a final judgment here upon the overruling of the demurrer.

THIS was a civil action, in which the complaint was for goods sold and delivered to the defendant in the year 1860, but an account annexed to the complaint showed that the goods were bought by the defendant and one Joyner. The action was brought in the year

1870, and the defendant appeared, and under the C. C. P., sec. 95, demurred to the complaint for the want of parties, as it appeared that Joyner was jointly liable with the defendant. The demurrer was sustained by his Honor, *Jones, J.*, at the last Term of the Superior Court for PITT County, and the action dismissed, and from this order the plaintiff appealed.

Battle & Sons for the plaintiff.
G. W. Johnston for the defendant.

DICK, J. The plaintiff alleges that he sold and delivered certain merchandise to the defendant. In the account of sale set out in the complaint, it appears that said merchandise was sold by plaintiff to Ballard & Joyner. The defendant demurs, and assigns as cause of demurrer the non-joinder of the other joint purchaser, as a defendant in the action. (169)

At common law in actions *ex contractu,* the general rule is, if the contract be joint the plaintiff must sue all the persons, who either expressly or by implication of law made the contract. If one of them be dead, then upon suggesting that fact in the declaration, the action may be brought against the survivor alone, 2 Mod. R. 280.

In general a person is presumed to be living until it be proved that he is dead, unless seven years have elapsed since he was heard of. 2 East, 313.

In such actions brought against some only of several persons who should have been jointly sued, the defendants must plead the non-joinder in abatement, there being no other way of taking advantage of it; unless it appear on the face of the declaration, or some other pleading of the plaintiff that the party omitted, is still living, as well as that he jointly contracted, in which case the defendant may demur, etc.

The statute (Rev. Code, ch. 31, sec. 84,) changed in some respects this rule of the common law as to the joinder of defendants in actions *ex contractu,* and "in all cases of joint obligations and assumptions of copartners in trade or others," allowed suits to be brought against all or any of such persons thus jointly liable. The C. C. P., secs. 62, 392, virtually repealed this statute, except as to "persons severally liable upon the same obligation or instrument, including parties to bills of exchange and promissory notes." C. C. P., sec. 63. When the action is against two or more defendants and the summons is served on one or more, the plaintiff may proceed in the manner provided by C. C. P., sec. 87.

The rule of the common law requiring the non-joinder of defendants in actions *ex contractu,* to be pleaded in abatement, has also been changed, and the omission of a necessary party defendant may be taken advantage of by demurrer when the defect appears upon (170) the face of the complaint. C. C. P., sec. 95.

We have thought proper to discuss the questions presented in the elaborate argument of counsel, but they do not govern the case before us, as the action is founded upon a contract made prior to the ratification of the C. C. P.; such cases are governed by the law existing before that date. C. C. P., sec. 8, par. 3, 4.

Under the statute above referred to (Rev. Code, ch. 31, sec. 84,) the plaintiff had a right to sue the defendant separately upon the joint contract.

The demurrer must be overruled, and as this case is governed by the old mode of pleading, the plaintiff is entitled to final judgment in this Court. *Ransom v. McClees,* 64 N.C. 17.

Per curiam.

Judgment affirmed.

Cited: Lewis v. McNatt, 65 N.C. 66; *Sc* 66; N.C. 398; *Matthews v. Copeland,* 80 N.C. 33; *Syme v. Bunting,* 86 N.C. 176; *Rufty v. Claywell,* 93 N.C. 308.

ALFRED WALTON v. ARTHUR JORDAN AND C. W. HOLLOWELL.

Where a *fi. fa.* was levied upon the land of the defendant in the execution, in 1861, and successive writs of *vend. expos.* were issued thereon until the Fall of 1867, when the land was sold by the sheriff, and in the meantime in the year 1866 the same land was conveyed by the defendant in the execution by a deed in trust, *it was held,* that the crops growing on the land in 1867, did not pass to the purchaser of the land under the execution, but belonged to the bargainee under the deed in trust.

Crops growing on land pass, by presumption of law, with the title of the land, but the presumption may be rebutted even by parol evidence.

THIS was a civil action tried before his Honor, *Judge Pool,* at the Spring Term, 1869, of the Superior Court of PERQUIMANS County.

On the trial the facts proved were substantially as follows:

(171) The defendant, Jordan, was in possession of a tract of land, which in May, 1866, he conveyed by a deed in trust to the

plaintiff, and the crops growing on the land that year were sold by Jordan and the proceeds applied under the plaintiff's direction to the purposes of the trust. The same land was let to tenants for the year 1867, who were to pay the rent in kind to the plaintiff. In 1861, a judgment was rendered against the defendant, Jordan, in the County Court of Gates County, upon which an execution was issued, levied upon the defendant's said tract of land and returned to the August term of the Court. Successive writs of *vend. expos.* were then issued, and in September, 1867, the land was sold by the Sheriff of Gates County, when the execution creditor became the purchaser, and then sold the land to the defendant Hollowell, who together with the defendant, Jordan, took the growing crops then on the land and converted them to their own use.

His Honor charged the jury that no interest in the crops of the rents for the year 1867, passed by the Sheriff's sale, to which the defendants excepted. There was a verdict and judgment for the plaintiff, and the defendants appealed.

Bragg & Strong for the defendants.
Smith for the plaintiff.

DICK, J. The sale made by the Sheriff in September, 1867, only transferred to the purchaser such interest and estate in the land as the debtor had at the time of the levy of the original *fi. fa.*

The levy of the *fi. fa* in 1861, created a lien in favor of the plaintiff in the execution, and gave the Sheriff authority to sell the land levied on.

The subsequent *vend. expos.* only continued the lien, and the authority which the Sheriff had acquired under the original *fi. fa.* The lien was not a title, but only a charge upon the land, and (172) the debtor had the right to sell the same, and the deed in trust made in 1866, to the plaintiff in this case, conveyed title subject to the subsisting lien. The crops growing upon the land in 1867 were not embraced in said levy, and did not pass by the sale made under the *vend. expos.*, founded upon such levy, but remained the property of the plaintiff who was the owner of the land at the time of the sale. Annual crops which are regarded in law as *fructus industriales,* do not necessarily pass with the title of the land. For many purposes they are considered as personal property and may be sold and transferred by parol, as they are not embraced in the statute of frauds. While they are growing they pass by presumption of law with the title of the land, but this

presumption may be rebutted, even with parol evidence. In the case before us the legal presumption is fully rebutted, for they were not included in the levy of 1861, and of course did not pass by the sale under which the defendant, Hollowell, claims the land.

We will not further consider the principles involved in this case, as they are elaborately discussed in *Bittinger v. Baker,* 29 Penn. R. 66; *Badham v. Cox,* 33 N.C. 456; *Brittain v. McKay,* 23 N.C. 265; *Flynt v. Conrad,* 61 N.C. 190.

There was no error in the charge of his Honor, and the judgment must be affirmed.

Per curiam.

Judgment affirmed.

Cited: Ray v. Gardner, 82 N.C. 456; *Kesler v. Cornelison,* 98 N.C. 385; *S. v. Green,* 100 N.C. 423; *S. v. Crook,* 132 N.C. 1058; *Buie v. Kennedy,* 164 N.C. 299; *Jeffreys v. Hocutt,* 193 N.C. 334.

(173)

NORTH-WESTERN NORTH CAROLINA RAIL ROAD COMPANY v. DAVID A. JENKINS, PUBLIC TREASURER.

The 8th section of the Ordinance of the Convention of 1868, having provided that, when the president and chief-engineer of the North-Western North Carolina Rail Road Company should have complied with certain terms in respect to the first division of the said road, the Governor should direct that the Public Treasurer should make a loan to the company by the issue of a certain amount of State bonds, and the terms having been complied with, *it was held,* that the company was entitled to have a peremptory *mandamus* to compel the Treasurer to issue the bonds, notwithstanding the subsequent legislation contained in the Acts of 1868-'9, ch. 32, of 1869-'70 chs. 71 and 100, as all those acts taken together left the ordinance above-mentioned in full force and effect.

THIS was a proceeding by way of a petition for a *mandamus* to compel the defendant to issue a certain amount of State bonds to the plaintiff, and a return having been made to the writ of alternative *mandamus,* the case came on to be heard before his Honor, *Judge Henry,* at the Fall Term, 1870, of the Superior Court for FORSYTHE County. His Honor being of opinion that the plaintiff was entitled to the remedy asked for ordered that the writ of peremptory *mandamus* should issue, and the defendant appealed. No statement is necessary for the understanding of the opinion of the Court.

Battle & Sons and Phillips & Merrimon for the plaintiff.
Attorney General and Bailey for the defendant.

SETTLE, J. The first division of the North-Western North Carolina Railroad incorporated under an ordinance of the Convention, ratified the 9th day of March, A. D. 1868, is admitted to be an unfinished road within the meaning of Art. V, sec. 5 of the Constitution.

As to the divisions beyond the town of Salem, we express no opinion, as that matter is not now before us.

Section 8 of the ordinance above referred to ordains, that (174) whenever the President and chief engineer of said company shall certify to the Governor of the State that the grading of any of the sections of said road, as mentioned in section 5 of this ordinance, is completed and ready for the superstructure, he shall direct the Public Treasurer of the State to loan in behalf of the State to the said company the sum of fifty thousand dollars in coupon bonds, and in like manner the Governor will direct similar loans to be made to the company, upon the completion of grading of each and every section until the first division is graded entire, etc.

By section 9, no part of said loan or bonds shall be delivered to said company until the President and Directors thereof shall execute and deliver to the Governor of the State a mortgage on the entire road and its property, conditioned to save the State harmless against the loss of both principal and interest of said loan.

Since the adoption of this ordinance there has been much legislation, which we need not review in detail, for the purpose of extending the road beyond Salem.

But the Act 1869-'70, ch. 71, ratified the 8th day of March, A. D., 1870, repeals "all acts passed at the last session of this Legislature making appropriations to Railroad Companies." And in a few days thereafter the same General Assembly passed An Act to enable this company to complete the first division of its road.

Act 1869-'70, ch. 100, ratified 22d day of March, A. D. 1870. The 3d section of this last act is as follows: "All acts of the General Assembly authorizing the appropriation of bonds of the State in aid of the first division of said railroad company, are hereby repealed, the validity of the preceding laws not to be by such repeal affected but such laws to be in full force."

Construing ch. 71 and 100 together, it is evident that the General Assembly intended to repeal only the legislation subsequent to the ordinance of the 9th of March, leaving that in full force (175) and effect. We have not overlooked the repealing clause of the

Act of 1868-'9, ch. 32, and admitting that it repealed the ordinance of the 9th of March, still the Act of 1869-'70, ch. 100, the last legislation upon the subject, is so strong and explicit as to amount to a re-enactment of the ordinance.

It follows that the company upon complying with the terms of the ordinance are entitled to the loan of the bonds.

The judgment of the Superior Court is affirmed.

Justice Dick being a stockholder in the company, took no part in the consideration of this case.

Per curiam.

Judgment affirmed.

Cited: Russell v. Ayer, 120 N.C. 197.

GEORGE HOWARD v. JOSEPH W. KIMBALL.

When a purchaser of land, upon taking a bond for title, gives in payment therefor a note expressing on its face that it is so given, the note itself will be notice of the vendee's equity in case the title of the land shall prove defective, and an assignee or holder of the note cannot, in case of such defect in the title of the land, recover on the note though he took it before it became due.

A purchaser of land is entitled to all that he bargained for, and is under no obligation to accept a part only, with warranty as to the other part, or to accept compensation, unless the part as to which a good title cannot be made, does not materially affect the value, and it is seen that the objection is not taken upon the merits, but only as a pretext to get rid of the purchase.

In a suit upon a note, expressed on its face to have been given for the purchase of a tract of land, the title to which has proved defective, as the plaintiff cannot recover upon the note, the proper judgment now to be rendered is, that the contract of sale be rescinded, and that the title bond and note be cancelled, so as to effect what would have been done in equity under the old mode of procedure.

THIS was a civil action submitted to his Honor, *Judge Jones,* (176) at the Fall Term, 1870, of EDGECOMBE Superior Court, upon the following case agreed:

On the 1st day of January, 1867, B. B. Nicholson contracted to sell to J. W. Kimball, the defendant, a tract of land for which two notes for $1,000 each, payable on the 1st of January, 1868 and 1869, with

interest from date, were given in part payment. The notes expressed on their face to be in payment "on the Rocky Swamp tract of land." Nicholson gave to Kimball a bond to make title to the land upon the payment of the purchase money. In the Spring of 1867, Nicholson purchased of one David W. Bullock a tract of land, and in payment of the same, and for the stock on it, endorsed the said notes in blank and handed them to Bullock, he, Bullock, at the time being aware that Nicholson had given bond to make title to the tract of land he had sold to the defendant, Kimball.

During the year 1867, Kimball learned for the first time that probably Nicholson's title was defective, and thereupon gave notice to plaintiff, who was about to receive the said notes from Bullock in a trade, that he should not pay them, and that plaintiff after such notice took them from Bullock in a trade with him. The plaintiff admits that there is a defect in the title of Nicholson to part of the land sold to Kimball. The tract consisted of about 400 acres, and at the time of the sale, embraced two tracts, one known as the Kyle tract, containing about 250 acres, and the other, as the Slade tract, containing about 150 acres. There is a dispute in regard to Nicholson's title to the Kyle tract, and an action of ejectment is now pending or is threatened, to recover the said land. There is also a claim adversely to Nicholson's title to an interest of two-fifths by minor heirs in the Slade tract, and the two tracts were sold to Kimball as one entire tract.

The plaintiff further admits that the two notes were given as the first and second payments for the Rocky Swamp tract of (177) land, and this fact is so stated on the face of the notes.

Some time afterwards, Nicholson becoming involved, made a conveyance to Bullock of the land sold to Kimball, in trust, to convey to Kimball when the notes should be paid, and when Bullock passed the notes to the plaintiff, he made a like conveyance of the land to him. The conveyance to Bullock was made before the discovery of any defect in the title of Nicholson, and the conveyance to the plaintiff afterwards. Nicholson is a bankrupt and has obtained his discharge as such. When Bullock received the notes he executed an absolute conveyance of the land he sold to Nicholson.

His Honor upon this case agreed, was of the opinion that the plaintiff could not recover upon the notes; and a judgment accordingly and for costs was entered upon the record of the Court, and the plaintiff appealed.

Bragg & Strong for the plaintiff.
Busbee & Busbee for the defendant.

PEARSON, C.J. 1. Suppose Nicholson, the original vendor, had kept the land, then upon the facts agreed, Kimball, the vendor, would have had a clear equity to rescind the contract of sale, on the ground of a defect in the title, to a substantial part of the thing sold. A purchaser is entitled to all that he bargains for, and is under no obligation to accept a part, with warranty as to the other, or to accept compensation, unless indeed the part, as to which a good title cannot be made, does not materially affect the value, and it can be seen that the objection is not taken upon the merits, but as a pretext to get rid of the bargain.

2. As Nicholson endorsed the notes in blank to Bullock, before maturity, there is a presumption that he purchased without notice; but this presumption may be rebutted by proof of any fact that (178) should put a man of ordinary prudence upon inquiry. We think the fact of the notes not being in the usual form of promises to pay money "for value received," but expressing on the face that they were given for the purchase money of the Rocky Swamp tract of land, was sufficient to put Bullock on inquiry, and to fix him with notice, that the notes could not be collected, unless a good title be made to Kimball. *Cox v. Jerman,* 41 N.C. 526. In this way significance is given to the words referred to, otherwise they must be treated as idle and superfluous.

It is said notice that the notes were given as the consideration of the Rocky Swamp tract of land does not amount to notice of a defect in the vendor's title. That may be so, but it does amount to notice of the vendee's equity, provided it turns out that the title is defective.

If a vendee executes a plain note of hand, this equity may be defeated by a transfer of the note, before it is due, but when he takes the precaution to set the fact out in the face of the note, unless it has the effect of notice, the vendor may in every instance defeat the equity of the vendee by making haste to dispose of the note, and thus the vendee will be deprived of an equity without default on his part.

The fact that Bullock took a deed for the land from Nicholson in trust to convey to Kimball on payment of the purchase money, substituted Bullock in the place of Nicholson, and put him in the relation of vendor in respect to Kimball. He was to receive the whole of the purchase money and to make title, according to the original contract of sale.

3. Such being the equity of the defendant as against Nicholson and Bullock, it is so beyond all question in regard to the plaintiff, for he had positive notice of the defect in the title before he purchased the notes, and he also took a deed for the land in trust to make title on

payment of the purchase money, and took upon himself the relation of vendor towards the defendant. (179)

We concur with his Honor, that the plaintiff was not entitled to judgment, but the judgment rendered for the defendant is erroneous in this: it discharges the defendant from the payment of the purchase money, but leaves the bond for title in his hands, as a cloud over the title of the plaintiff.

The judgment ought to have been, that the contract of sale be rescinded, and the title bond and the notes be cancelled, so as to effect what would have been done in equity under the old mode of procedure.

Such judgment will be entered, and each party will pay his own cost.

Per curiam.

Judgment accordingly.

Cited: Bank v. Michael, 96 N.C. 58; *Leach v. Johnson,* 114 N.C. 88; *Bank v. Hatcher,* 151 N.C. 362.

DOE ON THE DEMISE OF AMELIA KIRKMAN v. JOSEPH H. DIXON AND ANOTHER.

Where one of the parties to a cause is not ready for trial and upon his application, it is ordered to be continued for him "on payment of costs," it means the costs of the term, and not the whole costs of the action.

THIS was an action of ejectment under the former system of procedure, when the following proceedings took place:

At a special Term of CRAVEN Superior Court, in June, 1870, this case being reached, the plaintiff's counsel stated that he was not ready for trial because his associate counsel had just been called to Wilmington, and had inadvertently left all his client's papers locked up, and the plaintiff could not try without them. Thereupon the following order was made, "continued for plaintiff on payment of costs."

At the ensuing Fall Term of the Court before his Honor, *Judge Clarke,* the cause having been set for trial on Wednesday of the (180) 2d week, the counsel for the plaintiff moved his Honor to rescind the former order. This he declined to do, but ordered that the plaintiff should pay the costs of the special term in June, and not the whole costs of the cause, which order was immediately complied with, and the defendants appealed.

Green for the defendants.
Manly & Haughton for the plaintiff.

PEARSON, C.J. At a special term of the Court, June 1870, plaintiff not being ready for trial, because of the want of his title deeds, which was accounted for to the satisfaction of his Honor, it was ordered that the case be continued, "for plaintiff, on payment of cost."

At Fall Term, 1870, his Honor ruled that the trial should proceed, provided the plaintiff paid into Court the cost of the preceeding term.

It was the providence of his Honor to put a construction upon the terms of continuance, "continued for plaintiff, on payment of costs;" did this mean the costs of the term, or all of the costs of the case; we concur with his Honor. In the ambiguity of words, it was his duty to look at the attendant circumstances, and it is a matter of every day occurrence on the circuit, if through the laches of the party, and especially of his counsel, the trial is delayed, he must pay the costs—that is, the cost incident to the delay—to-wit, of the term, and no one ever before imagined that such general words, would include the whole costs of the action, for the reason that such penalty would exceed the damage done by the laches of the party.

No error.

Per curiam.

Judgment affirmed.

(181)

WILLIAM N. H. SMITH, EX'R, v. J. M. S. ROGERS, ADM'R.

The 14th section of the Act of 10th March, 1866, ch. 17, entitled an "Act to change the jurisdiction of the Courts and rules of pleading therein," which repealed the Act of 11th September, 1861, and 14th December, 1863, which had suspended the statutes of limitations, did not repeal the Act of 21st February, 1866, ch. 50, which had suspended the operation of these statutes until the 1st of January, 1867, so that there was no statute of limitation in operation during the year 1866.

THIS was an action of debt by the plaintiff as executor against the defendant, J. M. S. Rogers, as administrator of G. R. Reese, submitted to his Honor, *Judge Pool*, at the Fall Term, 1870, of HERTFORD Superior Court, upon the following case, agreed:

"The intestate, George R. Reese, died in Northampton County, on or about the 18th of June, 1854. The defendant, Rogers, sued out

letters of administration on the 4th of September, 1854, and immediately thereafter advertised according to law for creditors to present their claims. Said Rogers had no notice of the execution of the bond sued on until this action was brought, which was on the 8th day of December, 1866. Said Rogers filed his final account according to law and settled with the legatees of his intestate, and paid over to them more than $5,000. He took no refunding bond from said legatees, because some of them were infants. If upon this statement of facts the Court shall be of opinion for the plaintiff, judgment is to be rendered in his favor for $171.63, etc., otherwise judgment is to be entered for the defendant." His Honor gave judgment for the plaintiff, and the defendant appealed.

R. B. Peebles for the defendant.
Smith for the plaintiff.

READE, J. The bar of the statute of Limitations, seven years, was not complete up to 11th of May, 1861, lacking about one (182) month. And there were a series of statutes in force from that time up to January, 1870, suspending the statute of Limitations. If this were so then the statute does not bar in this case. *Johnson v. Winslow*, 63 N.C. 552. It was, however, supposed by the defendant's counsel, that the Act of the 10th of March, 1866, repealed the former statutes, and that the statute began to run and continued for three months up to the ordinance of 23rd of June, 1866, and that time completed the bar. But the counsel overlooked the Act of 21st of February, 1866, which suspended the statute up to January, 1867, so that the gap from March to June, never existed, as the Act of March did not repeal the Act of February.

It is not necessary that we should decide whether an Act suspending the statute of Limitations, retrospectively, is valid.

There is no error.

Per curiam.

Judgment affirmed.

Cited: S. v. Halbraith, 65 N.C. 411; *Williams v. Williams*, 70 N.C. 190; *Benbow v. Robbins*, 71 N.C. 339; *Barringer v. Allison*, 78 N.C. 80.

(183)

WILLIAM GRAY, EX'R OF PENELOPE GRAY v. JOHN COOPER, JR., ADM'R OF JOHN COOPER, SR.

Though a plaintiff could not be admitted as a witness, under the C. C. P., sections 342 and 343, to prove a special contract with the intestate of the defendant for the services of slaves before their emancipation, yet he is competent to prove that the intestate had the slaves in possession and enjoyed their services.

When the administrator of an intestate asks of the plaintiff, who had offered himself as a witness, whether there was not a special contract between himself and the intestate, with the view to defeat a recovery on an implied contract, it is competent for the plaintiff to prove by himself, or by another witness, all the particulars going to make up or qualify such fact, and put it in its proper light.

THIS was a civil action tried before *Pool, Judge,* at the last term of the Superior Court for the County of BERTIE.

The plaintiff claimed the hire of a negro slave for the years 1862 and 1863, and declared upon a special contract and upon the common counts. Upon the trial the plaintiff offered himself as a witness to prove that the defendant's intestate had his testator's slave in his possession and employment during the years 1862 and 1863, and also the value of the hire. The defendant objected that the plaintiff could not himself prove facts from which a contract between the parties could be implied, but the Court admitted the testimony.

The defendant then asked the plaintiff as a witness whether the intestate had possession of the slave under a special contract with the plaintiff's testatrix, stating that his object in proving a special contract, was to defeat a recovery upon the common counts. The plaintiff answered in the affirmative, and then proposed to state all the terms of the contract. The defendant objected to this testimony, but it was admitted, and the plaintiff obtained a verdict and judgment, and the defendant appealed.

Busbee & Busbee for the plaintiff.
Smith for the defendant.

(184) RODMAN, J. This is an action to recover of the defendant the value of the services of certain slaves belonging to the plaintiff which it is alleged were hired by the plaintiff to the intestate of the defendant. The action was commenced soon after the adoption of the Code of Civil Procedure, but it is in the old form of an action of debt, there is no complaint or declaration, and no answer or pleas, but merely short memorandums of pleas, among which is, "General issue."

This was irregular; but as no exception was taken by either party in the Court below, or in this Court, to the defects in the pleadings, and as the case made by the Judge presents definite points for the decision of this Court, we have considered, that we may regard the case as if issues had been joined between the parties as to whether;

1. The intestate of the defendant by special contract promised to pay hire for the slaves?

2. There was any implied contract on the part of the defendant to pay what the services of the slaves were worth?

Considering it thus: the first question presented by the case, is whether the plaintiff was a competent witness to prove that the intestate had and enjoyed the services of the slaves during the years 1862 and 1863. We think he was, (C. C. P. secs. 342 and 343.) That the intestate had the possession of the slaves during the years in question, was a fact which the plaintiff might know, and which he says he did know, otherwise than from a transaction or communication with the intestate. Being as to a matter of a *quasi* public nature, the testimony, if not true, might have been contradicted by others; notably, by the slaves themselves. We think that this point comes within the principle of *Whitesides v. Green,* 64 N.C. 307. *Isenhour v. Isenhour,* Id. 604, and *State ex. re. Peoples v. Maxwell,* 64 N.C. 314.

The plaintiff could not have volunteered his testimony as to the existence of any contract between himself and the intestate. (185) But the defendant asks him, as he had a right to do, if there was not such a special contract; to which the plaintiff replied that there was. The defendant desired to stop the evidence there; for the purpose of availing himself of the rule that when an existing special contract is proved, a plaintiff cannot recover upon an implied contract. Of course the rule is admitted to be correct. But we are of opinion, that, the defendant having proved a new fact, to-wit: the existence of a special contract; it thereby became competent for the plaintiff to inquire of the same witness, (or to prove by any other,) all the particulars going to make up or qualify such fact and put it in its proper light. As to this new fact, the witness became the witness of the defendant. A very slight consideration will show that a different rule, would in many cases work gross injustice; the lamp of evidence instead of diffusing a general light over all the objects of the investigation, would be a dark lantern casting a glare here and there at the pleasure of the holder, but more likely to deceive than to inform. It seems to us that the rule is

too reasonable, and its application too familiar in practice, to need to be supported either by illustration or authority.

The judgment is affirmed with costs in this Court.

Per curiam.

Judgment affirmed.

Cited: Jackson v. Evans, 73 N.C. 131; *March v. Verble,* 79 N.C. 24; *Lockhart v. Bell,* 90 N.C. 506; *Cade v. Davis,* 96 N.C. 144; *Lane v. Rogers,* 113 N.C. 173; *Johnson v. Rich,* 118 N.C. 270; *Moore v. Palmer,* 132 N.C. 976; *Davidson v. Bardin,* 139 N.C. 2; *Witty v. Barham,* 147 N.C. 482; *In re Bowling,* 150 N.C. 510; *Brown v. Adams,* 174 N.C. 498; *Ins. Co. v. Jones,* 191 N.C. 181; *Burton v. Styers,* 210 N.C. 232, *Wilder v. Medlin,* 215 N.C. 546; *Hardison v. Gregory,* 242 N.C. 328.

(186)

A. H. SUDDERTH, GUARDIAN v. R. D. McCOMBS AND D. T. SUDDRETH, ADM'RS.

The Superior Court has no original jurisdiction of an action for an account by an existing guardian of infant children against their former guardian; such action must be brought in the Court of Probate.

In a case in which, under the circumstances, a guardian was justified in taking Confederate treasury notes for his wards, during the late civil war, he will be justified in having converted them into Confederate bonds even so late as the year 1864.

Where a guardian, in the years 1859 and 1860, received bank notes for his wards and failed to invest them for their benefit, he will be charged with the amount of the notes with interest from the date of their receipt, unless he can show some good excuse for his apparent default.

The reception by a guardian of Confederate money in the early part of the year 1865 for the solvent debts due his wards was apparently inexcusable, and it will be for the guardian to show circumstances in justification of his act.

THIS was an action brought in the Superior Court of CHEROKEE County, by the plaintiff as guardian, against the administrators of the former guardian of his wards for an account. There was a reference for an account, and upon the return of the report both parties filed exceptions, which came on for hearing before his Honor, *Judge Cannon,* and from his judgment thereon the plaintiff appealed.

No statement of the facts is necessary, as it will sufficiently appear in the opinion of the Court.

M. Erwin for the plaintiff.
No counsel contra.

RODMAN, J. This is an action by the guardian of the infant children of Abram Harshaw against the defendants as administrators of A. Sudderth, the former guardian, brought in the Superior Court of Cherokee County. An account was taken and reported by the order of the court, to which exceptions were filed by both parties, and (187) it is by appeal from the Judge's rulings upon these exceptions that the case comes to this Court.

We have decided in *Rowland v. Thompson,* ante 110, that the Superior Court has no original jurisdiction of an action by a ward against his guardian for an account, but that it must be brought in the Probate Court. Of course the same thing is equally true of an action by a guardian against the administrators of a former guardian for a settlement of his guardian account. The present action must therefore be dismissed.

But as the questions presented by the exceptions will in all probability arise in the course of taking the account in the Probate Court, and our opinion was invited by counsel, and as the principal difficulty in dealing with them arises out of the absence of full statements in the report of the facts upon which they must be decided; we think we may not improperly present the views which we take of them.

The plaintiff excepts to the report because:

1. He is required to receive $7,000 of Confederate Treasury notes, bonds, etc., and that the defendants are credited with the same. On that point the report states that the former guardian had collected considerable amounts in Confederate money which on the 28th of March, 1864, he invested in Confederate bonds and certificates. Properly to pass on this exception it is necessary to know when and under what circumstances the Confederate money which the guardian converted into bonds was received. On this point nothing is stated in the report, nor so far as we can see in the evidence. If the Confederate money was received under circumstances which justified it, (and what those circumstances are has been defined in several decisions of this Court,) and if the guardian could not by ordinary diligence have disposed of it in some better and safer way, he would be justified even so late as March, 1864, in changing it for Confederate bonds, which (188) were at least no worse than the currency, and as bearing interest,

if anything a little better. The time and circumstances of the receipt of the currency is therefore the proper subject of inquiry, as the liability of the guardian will depend on his ability to justify the original receipt, and not on the mere conversion into another form of the same security. If the $1,200 paid by Joshua Harshaw in the Spring of 1863, was a part of the $7,000, it will be proper to inquire whether the payment was passed on the guardian by Harshaw, and into the other circumstances of the transaction, keeping in view the rule laid down in *Emerson v. Mallett,* 62 N.C. 234, and *State rel. White v. Robinson,* 64 N.C. 698. We are inclined to think *upon the evidence as it stands* the defendants would be chargeable with this sum of $1,200. As to the rest the facts are too vague for even a conjecture.

2. That defendants are credited with $1,023, which their intestate received in Bank bills in 1859 and 1860 and failed to invest and which they now offer to pay in the same bills to the plaintiff.

Prima facie, bank bills could have been safely loaned out in 1859 and 1860, and in the absence of some good reason to the contrary, it was the duty of the guardian to have done so. The defendants therefore, unless they can show some excuse for the default which does not appear in the present report, are chargeable with that sum and interest from its receipt.

3. That defendants are credited with $877.91 which their intestate received in Confederate money in 1865. The report does not state the circumstances under which this money was received in 1865, and it is therefore impossible to say whether or not its receipt was excusable. If it was voluntarily received in payment of solvent debts, it was not excusable, and it will be for the defendants to show circum-
(189) stances to justify the apparent negligence.

4. That defendants are credited with $575, received by their intestate in May, 1864, in North Carolina treasury notes, being for the hire of certain negroes.

The testimony of A. H. Sudderth leaves it doubtful what the contract about the hire of the negroes in 1864 was. We are inclined to think as the evidence stands at present that the defendants are entitled to that credit.

Those observations will probably render it unnecessary to consider the exceptions of the defendants.

The action is dismissed.

Per curiam.

Judgment reversed.

Cited: Dockery v. French, 73 N.C. 426; *Suddreth v. McCombs,* 82 N.C. 535; *Donnelly v. Wilcox,* 113 N.C. 409.

JOHN B. MATTHEWS v. DUNCAN MCPHERSON.

The distinction between actions in law and suits in equity, as to the forms of procedure has been abolished in this State, but the distinction between legal and equitable rights still remains.

The rights of a *cestui que trust* under the old system were administered in a Court of Equity. In trusts relating to real property where the purposes of the trust were completed, and the trustee had been paid his reasonable charges and expenses, the *cestui que trust* could compel a conveyance of the legal estate. Until a *cestui que trust* has acquired such a perfect equitable title, he cannot, under the C. C. P., maintain a civil action to recover possession of real estate held by a person under the legal title.

THIS was a civil action brought to recover the possession of a tract of land, and tried at the Fall Term, 1870, of the Superior Court for the County of MOORE, before his Honor, *Buxton, J.*

The facts material to the proper understanding of the case, as they were proved on the trial, were as follows: The land in (190) controversy belonged at one time to the illegitimate son of Mary Matthews, Daniel W. McNair, who died in the year 1848, intestate and without issue, when his said mother entered upon the land as her own, claiming it as his heir-at-law. By a deed bearing date 27th June, 1856, she conveyed it to the plaintiff, her nephew, who paid her nothing for it, as she intended it as a gift. He built a house upon the land, took possession of it the 19th August, 1857, and has lived there ever since. The defendant also entered upon the same land, built a house upon it and has lived there ever since November, 1868.

Mary Matthews administered upon the estate of her son, Daniel W. McNair, and at April Term, 1852, of the County Court of Moore, filed a petition for the sale of the land in question, upon which a sale was made under the order of the Court, and the defendant became the purchaser and obtained deeds for a part of the land on the 22d February, 1853, and for the residue on the 4th of August, 1853; and on this latter day he conveyed the whole land by deed to Dr. Alexander M.

McDonald. There was evidence tending to show that the defendant purchased the land for Mary Matthews, and had never paid any thing for it, and that Dr. McDonald, who was also a nephew of Mary Matthews, had bought with notice of the trust, but had expended, in costs and other expenses relating to the land, several hundred dollars.

Under the charge of his Honor, a verdict was found in favor of the plaintiff upon which he had a judgment to recover the possession of the land mentioned in the complaint; and from the judgment the defendant appealed.

Manning for the defendant.
B. & T. C. Fuller for the plaintiff.

DICK, J. The distinction between actions at law and suits (191) in equity, as to the forms of procedure, has been abolished in this State; but the distinction between legal and equitable rights still remains. This distinction has been defined and established by the judicial wisdom of centuries and will always exist in every system of law derived from the jurisprudence of England.

The rights of a *cestui que trust* under the old system were administered in a Court of Equity. In trusts relating to real property where the purposes of the trust were completed, and the trustee had been paid his reasonable charges and expenses, the *cestui que trust* could compel a conveyance of the legal estate. Until a *cestui que trust* has acquired such a perfect equitable title, he cannot, under the C. C. P., maintain a civil action to recover possession of real estate held by a person under the legal title.

In our case the plaintiff claims title under a voluntary conveyance from Mary Matthews, who was only a *cestui que trust*, and he acquired her equitable title subject to the rights of the trustee. The claims and charges of the trustee, McDonald, are still unadjusted, and the plaintiff cannot, in any form of action, obtain the legal title and possession of the land in controversy from the trustee or his assignee, unless the trustee is made a party, and his claims are settled and discharged. The plaintiff has not such an equitable title as will enable him to maintain his action in its present form; but, as the C. C. P. gives such large powers of amendment, his Honor, in the Court below, can allow the plaintiff to amend the complaint by making the necessary parties and praying the proper relief. C. C. P., sec. 65, *McKesson v. Mendenhall*, 64 N.C. 286.

There must be a *venire do novo.*

Per curiam.

Venire de novo.

Cited: Johnson v. Prairie, 91 N.C. 162; *Waters v. Garris,* 188 N.C. 310; *Scales v. Trust Co.,* 195 N.C. 775.

(192)

GEORGE CREDLE v. DAVID S. GIBBS.

The 31st section of the Act of 1868-'9, ch. 156, entitled an Act in relation to landlord and tenant is unconstitutional, because it professes to confer upon Justices of the Peace jurisdiction to administer the same remedies to purchasers of land under execution against the defendant therein, as to landlords against their tenants, contrary to the 15th and 33d sections of the 4th article of the Constituion, which confer exclusive original jurisdiction upon the Superior Courts of all civil actions, in which the title to real estate may come in question.

Those sections of the Act of 1868-'9, ch. 156, which give summary proceedings before Justices of the Peace, in favor of landlords to recover possession of lands from their tenants who hold over after the expiration of their leases, are not unconstitutional, because in consequence of the doctrine of estoppel the title to the real estate cannot come in question.

THIS was a summary proceeding in ejectment commenced before a Justice of the Peace, under the provisions of the Act of 1868-'69, ch. 156, sec. 31.

The plaintiff claimed title to the lands in controversy under a Sheriff's deed against the defendant in the execution under which the lands were sold. The Justice gave a judgment for the defendant, from which the plaintiff appealed to the Superior Court, where the defendant again had a judgment, from which the plaintiff appealed to the Supreme Court.

It is unnecessary to state the grounds of defence taken before the Justice and in the Superior Court, because the case was decided in the Supreme Court upon the question of the constitutionality of the Act under which the proceedings were instituted before the Justice.

Warren & Carter for the plaintiff.

Fowle and Battle & Sons for the defendant.

DICK, J. The Constitution establishes various Courts for
(193) the administration of justice, and in some degree defines their jurisdiction.

By reference to Art. 4, secs. 15 and 33, it appears that all civil actions in which the title to real estate comes in controversy, belong to the exclusive original jurisdiction of the Superior Court, and the General Assembly has no power to confer this jurisdiction upon any other Court. Therefore the 31st sec. of ch. 156 of the Acts of 1868-'69, is unconstitutional, for in actions by purchasers under execution sale to recover possession of land, the title must necessarily be considered and passed upon. The purchaser must establish his deed by evidence, before he can recover, and the debtor in possession may show any cause why the Sheriff's deed did not pass his estate. *Hardy v. Simpson,* 44 N.C. 325.

The debtor is not a tenant of the purchaser, as there is no privity of estate between them. He is a mere occupant and his possession is not regarded in law as adverse to the purchaser; and the doctrine of estoppel does not apply as strictly as in the case of landlord and tenant. *Jordan v. Marsh,* 31 N.C. 234.

The purchaser must show that the Sheriff's deed has passed the debtor's title, and a Justice of the Peace is expressly prohibited by the Constitution from taking jurisdiction of such questions.

That part of said Act which gives summary proceedings before Justices of the Peace, to recover possession of lands from tenants who hold over, is not unconstitutional, but is a wise and beneficial law. In such cases the title cannot come in controversy, as it is a well settled rule, both in this country and in England, that a lessee put in possession of leased premises, or any person holding under him, shall not be allowed to question the lessor's title, in an action brought to recover possession of the premises. In the early periods of the common law, it
was regarded as a violation of the oath of fealty, for a tenant
(194) thus to dispute his landlord's title, and it worked a forfeiture of the lease. 1 Washburn, 482. Before advantage can be taken of any defect in the landlord's title by the tenant, or person put in possession by him, the premises must be restored to the landlord. Smith on Land and Ten. 234. As the Legislature exceeded its constitutional authority in giving jurisdiction to Justices of the Peace, of cases in which purchasers at execution sale seek to recover possession from the debtors, the proceedings in this case cannot be sustained.

Proceedings dismissed.

Per curiam.

Judgment reversed.

NOTE.—The case of *Jones v. McGowan,* decided at the present term, presented the same question and was decided in the same way.

Cited: S. v. Yarborough, 70 N.C. 253; *Hughes v. Mason,* 84 N.C. 474; *Hauser v. Morrison,* 146 N.C. 250; *Simonds v. Lebrun,* 219 N.C. 46; *Howell v. Branson,* 226 N.C. 265.

PARKER RAND v. THE STATE OF NORTH CAROLINA.

Where a person was, before the late civil war, the *bona fide* holder of two bonds of the State, which had been issued ten years before for purposes of internal improvements, and which were then due and payable, and in 1862, received from the State in payment thereof treasury notes to the amount of the bonds, which expressed on their face that they were fundable in the bonds of the State, thereafter to be delivered, and the bonds had never been delivered, *it was held,* Rodman, Justice, dissenting, that the claim was founded upon an illegal consideration and the State was not bound to pay it.

THIS is the case of a claim against the State, presented to the Court at this Term for its recommendatory action under Art. 4, sec. 11 of the Constitution. A sufficient statement of the facts of the case will be found in the opinion of the Court. (195)

Phillips & Merrimon for the claimant.

SETTLE, J. The opinion of this Court is invoked by the claimant, under Art. 4, sec. 11 of the Constitution, with a view to obtain favorable action on his claim by the General Assembly.

The Clerk of this Court, in obedience to an order of reference, reports that the facts set forth in the complaint are true. Do they constitute a valid claim against the State?

The claimant having a legal claim (consisting of State bonds) in 1862 surrendered it and accepted in payment of the same Treasury notes, fundable and interest bearing, issued by the State in pursuance of a policy, evinced by a series of acts commencing in May, 1861, and entitled:

1. "An act to provide ways and means for public defence," ratified the 11th day of May, 1861, and appropriating $5,000,000.

2. "An ordinance to provide the ways and means for the defence of the State," ratified the 28th day of June, 1861, and appropriating $3,200,000.

3. "An ordinance to provide for the raising of money for the support of the government, and for the issue of Treasury notes for the purpose of paying the public debt and purchasing supplies for the military forces employed for defence in the present war, and for other purposes," ratified 1st December, 1861, and appropriating $3,000,000.

The titles of the Acts, under which these notes were issued, fully informed the claimant of their character, but as they professed to be fundable and interest bearing he, like thousands of others, took the venture and accepted them in payment and discharge of securities, which he surrendered. He was not compelled to this course—he might have retained his old securities, but he saw proper to exchange
(196) non-interest bearing for interest bearing securities, with a full knowledge of what was going on around him.

Had the rebellion, of which this currency was in part the life blood, succeeded, his may have been a good investment, but as it has failed he must share the fate of all who invested their money or rather property in securities of an illegal character.

As the tree has fallen so let it lie. But it is said, that as he has retained the identical notes which he received from the Treasury, the State is bound to make them good. *Non sequitur.*

These notes are not slightly tainted, but spoiled. Not only do the titles of the Acts above cited fix the character of Treasury notes, but a series of other Acts show for what purpose they were brought into existence, and that the authorities of the State were endeavoring to give them currency with the people in order to carry the rebellion to a successful issue.

The Governor was authorized to establish Post offices and Post roads, to establish telegraphic lines, to build forts and arsenals, to provide for the manufacture of arms, to raise and equip volunteers, to furnish salt and other supplies to citizens of this State, to feed troops from other Southern States passing through this State, etc., etc., for all of which he was to draw his warrant upon the Treasury, which as we have seen, had within a few months been almost filled with Treasury notes.

We may safely say that these notes would never have had an existence but for the rebellion.

The Convention of 1865 ordained "that all debts incurred by the State in aid of the late rebellion, directly or indirectly, are void, and

no General Assembly of this State shall have power to assume or provide for the payment of the same, or any portion thereof, nor to assume or provide for the payment of any portion of the debts incurred directly or indirectly by the late so-called Confederate States." (197)

And the Constitution Art. I, sec. 6, is to the same effect.

"Any act which would not have been done except for the existence of the rebellion, and which was calculated to counteract the measures adopted by the government of the United States, for its suppression, and to enable the people in insurrection to protract the struggle, was in aid of the rebellion."

"The Courts of the rightful State government, which has regained its supremacy cannot treat the acts of persons so unlawfully exercising the powers of the State and County authority as valid, unless the Court is satisfied that the acts were innocent and such as the lawful government would have done." *Leak v. Commissioners*, 64 N.C. 132. Public policy demands at least this much. And indeed it is no more than every one expected, and is only the same rule that the Legislature laid down in a resolution ratified the 9th day of May, 1861, and which would undoubtedly have been carried out to the letter if affairs had not taken a different turn. The resolution was as follows:

"WHEREAS, Abraham Lincoln has been and is still endeavoring to raise money upon the faith and credit of the so-called United States government, for the purpose of waging a wicked, unjust, and unholy and unconstitutional war upon the Southern States; and whereas, North Carolina is neither morally nor legally bound to pay or in any wise contribute to the payment of any debt incurred by said government since the 4th day of March last. Now, therefore, to the end that there may be no misapprehension on the part of those who may invest their means in the securities of said government, it is hereby

Resolved, That North Carolina ought never, in any event, to pay any portion of the debt incurred by what is called the United States government, since the 4th day of March last, or any portion of any debt or liability which may be incurred hereafter." (198)

The common law, the ordinance of 1865, the Constitution and the decisions of this Court in *Leak v. Commissioners*, and other cases effectually close the door against the present claim.

Were it admitted, it would open the door to a deluge of war claims, in comparison with which our present indebtedness is but a trifle.

We recommend the rejection of the claim.

PER CURIAM. The rejection of the claim recommended.

RODMAN, J. *dissenting.* I think a State is always under a moral liability for its debts. Such liability is acknowledged in our Bill of Rights. In this case it is not denied that the petitioner had, at one time, a just debt which has never been paid except in the notes of the State, which, although issued during the war, were not issued to him at least for the purposes of the war. He does not seem to be tainted with any illegal complicity. I do not concur, therefore, in the opinion of the majority of the Court.

Cited: Brickell v. Comrs., 81 N.C. 243; *Martin v. Worth,* 91 N.C. 47.

(199)

JOHN W. MARTIN v. A. B. MCMILLAN'S ADM'R, AND OTHERS.

A person who sold mules to an agent of the Confederate government, with a knowledge that they were to be used in the military service of such government, cannot recover upon a bond given for the price.

AFTER the *venire de novo* ordered in this cause by the Supreme Court at Fall Term, 1869 (see 63 N.C. Rep. 486) it came on to be tried again before his Honor, *Judge Mitchell,* at the Fall Term, 1870, of the Superior Court of ALLEGHANY County.

On the trial the evidence was substantially the same as it was on the first trial, except that there was no testimony that the plaintiff said that he would take less for the mules for which the bond sued on was given, because they were intended for the use of the Confederate government.

The defendant's counsel asked in writing for the following instructions:

1. That if the plaintiff at the time of the trade knew of the unlawful purpose for which the defendant Edwards was purchasing the mules, although he took no less for them on account of said purpose, he could not recover.

2. If the plaintiff at the time of the trade knew of the illegal purpose for which the defendant Edwards was purchasing the said mules, and if in making the trade the plaintiff had any design to aid or further said illegal purpose, he could not recover.

3. If the plaintiff sold the mules to the defendant, William Edwards, knowing at the time he was buying said mules as the agent of the Con-

federate government, and on behalf of the said government, to be used in hostility to the government of the United States, he could not recover.

His Honor refused to give the first instruction as prayed for, but told the jury that bare knowledge on the part of the plaintiff of the illegal purpose for which the defendant, William Edwards, was buying the said mules, would not vitiate the bond, and render it (200) illegal and void, unless the illegal purpose formed some part of the inducement to plaintiff in making said contract, or entered in some way into the consideration thereof.

His Honor gave the second instruction, and refused the third, substantially repeating what he had said on the first.

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

Folk and Boyden for the defendant.
No counsel for the plaintiff.

PEARSON, C.J. In *Smitherman v. Sanders*, 64 N.C. 522, the Court in commenting upon the case *Martin v. McMillan*, 63 N.C. 486, holds the principle to be "the fact of furnishing horses for the Confederate army was an act which of itself aided the rebellion, and amounted to treason—that was the ground of the decision, and the fact that the plaintiff said he was taking less than the value, for the sake of *the cause*, was merely a circumstance in aggravation."

The principles involved in this case have been so fully discussed in several cases recently before this Court, that the subject is exhausted. His Honor erred in not taking the distinction between a case like this when the very fact of supplying horses with a knowledge that the horses were bought for the service of the rebel army, which act *per se* was an act of treason, and other cases where the act might or might not have been unlawful, dependent upon the fact whether the vendor took part in the transaction. Reversed. *Venire de novo.*

Per curiam.

Judgment reversed.

(201)

G. W. SHULER v. T. D. BRYSON.

Where, on an attachment against the payee of a negotiable note, the maker is summoned as garnishee and admits his indebtedness to the payee, and thereupon a judgment is given against him for the amount, it will be no defence to show such maker when sued upon the note by one who became a *bona fide* endorsee before he was summoned as a garnishee in the attachment, even though such endorsement was made after the note was over due.

When one is summoned as a garnishee in an attachment, and owes a note which is negotiable, he has a right to insist upon the production and surrender of the note, or upon an indemnity as in the case of a lost note, before a judgment is taken against him upon his garnishment.

THIS was a suit commenced before a Justice of the Peace and taken, by appeal, to the Superior Court of the County of JACKSON, where it was tried at the Fall Term, 1871, before his Honor, *Judge Cannon.*

Upon the trial it appeared that the plaintiff's claim was upon a promissory note made by the defendant on the 8th day of January, 1869, payable to William Nichols one day after date, and by him, endorsed to the plaintiff on the 1st day of April, 1869. At the time of the endorsement there were certain credits for payments on the note which were admitted by the plaintiff. The defendant admitted the making of the note to Nichols, and relied as a defence against the plaintiff's recovery, a former judgment obtained by R. M. Henry on an attachment against Nichols, the payee of the note, in which the defendant had been summoned as a garnishee on the 13th day of April, 1869; and upon the defendant's answer as garnishee, the plaintiff in the attachment, R. M. Henry, obtained a judgment against him for the amount then due on the said note. In his answer to the garnishment the defendant had stated the time when he gave the note, and that on the 18th of January, he had made a payment which was credited on it,
(202) and that he had not seen it afterwards. But on the day on which notice of the garnishment was served on him, the present plaintiff, Shuler, informed him that he had the note, and the defendant prayed the Court to direct him to whom to pay the note.

The plaintiff in the present suit tendered evidence that he had paid a valuable consideration for the note and had had it endorsed to him before notice of the garnishment had been served upon the defendant, Bryson, but this evidence was rejected by the Court.

His Honor instructed the jury that if the note now sued upon was the same as that upon which the judgment in the attachment upon the

defendant's garnishment had been rendered, it was an adjudication of the rights of the parties, and the plaintiff was not entitled to recover.

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

Phillips & Merrimon for the plaintiff.
No counsel for the defendant.

PEARSON, C.J. The note sued on was executed on the 8th of January, 1869, payable one day after date. It was endorsed to plaintiff on the 1st of April, 1869. Being overdue, the plaintiff took it, subject to all equities and liens that had attached to it in the hands of the assignor at the date of the assignment. But subject to this the title passed to the plaintiff, and the defendant from that time became his debtor, and no longer owed the payee anything.

It follows, that Robert Henry, plaintiff in the attachment sued out afterwards, to-wit: on the 13th of April, 1869, acquired no lien on the note, and it was the folly of the defendant when summoned as garnishee, to admit an indebtedness to the payee upon a *negotiable note* which had in fact been assigned to the plaintiff, twelve days before.

The admission should have been qualified. He was only indebted to the payee, provided the note had not been assigned. (203) He had a right, and ought to have insisted upon the production and surrender of the note before judgment against him as garnishee, or else to have required indemnity, as in case of a lost note.

He may blame himself for submitting to a judgment as garnishee, when in fact he owed the payee nothing.

This is clearly settled by the case *Myers v. Beeman,* 31 N.C. 116, where the subject is fully discussed, and by the case *Ormond v. Moye,* 33 N.C. 564. In that case the garnishment was served *before* the assignment. And the Court approving *Myers v. Beeman,* put the plaintiff's right to recover on the ground, that although the garnishment was served before the assignment, yet as the assignment was made before the note fell due, the plaintiff acquired the title, discharged from the lien created by the garnishment of which he did not have notice.

There is error.

Per curiam.

Venire de novo.

Cited: Rice v. Jones, 103 N.C. 233.

(204)

JOSEPH H. BLAND, ADM'R., OF B. W. THOMAS v. WINSHIP HARTSOE AND WIFE AND OTHERS.

If an administrator has properly sold a horse, belonging to the estate of his intestate and taken a note therefor, he may nevertheless rescind the sale and take back the horse, provided he does it *bona fide* because he suspects the solvency of the parties to the note, but in such case he must sell the horse again immediately, or he will be held liable for his value at the time; and he must, if he can, collect from the first purchaser what the use of the horse was worth to him while in his possession, or be held liable for that also.

An administrator has no right to an order for the sale of land for the payment of the debts of his intestate until the personal estate is exhausted, and if he had made a distribution of part of the personal effects among the next of kin, the value of such effects must be charged against him, in taking an account for the purpose of ascertaining whether he has exhausted the personal estate of his intestate. And the same rule will apply as to personal effects advanced to the widow as a distributee, but not to such as she may take for her year's provisions.

THIS was a petition by the plaintiff as administrator of W. B. Thomas, in the Court of Probate for the County of CHATHAM, for the purpose of obtaining an order to sell the land of his intestate wherewith to pay the debts of the estate. The heirs at law were made parties defendants, and filed answers in which it was insisted that the personal effects of the intestate were sufficient for the payment of the debts of his estate, and that the sale of the land was unnecessary for that purpose. A reference for an account was made by the Judge of Probate, and upon the coming in of the report of the referee, exceptions were filed to it by the defendant, the first of which was sustained and the others overruled, whereupon the plaintiff appealed to the Judge of the Superior Court; and the appeal coming on to be heard before him *(Tourgee, J.)* at Chambers, on the 18th Nov., 1870, he affirmed the judgment of the Court of Probate, and the plaintiff appealed to the Supreme Court. A sufficient statement of the case will be found in the opinion of the Court.

Phillips & Merrimon for the plaintiff.
H. A. London for the defendants.

(205) RODMAN, J. By the law of North Carolina the personal estate of an intestate must be first applied to the payment of his debts. It is only when that proves insufficient that an administrator can obtain an order to sell the real estate. In this case it is not alleged that the administrator has exhausted the personal estate

in the payment of debts; he says that he gave a part of it to the distributees, and the Clerk so finds.

The defendants (who are the heirs of the intestate) except to the report of the Clerk, because:

1. He does not charge the administrator with the note given for a certain horse that was sold by the administrator; or

2. With the value of the horse.

The facts about the horse seem to be, that the administrator sold him and took a note with sureties for the price; the sureties afterwards became alarmed, and threatened not to pay, and the administrator became doubtful about the solvency of the note he had taken; he therefore agreed with the purchaser to rescind the sale, and surrendered the note, and took back the horse.

We think that if the administrator acted fairly and honestly according to his judgment as to what was for the interest of the estate in rescinding the sale, which does not seem to be disputed, he cannot be held liable for the amount of the note. Much discretion must be allowed to a trustee who acts in good faith, and many errors of judgment overlooked. But if the circumstances justified the administrator in taking back the horse, we see in the evidence no reason why he did not immediately sell him again. We think that he is properly chargable with the value of the horse at the time he took him back; and also with the value of his use while in the possession of the vendee, provided he could have recovered such value, which it does not seem that he ever made any effort to do. The first exception is overruled, the (206) second is sustained.

3. He does not charge the administrator with the value of 648 bushels of corn divided among the distributees. The distribution of the personalty before the payment of the debts was an act which the administrator did at his own peril. Whatever his rights may be against the persons to whom he made the distribution, or whether he has any right to recover back from them, we do not undertake to say. But it is clear, that he cannot make the heirs, who are, or may be, different persons from the distributees, or who at least take in different proportions, and in a different right, the sufferers by his unauthorized act. He cannot change the course of administration and make the land the primary fund for the payment of the debts. This exception is sustained.

4. That he does not charge the administrator with the corn delivered to the widow.

If the corn was delivered to the widow as a distributee, the observations under exception 3, apply. It may be, however, that it was deliver-

ed to her for her year's provisions, which she takes paramount to creditors. In that case there would be no misappropriation. Consequently this exception is neither overruled or sustained.

There is error in the judgment below, and the case is remanded in order that it may be proceeded in, conformably to this opinion.

The plaintiff will pay the costs of this Court.

Per curiam.

Judgment reversed.

Cited: Shields v. McDowell, 82 N.C. 140; *Blount v. Prichard,* 88 N.C. 447; *Lilly v. Wooley,* 94 N.C. 415; *Lee v. Beaman,* 101 N.C. 299.

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(207)

O. G. PARSLEY & CO. v. THOMAS W. NICHOLSON AND ANOTHER.

The rules of pleading, at common law, have not been abrogated by the C. C. P. The essential principles still remain, and have only been modified as to technicalities and matters of form. The effect of pleading both in the old and new system is to produce proper issues of law or fact, so that justice may be administered between parties litigant with regularity and certainty.

Every material allegation of a complaint which is denied by the answer must be sustained in substance by proofs; and though a plaintiff may prove a cause of action, he cannot recover upon it unless it be alleged substantially in his complaint.

THIS was a civil action brought in EDGECOMBE Superior Court and tried at the Spring Term, 1870, before his Honor, *Judge Jones.*

The complaint alleged that the defendants on the 3rd of December, 1867, received from the plaintiffs nine bales of cotton, on which they, the plaintiffs, had a lien for $311, and held as their property for the payment of that amount, and that the defendants promised to ship and sell it, and out of the proceeds pay the amount of their said lien.

It alleged further that the defendants did ship and sell the cotton, and, though they received more than the amount of the plaintiffs' lien, they had refused upon request to pay it or any part of it to the plaintiffs.

The answer denied that the defendants received, at the time specified or any other time, nine bales of cotton from the plaintiffs, but alleged that about the time specified they had bought from one Collin McNair

nine bales of cotton and that they were afterwards informed by an agent of the plaintiffs that they had a lien upon it for $311. The answer further denied that the defendants promised to ship and sell the cotton and pay any part of the proceeds to the plaintiffs, though it admitted that they had sold the cotton and had received therefor a sum greater than the amount of the plaintiffs' lien, and had refused to pay it or any part of it to the plaintiffs. (208)

On the trial, the allegations of the complaint were sworn to by one William M. Pippin, the agent of the plaintiffs in the transaction.

On the part of the defendants, Mr. Williams one of them, testified that McNair had sold them nine bales of cotton, upon which they paid him $160; that the witness, Pippin, afterwards came to their store and asked if they had not bought cotton of McNair, to which they replied that they had. He then said that he had a lien on it, that McNair had told him that he had sold the cotton to the defendants, and that he had said that he should not trouble it, but that he had been subsequently advised that it would be bad faith to his employers, O. G. Parsley & Co., to let the cotton go off; that Mr. Smith, (now dead) one of the copartners, said he would go and see McNair, and see if he could get back the advance; that he did go and came back, saying that he could not get the money from McNair, he having paid it out to the laborers, and that he shipped the cotton and after it was sold, he said he held the money subject to owner's order, less the $160 advanced. It was further testified that Pippin made a proposition to divide the funds between them, and leave the laborers to fight it out, and if they got a judgment, O. G. Parsley & Co., were able to pay it. Pippin may have threatened to take possession of the cotton, but never did after it was delivered by McNair to the defendants; that McNair had said he had sold the cotton while the plaintiffs lien was on it, because he had sold last year, the plaintiffs then having a similar lien.

The plaintiffs' counsel asked for the following instructions: First, that if Pippin was to be believed the cotton was the property of the plaintiffs. 2d. That if the defendants received and shipped the cotton as the property of the plaintiffs, and sold it and received the money, they were liable to the amount of the lien $311 with interest.
3d. That in any point of view, they were liable for the surplus, (209) after retaining $160, the cotton having sold for $435.

His Honor gave the first instruction asked, adding that both witnesses, Pippin and Williams, were before them, and it was for the jury to decide, upon a proper consideration to whose testimony they attached most weight; that if they believed the testimony of Williams, the cotton had not been delivered to Pippin by the defendants. His

Honor then gave the second, but declined to give the third instruction asked for. The jury found a verdict for the defendants, upon which they had judgment, and the plaintiffs appealed.

Howard and Battle & Sons for the plaintiffs.
Moore & Gatling for the defendants.

DICK, J. The complaint alleges:

1st. That the defendants received nine bales of cotton from the agent of the plaintiffs, and promised to ship and sell the same, and out of the proceeds pay the plaintiffs the amount which they claimed by virtue of their lien.

2nd. That the defendants sold said cotton for a sum of money more than sufficient to satisfy the claim of the plaintiffs, and refused payment on demand, etc.

The defendants in their answer deny these allegations, and the issues of fact thus joined were submitted to the jury.

The statement of the cause of action is sufficiently certain and positive, but the jury have found that it is not true in fact, and the evidence was fairly submitted by his Honor, in accordance with the 1st and 2nd instruction asked by the plaintiffs.

His Honor properly refused the 3rd instruction asked. The cause of action alleged in the complaint is an express contract, and the jury found that no such contract was made. If any contract with the plaintiffs arose by implication of law from the facts disclosed by the
(210) evidence of the defendants, the complaint ought to have been amended so as to meet such state of facts by proper allegations.

The rules of pleading at common law have not been abrogated by the C. C. P. The essential principles still remain, and have only been modified as to technicalities and matters of form. The object of pleading, both in the old and new system, is to produce proper issues of law or fact, so that justice may be administered between parties litigant with regularity and certainty.

Every material allegation of the complaint which is controverted by the answer must be sustained in substance by proofs.

In the case before us the contract alleged in the complaint is denied in the answer, and the jury have decided the issues in favor of the defendants.

There is no error and the judgment is affirmed.

Per curiam.

Judgment affirmed.

Cited: Withrow v. Biggerstaff, 82 N.C. 85; *Katzenstein v. R. R.,* 84 N.C. 695; *Hill v. Buxton,* 88 N.C. 29; *Kelly v. R. R.,* 110 N.C. 436; *Lassiter v. Roper,* 114 N.C. 19; *Webb v. Hicks,* 116 N.C. 604; *Griffin v. R. R.,* 134 N.C. 106; *Sumrell v. Salt Co.,* 148 N.C. 555; *Patterson v. R. R.,* 214 N.C. 42; *Bynum v. Bank,* 219 N.C. 121; *Wells v. Clayton,* 236 N.C. 106.

(211)

MICHAEL SWAIN v. MATILDA SMITH AND ANOTHER.

When the writ of *recordari* is used as a writ of false judgment, as it may be in this State, upon its return in which the proceedings before the Justice of the Peace are certified, the plaintiff in the writ must assign his errors, and then the proceedings will be the same as in other writs of error.

Where a Justice's judgment is given for the plaintiff and the defendant brings error, there shall only be a judgment to reverse the former judgment, for the writ of *recordari* is only brought to be eased and discharged of that judgment. But, where the plaintiff brings the writ, the judgment, if erroneous, shall not only be reversed, but the Court shall also give such judgment as the Court below shoud have given; for his writ is to revive the first cause of action, and to recover what he ought to have recovered by the first suit, wherein the erroneous judgment was given.

Where a suit before a Justice is for a money demand, it is erroneous for him after giving a judgment for the amount claimed to add "to be paid in old North Carolina bank money at par, of any bank in the State;" and, upon the return of a writ of *recordari* and the assignment of such error in the Justice's judgment, the Superior Court should not order the case to be placed on the trial docket, but should reverse the judgment, and enter the proper judgment for the plaintiff.

THIS was a writ of *recordari* in the nature of a writ of false judgment, to reverse a judgment given by a Justice of the Peace, and upon the return of the writ in which the whole proceedings were certified, the plaintiff, who was also the plaintiff in the suit before the Justice, assigned for error that the judgment given by the Justice in his favor for the amount claimed by him had the following words added as a part of it—"to be paid in old North Carolina bank money at par of any bank in the State." At the Fall Term, 1870, of ALEXANDER Superior Court, before his Honor, *Judge Mitchell,* the plaintiff moved to have the case placed on the civil issue docket, which was resisted by the defendants, who moved to dismiss the suit upon

the ground that the plaintiff had in legal effect the judgment
(212) which he sought by his writ. The motion of the defendants was overruled, and that of the plaintiff was granted, whereupon the defendants appealed.

Folk for the defendants.
Phillips & Merrimon for the plaintiff.

DICK, J. The judgment of the Justice of the Peace was erroneous. He had no right to adjudge that the plaintiff's debt was "to be paid in old North Carolina bank money at par, of any bank of the State."

Those words cannot be rejected as surplusage as they form a material part of the judgment. The original cause of action was merged in the judgment, and the terms of the contract so changed as to affect injuriously the rights of the plaintiff. A judgment is the conclusion of law from the facts proved or admitted in the suit, and in money demands must be absolute and in a specified amount. The plaintiff was entitled to such a judgment, and the law determines how it shall be satisfied. *Mitchell v. Henderson,* 63 N.C. 643.

The plaintiff has chosen the proper remedy as the writ of *recordari* is still in force in this State. *Marsh v. Williams,* 63 N.C. 371.

The writ of *recordari* is often used as a writ of false judgment, and lies where an erroneous judgment is given in a Court not of record. Upon the return of the writ when the whole proceedings are certified, the plaintiff must assign his errors. When the parties are in Court the subsequent proceedings are the same as upon writs of error. 2 Tidd. 1188.

The nature of the judgment in writs of error is well expressed in *Parker v. Harris,* 1 Salkeld 262, and is fully sustained in 2 Saund. R., 101 W. 2 Tidd. 1179. "Where judgment is given for the plaintiff and the defendant brings error, there shall only be judgment to reverse the former judgment, for the suit is only to be cased and discharged of that judgment. But where the plaintiff brings error the judg-
(213) ment shall not only by a reversal, but the Court shall also give such judgment as the Court below should have given; for his writ of error is to revive the first cause of action, and to recover what he ought to have recovered by the first suit, wherein the erroneous judgment was given."

These rules decide the case before us and the judgment must be reversed, and an absolute judgment entered in this Court for the amount ascertained to be due by the Justice of the Peace, with interest.

The motion to dismiss was properly disallowed. The motion to place the case on the trial docket was improvidently granted. Each party must pay his own costs in this Court.

Per curiam.

Judgment reversed.

Cited: Rush v. Steamship Co., 67 N.C. 49; *Carmers v. Evers,* 80 N.C. 60.

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(214)

P. N. HEILIG AND OTHERS, ADMINISTRATORS OF SARAH HEILIG v. ISHAM A. DUMAS.

In an action against several co-obligors to a bond in which one only pleads *non est factum,* it is not competent for the plaintiff on the trial of the issue with him to prove that he and another of the obligors were strong personal friends, and it is also incompetent for the plaintiff to prove that all the co-obligors of the contesting defendants were men of good character.

The case of *McRae v. Lilly,* 1 Ire. 118, cited and approved.

THIS was an action of covenant, under the old mode of procedure, upon the following sealed instrument: "One day after date, we, Angus Martin, Isham Dumas, and A. H. Saunders, as principals, and Parsons Harris and Thomas S. Cotton, as sureties, promise to pay Sarah Heilig, fifteen hundred dollars in gold coin, for value received. July 25th, 1859.

A. MARTIN, [SEAL.]
A. H. SANDERS, [SEAL.]
J. A. DUMAS, [SEAL.]
T. S. COTTON, [SEAL.]
P. HARRIS, [SEAL."]

Credit of interest to 20th July, 1861.

No appearance was entered for any of the defendants, except Dumas, who entered the plea of *non est factum.*

On the trial of the issue on this plea, at the Fall Term, 1870, of ROWAN Superior Court, before his Honor, *Judge Henry,* there was conflicting evidence as to the execution of the bond by Dumas, when the

plaintiffs offered to prove that the defendants, Dumas and Martin, lived within eight miles of each other, and that they were strong personal friends. The evidence was objected to by the defendant but received by the Court. The plaintiff also proposed to prove that all the co-obligors of the defendant, Dumas, were men of good character. This was also objected to by the defendant but admitted by the Court. Under the charge of his Honor the plaintiffs had a verdict and (215) judgment and the defendant, Dumas, appealed.

Dowd for the defendant.
Blackmer & McCorkle for the plaintiffs.

SETTLE, J. There was error in admitting the evidence that the defendant Dumas, and Martin, a co-obligor in the covenant sued upon, were strong personal friends.

It is the duty of the Court to protect juries from irrelevant and incompetent testimony. This circumstance, conceding it to be true, is too remote to throw any light upon the transaction under investigation, and could only serve to mislead and confuse the jury, as to the true matter of inquiry.

The fact of their being strong personal friends does not tend to prove that Dumas executed the covenant sued upon, and furnishes no legal foundation for such an inference.

What we have said in reference to this testimony is equally applicable to the evidence which was admitted to prove that all the co-obligors of the defendant, Dumas, were men of good character. In civil suits the general rule is, that unless the character of the party be put directly in issue, by the nature of the proceeding, evidence of his character is not admissible. *McRae v. Lilly,* 23 N.C. 118. In *Fowler v. Ætna Fire Insurance Company,* 6 Cowan 673, the Court say, in speaking of the admissibility of evidence of character in a civil suit, "if such evidence is proper, then a person may screen himself from the punishment due to fraudulent conduct, till his character becomes bad. Such a rule of evidence would be extremely dangerous. Every man must be answerable for every improper act, and the character of every transaction must be ascertained by its own circumstances, and not by the character of the parties." The same doctrine is laid down in *Thompson v. Bowie,* 4 Wal. 470. But in our case the admission of evidence (216) of the good character of co-obligors was much more irrelevant to the issue involved, than it would have been in any of the cases cited. Indeed it was not the character of the defendant, Dumas, who is contesting this matter, which was sought to be directly proved, but the

more remote matter of the character of his co-obligors, in order that an inference might be drawn from that fact to his prejudice.

The judgment of the Superior Court is reversed and a *Venire do novo* awarded.

Per curiam.

Venire de novo.

Cited: Sc 69 N.C. 206; *Clements v. Rogers,* 95 N.C. 253; *Norris v. Stewart,* 105 N.C. 457; *Marcom v. Adams,* 122 N.C. 225; *Lumber Co. v. Atkinson,* 162 N.C. 302; *Walters v. Lumber Co.,* 165 N.C. 392; *Merrill v. Tew,* 183 N.C. 175.

LOUISA EASON, ADMINISTRATRIX v. JOSEPH R. BILLUPS, ADMINISTRATOR, ROBERT J. SAUNDERS AND OTHERS.

A petition to rehear a decree of this Court, when the error complained of is one of fact commited in making an interlocutory order of reference, and in confirming the report made by the commissioner is not strictly a petition to rehear, but may be treated as a motion to set aside the order of reference and the order confirming the report, and the decree made pursuant thereto.

It is error in an order to refer the matters in controversy in a suit without the consent of the parties to the attorney of one of them, it being the same as if the reference were made to the party himself.

THIS was a proceeding in the form of a petition to rehear a decree made in favor of the plaintiff against the defendant Robert J. Saunders and others, at the last term of this Court. The petition states among other things that an order had been made at the January Term, 1868, of the Court referring the matters in controversy between the parties to Jonathan W. Albertson, of PERQUIMANS County, for a report; that he made a report and returned it in July, 1869, and that, at the last term, there being no exception to it, it was confirmed and a (217) decree made in accordance with it. The petition states further that Jonathan W. Albertson, the commissioner, who made the report, was the Attorney of the plaintiff and that the decree was injurious to the petitioner. The prayer is for a rehearing of the decree.

Bragg for the petitioner.
Smith contra.

PEARSON, C.J. This application may be treated either as a petition to rehear, or as a motion to set aside the order of reference and the order confirming the report, and the decree pursuant thereto.

It is not strictly a petition to rehear because no error in matter of law is complained of. The error is in a matter of fact and relief can be given upon a petition in the nature of a petition to rehear, or upon a motion to set aside the orders and decree; provided a fact existed in the proceeding which was not called to the notice of the Court and which, had it been made known, would have prevented the original order.

It is alleged as a fact and admitted that Jonathan W. Albertson, to whom the order of reference was made, and Jonathan W. Albertson, the Attorney of the plaintiff, is the same person. So in fact the order of reference was made to the Attorney of the plaintiff and the error is the same as if the reference had been made to the plaintiff himself.

In the absence of any allegation, that the reference was made to Mr. Albertson by the consent of the defendants there is error and the order, etc., must be set aside as of course.

The distinction between a writ of error for matter of law and a writ of error for matter of fact in the procedure of Courts of law
(218) furnishes an analgy. *Pearson v. Nesbitt*, 12 N.C. Dev. 315, where upon its being made to appear that Jesse A. Pearson, one of the plaintiffs and Jesse A. Pearson one of the defendants was the same person, the Court ordered the judgment to be vacated.

The order and decree complained of, will be set aside. The plaintiff may take an order of reference to W. H. Bagley, Clerk of this Court.

Per curiam.

Decree reversed.

WILLIAM A. ROGERS, EX'R. v. ROBERT MCKENZIE AND ANOTHER.

Where, upon a lease of turpentine boxes for four years, the lessee covenanted to pay the lessor at the end of each year a certain rate per thousand boxes, and the lessor died before the expiration of the second year leaving a will devising the land, *it was held*, that the executor could only recover for the rent of the first year, the rent for the remaining years having followed the reversion to the devisees.

THIS was an action of covenant brought under the former mode of procedure upon the following instrument under seal:

"We or either of us promise to pay John Drake or order for all the boxes that will be on the land known as the said Drake land betwixt the Creek and Buck Swamp, six dollars and fifty cents a thousand per year, all on the other side of the said Buck Swamp five dollars a thousand per year; it is understood that the above lands are rented for four years for turpentine purposes only—further understood the rent is to be paid on the 1st January of each year, beginning on the 1st January, 1861, ending January 1st, 1865.

ROBERT McKENZIE, [SEAL.]

JOHN McNAIR, [SEAL.]

March 19th, 1861.

Upon the trial at ROBESON Superior Court, at the Fall Term, 1870, before his Honor, *Judge Russell*, the execution of the (219) covenant was admitted, and the defendants proved that the lessor of the turpentine boxes had died during the year 1862, leaving a will of which the plaintiff was executor, and in which the land upon which the trees stood was devised to two of the sons of the devisor; and offered to prove that for the years during which the lease had to run after the death of the testator, they had paid the rent to the said devisees. This testimony was rejected by the Court. The defendants then offered to prove that they had paid to the Sheriff of the County the sum of $156, the amount of the taxes due on the said land for the years 1860 and 1861., but this was also rejected. Under the charge of his Honor the plaintiff had a verdict and judgment for damages to the whole amount of the rent for the four years, and the defendants appealed.

Leitch and Battle & Sons for the defendants.
N. A. McLean and W. McL. McKay for the plaintiff.

PEARSON, C.J. Rent service is incident to the reversion. If a lessor seized in fee dies, the rent accrued prior to his death (being, as Lord Coke expresses it, "fruit fallen," that is, having become a debt in gross and merely personal to the lessor) devolves upon his personal representative. But the rent which is not accrued at his death passes with the reversion to the heir or devisee.

If a lessor accepts a "fine," (that is, an amount of money in hand,) and reserves an annual rent of a pepper-corn, the reversion passes to the heir or devisee with this nominal rent and fealty, which, as now

understood, simply has the effect of preventing the lessee from disputing the title.

So if the lessor takes the notes of the lessee securing the payment of certain sums annually, in satisfaction of the rent and dies, all (220) of these notes belong to his personal representative.

The heir or devisee takes the reversion with no other service save fealty, because by taking the notes the lessor severs the rent from the reversion and makes it a debt in gross, being the same in legal effect as if he had accepted a "fine."

In our case the lease was for four years, and the question is, by the true construction of the covenant, is it simply evidence of an agreement to pay an annual rent? Or is it a severance of the rent from the estate so as to make it a personal debt, ("fruit fallen,") one from year to year? By a perusal of the covenant we can see nothing to take it out of the ordinary case of a covenant to pay rent, which passes with the reversion as an incident thereto.

There is no fine, no separate security taken, having the effect of detaching the rent from the estate, so as to let the *land* pass to the devisees subject to the term of years, but stripped of the rent which would otherwise have passed as an incident of the reversion, in lieu of the immediate possession of the land.

The amount of the rent could not, according to the terms of this lease, have been fixed before hand with certainty, for it depended upon the number and location of the trees brought under cultivation. This circumstance raises an inference against an intention to detach the rent from the estate.

It follows that the plaintiff was only entitled to recover the rent accrued at the death of his testator—the defendant was not called upon to prove that he had in fact paid the rent accruing after the death of the lessors to the devisees.

But as he offered to do so his Honor's refusing to admit the evidence shows that he was in error as to the extent of the plaintiff's cause of action, and the result was, he obtained a verdict and judgment for a much larger amount than that to which he was entitled. There is error.

Per curiam.

Venire de novo.

Cited: Kornegay v. Collier, 65 N.C. 70; *Sc,* 81 N.C. 164; *Holly v. Holly,* 94 N.C. 674; *University v. Barden,* 132 N.C. 486; *Timber Co. v. Bryan,* 171 N.C. 265; *Pate v. Gaitley,* 183 N.C. 263; *Mercer v. Bullock,* 191 N.C. 217; *Jennings v. Shannon,* 200 N.C. 3; *Trust Co. v. Dodson,* 260 N.C. 36.

(221)

V. W. PERRY v. SHADRICK MORRIS AND OTHERS.

If a number of Justice's judgments be docketed in the Superior Court, they will, under the C. C. P., be a lien upon the land of the defendant from the time, where they were docketed and will have a priority over a judgment obtained in Court by another person against the same defendant at a subsequent time, and though an execution be issued on the latter and the sheriff levies it on the land and advertises it for sale, yet, if before the sale executions are issued on a part of the justice's docketed judgments and are placed in the hands of the sheriff, the proceeds of the sale of the land must be first applied to the payment of all the justice's judgments.

The lien on the land of the defendant acquired by a docketed judgment shall not be lost in favor of a judgment subsequently docketed, unless the plaintiff in the latter take out execution and give the plaintiff in the former twenty days' notice before the day of sale by the sheriff, and the plaintiff so noticed fail to take out execution and put it into the sheriff's hands before the day of sale as is prescribed in the 19th rule of practice adopted by the Supreme Court at June Term, 1869.

The fact that a judgment docketed in one county is afterwards docketed in another, does not deprive it of the lien it had on the defendant's land in the first county.

AT the Spring Term, 1870, of the Superior Court for the County of STOKES, before his Honor, *Judge Cloud,* the Sheriff of that County had in his hands four executions in favor of V. W. Perry against Shadrick Morris, and one in favor of S. Westmoreland, to the use of Mary Moore and others, against the same man, and he made a return in open Court, and prayed the advice of the Court as to what application he should make of the money he raised on the executions, upon the following statement of facts:

On the 27th day of Oct., 1869, V. W. Perry obtained eight judgments before a Justice of the Peace, and on the 29th day of the same month, had them docketed on the records of the Superior Court of Stokes County, and instructed the Clerk to issue executions on four of them, and to send transcripts of the remaining four to be docketed in the Superior Court of Forsythe County. At the Fall Term, 1869, of the Superior Court of Stokes County, which commenced on the (222) 1st day of November, of that year, one S. Westmoreland suing to the use of Mary Moore and others, recovered judgment against the same man, Morris, and had it docketed as of the first day of the Term. He then took out execution on the 8th day of December, 1869, and put it into the hands of the Sheriff on the 23rd day of the same month, who, in a day or two afterwards, levied it upon the land of the defendant, Morris, and advertised it for sale.

On the 1st day of January, 1870, executions were issued on four of the docketed judgments of V. W. Perry, and placed in the hands of the Sheriff who levied them upon the same land and advertised it for sale under them also. Before the day of sale the Sheriff, at the request of Perry, applied to the Clerk of the Superior Court and requested him to issue executions on the other four docketed judgments, which he declined to do upon the ground that he had no power to do so after transcripts of them had been sent and docketed in the Superior Court of Forsythe County. The Sheriff sold the lands of Morris under the executions in his hands, and received the money therefor, which is claimed both by Perry and Westmoreland. Perry claims that his eight judgments should be first satisfied, and Westmoreland claimed that the money should be applied in satisfaction of his execution issued on the judgment obtained in Court, and which was first issued, and that at all events Perry could have priority only on his four executions that were taken out and put into the hands of the Sheriff. Upon the return of the Sheriff stating the above mentioned facts, and upon the motion of Perry to have the money applied to the satisfaction of his eight judgments, service of a rule was accepted in open Court, by the counsel for the parties claiming the interest in Westmoreland's judgment, and they thereupon insisted that they were entitled to priority of satis-
(223) faction out of the money in the Sheriff's hands.

His Honor, on consideration of the case, ordered the money to be first applied to the satisfaction of the eight docketed judgments of V. W. Perry, and the residue, if any, to be applied to the execution on the judgment in the name of Westmoreland, and from this order the parties interested in that judgment appealed.

No counsel for the defendants.
Dillard & Gilmer and T. J. Wilson for the plaintiff.

DICK, J. The fund in controversy was derived from the sale of land under execution. The facts set out by the Sheriff in his return entitled him to ask the advice of the Court as to the distribution of the fund; and the instructions of his Honor were correct in law.

Previous to the adoption of the C. C. P. the rights of an execution creditor, when he was not guilty of laches, generally depended upon the *teste* of his execution. Under the C. C. P. a judgment creditor acquires a lien from the time when his judgment is docketed upon the real property of the debtor, situated in the County in which the judgment is docketed. C. C. P., sec. 254.

A docketed judgment is intended as a security for money, and has the force and effect of a mortgage after the time of redemption has passed. If land is sold under an execution founded upon a junior docketed judgment, it amounts substantially to a sale of an equity of redemption, and the land remains subject to the lien created by a prior docketed judgment.

To prevent collusion and fraud between a debtor and a creditor claiming such a lien, this Court under the provision of the C. C. P., sec. 394, adopted a rule which enables a creditor claiming under a junior docketed judgment to force a sale, etc. Rule 19, 63 (224) N.C.R. 669.

The plaintiff in this case claimed a lien under eight Justice's judgments which were docketed in the office of the Superior Court Clerk in Stokes County, on the 29th day of October, 1869, and thus "became judgments of the Superior Court in all respects." C. C. P. sec. 503.

The defendant claimed under a judgment obtained in the Superior Court of Stokes County, and which, in contemplation of law, was docketed on the 1st day of November, 1869, the first day of the term.

The plaintiff, therefore, had the prior lien and he could in no way be divested of it, except in the manner prescribed in said rule of Court. As the defendant in proceeding upon his execution did not give the notice required by said rule, the plaintiff was not deprived of his priority of lien. The fact that four of the plaintiff's judgments were also docketed in the County of Forsythe, did not interfere with the lien created by their being docketed in the County of Stokes, in which the land was sold.

There was no error in the ruling of his Honor, and the judgment must be affirmed.

Per curiam.

Judgment affirmed.

Cited: Isler v. Moore, 67 N.C. 76; *Dougherty v. Logan,* 70 N.C. 558; *Titman v. Rhyne,* 89 N.C. 68; *Cheek v. Watson,* 90 N.C. 307; *Burton v. Spiers,* 92 N.C. 508; *Barnes v. Easton,* 98 N.C. 119; *Darden v. Blount,* 126 N.C. 250, 253.

(225)

THOMAS W. DEWEY, CASHIER v. R. M. WHITE, SHERIFF, AND OTHERS.

When a sheriff has money in his hands raised under executions against the same defendant in favor of two or more different creditors, and the money is claimed by one of the creditors to the exclusion of the others, he may, for the purpose of asserting his claim, obtain a rule against the sheriff, and under the C. C. P., sec. 65, cause the other creditors to be brought in by notice, and then upon the answer of the sheriff the Court may proceed to adjudicate upon the rights of the parties, and in doing so, will not be bound by the returns which the sheriff may have previously made upon the executions in his hands.

The C. C. P., sec. 65, does not embrace a case where a sheriff has an execution in favor of one person, and levies it upon property claimed by another, as in such a case the Sheriff cannot require these persons to interplead, because, if the claim of the person, against whom there is no execution, be just, the sheriff is a wrong doer as to him.

The practice of the Courts of England prior to the Stat. of 1 and 2, Wm. 4th, ch. 58, and under that statute, upon conflicting claims to money in the hands of a sheriff raised under executions in favor of different creditors, and also the practice in like cases in the Courts of the several States of the Union; and of the United States, and of this State prior to the adoption of the C. C. P. stated and explained.

THIS was a rule before *Logan, Judge,* at the Fall Term, 1870, of the Superior Court of MECKLENBURG County, in which there was a judgment against the plaintiff from which he appealed. The case is fully stated in the opinion of the Court.

J. H. Wilson for the plaintiff.
Guion for the defendants.

RODMAN, J. At Fall Term, 1870, of Mecklenburg Superior Court, the plaintiff obtained a rule on the Sheriff to show cause why $7,000 in his hands, the proceeds of the sale of certain land under execution, should not be applied to the payment of the executions in his
(226) favor, which were for debts owing by the firm of M. Martin & Co., of which the partners were M. Martin and John Wilkes. The application was supported by the affidavit of Wilkes that the debts were partnership debts and that the property belonged to the firm. Notice was ordered to be given to B. S. Guion, M. L. Wriston and others claiming to have the fund or a part of it applied to other executions against Wilkes, and against Wilkes and Martin, for their separate debts. The Sheriff answers the rule, and states, that at the time of the sale he had in his hands the following writs of *venditioni exponas*

all issued on *fi. fas.* tested of 14 Oct., 1867, *which had been levied on the land in question as the property of M. Martin & Co.*

He says the writs came to his hands and were levied in the Spring of 1867, but as this is contradictory to what is stated as to the teste of the original *fi. fas.*, it is considered a mistake.

The executions were as follows:

No. 1. *T. W. Dewey v. John Wilkes and M. Martin.*

2. *T. W. Dewey v. John Wilkes and B. S. Guion.*

3. *T. W. Dewey v. M. Martin, John Wilkes and Jasper Stowe.*

4. *First Nat. Bank of Charlotte v. John Wilkes and M. L. Wriston.*

5. *James H. Carson v. Wm. Boyd and John Wilkes.*

The aggregate of these was $22,854. Besides these, the Sheriff had in his hands at the time of the sale other executions of later teste, viz:

6. *First Nat. Bank of Charlotte v. John Wilkes.*

7. *T. W. Dewey v. V. Stirewalt, M. Martin and John Wilkes.*

8. *Mitcher and wife v. John Wilkes.*

Of these Nos. 1, 3 and 7 are alleged by Wilkes in his affidavit to have been upon debts owing by the partnership; and the aggregate of these exceeded the proceeds of the sale. (227)

At the same term of the Court the Sheriff files what he calls a return, asking the advice of the Court, which differs from his answer to the rule, in the very important respect, that in it he says that *he levied on and sold under the executions, only the interest of John Wilkes, in the property,* and that the money in his hands was derived solely from the sale of his estate. Wriston, who purchased the property, and who as surety for Wilkes was a defendant in execution No. 4, appears to the rule, and by what may be regarded as an interplea alleges that the fund should be applied ratably to the first five named executions; because,

1. It did not appear from any of the executions that they were for partnership debts.

2. That if the land was partnership property, insomuch as the Sheriff (as appears by his return) sold only the separate estate of Wilkes, the plaintiff has no equity to any priority.

3. That the land was the separate property of Wilkes.

4. That he purchased at the sale because he had been advised by counsel that the first five executions, in one of which he was interested, would share ratably.

His Honor the Judge below, decided that he could act only on the facts as stated by the Sheriff in his return, and directed the fund to be apportioned among the first five executions, from which the plaintiff appealed. His Honor seems to have considered the return of the Sheriff referred to by Wriston, as the true return, and not the one alleged by the Sheriff in his answer to the rule; but he takes no notice of the contradiction between them; it is singular that a doubt as to the true return should have been permitted when it could have been so easily settled by a reference to the returns to the original ,. *fas.* made *ante litem motam,* and to the returns endorsed or attached to the *venditioni exponas.*

The only question which in the view we take of the case it is proper at this time to consider, is whether his Honor was right in con-
(228) fining himself to the Sheriff's return.

In 2 Tidd's Practice, 1017, it is said, "If the property of the goods be disputed, which frequently happens on a commission of bankrupt, etc., the Court, on the suggestion of a reasonable doubt, will protect the Sheriff *by enlarging the time for making his return, till the right be tried between the contending parties, or one of them has given him a sufficient indemnity.*" See also, 2 Chit. Gen. Practice, 341, and *Wells v. Pickman,* 7 T.R., 174. But I have not found any case where prior to the statute of 1 and 2 William 4, ch. 58, an English Court of law undertook either to advise the Sheriff in the appropriation of money raised under execution, or to direct its appropriation. The assistance which the Court gave, was confined to such as that mentioned by Tidd. In the United States, the Courts undertook to go farther and to pass directly on the appropriation of the money. This seems to have been done under the idea that the Sheriff could at any time rid himself of the responsibility of an appropriation by paying the money into Court, in which case the Court would necessarily have to assume the control of its appropriation. *Turner v. Fendall,* 1 Cranch 116; *Acker v. Ledyard,* 4 Seld 62 (N. Y.) But as there was no common law process by which the Court could bring in the contending parties and compel them to interplead, the Court was compelled to rely for the facts exclusively on the return of the Sheriff, (*Washington v. Saunders,* 13 N.C. 343; *Palmer v. Clark,* Id. 354,) and hence its decision could bind no one but the Sheriff, for, of course, it is too clear for any difference of opinion, that no decision of a Court can bind those not parties to the proceeding, and if parties they must be at liberty to dispute the return. Hence also it followed, that unless the facts were conceded, or appeared of record, the Court, which always exercised a discretion to act according to circumstances, refused to act, and left all parties to their

remedy by action at law, or by bill of interpleader in equity, or (229) assisted the Sheriff only as had been the practice in England, by allowing a farther time for the return of the writ, or by compelling an indemnity. (*Camp v. McCormick*, 1 Denio 641, N.Y.) A *fortiori*, the Court would refuse to advise a Sheriff, or to direct the appropriation of the money, where his return was uncertain, defective or contradictory. For if the Court should do either in such a case, without being able effectually to bind the contesting claimants, the Sheriff would be left exposed to action by each of them, the inconvenience which it was the sole object of the proceeding to avoid; and in the event that the facts turned out different from what the Court on an *ex parte* statement had assumed, its advice or discretion instead of being a protection to the Sheriff, would be a pitfall, or at best merely idle. It followed also from the principle on which the Court proceeded—that of assisting its officer—that it would only give the assistance whatever it might be, at the request of the officer. The Sheriff might always, if he pleased, make the appropriation himself, and he was understood to do so whenever he took an indemnity from either of the parties. (*Ramsour v. Young*, 26 N.C. 133; *Whitaker v. Petway*, Id. 182.) If the officer applied for the assistance, of course it could make no difference whether the application was before or after a rule upon him to return the writ. And notwithstanding that the Courts in this State have *now*, the further power to order an interpleader and to adjudicate effectually on the rights of all persons interested, as I shall attempt to show, we think that the jurisdiction heretofore exercised in favor of the Sheriff, as properly understood, still subsists, and is not merged in the equitable powers of the Court, but will continue to be exercised in a proper case as it has heretofore been. The practice in England was found to be very far short of affording Sheriffs a summary and adequate remedy in many cases of conflicting claims to property seized by them. To give that remedy, and to relieve them from the necessity of resorting to a (230) tedious and expensive proceeding in equity, the statute of 1 and 2 William 4, ch. 58, was passed, section 6 of which applies especially to them. It may be found in Tomlin's Law Dictionary, Title Interpleader. We have no such act in this State.

But Courts of equity were accustomed in cases of this sort, as in so many others, to make the deficient processes of the common law Courts a ground of their own jurisdiction. To a limited extent they gave relief on a conflict of claims. The general principle of the jurisdiction is thus stated by Story, (Eq. Jur. sec. 806.) "It (the practice of interpleader) is properly applied to cases where two or more persons severally claim the same thing under different titles, or in separate interests, from an-

other person, who, not claiming any title or interest therein himself, and not knowing to which of the claimants he ought of right to render the debt or duty claimed, or to deliver the property in his custody, is either molested by an action or actions brought against him, or fears that he may suffer injury from the conflicting claims of the parties." Mitford's Eq. Pl. 141, is terser and as much to the point.

The principle covers this case. Heretofore the Courts of common law could not have applied it; but since the powers of Courts of law and of equity have been blended in the same Courts, there can be no difficulty in doing so; and the power is expressly given by sec. 68, C. C. P., which was acted on in a case substantially the same in principle with this. *McKesson v. Mendenhall,* 64 N.C. 286. There is a class of cases to which it may be proper to advert for the purpose of distinguishing them from the present. They decide that when a sheriff having an execution against A, levies it on property claimed by B, the sheriff cannot require A and B to interplead, because if B's claim be just, the sheriff is a wrong doer as to him, and did not come innocently
(231) and lawfully into possession, as the principle requires that he shall. *Slingsby v. Boulton,* 1 Ves. and B. 324; *Shaw v. Caster,* 3 Paige 339. Such cases are now covered in England by their Interpleader Act. In the absence of such an Act in this State, we presume the sheriff would be left to defend himself as best he might, although no doubt the Court would assist him as far as it could by enlarging the time for his return of the writ, until the contesting parties had adjusted their claims, or until one of them had indemnified him. But those cases are unlike the present. Here it is true that the rights of the contesting creditors are alleged to rest on the ownership of the property sold; but the sheriff held executions both against the partners as such, and against them separately, so that he might have sold against all, and is not a wrong doer in any event.

As the result of this discussion, we think his Honor erred in refusing to consider any evidence as to the real ownership of the property outside of the sheriff's return. The application is in its nature, and should be in form, an application that the contesting parties may appear and interplead, and they should be brought into Court by summons. The issues made between them must be decided as other issues are directed to be, and the decision of the Court will bind them as in other actions. As to the mode of proceeding, see 2 Story Eq. Jur. sec. 822. When the matter of fact respecting the ownership of the property is settled, the other questions raised by Wriston can be disposed of.

Judgment below reversed, and case remanded to the Superior Court of Mecklenburg, to be proceeded in according to this opinion.

Per curiam.
Judgment reversed.

Cited: Fox v. Kline, 85 N.C. 176; *Griffin v. Hasty,* 94 N.C. 442.

(232)

ISAAC BATES AND OTHERS v. H. LILLY AND OTHERS.

Where a sheriff has money in his hands raised under executions in favor of different creditors against the same defendant, and the creditors set up conflicting claims to the money, it is not such a case as may be submitted to a judge, without an action under the C. C. P., sec. 315, by the adverse claimants.

Under the former system, if a sheriff had doubts as to the proper application of money in his hands raised under different executions, he might apply to the Court for advice, which advice would be given upon the facts disclosed in his return; and the Court would refuse to give it if the sheriff claimed an interest in the fund, or had incurred an independent liability to any of the execution creditors.

The right of interpleader given by the C. C. P., under which a sheriff, who has money in his hands, raised under executions in favor of different creditors against the same defendant, may bring in the plaintiffs in the executions to contest their respective claims, was intended to apply to a controversy or action properly constituted in Court.

THIS was a case submitting without an action a question of difference between the parties as to the disposition of money in the hands of the Sheriff raised under executions in favor of the respective parties, to *Russell, Judge,* at the Fall Term, 1870, of CUMBERLAND Superior Court. His Honor decided the question in favor of some of the parties, and the others appealed to the Supreme Court. From the view taken of the case in that Court, it will be seen that no other statement is necessary.

Hinsdale & McRae for the plaintiff.
Phillips & Merrimon for the defendant.

DICK, J. This case is not such a one as is contemplated in the C. C. P., sec. 315.

That provision is only applicable to a case where there are parties to a question in dispute which might be the subject of a civil action in which a judgment might be rendered for one party (233)

against the other. The provision is highly beneficial, and was intended to prevent expensive litigation. In this case the parties have no claim—the one against the other; but they may have separate claims against the sheriff, and he is not a party to this controversy.

Where a sheriff has doubts as to the proper application of money raised under different executions, he may apply to the Court for advice as to the disposition of the fund which he holds as an officer of the Court under legal process. This advice must be given upon the facts disclosed in the sheriff's return;—and the Court will refuse its advice if the sheriff claims an interest in the fund, or has incurred an independent liability to any of the execution creditors.

This proceeding is not derived from the common law, and it is not regulated by statute, but it has been established in this State by the practice of the Courts.

The principles upon which this practice is founded, are analagous to the rules of Courts of Equity in cases of interpleader; but the modes of procedure are somewhat different.

The claimants cannot be compelled to become parties, and their rights are not barred by the decision of the Court. They are permitted by the Court to represent their respective interests,—but this does not constitute an adversary suit among them;—and they may have a remedy against the sheriff for any injury which they may sustain by his unlawful action. *Ramsour v. Young,* 26 N.C. 133; *Washington v. Saunders,* 13 N.C. 343; *Yarborough v. State Bank,* Id. 25.

In England the Interpleader Act 1 and 2, Wm. 4, affords protection to a sheriff when he is in danger of incurring liability in the execution of process, but it would not apply to a case like the one before us. The right of interpleader given by the C. C. P., Sec. 65, was intended to apply to a controversy or action properly constituted in Court.

(234) Here the sheriff is the stakeholder, and he has not asked the advice of the Court, or asked for any order to compel the adverse claimants to interplead as to the disposition of the fund in his hands, and the Court cannot control his action in a case in which he is not a party.

This case must be dismissed, and the parties must pay the costs equally.

Per curiam.

Case dismissed.

Cited: Milliken v. Fox, 84 N.C. 109; *Fox v. Kline,* 85 N.C. 176; *Kistler v. R. R.,* 164 N.C. 366; *Kistler v. R. R.,* 170 N.C. 667; *Waters*

v. Boyd, 179 N.C. 181; *Wagoner v. Saintsing,* 184 N.C. 363; *Burton v. Realty Co.,* 188 N.C. 474; *Bd. of Health v. Comrs.,* 220 N.C. 144.

BURROUGHS & SPRINGS v. COMMISSIONERS OF RICHMOND COUNTY.

Coupons, when detached from the bond to which they were annexed, bear interest from the time when they were due and payable.

Mandamus to compel the defendants to levy a tax for the payment of the principal and interest, of certain coupons detached from the bonds given by the County of Richmond and belonging to the plaintiffs. At the Fall Term, 1870, of the Superior Court of MECKLENBURG County, before his Honor, *Judge Logan,* the counsel for the plaintiffs moved his Honor for a peremptory *mandamus* for the purpose above stated, when he expressed his willingness to order the *mandamus* for the principal money due on the coupons, but declined to do so for the interest accrued and accruing thereon. To this plaintiffs excepted and prayed an appeal, which was granted.

Jones & Johnston for the plaintiffs.
J. H. Wilson for the defendants.

DICK, J. The County of Richmond, under the authority of an Act of the General Assembly, issued bonds and coupons as (235) stated in the complaint.

This proceeding was instituted to compel the payment of certain coupons detached from some of said bonds.

The only question presented for our consideration, is, whether the coupons bear interest from the time they were due and payable.

Those coupons are payable to bearer, and are negotiable securities, and have all the qualities and incidents of commercial paper.

They are written contracts for the payment of a definite sum of money on a given day, and upon general principles bear interest after payment of the principal is unjustly neglected or refused. *Aurora City v. West,* 7 Wallace 82.

There was error in the ruling of his Honor. Let this be certified, etc.

Per curiam.

Judgment reversed.

(236)

HENRY LEVY AND WIFE CATHERINE v. LUCIUS GRIFFIS AND OTHERS.

Where a husband purchased and paid for a lot of land, and procured the vendor to convey it by a deed of bargain and sale to a trustee in trust for the sole and separate use of the wife, "to dispose of to any person she may wish by deed or appointment in writing in the nature of a will," and she having died without disposing of the land by deed or will, *it was held* that, as the trust was not declared for her and her heirs, there was a contingent resulting trust in favor of her husband, which upon his death intestate before his wife had descended to his heir-at-law.

A devise to a trustee in trust for the sole and separate use of a married woman with a power given to her of appointing the estate in fee by deed or will, will vest the trust in her in fee under the Rev. Code, ch. 119, sec. 26, and it will not be inconsistent with the power of appointment, because without such power she could not dispose of real estate by will while she remained a married woman.

The distinction between executory and executed trusts, and the doctrine of powers of appointment given to any person, and particularly to a married woman, discussed and explained.

AT the Fall Term, 1870, of the Superior Court of WAKE County the following case agreed without an action was submitted to his Honor, *Judge Watts*. One A. Nicholson purchased of the defendant, Bunting, a certain lot of land, paid a full and fair price for it, and had it conveyed to the defendant, Briggs, and his heirs "in trust for the sole, separate and exclusive use and benefit of Caroline Nicholson, free from the control of her present or any future husband," etc., "with the right of the said Caroline to dispose of the said piece or lot of land to any person she may wish by deed or appointment in writing in the nature of a will." The *feme* plaintiff Catharine Levy, is the only heir at law of the said A. Nicholson who was the husband of the said Caroline Nicholson, and died intestate in the year 1865. Mrs. Caroline Nicholson died intestate in the year 1869, without having exercised the power of appointment given her in the deed above mentioned,
(237) either by deed or a paper writing in the nature of a will, and leaving the defendant Griffis her sole heir at law, who is in possession of the lot of land in question. The only questions presented by the case which it is necessary to state is whether the defendant Briggs holds the legal estate in the land conveyed to him in trust, for the *feme* plaintiff Catharine Levy, or for the defendant, Lucius Griffis. His Honor gave judgment in favor of the plaintiffs, and the defendant, Griffis appealed.

Bragg & Strong and Busbee & Busbee for the defendant.
Rogers & Batchelor for the plaintiffs.

PEARSON, C.J. A trust of which the scheme is in the outset completely declared is an *executed* trust. If the scheme be imperfectly declared in the outset, and the creator of the trust has merely denoted his ultimate object, imposing on the trustee or on the Court, the duty effectuating it, in the most convenient way, the trust is *executory*.

The requirement to devise means for effectuating the trust, proves that what had been done, is not meant as a conclusive declaration of the terms of the trust. Adams Eq. 40.

A trust for the separate use of A, and at her death for B, and his heirs, is clearly an executed trust, for the creator of the trust has done everything he expected to do, and no duty is imposed on the trustee, or on the Court, to complete a thing left imperfect.

In our case a power is given to Mrs. Nicholson to dispose of the land to any person she may wish; this was all that the creator of the trust intended to do, and nothing was left to be completed by the trustee or by the Court.

Had Mrs. Nicholson executed the power, by appointing a trust to B and his heirs, the effect would have been the same, as if the trust had been declared in favor of B, in the first instance.

It is a rule in the doctrine of powers, that the use created under the power, takes effect in the same manner as if it had (238) been inserted, instead of the power, in the deed containing the power. Thus, suppose an estate conveyed to the use of A for life, remainder to such uses as she shall appoint—she appoints the estate to B for life remainder to his first and other sons, in tail male. After this appointment is made, it is the same as if the estate had been originally limited to the use of A for life, remainder to the use of B, for life, remainder to his first and other sons in tail male. Coke Lit., 272 note vii, 2.

So, if Mrs. Nicholson had appointed the use to B and his heirs; after the appointment, it would have been the same as if the trust had been originally limited to her separate use and after her death to the use of B, and his heirs. It follows that the trust was an executed and not an executory trust. It is settled, that an executed trust limited by deed, will have the same construction as if it had been a conveyance of the legal estate. Adams, page 40 says—"The terms in which the trust is declared are interpreted by the ordinary rules of law. It was at one time suggested that the language of a trust might be construed with greater license, than that of a gift at law. But this notion is now at an end." According to the ordinary rules of law a feoffment to A passes an estate for his own life; an estate of inheritance cannot be created by deed *inter vivos* without the use of the word "heirs." The trust being

limited to Mrs. Nicholson without words of inheritance, vested in her only an estate for her own life, and the general power of appointment cannot have the legal effect of enlarging her estate into a fee simple, by any rule of construction applicable to deeds.

Had the power been created by a devise, we are inclined to the opinion upon the authorities cited, that Mrs. Nicholson would have taken an estate in fee simple. A devise to A. and to such persons as he shall appoint, vests the absolute property in A., without an ap-
(239) pointment. But if it be to him *for life* and after his death to such person as he shall appoint, he must make an appointment in order to entitle that person to anything. The express life estate to him repels the implication of a fee simple for himself. 1 Sugden on Powers 123, sec. 13. Such, seems to be the law in England. In this State the doctrine that a devise to one with a general power of appointment carries a fee simple, is put beyond all question by statute. Rev. Code, ch. 119, sec. 26, which provides that in a devise, every estate shall be construed to be a fee simple, unless the will shows the contrary intention. The statute of devises excepts *femes* coverts, and it was necessary to give Mrs. Nicholson a power, to enable her to dispose of the estate. Hence, had it been by will, its insertion is not inconsistent with an intention that she should take a fee simple in the first place. But we are dealing with a deed, and not with a devise.

As no appointment was made under the power, the question whether a power of appointment can be created by a deed of "bargain and sale" or "covenant to stand seized" is not presented. See *Smith v. Smith,* 46 N.C. 135.

Nor is the question presented whether a deed purporting to be a deed of bargain, and sale, may not be taken to be a deed passing the estate, without the ceremony of livery of seizure, as a deed of feoffment by force of the statute. Rev. Code, ch. 37, sec. 1, under the maxim, *"ut res magis valeat quam periat."*

We are of opinion that the defendant Briggs, holds the legal estate in trust for the plaintiff, Catharine Levy, who is entitled to an estate in fee simple, as the heir-at-law of Anderson Nicholson, who was entitled to a resulting trust, contingent upon the non-execution of the power of appointment.

There is no error.

Per curiam.

Judgment affirmed.

Cited: Hogan v. Strayhorn, 65 N.C. 287; *Bond v. Moore,* 90 N.C. 242; *Thurber v. LaRoque,* 105 N.C. 307; *Johnson v. Blake,* 124 N.C. 110; *Henderson v. Power Co.,* 200 N.C. 448.

(240)

THOMAS J. MOORE, EX'R OF JAMES W. OSBORNE v. WASHINGTON BYERS AND WIFE AND OTHERS.

Under the Act of 1868-'9, ch. 113, sub-ch. 4, sec. 24, explained by the Act of 1869-70, ch. 58, an executor who has taken out letters testamentary since the 1st of July, 1869, must pay all the debts due from the estate of his testator *pro rata*, according to their class; and the testator cannot give to a debt a preference over other debts of the same class by a bequest of it to the creditor.

Where a vendor of land receives a part of the purchase money and takes notes for the residue thereof, retaining the title until such notes shall be paid, and afterwards a judgment is obtained and docketed against him, and he then dies, the judgment will not be a lien upon the land or the notes in the hands of his executors, but the notes will be assets when collected for the payment of debts.

THIS was an action brought in the Court of Probate for MECKLENBURG County by the plaintiff, as executor of James W. Osborne, against the defendants, who were creditors of the estate of the testator. The material allegations of the complaint were that the testator died on the 9th day of August, 1869, leaving a will of which the plaintiff qualified as executor; that by his will the testator bequeathed certain promissory notes to his wife in trust for his niece, Mrs. Byers, who is one of the defendants, and that after satisfying that trust, the residue of the proceeds of the notes and of all his other property should be applied to the payment of certain preferred debts, and then to all his debts equally; that on the 29th of February, 1869, the testator sold a valuable tract of land to one J. L. Parks for the sum of $12,000, of which he received in cash $7,200 and took for the residue of the purchase money $4,800 in promissory notes, retaining the title to the land until they should be paid; that the said notes remained unpaid at the time of the testator's death, and that they and the proceeds of the other property of the testator, sold by the executor, amounted to about the sum of $6,000; that the preferred debts (241) mentioned in the will amounted to more than that sum, and that there were other debts amounting in the aggregate to about $20,000; that at the May Term, 1869, of the Superior Court of Mecklenburg

County, the defendants, J. M. & S. A. Potts, recovered judgments against the testator and his sureties for debts due them, and sued out execution thereon, but no levy upon the property of the testator had been made.

Upon the foregoing allegation of facts, the plaintiff asked instructions from the Court as to the disbursement of the funds in his hand as executor, as follows:

1. Have the debts preferred by the will to be first discharged?

2. Has payment to be made to all the creditors of the testator, including those preferred by the will, in accordance with the Act of 1868-'69, ch. 113?

3. Does the judgment in favor of J. M. & S. A. Potts create a lien on the estate of the testator which is entitled to a priority of satisfaction out of the trust assets?

In the several answers of the defendants, the creditors, whose debts were specially mentioned and preferred by the testator in his will, insisted that they had a right to a priority of payment out of the Parks notes and the proceeds of the other property. J. M. & S. A. Potts and the sureties to the debts due them contended that the judgment obtained against the testator in his life time was a lien on his property and gave it a priority of satisfaction.

The questions of law which were thus presented to the Judge of Probate were sent up to the Judge of the Superior Court, and at Chambers, January 11th, 1871, his Honor, *Judge Logan,* thus decided.

"1. It is the opinion of the Court that the judgment in favor of J. M. & S. A. Potts is a lien on the property of the deceased at his
(242) death, and is entitled to payment out of the estate of the testator according to the Act of Assembly of 1868-'69, class 5th.

2. That payment to all other creditors of the testator will be made, including those preferred by the will, in accordance with the provisions of the Act of 1868-'69."

From the judgment given in accordance with this opinion both parties appealed.

J. H. Wilson for the plaintiff.
Guion for the defendant.

READE, J. The statute concerning the settlement of the estates of deceased persons, fixes the dignity of debts, and directs that each debt

shall be paid *pro rata*, equally in its class, and forbids executors and administrators to exercise any preference. Act of 1868-'9, ch. 113. In the argument it was supposed, that this statute prevents the legacy to Mrs. Osborne from taking effect; because it would defeat the policy of the law to allow a testator to prefer one debt to another. On the other side it was insisted, that the testator, in his life time, might have preferred one debt to another, either by a conveyance or by payment, and why not by will, as well?

It is true that the legacy to Mrs. Osborne cannot take effect; but that is not because of the statute. It would not take effect if that statute had not been passed. This will be apparent if it be remembered, that all the property and effects of a testator vests in the executor—first for the payment of debts, and secondly, for the satisfaction of legacies. And no legacy can take effect, until the executor assents, and the executor cannot assent without a *devastavit* until *all* the debts are paid. The estate being insolvent, it follows, that the executor cannot assent to Mrs. Osborne's legacy at all, but must exhaust the whole estate in the payment of debts. (243)

In paying out the assets to the debts, the executor might give effect to the will of the testator, not by assenting to the legacy as a *legacy*, but by preferring the debts which the legacy was intended to secure. But then comes in the statute which forbids him to prefer one debt to another of the same dignity. So that the legacy cannot take effect directly as a legacy, nor indirectly as a preferred debt. This answers the first question.

The second question, whether the debts must be paid under the statute, is answered in the affirmative.

The third question, whether the land sold by testator to Parks was subject to levy and sale under the execution of Potts? is answered in the negative. Where land is sold, title retained, bonds for title when money paid, part paid and part unpaid, neither the interest of the vendor or vendee can be levied on and sold. The vendee has only an equity to call for the title when he pays all the money, and his is not an equity subject to levy and sale under the Act of 1812. The vendor holds the legal estate in trust for the vendee, and is obliged specifically to perform the contract to make title when the money is paid, and a levy and sale would divest him of the legal estate and would defeat the contract of the parties. The rights of the parties are adjustable as equities only. The debt due the vendor in this case upon the contract of sale, is assets, when collected, for the payment of debts. *Badham v. Cox*, 33 N.C. 456. *Giles v. Palmer*, 49 N.C. 386.

Per curiam.

Judgment reversed.

Cited: Tally v. Reid, 72 N.C. 339; *Sc,* 74 N.C. 464; *Isler v. Koonce,* 81 N.C. 380; *Peebles v. Pate,* 90 N.C. 355; *Chemical Co. v. Walston,* 127 N.C. 825.

(244)

THE STATE, UPON THE RELATION OF NARCISSA APPLEWHITE v. RUFUS D. HALES.

In bastardy cases the jurisdiction of the justice to issue the warrant before the birth of the child, depends upon the domicil of the mother at the time, and not on her legal place of settlement; and if the mother continues to reside in the same county until the birth of her child, making her whole residence therein more than twelve months, the full jurisdiction of the case will be in that county.

THIS was a proceeding in bastardy, in which the defendant put in a special plea to the jurisdiction, and the following case agreed was submitted to his Honor, CLARKE, J., at the Fall Term, 1870, of WAYNE Superior Court. The relator, Narcissa Applewhite, at the date of the warrant, had been a resident of Wayne county for only six months, she having previously resided and had her domicil in the county of Wilson. After the issuing of the said warrant she continued to reside in the county of Wayne until the birth of her child, which took place more than twelve months after her residence in the county of Wayne began. His Honor, being of opinion with the plaintiff, gave judgment sustaining the jurisdiction of the Court of Wayne county, and the defendant appealed to the Supreme Court.

Bragg & Strong for the defendant.
Attorney General for the State.

RODMAN, J. The defendant objects that the Justice of the Peace, when he issued his warrant in April, 1869, requiring the relator to appear before him, etc., did not have jurisdiction, because the relator, not having resided for twelve months in Wayne county, had acquired no settlement there. He contends that the subsequent birth of the child after a settlement did not validate the previous unauthorized pro-
(245) ceeding. The language of the statute (Rev. Code, chap. 12, sec.

1,) furnishes an answer to this objection: "Any Justice of the Peace, upon his own knowledge, or information made to him that any single woman *within his county* is big with child," etc., "may cause her to be brought before him," etc. The jurisdiction of the Justice to issue the warrant, before the birth of the child, depends on the present domicil of the mother, and not on her legal place of settlement. If the defendant, immediately upon the return of the process against him, had moved to quash, for the want of jurisdiction, his motion could not have availed; for he would have been obliged to have shown what county had jurisdiction, which, depending as it did on the settlement of the mother at the birth of the child, could not be known before. That this is the test was distinctly declared in *State v. Elam,* 61 N.C. 460. Had the birth taken place whilst the legal settlement of the mother was in the county of Wilson, the defendant might successfully have moved to quash. But at the birth she had acquired a settlement in Wayne, which county alone was likely to become subject to the charge, and which therefore was the one entitled to be indemnified. This is the principle which governed the decision in *State v. Elam, supra.*

The judgment of the Court below is affirmed; the defendant must answer the charge. Let this opinion be certified.

Per curiam.

Judgment affirmed.

Cited: S. v. Green, 71 N.C. 174.

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(246)

ROBERT MURPHY AND OTHERS v. HARRISON, McCUBBINS AND ANOTHER.

A civil action in the nature of a bill in equity to surcharge and falsify an account stated, must be brought before the Judge of the Superior Court at the regular term of the Court, and not before the Judge of Probate.

If an executor or administrator refuse to bring an action to surcharge and falsify an account by which his testator's or intestate's estate has been injured, such action may be brought by the legatees or next of kin, and in doing so, they should make the executor or administrator a party defendant together with the other defendant.

THIS was a civil action brought before the Judge of the Superior Court of ROWAN County, at the regular Term of the Court, and at the Fall Term, 1870, thereof, a motion was made by the counsel for the

defendants to dismiss the suit for want of jurisdiction, which was granted by his Honor, *Henry, J.*, and the plaintiff appealed. The facts are sufficiently stated in the opinion of the Court.

Boyden & Bailey for the plaintiffs.
Blackmer & McCorkle for the defendants.

DICK, J. The merits of this controversy are not before us for determination. The appeal is from a decision of his Honor upon a question of jurisdiction. The allegations of the complaint present a case which, under our old judicial system, was only cognizable and relievable in a Court of Equity.

The intestate, William Murphy, was the surviving partner of the firm of J. & W. Murphy, and wound up the business of the co-partnership. He was also co-executor with the defendant, James Murphy, of the estate of his co-partner, John Murphy.

In 1853, the said executors made a final return of their ad-
(247) ministration of the estate, which professed to include the amount due the estate from said co-partnership.

The plaintiffs settled with the executors upon this basis, which gave the final account the force and effect of an *account stated*, and was at law conclusive between the parties. A Court of Equity would have allowed the account to be opened, if important errors were specified and proved, and application made within reasonable time. Adams Eq. 222.

The plaintiffs allege a very important error, and ask that they may be allowed an opportunity to surcharge and falsify said account, in that respect. They give as a reason for their delay in the matter, the recent and accidental finding of the articles of said co-partnership, of which they had no previous knowledge, and which disclosed to them the error specified.

According to the allegations, the intestate, William Murphy, was a debtor to the estate of his testator, and had not accounted for such indebtedness in the final settlement *inter partes*.

The Ecclesiastical Courts of England could not take cognizance of such a case—and it does not come within the jurisdiction of a Judge of Probate, under our new system. The only remedy which the plaintiffs now have is by a civil action in the nature of a bill in equity, and the summons must be returned to the Court at term time. *Tate v. Powe*, 64 N.C. 644.

The defendant, James Murphy, as the surviving executor of John Murphy, ought to have brought an action for the purpose of opening the account, and recovering the amount alleged to be due to the estate

of his testator. As he refused to do so upon the application of the parties interested, the plaintiffs, as legatees and next of kin, had a right to bring this action, and James Murphy was properly made a defendant. *Nance v. Powell,* 39 N.C. Eq. 297; *Flemming v. McKesson,* 56 N.C. 316.

The ruling of his Honor was erroneous and the judgment must be reversed.

Let this be certified.

Per curiam.

Judgment reversed.

Cited: Houston v. Dalton, 70 N.C. 664; *Hardy v. Miles,* 91 N.C. 134; *Roberson v. Hodges,* 105 N.C. 51; *S. v. McCanless,* 193 N.C. 204; *Snipes v. Estates Administration,* 223 N.C. 781; *Spivey v. Godfrey,* 258 N.C. 677.

GEORGE C. DOUGLAS v. RICHARD A. CALDWELL.

Where a suit was brought prior to the adoption of the C. C. P., by a citizen of another State in the Court of Equity of one of the counties of this State against a citizen of this State, and at a term of the Superior Court of the county after the adoption of the C. C. P., a motion was made to refer the issues in the cause to a referee which was ordered and the defendant appealed to the Supreme Court, where the order was held to be erroneous and issues were directed to be made up to be tried in the Court below, and the cause was retained in the Supreme Court until the issues should be tried, *it was held,* that there was not a final hearing or trial of the suit so as to prevent its being removed at the instance and upon the affidavit of the plaintiff to the Circuit Court of the United States for the District of North Carolina, under the Act of Congress of March 2d, 1867, which provides that a non-resident party in a State Court, shall be entitled to remove it, on making proper application "at any time before the final hearing or trial of the suit."

THIS was an application made to the Supreme Court at its present term to remove a cause pending therein to the Circuit Court of the United States for the District of North Carolina. The case is fully stated in the opinion of the Court.

Blackmer & McCorkle and J. H. Wilson for the plaintiff.
Fowle & Badger and Moore & Gatling for the defendant.

RODMAN, J. The plaintiff, a citizen and resident of Georgia,
(249) in 1867, filed a bill in the Court of Equity for Rowan County, in which he set forth, that the defendant had been his guardian, and as such had received money and property to a large amount; that soon after he became of age, he had a settlement with his guardian, and was induced by fraud to execute a release, etc., and prays that the release may be set aside, and for an account. The defendant answered denying fraud, etc., to which there was a replication. At Fall Term, 1869, of ROWAN Superior Court, on motion of the plaintiff, a reference of the issues in the action was made to a referee, and from that order the defendant appealed to this Court, where the order of reference was held to be erroneous, and issues were directed to be made up as to the validity of the release, to be tried by a jury in the Superior Court of Rowan, and the case was retained in this Court. (64 N.C.R. 372.) The issues have not been tried.

The plaintiff now files in this Court an affidavit, in which he states, that he has reason to believe, and does believe, that from prejudice or local influence he is not able to obtain justice in the State Court; and prays that the case may be removed to the Circuit Court of the U. S. for N. C., in pursuance of the Act of Congress, ratified 2d March, 1867. He tenders a bond, etc.

That Act provides that a non-resident party to a suit in a State Court, shall be entitled to remove it, on making the proper application, "at any time before the final hearing or trial of the suit."

The counsel for the defendant, who resists the motion, referred us to the case of *Aherley v. Vilas* in the Supreme Court of Wisconsin, published in the American Law Register, vol. 8, p. 558. We have read with pleasure the able and learned opinion of Judge PAINE. We concur, generally, in his reasoning, and in his conclusion in that case.

In the present case, however, we do not think it can be con-
(250) tended that there has been a final hearing. No merits have been decided; nothing has been decided, except a mere question of practice preliminary to an inquiry into the merits. We cannot consider the mere fact that the case is pending in an appellate Court, sufficient to take it out of the Act of Congress, and we cannot see any reason why the motion should not be allowed.

The following order was made:

GEORGE C. DOUGLAS

v.

R. A. CALDWELL.

The motion for the removal of this cause coming on to be heard upon the affidavit filed and the argument of counsel, it is considered by the Court that the said cause be tranferred to the Circuit Court of the United States for the District of North Carolina to be held, at the City of Raleigh, on the first Monday in June, 1871; and to this end the Clerk of this Court will deliver to the Clerk of the Circuit Court of the United States all the papers belonging and pertaining to said cause, together with the opinion filed by this Court in said cause, as well as this decree.

Per curiam.

WILL B. RODMAN, A.J.

(251)

DAVID LOFTIN v. JACOB SOWERS.

The terms of the offices of the sheriffs chosen at the first election held under the present Constitution are, by force of Art. 4 and Art. 2, sec. 29, extended to the year 1872, after which time such terms will be for two years only.

An action by the Attorney-General in the name of the people of the State and of the person who claims the office of sheriff is by force of the 366th and 368th sections of the C. C. P., the proper mode of proceeding against the person, who is alleged to be usurping it, to try the question as to which of the parties is entitled to the office.

THIS was a proceeding by the plaintiff claiming to be Sheriff of DAVIDSON County, against the defendant who was alleged to be usurping it. The plaintiff applied in the first place to the Attorney General of the State and obtained his order for the institution of the proceedings, which accordingly were commenced by him in the name of the people of the State and of the plaintiff. The complaint alleged that at the regular election for members of the General Assembly in August, 1870, a poll was opened for the election of a Sheriff for the County of Davidson, when the plaintiff, having obtained the highest number of votes, was declared by the competent authority to have been duly elected, and he afterwards, on the ensuing 5th day of September, tendered the bonds required by law to the new Board of Commissioners who had been duly elected as such in the said County and had organized on that day; that his bonds were accepted and he thereupon qualified as Sheriff by taking the oaths of office, and then

demanded the books, papers, etc., belonging to the office from the defendant, who had been Sheriff theretofore, and that he refused to deliver them up. The complaint alleged further that the defendant had before the time of the election aforesaid announced himself as a candidate for the office of Sheriff, and had repeatedly declared that
(252) he would not claim it unless he were duly elected to it; that he failed to offer his bonds or to qualify before the Board of Commissioners above mentioned. The complaint closed by a demand of judgment for the plaintiff,

1. That the defendant is not entitled to the said office of Sheriff and that he be ousted therefrom.

2. That the plaintiff, David Loftin, is entitled to the said office and to assume the execution of the duties of the same.

The answer of the defendant admitted that the plaintiff had received the highest number of votes for the office of Sheriff, that he was declared to have been duly elected, and that he gave bonds and qualified as sheriff before the new Board of Commissioners as stated by him. It also admitted that the defendant was a candidate for the office, but denied that he intended to resign his office until the regular expiration of his term in it, which he contended did not expire until the year 1872, as provided in the 4th and 2d Articles of the Constitution; that he never had expressly or impliedly resigned his office or done any thing to forfeit it; that he tendered the bonds required by law to a majority of the old Board of Commissioners, who claiming that they were the rightful Board organized as such on the said 5th day of September, and that the bonds were accepted by the said Board and that he duly qualified as Sheriff before them; that he did not tender his bonds to, or offer to qualify before the new Board of Commissioners because he was told by them that they did not recognize him as Sheriff.

The case was tried before his Honor, *Judge Buxton,* at a Special Term of the Superior Court of DAVIDSON County, in December, 1870, and by the consent of the parties without a jury. His Honor found the facts to be as stated in the complaint and answer, and then announced his conclusions of law to be as follows:

"By comparison of sec. 30, Art. 4, of the State Constitution with sec. 32 of the same Article and with sec. 29, Article 2, I am of
(253) the opinion that the defendant by virtue of his election in 1868, at the first election held under the Constitution, was entitled to hold said office for two years next ensuing the first Thursday in August,

1870, having come to the conclusion that the terms 'the officers elected at the first election' embraced all the officers specified under the judicial department in Art. 4, among which is that of Sheriff.

I am further of the opinion that the Act of the General Assembly, ch. 148, of the laws of 1869-'70, entitled an "Act concerning elections and registrations in the year of our Lord 1870," although in terms directing the election of Sheriffs for the various counties on the 1st Thursday of August, 1870, did not have the effect of impairing the right of the defendant to hold his said office during the term prescribed by the Constitution (see opinion of the Justices of the Supreme Court in regard to the term of office of the General Assembly elected in April, 1868, 64 N.C. Ap. on page 785.)

I am further of opinion that the circumstances of the defendant having offered himself as a candidate for re-election, and the declarations made by him before the election, that he would abide the result of the election, do not work a resignation or abandonment of the office, but were at most a declaration of a purpose to resign or abandon, which, like the will of a testator, was ambulatory until the time came to carry it into effect, and could be revoked at pleasure. I am further of opinion that since the election there has been no abandonment of the office by the defendant, as he has held on to it as well as he could, and has tendered his bonds to the only Board who would receive it. Lastly, I am of the opinion that there has been no forfeiture by him of the office by reason of a failure to renew his official bond before the proper Board on the first Monday in September, 1870, because the provisions of the act of the General Assembly of 1869-'70, ch. 169, sec. 2, entitled an "Act in relation to official bonds," were not complied with by the proper Commissioners of the County." A judgment was, according to this opinion, entered for the defendant, and the (254) plaintiff appealed.

Boyden & Bailey for the plaintiff.
Blackmer & McCorkle for the defendant.

PEARSON, C.J. There are five cases at this term, called "The Sheriff Cases." The main question in all of these is, the term of office of the Sheriffs elected at the first election under the present Constitution, but each presents certain special circumstances, making it necessary that each case should be referred to separately. Each case differs in regard to the mode of instituting the proceeding. The purpose in all, however, is to get a decision upon the main question, and upon the effect of the special circumstances, without regard to the form of the

procedure—so, that matter will be passed upon with the remark, that the form adopted in this case, seems to us to be the proper one.

Art. 4, sec. 32 of the Constitution provides—"The officers elected at the first election held under this Constitution, shall hold their offices for the terms prescribed for them respectively, *next ensuing after the next regular election for members of the General Assembly.*"

The next regular election for members of the General Assembly, is to be held on the first Thursday in August, 1870. (Art. 2, sec. 29.) So the officers whose offices are provided for by Art. 4, elected at the first election held under the Constitution, are to hold their offices for the terms prescribed for them respectively, *next ensuing after that date.* These words are plain and positive, and admit of no other construction. There is no other section which conflicts with, or can control this construction, and it will be observed the wording differs very materially from that in respect to members of the General Assembly. This conclusion, although no reason for an extension of the term of officers elected at the first election appears on the face of the Constitution, is (255) forced upon the Court, because *it is so written.* Our duty is, to administer the law as it is, and not according to our notion as to how it ought to be. (See opinion of Chief Justice and Justice Dick on the question of "tenure of office," at the request of the General Assembly, 64 N.C. 785 appendix.)

The special circumstances relied on, do not, in our opinion, amount to a resignation, or to an abandonment, or to a forfeiture of his office on the part of the defendant, upon the facts found by his Honor, in the Superior Court, and for the reasons given by him.

This case is clearly distinguishable from *Williams v. Somers,* 18 N.C. 61. In that case, the Court put no stress upon the fact that Mr. Williams was a candidate before the people, and the decision is put upon an implied abandonment of the office, by reason of certain acts after the election. That decision did not meet with full concurrence on the part of the profession, because the abandonment of the office by Mr. Williams was not considered to have been voluntary, but ought to have been ascribed to the pressure of circumstances induced by unconstitutional action on the part of the Legislature, which the presiding Judge was ready to enforce. But, however this may be, our case in no wise comes up to that. See *Aderholt v. McKee,* post 257.

Per curiam.

Judgment affirmed.

NOTE.—The cases of the *People of the State on the relation of the Attorney-General and D. A. Koon v. J. H. King,* from Lincoln County,

and the *State on the relation of A. J. C. Powell v. the Board of Commissioners of Sampson County,* were decided upon the same grounds as those set forth in the above opinion, and the opinion is referred to for them. The same may be said of the case of *R. F. Trogden v. Commissioners of Randolph County.* In the case of *J. Foley v. Commissioners of Pitt,* the special circumstances relied on to take it out of the general principle announced in *Loftin v. Sowers* were that (256) being the former Sheriff, though he was not a candidate for re-election, he electioneered for the candidate who obtained the highest number of votes, voted for him, and afterwards proclaimed him as having been elected, and that he did not tender his official bonds at the proper time. The following is the opinion filed in the case.

John Foley

v.

Commissioners of Pitt County.

PEARSON, C.J. There is nothing in the special circumstances of this case, to take it out of the general principle announced in *Loftin v. Sowers,* ante 251.

The facts do not show a resignation or an abandonment or a forfeiture of his office on the part of Foley, all of his acts are attributable to an act of the General Assembly passed under a misconstruction of the Constitution in regard to the term of office, of Sheriffs elected at the first election, under the present Constitution; so nothing that he did or said can be looked upon as being voluntary on his part, or be allowed the legal effect of an estoppel, whereby he is excluded from the right to assert his title to the office.

Per curiam.

Judgment affirmed.

Cited: The case of *Koon v. King* was argued by *Hoke* for the plaintiff and *Bynum* for the defendant. *Powell v. Board of Commissioners, etc.,* by *Phillips & Merrimon* for the plaintiff and *Bragg & Strong* for the defendant. *Trogden v. Commissioners, etc.,* by *Scott & Scott* and *Ball & Keogh* for the plaintiff and *Gorrell* for the defendant, and *Foley v. Commissioners, etc.,* by *Battle & Sons* for the plaintiff and *Warren & Carter* and *G. W. Johnston* for the defendant.

Foley v. Comrs., 65 N.C. 256.

(257)

THE PEOPLE OF THE STATE OF NORTH CAROLINA ON THE RELATION OF EMANUEL ADERHOLT v. WYLIE L. McKEE.

The Constitution in Article 7, under the head "Municipal Corporations" provides for the election biennially in each county of a treasurer, register of deeds, etc., and as there is nothing in that article or any other to extend the term of office of treasurer elected at the first election in 1868 beyond two years, his term expired in 1870.

The term of office of a treasurer appointed by the board of commissioners in a county to fill a vacancy is only that of the unoccupied term of his predecessor.

THIS was a case agreed, submitted to his Honor, *Judge Logan,* at the Fall Term, 1870, of the Superior Court for the County of GASTON.

It is agreed that at an election for the office of Treasurer of Gaston County on the 19th day of April, 1868, M. J. Aydlotte was duly elected Treasurer and regularly qualified and inducted into office; that on the 1st November, 1869, the said Aydlotte tendered his resignation to the Board of Commissioners of said County, which was accepted; that afterwards, on the same day, the said Board of Commissioners appointed the defendant to fill the vacancy in said office of County Treasurer, who gave the bonds required by law, and was duly inducted into said office; that in compliance with the law requiring the County Treasurer annually to renew his official bonds, the defendant tendered to the Commissioners elected in August, 1870, good and sufficient bonds which they refused to accept because they held that his term of office had expired: that an election for County Treasurer was held on the 4th of August, 1870, in said County, when Emanuel Aderholt, the plaintiff, received the largest number of legal votes, and was declared by the Board of Commissioners duly elected Treasurer of said County; that on the 1st Monday in September, 1870, the plaintiff was regularly qualified and filed his bond as required by law, which bond was

(258) approved and accepted by the Board of Commissioners; that on the said 1st Monday of September, 1870, the defendant was the incumbent of the said office by virtue of his appointment as aforesaid, and still is the actual incumbent, claiming that the term of his office is yet unexpired; that plaintiff has duly demanded of the defendant the said office with its effects which the defendant has refused to surrender.

Upon this case agreed, his Honor gave judgment for the defendant, and the plaintiff appealed.

Attorney General Shipp for the plaintiff.
Bynum for the defendant.

PEARSON, C.J. The defendant being appointed to fill a vacancy, holds for the unoccupied term of his predecessor.

The Constitution, under the head "Municipal Corporations," Art. 7, provides for the election *biennially* in each County of a Treasurer, Register of Deeds, etc. No distinction is made in this article, in regard to officers elected at the first election—they fall under the general rule and hold for two years, unless an exception is made in respect to them by some other article.

It is said this result is affected by art. 4, sec. 32. "The officers elected at the first election under this Constitution shall hold their office for the terms prescribed for them respectively, next ensuing after the next regular election for members of the General Assembly. But their terms shall begin upon the approval of this Constitution by the Congress of the United States."

It seems clear, that the terms of officers elected at the first election to offices provided for by this article, have an extension, both at the beginning and at the end.

No reason appears, on the face of the instrument, for making the latter extension; yet such is the law, because it is so written.

This conclusion rests on a dry question of law, as a rule of con- (259) struction, of the very words of the Constitution—taken literally and strictly. Of course we are not inclined to extend this strict construction to cases which do not expressly come within its operation. We hold there is no extension of the terms of the officers elected at the first election under Art. 7, "Municipal Corporations," because in respect to them, it is not so written, and there is no reason for such extension appearing on the face of the Constitution. An examination of the entire instrument shows that the framers intended each article to be exclusive and complete within itself, and the reference made in some to another article, (obviously to avoid a repetition of words,) excludes the idea of any reference by implication of one article to another, on the maxim *"expressio unius exclusio alterius."*

For instance, article 2, "Legislative Department," fixes the number of the members of the General Assembly, term of office, two years—first regular election to be held on the first Thursday in August, 1870, but the first election shall be held when the vote is taken on the ratification of the Constitution, and the General Assembly then elected shall meet on the fifteenth day after the approval of the Constitution—and the members elected at the first election shall hold their seats until their successors are elected at a regular election. So this article is exclusive and complete within itself. See opinion of Chief Justice and

Justice Dick, given at the request of the General Assembly as to tenure of office, 64 N.C. 785 appendix.

Art. 3. "Executive Department" fixes the executive officer's term of office four years, to commence on the 1st day of January next, after their election. Provided that the officers elected at the first election, shall assume the duties of their office ten days after the approval of the Constitution, and shall hold their offices from and after the first day of January, 1869. So, this Article is exclusive and complete within itself.

Art. 4. "Judicial Department" fixes the officers' term of office.
(260) The terms of the officers elected at the first election, to begin upon the approval of the Constitution and to continue for the terms prescribed for them respectively, next ensuing after the next regular election for members of the General Assembly. Thus by an express reference to Art. 3, making this Article exclusive and complete.

Art. 7. "Municipal Corporations" fixes the County officers' terms of office two years, but in no wise, either in direct words or by reference to any other article, is an exception made to the general rule, in respect to officers elected at the first election. Indeed, the idea of an implied reference to Art. 4, sec. 32, is made repugnant by the clause in that section. "But their terms shall begin upon the approval of this Constitution by the Congress of the United States," and the fact that Art. 7 makes no provision for the election of County officers before the approval of the Constitution by Congress.

It would be a strained construction to imply an extention of the terms of municipal officers, either at the beginning or the end, in the absence of any reason for it, appearing on the face of the Constitution, or of express reference to some other article.

We take it, that the words, "by the qualified voters thereof as provided for the election of members of the General Assembly," relates merely to details. But if any other operation be allowed to them it will regulate the terms according to Art. 3, sec. 29, and fix the termination at the next regular election, for members of the General Assembly, on the 1st Thursday in August, 1870.

Judgment reversed, and judgment for plaintiff, as demanded in the complaint.

Per curiam.

Judgment reversed.

Cited: Loftin v. Sowers, 65 N.C. 255.

(261)

JAMES T. BARNES AND OTHERS. v. JAMES BARNES.

Where several owners of land lying on a swamp, some above and some below a mill situated on it, belonging to A bought and paid for it, and took a deed to themselves in fee with the site and all rights appurtenant thereto, to be held in trust for the benefit of the lands of which they were the owners, and to prevent any mill dam or other obstruction from being placed across said swamp, to the damage and injury of their said lands, *it was held*, that the said purchasers had a right to prevent the erection of a mill dam across the swamp one hundred and fifty yards below the site of the old mill, by A or by one who purchased his land, and who proposed to build the dam partly on the land purchased of A and partly on land which he owned before.

As a general rule every contract ought to be enforced specifically, but an exception to this rule is permitted when damages can be recovered at law, which are an adequate satisfaction, and the exception is confined to cases in which there is a certain measure of damages, and money must be a satisfactory compensation.

THIS was a civil action brought by the plaintiffs to enjoin the defendant from erecting a dam and mill at a place one hundred and fifty yards below the site of an old mill. At the trial at the Fall Term, 1870, of the Superior Court of WILSON County, before his Honor, *Judge Clarke*, an order for a perpetual injunction was made, and the defendant appealed. The case is sufficiently stated in the opinion of the Court.

Bragg & Strong for the defendant.
Moore & Gatling for the plaintiffs.

RODMAN, J. In 1859, the plaintiff Barnes and the defendant, and others, made a deed, in which, after reciting that William Felton owned a mill on White Oak Swamp, and that some of the other parties owned lands on said Swamp above the site of the mill, and others of them owned lands on the Swamp below the mill; that the mill was an injury to the lands; and that for the purpose of removing (262) and of preventing the erection of a mill on *said site* for the future, and as a consideration for said mill and its privileges, etc., the said parties had each paid to William Felton, a certain sum; the said Felton conveyed to the other parties his said mill together with the site and all rights, etc., appurtenant thereto, in fee "to be held in trust for the benefit of the land of which they (the said parties) are now individually and severally seized and possessed, and to prevent any mill dam or other obstruction to be built, placed or raised *across said Swamp*, to the damage and injury of their lands, and to carry out and

secure said trust, each to the other binds himself, his heirs, executors and administrators, to stand to and abide by the provisions of this deed, in their true intent and meaning," etc. The plaintiffs allege that since the execution of said deed the defendant has purchased the land on White Oak Swamp which William Felton then owned, and that he has commenced building a dam across the Swamp at a place (according to the answer) one hundred and fifty yards below the site of the former mill, from land which he owned at the date of the deed, to the land which he bought of Felton; and that the dam will irreparably damage the lands of the plaintiffs; and prays a specific performance of the contract, and an injunction against the threatened violation of it.

The answer admits the allegations of the complaint; but resists the relief sought, because, 1. The new dam is not on the site of the old one. 2. The plaintiffs can have adequate redress in damages.

1. We think it clear from the words of the contract that the parties intended to stipulate against the erection of a dam, not only upon the exact site of the old one, but across any part of the Swamp which was in their control at that time. Any less liberal construction of it, would not satisfy the words of the covenant and would make it illusory.

The defendant taking the lands of Felton with notice of his
(263) covenant, is equally bound by it in respect to those lands. Batten *Spec. Perf.*, 368, cases cited.

2. It is a mistake to suppose the rule to be that a contract will not be specifically enforced in any case when a plaintiff can obtain damages at law. On the contrary the general rule is, as it is the dictate of justice, that every contract shall be specifically performed. An exception to the rule is, that when damages can be recovered at law, which are an *adequate* satisfaction. But this is for the sake of convenience only, and because in such a case a plaintiff can have no interest in requiring a specific performance. The exception is confined to cases in which there is a certain measure of damages, and where money must be a satisfactory compensation. In sec. 717, art. 1, Story Eq. Jur., Redfield's edition, will be found a description of the extent of equity jurisdiction for the specific enforcement of contracts. It is there said: "The restriction stands, therefore, not so much upon any general principle *ex equo et bono*, as upon the general convenience of leaving the party to his remedy in damages at law, where that will give him a clear and full compensation." On a contract to deliver so many bushels of corn, or so many sheep, it is clear that a complete remedy may be given in damages, because the vendee can always go in the market and buy corn or sheep. But if there be any thing in the nature of the article

contracted for by reason of which it could not be purchased in the ordinary market, as if it be slaves, or an ancient horn, or a unique china vase, or shares in a particular railway, the exception would not be applicable, and the general rule of a specific enforcement would apply. *Williams v. Howard,* 7 N.C. 74. *Falche v. Gray,* 5 Jur. N.S. 645. As was said in *Kitchen v. Herring,* 42 N.C. 190, land has always been peculiarly regarded among Anglo Saxon people, and contracts for the sale of land, or for leases, and indeed it may be said all contracts affecting lands, will always be specifically enforced, if there be nothing in the circumstances to forbid it. 1 Story Eq. Jur. S. 746. (264)

In this case the character of the damage threatened to the lands of the plaintiff made it incapable of any certain measurement.

The drowning of his lands—even partially, might render their occupation so uncomfortable and unprofitable as to compel the abandonment of some portion of them. Contracts to use the lands of the contractor in a certain way, have been enforced in many instances. *Tux v. Moxhay,* 2 Phillips 774, 1 Story Eq. Jur. S. 721.

3. Further it is said that the contract of the defendant was not supported by the consideration which went to Felton alone, but we consider the respective contracts of the parties a consideration sufficient to support each other.

There is no error, the judgment below is affirmed.

Per curiam.

Judgment affirmed.

(265)

STATE ON THE RELATION OF JOHN N. WHITFORD AND WIFE MARY v. WILLIAM FOY AND ANOTHER.

Under the provision in the Revised Code, ch. 54, sec. 23, authorizing a guardian to lend the money of his ward "upon bond with sufficient security," he might, upon a loan before the late civil war, have taken a bond secured by a mortgage of slaves, and cannot now be made responsible for the loss of the debt by the emancipation of the slaves.

A guardian who, before the late civil war, took from the administrator of the father of his wards certain promissory notes as a part of the effects of his wards, but did not collect them and lend the money upon bonds with sufficient security taken to himself as guardian, is not responsible for the amount of them if they were lost by the events of the war without any

neglect or default on his part, but he is responsible for the annual interest which he might have collected and invested for their benefit.

A bailee who misuses the thing bailed, thereby converts it to his own use, and becomes liable for its value, whether any loss occurs from such misuser or not; but that rule does not apply to a trustee, who, when no fraud is imputed, is only liable for a loss resulting from his culpable negligence with regard to his trust.

A guardian is not responsible for having received bank notes and Confederate money before March, 1862, and did not invest it for the benefit of his wards, when it is shown that he made a *bona fide* effort to do so, but was prevented by the events of the war.

In taking an account of a fund in the hands of a guardian in which two or more wards are interested, it is proper to state a general account of the whole fund in the end of each year, and also a separate account with each ward to the end of the same year, crediting the ward with his share of the balance found owing on the general account, and debiting him with any proper debits peculiar to himself. In this way the balance due to each ward at the end of each year is ascertained; and, upon the death or coming of age of one of them the sum due to him will be payable immediately and will cease to bear compound interest.

A guardian will be allowed for reasonable counsel fees paid for advice and assistance in the management of his trust, and he may be allowed also for the fees paid to counsel in making a fair defence to the suit brought against him for an account and settlement of his guardianship.

Reasonable commissions will always be allowed to a guardian unless in cases of fraud or very culpable negligence. The rate will depend upon a variety of circumstances, such as the amount of the estate, the trouble in managing it, and whether fees have been paid to counsel for assisting him in the management, the last of which will lessen the rate.

Commissions should be allowed a guardian on the amount of notes and other securities for debt delivered to the ward upon the cessation of the guardianship.

THIS was an action upon a guardian bond, in the progress of
(266) which an account was taken to which both parties filed exceptions, which coming on to be heard before his Honor, *Judge Clarke*, at the Fall Term, 1870, of CRAVEN Superior Court, those of the plaintiffs were overruled and those of the defendants sustained, and the plaintiffs appealed. The exceptions are sufficiently stated in the opinion of the Court.

Bragg & Strong for the plaintiffs.
Manly & Haughton for the defendants.

RODMAN, J. This is an action on the bond given by the defendant, as guardian, of the *feme* plaintiff. An account was taken to which both

parties excepted, and it comes before us by appeal from the rulings of his Honor, the Judge below, upon those exceptions.

Exceptions of defendant.

1. That defendant is improperly charged with the note of one Andrews for $700 and interest. It appears from the testimony of the defendant that this note was taken by him several years before the war, and that instead of being secured by individual sureties, it was secured by a mortgage on three slaves, worth at that time much more than the amount of the debt. The objection is, that taking such security was not a compliance with ch. 54, sec. 23, Revised Code, which (267) requires individual sureties. That section requires the guardian to lend his ward's money "*upon bond with sufficient security,* to be repaid with interest annually," etc., and also, "*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."

The counsel for the plaintiff referred us to the cases of *Christman v. Wright,* 38 N.C. 549; *Boyet v. Hurst,* 54 N.C. 171; *Hurdle v. Leith,* 63 N.C. 597, and *White v. Robinson,* 64 N.C. 698, as construing this statute to forbid a guardian from taking any other security upon a loan of his ward's money than a bond with sureties. We think a different conclusion must be drawn from *Christman v. Wright.* There, the plaintiff, as guardian of his brother, held the note of Wright with Armstrong and others as sureties, which was perfectly good; at the request of Wright he gave up that note, and took from Wright a note made by him alone, secured by a mortgage on land; it turned out that the land was, at the delivery of the mortgage, subject to the lien of judgments for an amount exceeding its value, so that the note and mortgage were valueless; the plaintiff filed his bill to subject the sureties upon the original note, on the ground that he had been induced to surrender it by fraud. The Court refused the relief because the fraud was not proved, and Nash, J., delivering the opinion of the Court, intimates that the guardian must bear the loss. But that was not a question before the Court, and the opinion might have been justified by the manifest want of prudence in the guardian in not ascertaining the existence of the liens upon the land. The Judge nowhere expresses any doubt of the right of a guardian to invest upon real security, which it would have been in the course of his reasoning to do, if he had enter- (268) tained any. On the contrary, he says, "He (the guardian) concluded landed estate was better than personal security, and in general

his reasoning would have been right; in this instance it has proved fallacious."

In *Boyet v. Hurst* the guardian had loaned the ward's money to a trading partnership, composed of two partners, which was in good credit and possessed large means, but he had taken no additional security of any kind. The firm afterwards became insolvent, and the guardian was held chargeable with the loss. Evidently the case is not in point. But the counsel relies on some expressions found in the opinion of the Court delivered by the Chief Justice, "We concur with the counsel of the defendant, that the security meant is personal security, and that a guardian is not, by our law, as he is by the law of England *required* to invest the funds of his ward upon real or government securities. So if he takes good and sufficient personal security he has complied with our statute, *but he must take security* of some kind." Again, "The policy of the statute is to require the investment to be secured by the bond or note *of some person* in addition to the borrower." These expressions even if taken most strongly in favor of the view of the plaintiff, give it but little support, and are capable of being understood otherwise.

But in truth they have no bearing at all on the present question, which was not then raised, and could not have been in the mind of the Chief Justice. For similar reasons the other cases cited are even less applicable. So we are left to the statute itself.

The statute, as already quoted, requires the guardian to enforce payment of any bond taken by him, "when *the principal or his sureties* are likely to become insolvent." These words undoubtedly show that the guardian was authorized to take bond with individual sure-
(269) ties; and probably it was contemplated that such would be, as we know that in fact it became, the most usual form of security. But we do not think that the inference can be drawn, that this was the only form of security which a guardian could take. By the English law a guardian could invest only in government securities, or perhaps on mortgage on real estate. For obvious reasons this rule in its exclusiveness, was not applicable to North Carolina in its early condition. Hence the statute directs the guardian to take "bond with sufficient security;" leaving the nature and sufficiency of the security, to the judgment of the guardian, and adds that in the event of his taking a bond with sureties, he must enforce payment if either principal or sureties are likely to become insolvent, or he will be liable for the debt. We think the Act was an enabling, and not a restraining one; that it was intended to enable a guardian to take a form of security that he could not

have taken before, and not to restrain him from taking what he might have taken always before; to make another form of security lawful, and not to make the old forms unlawful. Indeed a lien on property, if prudently taken, after inquiry into the title and value, is, in its nature, a safer security than the suretyship of individuals; for their solvency depends at last on their property, and the property in their hands besides being subject to the risk of destruction or robbery, is subject to the additional risk that they may fraudently or imprudently make way with, or incumber it, to the detriment of the particular creditor. If an individual surety having property of triple the value of the debt is a sufficient security, it would seem clear, that a lien on the property itself, must be sufficient also. In this case, we think the defendant acted with sufficient prudence, and the exception is sustained.

2 and 3. That the defendant is charged with certain notes which were received by him from Hill, the administrator of Williamson, the father of the ward, upon a settlement in 1855, and is (270) required to pay the same in money instead of in the notes themselves. These notes it is admitted were good when they were received, and so continued up to 1862, or thereabouts, when the enemy took possession of Newbern and the adjacent country in which the parties and the debtors lived, and they have since become insolvent, through the results of the war. It is not alleged that the defendant has been guilty of any want of diligence in taking, or in endeavoring to collect them; but, it is alleged, that by neglecting from 1855 to 1862 to convert them into notes payable to him as guardian, he has made them his own, and is not entitled to pay them over specifically to his wards. In support of this view it is argued that if the guardian had converted these notes into others, *perhaps* some of the others would now be good, and that inasmuch as he has neglected his duty, he must be responsible for all the loss which has *followed*, whether it can be traced to that neglect *as a cause* or not. For this principle we are referred to *Bell v. Bowen*, 46 N.C. 316. In that case the defendant hired a slave of the plaintiff, and agreed not to take him out of the country, except at the hirer's risk. But in the course of his opinion, the C.J. says: "Suppose the slave had been hired with a stipulation that he was not to be carried out of the country. It is settled that by taking him out of the country, the bailee becomes liable to any loss that may happen without reference to the question of neglect." But this doctrine is, we think, peculiar to the law of bailments. The ground of it, as stated by Story (Bailments s. 413,) is, that, "by the misuser, the bailee converts the property bailed," and hence it would seem becomes liable for the value of the article,

whether any loss occurs or not. But such a rule has never been applied to other contracts, still less to a mere neglect by a trustee, where no fraud is imputed. As to contracts in general the rule of damages is well settled, that a plaintiff can only recover such damages as may
(271) be considered as having been within the view of the parties, and are the direct and necessary result of the breach. *Foard v. Railroad,* 53 N.C. 235. *Ashe v. DeRossett,* 50 N.C. 299. *Boyle v. Reeder,* 23 N.C. 607. Mayne on Damages 14. As to trustees, the Courts require of them the highest degree of good faith, and ordinary diligence; for any damages which result from their culpable negligence they are liable. Story Eq. Jur. 794. *Osgood v. Franklin,* 2 Johns Ch. R. 1. S. C. 14 Johns R. 527, but to nothing more. It has never been held that a mere neglect to change an investment amounts to a conversion of the security. The guardian therefore cannot be held liable for the loss of these notes merely by reason of his omission to change their form, or to take others payable to himself as guardian. Had he done so, and had the notes thus taken by him proved insolvent as these have, the same argument might have been then used to charge him that now is. It might have been said, that there was no reason for the change, and it was therefore laches, and that by collecting the interest annually, and investing it, he might in effect have made them bear compound interest. If the defendant is charged with these notes received from Hill, he must upon delivering them up be discharged from the principals of them.

We think, however, that it was the duty of the defendant to have collected the interest on these notes annually, and to have invested it for the benefit of the ward. The loss of this interest up to March, 1862, or to whatever other date, at which, by reason of the war it became impossible to collect it, is a loss directly caused by the omission of the defendant, and he is therefore liable for such a sum as the interest would amount to at the present time, if he had annually collected and invested it, as he ought to have done.

These two exceptions are sustained with the above qualification.

4. That defendant is not credited with $900 in Confederate
(272) money which he attempted to invest in Confederate bonds.

It appears that this money was received by the defendant before the capture of New Berne, which was on the 14th March, 1862; the defendant says he could not loan it out safely to individuals, and that he gave it to a Col. Hite to invest, in Confederate bonds, who gave it to a soldier for the same purpose, who was captured by the enemy, and the money was thus lost. It would have been equally lost if

it had been invested. Upon the principles established by this Court respecting the receipt of Confederate money by trustees and agents, in *Emerson v. Mallett,* 62 N.C. 234. *State ex rel. White v. Robinson,* 64 N.C. 698, and other recent cases, we consider that the defendant ought not to be charged, or if charged, ought to be credited with this sum.

It is argued for plaintiffs that the defendant ought to have sought the plaintiff, Whitford, after his marriage with the ward, and paid him this money. Whitford was in the Confederate army, and we think the defendant was under no obligation to hunt him up in camp and make a tender of the money, during the war. If Whitford had demanded payment and been refused, the case would be different. After the war, the defendant met Whitford and might then have tendered him the worthless money, and his share of the notes, but it was difficult to tell specifically what Whitford was entitled to; there is no proof that the defendant failed to use due diligence in securing the remnants of the property; the losses had then been all incurred, and we do not think under all the circumstances that the defendant incurred any additional liability by his delay after the war in accounting with the plaintiffs. This exception is sustained.

5. That the balance found owing by the defendant is not correct. This will depend upon the state of the account after it shall be corrected according to this opinion. It needs therefore no further observation.

6. That the report is incomplete, in that while the Commissioner reports the aggregate of liabilities against the defendant (273) in this and in the two other suits on his guardian bond at $19,-298.94, and the aggregate of credits reported and allowed is $35,602.66. Yet the said credits are not apportioned, nor the actual result stated in each case, after allowing the credits to which the defendant is entitled in each case.

We do not understand this exception. If it means that the Commissioner has not reported the sum for which each ward (or his representative) is entitled to judgment, it would seem on a reference to the report not to be sustained, as a fact. Of course that must be done before any judgment can be rendered. But as possibly, it may have some reference to the manner of stating an account in a case like this, it will not be amiss to state what we consider the proper and most convenient course, although any other which would arrive at the same result, would do.

Three wards were equally interested in a common fund, and must bear all losses affecting it equally. So long as all remained infants, each was entitled to have his share of the fund bear compound interest, but when any one ceased to be entitled to this privilege of an infant, by death or marriage, the share of that one becoming immediately demandable, ceased to bear any more than simple interest, although if the guardian received more, he would be liable to pay it. *Wood v. Brownrigg,* 14 N.C. 430.

It was necessary therefore to state a general account of the whole fund to the end of each year, and also a separate account with each ward to the end of the same year, crediting the ward with one-third of the balance found owing on the general account, and debiting him with any proper debits peculiar to himself. In this way the balance owing to each ward at the end of each year is ascertained, and upon the death of Frances, for example, the sum due to her, becoming immedi-
(274) ately payable to her administrator, is converted into an ordinary debt, and henceforth bears only simple interest. *Ford v. Van Dyke,* 33 N.C. 227. We call the attention of accountants to the mode of proceeding here suggested, as the accounts reported in cases like this are often in a state of unintelligible confusion.

Exceptions of plaintiff.

1. That the defendant is credited with $500 paid to his counsel. There were three wards of the defendant; he gave a single bond for the benefit of all of them; one of them died in June, 1858, the other two married, one the plaintiff in this case, in 1860 or 1861, and the other in December, 1865. The administrator of the deceased, and each of the others, has brought a separate suit on the bond. In each case the Commissioner has credited the defendant with $500 paid to counsel, making $1500 for services in the management of the estate. It is not disputed that a trustee may, if necessary, and ought to employ counsel to advise him in the execution of his trust at the expense of the trust fund. This is considered settled here, although in some of the States a contrary doctrine prevails. 2 Wm's. Ex'rs. 1679. Am. note, citing *Pusey v. Clemson,* 9 Serg. and Rawle 209. (Pa.) and *Satterwhite v. Littlefield,* 13 S. and M. 302, (Miss.) Any reasonable sum paid for this purpose is a proper credit. It is said that the sum paid in this case was excessive. The Commissioner finds no facts as to the necessity for, and the extent of, the services of counsel. The only evidence upon the point is to the effect that the guardian prosecuted one suit against Hill, the administrator of the father of his wards; a second suit to recover the value of a slave of the ward's that was drowned; some fifty-

five or sixty actions upon notes held by the defendant as the property of the wards, and defended the present actions. Of the difficulty and labor attending those suits there is no evidence. The sums paid by the defendant were probably reasonable as between the defendant and his counsel. But it does not appear to us that so large an (275) expenditure was required for the benefit of the estate. In that point of view we think it excessive.

We think at all events the Commissioner should not have allowed a gross credit of this sort without some bill of particulars showing in sufficient detail the nature and extent of the services. It is also a circumstance to suggest criticism that the defendant from 1854, when he became guardian, does not appear to have paid any thing to counsel until about the time of the institution of these actions; neither does it appear that the counsel to whom the payment in question was made, rendered services in any of the actions prosecuted by and against defendant before 1862; on the contrary, Mr. Stevenson is stated to have been the counsel of the defendant in the action by the administrator of Francis T. Williamson against him, up to his death in 1861. For these reasons we are not able to decide on this exception, and are compelled to refer this item of credit to the Commissioner for further inquiry. There was a view of this question which was urged by the counsel for the plaintiff in his argument, which it is proper to notice. He contended that in estimating the sum proper to be credited to the defendant for counsel fees, the Commissioner should not consider any sum paid to counsel for services in the present action; that such payments *could not* be for the benefit of the wards; that the services were in their nature for the individual benefit of the defendant, either as remedying his own neglect to keep an account, or in enabling him to postpone or reduce a just demand. We do not quite agree with the counsel. It is true that a defence *may* be so conducted as to make it manifest that the object is of the character supposed, and in such a case no Court could allow the defendant credit for any sum paid for such an abuse of the machinery of the law. But it cannot be presumed that every defence is of this character: if it be so, it must be shown. Ordinarily it is the duty of every trustee, upon a demand for settlement, to present his account; we think he is entitled to be (276) credited for a reasonable sum paid to an accountant or attorney for stating the account; we think, too, if there is any difficulty in doing it, he is entitled to the advice of counsel and to be credited for any reasonable fees paid for that purpose. But for any payment beyond this we think it must be an exceptional case to entitle him to credit. The question in all cases is whether the payment was made fairly and

on account of the estate. This is the rule established by the decision of the Court upon the fourth exception of the defendant in *Hester v. Hester,* 38 N.C. 9, and it seems to us to be founded in reason and justice. With this statement of what we consider the principles upon which the claim to this credit must be decided, we may hope that it will be adjusted by the parties themselves.

2. That the Commissioner has credited the defendant with bank notes received by him prior to the year 1862, to the amount of $2,851, and Confederate notes received prior to the year 1862, to the amount of $372.08. We refer to what was said upon the 4th exception of defendant. It is not attempted to be shown that the defendant could have made any safe investment of this money. He may reasonably have supposed as to the bank notes, that the credit of the banks was better than that of any individuals, and that for the sake of that difference it was prudent even to lose the interest during the war. We cannot require prescience of trustees, nor must we judge them by the light of the present day. This exception is not sustained.

3. That the Commissioner decides that the plaintiff shall receive as cash in payment of the aggregate amount due, to-wit: $12,463.40, the sum of $9,963.23 in notes or judgments.

The statute (Rev. Code, ch. 54, sec. 23) requires the ward to receive of his guardian all securities properly taken by him, and for (277) which he has not made himself liable by his laches. If there be any bond or note which the ward is required by the Commissioner to take which is excluded by this rule, it should have been particularly specified in the exception, and the case made upon it could then have been considered. All the securities which a guardian takes upon a loan of his ward's money, are specifically the property of the ward. If they become worthless through the laches of the guardian, he is chargeable with their value. If, having securities in hand which he supposes good, he advances his own money to the ward, whereby upon a settlement it turns out that he has on hand guardian securities to a greater sum than the ward is entitled to, he is entitled to retain from the securities *pro tanto.* How it would be in case where some of the securities had become worthless without default by the guardian, while others remained good; whether the guardian could retain the good ones to the extent of his advances, or should share them *pro rata* with the ward, or would be compelled to take the worthless ones, on the ground of a voluntary confusion of goods, is a question which does not arise here, that we can see.

This exception is not sustained.

4. That the commissions allowed the defendant are excessive.

We agree with the plaintiff; we think 2½ *per cent.* on each side of the account sufficient; the more especially as so large a part of the business seems to have been done by the defendant's Attorneys.

5. That the Commissioner has credited the defendant with commissions on notes and judgments amounting to $9,963.23, which he decides that the plaintiff shall receive as cash.

As a matter of law, commissions may be allowed to a guardian upon notes which he delivers over to the ward. *Shepard v. Parker,* 13 N.C. 103. Succession of Johnson, 1 La. Ann. Rep. 75. Of course the fact that the notes had become worthless without his default, would have its weight in estimating the rate of commissions to be allowed (278) him, just as any other accident affecting the value of the ward's estate would. In the allowance of commissions which we have considered adequate, we have assumed, that they would be computed on these notes. This exception is not sustained.

6. That the Commissioner has allowed defendant any commissions.

This exception is not sustained; it is only in a case of fraud, or of very culpable negligence, that a trustee will be punished by being deprived of his commissions.

The case is retained in this Court for further directions: the report is remanded to Commissioner Bryan, in order that he may modify it in accordance with this opinion; and may take testimony on the matter of the plaintiff's first exception, if the parties shall desire it. Each party must pay his own costs in this Court. Let this opinion be certified.

Per curiam.

Judgment accordingly.

Cited: Covington v. Leak, 67 N.C. 366; *Camp v. Smith,* 68 N.C. 541; *Keener v. Finger,* 70 N.C. 52; *Sc,* 71 N.C. 527; *McNeill v. Hodges,* 83 N.C. 516; *Burke v. Turner,* 85 N.C. 505; *Ogburn v. Wilson,* 93 N.C. 119; *Young v. Kennedy,* 95 N.C. 267; *Extinguisher Co. v. R. R.,* 137 N.C. 281; *Kelly v. Odum,* 139 N.C. 280; *Knights of Honor v. Selby,* 153 N.C. 208; *Overman v. Lanier,* 157 N.C. 550; *In re Stone,* 176 N.C. 344; *Lightner v. Boone,* 221 N.C. 86; *Casualty Co. v. Lawing,* 225 N.C. 108.

NOTE.—Two other suits on the same guardian bond as that in the above case, to-wit: *State on the relation of Hardy Whitford and wife v. William Foy and other,* and *State on the relation of John N. Whitford, Adm'r of Frances Williamson v. William Foy and another,* were

decided at this Term, and the same principles of law were expressed as are contained in the above opinion.

(279)

JOHN T. HOGAN v. ROBERT P. STRAYHORN.

Where a debtor executed a deed conveying a tract of land in trust to pay specified debts, and it was provided in the deed in which no money consideration was recited, that if the debts were not paid on or before a particular day the trustee should sell the land and "pay off and discharge all costs and charges for the drawing and execution of this trust," and, the debts not having been paid, the trustee did sell the land and pay them out of the proceeds, *it was held*, that the deed in trust not being upon a valuable consideration there was a resulting use for the grantor, subject however, to a *scintilla juris* in the trustee sufficient to feed the contingent use that might be created by an exercise of the power of sale, and that when the sale was made, and the purchase money was received by the trustee and paid to the creditors mentioned in the trust, the purchaser acquired a good title against the grantor and his other creditors.

The doctrine of conveyances at the common law and under the Statute of Uses, 27th Henry 8th, and also under our Act of 1715, (1 Rev. Stat. ch. 37, sec. 1, Rev. Code, ch. 37, sec. 1,) which enacts that all deeds for land proved and registered in the county where the land lies "shall be valid, and pass estates in land, without livery of seizen, attornment, or other ceremony whatever," discussed and explained.

THIS was a civil action to recover a tract of land, submitted to his Honor, *Judge Tourgee*, in the Superior Court of ORANGE County, in January, 1870, upon a case agreed.

Calvin G. Strayhorn was the owner of the land in question, and both parties claim title under him. He became a bankrupt, and on the 4th of May, 1868, all his interest in the land was conveyed to his assignee, E. B. Lyon, who on the 26th day of February, 1869, sold and conveyed it to the plaintiff, John T. Hogan, who claims it under that deed.

Prior to the time when the said Strayhorn became a bankrupt, to-wit: on the 13th day of September, 1866, he made and delivered to George Laws a deed in trust for the same land which was duly
(280) proved and registered, the material parts of which deed are as follows:

This deed made, etc., witnesseth that whereas, Calvin G. Strayhorn is justly indebted to Robert P. Strayhorn, as his guardian, in the sum of $1,300, and to F. & J. T. Strayhorn in the sum of $1,080, due by

bond, etc., and whereas, the said Calvin G. Strayhorn is honestly desirous of securing the payment of said sums of money; he, the said C. G. Strayhorn, hath this day given, bargained and sold, etc., to the said George Laws and his heirs, a certain tract or parcel of land, in Orange County, on the waters of Stone's Creek, etc., to have and to hold the said land in special trust and confidence, nevertheless that the said Laws will hold, keep and use the same as hereinafter directed. If the said C. G. Strayhorn shall on the 1st day of August have paid off and fully discharged all of the aforesaid debts with interest, then this indenture is void and of no effect. If, however, he shall not have paid the said debts, then it shall be the duty of the said George Laws to advertise and sell on such time and terms as the said Robert and William F. Strayhorn and the trustee shall agree upon. It shall be the duty of said trustee to pay off and discharge all costs and charges for the drawing and executions of the trust.

The said George Laws, afterwards and prior to the bankruptcy of the said C. G. Strayhorn, sold and conveyed the land to the defendant, Robert P. Strayhorn, who claims title under his deed.

At the date of the deed in trust from the said C. G. Strayhorn to Laws, he, the said Strayhorn, was indebted to a number of other persons whose debts were not mentioned in the deed to Laws, and were unpaid when he filed his petition in bankruptcy.

On the argument of the case it was contended for the plaintiff that the deed in trust from C. G. Strayhorn to Laws was inoperative and void, especially as against the other creditors of Strayhorn. First, for want of a money consideration from Laws to said (281) Strayhorn; and secondly, because the said deed makes no appropriation of the proceeds of the land, when sold by Laws, further than for the costs and charges of the drawing and execution of the trust.

For the defendant it was admitted that the case turned upon the points taken for the plaintiff, but his counsel contended that the said deed was good and sufficient, and did pass the title, because, first, the deed passed the land to Laws; and secondly, that it was a declaration of trust by C. G. Strayhorn upon which Laws became trustee for the creditors named in the trust.

His Honor, after hearing the argument on both sides, was of opinion with the plaintiff on both points taken for him, and ordered a judgment to be entered accordingly, from which the defendant appealed.

Battle & Sons and Norwood for the plaintiff.
Phillips & Merrimon and Strayhorn for the defendant.

PEARSON, C.J. The plaintiff derives title from the Assignee in bankruptcy, who represents the creditors of Calvin Strayhorn. To resist a recovery it is necessary for the defendant to maintain two positions:

1. The deed of Calvin Strayhorn to Laws passed the title.

2. The deed makes a valid declaration of trust.

As to the first, the objection to the deed is, that it is not supported by a valuable consideration from Laws to Calvin Strayhorn. Treating it as a deed of bargain and sale, this objection would be fatal; but under the maxim, *ut res magis valeat quam pereat,* an instrument which can not have effect in one form, will be supported in another; provided, that meets the difficulty, and sufficient words are used. For instance, a deed in the form of a covenant is allowed to operate as a grant; a deed purporting to be a bargain and sale, as a covenant
(282) to stand seized; and either of these as a deed at common law if that will answer the purpose. An instrument in the form of bargain and sale, purporting to pass a remainder after a life-estate in land, but inoperative for want of a valuable consideration, will be allowed the effect of pasing the remainder as a deed at common law, which does not require a consideration, *Harrell v. Watson,* 63 N.C. 454, and operates to pass remainders, reversions, rights of way and other easements, and any incorporeal hereditaments; the solemn act of delivery being accepted in lieu of "livery of seizin," which can not be made of things incorporeal. This principle could not be applied to deeds accompanying feoffments, or deeds of feoffment as they were termed, to supply the want of livery of seizin; for the reason that the land passed by the livery of seizin, and not by the deed; for, although after the introduction of contingent remainders, springing and shifting uses, powers of appointment and conditional limitations, a deed always accompanied the livery of seizin, it was held that the freehold passed by the livery, an act of notoriety, and not by the deed, which served only the secondary purpose of a memorial of the limitations of the estate, and declarations of uses which were too complicated to be trusted to the memory of witnesses.

The ceremony of making livery of seizin was in its original very imposing. The parties went upon the land, and the tenant, in the presence of the freeholders of the manor, delivered *the soil* to the feoffee, by handing to him a twig, or clod of dirt, in the name of the whole; by which act, notoriety was given to the fact that the one had ceased to be tenant, and the other had taken his place. After it became nec-

essary to have a deed to accompany the livery of seizin, this mode of conveyance was both expensive and inconvenient, and upon the passage of the Statute of Uses, 27 Hen. viii, the conveyance by deed of bargain and sale was substituted for it in all cases not requiring limitations of the estate, or a declaration of uses. This was also expensive by reason of the statute of enrollments, and the con- (283) veyance by lease and release took the place of bargain and sale.

A conveyance by transmutation of possession, to-wit: feoffment, was only used when the estate was to be limited by way of contingent and cross-remainders, or family relations called for a declaration of contingent uses and powers of appointment. Fines and common recoveries, which are called feoffments of record, were only used when it was necessary to bar contingent estates that might spring out of some former conveyance, and thereby free the land from the complication of title incident thereto.

The Legislature of the colony of North Carolina, in 1715, seeing the expense and inconvenience of requiring the ceremony of livery of seizin, by which the parties were required to go upon the land, in a sparsely-settled country, enacted that "no conveyance or bill of sale for land shall be good, unless the same shall be acknowledged, etc., and registered in the County where the land lies," and *"all deeds so done and executed shall be valid and pass the estates in land without livery of seizin,* attornment, or other ceremony in the law, whatsoever." Rev. Stat. ch. 37, sec. 1; Rev. Code, ch. 37, sec. 1. The object of this statute manifestly is to dispense with the ceremony of livery of seizin, to substitute registration of the deed in lieu thereof, and to allow title to be passed by the deed, which before had accompanied the livery of seizin, without that expensive and inconvenient ceremony. To a plain man it must be a matter of surprise how any question ever could be made as to the validity of a deed, or "bill of sale for land," executed and registered in pursuance of this statute. The reference to the old mode of conveyance by livery of seizin, accompanied by deed of feoffment, was made to explain this matter, and the explanation will be made full by the fact that in the colony and in the State of North Carolina, sales and conveyances of land have been simple and free from all complication by reason of contingent and cross remainders, and (284) declarations of contingent and shifting uses, although such limitations and declarations of users are often met with in wills: so that at the first, a conveyance by lease and release, and after act of 1715, dispensing with enrollment and actual indentation of deeds of bargain and sale, and substituting registration in lieu thereof, deeds of bargain and sale, and of covenants to stand seized, have answered every purpose.

It is a remarkable fact that there has been no occasion to be met with in our books, except in one instance, to resort to conveyances operating by transmutation of possession. Indeed the members of the legal profession seem almost to have lost sight of the fact that by the Act of 1715, the deed which before accompanied livery of seizin, is, provided it be duly registered, allowed the effect of passing the title by transmutation of possession, without the ceremony of livery of seizin.

The single instance referred to above where there was a necessity for a conveyance operating by transmutation of possession, is *Smith v. Smith,* 46 N.C. 135. There the maker of a deed of bargain and sale, or of a covenant to stand seized (for it is good either way) attempted to create a power of sale to one who was a stranger to the consideration; and it is held that the power could only be created by conveyance operating by transmutation of possession. The Court was not able to give effect to it as a deed under the statute of 1715, because there were no words of conveyance to the stranger who was to exercise the power. In our case that difficulty is not presented, for the land is given to Laws "to have and to hold, to him and his heirs," and the ceremony of livery of seizin being dispensed with, the deed operates to pass the title under the act of 1715, although it cannot take effect as a deed of bargain and sale for the want of a valuable consideration.

As to the second position: With every disposition, under the
(285) maxim *ut res magis valeat quam pereat,* to give effect to the deed, and although we feel satisfied that the omission was caused by the ignorance or mistake of the draughtsman, we are forced to the conclusion that the deed does not make a valid declaration of trust in favor of Robert and William J. Strayhorn. They are taken to be *bona fide* creditors, the deed sets out a desire on the part of the grantor to secure the payment of their debts, it directs the grantee, if the debts are not paid by a day certain, to expose the land to sale on such terms (in reference to cash or credit, etc.,) as he and the said Robert and William J. Strayhorn may agree upon, "to pay off and discharge all costs and charges for the drawing and execution of this trust," and then—omits to say what is to be done with the money: in other words, it omits to make a declaration of trust in favor of the creditors whose debts he had expressed a desire to secure. These words are left out, viz: "and apply the proceeds of sale to the payment of the debts due to Robert and William J. Strayhorn, and the excess, if any, to be paid to Calvin Strayhorn." Thus we have the play of Hamlet with the character of Hamlet omitted. This omission is fatal. The title passed to Laws by force of the deed, but there being no trust declared in favor of creditors, the power to sell is unsupported by a consideration, and

must be held voluntary, and of course void against creditors: 13 Eliz.; *Ingram v. Kirkpatrick,* 26 N.C. 462.

So there was a resulting use in the grantor, which divested the legal estate of the grantee, and revested it in the grantor, and it passed to the assignee in bankruptcy who represents all the creditors.

If A makes a feoffment or (under the statute of 1715) a deed duly registered, for a valuable consideration, the use is in the feoffee or grantee by force of the consideration.

If the feoffment or deed be without consideration, the use is in the feoffer or grantor, and the legal estate is instantly revested in him by force of the statute, 27 Hen. viii, unless there be a (286) declaration of uses or trusts, or a power to appoint uses be given to a third person, or reserved to the feoffor, in which case so much of the use as is not declared or raised under the power, results to the grantor, and draws to it the legal estate in the "same manner, force and condition that he has the use." This is familiar learning. In our case the legal estate passed to Laws by the deed, but no trust is declared in favor of Robert and William F. Strayhorn, so the use resulted to Calvin Strayhorn.

The suggestion that the trust to pay the cost and expense of making the deed is valid, and prevents the legal estate from passing back to the grantor, has nothing to support it. The power to sell falls, because there is no consideration to support it against creditors, and the incident falls with the principal. The idea that the payment of the cost and expense of making a deed is a sufficient consideration to support it as a trust against creditors, is a legal absurdity.

After the opinion was filed, but before it was out of the control of the Court, the term not having expired, Mr. Phillips called our attention to a point that was not presented on the argument.

The point is this, the power of sale given Laws had the legal effect to prevent the entire use from resulting, so the legal estate vested in him, subject to a *scintilla juris,* to feed the contingent use that might be created by an exercise of the power. 2nd. The valuable consideration paid by the purchaser, had the legal effect to make the deed valid as against creditors.

Upon consideration we are satisfied the point is well taken. In a feoffment without consideration, to such uses as the feoffor may by deed or will appoint, the power qualifies the resulting use, and it only draws back a corresponding quantity of the legal estate, leaving a part of the estate in the feoffee, to feed the use that may be created by an exercise of the power. So a feoffment to such uses as the fe- (287)

offee may appoint has the like effect, and a power to sell is a power of appointment. See *Levy v. Griffis,* ante, 236.

It follows that a *"scintilla juris,"* as it is termed in the books, was left in Laws to feed the use that was subsequently created by the exercise of the power. *Chudleigh's case,* 1 Coke's Reports, 120 f., and that the resulting use was qualified by the power.

It is equally well settled that if a donee under a voluntary conveyance, make a *bona fide* sale for valuable consideration, before a creditor acquires a lien, the title of the purchaser is valid, as against creditors; for the consideration in the second deed supplies the want of one in the first. *Martin v. Cowles,* 18 N.C. 29. And Roberts on Fraudulent Conveyances. In our case the sale being made by Laws under the power, for a valuable consideration before the assignment under which plaintiff claims, and the purchase money having been applied in the liquidation of the very debts which the maker of the deed desired to secure, the purchaser acquired a good title.

Our excuse for not noticing what seems to be familiar learning on the merits of the case, is that the whole argument at bar was devoted to the question, whether by power of the statute, title to land in this State does not pass by deed duly registered without the ceremony of *"livery of seizin,"* or the necessity for a consideration which applies only to deeds operating under the statute of uses and not to conveyances operating by transmutation of possession.

Judgment reversed and under the case agreed judgment for the defendant.

Per curiam.

Judgment reversed.

Cited: Ivey v. Granberry, 66 N.C. 229; *Triplett v. Witherspoon,* 74 N.C. 476; *McMillan v. Edwards,* 75 N.C. 82; *Hare v. Jernigan,* 76 N.C. 474; *Morris v. Pearson,* 79 N.C. 260; *Riggan v. Green,* 80 N.C. 238; *Love v. Harbin,* 87 N.C. 252; *Savage v. Lee,* 90 N.C. 324; *Taylor v. Eatman,* 92 N.C. 608; *Rowland v. Rowland,* 93 N.C. 221; *Southerland v. Hunter,* 93 N.C. 312; *Taylor v. Taylor,* 112 N.C. 33; *Gray v. Hawkins,* 133 N.C. 4; *Weeks v. Wilkins,* 134 N.C. 521; *St. James v. Bagley,* 138 N.C. 389; *Bryan v. Eason,* 147 N.C. 292; *Jones v. Jones,* 164 N.C. 324.

(288)

THE STATE v. LEE DUNLOP.

When, on the trial of a prisoner, a prayer on his behalf for instructions assumes certain facts to be in proof, and in the opinion of the Judge there is no evidence tending to prove them, he ought to say so, and thus disembarrass the jury of the consideration both of the assumed facts and of the questions of law predicated on their assumption.

When instructions are asked for upon an assumed state of facts, which there is evidence tending to prove, and thus questions of law are raised which are pertinent to the case, it is the duty of the Judge to answer the questions so presented and to instruct the jury distinctly what the law is, if they shall find the assumed state of facts to be true, and so in respect to every state of facts which may be reasonably assumed upon the evidence.

If the charge of a Judge on a trial for murder is correct as a general essay on homicide, and his propositions taken generally are supported by the authorities; still it is not a full compliance with the statute, Rev. Code, ch. 31, sec. 130, which requires the Judge to declare and explain to the jury, the law arising on the evidence.

A person indicted in the same bill as an accessory with the prisoner in the murder, although not on trial with him, is an incompetent witness.

What the bystanders may say immediately after a homicide has been committed is not competent evidence.

THIS was an indictment of the prisoner for the murder of one James A. Gleason, tried at the last term of the Superior Court for the County of LINCOLN, before his Honor, *Judge Logan*. The homicide was alleged to have been committed in the City of Charlotte, but the trial was removed, at the instance of the prisoner, from the County of Mecklenburg to that of Lincoln.

On the trial many witnesses were examined, both for the State and for the prisoner, but it is unnecessary to state the testimony, as the material facts will be found in the opinion of this Court. During the progress of the trial, Burton Schenck was called as a witness for the prisoner, but was objected to by the Solicitor for the State on the ground that he was indicted in the same bill, as an accessory, with the prisoner. The objection was sustained, though the proposed wit-
ness had not removed his trial from Mecklenburg county. The (289)
prisoner's counsel offered to prove the declarations of the by-
standers immediately after the commission of the homicide, which was done by pistol shots, as to who had fired, whether the prisoner, or both, but the testimony was objected to and rejected.

The prisoner's counsel prayed for several specific instructions, which it is unnecessary to state, as the substance of them will be found in the

opinion of this Court. His Honor then, after declining to give the instructions asked for, proceeded to give his charge, in which he explained the different grades of homicide, to-wit: murder, manslaughter and excusable homicide in self-defence, stating the definitions, and setting forth the doctrines applicable to each very much as they are found in the elementary treatises on those subjects, and concluded as follows: "Necessity distinguishes between manslaughter and excusable homicide, not between manslaughter and murder. The prisoner must show mitigating circumstances when there is a killing to reduce the degree of crime. Of these the jury must be satisfied. If the jury were satisfied from the evidence that the killing was in self-defence, they should acquit the prisoner, or if they should be satisfied from the evidences that the killing only amounted to manslaughter, the prisoner should be acquitted."

The jury found the prisoner guilty of murder, and after ineffectual motions for a new trial, and in arrest of judgment, sentence of death was pronounced, from which he appealed to the Supreme Court.

Hoke and Boyden & Bailey for the prisoner.
Attorney General for the State.

RODMAN, J. It is necessary to state the evidence on each side of this case in a general way, in order to see whether the instruc-
(290) tions prayed for, and the points made by the accused, arose out of the evidence; and whether the instructions of the Judge were fairly responsive to those points.

The evidence for the State tended to prove that at an examination in the city of Charlotte touching an assault and battery, held before the Mayor of that city, in December, 1868; the deceased asked the Mayor if he allowed such language to be used in his office, (alluding to some words which it was said passed between the prisoner and one Asher, which it is not material to set out.) The Mayor replied in substance, no. The deceased then said, pointing to the prisoner, "There is a man who has called one a son of a bitch two or three times." The prisoner replied — "the man that say I called him a son of a bitch tells a damned lie." Thereupon two pistol shots were fired in quick succession. Both (it was contended, for the State,) were fired by the prisoner at the deceased, who was mortally wounded, and soon thereafter died. The deceased had no weapon.

On the part of the defendant there was evidence tending to prove, 1. That the deceased fired the first shot at the prisoner. 2. That after the utterance by the prisoner of the words above stated, (or others

substantially the same) the deceased said he could not stand that, and raised his right hand to his breast; and that the deceased had previously threatened to kill the prisoner. The prisoner contended, and his counsel in substance requested the Judge to instruct the jury.

1. That if the jury believed that the deceased fired the first shot at the prisoner, the firing by the prisoner was acting in self defence and excusable.

2. That if the prisoner did believe, and had reasonable ground to believe, that when the deceased put his hand to his heart he was about to draw a deadly weapon for the purpose of shooting the prisoner, and that the prisoner believed and had reasonable ground to believe, that he was in imminent danger of his life, or of some great (291) bodily harm, from the attack which the deceased was making or was manifestly prepared to make; and that the prisoner had no means of escape by a retreat, or otherwise than by killing the deceased, then in such case, the killing was in self-defence, and excusable; or if, the other circumstances being as supposed, he could have retreated but did not attempt to do so, then in such case the killing was only manslaughter. I have not stated the prayer of the prisoner for instructions in the words of the record, and perhaps not strictly according to its substance. It is not material to do so, as the question presented to us does not turn on the propriety of the instructions asked for, but of those which were given. The prisoner contends that he presented questions which arose upon the evidence, and to which he was entitled to have from the Judge a distinct and particular response; and that if in the opinion of the Judge there was no evidence to support any one or more of the facts which his prayer assumed to be proved, he was entitled to a declaration by the Judge to that effect. We think that this proposition is correct. We do not wish to be understood as implying that the Judge ought to have given either of the instructions which the prisoner actually asked for, or what we have assumed to be their substance. It may be that there was no evidence in support of several of the facts assumed as the basis of the prayer; we express no opinion on that point.

But we think that when a prayer for instructions assumes certain facts as in proof, when in the opinion of the Judge there is no evidence tending to prove them, he should say so, and thus disembarrass the jury of the consideration, both of the assumed facts and of the questions of law predicated on the assumption. A prisoner is entitled to this.

We think also that when instructions are asked for upon an assumed state of facts which there is evidence tending to prove,
(292) and thus questions of law are raised which are pertinent to the case, it is the duty of the Judge to answer the questions so presented, and to instruct the jury distinctly what the law is, if they shall find the assumed state of facts; and so in respect to every state of facts which may be reasonably assumed upon the evidence.

Upon a demurrer to a pleading or a special verdict, or case agreed, or when, in whatever way, certain facts are ascertained, it becomes the duty of the Judge to apply the law to the facts, and pronounce a judgment. In close analogy to those cases, is the case when upon issue joined, and a trial by jury, there is evidence proving one or another state of facts, according to the credibility and weight of the evidence. In such a case, the Judge cannot apply the law to any ascertained state of facts, for the facts are to be ascertained by the jury, but he must do what the circumstances admit of. To that end, he must tell the jury, if they find the facts thus, the law is thus, etc.

And this brings us to consider whether the questions which were raised by the prisoner, and which he was entitled upon the evidence to raise, were presented by the Judge to the jury, in the way in which the prisoner was entitled by the law to have them presented. There is but a single positive error in the charge of the Judge, suggested by the counsel for the prisoner, viz: his instruction that if the jury were satisfied from the evidence that the killing amounted only to manslaughter they should acquit the defendant. We pass by this exception for the present. In other respects it is conceded that the charge of his Honor is correct as a general essay on the law of homicide, and that his propositions taken generally are supported by the authorities. But the counsel for the prisoner contends that this form of instruction is not a full compliance with the statute (Rev. Code, ch. 31, sec. 130) which requires the Judge to declare and explain to the jury, the law arising on the evidence.

We concur with the counsel for the prisoner in his view of the
(293) charge of the Judge; we think it did not give that distinct and plain response to the questions raised which the statute requires. On this point the statute is only declaratory of the common law. It is impossible to frame any general formula which can supercede the distinct application of the law to the particular alleged state of facts or dispense on the part of the Judge with the active exercise of his intelligence. This duty is the *special* duty of a Judge; for this mainly is he required to possess ability and learning; and to evade or slight it, is to renounce the most difficult; but also the most useful and honorable

duty of his office. All lawyers know, that to eliminate facts, to put those which are material in their proper order, and to apply the law to them as a whole, taxes many times the strongest intellect, and always requires an amount of learning and practiced ability which a jury is not supposed to possess, and which it is evident they cannot acquire through the hearing of any general dissertation on the law, however clearly it may be expressed.

For these reasons we think the prisoner entitled to a new trial. It is unnecessary, therefore, to do more than allude to the mistake into which his Honor fell in instructing the jury that, upon an indictment for murder, they could not find the accused guilty of manslaughter. We presume that this was a mere inadvertence.

We concur with his Honor that a person indicted in the same bill as an accessory with the prisoner in the murder, although not then on trial, was an incompetent witness.

We also concur with him, that what was said by the bystanders immediately after the killing was incompetent. The case to which we were referred of *Rex. v. Lord George Gordon* (21 How. St. Tr. 534,) is not in point. There the prisoner was with a large number of persons engaged in a common unlawful purpose, and the cries of the mob were admitted as evidence of what the purpose was. In this case the *res gesta* was at an end. What the bystanders said, could only have been either the expression of their feelings, or a narrative in the past (294) tense of what they saw or thought they saw. In the first case it was immaterial; in the second, it was mere hearsay.

Judgment reversed, and *venire do novo.*

Let this opinion be certified.

Per curiam.

Venire de novo.

Cited: S. v. Matthews, 78 N.C. 537; *S. v. Jones,* 87 N.C. 556; *Kinney v. Laughenour,* 89 N.C. 368; *S. v. Kennedy,* 89 N.C. 590; *Lawton v. Giles,* 90 N.C. 379; *S. v. Rogers,* 93 N.C. 531; *S. v. Gilmer,* 97 N.C. 431; *S. v. Rippy,* 104 N.C. 757; *S. v. Boyle,* 104 N.C. 821; *S. v. Melton,* 120 N.C. 597; *S. v. Groves,* 121 N.C. 568; *S. v. Goode,* 132 N.C. 988; *Horne v. Power Co.,* 141 N.C. 58; *Baker v. R. R.,* 144 N.C. 42; *Kearney v. R. R.,* 158 N.C. 554; *Marcom v. R. R.,* 165 N.C. 260; *Smith v. Telegraph Co.,* 167 N.C. 256; *Parks v. Trust Co.,* 195 N.C. 455; *S. v. Lee,* 196 N.C. 716; *Switzerland Co. v. Highway Comm.,* 216 N.C. 458; *McNeill v. McNeill,* 223 N.C. 182; *S. v. Jackson,* 228 N.C. 658; *Fish Co. v. Snowden,* 233 N.C. 271.

THE STATE v. JOSEPH SHELTON.

Where, upon a trial for murder, there was a question whether the prisoner was in the military service of the United States on or before the 17th day of August, 1865, in order to ascertain whether he was entitled to the benefit of the Act of "Amnesty and Pardon," ratified the 22d December, 1866, and a witness testifying five years after the transaction, said that the homicide was committed "about the last of August, 1865," *it was held*, that there was some evidence, which ought to have been submitted to the jury, tending to show that the homicide was committed on or before the 17th day of August, 1865, and that it was error for the Court to instruct the jury that there was no evidence of that fact.

The Amnesty Act of December, 1866, does not embrace the case of a crime such as rape committed prior to the 1st day of January, 1866, and having no connection with war duties or war passions, but extends to the case of a prisoner who had committed a homicide prior to that time, which was directly connected with, and grew out of the events of the war, and the passions engendered by it, though he was not acting strictly under authority, or during active hostilities.

THIS was an indictment for murder, tried before *Cloud, J.*, at the Fall Term, 1870, of the Superior Court of BUNCOMBE County.

There was a verdict of guilty, and from the judgment thereon
(295) the prisoner appealed to the Supreme Court. In the view taken of the case by the Court, the facts are sufficiently stated in their opinion.

Attorney General and Cocke for the State.
M. Erwin for the defendant.

READE, J. The question is, whether the prisoner was entitled to the benefit of the State Amnesty Act, passed December, 1866.

The case sent up does not disclose the inducement to the homicide, nor the circumstances connected with it, except that as described in the indictment, it was by a pistol shot.

The case was made to turn upon the point, whether the prisoner was in the United States service when he committed the homicide. This was a question of fact for the jury to try, if there was *any* evidence tending to show that he was.

When the prisoner's counsel asked his Honor to charge the jury, that if they believed that the prisoner was in the United States service, when he committed the homicide, there was a presumption that it was done under orders, and he was entitled to amnesty; his Honor declined so to charge, saying that it did not fit this case, for that the prisoner had failed to show that he was in the service. It will be seen, there-

fore, that his Honor decided this question of fact, which he ought to have left to the jury, if there was any evidence tending to prove it.

The evidence was, that the prisoner had been authorized to recruit for the 3rd North Carolina federal regiment, and then again for the 2nd regiment, and then again as late as March, 1865, he was authorized to recruit colored troops for artillery service in the United States. And he was actively engaged in recruiting as late as 22d July, 1865, and there was no evidence that his authority has ever been revoked. It is true that there was evidence that the 3rd regiment was disbanded 17th August, 1865, and the 2nd regiment a few days be- (296) fore, but there was no evidence that the prisoner was present, or that he was a member thereof.

It would seem, that his recruiting authority did not connect him with any particular command. But suppose it did, suppose it had been shown that he was of the third regiment, and that his authority ceased when the regiment was disbanded 17th August, 1865, still it was a question for the jury, whether the homicide was before or after 17th August. The witness speaking of the transaction five years after it occurred, said it was "about the last of August," was it for his Honor to say, whether that was before or after 17th August? Suppose the witness's recollection to be reliable, what did, "about the last of August" mean? Did it mean the last day, or the last part, or half? The 17th is of the last half; and *"about"* the last half, might have left it, even before the 15th. This was clearly a question for the jury. And because it was not left to the jury, the prisoner is entitled to a *venire de novo.*

We think it proper to say further, that there was upon the trial much too narrow a view taken of the Amnesty Act.

We take it that the homicide grew out of the war—else why was amnesty considered in connection with it? for in *State v. Cook,* 61 N.C. 535, we decided that only those who committed crime by reason of their connection with the war were entitled to amnesty. As, for instance, one who committed rape, would not be presumed to commit it with his war duties, or war passions. Suppose then that the prisoner was not acting strictly under authority, or during active hostilities; yet, if the homicide was directly connected with and grew out of the events of the war, and the passions which had been engendered by it, and was committed prior to 1st January, 1866, we think the spirit, if not the very letter of the amnesty act, embraces it. If this be not so, what does the act mean by extending its provisions to 1st January, 1866? The war closed in the spring, 1865. There were no officers or privates acting under orders as late as January, 1866, cer- (297) tainly not on the Confederate side. And yet by the express terms

of the act, all who had been connected with the army on either side, and committed crimes growing out of the war up to 1st January, 1866, should have amnesty. There must have been some reason for this. The reason is manifest. In some portions of the State, and especially in the West, where this homicide was committed, the people were divided, some fighting for the United States, and some against it, and many had to leave their homes and families. These persons had to return and meet each other, and learn of the destruction of their property and the outrages to their families and friends. And our legislators knew that, just as the ocean is angry, long after the storm has passed, so the passions of men do not become calm in a day, after a war. And the object was to show the same clemency to criminals who acted under the frenzy of vengeance after the war, and up to 1st January, 1866, for outrages committed during the war, as to those who committed the outrages. Amnesty is an act of grace, to be construed liberally in favor of the subject; it being the highest respect to the government to suppose that its most amiable prerogative was not intended to be exercised sparingly. *State v. Blalock,* 61 N.C. 245.

There is error. Let this be certified.

Per curiam.

Venire de novo.

Cited: S. v. Henderson, 66 N.C. 628; *S. v. Haney,* 67 N.C. 468.

(298)

THE STATE v. WILLIAM DAVIS.

On an indictment for an affray, a plea of *autrefois convict,* before a Justice of the Peace, "in his own proper township, and that no deadly weapon was used, and no bodily injury inflicted," is insufficient, when the complaint does not set forth that the offence was committed in the township of the Justice, or that the complaint was made by the party injured, as expressly required by the Act of 1868-'9, ch. 178, sub-ch. 4, secs. 6 and 7.

A Justice of the Peace may have final jurisdiction of that kind of an affray, which consists of the fighting by consent of two or more persons in a public place, but not that of kind which is committed by one or more persons making a display of deadly weapons with violent or threatening words, or by other similar means, calculated to terrify the people. In the latter sort of cases, as no one in particular is injured, there is no injured party to complain to the Justice, and he cannot have jurisdiction, except to bind over the party to the Superior Court.

STATE *v.* DAVIS.

In the Act of 1868-'9, ch. 178, sub-ch. 4, sec. 6, the provision "that the complaint shall not be made by collusion with the accused," does not apply to the case of a disdeameanor, such as a battery, where there is both a public wrong, and a private injury, and the party injured accepts from the aggressor satisfaction for his injury, but to the case where the complaint is not made *bona fide*, but under terror, or is induced by some fraudulent practice, or is for some fraudulent end. In such latter case the Justice should decline the final jurisdiction, and bind the offender over to the Superior Court.

THE facts of this case are sufficiently stated in the opinion of the Court.

Attorney General and F. H. Busbee for the State.
No counsel for the defendant.

RODMAN, J. The defendant was indicted with one Jones at Spring Term, 1870, of JOHNSTON Superior Court, before his Honor, *Watts, J.*, for an affray by fighting together in a public place. He pleaded a former conviction before a Justice of the Peace "in his own proper township, and that no deadly weapon was used and no bodily injury inflicted." He produced in evidence in support of his plea, a (299) transcript of the proceedings before a Justice, from which it appeared that the complaint to the Justice was made by one Gupton against both Davis and Jones, and it did not appear that the offence was committed in the township of the Justice; Davis was convicted and fined by the Justice; it did not appear that Jones was ever arrested or tried by the Justice. His Honor thought the plea sufficient and that it was sustained by the evidence, and directed the issue to be found for the defendant, from the judgment thereupon the State appealed.

We do not concur with his Honor. The plea was defective in two particulars; it did not set forth (nor did the transcript produced show) that the offence was committed in the township of the Justice, or that complaint was made by a party injured, both of which are expressly required by the Act of 1868-'69, (ch. 178, sub chapter 4, secs. 6-7.) This mere reference to the statute would be sufficient for the decision of this case. But the more general question was discussed at the bar, whether a Justice has jurisdiction of an affray for final judgment in any case. We think the question a plain one. The term affray means some disturbance of the public peace to the terror of the people. It may be by two or more persons fighting together by mutual consent in a public place, or by one or more persons making a display of deadly

weapons with violent or threatening words, or by other similar means, calculated to terrify the people, although no assault is actually made on any person, and there is no actual breach of the peace. In the latter sort of cases, as no one in particular is injured, there is no injured party to complain to the Justice, and he cannot have jurisdiction, except to bind over to the Superior Court. In the case where two or more fight by mutual consent, each may be convicted of an assault and battery, consequently any one may complain against the others, and a case is presented in which by the statute the Justice has jurisdiction.
(300) As was said in *State v. Johnson,* 64 N.C. 581, the evident object in requiring the complaint to be made by the injured party, is to prevent that an aggressor who has committed a serious battery should evade proper punishment by bringing the case before a Court having such limited power to punish. This provision of the statute is essential, as without it, the most flagrant crimes might escape under an abuse of the Justice's jurisdiction. Whereas, if the jurisdiction be assumed only upon the complaint of the injured party, there can be little danger that he will underestimate his own injuries, or bring his case before a Court inadequate fully to punish them.

For fuller understanding of the policy of the statute it may be proper to advert to another provision in sec. 6, viz: "that the complaint shall not be made by collusion with the accused." The law forbids and punishes the compromise of a felony, yet, there are many misdemeanors which although they are public wrongs, yet are also, and in an especial degree, wrong to a particular person, for, which damages may be recovered in a private action. In this class of cases, especially when the offence to the public, is of a minor character, it has always been deemed permissable in weighing the punishment for the offence in a criminal action, to inquire whether or not the offender has made satisfaction to the party injured, and in order that he may do so, to allow him to speak with the prosecutor; and in case he has done so, to consider it in mitigation of the punishment. Sec. 1, Chit. Cr. Law, 430, 498, 665. 1 Leach 111. *Keir v. Leeman and Pearson,* 6 A. and E.N.S. 308, 51 E.C.L.R.

This practice has prevailed in this State; and the principle on which it is founded has not been interfered with by the statute. That the injured party has been induced to make the complaint before the Justice, by reason that he has received satisfaction from the offender, cannot be considered "collusion" within the meaning of the statute; for what the law not only permits and sanctions, but encourages, and through
(301) a civil action enforces, can never be held an illegal collusion. The collusion which it was intended should exclude the final

jurisdiction of a Justice, is an unlawful or fraudulent one; as where the complaint is made not *bona fide*, but under terror, or is induced by some fraudulent practice, or is for some fraudulent end. In such case the Justice should decline the final jurisdiction, and bind the offender over to the Superior Court.

Judgment reversed and *venire de novo.*

Per curiam.

Venire de novo.

Cited: Street v. Bryan, 65 N.C. 619; *S. v. Perry,* 71 N.C. 525.

THE STATE v. REUBEN J. T. HAWES AND OTHERS.

A warrant issued by a Justice of the Peace at the instance and upon the oath of a prosecutor, may be taken as the complaint of such prosecutor, but to give final jurisdiction to a Justice of the offence therein charged it must, under the Act of 1968-'9, ch. 178, sub-ch. 4, sec. 6, allege that the complaint is not made by collusion with the accused, and without such allegation, a conviction under it will not sustain the plea of *autre fois convict.*

A warrant for an offence within the jurisdiction of a Justice of the Peace, under the Act of 1868-'9, ch. 178, sub-ch. 4, sec. 6, may be issued by a Justice who does not reside in the township where the offence was committed, but it must be returned before, and tried by, a Justice who does reside in such township.

THIS was an indictment for an assault and battery upon one Edward Hall, tried before his Honor, *Buxton, J.*, upon the plea of *autrefois convict* at the last Term of the Superior Court of the County of DUPLIN. In support of their plea the defendants produced a warrant in the following words:

"STATE OF NORTH CAROLINA,

To the Sheriff or other lawful officer of Duplin County— (302)
GREETING:

WHEREAS, Information on the oath of Edward Hall, of said County, has been made to me, J. J. Ward, one of the Justices of the Peace of said County, that W. B. Hawes, John H. Blanton, Jacob D. Matthis, and R. J. T. Hawes, late of said County, did with force and arms at

and in the County of Duplin aforesaid, and in the Township of Magnolia, on the 31st day of December, A.D. 1869, commit an assault on the body of the said Edward Hall, against the peace of the State, then and there being. These are, therefore to command you to apprehend the said W. B. Hawes, John H. Blanton, Jacob D. Matthis and R. J. T. Hawes, and have them before me or some other Justice of your County, to answer to the said charge, and be further dealt with according to law. Whereof fail not, and of this warrant make due return. Given under my hand this 4th of January, 1870.

(Signed) J. J. WARD, J. P."

The warrant was executed, and the defendants were taken before James E. Kea, another Justice of the County, who rendered the following judgment:

"It is ordered and adjudged that the defendants, Wm. B. Hawes and R. J. T. Hawes do pay a fine of $5 each and costs, and that defendants John H. Blanton and Jacob D. Matthis pay costs and be discharged.

JAS. E. KEA, J. P."

January 8th, 1870.

It appeared that the Justice, J. J. Ward, did not reside in the Township of Magnolia, but that the Justice Jas. E. Kea, who tried the case and gave the judgment, did reside in said township. His Honor was of opinion that the warrant might be treated as a complaint in writing and under oath of the party injured; but he held it to be insufficient under the act of 1868-'9, ch. 178, sub ch. 4, to give the Justice
(303) of the Peace final jurisdiction of the offence, because it omitted to aver that the complaint was not made by collusion with the accused. Under this ruling of his Honor, the jury found against the defendants upon their plea of *autrefois convict* and pronounced a judgment, from which they appealed.

No counsel for the defendant.
Attorney General for the State.

SETTLE, J. The judgment is affirmed, for the reason given by the presiding Judge, to-wit: that the warrant, (which he considered as a complaint in writing, in which view we also concur,) contains no averment negativing collusion with the accused.

This is perhaps the most essential requisite prescribed by the Legislature in order to give a Justice of the Peace jurisdiction in criminal matters, for the great objection heretofore urged to conferring upon them this jurisdiction has been that by collusion, grave offences against the State would be compromised before these inferior Courts, to the exclusion of the jurisdiction of the Superior Courts, thereby scandalizing public justice. To meet this objection the Legislature has, as we think wisely, erected this barrier, which must appear in every complaint in order to give jurisdiction.

This disposes of the case before us, but we will call attention to the fact, which appears upon the record, that while the offence was committed in Magnolia Township, the warrant was issued by a Justice of the Peace, residing in Rockfish Township. It was, however, returned before and tried by a Justice residing in Magnolia Township. We see no objection to this practice. There is nothing in the act regulating the jurisdiction of Justices of the Peace in criminal actions, which require the warrant to be *issued* by a Justice of the (304) Township in which the offence was committed. The restriction is that no Justice shall have final jurisdiction to *determine* any criminal action or proceeding for any offence whatever, unless it shall appear on the complaint, and upon proof before him, that the offence was committed within his Township.

It will doubtless be found very convenient, and in furtherance of the ends of public justice, that warrants may be *issued* by any Justice of the County, to be returned before a Justice of the Township in which the offence was committed.

Per curiam.

Judgment affirmed.

NOTE.—The cases of the *State v. Bob Mooney*, and *State v. Amos Hyder*, decided at the present term, presented the same question as to the want of an averment in the warrant or complaint that there was no collusion between the defendant and the party injured, and were decided as in the above case of the *State v. Hawes*.

Cited: S. v. Gardner, 72 N.C. 381; *S. v. Jones*, 88 N.C. 681.

(305)

THE STATE v. JOHN D. JACKSON.

Where a prosecutor, being drunk and partially paralized and having a belt with money around his body, was sitting with his head bent down, and alone with the defendant in his bar-room, the latter gently removed the belt and money from the prosecutor's body, upon which the prosecutor, raising his head and seeing the belt in his hand, asked him to give back his money to which he replied, "no, I'll keep it," and afterwards, upon the prosecutor's stepping out for a moment, the defendant refused to let him come in again, and never returned his belt or money, *it was held*, that these facts tended to prove a *larceny* of the belt and money by the defendant.

It is a sufficient carrying away to constitute the crime of larceny, that the goods are removed from the place where they were, and the thief has, for an instant, the entire and absolute possession of them.

INDICTMENT for larceny, found in the Superior Court of CUMBERLAND County, but removed by the defendant to HARNETT and tried in the Superior Court of that County at the last term, before his Honor, *Judge Buxton.*

The evidence on the trial was substantially; that the prosecutor, some time in the month of March, 1870, was in the defendant's bar-room, in the town of Fayetteville, having around his body, next to his skin, a cloth belt containing money in United States Treasury notes, National Bank notes, two promissory notes of individual persons and some other papers; that he was sick, and his suspenders becoming unbuttoned, a Mr. Davis who was there remarked upon it when the defendant's bar-keeper went to the prosecutor and buttoned them up, and in doing so, said that the prosecutor had money on his person; that Davis made light of it, when the bar-keeper pulled up his shirt, the defendant being then in the room about four feet from him; that the prosecutor remained in the room sitting down, feeling very sick with his head bent down and his eyes shut, when he felt the hand of the defendant, who was then the only other person in the room, at
(306) his left side, and raising up saw the wad of packages in his hand, and told him to give back his money, to which the defendant replied, "No, I'll keep it;" that he, the prosecutor, then went out and soon came back to the defendant's bar-room, when he told him to go out, and put his hand on him, and he left; that he, the prosecutor, returned next morning and asked defendant for his money, when he said that he did not have it, and had lost it; that the prosecutor had never recovered it; that before the belt with the money was taken, the prosecutor had on the same day deposited with the defendant, for safe

keeping, his pocket-book, containing some money, and his shawl, neither of which articles had ever been returned to him.

The defendant's counsel insisted that if this evidence were taken to be true, it was not sufficient to support the charge of larceny, for that it proved only a trespass.

His Honor instructed the jury that if the defendant took the articles from the person of the prosecutor, under the circumstances testified to by him, with the intent to appropriate them to his own use, they should find him guilty of larceny. There was a verdict of guilty, upon which judgment was given, and the defendant appealed.

B. & T. C. Fuller for the defendant.
Attorney General for the State.

SETTLE, J. The defence relied mainly upon the authority of the *State v. Deal,* 64 N.C. 270, but the facts of the two cases are so dissimilar, that we cannot perceive the analogy between them. In *Deal's* case deception was resirted to, in order to get possession of the bond, which was the alleged subject of larceny, but the deception was practiced upon a man in the full possession of all his faculties, and only extended to getting possession of the bond, and was not calculated nor intended to conceal the fact that he did have the bond, or to evade the law. Further, he got possession of the bond under a (307) claim of right, saying, "now I have got it and you won't get it again," and when the prosecutor seized his hand, Deal broke loose and picked up an axe, which he kept until he reached his horse, saying Tom (who was a son of the prosecutor and one of the sureties to the bond) had sent him word to get the bond as he could or might. He rode away saying, if the prosecutor would make him a title, he would pay for the land. Here the defendant evidently took advantage of the drunken condition of the prosecutor. The bar-keeper, while fastening the suspenders of the prosecutor, discovered his belt of money, and called the attention of the bystanders to it. If the defendant, who was then within four feet, had at that time, in the presence of witnesses, taken his money to keep for him, it would have been an honest, friendly act; but he waited until all had gone, and he alone was left in his bar room with the prosecutor, who was sitting with his head bent down and his eyes shut, stupefied with liquor and benumbed with paralysis, when a transaction occurs, which the prosecutor describes by saying, "I felt his hand on my left side and raised up and saw the wad of packages in his hand." When requested by the prosecutor to give back his money, he replies, "no I'll keep it." He was not so anxious to take

care of the prosecutor as he was of his money, for when the prosecutor left the bar room and stepped to the next door for a moment, upon his return the defendant ordered him out, and put his hand upon him in order to hasten his movements. These, with other facts set forth in the statement, fully justify his Honor's charge, that "there was evidence to go to the jury upon the count for larceny."

At the time of the taking, the prosecutor was apparently in a situation not to know what was going on, or even if he should be aroused for a moment, the defendant may well have calculated that all remembrance of a transaction done so gently, and in a manner
(308) not to make an impression on his beclouded mind, would pass away before he became sober.

But the jury, having by their verdict, established the guilty intent of the taking, it only remains for us to see if there was a sufficient asportation to constitute the offence of larceny. The offence was complete the moment the defendant severed the belt from the person of the prosecutor, and got it fully into his own possession. The evidence is, that "the wad of packages" was already in the hands of the defendant when the prosecutor raised up.

In *Lapier's* case, 1 Leach. Cr. L. 320, it is held that tearing an ear ring loose from a lady's ear is a sufficient carrying away to constitute the offence of larceny, although the ring was only removed from the ear and lodged in the curls of her hair, where she found it upon reaching home.

Lapier's case, with others there cited, establish the principle that it is a sufficient carrying away to constitute the offence of larceny, if the goods are removed from the place where they were, and the felon has for an instant the entire and absolute possession of them.

Judgment affirmed. Let this be certified.

Per curiam.

Judgment affirmed.

Cited: S. v. Jones, 65 N.C. 397; *S. v. Buckley,* 72 N.C. 361; *S. v. Carpenter,* 74 N.C. 233; *S. v. Green,* 81 N.C. 562; *S. v. Gray,* 106 N.C. 735.

(309)

STATE v. HARVEY BUTLER AND HARDY JOHNSON, JR.

An indictment at common law for larceny in stealing a cow is not supported by proof that the cow was shot down, and her ears cut off by the defendants. Such acts would have supported an indictment for malicious mischief, or an indictment, under the Act of 1866, ch. 57, for injuring live stock with intent to steal them.

THE defendants were indicted for larceny at common law in stealing a cow, and on the trial at the Fall Term, 1870, of the Superior Court of BERTIE County, before his Honor, *Judge Pool*, it was proved that the cow was badly shot, and her ears were cut off. The defendants' counsel contended that no larceny of the cow had been committed, and asked his Honor so to instruct the jury, but he charged them that if they believed the defendants had shot the cow down with intent to steal her, and in the attempt to appropriate her feloniously to their use had cut off her ears, they were guilty of larceny. There was a verdict of guilty, and from the judgment thereon, the defendants appealed.

Busbee & Busbee for the defendants.
Attorney General contra.

DICK, J. Cattle in the range are in the constructive possession of the owner, and are the subjects of larceny. When it is larceny to steal the animal itself, it is so to steal its product; as to take milk from a cow or to pluck wool from the backs of sheep, if done *animo furandi*. *Martin's* case, 1 Leach 171; but the articles taken must be set out *eo nomine* in the indictment. To cut off and take away the ears or tail of a cow, might be malicious mischief, or might be indictable under the Act of 1866, ch. 57; but it would not be larceny, as they are of no value as articles of property. It is certain that a person cannot be convicted on an indictment at common law, for stealing a cow upon evi-
dence that only the ears were taken. (310)

Merely shooting down an animal with felonious intent, is not an asportation sufficient to constitute a larceny of the animal. 2 Bishop 807. To supply this defect in the common law, and to afford protection to the owners of domestic animals, several statutes were passed in England at various times which were replaced by 24 and 25 Victoria ch. 96. Roscoe 351. An Act for the same purpose was passed in this State, making it a misdemeanor punishable as larceny for a person to pursue, kill or wound any horse, cattle, etc., "with the intent unlawfully and feloniously to convert the same to his own use." Act, *supra*.

William's case, 1 Moody 107, was an indictment under 14 Geo. 2, and contained two counts. The first count charged the prisoner with stealing three sheep, etc. The second count was for killing the sheep with intent to steal the whole of the carcasses.

It appeared in evidence that the sheep were in the field of the prosecutor on a certain evening, and early the next morning, they were found killed and cut open, and the fat taken out and carried away, etc. The Judges held that the second count was supported; but not the first, which was for larceny.

The indictment in this case, is not under the Act above referred to, but is for larceny at common law; and we are of the opinion, that there was *no evidence* of an asportation of the cow to be submitted to the jury.

There was error in the charge of his Honor, and there must be a *venire de novo.*

Let this be certified.

Per curiam.

Venire de novo.

Cited: S. v. Alexander, 74 N.C. 233; *S. v. Fulford,* 124 N.C. 800.

(311)

THE STATE v. WILEY KENT.

A person may be convicted of larceny upon evidence connecting him with the theft though the article stolen may not be identified, or even found.

A change in the punishment of larceny from whipping and imprisonment at common law to imprisonment in the State's prison or County jail for not less than four months nor more than ten years, is not liable to the objection of an *ex post facto* law. The rule is, not that the punishment cannot be *changed,* but that it cannot be *aggravated.*

The military order of Gen. Sickles, forbidding corporal punishment, could not have had any greater effect than merely to *suspend* the law; and as soon as the order ceased, the law was restored to be administered as before.

THE defendant was indicted for larceny, in stealing eight pieces of bacon, and was tried before his Honor, *Judge Cloud,* at the Spring Term, 1870, of ROWAN Superior Court.

On the trial, the prosecutrix testified that she had lost eight pieces of bacon, and there was much circumstantial evidence tending to con-

nect the defendant with the theft; and among other things it was proved that the prosecutrix had recovered about fifty pounds of meat which she claimed as hers; that it was not smoked and had a yellow mould on it, but there was no other evidence of the identity of the stolen meat.

The defendant's counsel contended that there was no evidence that the meat found was parcel of the meat stolen, but his Honor left it to the jury to say whether the meat had been sufficiently identified as the property of the prosecutrix. To this ruling the defendant excepted.

The defendant was convicted, and thereupon it was insisted in his behalf, that as the larceny was committed on the 26th of April, 1868, the several acts passed since that time relating to punishment, so far as the same authorized imprisonment in the Penitentiary for larceny, could have no application to his case, and that the defendant should be imprisoned in the common jail. (See Acts of 1868, ch. (312) 44, sec. 5, and 1868-'69, ch. 167, sec. 9.)

His Honor, however, being of a different opinion, sentenced the defendant to imprisonment in the Penitentiary for the term of three years, from which judgment he appealed to the Supreme Court.

Bragg and Boyden & Bailey for the defendant.
Attorney General for the State.

READE, J. We do not see any force in the defendant's first exception: "That the bacon *'found'* was not sufficiently identified as the bacon that was *stolen.*"

Suppose that was so; or suppose no bacon had been found at all, still there was evidence that bacon had been stolen and that the defendant was connected with the theft, the jury were authorized to convict. There was, however, evidence that the bacon found, was the bacon stolen. The prosecutrix testified that her bacon was unsmoked and had a yellow mould on it. The bacon found was unsmoked and had yellow mould on it, and she believed it was hers. And the defendant pointed out the place where the bacon was found and spoke of it as hers.

The punishment of larceny at common law was infamous—whipping and imprisonment. The statute passed since the commission of the offence charged, changes the punishment to confinement in the Penitentiary. And the objection is taken that the statute is *ex post facto* and void.

The rule is, not that the punishment cannot be *changed,* but that it cannot be *aggravated.*

And the change in this case would seem to be a mitigation. *State v. Ratts,* 63 N.C. 503.

At the time of the commission of this offence Gen. Sickles' military order forbidding corporal punishment was in force. And there-
(313) fore it is objected that no corporal punishment can be inflicted for that act.

Whatever force there was in the military order it was not more than to *suspend* the law. And as soon as the order ceased the law was restored to be administered as before.

There is no error. This will be certified.

Per curiam.

Judgment affirmed.

Cited: S. v. Jenkins, 78 N.C. 473; *S. v. Lawrence,* 81 N.C. 526; *Varner v. Arnold,* 83 N.C. 210; *S. v. Massey,* 103 N.C. 361; *S. v. Hullen,* 133 N.C. 659; *In re Holley,* 154 N.C. 170.

THE STATE v. WILLIAM BELL.

Where, in an indictment for larceny, it was charged that the article stolen was the property of H. Hoffa, whose given name was to the jurors unknown, and it was testified by witnesses that they knew of no other name of the owner of the article than H. Hoffa, *it was held,* that there was no variance between the allegation and the proof.

The owner of an article charged to have been stolen, may have a name by reputation, and if it be proved that he is as well known by that name as any other, a charge in an indictment by that name will be sufficient.

If a person usually signs his name with only the initials of his christian name; and he is thus generally known and designated, he may be properly indicted by such name.

THE defendant was indicted and tried at the last Term of the Superior Court of WAKE County, before his Honor, *Judge Watts,* for stealing a valise, the property of H. Hoffa, whose given name was to the jurors unknown.

On the trial it was proved on behalf of the State by Dr. G. W. Blacknall and others that the owner of the valise stolen by the defendant was H. Hoffa. The defendant's counsel contended before the jury that the proof of the owner of the property being H. Hoffa, there was a fatal variance, and asked the Court so to charge, but

his Honor held that there was no variance and that the indict- (314) ment was sufficient, and not bad for uncertainty. The jury returned a verdict of guilty, and after ineffectual motions for a new trial, and in arrest, judgment was pronounced, and defendant appealed.

A. M. Lewis for the defendant.
Attorney General for the State.

DICK, J. The indictment charges, that the valise stolen was the property of "H. Hoffa whose given name is to the jurors unknown." The witness proved that the property stolen belonged to H. Hoffa, and gave no information as to the "given" or christian name of the owner. The proof, therefore, corresponded with the allegation, and there was no variance—and the jury properly convicted the defendant.

The motion in arrest of judgment was properly overruled. The technical precision required in the old forms of indictment are not now strictly observed in criminal proceedings, and judgment will not be arrested where sufficient matter appears to enable the Court to proceed to judgment. Rev. Code, ch. 35, sec. 14.

The name of the owner of property stolen is not a material part of the offence charged in the indictment, and it is only required to identify the transaction, so that the defendant by proper plea may protect himself against another prosecution for the same offence. The indictment may charge that the owner is to the jurors unknown. In all cases the charge must be proved as laid. The owner may have a name by reputation, and if it is proved that he is as well known by that name as any other, a charge in the indictment in that name will be sufficient. *State v. Angel,* 29 N.C. 27. *State v. Godet,* Id. 210. *Stroud's* case, 2 Moody C. C. 270. *Rex v. Norton, Russ and Ryan,* 510.

If a person usually signs his name with only the initials of his christian name, and he is thus generally known and designated, (315) he may be properly indicted by such name. 7 Bac. Ab. 8. *State v. Stephen,* 11 Georgia 225.

In this case H. Hoffa is known by no other name, and the charge in the indictment is sufficient to identify the transaction and accomplish the purposes of the law.

There is no error and the judgment must be affirmed.

Let this be certified.

Per curiam.

Judgment affirmed.

Cited: S. v. Grant, 104 N.C. 910; *S. v. Law,* 227 N.C. 104; *S. v. Law,* 228 N.C. 444.

THE STATE v. WILLIAM HOUSE.

An otter is an animal valuable for its fur, and though it be one *ferae naturae,* yet, if it be reclaimed, confined or dead, the stealing it from its owner is larceny.

It is error to quash an indictment which charges in one count the stealing one otter, confined in the trap of one J. D. P., and in another count "a certain dead otter of the value of one dollar of the goods and chattels of the said J. D. P."

THIS was an indictment against the defendant, in which he was charged in one count with stealing "one otter confined in the trap of one John D. Parish, of the value of one dollar, of the goods and chattels of the said John D. Parish." A second count charged that the otter was dead.

At the last term of the Superior Court for the County of JOHNSTON, the defendant's counsel moved the Court, his Honor, *Watts, J.,* presiding, to quash the indictment upon the ground that the thing stolen was not the subject of larceny. The motion was granted and the defendant ordered to be discharged, whereupon the Solicitor, Cox, appealed to the Supreme Court.

(316) *No counsel for the defendant.*
Attorney General for the State.

SETTLE, J. There was error in quashing the indictment, on the ground that the thing stolen was not the subject of larceny.

An otter belongs to the class of animals known as *ferae naturae,* and therefore it was necessary to allege in the indictment that it had been reclaimed or confined or that it was dead. This is done in the indictment under consideration. It was not suggested that animals *ferae naturae* are not the subject of larceny, provided they are fit for the food of man and are dead or confined, but we apprehend that his Honor acted upon another distinction laid down in the English authorities, to-wit: that there is a class of animals which, though they may be reclaimed, are not such of which larceny can be committed, by reason of the baseness of their nature.

All of the distinctions as to animals *ferae naturae* and as to their generous or base natures, which we find in the English books, will not hold good in this country. The English system of game laws seems to have been established more for princely diversion than for use or profit, and is not at all suited to the wants of our enterprising trappers.

We take the true criterion to be, the *value* of the animal, whether for the food of man, for its fur, or otherwise. We know that the otter is an animal very valuable for its fur, and we know also that the fur trade is an important one in America, and even in some parts of North Carolina. If we are to be bound absolutely by the English authorities, without regard to their adaptation to this country, we should be obliged to hold that most of the animals so valuable for their fur, are not the subject of larceny, on account of the baseness of their nature, while at the same time we should be bound to hold that hawks and falcons, when reclaimed, are the subject of larceny in respect of their generous nature and courage. (317)

There was error. Let this be certified.

Per curiam.

Judgment reversed.

Cited: S. v. Krider, 78 N.C. 482; *S. v. Holder,* 81 N.C. 527; *S. v. Bragg,* 86 N.C. 691; *S. v. Gallop,* 126 N.C. 982; *S. v. Horton,* 139 N.C. 597; *S. v. Barkley,* 192 N.C. 186.

THE STATE v. DAVID FANN.

A person employed as a "field hand," working by the day, week or month, has no charge of his employer's money, and if the latter entrust him with money and he embezzles it, he is not guilty of larceny.

THIS was an indictment for larceny, in stealing Bank and United States Treasury notes, tried before his Honor, *Watts, J.,* at a Special Term of the Superior Court of WAKE County, held in January, 1871.

At the trial, it appeared that the defendant was in the employ of one Cook, working for him as a "field hand" by the day, week or month; that on a certain occasion, Cook, being very much intoxicated, entrusted him with a roll of money, wrapped up in paper, to take care of for him; that afterwards the money was found to be missing, and

there was evidence tending to show that the defendant had fraudulently appropriated it to his own use.

His Honor was requested by the defendant's counsel to instruct the jury that if he, the defendant, received the money from his employer to keep for him, he was not guilty of larceny, though he subsequently appropriated it to his own use, denying that he knew anything about it. His Honor refused so to charge, but instructed the jury that if the defendant, after receiving the money from his employer to keep for him, subsequently appropriated it to his own use with a fraud-
(318) ulent intent, he was guilty of larceny.

The jury found a verdict of guilty, upon which a judgment was rendered, and the defendant appealed.

Battle & Sons for the defendant.
Attorney General and Fowle for the State.

DICK, J. Where a master having possession of goods, entrusts them to the care and custody of his servant, and the servant fraudulently converts them to his own use, he is guilty of larceny, as the goods remained in the constructive possession of the master. *State v. Jarvis,* 63 N.C. 556.

This strict rule of the common law was adopted for the purpose of protecting masters against the depredations of their servants—but it was not applicable in England to the case of a dishonest bailee until the enactment of the statute of 24 and 25 Victoria, and it has been held that the provisions of that statute do not apply to a bailment of money. Roscoe 584. The rule of the common law is still in force in this State, and is very clearly expressed in the case of *Rex v. Banks, Russ v. Ryn,* 441, which overrules the doctrine laid down on this subject in 2 East. P. C. 690-695, and 2 Russell, 1089. "If the owner parts with the possession of goods for a special purpose, and the bailee when that purpose is executed, neglects to return them, and afterwards disposes of them, if he had not a felonious intention when he originally took them, his subsequent withholding and disposing of them, will not constitute a new felonious taking, or make him guilty of felony." It is also well settled, that if goods are delivered to a bailee and he *breaks bulk,* and fraudulently appropriates a part of the goods to his own use, this is a determination of the bailment, and the bailee is guilty of larceny. Roscoe 583.

The only question presented in the case before us, is whether the prisoner was a servant, or a bailee of the prosecutor. The pris-
(319) oner was employed as a "field hand" and as such had the charge

and custody of such property as he used in the course of husbandry, but had no custody or control of the money of the prosecutor. He was not a slave and subject to the orders of a master in all respects, but he had certain duties to perform under contract. The money was delivered to him as a friend, and he was requested to take care of it, while the owner was intoxicated. The transaction, as proved by the witness, Mrs. Virginia Cope, constituted the prisoner a bailee of the money, and as he acquired possession lawfully, his subsequent dishonest conduct did not amount to the crime of larceny. *State v. England*, 53 N.C. 397.

There was error in the ruling of his Honor, and there must be a *venire de novo.*

Let this be certified.

Per curiam.

Venire de novo.

(320)

THE STATE v. SETH GASKINS.

Upon a conviction for larceny, a sentence "that the defendant be imprisoned in the State prison for one year, and in the meantime and until he is carried there, that he be imprisoned in the County jail," is sufficiently definite as to the term of imprisonment in the State prison to be valid under the Act of 1868-'9, ch. 167, secs. 9 and 10, which declares that the term "shall begin to run upon and include the day of conviction."

THE defendant, Seth Gaskins, was tried and convicted at the last Term of the Superior Court for the County of HYDE, before his Honor, *Jones, J.*, upon an indictment for larceny, where the following sentence was pronounced upon him, "that the defendant, Seth Gaskins, be imprisoned in the State's prison for one year, and in the mean time until he is carried there, that he be imprisoned in the County jail." From this judgment the defendant prayed an appeal to the Supreme Court.

Warren & Carter and Bailey for the defendant.
Attorney General for the State.

DICK, J. The judgment of the law, as pronounced by his Honor, was, "that the defendant, Seth Gaskins, be imprisoned in the State's

prison for one year, and in the mean time until he is carried there, that he be imprisoned in the County jail."

The defendant insists that this judgment is defective and ought not to be executed, as it does not specify with sufficient certainty the term of imprisonment in the State's prison.

The term of imprisonment must be fixed by the Judge within certain limits; the law declares that the term "shall begin to run upon and shall include the day of conviction." Acts 1868-'69, ch. 167, sec. 9 and 10. The judgment in this case conforms to the statute. There is no error.

Let this be certified.

Per curiam.

Judgment affirmed.

Cited: S. v. Vickers, 184 N.C. 678.

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(321)

THE STATE v. ROBERT PHIFER.

To sustain an indictment for obtaining goods by a false pretense, under our Statute, Rev. Code, ch. 34, sec. 67, there must be a false representation of a subsisting fact, calculated to deceive and which does deceive, whether the representation be in writing, or in words, or in acts, by which the defendant obtains something of value from another without compensation. But this does not extend to what are called "mere tricks of trade" by which a man puffs his goods.

The doctrine of cheating by false tokens at the common law and under the Statute of Henry 8th, and by false pretences under the Statutes of 30 George 2, ch. 24, and our Act, discussed and explained.

THIS was an indictment for obtaining goods by false pretences under the statute in the Revised Code, ch. 34, sec. 67, tried at the Special Term of WAKE Superior Court in January, 1871, before his Honor, *Judge Watts,* when the jury found the following special verdict:

"That the defendant, Robert Phifer, came to the store of the prosecutor, Leopold Rosenthal, representing himself as the son of one P. Phifer, of New York, and offering to sell goods for the house of P. Phifer & Co., to the said Rosenthal. He came to the store of Rosenthal several times and requested Rosenthal to cash several drafts on P.

Phifer & Co., which request was refused. He afterwards offered to buy of Rosenthal a diamond ring, and did obtain the said ring, paying for it by a draft upon P. Phifer & Co., which draft the defendant stated, would be paid upon presentation. Rosenthal delivered the ring to him upon the faith of the representation that he was the son of P. Phifer, and that the draft would be paid on sight. The draft was returned protested and unpaid. The defendant was not the son of P. Phifer, and knew that the draft would not be paid." Upon this verdict the Court was of opinion that the defendant was not guilty and gave a judgment accordingly, from which the Solicitor, Cox, appealed. (322)

Ovide Dupre for defendant.
Attorney General and Busbee & Busbee for the State.

READE, J. At common law, to cheat by false symbol or token, was a crime. What was such symbol or token was sometimes difficult to determine, and the decisions left it in some confusion. It was settled that it must be some *act* or *thing* as contra distinguished from mere *words.*

A further question was made, in regard to which there were contradictory decisions, as to whether the symbol or token must not be of a public character calculated to impose upon the public generally—as false weights and measures—as contra distinguished from such as were used to impose upon a private or particular individual. To remedy this last difficulty, the statute of Hen. 8 was passed, which, reciting the mischief, that the practice had grown up of "getting into possession goods and chattels, etc., by *privy* tokens and counterfeit letters in other men's names," makes such *privy* tokens indictable. This statute, added to the common law, makes all cheats by false tokens, whether of a public or private nature, indictable. But still, there must be a token, as distinguished from mere words.

But crime is fruitful in expedients. As trade increased and commerce spread out over the world, and stranger had to deal with stranger, and it became impossible for vigilance and prudence to apply the tests of truth—such as weights and measures, actual examinations, or diligent inquiry in business transactions; *words* had to be trusted. And false words were as ready to be used as false tokens. And thus it became necessary to pass the statute of 30 George II, which makes cheating by *"false pretense"* indictable.

Our statute is intended to embrace all that was indictable at common law, under Hen. 8, and 30 George II. The words of our

(323) statute are, "any forged or counterfeited paper in writing or print, or by any false token, or other false pretense whatsoever."

We have already seen what are false tokens; it is now to be considered what are false pretenses under 30 George II, and under our statute.

The objection is taken, that false pretense means the same as false token, and that in no case will mere words, however false, make out a case of guilt. To sustain the objection English authorities were cited: but we think they are misunderstood and misapplied. They are decisions under the common law and under Hen. 8, and not under George II. But the case chiefly relied on to support the objection is to be found in our own reports, *State v. Simpson,* 10 N.C. 620. In that case A said to B, I want to see the judgment you have against me, to ascertain the amount and pay it off. And when the judgment was handed to him he kept it. This was held to be not a false pretense under our statute. We are inclined to think that it was not, for reasons which will be hereafter given. And, therefore, we are not under the necessity of overruling that case.

But we cannot concur with the Court in the reasoning and definitions. Judge Henderson in delivering the opinion said: "Our own statute requires that the cheat should have been effected by means of some token or false *contrivance,* * * *," for if a cheat practiced by a bare and naked lie was designed to be brought within the statute, why insert in the specifications, false writings, tokens, etc., or why insert any specifications at all? The words "any false pretense whatsoever must, therefore, mean pretenses of the like kind, something more than a naked lie, something of the same family with those specified." There is no authority cited by the Court and the only authority cited in argument was East's P. C. Title Cheat. An Examination of East will show abundant authority to support the position that a naked lie will

(324) not do—that there must be some *token*—but they are cases at common law and under Hen. 8. And the Court seems to have given no consideration to the cases under George II, except to say incidentally that, whatever they are, they do not affect the case. The Court evidently thought that our statute differed from George II, and was only in affirmance of the common law. The error probably arose from the fact, that the case was argued on but one side, and the views and authorities presented directed the attention of the Court to cases at common law and under Hen. 8. If this be not so, and that case is to be considered as going to the length of saying that under George II, and our statute, there must be a *token,* and that words will not do, we would feel obliged to overrule it.

A false token was indictable at common law and under Hen. 8. If, therefore, George II intended no more, where was the necessity for the statute? And, surely, the attempt to distinguish our statute from George II must fail. The words in George II are "false pretense." In ours they are "or other false pretense whatsoever." No reason can be given why our statute should not embrace all that was embraced in George II. The mischief to be remedied was the same, and the words are substantially the same. It will be necessary, therefore, to consider what was settled to be a "false pretense" under George II. The learning is well digested in East's P. C., Title Cheat, and in Bishop's C. L., Title False Pretense, where all the cases may be found.

It is settled that a *promise* is not a *pretense*. No matter what the form, or however false the promise, to do something in the future, it will not come within the statute. There must be a false allegation of some subsisting fact; but there need not be any token. Lord Kenyon, Ch. J., said, "That the statute 30, George II, was considered to extend to every case where a party had obtained money by falsely representing himself to be in a situation in which he was not. (325) * * * * Hen. 8 required a token to be used, but that being found to be insufficient the statute of George II introduced another offence, describing it in terms extremely general." And Buller, J., said, "It clearly extended to cases which were not indictable at common law, or under Hen. 8." It is said in Bishop, "no representation of a future event, whether in the form of a promise or not, can be a pretense under the statute, for the pretense must relate to the past, or to the present." And, according to that definition, the facts in *Simpson's* case, *supra,* were not indictable. He professed to want to see the judgment and to pay it off, all in the future.

The following cases put in East and Bishop show how near the lines are together:

"A said to B, I will tell you where your strayed cattle are if you will pay me." Held not to be indictable. But if he had said, "I *know where they are,* and I will tell you," etc., that would have been indictable. So a man promised to marry a woman and obtained money to buy clothes," etc. Held not be to sufficient. But upon its appearing that he represented himself *to be unmarried,* he was held to be guilty. So if a man buy goods and promises to call to-morrow and pay for them, when he does not mean to do it, this is no false pretense. But if he represent himself to be of large property and able to pay, when he is not, that is a false pretense.

We have discussed these questions at some length, because it was necessary to correct the error which generally obtained from *Simpson's* case, *supra,* which, as was said at the bar, has made it almost impossible to convict for cheating by false pretense in this State.

We state the rule to be, that a false representation of a subsisting fact, calculated to deceive, and which does deceive, and is intended to deceive, whether the representation be in writing, or in words, (326) or in acts, by which one man obtains value from another, without compensation is a false pretense, indictable under our statute. But this must not be understood to extend to the mere "tricks of trade," as they are familiarly called, by which a man puffs his wares and deceives no one—as, this is an excellent piece of cloth; or, this is the best horse in the world. Against such craft, ordinary prudence is a sufficient safeguard; or if it be not, the injured party must be left to his civil remedy. Applying the rule to this case, the defendant is clearly guilty. It may be that if the defendant had bought the goods and paid for them with a draft on the New York firm, saying it would be paid on presentation, which he knew was false, it being all in the future, it would not come within the meaning of false pretense; but the defendant represented himself to be the trusted agent of a New York firm, and the son of one of the firm; and this was a representation of a subsisting fact calculated to give him a false credit, and to deceive a prudent man. This was clearly a false pretense, indictable.

There is error. This will be certified that there may be judgment as upon a verdict of guilty.

Per curiam.

Judgment reversed.

Cited: S. v. Covington, 70 N.C. 77; *S. v. King,* 74 N.C. 179; *S. v. Young,* 76 N.C. 259; *S. v. Munday,* 78 N.C. 462; *S. v. Holmes,* 82 N.C. 608; *S. v. Hefner,* 84 N.C. 752; *S. v. Eason,* 86 N.C. 675; *S. v. Dickson,* 88 N.C. 645; *S. v. Mikle,* 94 N.C. 846; *S. v. Sherrill,* 95 N.C. 666; *S. v. Dixon,* 101 N.C. 743; *S. v. Hargrove,* 103 N.C. 334; *S. v. Moore,* 111 N.C. 672; *S. v .Walton,* 114 N.C. 787; *S. v. Daniel,* 114 N.C. 825; *S. v. Mangum,* 116 N.C. 1002; *S. v. Matthews,* 121 N.C. 605; *S. v. Knott,* 124 N.C. 815; *S. v. Van Pelt,* 136 N.C. 646; *S. v. Davis,* 150 N.C. 853; *S. v. Whedbee,* 152 N.C. 773; *Montsinger v. Sink,* 168 N.C. 554; *S. v. Carlson,* 171 N.C. 824; *S. v. McFarland,* 180 N.C. 729; *S. v. Roberts,* 189 N.C. 95; *S. v. Yarboro,* 194 N.C. 501; *S. v. Howley,* 220 N.C. 117; *S. v. Hargett,* 259 N.C. 498.

(327)

THE STATE v. BARNEY BRYANT ALIAS COBB.

A private person may arrest for felony, when it appears that it is necessary, for want of an officer or otherwise, that he should do so, to prevent the escape of the felon. In making such arrest for a felony, the person making it must notify the felon of his purpose, or he will be guilty of a trespass.

It seems that a private person who, when it is necessary for him to act, attempts to arrest a felon guilty of a capital offence, such as murder or rape, may kill him if he either resists or flies, but he has no right to kill a person guilty of a felony of an inferior grade, such as theft, if he does not resist, but only attempts to escape by flight.

THE defendant was tried at the last Term of the Superior Court for the County of WAYNE, before his Honor, *Clarke, J.*, upon an indictment for an assault and battery upon one Cogdell. It appears in evidence that a hog was stolen from the defendant's employer, and that the defendant suspecting that Cogdell was the thief, went to his house and charged him with the offence, but he denied it and attempted to run off, when the defendant, after ordering him four times to stop, shot him. The stolen hog was found in Cogdell's house, partly cleaned and cut up, his wife and children being the only persons there. His Honor, upon these facts, held that the defendant was guilty and so charged the jury, whereupon a verdict of guilty was rendered and a judgment pronounced, from which the defendant appealed.

Faircloth for the defendant.
Attorney General for the State.

READE, J. The defense is put upon the ground, that a felony had been committed to the knowledge of the defendant; that he, a private person, had the right, without a warrant, to arrest the felon; that the felon fled to prevent arrest, and that the defendant shot him to prevent his escape.

It is the duty of every sworn officer, and the privilege of every private person, to prevent the commission of crime, and (328) to arrest the felon when crime has been committed.

The right of a private person to arrest without warrant, grows out of the importance of bringing offenders to trial, and the danger of escapes, when warrants cannot be readily had. But, manifestly, when the condition of things will bear it, it is best to apply to a Justice for a warrant, or, to apply to a Constable or Sheriff. But when such delay would be dangerous, a private person may arrest without a warrant,

and may call others to his assistance. "Nay, further, if the felon resists or flies, so that he cannot be taken without killing him, this is justifiable, and no felony; but still, it must be where he cannot be otherwise taken." 2 Hale's P. C., 76-7.

It must be, however, that the powers of arresting, and the means used, must be enlarged or modified by the character of the felony. The importance to society of having felons arrested in cases of capital felonies—such as murder and rape—must be much greater than in cases of inferior felonies, such as larceny. As is said in Hale's P. C. 73, in speaking of the liability of the ville, town or county for the escape of felons: "But this is only in case of felony touching the death of a man; for there the fact is apparent that the man is slain; but in case of other felony, as theft, there, though the thief be not taken, no amercement lies upon the town, or other penalty at common law." Extreme measures, therefore, which might be resorted to in capital felonies, would shock us if resorted to in inferior felonies. But, in any case where extreme measures are resorted to in making arrests, it must appear that they were *necessary,* and that the felon could not be otherwise taken. It should be noted, also, that the cases where extreme measures have been justified, have usually been cases where the felon has actually *resisted.* No man would attempt to arrest a felon if he were not allowed the advantage of overcoming the resistance (329) without subjecting himself to peril. He need not, therefore, engage with the felon on equal terms, but may overcome resistance with superior force, even to the extent of killing the felon if it be necessary. Yet it is said: "It behooveth them to be very careful that they do not misbehave themselves in the discharge of their duty, for if they do, they may forfeit this special protection." Foster, chap. 8 § 18, p. 319.

In the quotation from *Hale, supra,* it is said that killing the felon may be justified if he "resists or flies." This would seem to put resistance and flight upon the same footing. But this must be understood with some modification. In case of resistance and conflict, the resistance must be overcome *then* and *there,* because, not only is the arrest of the felon involved, but the safety of him who is rightfully making the arrest. But ordinarily there is not the same urgency in case of flight; for, although he be not arrested then and there, yet he may be arrested at another time and place. So it would seem, that, at any rate, there ought to be pursuit, or a certainty of escape, before killing could be justified—else how does it appear that he "could not be otherwise arrested?"

It is necessary in all cases that the person making the arrest should make known his purpose; else he may be treated as a trespasser.

Applying these principles to the case before us the defendant is clearly guilty. Suspecting, justly as it seems, that a felony—larceny—had been committed he did not go to a magistrate for a warrant, nor to a constable or sheriff; but took his gun and went to the felon's house, and called him out. He did not inform the felon that he had come to arrest him, nor command him to surrender; but told him that he had "come to look for that stolen hog." The felon said, "the hog is not here," and ran off. The defendant ordered him to stop, four times, and shot him. There was no pursuit, no resistance. The (330) defendant did not inform the felon that his purpose was to arrest him; and the felon may have reasonably supposed that his purpose was to kill him; and was running to save his life. There is nothing in the case to show even a probability, that if the felon escaped *then*, he could not be arrested at some other time or place. So, there was no *necessity* to kill; and if the defendant had killed he would have been guilty of manslaughter at the least.

The defendant did not observe Justice Foster's injunction to "take care how he behaved himself," and therefore he "forfeited the special protection" which the law would otherwise have afforded him.

There is no error. This will be certified.

Per curiam.

Judgment affirmed.

Cited: S. v. Belk, 76 N.C. 14; *S. v. Shelton,* 79 N.C. 607; *S. v. Campbell,* 107 N.C. 953; *S. v. Stancill,* 128 N.C. 610; *S. v. Greer,* 162 N.C. 656; *S. v. Beal,* 170 N.C. 767; *S. v. Fowler,* 172 N.C. 911; *S. v. Dunning,* 177 N.C. 563; *S. v. Burnett,* 183 N.C. 708; *Holloway v. Moser,* 193 N.C. 188; *S. v. Mobley,* 240 N.C. 478.

THE STATE v. THOMAS SWANN.

In an indictment, under the Act of 1868-'9, ch. 167, sec. 8, for an assault with a deadly weapon with intent to kill, it is sufficient to charge that the assault was made "with a certain pistol then and there loaded with gunpowder and one leaden bullet," without stating that it is a "firearm" or "deadly weapon," because the Court can see and will take notice that a loaded pistol is both.

STATE *v.* SWANN.

An assault with a deadly weapon with intent to kill is not made a felony by the Act of 1868-'9, ch. 167, sec. 8, and therefore it is not necessary to charge that the assault was made with a felonious intent.

THIS was an indictment for an assault with a deadly weapon with intent to kill, tried before his Honor, *Cloud, J.*, at the last Term of the Superior Court for the County of McDOWELL.

The indictment was founded upon the Act of 1868-'69, ch. 167, sec. 8, and charged that the assault was made upon the prosecutor, (331) William Forney, "with a certain pistol, then and there, loaded with gunpowder, and one leaden bullet," with intent to kill him.

After conviction, the defendant's counsel moved in arrest of judgment because,

1. The bill of indictment failed to charge that the assault was made with a deadly weapon, and did not describe the weapon as being fire-arms, under the statute.

2. That the indictment did not charge that the assault was committed willfully, feloniously and with malice aforethought.

The motion in arrest was overruled, and the defendant was sentenced to the State's prison at hard labor for ten years, from which he prayed and obtained an appeal to the Supreme Court.

Attorney General for the State.
No counsel for the defendant.

READE, J. 1. It is not necessary that an indictment under a statute should be in the very words of the statute—as where the statute makes it indictable and punishable in the Penitentiary for one to shoot at another with "any kind of fire-arms," it is sufficient to charge that it was "with a certain pistol, then and there, loaded with gunpowder and one leaden bullet," because the Court can see that this is a "fire-arm."

And so it was not necessary to charge that it was a "deadly weapon" in the words of the statute; because the Court will take notice that a loaded pistol within carrying distance is a deadly weapon.

2. The statute, Acts 1868-'69, ch. 167, sec. 8, does not make the offence charged a felony, and therefore it was not necessary to charge that it was done with a felonious intent.

There is no error. This will be certified.

Per curiam.

Judgment affirmed.

Cited: S. v. Frisbee, 142 N.C. 674.

(332)

THE STATE v. JOSEPH BAKER.

Where a defendant went to the prosecutor and said "I once thought we were friends, but I understand you have said thus and so about me, and you have to take it back." The prosecutor refused to take it back, whereupon the defendant put his hand open and flat on the prosecutor's breast, and pushed him back some steps, when he fell over a flour barrel, *it was held,* to be an assault and battery.

THIS was an indictment for an assault and battery, tried before his Honor, *Judge Cloud,* at the last Spring Term of ROWAN Superior Court.

The testimony on the trial was that the parties were at a country store; that the defendant approached the prosecutor, and said, "I once thought we were friends, but I understand you have said thus and so about me, and you have got to take it back." The prosecutor said in reply, "that he would not take back anything that he had said," whereupon, the defendant put his hand, opened and flat, on the prosecutor's breast and pushed him back some steps, when the prosecutor fell over a flour barrel.

This was the only testimony, and his Honor told the jury that if they believed it, the defendant was guilty. The jury returned a verdict of guilty accordingly, and the defendant appealed.

Boyden & Bailey for the defendant.
Attorney General for the State.

READE, J. The defendant went up to the prosecutor and said, "I once thought we were friends, but I understand you have said thus and so about me, and you have got to take it back." The prosecutor refused to take it back, "whereupon the defendant put his hand, open and flat, on the prosecutor's breast and pushed him back some steps, when he fell over a flour barrel."

At first sight this seems to be so indisputably an assault and battery, that, lest it be supposed that the defendant is encum- (333)

bering the Court with trifles, it is necessary to state the ingenious shifts of his learned counsel in presenting his case.

I. "It was at a country store where politeness is not a commodity." Suppose this to be so, and make full allowance for country manners, still, there may be "rudeness" at a country store; and if this was not, then rudeness cannot be.

II. "The hand was open." So it would have been if he had slapped his face.

III. "Whether it was 'rudeness' was a question for the jury—putting the hand on being an equivocal act and might have been friendly."

Suppose the facts testified to had been embodied in a special verdict, would it not have been for the Court to say whether they made a case of guilty? Doubtless. The facts were not disputed, and, therefore, they had the same force as a special verdict. It is true that a laying on of the hand may be friendly, but here the defendant said at the time that it was not in friendship. "I once thought we were friends," said he. And he preceded the act by a threat. And the act itself was so violent and insolent as to make it unequivocal. At any rate, if it was intended as an innocent familiarity, in consonance with country manners and local custom, it ought to have been proved to have been so, by the defendant —the burden of proof was on him.

There is no error. Let this be certified.

Per curiam.

Judgment affirmed.

Cited: S. v. Jefferson, 66 N.C. 312; *S. v. Honeycutt,* 74 N.C. 391; *S. v. Freeman,* 127 N.C. 549; *S. v. Cain,* 175 N.C. 829.

(334)

THE STATE v. DAVID RAWLES AND OTHERS.

If a person be at a place where he has a right to be, and four other persons having in their possession a manure fork, a hoe and a gun, by following him and by threatening and insulting language, put him in fear and induce him to go home sooner than, or by a different way from, what he would otherwise have gone, are guilty of an assault upon him, though they do not get nearer to him than seventy-five yards, and do not level the gun at him.

When a number of persons meet together, and there is evidence tending to show a common design to commit an assault upon another, they may all

be properly found guilty, though only one of them used threatening and insulting language to him.

Where a number of persons were charged with having met together and then gone to commit an assault upon another person, and it was proved on the part of the State, that one of the number had just had a conversation with him, *it was held*, that the defendants had a right to prove the details of the conversation as a part of the *res jestae* to prove the *quo animo* of their coming together.

THIS was an indictment, in which the defendants, a father and three sons, were charged in three counts with, first an affray, secondly, a riot, and thirdly an assault upon one Charles Odom.

On the trial before *Pool, Judge,* at the last term of the Superior Court for the County of HERTFORD, the prosecutor testified that early in the morning in January, 1869, he was on the public road, engaged in putting up his fence, which had been knocked down; that he there saw the defendant, Braxton Rawles, who was going in the direction of the house of his father, David Rawles, which was about half a mile distant. He said that he had a conversation with Braxton Rawles, and was about to tell what it was, when he was stopped by the Solicitor for the State, who objected to his stating it.

The witness then went on to state that, after the conversation had ended, he and Braxton Rawles parted, each going towards his own home; that he, the witness, had proceeded down the road (335) about forty or fifty yards when he looked back and saw, about two hundred and fifty yards behind him, the defendants David Rawles, John Rawles and Jesse T. Rawles, the first with a manure fork, the second with a weeding hoe, and the third with a gun on his shoulder, all coming down the road towards him; that as soon as he saw this, he hastened his gait towards home, the said parties following him; that the defendant, Braxton Rawles, joined them, and they all continued to follow him. David making use of insulting and threatening language, the exact words of which the witness could not distinctly hear. The witness continued going down the road until he came to a path leading to his house, by the house of a Mr. Powell; that the defendants at one time were about seventy-five or a hundred yards from him, when David Rawles halloed to him, and told him to come back and let him whip him, and called upon the other defendants to set the dogs upon him. This, however, they did not do, nor did the witness see any dogs, nor did either of them take the instrument he had from his shoulder, nor was the gun leveled at him; nor was any abusive or threatening language used by any one of them, except David. Witness

said, "he was put in fear and made to hasten home by the language and conduct of the said David Rawles."

Upon the cross examination of this witness he was asked to state the particulars of the conversation between himself and the defendant, Braxton Rawles, when they met at the broken fence, but this was objected to by the Solicitor, and was ruled out by the Court.

His Honor, after directing the jury to confine their attention to the count in the indictment for an assault, told them that "if parties use such insulting and threatening language to another as is calculated to intimidate him, and he is thereby put in fear and caused to de-
(336) viate from the course he was pursuing, they are guilty of an assault, and that if they were satisfied that the defendants assembled themselves together with a common design, they were all equally guilty."

Under this charge the defendants were all found guilty, and after the ineffectual motion for a new trial, appealed from the judgment which was rendered against them.

R. B. Peebles for the defendants.
Attorney General for the State.

SETTLE, J. The prosecutor, while in the public road engaged in putting up his fence meets with Braxton Rawles, one of the defendants, with whom there is some conversation in relation to knocking down the fence. They separate, and in a few moments David Rawles with his three other sons are seen coming down the road towards the prosecutor, when they meet Braxton, he returns with them, David, the father, using threatening and insulting language. When they get within seventy-five or one hundred yards of the prosecutor, David Rawles calls to him and says, "come back here and let me whip you," and he tells the other defendants to set the dogs on him. No dogs are seen. One of David Rawles' sons has a manure fork, another a hoe, and a third a gun, but neither the fork, hoe or gun are taken from the shoulder of the bearer.

The prosecutor swears that he was put in fear and made to hasten home by the language and conduct of the defendants.

His Honor instructed the jury that "if parties use such insulting and threatening language to another as is calculated to intimidate him and is thereby put in fear and caused to deviate from the course he was pursuing they are guilty of an assault; and if they were satisfied that the defendants assembled themselves together with a common
(337) design, they were all equally guilty."

Without the conversation which took place between the prosecutor and Braxton Rawles when they first met, which would doubtless have thrown much light upon the whole transaction, the defendants are left in the position of advancing upon the prosecutor under such circumstances as were well calculated to put a man of ordinary firmness in fear. They were five in number, a father and four sons, the language of the father was insulting and threatening, and they had in their possession at least one weapon with which they could have inflicted a mortal wound at the distance to which they approached the prosecutor. An assault is defined to be an offer or attempt to strike the person of another. Here was certainly an offer to strike, not made in one moment and abandoned the next, but pressed upon the prosecutor over a distance of two hundred and fifty yards, and the assault was only prevented from becoming a battery by the agility of the prosecutor.

The prosecutor was where he had a right to be, and just been engaged in repairing his fences, which some one had knocked down, and no one had the right by numbers, manner, language, weapons or otherwise to drive him home by a different path or at a different pace than that which he chose to take.

What was the prosecutor to do; was he to stand still and submit to a battery? Can the defendants stand in a more favorable light before a Court of justice merely because their violence was not fully consummated, in consequence of the flight of the prosecutor? Some stress seems to be laid upon the fact that the gun and other weapons were not taken from the shoulders of those carrying them.

As is said in *State v. Church,* 63 N.C. 16, that makes no difference, for "that would have been but the work of a moment, and was not needed to put the prosecutor in fear and to interfere with (338) his personal liberty."

As has often been said, the rules of law in respect to assaults are plain, but their application is sometimes difficult. Each case must depend upon its own peculiar circumstances.

It was contended at bar that as David Rawles alone used insulting and threatening language, there was no evidence tending to criminate his sons. The fact that three of them came with their father and that their brother Braxton joined them when they met and returned towards the prosecutor, was evidence which made it proper for his Honor to submit the whole matter to the jury. In this respect we see no objection to the charge of his Honor, or to the finding of the jury. But we are constrained to grant the defendants a new trial upon the ground that his Honor excluded the conversation which occurred between Braxton Rawles and the prosecutor just preceding the assault. The

State introduced the fact that the prosecutor and Braxton Rawles met at the broken fence. For some purpose the prosecution chose to commence the campaign at that point, and to introduce that fact. The general rule that one charged with a crime shall not be allowed to offer what was said in reply in evidence, (because that would be manufacturing testimony for himself) does not apply here, for the crime with which the defendant is now charged had not then been committed, and the conversation, as far as we can see from the record, was about another matter, to-wit: the broken fence, and was therefore competent as showing the *quo animo,* and giving character to that meaning.

It was as much a part of the *res gestae* as the fact itself that they met at the broken fence. The *res gestae* includes what was said as well as what was done. *State v. Worthington,* 64 N.C. 594. It does not clearly appear to us how either the fact of their meeting or their conversation was material; but the State having introduced part, must
(339) take the whole of the *res gestae.*

There must be a *venire de novo.*

Let this be certified, etc.

Per curiam.

Venire de novo.

Cited: S. v. Vannoy, 65 N.C. 533; *S. v. Neely,* 74 N.C. 426; *S. v. Shipman,* 81 N.C. 516; *S. v. Martin,* 85 N.C. 510; *S. v. Sigman,* 106 N.C. 732; *S. v. Jones,* 118 N.C. 1239; *S. v. Daniel,* 136 N.C. 575; *Saunders v. Gilbert,* 156 N.C. 470, 473; *S. v. Davenport,* 156 N.C. 609; *Humphries v. Edwards,* 164 N.C. 159; *Trogdon v. Terry,* 172 N.C. 542; *S. v. Davis,* 177 N.C. 576; *S. v. Rumple,* 178 N.C. 721; *S. v. Williams,* 186 N.C. 630; *S. v. Strickland,* 192 N.C. 256; *S. v. Gay,* 224 N.C. 143.

THE STATE v. JULIA CUSTER.

If there be two statutes relating to the same subject, and the latter contains no repealing clause, and there is no positive repugnancy between them, both may be in force. But, if there be such repugnancy, the latter will operate as a repeal of the former. Hence the Act of 1866, ch. 42, in relation to vagrancy is a repeal of the 43d section of the 34th chapter of the Revised Code, which relates to the same subject, because the two statutes differ materially as to the punishment of the offence of vagrancy, the Revised Code prescribing a fine *and* imprisonment *and* security for good behavior, while the Act of 1866, ch. 4, declares that the Court *may* fine, or imprison, or both, or sentence the party to the work-house.

STATE *v.* CUSTER.

In the Act of 1866, ch. 42, which prescribes "that if any person who may be able to labor, has no apparent means of subsistence, and neglects to apply himself to some honest occupation for the support of himself and his family, if he have one; or, if any person shall be found spending his time in dissipation, or gaming, or sauntering about without employment, etc., the word *"or,"* in the beginning of the second paragraph must be construed *"and."*

An indictment for vagrancy, under the Act of 1866, ch. 42, must charge that the defendant was able to labor, and that he or she neglected to apply him or herself to some honest occupation. And in charging that he or she was endeavoring to maintain him or herself by any undue or unlawful means, it must state what the undue or unlawful means are.

A special verdict, on an indictment for vagrancy, under the Act of 1866, ch. 42, which finds that the defendant "was frequently seen sauntering about and endeavoring to maintain herself by whoring," entitled her to a judgment of not guilty, as the verdict finds that she was *endeavoring* to do something wrong, and not that she did it, and the thing she was endeavoring to do, was something immoral only, and not unlawful.

THIS was an indictment tried at the last Term of EDGECOMBE Superior Court, before his Honor, *Judge Jones.* (340)

The indictment charged "that Julia Custer, late of the County of Edgecombe, with force and arms, at, etc., on the 30th day of April, 1870, and constantly from that time to the taking of this inquisition, was found unlawfully sauntering about and endeavoring to maintain herself by gaming or other undue means, with no apparent means of subsistence, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State." Upon the trial, the jury found the following special verdict:

"That the defendant, Julia Custer, on the 30th day of April, 1870, and constantly from that time to the finding the indictment, and for many months next preceeding, had no apparent means of subsistence, and wholly neglected applying herself to any honest calling for the support of herself; that during the said period the said Julia Custer was frequently seen idly sauntering about in the County of Edgecombe, and endeavoring to maintain herself by whoring." Upon this verdict the Court adjudged that the defendant was not guilty, and the Solicitor, Martin, appealed.

Attorney General for the State.
No counsel contra.

RODMAN, J. The subject of vagrancy is governed altogether by statute. There are two of this State which must be considered for the

decision of this case. The indictment follows closely the language of S. 43, ch. 34, Rev. Code; and as this differs somewhat from the subsequent act of 1866, (ch. 42, p. 61,) it becomes necessary to inquire whether the latter act is a repeal of the first. The last contains no clause of express repeal; and the rule in such cases is, that if there be no positive repugnancy, it will be held that the Legislature in-
(341) tended that both should be in force. In the description of the offence in the two statutes, there is a slight difference in words, but we can perceive no substantial difference in meaning. Both provide that a Justice of the Peace may issue a warrant and bind the defendant over to Court, where he may be indicted. But the act of 1866 differs from Rev. Code in *expressly* declaring vagrancy a misdemeanor, and therefore indictable without any preliminary proceedings before a Justice. If it were material, probably, we should so hold under the Revised Code. But as we consider the section in the Rev. Code repealed, it is not material. The most important difference in the two statutes, is in the punishment. By the Revised Code it is required that the convict "*shall* be fined, and be also imprisoned for the space of twenty days, *and* be required to give security for his good behavior for such time as the Court shall adjudge." Whereas, by the act of 1866, "upon conviction the Court *may* fine, *or* imprison him, or both, or sentence him to the work house for such time as the Court may think fit." The two punishments for the same offence are inconsistent; under the first statute, fine *and* imprisonment for twenty days are imperative; under the second, the punishment may be fine *or* imprisonment, *or* the work house. We think the two statutes cannot stand together, and consider the second a repeal of the first.

The second question is, whether the indictment can be sustained under the act of 1866. We think it cannot be. And the same objections which are fatal to it, considering it drawn under this act, would be equally applicable if the act in the Revised Code was in force, and the indictment had been drawn under that act as it seems to have been.

The statute defines vagrants under five descriptions:

1. "Any person who may be able to labor and has no apparent means of subsistence, and neglects to apply himself to some
(342) honest occupation for the support of himself and his family, if he have one;
2. Or shall be found spending his time in dissipation;
3. Or gaming;
4. Or sauntering about without employment;

5. Or endeavoring to maintain himself or his family by any undue or unlawful means, shall be deemed a vagrant," etc.

We think that the description of persons expressed in the first of these paragraphs must be held to extend through the whole sentence, and that the word "or" in the second paragraph must be read "and." Otherwise it would follow, among other things, that any person whatever "sauntering about without employment," although he might have ample means of subsistence, or might generally be engaged in an honest accupation, would be a vagrant. Now the indictment does not charge that the defendant was able to labor, or that she neglected to apply herself to some honest occupation. It fails, therefore, to bring the defendant within the description of the statute.

2. The indictment charges that the defendant "endeavored to maintain herself by gaming or other undue means." We think it is deficient in the certainty required in the description of the offence. It is not allowable to charge that a defendant committed one offence, or some other offence. Wharton Crim. Law, § 294-295. Nor would it be sufficient to say "by other undue means;" the particular means must be alleged, in order that the Court may see that they were "undue." These defects would cause the Court to arrest the judgment, if the defendant had been found guilty by a general verdict. But the defendant is entitled to require the decision of the Court upon the effect of the special verdict. We concur with the Judge below, that upon that verdict the defendant was entitled to be declared not guilty. The verdict finds that the defendant "was frequently seen sauntering about and endeavoring to maintain herself by whoring;" as a question of morals, no one will doubt that prostitution is an undue means of self-mainten- (343) ance.

But in a Court of law, and for the construction of a penal statute, "undue" cannot be held to mean merely immoral; it can only mean unlawful. Courts of law are not authorized to guard private morals, or to act *"pro salute animae."* Prostitution is not an indictable offence at common law, unless it be so public as to be a nuisance; nor is it made so by § 45, ch. 34, of the Rev. Code. Moreover, it is not found that the defendant committed prostitution, her endeavors might have been ineffectual. In a special verdict we are not at liberty to infer anything not directly found.

The judgment below is affirmed. Let this opinion be certified.

Per curiam.

Judgment affirmed.

Cited: S. v. Massey, 103 N.C. 358; *S. v. Biggers,* 108 N.C. 764; *Winslow v. Morton,* 118 N.C. 492; *S. v. R. R.,* 141 N.C. 853; *S. v. Hanner,* 143 N.C. 635; *S. v. McCloud,* 151 N.C. 731; *S. v. Colonial Club,* 154 N.C. 185.

(344)

THE STATE v. JOSEPH MACE.

An indictment for tearing down a dwelling house, under the Act in the Revised Code, ch. 34, sec. 103, cannot be supported by proof that it was torn down by the owner or his tenant, though it was occupied at the time by a tenant at sufferance; but, if the tenant, at sufferance, were present, forbidding the act when the house was torn down, an indictment for a forcible trespass might have been supported.

INDICTMENT for tearing down a dwelling house, under the Act in the Revised Code, ch. 34, sec. 103, tried before his Honor, *Judge Mitchell,* at the Fall Term, 1870, of the Superior Court for the County of MCDOWELL. The defendant was convicted and appealed from the judgment rendered against him. The facts are sufficiently stated in the opinion of the Court.

Malone for the defendant.
Attorney General for the State.

SETTLE, J. This is an indictment under the 103rd section of the Revised Code, and charges that the defendant "unlawfully and wilfully did tear down, demolish, destroy, injure and deface a certain dwelling house, there situate, then and there occupied and used as the dwelling house of one Jane Lackey," etc.

The material facts are (according to all the testimony both of the prosecution and defence) that one Godfrey had, sometime previously, leased the premises to Jane Lackey, and that her term had expired; further that Godfrey had leased the premises to the defendant Mace, to take possession on the expiration of the lease to Jane Lackey.

The said Jane was making arrangements to quit, but before she did so, the defendant uncovered the greater portion of the house with a view to repairing the same, the said Jane being present, and as she testifies, forbidding him to do so. It is conceded that these facts would sustain an indictment for forcible trespass, for although Jane

Lackey was only a tenant at sufferance, still the public peace (345) demands that her possession shall not be disturbed by force.

If one having a right of entry, be guilty of a forcible entry, he may be indicted for a disturbance of the peace, but if he obtain possession by force, the person who had no right to retain the possession, cannot sustain an action for such forcible regaining the possession, so far as regards any alleged injury to the *house or land;* but at most only for any unnecessary personal injury in turning him out, or avoidable damage to the furniture, *State v. Johnson,* 18 N.C. 324.

The purpose of the act upon which this indictment is founded, seems to be the protection of certain classes of property—houses, fences, etc., considered as improvements and property, rather than the preservation of the public peace, which was already sufficiently guarded by law, without this statute. This appears from the fact that the act protects not only dwelling houses, but almost every conceivable improvement in the way of a house, a bridge, fence or other enclosure, notwithstanding the house may be uninhabited or an outhouse.

But surely the purpose was not to prohibit the owner from doing as he likes with his own property. He may either improve or destroy it, and no questions can be made by others, as to the damage done to the property. If in dealing with his property, or in any other manner he commits a breach of the peace, he is amenable to law, but our conclusion is that the facts do not make out a case *within the act* under consideration. We have considered that the defendant acted throughout, under and by the authority of the landlord Godfrey. *Qui facit per alium facit per se.*

The judgment of the Superior Court is reversed and a *venire de novo* awarded.

Per curiam.

Venire de novo.

Cited: Capehart v. Detrick, 91 N.C. 633; *S. v. Boyce,* 109 N.C. 748.

(346)

THE STATE v. GEORGE W. DOBSON.

In an indictment, under the Act of 1868-'9, ch. 213, for selling spirituous liquors within three miles of the Western North Carolina Rail Road, during the period of its construction, "unless licensed by the State," it is a complete defence to show a license granted by the County Commissioners

of the County in which the selling takes place, as such Commissioners are the agents of the State for that purpose.

THE defendant was indicted and tried before *Cloud, J.,* at the Fall Term, 1870, of the Superior Court for MCDOWELL County, under the Act of 1868-'9, ch. 213, entitled "An Act to prohibit the sale of intoxicating liquors within three miles of that part of the Western North Carolina Railroad from Morganton to the western terminus of the road at Ducktown and Paint Rock."

The jury found a special verdict "that the defendant sold spirituous liquors as alleged in the bill of indictment, but that the defendant had a license from the County Commissioners of McDowell County to sell spirituous liquors at his, the defendant's, residence, which is less than three miles of the road; that said license was obtained from the Commissioners after the passage of the Act aforesaid." Upon this special verdict the Court was of opinion that the defendant was not guilty and gave judgment accordingly, and the Solicitor for the State appealed.

Attorney General for the State.
Malone for the defendant.

SETTLE, J. This is an indictment, under the Act of 1868-'9, ch. 213, sec. 1, which is as follows, to-wit: "That it shall be unlawful for any person or persons, to sell, give away, or dispose of any kind of intoxicating liquors, within three miles of the Western North Carolina Rail Road from Morganton to the western terminus of the road at Ducktown and Paint Rock, during the construction of said road, un-
(347) less licensed by the State."

The second section prescribes the punishment upon conviction.

The jury returned a special verdict, to the effect, that the defendant sold spirituous liquors, as charged in the bill of indictment, but that the defendant had a license from the County Commissioners of McDowell County, to sell spirituous liquors at his residence, which is in less than three miles of the road.

The Court being of opinion upon this verdict, that the defendant was not guilty, directed his discharge, from which judgment the Solicitor for the State, appealed.

The whole case turns upon the construction of the words, "unless licensed by the State," which we find in the Act upon which the indictment is founded.

This Act evidently contemplates that there is authority existing some where to grant such license, and what the State does by her agents she does by herself.

The County Commissioners are the agents by which such police regulations are now carried into effect, and we are to understand the words "unless licensed by the State," to mean, unless licensed by authority under the State.

Any other construction would make it impossible to obtain such license, although the authority to grant the same is taken to be some where, for there is no suggestion that the State has made provision to grant such license otherwise than is provided by general law.

This is a penal statute and must be construed strictly. We are to infer nothing in derogation of the rights of the citizen.

The judgment of the Superior Court is affirmed.

Per curiam.

Judgment affirmed.

APPENDIX

I ask the concurrence of the associate Justices to an order directing the Clerk to enter upon the record, and the Reporter to insert in an appendix to his next number, the following statement:

An imputation upon my official conduct has been made, on the ground of culpable omission of duty, for the want of firmness to discharge it. The imputation is without the semblance of foundation, but the public mind is at this time excited, and it may be there is now no adequate relief for the grievance. My purpose is, to perpetuate the evidence for consideration in calm times.

The imputation is made on the ground, of my refusal, after the Governor's avowal of his orders to Col. Kirk to disobey the writs of *habeas corpus,* to allow the motion for an order to the sheriff of some county to take the prisoners out of the custody of Kirk, by force, if necessary, and bring them before me.

I did refuse to allow the motion and instead think, directed an order to the marshal, and he was instructed to exhibit the order together with a copy of my opinion to his Excellency, and to report to me, should the Governor refuse to revoke his orders.

This was done for the reason, that under the Constitution, all of the physical power of the State is vested in the executive, and the judiciary has not the power to call upon the *"posse comitatis,"* or to *"accept volunteers,"* to come in collision with a military power called into active service by the executive.

As against Gen. Hoke, or Col. Mallet, during the late war, it was my duty to enforce the writ. I had the power; because I could fall back on the Governor. But as *against the Governor,* who is the commander-in-chief of all the able bodied men in the State, it was (350) otherwise; that is the point. Every one, unless his eyes are shut, must see it.

I held full conference with the four Associate Justices. We all concurred in the opinion, that the power of the Judiciary was exhausted, *as against the Governor,* by declaring the law, and leaving the responsibility of declining to obey it, upon him. The law was declared in terms as explicit as I was able to use. I had no communication with Gov. Holden, directly or indirectly, in regard to the matter, save what is contained in my opinions, and the correspondence reported 64 N.C. appendix.

R. M. PEARSON, C.J.

February 27th, 1871.

The Associate Justices have heard the statement of the Chief Justice with approbation. And they order that it be spread upon the minutes, and that it be appended to the ensuing volume of the Reports.

So long as the assaults upon the Chief Justice were confined to the partizan press, we would have thought it unnecessary, if not improper, to give to them the importance which this action does: but we observe that there has been introduced into a co-ordinate branch of the Government—the House of Representatives—a bill, reciting matters to the prejudice of the Chief Justice; and we think that his fame, and the fame of the Court with which he has been connected for twenty-three years under all parties, and the fame of the State which is so intimately connected with his own, not only justify but require this vindication.

This Court was in session at the time the *habeas corpus* cases were before the Chief Justice at Chambers. They were pending for a considerable time, and were elaborately argued. It was a moment
(351) of great interest to the State, and to citizens; and there was much excitement. The Chief Justice was in constant communication with the Associate Justices: and, while the opinions delivered were in language his own, his conclusions had the sanction of the Associates. And there was not at any time, any other purpose manifested than an earnest desire to declare the law correctly; to preserve the liberty of the citizen, and the safety of the State. We thought then, and think now, that he did declare the law correctly, that he exhausted his power to secure the liberty of the citizen, and that he did preserve the safety of the State.

It is a pleasure to his Associates to do him the further justice to declare, that he is one of the most learned jurists of the age, and that he is singularly free from political and other prejudices, and that under all, and often under the most trying circumstances, he has had the moral courage to put himself in jeopardy to maintain the rights of the humblest citizen whose liberty or interests have been under consideration before him.

E. G. READE, A.J.
ROB'T. P. DICK, A.J.
THOMAS SETTLE, A.J.

February 27th, 1871.

I concur in placing the communication from the Chief Justice on the records of this Court. I did not sit with him in the *habeas corpus*

cases of *Moore* and others. He did me the honor, however, to consult with me in the first stage of those trials while I was in the city, and although there are some portions of his opinion in which I did not concur, I did entirely concur with him in his conclusion to refuse to order any Sheriff or other person to summon a *posse* to rescue the prisoners from Kirk. I believed then, as I believe now, that (352) no law authorized him to do so; neither did the Constitution which is a part of the law. To have done so, would have been to do an act without authority, which in all probability would have produced bloodshed, and in that case, he would have deservedly shared the blame. To have sent a rabble of citizens without organization, or arms, or provisions, or lawful discipline, against Kirk's soldiers, in the face of the Governor's expressed determination to resist them, would have been insane, and but for its serious consequences, ridiculous. That the Chief Justice was honest in all that he did, and utterly guiltless of any complicity with Governor Holden in the arrest or detention of the prisoners, I know, as well as I can know anything of the kind. I have known the Chief Justice for about thirty years. During all that time he has been in all respects, publicly and personally, what he is now; a lover of liberty as defined by the common law and Magna Charta, and too much of a lawyer to be capable of being a selfish politician, much less a conspirator. As to the scandalous charges of a portion of the press, I do not think they deserve notice.

WILL. B. RODMAN, J.

February 27th, 1871.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

JUNE TERM, 1871.

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(353)

EX PARTE DAVID SCHENCK.

The Act of 4th of April, 1871, declaring that no Attorney who has been duly licensed to practice law shall be disbarred or deprived of his license and right to practice, except upon conviction for a criminal offence, or after confession in open Court, is constitutional.

The aforesaid act does not take away any of the inherent rights which are absolutely essential in the administration of justice.

Therefore, where a Judge, after the ratification of the aforesaid act, attempted to debar an Attorney from practicing his profession in his Judicial District, who had not theretofore been convicted of any criminal offence, or who had not confessed himself guilty thereof in open Court; *Held*, that such action was unauthorized, and in violation of law.

CONTEMPT of Court by David Schenck, an Attorney of this State, adjudged by *Logan, J.*, at Spring Term, 1871, of GASTON Superior Court.

On the first day of the Term of said Court, his Honor made the following order, and had the same entered on the Minute Docket of said Court, to-wit:

"The Court being informed of a certain libellous publication directly tending to impair the respect due to the Hon. G. W. Logan, Judge of the Superior Court of the Ninth Judicial District of (354) the State of North Carolina, and to the authority of the Court, which appeared in the *Daily Patriot*, a newspaper published in the City of Washington, D. C., on the 25th of April last, and is headed "Letter

from North Carolina, Photograph of a Radical Judge, Lincolnton, N. C., April 21st, 1871, Hon. Francis Blair," etc., (a copy of which is spread upon the records,) purporting to be signed by D. Schenck, an Attorney of said Court.

It is therefore ordered by the Court that the said D. Schenck be disabled from hereafter appearing as an Attorney and Counsellor in said Court, unless he shall apply on Saturday, 13th May, inst., and show cause to the contrary.

It is further ordered, that a copy of this order be served on the said D. Schenck immediately with a copy of the aforesaid letter."

The letter referred to in the foregoing order, as taken from the records of said Court, is as follows:

"LETTER FROM NORTH CAROLINA.

"PHOTOGRAPH OF A RADICAL JUDGE,

"*Lincolnton, N. C.*, April 21st, 1871.

"HON. FRANCIS BLAIR:

"*Dear Sir:* I write to inform you that the communication read by Senator Nye on the 13th from Judge (?) Logan, is a base and unmitigated falsehood, made out of the whole cloth to bear upon the Ku Klux bill. I, with the whole bar, attended Cleaveland Court. On Monday there was a rumor that one Biggerstaff, a pliant tool of Logan's, had been whipped by parties who retaliated upon him for shooting at his own brother, and endeavoring to assassinate him. There was no politics in it—purely a family feud; but Logan summoned 300 men, and had them armed and paraded around his house, and arrested some forty persons, not one of whom, as every one knows, had anything to do with it.

"At the same time he dispatched his man 'Friday,' one Car-
(355) penter, to report to Washington, and he remained at home and the report was circulated that he was afraid to leave home for Cleaveland Court. The citizens of Cleaveland at once held a public meeting, assuring him of protection, and sent their sheriff to escort him to Shelby. Mark his reply, 'He was not at all afraid, but was staying to investigate the whipping, and that he would come when he got through.' Thus leaving Court and people to lose time and money, while he was doing magistrate's duty at home.

"The Solicitor, a republican, strongly denounced him, and wrote him an urgent letter to come. The very day that Senator Nye read Logan's

letter in the Senate, saying he, *Logan,* was afraid to come to Cleaveland, Logan came without escort or molestation, and held court as peacefully, if not more peacefully than ever one was held before.

"This *Logan* is an ignorant, vile, corrupt man, whom no one respects, and for whom the whole bar have a sovereign contempt.

"Yours truly and gratefully,

"D. SCHENCK."

Upon the day mentioned for the return of said rule, and after service of notice thereof upon the said Attorney, *he* filed the following plea, verified by affidavit.

"GASTON COUNTY:

"*In Superior Court,*

"In the matter of David Schenck.

"This respondent having been served, on the 8th inst., with a copy of an order rendered by the court on that day, (here reciting the order mentioned heretofore,) now on this the 13th day of May, in open Court appears, and for cause to the contrary shows:

"1. That having been duly licensed to practice law as an Attorney of said Court, he has the lawful right to continue so to practice in said Court without restraint or impediments, for that he has (356) not been convicted, or in open Court confessed himself guilty of any criminal offence, showing him unfit to be trusted in the discharge of the duties of his profession according to the provisions of the statute in such case made and provided.

"2. This respondent affirms that he has never been convicted, or in open Court confessed himself guilty of any criminal offence, showing him to be unfit to be trusted in the discharge of his profession, and therefore denies, that this Court has the power to lawfully make the order temporarily disabling him from practicing his profession, and further denies that it has any jurisdiction in the premises to continue and enforce it.

"Wherefore he insists that said order be discharged, and respondent be permitted to exercise his right as an Attorney and Counsellor, agreeable to the Constitution and the laws of the land.

"D. SCHENCK."

Upon the coming in of the foregoing plea, and after argument of Counsel, his Honor was of opinion that no answer had been filed so as

to entitle respondent to be heard upon the rule, and ordered that said rule be made absolute, from which ruling the respondent prayed an appeal to the Supreme Court, which was declined by the Court, upon the ground that respondent had failed to answer the rule as required by the provisions of the statute of April 10th, 1869.

At the present term of this Court respondent filed a PETITION FOR A *certiorari*, which was granted, and made returnable on 19th June.

The transcript having been returned to the effect above.

Moore, with whom were *Gatling, Wilson, Bragg & Strong*, in behalf of respondent, argued as follows:

1. Unless the letter was written for publication, the Judge could not notice it as a contempt of Court. For there can be no con-
(357) tempt of Court if the act be not so intended, unless the act be a contempt *per se*. Thus, to say to an intimate friend confidentially that a certain Judge is a *felon*, is not a contempt of the Court in which that Judge presides, although the friend should publish it. So, if a writer intending his composition for an after age, should lose it, and, without his consent it should get into the press, he is not responsible for the effects of its publication, no more than if the composition should be swept away by a tornado and be found and published in another kingdon. 2 Gr. Ev. sec. 414, 326.

2. The Judge had before him no legal evidence of even the writing of the letter by the defendant, much less of its publication by his consent. The printed name of the subscriber furnishes no evidence of the writer, unless it be shown that he has acquiesced in the charge of authorship. This may be done by showing that he has had notice of the publication, and has omitted, after opportunity to do so, to deny it. 2 Gr. Ev. sec. 416.

3. But conceding the publication to have been intended, it is no contempt of Court, under our law, though it were so at common law, because our statutes expressly forbid the Courts so to treat it.

To this it is replied on behalf of the Judge, that the statutes are unconstitutional — that the powers of courts over contempts are *inherent*, and that when the Courts exist by virtue of the Constitution, the inherent powers become constitutional provisions.

We admit, that there is in all courts an *inherent* power to preserve order, while discharging their business. This power is incidental to the office, inseparably attached to it, and cannot be taken away by legislative authority while the Court exists by virtue of the Constitution.

Every Judge invested with the power to hear and determine cases, must be endowed with all the powers, which, as Chief Justice

Nash says, "are necessary to the proper transaction of the busi- (358)
ness before him." "If it were not in the power of the Court to punish individuals, who by noise or otherwise interrupt its proceedings, its business would be impeded, the majesty of the law defied and the Court ultimately brought into contempt."

Such powers as are clearly necessary for this purpose, are *inherent*. To deny them would annihilate Courts of justice. The judicial department exists by virtue of the Constitution, and stands upon the same base with the Legislative and Executive. The legislative department has the same constitutional power to destroy the judicial by the sword, as it has, by allowing a lawless mob to interrupt its officers in the discharge of their judicial functions.

It may sometimes be difficult to determine precisely where the line shall be drawn between the *inherent* powers of a Court, and those which are subjects of legislative regulations. That the common law recognized many acts as contempts, which are the subjects of legislative control, is manifest from the wide distinction drawn between Judges of Superior, and Judges of inferior Courts, in respect to language deemed contempts of the former, but not of the latter, and in no respect disturbing the official proceedings of either.

But the power of the legislature over contempts of Court, to the extent which Congress and this State have exercised it, must be conceded to be now settled too firmly to be upset. The Constitution of every State establishes the three great departments of government as independent of each other. Not one of these Constitutions expressly subjects the law regulating contempts of Court to the control of the legislature. They are all silent upon the subject. Yet the Legislature of every State has regulated contempts of Court, both in defining and punishing them, as this State and the United States have done; and the Constitutional power to do so has never been questioned.

A brief review of the legislation and decisions upon this subject is offered to illustrate and sustain our position. (359)

(1.) The act of Congress of 24th September, 1789, ch. 20, establishing the Judicial Courts of the United States, provides by sec. 17, that the Courts thereby established shall have power "to punish by fine or imprisonment all contempts of authority in any cause before the same, and to make and establish all necessary rules for the orderly conducting business in the said Courts, provided such rules are not repugnant to the laws of the United States."

The Courts thus created existed as fully by virtue of the 3d article of the Constitution of the United States as if they had been named

and created and their powers prescribed by that article. The powers over contempts, thus specially conferred, were declared by the Supreme Court of the United States (in *U. S. v. Henderson and Goodwin,* 7 Cr. 32-4,) to be necessary to the Court, and that they would have existed independently of the act of Congress.

It will be observed that none of the powers mentioned in the act, and by the Court declared to be necessary, extended to the case of a defamatory letter or speech about a Judge or Court, which did not disturb the order of the Court or obstruct it in the discharge of its business. The power as expressed was over "contempts of authority," and the usual and universal punishment, fine or imprisonment (and not *striking from the rolls*) had ever been the only punishment in England, was prescribed by the act of Congress.

(2.) In 1830 James H. Peck, a District Judge of the United States, undertook to punish the writer (over the signature of "a citizen,") of an article published in a newspaper, publicly calling attention to many supposed errors, as the writer alleged, in a judicial opinion of the Judge just before published by himself. The Judge, deeming the article disrespectful to him as a Judge, attached the editor of the paper to answer for contempt of Court. In the course of examination before Court Mr. Lawless, an attorney, avowed himself the author, whereupon (360) he was attached and sentenced to imprisonment and suspension from practice. Judge Peck was impeached for this before the Senate of the United States, and was acquitted by a vote of 22 against 21. Whether the acquittal was on the ground that he had exercised only the powers belonging to the Court, or because if he had transcended them he had done so without corrupt intent, does not appear. But in the course of the debate such vast and undefined powers of construing acts into contempt of Court were claimed in his defence as incidental to judicial authority, unless expressly limited by law, that Congress deemed it an imperative duty to pass the law of 2d March, 1831, entitled "An act declaratory of the law of contempts of Court."

The law was passed without dissent or further debate upon the subject, with an amendment defining and specifying the *punishment* as well as the *acts* of contempt.

(3.) It enacts "that the power of the several Courts of the United States to issue attachments and inflict summary punishments for contempts of Court shall not be construed to extend to any cases, except the misbehavior of any person or persons in the presence of the said Courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said Courts in their official

transactions, and the disobedience or resistance by any officer of the said Courts, party, juror, witness or any other person or persons to any lawful writ, process, order, rule, decree or command of the said Courts."

This law has existed unchanged for forty years, and for thirty-six years since the full and able judicial construction given to it in 1835, by Mr. Justice Baldwin, a very learned and distinguished Judge of the Supreme Court of the United States. It applies to the Supreme Court, as well as to the Circuit and District Courts of the United States; is cited as the law by Brightly in his digest of Federal Cases, and by Conkling in his "treatise," 16. Mr. Justice Baldwin, in *ex parte Poulson*, 15, Haz. Pa. Reg. 380, says, "It is in the discretion of (361) the legislative power to confer upon Courts a summary jurisdiction to protect their suitors, or itself, by summary process, or to deny it; it has been thought proper to do the latter, in language too plain to doubt of the meaning of the law, or if it could be doubted by any ordinary rule of construction, the occasion and circumstances of its enactment would most effectually remove them."

"It would ill become any Court of the United States to make a struggle to retain any summary power, the exercise of which is manifestly contrary to the declared will of the legislative power * * *. Neither is it proper to arraign the wisdom or justice of a law to which a Court is bound to submit, nor to make an effort to move in relation to a matter when there is an insuperable bar to any efficient action."

"The law prohibits the issuing of an attachment, except in certain cases, of which the present is not one; it would therefore, be not only utterly useless, but place the court in a condition beneath contempt, to grant a rule to show cause why an attachment should not issue when an exhibition of the act of 1831, would show most conclusive cause. The Court is disarmed in relation to the press, it can neither protect itself or its suitors; libels may be published upon either, without stint."

(4.) In 1846, ch. 62, (Rev. Code, ch. 34, sec. 117,) an act was passed by this State entitled "An act concerning contempts of Court." This act has *its* history as well as that of Congress. It was written by the late Geo. E. Badger, and was introduced into the Legislature by the late Judge Gilliam. The language of this act is almost identical with that of Congress. That of this State underwent a slight change of expression when revised in 1854, but none in meaning or force of language. Under the act of Congress, there has been one judicial opinion uniformly acquiesced in. Under that of this State there has been one also, made in 1855. *Weaver v. Hamilton*, 47 N.C. 343. In this case the

(362) Court, composed of *Nash, C.J.,* and Justices *Pearson* and *Battle,* through the Chief Justice, says, "The doctrine of contempts is regulated in this State by statute. Before the year 1846, they were undefined, and left very much to the discretion of the Court presiding."

"Under such circumstances, it is not at all to be wondered at that many acts were considered as contempt, and punished as such, which in the eyes of the public, were looked upon as harmless in themselves, but as exhibiting an arbitrary spirit in judicial offences."

"The necessity of this power, however, is felt and acknowledged by every one who values the independence of the judiciary or its wholesome action. If it were not in the power of the Court to punish individuals who, by noise or otherwise, interrupt its proceedings, its business would be impeded — the majesty of the law defined, and the Court ultimately brought into contempt."

"Needful, then, as the power to punish for contempt is to every Court, it is proper and right that the Courts should have, as far as possible, some sure guide to regulate their course."

"No well minded Judge desires to be burthened with discretionary powers — at least no further than is necessary to the proper transaction of business before him."

(5.) The act of Assembly of April 10, 1869, ch. 177, sec. 1, is, to all intents, the act of 1846, except by the addition in the former of sec. 7, relating to the publication of proceedings in Court.

4. It is certain that Judge Logan, had he been a Justice of the Supreme Court of the United States, would have been disarmed of all power to protect *himself or the respect due to the authority of his Court* from the effects of the alleged libel.

It is contended, however, that *ex parte Moore,* 63 N.C. 397, overrules this interpretation.

But it is insisted, on behalf of Mr. Schenck, that whatever of doubt might have existed upon the question, whether the act of 1869
(363) excluded his case from contempt of Court, none can exist since the act of 4th April, 1871.

This last act as to contempts of Court,

(1.) Expressly repeals every part of the common law which is not recognized in the provisions of the act of 1869;

(2.) Specifies and defines expressly or by reference to sec. 1 of that act every act of contempt which a Court can lawfully notice;

(3.) Confines Courts to the punishments prescribed in sec. 2 of the act of 1869, in an unmistakable manner;

(4.) Forbids expressly the disbar of an Attorney at Law, and depriving him of his license to practice, *until after he may be convicted of, or may confess in open Court, some criminal offence, shewing "him to be unfit to be trusted in the duties of his profession."*

5. If there be any power in legislation over the doctrine of contempt we may now assume as certain.

(1.) That for a mere contempt of Court, which the Court itself may find and declare, the only punishment is fine or imprisonment, or both. This is the law of Congress also;

(2.) That no attorney shall be disbarred, except for some offence which he shall confess in open Court, or of which he shall be duly convicted according to course of law. The Court is forbidden to try the fact charged;

(3.) That the criminal offence thus ascertained shall be such an one as shall deprive him of a moral *status*, and "shall show him to be unfit to be trusted in the duties of his profession."

6. But if the foregoing objections to the sentence of Judge Logan were all out of the way there still remains one which cannot be removed. He deprived Mr. Schenck of his privilege or office to practice law, *without giving him a day in Court,* contrary to natural justice and the express inhibition of sec. 17, art. 1, of the State Constitution, that *no person ought to be deprived of his freehold, liberties or privileges, but by the law of the land.* This sacred principle of liberty, the birthright, alike, of our English ancestors and ourselves, has been often proclaimed and enforced by the Courts of England, and (364) by those of our own and sister States, as the great shield of freedom.

"It is a principle never to be lost sight of, that no person should be deprived of his property or rights without notice and an opportunity of defending them. This right is guaranteed by the Constitution. Hence it is that no Court will give judgment against any person, unless such person have an opportunity of shewing cause against it. A judgment entered up otherwise would be a mere nullity." *Hamilton v. Adams,* 6 N.C. 161.

"That is not a law of the land which deprives a citizen of his office without trial." *Hoke v. Henderson,* 15 N.C. 1.

"The Constitution and laws of the country guarantee the right that no freeman shall be divested of a right by the judgment of a Court, unless he shall have been made a party to the proceeding in which the judgment shall be obtained." *Armstrong v. Harshaw,* 12 N.C. 87.

"It would violate one of the first principles of justice secured to us by the 10th (now 17th) section of our Bill of Rights, that any man should be condemned, in his person or property, without a hearing or an opportunity to be heard." *Otey v. Rogers,* 26 N.C. 534.

Before an Attorney can be struck from the rolls of Court "he must have notice of the charges against him, and an opportunity to make his defence." 1 Cal. Rep. 188, *ex parte Bradley,* 7 Wall. 364. *In re Pollard,* 2 Eng. Priv. Coun. cases 106, (1868.)

Lord Coke, in *Baggs'* case, 11 Rep. 93, says, that if a citizen be removed from his office "without hearing him answer to what was objected, or that he was not reasonably warned, such removal is void and shall not bind the party, and such removal is against justice and right" "*because he who decides a case without hearing both parties, though his decision may be just, is himself unjust.*" 1 Bl. Com. 282.

(365) "Attorneys and Counsellors hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the Court after opportunity to be heard has been afforded." *Ex parte Garland,* 4 Wall. 333.

7. The sentence expelling Mr. Schenck from the bar is that pronounced when the Judge first took action upon the subject; it is still in force, and is the only one ever passed. His subsequent proceeding, after notification to Mr. Schenck, was no revocation of the illegal sentence, but merely an affirmation that he would not disturb it. It stands now by virtue of its first entry, and therefore is void.

8. The letter of Mr. Schenck, though harsh and passionate, and manifesting a want of respect for Judge Logan, does not authorize a deprivation of his license as Attorney, even if the acts of 1869 and 1871 were silent on the question. By the rules of the common law there must be clear evidence of a want of moral *status* in the accused. *Ex parte Brounsall,* 2 Com. 489. *Bagg's* case, *ante, Ex parte Brandley,* 7 Wall. 364, 1 ch. Cr. Law 660. 1 Tidd 89. The *King v. Southerton,* 6 East. 143. *Jerome's* case, Cr. ch. 74. *Ex parte Stokes,* 28 E. C. L. Rep. 303, and notes (ed. of 1856.) *In re Wallace,* 1 Eng. Priv. Com. cases 283. *Ex parte Burr,* 9 Wheat. 529.

9. In our view of the case, the Judge violated the Constitution and laws in the following particulars:

(1.) He assumed without any proof by affidavit or otherwise, that Mr. Schenck was the writer of the letter, contrary to the rule in 4 Bl. Com. 286, and uniformly recognized. *Ex parte Burr, ante. In re Judson,* 3 Bl. C. C. 148; 3 Atk. 219; 2 Str. 1068; 28 E. C. L. Rep. 154.

(2.) He assumed that it was written for publication, without any evidence to that effect.

(3.) He punished before trial or opportunity to be heard.

(4.) He punished for an assumed contempt of Court with a punishment not allowed for contempts, contrary to the Acts of 1869 and 1871, and equally forbidden by the common law. *Ex parte* (366) *Bradley, ante. In re Wallace,* 1 Priv. Com. cases *ante.*

(5.) He punished an act which was not the subject of punishment by him.

(6.) He imposed punishment upon Mr. Schenck without any conviction in due course of law, or confession by him in open Court, contrary to the plain letter and the manifest meaning of the act of April, 1871.

Phillips & Merrimon, Blackmer and McCorkle contra.

DICK, J. Courts of justice are established by the Constitution, and are invested with certain inherent powers, which are essential to their existence, and of which they cannot be deprived by the Legislature.

Their province is to construe existing laws and to administer justice, and they must necessarily have the power by summary remedies to preserve order during their sessions, control the action of their officers, and enforce their mandates and decrees.

If the Courts could be deprived by the Legislature of these powers, which are essential in the direct administration of justice, they would be destroyed for all efficient and useful purposes.

The Government is composed of three co-ordinate branches, and the Constitution wisely declares that, "The Legislative, Executive, and Supreme judicial powers of the government, ought to be forever separate and distinct from each other. The Constitution is the fundamental law of the State, and contains the principles on which the government is founded. It regulates the division of the sovereign powers, between the coordinate departments, and directs the manner in which they are to be exercised. Each department has appropriate functions; and each is in some degree, a check upon the others, so as to prevent hasty and improvident action.

If either department encroaches upon the inherent rights of the others, this wise equilibrium of power will be disturbed and (367) the several departments cannot operate together in harmony, and thus accomplish the objects of good government.

The Legislature as the law-making power, may within constitutional limits, prescribe rules by which the authority of the judiciary is to be

exercised. The Judiciary cannot pass upon the wisdom and policy of particular legislation; but they can declare an act of the Legislature to be unconstitutional. This power ought to be exercised with great caution, and in no case unless there is a plain violation of the fundamental laws of the State. To preserve harmony in the government, each department, while it is jealous of its own rights, ought to keep as far as possible in its own appropriate sphere. The common law power of the Courts upon the subject of contempts, has been restricted in this State by statute. Rev. Code, ch. 34, sec. 117. Acts of 1868-'9, ch. 177. The whole subject has recently been elaborately considered by this Court, and needs no further discussion. *Moore, ex parte,* 63 N.C. 397. *Biggs, ex parte,* 64 N.C. 202.

Since the discussion of these cases the Legislature has seen proper to impose other restrictions upon the discretion and power of the Courts, by the Acts, ratified the 4th day of April, 1871. The necessity and propriety of such acts may well be questioned, as unduly restricting the powers of the Courts for the efficient administration of justice. There were already sufficient safeguards against "judicial tyranny." A person under process of contempt, for an offence committed in the presence of the Court, or which tended to obstruct the administration of justice, was entitled to have the particulars of the offence spread upon the records of the Court.

If the offence alleged occurred out of the presence of the Court, and consisted of an act or statement, which the Judge regarded as libelous, and done with the intention of bringing the Court into contempt, the respondent might "try himself" upon his own affidavit; or he
(368) might join issue as to the facts, and justify by showing the truth of the allegations, which the Court regarded as libelous, and for which he was held in contempt. If a Judge refused to perform his duty, or acted in defiance of established facts, he would not only meet the indignant condemnation of public opinion, but he would be answerable at the bar of the High Court of Impeachment. The recent act above referred to, does not take away any of the inherent powers of the Courts, which are absolutely essential in the administration of justice, and is not such an encroachment upon the rights of the judicial department of the government as to warrant us in declaring it to be unconstitutional and void.

It is a law of the land and ought to be observed. It is unnecessary for us to pass upon the facts involved in this matter.

The plea of the respondent was sufficient in law, and his Honor ought to have discharged the rule.

There was error.

Per curiam.

Order reversed and rule discharged.

Cited: Kane v. Haywood, 66 N.C. 31; *In re Oldham,* 89 N.C. 26; *In re Robinson,* 117 N.C. 537; *In re Gorham,* 129 N.C. 487; *Ex parte McCown,* 139 N.C. 104; *In re Application for License,* 143 N.C. 9; *In re Ebbs,* 150 N.C. 51, 57; *In re Brown,* 168 N.C. 423; *S. v. Johnson,* 171 N.C. 801; *McLean v. Johnson,* 174 N.C. 348; *S. v. Little,* 175 N.C. 745; *In re Parker,* 177 N.C. 468; *In re Parker,* 209 N.C. 695; *S. v. Lawrence,* 213 N.C. 681; *Roller v. Allen,* 245 N.C. 525.

(369)

STATE v. SAMUEL A. SMITH.

1. Special Courts for cities and towns are not put by the Constitution upon the same footing as the Court for the trial of impeachments, the Supreme Court, the Superior Courts and Courts of Justice of the Peace.

2. These latter Courts are established by the Constitution, and owe their existence to that instrument *alone*, and are in no wise dependent upon an act of the Legislature.

3. Special Courts for cities and towns are creatures of the legislative will and discretion, and owe their origin to the expression of such legislative will and discretion by constitutional permission.

4. Such discretion is not exhausted by an act erecting such Courts, but may be directed as well to their abolition.

5. The Judge of such a Court has not a "vested right" in his office within the meaning of the Constitution, as that principle only applies where the office remains.

6. The act of March 30, 1871, (act 1870-'71, ch. 160,) had the effect to abolish the office of Judge of the Special Court for the city of Wilmington.

THIS was an appeal from the judgment of *Hon. Edward Cantwell,* professing to act therein as Judge of a Special Court for the city of Wilmington.

The defendant was tried by Edward Cantwell on the 12th day of June, 1871, on the charge of assault and battery, Mr. Cantwell claiming to have the right to try him by virtue of his office of Judge for the Special Court for the city of Wilmington. The transcript showed that the defendant by plea denied the jurisdiction and existence of said Court, and the office and power of Mr. Cantwell as asserted, but his

plea was overruled, and after hearing evidence, he was found guilty of the charge and fined the sum of one dollar.

From this judgment the defendant appealed to this Court, and the only question presented for the consideration of this Court, was,

whether the Legislature possessed the power to abolish the
(370) Special Court for the city of Wilmington, and the office of Judge of said Court, which had been established by the act of February 3d, 1870, which it had professed to do by the Act of 3d March, 1871.

Attorney General for the State.
No counsel for defendant.

PEARSON, C.J. This case was filed after *State v. Walker* had been decided. In that case a preliminary point excluded a decision of the question, whether the General Assembly, in 1870, had power to abolish the Special Court established in the city of Wilmington by the Act of 1868. In this case, a determination of the question becomes necessary for the purpose of this decision; and we must decide it in a collateral way, although it would have been more in accord with the course of the Court, to have had it presented directly, in a proceeding in the name of the Attorney General, in the nature of a *quo warranto* against his Honor Judge Cantwell, for usurping functions as Judge of a Special Court of the city of Wilmington, after the Act 30th March, 1871.

It is not true, as assumed by the learned argument of Judge Cantwell, that Special Courts in cities and towns are put by the Constitution on the same footing as the Court for the trial of impeachments, the Supreme Court, the Superior Courts and Courts of Justice of the Peace. The fallacy of his reasoning and his wrong conclusions grow out of this erroneous assumption. These judicial tribunals are established by the Constitution, owe their existence to that instrument alone, are in no wise dependent upon an act of the General Assembly, whereas in respect to Special Courts, the Constitution simply provides that the General Assembly shall establish such Courts in cities and towns, *"where the same may be necessary,"* leaving it for the General Assembly in its wisdom to decide upon the existence of the necessity both in

regard to term and plan. So a Special Court cannot be establish-
(371) ed in a city or town, without an act of the General Assembly, deciding upon the necessity for its establishment; and as a thing of course, one session of the General Assembly has power to repeal an act passed at a former session. The General Assembly, at its session in 1868, was of opinion, that a Special Court was necessary in the city

of Wilmington. If, at the session in 1871, in its judgment, such necessity no longer existed, the power to abolish the Court and repeal the act of 1868, seems to us to be too clear for discussion. The question then is narrowed to a consideration of the legal effect of the repeal of the statute by which the Court was established. If the effect be to abolish the Court, the incidental effect must be, that the incumbent of the office can no longer discharge the duties of a Judge, for there can be no officer where there is no office.

It is said a thing which has been done under a statute, cannot be undone by its repeal, and as a Judge of the Special Court in Wilmington, had been inducted into office before the repeal of the statute, he has a "vested right" to continue in the office, until the term prescribed shall expire, whatever effect the repeal of the statute may have upon the future.

For this position *Cotton v. Ellis,* 52 N.C. 345, is relied on. The office of Adjutant General was created by an act of Congress in pursuance of the Constitution of the United States, but the appointment of the officer is reserved to the State. The General Assembly in 1856, conferred the power of appointing an Adjutant General, to continue in office for three years, upon the Governor. Cotton was appointed under this act. In 1858, the act of 1856, was repealed. It is held that Cotton was entitled to fill the office until the term of three years expired, on the ground, that as the office was not abolished, he had a "vested right," "a property in the office," which could not be disturbed as long as the office existed, according to the doctrine settled by *Hoke v. Henderson,* 15 N.C. 1.

In both of these cases the office continued to exist and the question involved simply the power of a motion from the officer. But in the case now before us — the office is abolished. (372)

This point makes a most material difference for *Cotton v. Ellis,* and *Hoke v. Henderson,* can only be applicable, upon the idea, that to save the right of the incumbent the office should be continued after it has been abolished, whereas it is settled, that the incumbent goes out with the office, and all offices are accepted with the implied condition, that the term of the incumbent is to end should the office be abolished, so as not to cramp Legislative discretion in regard to the continuation of public offices. In short the whole question depends upon the power of the General Assembly to abolish the office of Special Court in the city of Wilmington, either directly, or by repealing the act creating it. This has been already disposed of.

There is error. This opinion will be certified, to the end that the defendant may be discharged.

Per curiam.

Reversed.

Cited: Day's Case, 124 N.C. 366; *Wilson v. Jordan,* 124 N.C. 709; *Greene v. Owen,* 125 N.C. 215; *Lacy v. State,* 195 N.C. 285.

R. B. BLAND, ADM'R. OF T. J. BLAND v. THOMAS D. WARREN AND WIFE E. A. WARREN.

It is not competent to introduce as evidence the entries made by a decedent, containing accounts against third persons in his own favor.

Entries made by Merchants' Clerks, and other persons acting as agents and servants in their usual course of business, who are dead, are competent evidence of the statements they contain.

Under the Rev. Code, chapter 15, known as the book debt act, it is admissible, to the amount of sixty dollars, to offer the book accounts of a decedent, containing charges against third persons, and made by him.

CIVIL Action, tried before *Pool, J.,* at Spring Term, 1871, of CHOWAN Court.

The plaintiff in his complaint alleged that the defendants (373) were indebted to his intestate for goods sold and delivered, money advanced, and labor performed, as shown by the books of plaintiff's intestate, and from entries made by said intestate. The defendants in their answer denied the allegation of the complaint.

For the purpose of proving the allegations of the complaint, the plaintiff introduced the son of the intestate, who testified that about the time the alleged account was contracted, that his father and the defendants had large business transactions. That the intestate in his usual course of business with the defendants, and other persons, kept his accounts in a certain book in his own hand writing, and that he (the witness) knew the hand-writing of his father.

The plaintiff proposed to prove by said witness, that the entries in said book, were in the hand-writing of the intestate; that it was kept by the intestate, and contained the accounts of his business transactions; that it was found amongst the valuable effects of the deceased, and was delivered by the witness to the plaintiff. This evidence was rejected by his Honor, to which plaintiff excepted, and submitted to a nonsuit. Rule, etc. Judgment and appeal.

John A. Moore for appellant.
No counsel for appellee.

BOYDEN, J. It is a general rule of law, that a party cannot make evidence for himself, and that a party cannot introduce his own declarations, oral or written, as evidence in his own behalf. It is true that an entry of a credit upon a bond, before the presumption of payment has arisen, in the hand-writing of the obligee, is evidence to rebut the presumption of payment; but this is for the reason that at the time of the entry, it was against the interest of the obligee to make it, as it lessened the amount recoverable upon the bond. *Williams v. Alexander,* 51 N.C. 137. (374)

It follows, that there was no error in rejecting the evidence in this case.

By the book-debt law, such evidence is made admissible, to the amount of sixty dollars, but this was in derogation of the common law.

It is true, that when entries have been made, in the usual course of business, by merchants' clerks, and such clerks are dead, these entries thus made are admissible as evidence; but we know of no case where such entries have been held admissible when in the hand-writing of the party himself. In the case of the *Bank of the State of North Carolina v. Clarke,* 8 N.C. 36, the Court held the books of the Bank inadmissible in favor of the Bank.

Per curiam.

Judgment affirmed.

Cited: Morgan v. Hubbard, 66 N.C. 396; *Peele v. Powell,* 156 N.C. 560; *Fields v. Rollins,* 186 N.C. 221; *Breneman v. Cunningham,* 207 N.C. 81.

R. P. ROSEMAN AND WIFE ANN L. v. JACOB PLESS, ADMINISTRATOR OF P. I. SHAVER.

An Administrator is guilty of gross *laches,* who sells property on a credit, and takes no other security than the bond of the purchaser.

ACTION of debt tried before *Cloud,* Judge, at Spring Term, 1871, of ROWAN Superior Court.

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

Blackmer & McCorkle for plaintiff.
Bailey for defendant.

READE, J. There was but one exception ruled against the de-
(375) fendant, that in regard to the sale of the slave, and upon the ruling, the case is before the Court.

The defendant, as administrator, sold a slave of the estate in May, 1863, and took a bond for the price without surety. The purchaser of the slave became insolvent, and the debt was lost.

In taking the account the administrator was charged with the amount, and he excepted. We think he was properly charged. It is gross negligence in an administrator to sell property on a credit, and take no security other than a bond of the purchaser.

If anything could save the administrator from blame, it would be to prove that the purchaser was entirely solvent; but that is not shown in this case. While the general rule is as stated, it is insisted that the peculiar circumstances of this case ought to relieve the administrator. The slave was sold to the widow of the intestate, and but for the result of the war, which the administrator could not foresee, the estate would have paid all the debts, and the widow entitled to a distributive share, how much does not appear. Slavery was in jeopardy by the war, and was abolished by the result. If the slave had not been sold he would have been lost to the estate; if he had sold the slave for cash, it would have been Confederate money, and would have been lost. These peculiar circumstances strongly inclined me to relieve the administrator, but the other Justices are unanimous, and I yield to the application of the general rule to this case.

There is no error.

Per curiam.

Judgment affirmed.

NOTE. — Justice *Boyden* having been of counsel, did not sit in this case.

(376)

SCOTT v. WILKIE.

A. brings an action of replevin for the recovery of an Ox; during the pendency of the suit he is adjudged a bankrupt upon his own petition, and the Ox is allotted to him as a part of his exemptions under the bankrupt

law: *Held*, that the legal title to the Ox remained in A, and that it had never vested in the ASSIGNEE.

THIS was an action of Replevin, brought under the old system, tried upon a case argued before *Clarke, J.*, at Spring Term, 1871, of JONES Superior Court.

After suit was brought, the plaintiff on his own petition was adjudged a bankrupt, and the assignee in bankruptcy set apart to plaintiff, among the articles of property exempted, the animal in question. Upon this state of facts, defendant's counsel moved to non-suit the plaintiff, which motion was refused, and upon the facts agreed, the Court rendered judgment against the defendant. Appeal.

Green and Hubbard for plaintiff.
J. H. Haughton for defendant.

A decree of Bankruptcy divests a bankrupt of all his property and rights of property, except articles exempt, and declares all suits pending to which he is party, shall be prosecuted or defended by the assignee, consequently assignee must be party to the litigation pending in favor of or against the bankrupt, or it cannot progress to a trial. *Lucy v. Rockett*, 11 Ala. 1002.

It is competent for the defendant to plead in law to an action by the bankrupt himself, the decree deciding the plaintiff a bankrupt. The effect of this plea may be avoided by the assignee making himself a party, but if he demurs and his demurrer is overruled and he does not plead further, judgment will be rendered for the defendant. *Ib.* *Brown on actions*, 220. (377)

After a person has been declared a bankrupt, and his goods passed to his assignee, he has no right of property or possession in the goods. *Redmon v. Gould*, 7 Blackford 361.

BOYDEN, J. There is no error. Section 149, the Bankrupt Law provides, "that as soon as the assignee is appointed and qualified, the Judge, or where there is no opposing interest, the Register, shall by an instrument under his hand, assign and convey to the assignee, all the estate real and personal of the Bankrupt, etc., and thereupon by operation by law, the title to all such property and estate, both real and personal, shall vest in the assignee, etc., *Provided however:* that there shall be excepted from the operation of the provisions of this section, the necessary household and kitchen furniture, and such other articles and necessaries of such Bankrupt as the said assignee shall designate, and set apart, etc."

The animal in controversy, was thus designated and set apart, by the assignee, as excepted from the operation of that part of section 14th, which declares: "that the assignment shall by operation of laws, vest in the assignee, all the property both real and personal of the Bankrupt."

This same 14th section of the Bankrupt law, especially provides: "that the foregoing exception shall operate as a limitation, upon the conveyance of the property of the Bankrupt to his assignees; and in no case shall the property hereby excepted pass to the assignees, or the title of the Bankrupt thereto, be impaired or affected by any of the provisions of this act." So that it is clear that the title of the animal in dispute, did not pass to the late assignee, but continued in the Bankrupt, unimpaired and unaffected by his being adjudicated a Bankrupt.

This case will be certified.

Per curiam.

Judgment affirmed.

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(378)

WILLIAM VAUGHN v. W. J. DELOATCH, ADM'R OF SIMON T. BUIE, DEC'D, AND E. A. MARTIN, ADM'R. OF JAMES H. BUIE, DEC'D.

Real estate is not assets for the payment of the debts of decedent before the same has been sold, and the proceeds received by the administrator. *Fike v. Green*, 64 N.C. 665, cited and approved.

Whether an Administrator can be sued on his bond where he has been guilty of negligence in not applying for and obtaining an order to sell the real estate of his intestate: *Quaere?*

THIS was an action of debt brought under the old system, and tried before *Pool, J.*, at Spring Term, 1871, of HERTFORD Superior Court.

The plaintiff declared on a single bill, the execution of which was admitted; the defendants relied upon the pleas, of fully administered and no assets.

Upon the trial of these issues the plaintiff offered to show, that at the time of the death of James Buie (the intestate of the defendant, E. A. Martin,) he was seized and possessed of certain real estate which the defendant Martin neglected to sell and convert into assets. The defendant objected to this evidence, upon the ground that in this action he was not chargeable with the value of the real estate as assets. His

Honor overruled the objection and admitted the evidence. Verdict for plaintiff. Rule, etc. Judgment and appeal.

Barnes and R. B. Peebles for appellant.
Smith for appellee.

READE, J. The only question is, whether real estate is assets to pay debts before the same has been sold, and the proceeds received by the administrator?

Recent decisions settle the question in the negative. 64 N.C. *Fike v. Green,* and the cases there cited.

It may be, that in a case of negligence the administrator would be liable on his bond for not obtaining license and selling; (379) but that is not before us.

There is error.

Per curiam.

Venire de novo.

Cited: Hawkins v. Carpenter, 88 N.C. 406; *Wilson v. Bynum,* 92 N.C. 723.

TOWN OF EDENTON v. JACOB WOOL AND GEORGE CRAWLIN.

The Legislature cannot confer on the Mayor of a town the judicial powers of a Justice of the Peace in civil actions. Article 4, section 33, confers exclusive original jurisdiction on Justices of the Peace wherever the sum demanded does not exceed two hundred dollars.

The State Constitution requires that Justices of the Peace shall be elected by townships, whilst Mayors are elected only by towns and cities. *Wilmington v. Davis,* 63 N.C. 582, cited and approved.

THIS was an appeal from an alleged judgment rendered by the Mayor of Edenton against the defendants for a violation of a town ordinance, and known as Ordinance No. XVI — in which it is declared that "no bar room or house where liquors are sold shall be opened on the Sabbath," etc. The defendants were fined twenty-five dollars and costs, and the said appeal was tried before *Pool, J.,* at Spring Term, 1871, of CHOWAN Superior Court.

The defendants moved to dismiss the action, because, amongst other grounds, that the Mayor of Edenton had no jurisdiction over the subject matter.

Smith for defendants, cited Wilmington v. Davis, 63 N.C. 582.

RODMAN, J. The town of Edenton was originally incorpo-
(380) rated many years ago. At the session of 1869-'70, (*Private Acts, ch.* 123, *p.* 232,) the Legislature re-incorporated it, and attempted to give to the Mayor of the town, the jurisdiction of a Justice of the Peace.

This is an action for a penalty for breach of a town ordinance; and is technically, a civil action arising out of a contract.

The question presented is, whether the Legislature could constitutionally confer on an officer elected by the voters of a town, but not of a township, the judicial powers of a Justice of the Peace in such an action?

We think the principles on which the case of *Wilmington v. Davis,* 63 N.C. 582, was decided, must control our decision. It would probably be convenient to the inhabitants of towns for their chief officer to have such powers.

The generality of the question presented, has induced us to re-consider with care the reasoning pursued in that case. We have not been able to see how any other decision could be reconciled with the provisions of the Constitution. That instrument, (Art. IV. s. 33,) enacts: "The several Justices of the Peace, shall have *exclusive* original jurisdiction, under such regulations as the General Assembly shall prescribe, of all civil actions founded on contract, wherein the sum demanded shall not exceed two hundred dollars, etc."

Under this positive grant of *exclusive* original jurisdiction to Justices of the Peace, we do not see how the Legislature can give a concurrent jurisdiction to any officer, other than a Justice of the Peace.

It seems clear also, that merely calling the chief officer of a town a Justice of the Peace, or conferring on him the functions of one, cannot make him one in the sense of the Constitution. By Art. VII. s. 5, a Justice of the Peace can only be a person elected to that office by the qualified voters *of a township.* It is not alleged that the town of Eden-
ton constitutes a township by itself; it is part of a township;
(381) and the Mayor is elected not by the township, but by the town alone. The duties of a Justice must extend over a whole township, and it is inconsistent with the spirit as with the letter of the Con-

stitution, that he should be elected by the voters within any limited part of it. We think the plea to the jurisdiction must be sustained.

Our opinion on this point renders it unnecessary to consider the other points made by the defendant.

Whether the Legislature, if so disposed, could obviate any supposed inconveniences of this limitation of its power, by making any particular city or town, in which it was thought desirable to vest the chief officer with the functions of a Justice, a township by itself, and by then giving him those functions; or, by making the chief officer of any city of town elective as a Justice, by the voters of the whole township; or, by making the chief officer of any city or town a Special Court, with power to try misdemeanors, under s. 19, of Art. IV., is entirely for its consideration, and we could not venture to offer even a suggestion.

Per curiam.

Judgment affirmed.

Cited: S. v. Pender, 66 N.C. 315; *Washington v. Hammond,* 76 N.C. 34; *Hendersonville v. McMinn,* 82 N.C. 534; *Katzenstein v. R. R.,* 84 N.C. 696; *McDonald v. Dickson,* 87 N.C. 407; *Mott v. Comrs.,* 126 N.C. 878; *Sewing Machine Co. v. Burger,* 181 N.C. 244; *Linker v. Linker,* 213 N.C. 354; *Smoke Mount Industries, Inc. v. Fisher,* 224 N.C. 75; *Credit Corp. v. Motors,* 243 N.C. 334.

(382)

ABRAM RIDDICK v. WM. A. MOORE.

A, domiciled in Virginia, dies, leaving a note on a resident of this State; his administrator, being duly qualified in Virginia, sends said note to an attorney in this State, with instructions to collect, compromise, or sell the same, as he may deem advisable: *Held,* that a transfer of said note by an Administrator passed the legal title thereto to the purchaser.

Although A.'s Administrator appointed in Virginia could not have maintained a suit in his name in this State against the maker of the note, yet for all purposes *in pais,* he was as much the owner of the note as he was of any personal property which he took into his possession in Virginia, and brought to this State and sold.

Where the defendant purchased a note on the plaintiff during the week of the trial term of the cause, he is not entitled to have his demand applied in satisfaction of the plaintiff's claim. Such a case is not embraced by the second clause of sec. 101, C. C. P., because it was not "existing at the commencement of the action;" nor by the first clause of said section, as it is not "connected with the subject of the action." Neither has the defendant

any right to an equitable set-off upon the mere ground of the insolvency of the plaintiff.

To authorize an equitable set off some equitable grounds must be shown by the defendant why he should be protected against his adversary's demand. The mere existence of cross demands, or the insolvency of the plaintiff, is not sufficient.

THIS was a civil action tried before *Pool, J.*, at Spring Term, 1871, of HERTFORD Superior Court.

The plaintiff declared upon a simple bond which defendant owed him.

The defendant answered that he had paid off and discharged said bond.

At the trial Term, the defendant, by leave of the Court, filed a supplemental answer in which he alleged that the plaintiff and another person, gave their single bond to one Robt. J. Barnes, Guardian of Miss P. J. Worrell, for $268.71, due and payable 1st day of February, 1860.

That said Barnes died intestate, domiciled in Southampton County, Va., and one Worrell was duly appointed his administrator in (383) said county by the proper Court, who entered upon the duties of his office, and is still administrator.

That since the last Term of this Court, the administrator of said Barnes had through his Attorney in this State, transferred to the defendant for value, the said bond by endorsement, and that said Attorney had full power and authority to sell and dispose of said bond.

That the plaintiff was insolvent, and that defendant's claim was for a sum greater than that of the plaintiff's against him.

That defendant was without remedy, and would lose his said debt unless he could extinquish the debt of plaintiff against the defendant, with the claim which defendant had purchased from the administrator Barnes.

The facts were that during the week, when the said supplemental answer was filed and this cause tried, the defendant bought of the administrator of Robt. J. Barnes, who was duly appointed as such in Southampton County, Va., a bond executed by one Jenkins as principal, and the plaintiff as security. This bond was in the possession of Barnes at his death in Virginia, and passed into the hands of his administrator, and was by him placed in the hands of an Attorney in this State to collect, compromise, or do the best he could with the bond. The said Attorney sold said bond to defendant for thirty cents in the dollar; and upon the trial swore that he had full authority to sell said bond.

No administration on Barnes' estate had been granted in this State. It was admitted that the plaintiff was insolvent, and that defendant's

demand was for a sum greater than the amount of plaintiff's demand against defendant. The defendant asked for judgment against plaintiff for the excess.

His Honor being of opinion that the defence to said action was insufficient, gave judgment for the plaintiff, to which defendant excepted and appealed to the Supreme Court.

W. N. H. Smith for plaintiff. (384)
D. A. Barnes & John A. Moore for defendant.

PEARSON, C.J. I. The objection that the legal title to the demand which the defendant seeks to set up, did not vest in him by the assignment, is not tenable. Barnes was domiciled in Virginia, and had the note in his possession at the time of his death. It passed to Worrell the administrator in that State, and he had clearly the right to receive the money upon it, or to make an assignment of it. The place where he received the money, or assigned the note can make no difference, for the fact of his being administrator gave him the authority to do these acts anywhere.

It is true, that an action in this State upon the note could only be maintained in the name of an administrator appointed here; for the reason that the plaintiff is required to make profert of his letter of administration. And our Courts do not for that purpose, recognize letters granted in another State; but for all purposes *in pais,* Worrell was as much the owner of the note, as of a horse taken into his possession at the place of domicil, and had the same right to send the note to this State, and sell and assign it, as he had in regard to the horse. In deducing title, the letters of administration granted in Virginia, and the assignment, although made in this State, have the same legal effect, as the letters of administration, and a bill of sale for the horse executed in this State, had he sent a horse here and sold it as he did the note.

II. In regard to the second objection, we concur with his Honor, in the opinion that the defendant was not entitled to have his demand applied in satisfaction of the plaintiff's demand. It is not embraced by the 2d clause of sec. 101 C. C. P., for the reason that it was not "existing at the commencement of the action;" this was conceded on the argument; nor is it embraced in the 1st clause of that section, for the reason that it is not "connected with the subject of the action."

To meet this difficulty, the defendant's counsel took the position, that as all distinction between actions at law and suits in (385) equity, is abolished by the Constitution, defendants are entitled to avail themselves of any defence to an action brought under the new

system, which could have been made available by any proceeding either at law or in equity, and that under the old system, the defendant could have set up an equity to have his demand applied in satisfaction of the plaintiff's demand, upon the ground of the insolvency of the plaintiff.

We concede the first branch of the proposition. In fact, the Code of Civil Procedure is framed with an eye to that state of things; and as it makes no provision for setting up the equity suggested by the second branch of the proposition, but on the contrary excludes it, this might be taken as a legislative declaration, that there is no such equity on the part of defendants, in regard to a demand which is not connected with the subject of the action. For illustration; if after the commencement of the action, the defendant, *at the instance of Riddick*, bought the note, and Riddick had refused to allow it to be applied in satisfaction; that would have been a fraud, and created an equity, connected with the subject of the action within the meaning of section 101. But as the defendant bought the note without any concert with Riddick, it is simply an unconnected demand, which is not embraced by either clause of the section referred to, or by any other section of the Code of Civil Procedure, showing that in the opinion of the lawmaker, a mere unconnected cross demand acquired after the commencement of the action, could under no circumstances create an equity to have it applied in satisfaction.

But apart from this view of the matter, and supposing that the Code of Civil Procedure is not to be taken as exclusive of what may be called common law rights, (in regard to which question we are not called upon now to express an opinion,) and supposing that the defendant is entitled before a Court having both law and equity jurisdiction,

(386) to any defence which could have been made available under the old system, by any proceeding either at law or in equity, upon general principles and the reason of the thing, or upon the weight of the authorities, the defendant is not entitled to the equity which he claims.

It is a settled principle both of the common law and of equity, that a man who finds himself unable to pay all of his debts, has a right to make a preference and pay those creditors whom he considers the most meritorious, provided the preference be honestly made. The equity here insisted on, defeats this right, and puts it in the power of any debtor after he is sued, if the plaintiff be insolvent, to go into the market and buy up claims on him and defeat the action, the effect of which will be, that no man who is insolvent can maintain an action, and any debtor whom he sues, may take this right of preference away

from him, and exercise it as a matter of speculation, by buying in claims at a discount, and getting credit for the full amount; nay! if the notion be carried out, he may demand judgment for the excess, as is done in our case. How is this supposed equity worked out? The man he buys of, has no equity, and he himself has none; so the equity, if there be one, must originate from the fact, that in order to avoid the payment of an honest debt, he buys a debt upon a man whom he knows to be insolvent, and then puts the *gravamen* of his case upon that very insolvency.

True, a debtor may buy up claims before he is sued, and have them applied in satisfaction of the debt. But one who seeks to have this benefit of a claim unconnected with the subject of the action, must see to it, that he is not "behind time," and cannot stand alone upon the insolvency of the plaintiff.

Upon the weight of authority, without reference to all of the cases which are cited and commented upon in the text books, we deem it enough to say, the preponderance is decidedly against the idea that insolvency can constitute a ground of equity. In all of the cases in which the allegation is made, with one or two exceptions, there is some distinct equity, and the insolvency of the other party is (387) relied on, only as a make-weight, and by way of troubling the Court.

Story, in his Equity Jurisprudence, sec. 1436, says, in treating of sets-off allowed in equity, "whenever there is a mutual credit, between the parties touching the debts, (that is, when the debts are in any way connected) a set-off is, upon that ground alone, maintainable in equity; although the mere existence of mutual debts, without such a mutual credit, might not even in a case of insolvency, sustain it." That judicious author, Adams, in his Treatise on Equity, 223, referring to the subject, says, there must be some equitable element such as trust or fraud, and does not even refer to "insolvency" as an element of equity. In *Ransom v. Samuel*, 1 Craige and Phillips, 161, 177, which seems to be the controlling case, after plaintiff's counsel had taken ground that the circumstance of the defendant's being out of the jurisdiction, and of his insolvency, furnish additional reasons why the Court should afford relief, for if the defendant be allowed to recover, the Court will have lost the power of doing justice between the parties; the Lord Chancellor intimated to the defendant's counsel, that it was unnecessary for him to address himself to the circumstance of the defendant's being out of the jurisdiction, and insolvent, inasmuch as those circumstances could give the plaintiff no equity. The argument is then continued upon other matters, and the Chancellor concludes by say-

ing, "we speak familiarly of equitable set-off, as distinguished from set-off at law: but it will be found, that the equitable set-off exists in cases where the party seeking the benefit of it, can show some equitable ground, for being protected against his adversary's demand. The mere existence of cross demands, is not sufficient." He had before put insolvency out of the question; so that disposes of our case; for the defendant has nothing to stand on except the existence of cross demands, and the insolvency of the plaintiff.

Under the Code of Civil Procedure, and upon the reason of (388) the thing, and the weight of authority, we concur with his Honor.

There is no error.

Per curiam.

Judgment affirmed.

Cited: Martin v. Richardson, 68 N.C. 258; *Williams v. Williams,* 79 N.C. 421; *Lane v. Richardson,* 104 N.C. 648; *Morefield v. Harris,* 126 N.C. 627; *Sineath v. Katzis,* 219 N.C. 444.

JOHN H. STEADMAN v. JERUSHA E. JONES.

The Code of Civil Procedure requires no surety on an appeal from a Justice's judgment.

On an application to a Justice of the Peace for a suspension of execution after a recovery by a landlord against his tenant; the Justice has a discretion as to the sufficiency of the surety, which a Judge will not review, in the absence of any suggestion that the Justice acted dishonestly or capriciously.

Before an application for a *recordari* can be entertained, petitioner must aver that he has paid, or offered to pay, the Justice's fees.

An order for a *recordari* should be accompanied with an order for a *supersedeas* and suspension of execution.

Although a tenant cannot dispute the title of his landlord, yet, in an action for the recovery of realty by an assignee in bankruptcy against the tenant of the bankrupt, he may dispute the assignment.

APPLICATION for a *recordari, supersedeas* and *injunction,* heard before *Watts, J.,* at Spring Term, 1871, of CRAVEN Superior Court.

The facts necessary for a proper understanding of the case are stated in the opinion of the Court.

J. H. Haughton for petitioner.
Lehman contra.

RODMAN, J. This was an application to the Judge of the Third District for a *recordari, supersedeas* and *injunction.* (389)

In his petition, the applicant states in substance:

1. That Jerusha Jones had brought an action against him in a Justice's Court, under the *Landlord and Tenant Act,* 1868,-'9, ch. 156, to recover possession of certain land held by him as her tenant; that upon the trial, the defendant, Steadman, offered to prove that the title to the property was in the assignee in bankruptcy of one Samuel T. Jones, who was the original landlord of the defendant; that the said Samuel T. Jones had conveyed the land to one Foster, who had conveyed to the plaintiff, Jerusha Jones; and that after these conveyances, Samuel T. Jones was adjudicated a bankrupt, etc., and that said conveyance to Foster, was in fraud of the assignee in bankruptcy, in whom the title vested, and was therefore void; which evidence the Justice refused to receive, and therein the Justice erred in law.

2. That there was a verdict and judgment against him, from which judgment he prayed an appeal for the reasons stated, and offered one sufficient surety whom the Justice refused, requiring two sureties. But he does not allege that he paid the Justice his fees, or that he moved for a suspension of execution.

The application to the Judge was without notice to the opposite party. The Judge granted the order demanded; and upon the return of the order, Jones, the plaintiff in the original action, moved to dismiss the *recordari,* and to vacate the *supersedeas* and *injunction,* which motion the Judge granted, and thereupon Steadman appealed to this Court.

The statement of the defendant, Steadman, in his petition, was the only evidence of the proceedings before the Justice, which was before the Judge when he made the orders prayed for. This statement was not contradicted or altered by any statement by the plaintiff, and with the imperfect return made by the Sheriff of the proceedings before the Justice, it continued the only evidence before the Judge when he dismissed the *recordari.* That statement must therefore for (390) the present purpose be taken as true.

1. By sec. 534, C. C. P., as also by the Landlord and Tenant Act, 1869-'9, ch. 156, sec. 25, any party can appeal from a Justice's judgment. No security for costs is required. By sec. 537 the Justice is re-

quired to file the papers, proceedings and judgment, with the Clerk of the Appellate Court, and may be compelled to do so by attachment, provided his fees for the service are paid him, and not otherwise. As there is no allegation that the Justice's fees were paid or tendered, we think his Honor was wrong in making an order for the Justice to return the papers, without requiring his fees to be first paid.

2. If we understand the motion of Steadman before the Justice to have been, not for an appeal, as he states it to have been, but for a suspension of execution pending the appeal, and that the Justice refused to grant that, because in his opinion the security offered was insufficient, we think, in that point of view, the Judge was wrong in granting an order for suspension of execution, (which we suppose is what is meant by an injunction); because as the matter stood there was no pending appeal, nor had an appeal been wrongfully refused or lost through accident, etc. We think, also, that the taking of the security upon the suspension of execution, is a matter within the discretion of the Justice. If indeed, the Justice should wantonly or fraudulently refuse the order of suspension when the security offered was manifestly sufficient, no doubt the Judge could compel him to make it, or could himself do it. But it is not alleged that the Justice in this case acted either wantonly or fraudulently. It is perfectly consistent with what is said, that he thought the single security offered was insufficient. He was not abliged to require two sureties but he might do it if he thought it necessary. We do not think that the action of the Justice in this respect, justified the Judge in issuing the injunction. The Judge had no power to review the discretion of the Justice as to the (391) sufficiency of the security, if honestly exercised.

3. It is said on behalf of Steadman, that the writ of *recordari* is not only a substitute for an appeal, but may also be used as a writ of false judgment to bring up the case for review on matters of law appearing on the record, and that a party is entitled to it for such a purpose, even though he never prayed an appeal. *Leatherwood v. Moody,* 25 N.C. 129, *Webb v. Durham,* 29 N.C. 130. This is conceded. But the Judge would not even in such a case, permit the writ to be used for the purpose of evading the payment of the fees of the Justice; and would require an averment that they had been paid or tendered. Supposing however that to be done, it is conceded also, that in a case proper for ordering a *recordari,* the Judge shall generally order also a *supersedeas* and suspension of execution until the hearing. These conceptions bring us to the point, whether such errors are alleged in the complaint as will justify a writ of *recordari* in the nature of a writ of false judgment.

It is conceded that a tenant cannot dispute the title of his landlord. It is also clear that where an action of ejectment is brought by one claiming to be an assignee of the landlord, the tenant may dispute the assignment.

In this case it was open to Steadman to deny that S. T. Jones (his landlord) had in fact conveyed to Foster, and that Foster had conveyed to the plaintiff (Jerusha Jones.) He does not however do this; but seeks to avoid the conveyance to Foster, by alleging that it was in fraud of the Bankrupt act. By that act, conveyances in fraud of creditors, and also those made in contemplation of bankruptcy, are void, as against the assignee of the bankrupt. But we are of opinion that such a defence is not open to a tenant, at least until he has been notified by the assignee that he claims the property. We think that at all events until such notice, the tenant could not be held liable for rent to the assignee. No such notice or any acceptance of the property by the assignee is alleged. The assignment to Foster was good against S.
T. Jones; assuming it to have been void as to his creditors, or as (392)
to a subsequent purchaser from him, on the ground of fraud,
yet that defence could be made to it only by a creditor or purchaser or by some one who like an assignee in bankruptcy represented the creditors. We think, therefore, that the Justice committed no error in excluding the evidence offered, as it raised a defence which was not open to the defendant.

It may be proper to remark here, that an order to return the papers or to record his proceedings, should be directed to the Justice, and not as was done in this case to the Sheriff. The thing commanded is to be done by the Justice. The Sheriff only serves the order on the Justice, whose duty it is to make a return thereto.

The return of the Sheriff should state merely the fact of service.

Upon the whole case, we are of opinion that the Judge was right in vacating the orders for a *recordari, injunction* and *supersedeas,* improvidently issued by him in the first instance.

The judgment below is affirmed, and the clerk will certify this opinion to the Superior Court of Craven, in order that the Judge thereof may direct a *procedendo* to the Justice of the Peace before whom the action was tried.

Per curiam.

Judgment affirmed.

Cited: Marsh v. Cohen, 68 N.C. 286; *Hargrove v. Cox,* 180 N.C. 361, 364.

(393)

THOMAS W. HUDGINS v. PETER F. WHITE, ET AL.

The C. C. P. sec. 133, makes it discretionary with a Judge whether he will relieve a party against a judgment taken against him through his "inadvertence, mistake, surprise, or excusable neglect." If a Judge refuses to entertain a motion to set aside a judgment for any of the enumerated causes, because he thinks he has no power to grant it, then there is error, and he has failed to exercise *the discretion* conferred on him by law.

After hearing the evidence and finding the facts under the above recited section of the C. C. P., the action of the Judge is conclusive upon the parties, from which there is no appeal.

This discretion, however, is not arbitrary, but implies a legal discretion. As for instance, if the Judge mistake the meaning of the statute as to what is "mistake, inadvertence, surprise, or excusable neglect." In such cases his judgment is the subject of appeal and review.

MOTION to set aside a judgment heard before *Pool, J.*, at Spring Term, 1871, of CHOWAN Superior Court.

The facts were, that at Fall Term, 1869, the present plaintiff upon the relation of the State of North Carolina obtained judgment against the defendant White and others, on the official bond of said White as Sheriff of Chowan County. The suit was instituted in the year 1861, and tried upon the issues presented by the defendant's pleas, to wit: "Covenants performed and no breach."

In August, 1868, the defendant, Bond, filed his petition in bankruptcy, and received his certificate of discharge some time in 1869. The bankruptcy of said defendant was not suggested during the pendency of said suit, nor after he received his certificate of discharge from the Court of bankruptcy did he plead the same, at or before the rendition of judgment in this case, but from facts not necessary here to state he was led to believe that a *nol. pros.* had been entered as to him.

It is conceded that the motion to set aside said judgment shall be regarded as made within the time prescribed by law.

His Honor refused to allow the motion, upon the ground that
(394) he had no power to grant it, from which ruling the defendant White appealed to the Supreme Court.

J. A. Moore and Phillips & Merrimon for plaintiff.
Smith for defendants.

1. A motion in the cause was the proper course. *Caldwell v. Bank. Mason v. Miles,* 63 N.C. 565, decide that the present action cannot be sustained.

Objection not raised in the pleadings can be taken *ore tenus, Council v. Rivers,* 65 N.C. 54.

2. Equity would not relieve upon the facts contained in the complaint. 2 Story's Eq. Jur., sec. 1572, 1573, 1574.

A Note taken by a bank in payment of a pre-existing debt is not discounted. etc. *Bank v. Hewett,* 52 Maine 531. Morse on Banks and Banking, 20 *Vide* Code, sec. 133.

READE, J. The Code, s. 133, provides, that a Judge may, in his discretion, and upon such terms as may be just, at any time within one year, after notice, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertance, surprise or excusable neglect.

In this case the motion was made more than a year after its rendition; but it was agreed to be considered as if it had been made within time. So there is no difficulty about that.

His Honor heard evidence as to the facts under which the judgment was rendered; and refused to set it aside because he supposed he had not the *power.*

What were the facts, was a question exclusively for his Honor. In such cases the Judge is the trier of the facts, as the jury is in ordinary cases; and from his finding there is no appeal.

After hearing the evidence and finding the facts, it is discretionary with the Judge, to set aside the judgment or not; and from the exercise of his discretion, there is no appeal. But this must be understood with the qualification, that it is not altogether an arbi- (395) trary discretion; for, if in ascertaining the facts, or exercising his discretion, he make a mistake of the *law,* that mistake can be appealed from. As, for instance, if competent evidence be offered and rejected; or, if he mistake the meaning of the statute as to what is, "mistake, inadvertence, surprise, or excusable neglect." In such case he may be reviewed; because that is not the exercise of a discretion, but a misapprehension of the law; and no one has a discretion to misapply the law. So, in the case of an application for the removal of a case, the Judge has a discretion, the exercise of which we cannot review, unless it appear that some principle of law is misconceived and misapplied.

In the case before us, his Honor did not exercise his discretion upon the merits, but supposed that he had no *"power"* to set the judgment aside, even if the merits required it. Whether he had such power, is a question of law. We think he had the power.

There is error. Let this be certified.

Per curiam.

Error.

Cited: *Clegg v. Soapstone Co.*, 66 N.C. 393; *Powell v. Weith*, 66 N.C. 424; *Keener v. Finger*, 70 N.C. 43; *Simonton v. Lanier*, 71 N.C. 500; *McDaniel v. Watkins*, 76 N.C. 400; *Jones v. Swepson*, 79 N.C. 511; *Gilchrist v. Kitchen*, 86 N.C. 21; *Warren v. Harvey*, 92 N.C. 141; *Beck v. Bellamy*, 93 N.C. 133; *Clemmons v. Field*, 99 N.C. 402; *S. v. Casey*, 201 N.C. 628; *Dunn v. Wilson*, 210 N.C. 495; *Crissman v. Palmer*, 225 N.C. 474; *Rierson v. York*, 227 N.C. 578.

STATE v. LINNEUS JONES ALIAS LINEUS WHITTED.

The turning of a barrel of turpentine which was standing on its head, over on its side, with a felonious intent, is not such an asportation as will constitute Larceny.

LARCENY tried before *Russell, J.*, at Spring Term, 1871, of BLADEN Superior Court.

The indictment charged the defendant with stealing a barrel of turpentine, the property of T. D. Love and David H. Ray. The (396) defendant pleaded not guilty, whereupon the jury upon the evidence offered, returned a special verdict, to wit: "That the defendant went to the still of Love & Ray, where there was a lot of turpentine in barrels, which was the property of Love & Ray; that defendant took one of the barrels which was standing on its head, and turned it over on its side, moving it no further, and no more, than was necessary to turn it over from the head to the side; that defendant then went to Love and offered to sell his this barrel of turpentine, inducing him to believe that he, the defendant, had just brought it there for sale; that Love went out and looked at the barrel, and told the defendant to roll it to the scales for him to weigh, which defendant did. Love not knowing at the time that the barrel belonged to him and Ray; that the purpose of defendant was to deceive Love & Ray, and to sell them some of their own turpentine; that this was his intent at the time he turned over the barrel."

"If his Honor shall be of opinion upon the facts as found by the jury, that the defendant is guilty, then the jury say that the defendant is guilty, in manner and form as charged in the bill of indict-

ment; but if his Honor shall be of a contrary opinion, then the jury say the defendant is not guilty."

Upon consideration whereof his Honor decided that the defendant was not guilty, and ordered that he be discharged; from which judgment the Solicitor for the State appealed.

Attorney General for the State.
No Counsel for the defendant.

DICK, J. There must be an asportation of the article alleged to be stolen, to complete the crime of larceny. The question as to what constitutes a sufficient asportation has given rise to many nice distinctions in the Courts of England, and the rules there established have been generally observed by the Courts of this country. (397) Roscoe 570, 2 Bishop Crim. Law, 804.

The lease removal of an article, from the actual or constructive possession of the owner, so as to be under the control of the felon, will be a sufficient asportation. *State v. Jackson,* 65 N.C. 305. Where a parcel was not removed, its position only being altered on the spot where it lay, the Judges in England held that there was not a sufficient asportation. *Cherry's* case, 2 East. P. C. 556.

In the case before us, the barrel of turpentine was turned from its head over on its side by the defendant with a felonious intent, but there was no other removal from the spot where it had been placed by the owners. We concur in the opinion of his Honor, that there was not a sufficient asportation to constitute the crime of larceny. The defendant by his act used a false pretence, and if he deceived the owner of the turpentine, and by such deception received from the owner anything of value, he may be liable to indictment under our statute. Rev. Code, ch. 34, sec. 67.

There is no error. Let this opinion be certified.

Per curiam.

Judgment affirmed.

Cited: S. v. Alexander, 74 N.C. 233; *S. v. Green,* 81 N.C. 562; *S. v. Fulford,* 124 N.C. 800.

(398)

STATE v. RUTHA WILLIAMS.

Where a *feme covert* commits an assault and battery in the presence of her husband, it is presumed, in the absence of evidence to the contrary, that she did it under his constraint.

This presumption of law, however, may be rebutted by the circumstances appearing in evidence, and showing that, in fact, the wife acted voluntarily, and without constraint.

Semble, That this principle applies only to misdemeanors committed by the wife in the presence of her husband.

THIS was an indictment for assault and battery tried before *Moore, J.*, at Spring Term, 1871, of EDGECOMBE Court.

The husband of the *feme* defendant was jointly indicted with her for an assault and battery upon one Anna Davis. It was in evidence that the defendant and her husband committed a battery on the prosecutrix. The defendant's counsel asked the Court to instruct the jury that the *feme* defendant was not guilty, as the offence had been committed with her husband, and in his presence.

The Court declined so to charge, but instructed the jury that when a married woman in the presence of her husband, committed an offence against natural law, and with force and violence, the presumption of coercion did not arise. Defendant excepted; Verdict of guilty; Judgment, and Appeal.

Attorney General for the State.
No counsel for the defendant.

RODMAN, J. The liability of a wife for a crime committed in the presence of her husband, has been variously stated by respectable text writers. *Blackstone Book* 1, p. 444, says, "and in some felonies, and some inferior offences committed by her (the wife) through constraint of her husband, the law excuses her: but this extends not to
(399) treason, or murder." The same writer in Book IV, says "and she will be guilty in the same manner, of all those crimes which like murder, are *mala in se*, and prohibited by the law of nature." 1 Russ, cr. 16. Also in Archbold's Crim. Prac. and Plead. 6. "So if a wife commit an offence under felony, even in company with her husband, she is liable to punishment as if she were not married." For this is cited 1 Hawk. ch. 1, sec. 13, "and generally a *feme covert* shall answer as much as if she were sole, for any offence, not capital, against the common law or statute. And if it be of a nature that may be committed by her

alone without the concurrence of her husband, she may be punished for it without her husband," etc.

It was upon a recollection of these authorities that his Honor below ruled in the case as he did.

Nevertheless upon a fuller examination of the authorities, we are of opinion that he was in error.

It seems to be admitted by all the authorities, that if a wife commit any felony, (with certain exceptions not material now to consider,) in the presence of her husband, it shall be presumed, in the absence of evidence to the contrary, that she did it under constraint by him, and she is therefore excused.

It is generally agreed that treason and murder are exceptions to this rule; and some add to these, manslaughter, robbery and perjury, although the last is not a felony. The most important, (perhaps all) of the authorities will be found referred to in the notes to *Commonwealth v. Neal,* 10 Mass. 152, 1 Leading Criminal Cases, 81; in the argument of the counsel for the prisoner in *Regina v. Cruse,* 2 Moody C. C. 53, and in 1 Bishop C. Law, 452.

As has been seen, several eminent text writers confine the presumption to cases of felony. But the more recent cases, both English and American, extend it to misdemeanors as well; those cases excepted, which from their nature would seem more likely to be committed by women, such as keeping a bawdy house, etc. (400)

The case above referred to, of *Commonwealth v. Neal,* 10 Mass. 152, was an indictment against husband and wife for an assault and battery, and is therefore in point. Bishop 1 vol. sec. 452, considers the rule applicable to all offences whatever, with certain exceptions such as treason, murder, etc. There are many English cases in which it has been applied in indictments for receiving stolen goods. *Rex v. Archer,* 1 Moody C. C. 143; *Regina v. Barber,* 4 Cox C. C. 272. *Rex v. Price,* 8 C. and P. 19, was for a misdemeanor in uttering counterfeit coin; and so was *Conolly's* case, 1 Lewin C. C. 227.

When our accustomed authorities differ as to a principle, it is always proper to look at its foundation in reason. Mr. Lewin in his note to *Rex v. Hughes,* 2 Lewin C. C. 225, says that the reason of the rule in cases of burglary and larceny, had been said to be, that the wife might not know whose the goods were that were taken. This reason he properly rejects as insufficient, and suggests that it was considered odious and unjust to inflict on the wife a severe punishment, when the husband could plead his clergy, (which a woman could in no case do,) and thus escape with a slight one.

The reason would confine the principle to the clergiable felonies. It seems, however, more natural to suppose the principle to have been founded upon the fact, that in most cases the husband has actually an influence and authority over the wife, which the law sanctions, or at least recognizes. 1 Hawk. ch. 1, sec. 9; 1 Bishop C. L. 452. In that case the reason would apply to misdemeanor with at least as much force as to clergiable felonies. And this we think the true view.

It is also conceded by all the authorities, that the presumption may be rebutted by the circumstances appearing in evidence, and showing that in fact, the wife acted without constraint; or by the nature of the offence. But in this case no circumstance appears tending to rebut the presumption which the law raises; and the case was not put to (401) the jury in that point of view.

There was error.

Per curiam.

Venire de novo.

Cited: S. v. Nowell, 156 N.C. 652; *S. v. Seahorn,* 166 N.C. 377; *S. v. Cauley,* 244 N.C. 709.

H. H. COOR v. JOHN D. SPICER, ET AL.

Where a note tainted with usury is endorsed to a third person, who purchases it for value, and without notice of any illegality attending the execution thereof, and the maker gave to the payee a mortgage to secure the payment of said note: *Held*, that the defence of usury could not avail the maker, and that the mortgage given to secure the payment of the principal and interest due thereon could be enforced.

MOTION to dissolve an injunction heard before *Clarke, J.,* at Spring Term, 1871, of WAYNE Superior Court.

The following facts were found by the Court:

1. That on the 28th April, 1870, the plaintiff borrowed from defendant Spicer, three hundred dollars, for which he gave him three promissory notes for one hundred and forty-five dollars and sixty cents each, payable to said Spicer, or order, due and payable Jan. 1st, 1871. At the time of executing said notes, and for securing the payment thereof, the plaintiff executed a mortgage to the defendant Spicer, of his

lands, with power of sale, in case of failure of plaintiff to pay said notes at time of maturity, which said mortgage was duly recorded.

2. That on 4th July, 1870, the defendant Spicer sold said notes to W. G. Morrisey for value, and without notice of the usurious transaction between plaintiff and defendant Spicer, and on the following day, Morrisey transferred said notes to the defendant Isler, who bought them as agent for the defendant Penelope Holt; that the latter transfer was also for value, and without notice on the part of (402) Morrisey, Isler or Holt, that said notes were usurious.

3. That early in January, 1871, plaintiff proposed to pay defendant Holt $300, with interest at six per cent. from date of said notes, in discharge and satisfaction thereof, which defendant, Penny, refused to receive.

4. That on 24th Jan. 1871, the plaintiff filed an injunction to restrain the mortgagee Spicer, from selling said lands to secure the payment of the aforesaid notes, which said injunction was obtained after a summons had issued against the defendants.

At Spring Term, 1871, of said Court, the defendants moved that the injunction order be dissolved, which motion was refused by his Honor, whereupon defendants appealed.

Bragg & Strong for plaintiff.
Faircloth for defendants.

READE, J. The only question presented for our consideration, is, whether a mortgage to secure a usurious debt, in the hands of a purchaser for value without notice of the usury, is void.

Except as otherwise provided by statute, a negotiable instrument, void as between the original parties by reason of any illegality in the consideration, was, nevertheless good in the hands of an endorsee for value and without notice. *Henderson v. Shannon,* 12 N.C. 147. Of course it might be otherwise provided by statute; and our usury statute, Rev. Code, ch. 114, did make void all instruments, the consideration of which, was usurious; and under the operation of that statute, innocent and meritorious holders were obliged to suffer. No doubt it was the consideration of that statute which misled his Honor; and it was probably not called to his attention, as it was not to ours in the argument, that our statute, Rev. Code, ch. 50, sec. 5, provides that no conveyance or mortgage, etc., by reason that the consideration shall be forbidden by law, if such purchaser at the time of his pur- (403) chase have no notice of the unlawful consideration.

This statute, we think, embraces the case under consideration. The endorsees for value and without notice, are not affected by the illegality of the consideration of the note between the original parties to the mortgage, and consequently have a right to enforce payment by a sale under the mortgage.

The injunction ought to have been dissolved.

This will be certified. There is error.

Per curiam.

Error.

Cited: Ward v. Sugg, 113 N.C. 493; *Faison v. Grandy,* 126 N.C. 829; *Faison v. Grandy,* 128 N.C. 443.

RALPH B. LUTTERLOH v. THE BOARD OF COMMISSIONERS OF CUMBERLAND COUNTY.

Where a party has established his debt against a county by judgment, and payment cannot be enforced by an execution, he is entitled to a writ of *mandamus* against the Board of Commissioners of said county, to compel them to levy a sufficient tax to pay off and discharge his said judgment.

There is no provision in the C. C. P. regulating the proceedings in writs of *mandamus*, and in such cases "the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice." C. C. P. sec. 392.

This writ can only be used by the express order of a Court of superior jurisdiction, and is not embraced in the rule established in *Tate v. Powe*, 64 N.C. 644, which marks out the distinction between civil actions and special proceedings.

Where the plaintiff's demand may involve disputed facts, the proper application is for an alternative *mandamus*. Where, however, the plaintiff's claim is based upon a judgment, then the proper process is a peremptory *mandamus*.

THIS was a petition for a peremptory *mandamus* heard before *Buxton, J.*, at Spring Term, 1871, of CUMBERLAND Superior Court.

The petitioner had heretofore obtained judgments in sixteen (404) cases against the defendants, amounting in the aggregate to several thousand dollars. Executions were issued in all the cases, upon each of which the Sheriff of Cumberland county returned "nothing to be found."

After said return of the Sheriff, the plaintiff caused a summons to issue against the defendants, returnable to Spring Term, 1871, of Cumberland Superior Court, and filed a written complaint verified by affidavit, specifying the particulars of his demand, which comprised the foregoing judgments, and the steps heretofore taken without avail for their enforcement, and demanding judgment of *mandamus*.

Upon the defendants, claiming the whole term in which to file an answer, the plaintiff withdrew his civil action, and obtained a rule upon the defendants, to show cause on a day named, of that Term of the Court, why a *mandamus* should not be issued by the Court to enforce them to levy a tax sufficient to pay off, and satisfy his aforesaid judgments.

On moving for the rule, the plaintiff read as an affidavit in support of his motion, the complaint filed in the action which he had hereto fore withdrawn.

Notice of the rule was accepted by the defendant. The plaintiff also gave notice, that at the hearing, the complaint would be used as a petition for *mandamus*.

Upon the day named for the hearing of the application, the defendant appeared, and moved to dismiss the application, because it was made *neither by a civil action*, nor by a special proceeding.

His Honor refused to dismiss, and directed a *mandamus* to issue returnable to next Term, making it *peremptory* in the first instance. From which rulings and order, defendant appealed.

McRae for plaintiff.
Phillips & Merrimon and B. & T. C. Fuller for defendant.

DICK, J. The plaintiff has established his debt against the County of Cumberland by judgment duly docketed; and as he (405) cannot enforce payment by an execution, he is entitled to a writ of *mandamus* against the Board of Commissioners to compel them to levy a tax for the satisfaction of said judgment. *Gooch v. Gregory*, 65 N.C. 142.

There is no provision in the C. C. P., regulating the proceedings in writs of *mandamus*, and in such cases "the practice heretofore in use, may be adopted so far as may be necessary to prevent a failure of justice." C. C. P., sec. 392.

The writ of *mandamus* is an extraordinary remedy, and can only be used by the express order of a Court of superior jurisdiction, and is not governed by the rules prescribed for the prosecution of ordinary legal remedies. *State v. Jones*, 23 N.C. 129. It is not embraced in the rule

established in *Tate v. Powe,* 64 N.C. 644, which defines the distinction between civil actions and special proceedings.

This high prerogative writ may be obtained from the Superior Court, and the applicant must show by petition or affidavit that he has a specific legal right, and has no adequate legal remedy to enforce it. If the case presented by the applicant shows that the rights of the parties are unadjusted, and there may be facts in dispute, the first process is an alternative *mandamus,* or a rule to show cause, which is in the nature of an alternative *mandamus.* In all cases the defendant is entitled to reasonable notice to make his defence; and the manner of service and the day of return are matters within the discretion of the Court. When the rights and liabilities of the parties are ascertained and determined by the judgment of a Court of superior jurisdiction, and the remedy cannot be enforced by an execution, there is no reason why the Court may not grant a peremptory *mandamus* in the first instance, upon a rule to show cause, etc. In our case there are judgments of the Court establishing the rights of the plaintiff — those rights cannot be enforced by execution, the motion for a rule to show cause was found-
(406) ed upon affidavits. Service of the rule was accepted by the defendants, and only a technical defence was made.

We think his Honor was right in granting a peremptory *mandamus,* and the judgment is affirmed.

Let this be certified.

Per curiam.

Judgment affirmed.

Cited: Webb v. Comrs., 70 N.C. 308; *Hawley v. Comrs.,* 82 N.C. 24; *Fry v. Comrs.,* 82 N.C. 305; *Hughes v. Comrs.,* 107 N.C. 605; *Bear v. Comrs.,* 124 N.C. 212; *Person v. Watts,* 184 N.C. 506; *Casualty Co. v. Comrs. of Saluda,* 214 N.C. 238.

K. P. BATTLE, TREASURER OF THE STATE OF NORTH CAROLINA v. JOSEPH THOMPSON.

Where a person is indebted to the State of North Carolina, and is sued on such indebtedness, he cannot offer as a set-off or counter claim, the indebtedness of the State to him arising out of coupons of the State which are overdue, and which the State legally owes.

A set-off is allowed to avoid *circuity* of actions, hence it cannot be entertained in this case, as none of its citizens can bring suit against the State.

BATTLE *v.* THOMPSON.

Where the State sues one of its citizens who has a claim against the State which falls under clause 1, sec. 101, C. C. P., and arises out of the contract, or is connected with the subject of the action, it may be that the defence can be made against the State, not however upon the principle that a set-off or counter claim could be offered by the defendant, but upon the ground that the claim is in the nature of a payment or credit. *Lindsay v. King*, 1 Ire. 40; *Worth v. Fentress*, 1 Dev. 419, cited and approved.

THIS was an action of DEBT brought under the old system, tried before *Russell, J.*, at Spring Term, 1871, of ROBESON Court.

The plaintiff declared upon a single bill executed by the defendant and payable to the plaintiff as Public Treasurer of North Carolina, and his successors in office, the consideration whereof, was a lot of cotton sold by the plaintiff, as Treasurer aforesaid, to the de- (407) fendant.

The plaintiff relied upon the plea of set-off, and for the purpose of establishing said plea, offered in evidence, coupons taken from bonds executed by the State of North Carolina, to the amount of plaintiff's indebtedness to the State. It was admitted that these coupons were taken from bonds upon which the State of North Carolina was liable; that they were overdue at the commencement of this action, and belonged to defendant.

The Court held that the coupons offered by defendant, did not constitute a set-off.

There was a verdict for plaintiff, Rule, etc., Judgment and Appeal.

W. Mc. L. McKay for appellant.
K. P. Battle and Leitch for appellee.

PEARSON, C.J. The State has the beneficial interest in the note sued on. The question will be considered as if the action was in the name of the State, and the debts mutual.

The defendant holds an unconnected cross demand against the State, and the question is can he use it as a defence to the action? In an action by an individual, the demand would be available as a counter claim, under 2 clause, sec. 101, C. C. P. "a cause of action arising on contract, and existing at the commencement of the action." In this instance the counter claim is precisely the same as a set-off under Rev. Code, chap. 31, sec. 77.

A set-off must be a claim upon which an action of debt, or *indebitatus assumpsit*, will lie. *Lindsay v. King*, 23 N.C. 401. The defendant has his election either to use his demand as a set-off, or to bring a separate action on it. When used in defence it is treated as a cross action; for

which reason the plaintiff may reply double, under the statute 4 Anne. *Worth v. Fentress,* 12 N.C. 419.

The test of a set-off under the statute, and a counter claim
(408) under clause 2, sec. 101, C. C. P., is this: Could the defendant maintain an action against the plaintiff? Tried by this test, the defence in our case fails, for a citizen cannot maintain an action against the State.

The provision of the Constitution, Art. 4, sec. 11, which the defendant's counsel "prayed in aid," operates against him, for it assumes that the State cannot be sued in the ordinary way, and only relaxes to the extent of conferring on the Supreme Court original jurisdiction to hear claims against the State; but its decisions are merely recommendatory: thus excluding beyond all question, the idea that the State can be sued in the Superior Court, which as we have seen would be the effect of allowing a set-off or counter claim under clause 2, sec. 101, C. C. P.

When the defendant's claim falls under clause 1, sec. 101, C. C. P., and arises out of the contract or is connected with the subject of the action, it may be that the defence can be made against the State, and the claim be allowed in diminution of the amount to be recovered, or to prevent a judgment in favor of the State, when the claim is equal to, or in excess of the demand of the State; but it would be on the ground that the claim is in the nature of a payment, or a credit, to which the defendant is entitled, and that the demand of the State is, in fact, only for the balance.

Such a defence was available at Common Law, and is independent of the statute of set-off. So it does not involve the idea of a cross action; however this may be, the present case does not fall under the principle.

There is no error.

Per curiam.

Judgment affirmed.

Cited: Cobb v. Elizabeth City, 75 N.C. 8; *Gatling v. Comrs.,* 92 N.C. 540; *Blount v. Simmons,* 119 N.C. 51; *Wilmington v. Bryan,* 141 N.C. 679; *Graded School v. McDowell,* 157 N.C. 317, 319; *Comrs. v. Hall,* 177 N.C. 491; *Dameron v. Carpenter,* 190 N.C. 598; *Comrs. v. Blue,* 190 N.C. 641; *Coburn v. Carstarphen,* 194 N.C. 370; *McClure v. Fulbright,* 196 N.C. 453.

(409)

STATE UPON THE RELATION OF WILLIAM TAYLOR v. DANIEL GALBRAITH, ET AL.

Where a person gave bond as Constable in February, 1856, and also in February, 1857, and received claims for collection in April, June and July, 1856: *Held*, if the claims were collected in 1856, that suit should have been brought upon said bond, and that it was incumbent upon the relator of the plaintiff to prove that the claims *were not collected in* 1856, and were in the Constable's hands after the date of the bond sued on.

The statute of limitation on a Constable's bond is suspended from 20th May, 1861, to January 1st, 1870.

ACTION of DEBT on the official bond of Daniel Galbraith, Constable, tried before *Buxton, J.*, at Spring Term, 1871, of CUMBERLAND Superior Court.

The relator of the plaintiff declared on a bond dated Feb. 23rd, 1857, and assigned as breaches: failing to collect; collecting and failing to pay over; and not returning the claims, being sundry notes, and other written evidences of indebtedness on different persons, described in four different receipts, given by the defendant, Galbraith, to the relator of the plaintiff; Said receipts are dated respectively in February, April, June and July, 1856, all in the usual form "to collect or return." Pleas: General issue, Stat. Lim., and Payment.

The bond sued on, was read in evidence without objection. The relator of plaintiff proved that the defendant, Galbraith, had acted as Constable for two years successively, to wit: for 1856, and 1857; that the claims described in the receipts were placed in his hands at the date mentioned therein, and had never been returned to relator of plaintiff. There was evidence of the solvency of some of the claims in the years 1856 and 1857.

The defendants insisted:

(1.) That the proof, by the receipts, that the claims were in the hands of the Constable in 1856, did not establish the fact that the claims were in his hands in 1857, being the time of the al- (410) leged breach; and that a breach of the bond of 1856, was no breach of the bond of 1857;

(2.) That the statute of limitations protected the bond from recovery.

The defendants introduced the records of a suit instituted by the relator of the plaintiff against the defendants, in which judgment was rendered on the present bond sued on, for $134.70 damages, assessed at Fall Term, 1858, and an execution thereon had been returned to Spring Term, 1859, marked "paid and satisfied." The evidence was that this

judgment was obtained upon claims due relator of plaintiff, other than the claims sued on in this case.

The defendants insisted that the recovery in the former suit was a bar to the present action.

His Honor instructed the jury that the relator of the plaintiff was entitled to recover the amount of all the claims embraced in the four receipts, which they were satisfied from the evidence, were good and collectable during the year 1857. Defendants excepted. Verdict and judgment for plaintiff. Rule, etc. Appeal.

B. & T. C. Fuller for relator of the plaintiff, cited State v. Johnson, 29 N.C. 77. *State v. Wall,* 30 N.C. 11, *Ib.* 31 N.C. 20.

Leitch for defendants.

READE, J. The record does not show the plea of conditions performed, no breach, on the part of the defendant; and the case does not show a demand before suit on the part of the plaintiff, but it was agreed at the bar that the case should be considered as if the plea were in, and as if demand had been made.

The bond sued on was dated 23rd February, 1857, and the suit was not commenced until 1867, after a lapse of more than six years, (411) and therefore the action would have been barred, but for a series of statutes which provide that the time elapsing from May, 1861, to January, 1870, shall not be counted. *Smith v. Rogers,* 65 N.C. 181, and *Plotts v. R. R.,* 65 N.C. 74, and the cases there cited.

The defendants proved that they had been sued by the plaintiff on the same bond, and that there was judgment against them, and that they had "paid," that judgment, and insisted, that in law, that supported their plea of "payment."

There is no plea of former judgment so as to estop the plaintiff, if indeed it would have that effect, and under the plea of "payment" of the claims involved in this suit, it was competent for the plaintiff to show, and he did offer evidence to show, that the former suit was not upon the same claims involved in this.

So that the payment of other claims does not, either in law or fact, support the plea of payment of these claims. The defendant can take nothing by this objection.

The real question in dispute is, whether the defendants are liable upon the bond of 1857, or whether the remedy of the plaintiff is not upon the bond of 1856. The principal defendant Galbraith, was Constable for 1856 and for 1857; his bond on which this suit is brought, is dated 23d February, 1857. The claims were put into his hands for

collection in February, April, June and July, 1856, from eight to twelve months prior to the date of the bond sued on. It was his duty to collect them immediately.

There was no direct evidence that he collected them in 1856, and none that they were in his hands in 1857. If the claims were collected in 1856, the suit ought to have been upon the bond of 1856. (*State v. Lackey,* 25 N.C. 25,) but if they were not collected in 1856, and were in his hands after he gave the bond sued on, in 1857, his possession of the claims, although they had been put into his hands the year before, would have been evidence, from which a new contract to collect might have been inferred, so as to make his sureties for 1857 (412) liable. *State v. Johnson,* 29 N.C. 77.

It was therefore incumbent upon the plaintiff to prove that the claims were not collected in 1856, and that they were in the Constable's hands after the date of the bond sued on February, 1857. The burden was upon the plaintiff. He relied solely upon the facts that the claims were put into the hands of the Constable and had never been returned. This is entirely consistent with the supposition that they were collected in 1856. The presumption that they were, is at least as strong as the presumption that they were not, and then the burden of proof being upon the plaintiff, he must fail. At the least, the defendants were entitled to have the question submitted to the jury; but his Honor held, that if the claims were put into the hands of the Constable in 1856, and that the debtors were solvent in 1856, and continued to be solvent in 1857, the defendants were liable upon the bond of 1857. At least so we understand the charge. It is true that the language of the charge is, "that the plaintiff was entitled to receive the amount of all the claims, etc., which were good and collectable during the year 1856, and continued so during the year 1857."

When we speak of a good claim, or a solvent claim, we mean a claim upon a solvent man. This charge leaves out of view the fact that the claims might have been collected in 1856, and seems to convey the idea that if the claims, or the debtors, were good or solvent during both years, then the plaintiff was entitled to recover, no matter whether the claims were collected in 1856 or in 1857, or whether they had ever been collected at all.

Whereas the law is that if the claims were collected in 1856, the defendants are not liable upon the bond of 1857.

There is error.

Per curiam.

Venire de novo.

(413)

JOHN BLACKBURN, CLERK SUPERIOR COURT, ETC. v. C. B. BROOKS AND HALEY DAVIS.

A note given for land sold in November, 1864, upon a credit, with the understanding at the time of said sale that payment would be required in "*undepreciated money*," does not mean specie, or its equivalent.

The time and circumstances under which said note was given are to be considered in ascertaining the intention of the parties, and these things, together with the conditions of sale, indicate that payment was to be made in money receivable in the ordinary commercial and business transactions of the country.

THIS was a proceeding by motion under Rev. Code. chap. 31, sec. 129, tried before *Cloud, J.*, at Spring Term, 1871, of FORSYTHE Superior Court.

It was agreed that his Honor should pass upon the facts, which he found to be as follows:

(1.) The bond upon which the motion is based is in the following words, to wit:

"Twelve months after date we or either of us promise to pay D. H. Starbuck, Clerk and Master of Forsythe Court of Equity, fifteen hundred and twenty-five dollars, being the purchase money for three hundred acres of land sold under a decree of said Court, as the property of the heirs of Thos. Voss, deceased. Witness our hands and seals 23rd November, 1864." Signed by defendants.

(2.) That the conditions of the sale of said land were known to the defendants, and amongst other conditions, the purchaser of said land was required to make payment in *undepreciated money*.

(3.) That the obligors of said bond made various payments thereon, prior to the 2nd November, 1870, in legal tender United States Treasury Notes, and that on said day, defendants paid the balance of the principal and interest due thereon in said currency.

(4.) That the plaintiff, who is Clerk of the Superior Court of said County, at the request of the parties interested, demanded
(414) twelve per cent for depreciation of said legal tender notes, which defendants refused to pay, whereupon the plaintiff gave the usual notice to defendants of his intention to apply for judgment for balance due on said note, at Spring Term, 1871, of said Superior Court.

His Honor upon the foregoing facts, decided:

1. That said bond was not payable and dischargeable in the legal tender treasury notes of the United States, and could only be discharged by payments in specie, or its equivalent.

2. That although the defendants had paid the principal and interest of said note according to the face thereof, yet they were bound to pay twelve per cent., for the depreciation of said legal tender currency at the respective dates of payment; and rendered judgment for $228.84; (being the amount of said depreciation,) from which judgment, defendants appealed.

No counsel for plaintiff.
T. J. Wilson for defendant.

DICK, J. This is a motion for judgment upon a bond given at a judicial sale. Rev. Code, ch. 31, sec. 128.

The bond was executed on the 23d of November, 1864, and comes within the operation of the statute of 1866, chap. 39.

The terms of sale which were made known to the defendants, rebuts the presumption created by the statute, and makes the bond solvable in *undepreciated money*. The meaning of this contract is a question of law, and must be construed according to the intent and understanding of the parties, at the time when it was executed. At that time coin had virtually ceased to be a circulating medium, and there were several kinds of depreciated paper currency, which differed greatly in value. If the property had been sold for coin it would not have brought its full value. The disturbances of the times had greatly deranged financial matters, and coin had a fictitious value, and could not be obtained without much difficulty. The purpose of the vendor, who (415) was an officer of the Court, was to secure himself and the parties interested in the proceeds of the sale, against payment in the depreciated currency of the country. If his purpose was to demand gold or silver, he ought, in common fairness, to have so declared in his terms of sale.

We conclude, after considering the facts in the case in connection with the circumstances of the times, that the understanding between the parties was, that payment was to be made in money of par legal value, and not at a discount in the ordinary commercial and business transactions of the country.

Money is a representative of value, established by law, and made a legal tender in the payment of debts. In this country we now have two kinds of money, i.e., coin and treasury notes, but, in contemplation of law, they are of equal value in the payment of private debts. Treasury notes may therefore be regarded in the payment of this bond as *"undepreciated money,"* and as the holder received the nominal amount and interest in treasury notes, the bond was satisfied and discharged,

and judgment ought not to have been rendered for any premium, as on a special contract.

There was error.

Per curiam.

Judgment reversed.

(416)

ROBERT A. WILLIAMS v. S. A. DIXON AND J. L. DIXON.

The plaintiff owned an ass, which he knew to be dangerous, and in the habit of pursuing and injuring stock, and with a knowledge of such vicious qualities he permitted him to run at large: *Held*, that if such an animal is found pursuing a cow which he threw down, and was in the act of stamping her, when the defendant, believing it was necessary to kill him to save the life of his cow, killed the ass, that defendant was justifiable.

THIS was an action of trespass *vi et armis* brought under the old system, and tried before *Tourgee, J.*, at Spring Term, 1871, of PERSON Superior Court.

The plaintiff's declaration alleged that defendant had killed an ass belonging to the plaintiff, to his damage three hundred dollars. The facts were, that the plaintiff bought the animal from one Barnett, with a full knowledge that he was dangerous and had a propensity for injuring and killing stock. With this knowledge the plaintiff did not confine the ass, but permitted him to run at large. It was also shown that the animal had committed sundry depredations upon the stock of defendant; that plaintiff had been informed thereof, and had been advised by defendant that the animal ought to be confined. It was also in evidence that Barnett (the former owner of the ass) informed plaintiff prior to the sale that the ass would attack also persons on horseback.

Sometime after the purchase of the animal by the plaintiff, the defendant heard a noise near his house, and found the ass pursuing a cow belonging to him; that defendant attempted to drive off the ass; before, however, he could reach him, he had thrown the cow, and was standing with his feet in the act of stamping her; that defendant shouted, and as he did so, the ass turned off from the cow, and as he turned, defendant, at the suggestion of the other defendant, fired his gun and shot the ass, from the effects of which the animal died. The de-
(417) fendant testified that he believed the ass would have killed the cow, had he not shot him.

His Honor instructed the jury that if they believed from the evidence that the ass was a dangerous animal, and that it was necessary to kill him to protect the life of his cow, they should find for defendants, to which the plaintiff excepted.

Verdict for defendants. Rule, etc. Judgment and appeal.

R. C. Badger for plaintiff.
T. B. Venable and J. B. Batchelor for defendants.

RODMAN, J. There is no error. The rule laid down by his Honor is supported by the cases of *Parrott v. Hartsfield,* 20 N.C. 110, and *Morse v. Nixon,* 51 N.C. 84. It is objected however, that it appeared upon the evidence that at the moment when the ass was shot he had turned off from the cow, and therefore the killing could not be justified as being necessary to protect the property of the defendant.

But we are of opinion, that this question was fairly left to the jury, and that there was evidence in support of their finding.

With the weight of the evidence we have nothing to do.

Per curiam.

Judgment affirmed.

Cited: S. v. Smith, 156 N.C. 634.

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(418)

HENRY HUGHES v. W. H. WHEELER.

Under the old system, if the declaration is *in case*, and it does not further appear whether the action is in tort or contract, it will be regarded as ambiguous or doubtful pleading.

Where the defendant understood the action to be *in tort*, and the plaintiff did not disclaim it, but offered evidence to establish a breach of contract, such action cannot be sustained.

THIS was an action on the case brought under the old system, tried before *Henry, J.,* at Fall Term, 1870, of FORSYTHE Superior Court.

The plaintiff upon the trial offered in evidence a note executed by the defendant to plaintiff in which the defendant promised to deliver the plaintiff a quantity of wheat; and claimed damages for the non delivery of the wheat in accordance with said contract. Plea. general

issue. There was no declaration in writing, and only a statement that the plaintiff declared *in case*. The defendant asked the Court to charge the jury that the action could not be sustained, and that plaintiff should have declared in *assumpsit*. His Honor held that the action was properly brought, to which defendant excepted. Verdict for plaintiff. Rule, etc. Judgment, and appeal by the defendant.

T. J. Wilson for defendant.
Masten and Blackmer & McCorkle contra.

READE, J. The declaration is in case, the action having been commenced under the old system, but it does not appear whether in tort or contract. This is what is called "ambiguous or doubtful pleading," and therefore bad, 1 Chitty Pl, 271.

The defendant took the objection that the action would not lie. From this it would seem that he understood the declaration to be in tort, and the plaintiff did not disclaim it. In answer to the objection his (419) Honor held that the "action would lie."

But still it does not appear, except by inference, and from that obscurely, whether the action is founded in tort or contract.

If in tort it is misconceived. Case, nothing more appearing, is generally understood to be in tort. 1 Chitty Pl. 151.

For the error in this particular there must be a *venire de novo*, which is to be regretted, as the merits seem to be with the plaintiff.

The bad pleading however is his own fault.

Per curiam.

Venire de novo.

STATE v. JOSEPH LAMB.

To constitute an "order for the delivery of goods," within the meaning of Rev. Code, chap. 34, sec. 59, a forgery, there must appear to be a drawer, a person drawn upon, who is under obligation to obey, and there must appear to be a person to whom the goods are to be delivered.

If the paper writing set forth in the indictment as a forgery does not contain these requisites, there cannot be a conviction for forgery under such statute.

The writing set forth in the indictment is such an instrument as will constitute at common law a forgery, *hence*, the conclusion "against the form of the statute" may be rejected as surplusage, and under the conviction in

this case the defendant may be punished for a misdemeanor, as at common law.

INDICTMENT for forgery tried before *Pool, J.*, at Spring Term, 1871, of PERQUIMANS Superior Court.

The indictment contained two Counts, the first of which is only material to be stated, and is as follows, to wit:

"STATE OF NORTH CAROLINA,

"PERQUIMANS COUNTY, (420)

"Superior Court, Fall Term, 1871.

"The JURORS for the State upon their oath present that Joseph Lamb, of color, late of said county, at and in said county, with force and arms on the 20th day of September, A. D. 1870, falsely and fraudulently did forge and counterfeit, and cause and procure to be forged and counterfeited, a certain order for the delivery of goods, purporting to be made and signed by one James H. Hyatt, and addressed to Baxter & Adelsdorf, of Norfolk, Va., the tenor of which said forged and counterfeited order for the delivery of goods is as follows, that is to say:

'WOODVILLE, N. C., Sept. 20, 1870.

'*Messrs. Baxter & Adelsdorf, Norfolk, Va.,*

"GENTS:—Please send me one bbl. of molasses, one-half bbl. of sugar, 2 boxes soap, 2 bbls. of crackers, 1 keg powder, 1 jar snuff. Please put them as cheap as possible, and send them by steamer to E. City, and oblige,

'Very respectfully,

'JAMES H. HYATT.'

"With intent to defraud the said James H. Hyatt to his great damage, contrary to the form and statute in such cases made and provided, and against the peace and dignity of the State."

The jury found the defendant guilty upon said count, and not guilty upon the second count, whereupon the defendant moved in arrest of judgment, which motion was overruled. Judgment and appeal.

Attorney General for the State.
Busbee & Busbee for defendant.

I. This indictment is defective,

1. Because the forged paper writing set out, is not "an order for the delivery of goods," and the indictment is therefore self-contradictory and defective.

2. That there is no allegation that the person whose name is signed to the order, had or assumed to have any right to order the de-
(421) livery of goods. Clinch's case, 2 Russ on Cr. 473; 3 Chitty Cr. Law 1033.

3. Because it is not alleged that the persons to whom the order was directed, were, or were supposed to be, in possession of the goods, or any part of them named in the order. 3 Russ on Cr. 474.

4. Because the intent to injure is corruptly laid, the injury being necessarily inflicted, (if the rest of the indictment was good) upon the persons from whom the goods were ordered.

II. The indictment cannot be maintained at common law, because,

1. If the forged paper is described as an "order for the delivery of goods," and is not, the indictment is contradictory and defective at common law as well as by statute. Fost. 119.

2. But the offence is not indictable at common law; a promissory note is not such a paper as can be forged, and much less an order for the delivery of goods, or a request for goods. 3 Ch. Cr. Law 1022.

DICK, J. The question presented on the motion in arrest of judgment, is whether the forged paper writing set forth *in haec verba* in the indictment, and described as an "order for the delivery of goods" comes within the meaning of our statute. Rev. Code, ch. 34, sec. 59.

The same language is used in the statute, 7 Geo. 2, and has frequently received judicial construction in England.

"A forged order on a tradesman in the name of a customer, requesting that the goods mentioned in it, might be delivered to the bearer, is not within the statute, 7 Geo. 2, if the customer has no interest in the goods mentioned." Williams' case, 1 Leac., 114; Clinch's case, *Ib.* 540.

To constitute an "order for the delivery of goods," within the meaning of the statute, there must be apparently a drawer; that he must appear to have a disposing power over the goods: that there
(422) must be a person drawn upon, who is under obligation to obey; and there must appear a person to whom the delivery is to be made. 1 Bish. C. L. 343. *Newton's* case, 2 Moody, 89. To remedy the defects in the statute, 7 Geo. 2, pointed out in numerous decisions, other statutes were passed to cover as far as possible, all cases of forgery which might arise in commercial or business transactions. The

words "undertaking," "warrant," "authority," and "request," contained in statute 11 Geo. 4, and 1 William 4, are not in our statute; and we need not refer to the construction given to these words by various decisions in the English Courts. In the case before us the forged paper writing, does not come within the statutory meaning of an "order for the delivery of goods," as construed and defined by the Courts in England, and we see no sufficient reason for departing from the rules which they have established. The paper in question is a request for the delivery of goods, and would come within the provisions of the English statutes against forgery, but it is not embraced in our statute.

His Honor erred therefore in pronouncing judgment against the defendant, for a felony under the statute. The Attorney General insisted in his argument in this Court, that the defendant was guilty of the crime of forgery at common law, and as he was convicted, judgment ought to be pronounced against him for this offence.

After careful consideration, we are of opinion that such a position is correct in law.

In *Wood's* case, Strange, 747, it was held that forging an order for the delivery of goods, was a misdemeanor at common law; and Mr. East considers this case to have settled the rule that the counterfeiting of any writing with a fraudulent intent whereby another may be prejudiced, is forgery at common law. 2 East. P. C. 861.

In our case the forged paper is set out fully in the indictment, and we can see that it is such a forgery as is punishable at common law, and judgment may be pronounced, although the prisoner was indicted under the statute, for the conclusion against the statute (423) may be rejected as surplusage. *State v. Walker*, 4 N.C. 229, 1 Bish. C. Pr. 349.

The objection made by the defendant's counsel, that there is a misdescription of the paper set out in the indictment, cannot be sustained. Under some of the old decisions of the Courts, this objection would be fatal,—but the principle is now well established, that where the instrument is fully set out in the indictment, a technical designation of its character, may be dispensed with; and in such, a misnomer of the instrument may be rejected as surplusage. Wharton C. L. sec. 1467, and note.

There was error in the judgment of the Court below, and this opinion must be certified, to the end that his Honor may pronounce judgment according to law.

Per curiam.

Reversed.

Cited: S. v. Thorn, 66 N.C. 645; *S. v. Bryson,* 79 N.C. 652; *S. v. Leak,* 80 N.C. 406; *S. v. Williams,* 86 N.C. 672; *S. v. Weaver,* 94 N.C. 838; *S. v. Covington,* 94 N.C. 917; *S. v. Harris,* 106 N.C. 688; *S. v. Hall,* 108 N.C. 779.

ISAAC BATES v. HINSDALE, ET AL.

The law takes notice of the fractional parts of a day when there is a conflict between creditors arising as to the application of money received on Justices' judgments filed and docketed on the same day. Sec. 503, C. C. P.

Therefore judgments filed and docketed at 2 o'clock, 30 minutes P.M., have priority over judgments filed and docketed at a later hour of the same day.

RULE upon the defendant Robert W. Hardie, Sheriff of Cumberland County, to show cause why money in his hands, the proceeds of sale of personal and real property of the Bank of Fayetteville, (424) sold under executions, should not be applied to the payment of the executions in favor of plaintiff, heard before *Buxton, J.,* at Spring Term, 1871, of CUMBERLAND Superior Court.

The Sheriff made return that the defendants were contesting claimants to the fund in his hands, and asked that they be made parties, whereupon the defendants accepted service of summons, appeared and litigated their rights.

The facts are that on the 4th day of April, 1870, the plaintiff and the defendants all obtained judgments against the Bank of Fayetteville, amounting to one hundred and fifty-six cases. In the language of his Honor who tried the cause, "there was quite a rush" amongst the creditors, in trying to get the first judgments.

The transcripts in the plaintiff Bates' fifteen judgments, as also those of the defendants John W. Hinsdale and Samuel J. Hinsdale were filed in the Clerk's office on the 4th of April, 1870, and marked "filed at 2 o'clock, 30 minutes, P.M."

The other defendants having one hundred and nineteen judgments, made "quick time" in procuring transcripts, and having the same filed, which were endorsed by the Clerk, "filed and docketed 4th of April, 1870, at 3 o'clock, 35 minutes, P.M.," excepting the two judgments of the defendant, Pemberton, which were docketed at 4 o'clock, 10 minutes, P.M.

His Honor was of opinion, and so decided, that the proceeds of the realty should be applied ratably amongst all the judgments and executions. It is unnecessary to report his ruling as to the application of the proceeds of the personalty. From the ruling of his Honor the defendant Hinsdale appealed.

Bragg & Strong and McRae for the plaintiffs.
Phillips & Merrimon and B. & T. C. Fuller for the defendants.

PEARSON, J. The question in regard to the application of the proceeds of the sale of the personal property, having been (425) disposed of, as was stated at the bar, the case is now confined to the question in regard to the application of the proceeds of the sale of the house and lot.

His Honor ruled, that the fund be applied rateably to all of the executions. We regret not to be able to concur in this conclusion; for, "equality is equity." The parties all used diligence, and the difference is simply in respect to time. But these judgments and the proceedings had thereon, being rendered and done in 1870, must be governed by the C. C. P. alone; and according to it, time in docketing judgments, is made material, and the miller's rule is adopted; "first come, first served."

Grant, that the day during which a Justice of the Peace renders judgments, in his Term, and has the same legal incidents, as the Term of a Court, so that all of the judgments, to use the language of his Honor, are "contemporaneous," we can see no ground on which this principle can be applied to the action of the clerk in docketing judgments, in the face of the provision of C. C. P. sec. 503: "The time of the receipt of the transcript by the clerk, shall be noted thereon, and entered in the docket; and from that time, the judgment shall be a judgment of the Superior Court in all respects." Time is sometimes used as synonymous with day, as when one asks, "at what time in April, was the act done?" Reply, "on the 4th day" — here time and day are treated as the same in meaning. But if asked, "at what time of the day, was the act done"? obviously the meaning of the two words would not be the same.

Time in the section under consideration, is material; as it is in regard to the registration of deeds of trust; when the most the Court could do by construction, was to treat deeds as being registered the moment they are handed to the officer, as it is in regard to the levy of executions on personal property.

This matter was fully argued and considered by us in *Johnson v. Sedberry,* 65 N.C. 1. The Court was not able then, and is not (426) able now, to see how the mischief could be remedied, by construction merely, and felt obliged to have recourse to the power conferred by section 394, of prescribing rules of practice and procedure; and did at that Term, prescribe a rule; but that rule can have no application to the present case, for all of these proceedings were had before the adoption of the rule, and must stand solely upon the C. C. P., as it is written.

There is error. The fund must be applied to the several executions, giving priority, according to the times in the day at which the transcripts were received by the clerk. Judgment of the Superior Court reversed, and judgment in conformity to this opinion.

Per curiam.

Judgment reversed.

Cited: McKinney v. Street, 165 N.C. 516; *Hood, Comr. v. Wilson,* 208 N.C. 123.

THE STATE v. MILES BAILEY.

The judgments of inferior Courts at Common Law could only be reviewed by *writs of error,* or *writs of false judgment.* By our Law, appeals are used in lieu of those writs.

Appeals from interlocutory judgments are only allowed in civil suits, and this by virtue of Rev. Code, chap. 34, sec. 27. Therefore when the Court found from *ex parte* affidavits that the defendant, during the trial of an indictment for larceny, was guilty of tampering with a juror, and for such conduct ordered a juror to be withdrawn and a mistrial made, the defendant had no right to appeal to this Court. *State v. Prince,* 63 N.C. 529, cited and commented on.

THIS was an indictment for larceny, with a count for receiving stolen goods, tried before *Pool, J.,* at Spring Term, 1871, of BERTIE Superior Court.

The defendant had pleaded "not guilty," when the jury was (427) empanneled, and three witnesses had been examined on the part of the State. The Court was then adjourned for the night, and the jury permitted to separate, with the usual instructions not to dis-

cuss the case amongst themselves, nor to allow others to speak of the matter to them.

On the meeting of the Court next morning, the Solicitor offered certain *ex parte* affidavits of indifferent persons, charging defendant, two of the jurors, and one of the witnesses, with corrupt conduct during the recess of the Court, and moved to discharge the jury from the further consideration of the case. The defendant opposed the motion, and asked to be allowed to offer the affidavits of himself and those of the two jurors, and that of the witness charged with these offences, denying the allegations made against them. The Court held that the affidavits of indifferent persons could be offered, but declined to hear the affidavits of the parties implicated; to which defendant excepted.

The Court, after finding the facts from the *ex parte* affidavits, which the decision of the Court renders unnecessary to be recited, ordered a juror to be withdrawn and mistrial made.

The Solicitor moved that the defendant be required to enter into recognizance for his appearance at the next term of this Court. The defendant moved to be discharged. The Court overruled defendant's motion, and required him to enter into recognizance for appearance asked for by the State.

The defendant prayed an appeal to the Supreme Court, from the order discharging the jury and making a mistrial, and from the order requiring him to enter into recognizance.

Attorney General for the State.
D. A. Barnes for the defendant.

BOYDEN, J. At common law, there was no appeal from the decision of any of the Courts, high or low, and these decisions could only be reviewed by *writ of error*, or *writ of false judgment.* (428)

By our law, appeals are used as a substitute for those writs, and these writs were always after a final judgment in the Court where the suits were tried; and appeals being by our law a substitute for writs of error and false judgment, were always after a final decision, until the act of 1831-'2, Rev. Code, chap. 35, sec. 2, entitled "an act to allow appeals to the Supreme Court from interlocutory judgments, orders, and decrees of the Superior Courts of Law and Courts of Equity."

And when appeals were allowed by the Judges under the act of 1831-'2, the Supreme Court possessed no power under this act to enter any judgment reversing, affirming or modifying the orders, judgment or decrees appealed from, but the Supreme Court are directed to cause

their opinion to be certified to the Court below with instructions to proceed upon such order, judgment or decree, or to reverse or modify the same according to the opinion so certified. But the act 1831-'2, did not authorize the Judges to allow appeals in State cases. So appeals in such cases can only be taken after a final decision in the Superior Court.

There was therefore error in allowing an appeal from the order directing a mistrial.

We make this decision with less regret for the reason, that it does not deprive the defendant of his right to have the decision of his Honor reversed by this Court, if he erred in ordering the mistrial, as the defendant can avail himself of the objection when called for a second trial. See the cases of the *People v. Alcott,* 2 Johnson's cases, 301; *Commonwealth v. Cook,* 6 Sergeant, S. & Rawle, 577; and *Klock v. The People,* 2 Parker, C. C. 676. In inferior misdemeanors such as assaults, batteries, forcible trespass and the like, the Judges have a discretionary power to order mistrials, and in such case their decisions cannot be reviewed in this Court, but even here mistrials should not be granted for slight causes. But in capital felonies, and in (429) felonies not capital, and in misdemeanors where infamous punishments may be inflicted, as in perjury, conspiracy and the like, the decisions of the Judges in the Court below may be reviewed in this Court: In such cases the Judges should find the facts, which this Court cannot review; but the law, bearing upon the facts thus found, are the subject of review in this Court, by an appeal, after a final decision in the Court below.

No mistrials should be ordered in such cases, unless there exists what the law terms a strong and urgent necessity. In the case of the *Commonwealth v. Cook,* 6 Sergeant and Rawle 577, Chief Justice Tilghman in defining this legal necessity, says "the moment it is made to appear to the Court, by satisfactory evidence, that the health of a single juryman is so affected as to incapacitate him to do his duty, a case of necessity has arisen." The Chief Justice also says, there is a class of cases which depend on what may be termed a necessity of doing justice, such as where the prisoner has tampered with some of the jury; this necessity arises from the duty of the Court, to guard the administration of justice against fraudulent practices.

It is presumed that it was this necessity upon which the Judge below ordered the mistrial in this case.

In the case of the *State v. Prince,* 63 N.C. 529, this Court did entertain the appeals from a decision ordering a mistrial. In that case both the State and defendant appealed, and no objection was taken to the

appeal, and the attention of the Court was not called to the fact, that in criminal cases, no appeals are allowed from interlocutory orders, but only after the final decision.

There being error in allowing the appeal, it must be dismissed.

Per curiam.

Judgment affirmed.

Cited: S. v. Jefferson, 66 N.C. 310; *S. v. Wiseman,* 68 N.C. 205; *S. v. Davis,* 80 N.C. 387; *S. v. Bell,* 81 N.C. 594; *S. v. Hinson,* 82 N.C. 541; *S. v. Padgett,* 82 N.C. 546; *S. v. Sherrill,* 82 N.C. 695; *S. v. McDowell,* 84 N.C. 802; *S. v. Washington,* 89 N.C. 538; *S. v. Saunders,* 90 N.C. 652; *S. v. Twiggs,* 90 N.C. 686; *S. v. Polk,* 91 N.C. 653; *S. v. Hazell,* 95 N.C. 624; *S. v. Webb,* 155 N.C. 430; *S. v. Andrews,* 166 N.C. 353; *S. v. Ford,* 168 N.C. 167; *Taylor v. Johnson,* 171 N.C. 85; *S. v. Burnett,* 173 N.C. 751; *S. v. Cain,* 175 N.C. 829; *S. v. Cornett,* 197 N.C. 628; *S. v. Rooks,* 207 N.C. 276; *Barbour v. Scheidt, Comr.,* 246 N.C. 171.

(430)

ELIZABETH O. GARRETT v. ABRAM TROTTER AND JEREMIAH FIELDS.

Whether in a complaint for the recovery of realty, it is sufficient to allege that the defendants are in possession of the *locus in quo*, and withhold the possession thereof from plaintiff. *Quere?*

Assuming that the complaint is defective, advantage ought to have been taken thereof in "apt time," and it cannot be considered "apt time," to have filed an answer to the merits, and make the objection at the trial term.

Such a complaint is sufficient, and the defect, if any, is aided by the defendants' answer, which shows that they understood the complaint to charge *an illegal* withholding of the possession.

The doctrine of *aider*, express or implied, and the principles applicable to defective pleading discussed and explained.

ACTION for the recovery of realty, tried before *Tourgee, J.,* at Fall Term, 1870, of GUILFORD Superior Court.

The plaintiff alleges in her complaint, that she is seized for life of certain premises, describing them with sufficient certainty.

In article II of the complaint, she alleges that the defendants are in possession thereof and withhold the same from her. Then she demands judgment for the possession of the premises, and for one hundred dollars as damages sustained, etc.

The defendants in their answer admit that the plaintiff is the owner of the *locus in quo*, but "deny they withhold the same illegally." They also aver that they are entitled to the land for three years commencing in January, 1868, by virtue of a lease made to the defendant Fields by the plaintiff. The pleadings were filed at Spring Term, 1869.

When the cause was reached for trial, and before the jury were empanelled, the defendants objected to the hearing of any testimony on behalf of the plaintiff against the defendants, because said complaint omitted to set forth, "that the defendants were wrongfully and
(431) unlawfully in possession of the premises described in the complaint, and wrongfully and unlawfully withheld the same from the plaintiff."

The said objection being considered by the Court, it was ordered that said action be dismissed. Judgment and appeal.

Dillard & Gilmer and Mendenhall for plaintiff.
Scott & Scott and Ball & Keogh for defendants.

PEARSON, C.J. It appears by the record, that the controversy between the parties is in regard to a lease for a term of three years, which the defendants allege the plaintiff made to Fields.

This allegation is denied by the plaintiff, issue is joined and comes on for trial; but a motion is made by the counsel of the defendants *in medias res*, and the action is dismissed, without the merits of the case being touched.

The first reflection suggested by this state of facts must be under a Code of Civil Procedure, professing its main object to be, to have every case decided "upon the merits," and to this end abolishing the distinction between actions at law and suits in equity, and all the forms of such actions and suits, C. C. P., sec. 112; abolishing all the forms of pleading heretofore existing, sec. 91; declaring no variance shall be deemed material, unless it has actually misled the adverse party in maintaining the merits on his side, sec. 128; and allowing amendments on a scale so liberal that it may well be said "any thing may be amended at any time;" for, before or after judgment, the pleading, process or judgment may be amended by "inserting other allegations material to the case," and by "conforming the pleading or proceeding to the facts proved," sec. 131, 132. How does it happen that a case could thus go off, without touching merits?

There is error on the grounds:

1. The complaint alleges that the defendants are in possession of

the land, and withhold the same to her damage, one hundred dollars. (432)

The answer admits that the defendants are in possession of the land, but deny that they withhold the same from the plaintiff, illegally, as is alleged in the complaint; and then avers the fact of a lease by her for a term of three years, which is unexpired.

Admit that the complaint is defective in this, it does not allege in so many words that the defendants illegally and wrongfully withhold the possession from the plaintiff; although as the C. C. P. requires a statement of facts to be "plain and concise, without unnecessary repetition," section 13; and a statement in "ordinary and concise language, without repetition," section 100; it might well be questioned whether the complaint be defective in this particular. But supposing it to be so, the defect is aided by the answer, which shows that defendants understood the complaint to charge an illegal withholding of the possession.

"A defect in pleading is aided, if the adverse party plead over to, or answer the defective pleading in such a manner, that an omission or informality therein is expressly or impliedly supplied or rendered formal or intelligible."

The following are a few instances of an express aider: In an action of debt on a bond, when the declaration specified no place at which the bond was made, it was held that a plea of duress, *"apud B.,"* supplied the omission in the declaration, as such a plea contained a distinct admission that the bond was made at the place where the duress was. In an action for slander, when the declaration averred that the plaintiff was foresworn, without saying how, it was determined that this defect was aided by a plea of justification, which alleges that the plaintiff, who was stated in the declaration to be a constable, had taken a false oath at the sessions. And again in an action of trespass for taking a book, when the plaintiff omitted to state that it was his book, or that it was in his possession, and the defendant in his plea, justified the taking the book out of the plaintiff's hand; the Court held, on motion in arrest, that "the omission in the declaration was (433) supplied by the plea." 1 Chitty Plead. 671. Our case furnishes another apt illustration of the principle of aider, by admissions express or implied in pleading over. It was said the Code of Civil Procedure no where adopts the doctrine of "aider," by admissions in pleading over. The principle commends itself so strongly by its good sense, that it must be taken to underlie every system of procedure, professing to aim at the furtherance of justice, and to put controversies upon their merits, and not allow actions to go off upon subtleties and refinements.

We have seen also that the Code of Civil Procedure is much more liberal in its provisions to meet the merits of controversies, than the system of procedure in England, even after the statutes of *jeofails* and *amendments,* and the statute, 4 Anne, requiring all defects in form to be specially assigned as cause of demurrer; and it may be added, that in regard to demurrers, the C. C. P. improves upon the statute of Anne, and requires every demurrer, whether for substance or form, to specify distinctly the ground of objection to the complaint, sec. 96; *Love v. Commissioners,* 64 N.C. 706. When there is a defect in substance as an omission of a material allegation in the complaint, it is a defective statement of the cause of action; and the demurrer must specify it, to the end that it may be amended by making the allegation. And when there is a statement of a defective cause of action, the demurrer must specify, to the end that as there is no help for it, the plaintiff may stop his proceeding without a further useless incurring of costs. The distinction between a defective statement of a cause of action, and a statement of a defective title or cause of action, is made, 1 Chitty Plead. 681, and may be illustrated by two instances:

1. The complaint alleges that the defendant, as constable, collected money for the plaintiff, and failed to pay it over; omitting to allege a demand. Here is a defective statement of a cause of action.

(434) The complaint alleges that the plaintiff is assignee of a reversion after a term of years; that at the time of the assignment there was rent arrear due by the defendant, the lessee, for years, and the plaintiff demands this rent arrear. Here is a statement of a defective title or cause of action. The distinction is a clear one, and leads to important differences.

2. It is a rule in every system of procedure; "good matter must be taken advantage of, in due form, apt time and proper order." Had the supposed defect, in omitting to allege that the withholding of possession was illegal, been set out as ground of demurrer, the plaintiff could have amended; or if it had been taken in arrest of judgment, after verdict, the plaintiff could have amended *ore tenus,* or availed himself of the principle, that certain defects of substance, as well as form, are cured by verdict. This is a well settled principle. It is thus stated by Sergeant Williams in his notes to Saunders' Reports, 1 vol. 228, note 1. "When there is any defect or omission in any pleading, whether in substance or form, which would have been a fatal objection upon a demurrer; yet if the issue joined be such, as necessarily required on the trial proof of the facts so defectively stated or omitted, and without which it is not to be presumed, that, either the judge would

direct the jury to give or the jury would have given the verdict: such defect, imperfection or omission is cured by the verdict, by the common law, or in the phrase often used upon the occasion, such defect is not any *jeofail* after verdict."

In our case, the objection was not taken in apt time, or in proper order; but in the midst of the trial, all evidence on the part of the plaintiff is ruled out, and her action dismissed, thus depriving her of the benefit of the principle, of certain defects being cured by verdict, if it applied to the case; and at all events depriving her, of the right to amend *ore tenus*, "by inserting other allegations material to the case," and by "conforming the pleading or proceeding to the facts proved," C. C. P., sec. 131, 132. This irregularity furnishes a second ground upon which the plaintiff is entitled to have the judgment (435) set aside, and a *venire de novo* awarded.

It was said upon the argument; the C. C. P. prescribes no order or time for taking objections, and reliance was put upon sec. 99: "If no such objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the Court; and the objection that the complaint does not state facts sufficient to constitute a cause of action."

The counsel for the defendant, and his Honor, fell into error, by not adverting to the distinction above referred to, between a defective statement of a cause of action, and a statement of a defective cause of action. There is a like distinction between a defect of jurisdiction in respect to the subject of the action, and a want of jurisdiction in respect to the person: for illustration: Action in a Superior Court upon a note for less than $200; here there is a defect of jurisdiction in respect to the subject of the action; it cannot be helped by waiver, consent, amendment or otherwise, and the sooner the proceeding is stopped, the better: Action in the County of Orange, against the Charlotte & Columbia R. R. Co.; here is a want of jurisdiction in respect to the person, which may be waived by consent, or by making full defence or pleading by an Attorney of the Court.

If at any time it appear that the Court has no jurisdiction of the action, or that the plaintiff has no cause of action, the Court may stop the proceedings and dismiss the action, for it is idle to go further; but when the objection grows out of a defective statement of the cause of action, the Court cannot stop in the midst of the trial of an issue and dismiss the action; for, the plaintiff is thereby deprived of the advantage of having the defect or omission in the statement of his cause of action cured by verdict, which is a principle of the common law, and

does not depend upon a provision of the C. C. P., provided the case falls within the application of the principle; and at all events (436) he is deprived of the privilege of amending, secured to him by the C. C. P., by having the pleadings and proceedings made to conform to the facts proved, which of course he cannot avail himself of, should the testimony be all ruled out, and the action abruptly terminated, instead of proceeding in the trial of the issue, and hearing the evidence which the parties have come prepared to offer. After verdict, the defendant may make the objection by motion in arrest.

Judgment reversed.

Per curiam.

Venire de novo.

Cited: Mastin v. Marlow, 65 N.C. 701; *Long v. Bank,* 81 N.C. 45; *Wilson v. Lineberger,* 82 N.C. 414; *Tyson v. Sheppard,* 90 N.C. 316; *Johnson v. Finch,* 93 N.C. 209; *Halstead v. Mullen,* 93 N.C. 255; *Willis v. Branch,* 94 N.C. 147; *Warner v. R. R.,* 94 N.C. 257; *Barfield v. Minor,* 101 N.C. 358; *Knowles v. R. R.,* 102 N.C. 66; *Harris v. Sneeden,* 104 N.C. 375; *Bonds v. Smith,* 106 N.C. 562; *Conley v. R. R.,* 109 N.C. 697; *Brown v. Rhinehart,* 112 N.C. 776; *Goodwin v. Early,* 114 N.C. 12; *Wiggins v. Kirkpatrick,* 114 N.C. 301; *Mizzell v. Ruffin,* 118 N.C. 72; *Whitley v. R. R.,* 119 N.C. 727; *Martin v. Bank,* 131 N.C. 123; *Harrison v. Garrett,* 132 N.C. 178; *Hitch v. Comrs.,* 132 N.C. 576; *Wright v. Insurance Co.,* 138 N.C. 491; *Eddleman v. Lentz,* 158 N.C. 69; *Lyon v. R. R.,* 165 N.C. 148; *King v. R. R.,* 176 N.C. 304; *Williams v. Bailey,* 177 N.C. 40; *Public Service Co. v. Power Co.,* 179 N.C. 27; *Ricks v. Brooks,* 179 N.C. 209; *Hicks v. Nivens,* 210 N.C. 47; *Rushing v. Ashcraft,* 211 N.C. 629; *Clevinger v. Grover,* 212 N.C. 16; *Propst v. Trucking Co.,* 223 N.C. 492; *Bank v. Sturgill,* 223 N.C. 827; *McDaniel v. Leggett,* 224 N.C. 810; *Hughes v. Oliver,* 228 N.C. 685; *Anderson v. Atkinson,* 235 N.C. 301; *Cox v. Freight Lines,* 236 N.C. 79; *Mills v. Richarson,* 240 N.C. 190.

GEORGE W. BULLARD, ADM'R. OF WM. C. McDANIEL, DECEASED v. A. JOHNSON, JR. AND MICAJAH THOMASON.

Under sec. 132, C. C. P., the Courts possess the power at any time before or after judgment, to amend, by adding or striking out the name of any party, or by conforming the proceedings to the facts proved.

BULLARD *v.* JOHNSON.

When a lessor, during the existence of a lease, conveys by deed the realty to a third person, and an action is afterwards brought for the rent by the lessor, the Court has the power to amend, by striking out the name of the lessor, and inserting that of the assignee.

Where A. made a lease for a term of years, and during the existence thereof he conveys the land by deed to B., the latter can recover for the rent which had accrued after the title to the land passed to him.

THIS was a civil action tried before *Buxton, J.*, at Spring Term, 1871, of CUMBERLAND Superior Court.

The summons was originally in the name of Randal McDaniel, and the complaint alleged the non-payment of two years rent for a set of mills in Fayetteville, leased by plaintiff to defendants, from 1st of November, 1862, to 1st of November, 1864. During the (437) progress of the trial the defendants offered in evidence a deed from Randal McDaniel to W. C. McDaniel, dated August 29th, 1863, and registered November 6th, 1863, for the mill property.

Upon the deed being read, the counsel for the plaintiff offered evidence that W. C. McDaniel was dead, and that G. W. Bullard was his administrator, and asked leave of the Court that said administrator might have leave to come in and be joined as party plaintiff with Randal McDaniel, and that the necessary amendments for that purpose might be made. This application was allowed by the Court.

After the amendments had been made in accordance with leave of the Court, the defendants moved to non-suit the plaintiffs, on the ground of misjoinder.

The plaintiffs met this motion, by a motion to amend the summons and complaint by striking out the name of Randal McDaniel, leaving Bullard sole plaintiff, and also to amend so as to claim the value of only one year's rent, being rent due for 1863.

The Court, after consideration, in furtherance as was supposed of justice, and to save the public time, (two days having been consumed in the trial) overruled the motion to non-suit, and allowed the motion of the plaintiffs to amend and strike out, upon the payment of all costs incurred, and a mistrial and continuance of the case, should the defendants so desire, in consequence of being taken at a disadvantage by reason of the amendments allowed.

The terms were accepted by the plaintiff, when the defendants moved to nonsuit the plaintiff, on the ground that there was no privity of contract showed between him and the defendants. His Honor being of opinion that the rent accruing since the date of the deed remaining unpaid, if there was any, was incident to the reversion, and passed by the deed from Randal McDaniel to Wm. C. McDaniel, and that so

much of said rent as the jury should find had accrued since the execution of the deed, and was remaining unpaid, was recoverable in (438) this action as now constituted, refused to non-suit the plaintiff, to which defendants excepted. For an understanding of the opinion of this Court, it is unnecessary to report the evidence and other points taken in the case. Verdict for plaintiff. Judgment and appeal.

W. McL. McKay for plaintiff.
Hinsdale and B. & T. C. Fuller for defendants.

PEARSON, C.J. The Court may before or after judgment, amend, by adding or striking out the name of any party, or by conforming the proceedings to the facts proved. C. C. P. sec. 132.

This provision, and numerous others of the C. C. P. show, that its purpose is to prevent actions from being defeated on grounds that do not effect the merits of the controversy, whenever it can be done by amendment. The pervading idea being to settle controversies by one action, and thereby prevent the loss of the labor and money expended in that action, and the necessity for incurring like labor and expense in a second.

Whether under this broad power of amending, the Superior Court in an action by A, could strike out the name of A and insert that of B, a stranger to the controversy, either directly or indirectly, as by first adding the name of B as co-plaintiff, and then striking out the name of A, is a question not now before us; for Bullard, the administrator of the assignee of the reversion is not a stranger, but is the person entitled to the subject of the controversy according to the facts proved. Our case is that of an action commenced in the name of the lessor of a term of years for rent accrued after he had assigned the reversion; and the question is, had the Court power to amend by striking out the name of the assignor, and inserting that of the assignee as plaintiff?

At the last Term of this Court, it was decided after much argument, that rent service was incident to the reversion, and that the rent (439) not accrued passed to the assignee. *Kornegay v. Collins,* 65 N.C. 69. Before that case, it appears to have been a question of doubt, among the members of the profession, whether the rent passed to the assignee of the reversion, or belonged to the lessor as a personal chose in action. In this case the action had been commenced in the name of the lessor; and after that decision the motion to amend was made. We concur with his Honor in the opinion that he had power

to allow the amendment; and we will add that upon the facts proved, it was a proper case for its exercise.

The terms imposed upon the plaintiff, secured to the defendants all the advantage which they had any right to expect. And there was no controversy between the assignor and the assignee; but the controversy was, that the defendants were not disposed to pay the rent to either of them, and to set up claims for repairs. The action being in the name of the assignor, the attempt was to defeat it on the ground that it should have been in the name of the assignee. This difficulty did not touch the merits of the case, and was properly put out of the way by the amendment.

The exceptions to the charge and to the rate of damages, were not argued in this Court, and it is unnecessary to discuss them.

There is no error.

Per curiam.

Judgment affirmed.

Cited: Robinson v. Willoughby, 67 N.C. 85; *Oates v. Kendall,* 67 N.C. 243; *Cheatham v. Crews,* 81 N.C. 346; *Reynolds v. Smathers,* 87 N.C. 27; *Stokes v. Taylor,* 104 N.C. 397; *Mills v. Callahan,* 126 N.C. 757; *S. v. Lewis,* 177 N.C. 557; *Jennings v. Shannon,* 200 N.C. 3; *Trust Co. v. Williams,* 209 N.C. 809; *Cody v. Hovey,* 217 N.C. 411; *Webb v. Eggleston,* 228 N.C. 579; *Dwiggins v. Bus Co.,* 230 N.C. 239; *Perkins v. Langdon,* 231 N.C. 390; *Hine v. Blumenthal,* 239 N.C. 543; *Exterminating Co. v. O'Hanlon,* 243 N.C. 464.

(440)

JOSEPH SPARKS ET AL v. ELISHA MESSICK ET AL.

1. In a written bill of sale which contains no warranty of title, none can be implied or proved.

2. Although there seems to be an implied warranty of title in the sale of personalty, made by parol, yet no such rule is applicable to sales made by executors, administrators, etc.

3. Where there is a warranty of title to personalty which is broken, the vendee can take no advantage thereof to have the contract rescinded, and refuse payment of the purchase money, when he has kept the property for many years, and had the benefit thereof, until it is destroyed.

Anders v. Lee, 1 D. and B. Eq. 318, *Pender v. Forbes,* 1 D. and B. 250, cited and approved.

SPARKS *v.* MESSICK.

MOTION to dissolve an injunction heard before *Cloud, J.,* at Spring Term, 1871, of YADKIN Superior Court.

The plaintiffs gave their single bill to the defendant Elisha Messick during the years 1857, or 1858, for fourteen hundred dollars, in consideration of a family of negroes sold by the defendant, Elisha Messick, to the plaintiff Joseph Sparks. The negroes went into the possession of plaintiff, Joseph, in 1857 or 1858, who kept them until their emancipation, except a female slave who died during the year 1863. These slaves were bequeathed by the last will and testament of George Messick to his two daughters, and in the event of their dying without issue, then to the children of the defendant, Elisha, who was the executor of the said George. The daughters of the testator died without issue, and the defendant was the Guardian of his children, who are the other defendants in this action. The daughters of the testator died prior to the sale of said slaves to plaintiff, and at the time of said sale the children of the defendant Elisha, were all infants.

The defendant Elisha brought suit on said single bill prior to the adoption of the Code of Civil Procedure, and obtained judgment thereon at Spring Term, 1870, of Yadkin Superior Court; after which the plaintiffs commenced a civil action against defendants, and al-

(441) leged in their complaint that the defendant Elisha had warranted the title to the plaintiff for said slaves, and that he sold said negroes without having had any authority so to do, and that he had no title thereto. Thereafter the plaintiff applied for and obtained an injunction against the defendants restraining them from the collection of said judgment for the reason above stated.

The plaintiffs' answer avers that said sale was made by the defendant Elisha, by a written bill of sale, signed by him as executor of George Messick, which was not offered as an exhibit, nor does it appear when it was given.

At Spring Term, 1871, the defendants after due notice being given, moved to dissolve the injunction theretofore granted. His Honor being of opinion with the defendants, made an order dissolving said injunction, from which the plaintiffs appealed.

Phillips & Merrimon for the plaintiffs.
Bailey for the defendants.

RODMAN, J. The argument for the plaintiffs requires the maintenance of three propositions:

1. That Messick, the executor, who sold the slave, had no title.

2. That he warranted the title.

3. That in consequence of the defect, the plaintiff, although he continued to hold the slave from 1858, or thereabouts, until her death in 1863, might rescind the sale, and refuse payment of the price.

1. It is not necessary to examine particularly the first proposition, as it is conceded.

2. The second requires a little more consideration. It seems to be the law in England, that as a general rule, there is no implied warranty of title upon a sale of chattels. *Morley v. Altenborough,* 3 Ex ch. 500. But this rule has been so limited by exceptions, that it has been said to have been practically "eaten up." Broom's Leg. Max. 767; *Eicholz v. Bannister,* 17 C. B. N. S. 708, (112 E. C. L. R.,) *Baguely v. Hawley,* Law Rep. 2, C. P. 625. (442)

That there is such a warranty, seems to be the general doctrine in the United States. 1 Pars. Cont. 574, and note e. on p. 575. *Andres v. Lee,* 21 N.C. 318. But we think it clear, that where there is a written bill of sale, which contains no warranty, none can be implied or proved, as that would be to add to the writing by parol. *Van Ostrand v. Reed,* 1 Wend. 424; *Pender v. Forbes,* 18 N.C. 250. In this case the plaintiff speaks in his complaint of a "pretended bill of sale;" and the defendants say there was a bill of sale for the slaves.

Neither of them produce the bill of sale, or set out its contents, and it is not said to have contained any warranty. If it had, in fact, contained a warranty, the plaintiff ought to have so alleged with certainty; and it is fair to presume that he would have done so.

And although it is stated by the plaintiff, that the defendant claimed the slaves as executor, it is not stated whether he sold in his capacity as executor, and professed to convey the estate of his testator, or in his own right. It might make a material difference, because, it is held that on sales by executors, administrators, etc., there is no implied warranty of title. *Ricks v. Dillahunty,* 8 Pars. (Ala.) 134. *Bingham v. Maxey,* 15 Ill. 295. If this were material, in the view we take of the case, we should be compelled to assume the fact against the plaintiff; because it is his duty to state his case plainly and directly, and not leave important facts to be inferred or guessed at.

It is impossible to tell from the pleadings, with any precision, the date of the sale. It seems from the answer to have been in 1857 or 1858. Dashe, remained in possession of the plaintiff until her death in 1863, and her children so far as appears, until their emancipation.

We think that even if there was a warranty of title, which was broken, it cannot be allowed to a vendee, to keep the property many years, and until it is destroyed, and then to rescind the con-
(443) tract and refuse payment of the price, upon the ground that the consideration has failed. He has received a substantial consideration, he cannot restore the vendor to his original condition, and by his delay, has forfeited whatever right he might originally have had to rescind the contract. *Hunt v. Silk,* 5 East, 449; *Percival v. Blake,* 2 C. & P. 514.

He must be left to recover upon his warranty, if he can make one out, such damages as he may be entitled to.

Per curiam.

Judgment affirmed.

Cited: Martin v. McDonald, 168 N.C. 233; *Farquhar Co. v. Hardware Co.,* 174 N.C. 376.

ELIZABETH A. HAGANS ET AL V. H. B. HUFFSTELLER, ADM'R. OF HIRAM HAGANS.

Before entering the Confederate service, A. placed in the hands of B. Confederate currency to be applied to the support of A.'s family. The latter died in December, 1862, when B. administered upon his estate, paid off the debts of his intestate, and retained *in kind* the money deposited with him by A.: *Held,* that B. was not liable for the value of said currency.

CIVIL action tried before *Logan, J.,* as Spring Term, 1871, of GASTON Superior Court.

The plaintiffs are two of the next of kin of the defendant's intestate, and brought this action to recover their distributive share of said estate. Upon the coming in of defendant's answer to the plaintiffs' complaint, it was referred to the Clerk of the Superior Court to take an account, etc.

The facts were, that one Hiram Hagans in August, 1862, placed in defendant's hands about $1,200 in Confederate currency, to be applied to the support of his family as their wants required, or as he (Hagans) directed. At the time of said transaction the said Hagans entered into the Confederate service, and was killed in December, 1862. In February, 1863, the defendant administered upon the estate of Hiram Hagans, and applied a part of said Confederate currency which

he had received from his intestate, and which he had not ex- (444)
pended in the life time of decedent for the support of his family, to the payment of his debts. The remainder he exchanged for the new issue of Confederate currency at the passage of the act causing said money to be funded, etc.

The referee charged defendant with the value of said currency, and upon an exception filed thereto, his Honor overruled said exception, and gave judgment against the defendant. Appeal.

Bynum for plaintiff.
Hoke for defendant.

READE, J. The intestate of the defendant, upon going into the army deposited with the defendant a sum of Confederate money, to hold and give out to the family of the depositor as they might need it. The defendant did so as long as the depositor lived. At his death the defendant qualified as administrator upon his estate, and the same money was then on hand in kind. There was certainly no default on the part of the defendant up to this time, February, 1863.

After qualifying as administrator, he paid off all the debts of the estate; paid the widow's year's support, and settled with all the distributees except the plaintiffs, one of whom was in the army, and did not call for his share, and the other was a minor. Their shares consist of a portion of the same money which was on hand, and it died on the administrator's hands at the end of the war.

The defendant was in no default, but in all things did his duty, both as the agent of the intestate in his life time, and as administrator of his estate, and there is no principle upon which he can be charged.

There is error.

Per curiam.

Judgment reversed.

Cited: Clerk's Office v. Huffsteller, 67 N.C. 450.

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(445)

J. T. REDMAN v. W. TURNER, ADM'R., ET AL.

An Administrator will not be allowed to retain out of the assets of his intestate, a note payable to him as guardian where his intestate is surety, when he has paid over to the principal of said note, who was insolvent, a

claim on his intestate for a sum more than sufficient to have paid off and discharged the indebtedness of the principal.

DEBT tried before *Mitchell, J.*, at Spring Term, 1871, of IREDELL Superior Court.

The defendant relied upon the plea of fully administered and no assets, Retainer. It was referred to the clerk to take an account of the administration of the estate of intestate in the hands of the defendant.

It appeared from the report of the clerk, that the defendant filed a petition for an account and settlement against the next of kin of his intestate at August Term, 1863, of the County Court of Iredell, and that said account was taken in November 1863, and confirmed at November Term, of said Court; That at said time he paid over to the next of kin of his intestate, $4657.13 cents in Confederate currency without taking from them refunding bonds; (having delivered over to the next of kin a number of negroes in 1861, when he took refunding bonds for the same.) In 1867, defendant filed a petition to sell the lands of his intestate, to make the proceeds, assets for the payment of debts, alleging in his said petition that his intestate still owed about $1500, without stating to whom owing. This land was sold and the proceeds thereof applied to other, than the plaintiff's claim.

When the account was taken before the Clerk, the defendant produced a note on R. L. Wilson, with his intestate as security, for $545, principal, payable to defendant as guardian, which defendant insisted he should be allowed to retain out of the assets of his intestate. It appeared from said report that R. L. Wilson, had been insolvent
(446) since 1860. Amongst the vouchers produced and allowed to defendant, was a receipt from the said R. L. Wilson, for an amount more than sufficient to have paid off the note which defendant held on the said Wilson, as guardian, and said receipt was given several years after the insolvency of Wilson. The Clerk allowed the defendant's note against Wilson, and his intestate as a voucher. The plaintiff filed several exceptions to the report of the Clerk, none of which are necessary to notice in this case except the one numbered in said exceptions as the "fifth," which was in allowing defendant to retain the said Wilson claim out of the assets of his intestate. His Honor sustained said fifth exception, and rendered judgment for amount of plaintiff's claim, from which defendant appealed.

W. P. Caldwell and Blackmer & McCorkle, for plaintiff.
Armfield for defendant.

READE, J. We think his Honor was right in sustaining the 5th exception, and that makes it unnecessary that we should consider the other exceptions, because the 5th exception fixes the defendant with sufficient funds to satisfy the plaintiff's demand.

In regard to the 5th exception, the facts are that the defendant claims to retain the amount of a note due him by his intestate as surety for one Wilson, who was alleged to be insolvent. But then the defendant claims that his intestate was indebted to said Wilson in a sum larger than the note, and that he paid Wilson out of the funds of the estate, and took a credit therefor. And the question arises—Why did the defendant pay Wilson when Wilson owed him the note aforesaid? Why did he not set off the note he had on Wilson instead of paying Wilson his claim against the intestate, and then leaving the note to fall upon Wilson's surety, who was the defendant's intestate? No reason or explanation is given, and we think the defendant (447) ought not to be allowed to retain the amount out of the estate of the intestate.

Per curiam.

Judgment affirmed, and judgment here for plaintiff.

JOHN C. POE v. R. W. HARDIE, SHERIFF.

The act of 1869-'70, chap. 121, exempting from execution the reversionary interests in Homesteads, is constitutional.

The object of this act was intended to protect the owner thereof against any vexatious litigation which might be instituted by the purchaser of a reversionary interest.

The estate in the Homestead is a *determinable fee*, and the owner thereof is not impeachable for waste.

RULE for an amercement against the Sheriff of Cumberland County, heard before *Buxton, J.*, at Spring Term, 1871, of CUMBERLAND Superior Court.

The plaintiff placed in the hands of the defendant, as Sheriff, an execution against one Duncan Shaw, based upon a judgment which was obtained upon an ante-war debt. The Sheriff returned thereon, "Received April 11th, 1871. Nothing to be found in excess of Homestead." The defendant for cause why a judgment *ni si* should not be entered against him, relied upon the Act of 1869-'70, chap. 121.

His Honor held the return of the defendant sufficient, and dismissed the rule. Appeal by plaintiff.

Hinsdale for plaintiff.
Phillips & Merrimon, W. McL. Kay and B. & T. C. Fuller for defendant.

1. The Constitution, Art. X, sec. 2, 3, and 5, exempts the
(448) Homestead from sale under execution, *not any particular estate,* but the whole, during a designated period of time. By sec. 8, the owner may sell, subject to a lien, however, if one has been acquired; the lien being in the nature of a mortgage.

2. The Act of 1870, chap. 121, is constitutional;

(a.) Because it merely prohibits the Sheriff from interfering with a vested right, it does not enlarge the exemption, nor impose any unusual hindrances in the way of the creditor.

(b.) If its operations be to enlarge the exemption, this is no objection, because the exemption is constitutional. *Hill v. Kesler,* 63 N.C. 437. And for the same reason any extension of it must be constitutional.

(c.) If the result of the statute be to enlarge the exemption, it is good because the right of the creditor is not impaired. He can still sue, get judgment, and have his execution satisfied out of the debtor's property liable to execution.

DICK, J. The execution in the hands of the Sheriff was issued to satisfy a judgment obtained on the 17th day of March, 1871, upon a debt contracted previous to the adoption of our Constitution.

The Sheriff failed to levy upon and sell the reversionary interest in a homestead, which had been assigned to the defendant in the execution; and a motion was made to amerce the Sheriff for his failure to perform an official duty. This presents the question whether the Act of the 25th of March, 1870, (Acts of 1869-'70, chap. 121, page 165) exempting from execution the reversionary interest in homesteads, is in violation of the Constitution of the United States as "impairing the obligation of contracts," (Art. 1, sec. X.)

The rules of law regulating homestead and personal property exemptions, and the principle upon which they are founded, were elaborately considered by the Court in *Hill v. Kesler,* 63 N.C. 437. In that case it was decided that "the provisions of the State Constitution giv-
(449) ing 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."

As it was determined that the State had the power to create the homestead, there can be no constitutional objection to the law-making power of the State throwing around the homestead, while it exists, such safe-guards as are necessary for its protection and complete enjoyment.

The act of the 25th day of March, 1870, is not only constitutional, but it carries out the wise and beneficent policy of the Constitution of the State, in securing a home to a householder and his family beyond the reach of legal process on the part of creditors.

The estate in the homestead, as created by the Constitution, is a determinable fee, and the tenant was not "impeachable for waste" even before the passage of the act above referred to. That act was intended to protect the owner of a homestead against any vexatious litigation which might be instituted by the purchaser of a reversionary interest. Such interest, if sold, would yield but little to an execution creditor in satisfaction of his debt, and in nine cases out of ten, would be purchased by speculators.

The entire interest and control of the homestead being now, by law, vested in the holder, encourages him to improve and beautify his home, make it more comfortable for himself and family, and more valuable to creditors at the expiration of the determinable estate. The act also provides that the statute of limitations shall not run against the creditors of the holder of a homestead, during the existence of the estate.

The ruling of his Honor in the Court below was correct.

Per curiam.

Judgment affirmed.

Cited: Hinsdale v. Williams, 75 N.C. 430; *Mebane v. Layton,* 89 N.C. 401; *Markham v. Hicks,* 90 N.C. 205; *Jones v. Britton,* 102 N.C. 175; *Vanstory v. Thornton,* 112 N.C. 207; *Joyner v. Sugg,* 132 N.C. 588; *Stokes v. Smith,* 246 N.C. 699.

(450)

THE STATE v. ANDERSON PHELPS.

A count in an indictment must be complete in itself, and contain all the material allegations which constitute the offence charged. Therefore, a count charging defendant with receiving stolen goods, is defective, which does not contain the name of the defendant in the proper place, and distinctly charge him with receiving the stolen goods.

This defect is not cured by the statute, Rev. Code, chap. 35, sec. 14, and judgment will be arrested.

INDICTMENT for receiving stolen goods tried before *Cloud, J.*, at Spring Term, 1871, of ROWAN Superior Court.

The indictment contained two counts, one for larceny, the other for receiving stolen goods. The jury acquitted defendant on the first count, and convicted on the latter, a copy of which is as follows:

"And the jurors aforesaid, upon their oath aforesaid, do further present that on the day and year aforesaid, in the County aforesaid, one box manufactured tobacco, two bottles of whiskey, and five gallons of whiskey, of the value of twenty dollars, of the goods, and chattels of William B. March before then feloniously stolen, taken and carried away feloniously did receive and have, he the said Anderson Phelps, Green Phelps, and David Phelps, then and there well knowing the said goods and chattels to have been feloniously stolen, taken, and carried away, against the form of the statute in such case made, and provided, and against the peace, and dignity of the State."

Motion in arrest of judgment, motion refused. Judgment and appeal.

Attorney General for the State.
Bailey for defendant.

As to the motion in arrest:

There being an acquittal in the count for larceny, the count for receiving is alone under consideration, and with regard to that I
(451) submit that it is the play of Hamlet with the Prince of Denmark left out. The name of the defendant being omitted from the first part, the count charges a receiving, but it cannot be seen by whom: the latter part in which the prisoner's name occurs, only charges him with a knowledge that certain goods had been theretofore stolen, which has not as yet, been made an indictable offence.

Indictments should be certain to every intent and without any intendment to the contrary, 1 Ch. Cr. Law, 171.

And by reference to Arch. Cr. Pl'd. I find a form of an indictment of larceny and receiving, the jonder of which had been authorized by statute 11 and 12 Vict. Vol. 3 top page 475, and in that form the name of the defendant appears after the words "do say that" and so is the printed form used by the Solicitors which is herewith filed, furnished me by Gen. Cox. In the principal case, the verbs "receive and have" have no noun to govern them, nor are they employed in such connection that the ellipsis may be supplied.

DICK, J. The defendant was convicted only on the second count in the indictment; and it is insisted on a motion in arrest of judgment that said count is so defective, that the Court ought not to pronounce judgment.

It appears upon the face of the indictment, that the name of the defendant is not mentioned in the commencement of the statement of the offence, charging the receiving of the stolen goods; but, is subsequently introduced, that, "He, the said Anderson Phelps, then and there, well knowing the said goods and chattels to have been feloniously stolen," etc.

A count in a bill of indictment, must be complete in itself, and contain all the material allegations which constitute the offence charged.

The general rules of pleading, as to the sufficiency of the indictment, are well stated in 1 Bish. Cr. Pro., sec. 411. "The indictment must show on its face, that it has been found by competent au- (452) thority, in accordance with the requirements of law; and that a particular person mentioned therein, has done within the jurisdiction of the indictors, such and such specific acts, at a specific time, which acts, so done, constitute what the Court can see, as a question of law, to be a crime."

The Count under consideration, is not in accordance with the precedents, 3 Chit. C. L. 988; and is defective in not containing the name of the defendant in the proper place, and distinctly and positively charging him with receiving the stolen goods, etc.

The defect is not cured by the statute, Rev. Code, ch. 35, sec. 14; as there is an omission of a material averment, constituting the crime charged.

There is error. The judgment is arrested, and this must be certified to the end that the defendant may be discharged.

Cited: S. v. May, 132 N.C. 1022; *S. v. McCollum,* 181 N.C. 585; *S. v. Whitley,* 208 N.C. 663; *S. v. Finch,* 218 N.C. 512; *S. v. Johnson,* 220 N.C. 778; *S. v. Camel,* 230 N.C. 428; *S. v. Sawyer,* 233 N.C. 78; *S. v. Hammonds,* 241 N.C. 227; *S. v. Cox,* 244 N.C. 59.

(453)

THE STATE v. W. B. PARKER AND ALFRED GILMER.

An indictment for murder which charges that the prisoners on the deceased "did make an assault and in some way and manner, and by some means, instruments, and weapons to the jurors unknown, did then and there feloniously, wilfully, and of their malice aforethought deprive him the said A. of his life so that the said A. did then and there instantly die," etc., is sufficient, although the evidence presents different ways and means by which the deceased might have been killed.

It is not competent on the cross-examination of a witness to ask him if he made the same statement before the grand jury as he now makes, when the counsel state that their object in asking such question is not to impeach the credibility of the witness.

THE prisoners were indicted for the murder of one Thomas Price, (Colored) tried before *Tourgee, J.,* at Spring Term, 1871 of GUILFORD Superior Court.

The indictment contained but one count, and in describing the manner and means by which the deceased was killed, says, the prisoners "on the body of Thomas Price, did make an assault and in some way and manner and by some means, instruments, and weapons to the jurors unknown, did then and there feloniously," etc., etc. The indictment concludes, "and so the jurors aforesaid on their oath aforesaid do say that the said William B. Parker and Alfred Gilmer, him the said Thomas Price in the manner, and by the means aforesaid to the jurors aforesaid unknown, then and there feloniously, wilfully, and of their malice aforesaid did kill and murder, against the peace and dignity of the State."

W. B. Bogart, Coroner of the County, testified that deceased was found on Monday morning the fifth of December, 1870, dead on the premises of the prisoner, Parker, and about a quarter of a mile from the house of said prisoner, with the flesh of one leg entirely gone, the foot had been separated from the leg, small bone in the lower
(454) part of leg broken, on the back and sides of the body were found many bruises, and as the witness testified "at least a

dozen bruises between the shoulders and down the small of the back, and were of the size of silver half dollars, oval and round."

The witness further testified that the place where the body was found was a sandy surface covered with dead grass, that he found blood on rails lying against a fence in the direction of the prisoner Parker's house; the blood seemed fresh, and its appearance indicated that it had been there but a short time; that he followed a path in the direction of Parker's house to the body of deceased, and when within forty or fifty yards from the prisoner Parker's house, he found a spot where there seemed to have been marks of quite a struggle and considerable blood on the ground, three or four different sized tracks were at this place seen, these indications covered a space of eight or ten feet square, at this place found some drops of blood which indicated a fresh appearance.

The witness further testified that the bruises, showed as if they might have been caused by a rock, or punches by a stick. Bruises were also found on the breast. He also stated that the bruises might have been caused by the biting of dogs.

Another witness testified that he met the prisoners on Saturday night of the fourth of December, 1870, both of whom had sticks, and the prisoner, Parker, said "they intended to find out who had burned his corn, and were in search of the party, that they intended to kill some one, and kill till they were taken up."

Another witness testified that during the winter of 1870, he lived in 250 yards of Parker's house, that on Saturday night December 4th, Parker came to the house of witness and asked witness to go up and see the thief who burnt his corn, that he then had old Tom Price under arrest up there by the women, that if witness did not go then, that he might not see him, for he (Parker) might kill him or make his dogs tear him up, that Parker left, but returned in a few minutes, and begged witness to go and hear the old man tell his tale, for (455) he did not think he would ever turn him loose. Parker had with him a half dozen dogs, a gun, and an old knife. After he, (Parker) left, witness saw the prisoner Gilmer, join Parker, some twenty or thirty yards from the house of witness. This was about midnight.

Witness further testified, that sometime after Parker left his house, he heard the dogs fighting, as he supposed, in Parker's yard; a few minutes after this, he heard Parker say, "Oh, God damn you, I told you they would kill you." Shortly thereafter, witness recognized the voice of the deceased cry out three times, "Oh, Lordy."

There were several other witnesses, who testified as to the condition of the body of the deceased when found.

When the witness Bogart was being cross-examined, the prisoners' counsel proposed to ask him if he made the same statement before the Grand Jury, as he made then.

The Court inquired if the defence intended to impeach the witness; to which the prisoners' counsel stated that such was not their object.

His Honor held that the question was not competent in any other view. Prisoners excepted.

The prisoners' counsel offered no evidence, but asked his Honor to charge:

1. That the evidence of bruises upon the body of the deceased, taken in connection with the subsequent testimony in the case, establish, or tend to establish that the bruises upon the body of the deceased were caused by dogs, before his death, and consequently there is a fatal variance between the *allegata et probata.*

2. That the "way, and manner, and means," of the death of the deceased, are shown by the evidence, and therefore there is a variance between the allegations and proof.

3. That the jury, if there is any doubt upon the question as
(456) to how the bruises were made, should give prisoners the benefit of the doubt.

4. That if the jury are satisfied from the testimony, that the deceased came to his death by reason of the bruises upon his body, caused either by dogs, stones, sticks, or any blunt instrument, or weapon, there is a fatal variance between the indictment and proof.

There were also other instructions prayed for not necessary to be stated.

His Honor declined to charge as requested in each and every particular, to which the prisoners' counsel excepted.

Verdict guilty. Rule, etc. Judgment and appeal.

Attorney General and Scott & Scott for the State.
Mendenhall and Ball & Keogh for the prisoners.

RODMAN, J. This was an indictment against the prisoners for the murder of Thomas Price.

It contained but a single count, which was in the usual form, except that it charged that the prisoners, on the said Price, "did make an assault, and in some way and manner, and by some means, instruments and weapons, to the jurors unknown, did then and there, feloniously, wilfully, and of their malice aforethought, deprive him, the said

Thomas Price, of life, so that the said Thomas Price did then and there instantly die," etc. In the course of the trial, the prisoners proposed to ask of the witnesses examined on the part of the State to prove the homicide, whether the testimony they had given before the Grand Jury, was the same with that they gave to the jury on the trial then in progress. In reply to a question of the Judge, the counsel for the prisoners said, it was not his purpose to impeach the witnesses, by showing that they had testified differently before the Grand Jury. Whereupon, his Honor refused to allow the question to be put. After a verdict against the prisoners, they moved in arrest of judgment, which was overruled and they appealed. (457)

The counsel for the prisoners in this Court, in an able argument, has endeavored to maintain, (as we understand him) the following propositions:

1. Assuming it to be known to a Grand Jury, that a homicide was committed in one of a limited number of ways, but not to be known in which one of those ways in particular, the rules of the common law require the indictment to contain separate counts, severally charging the crime to have been committed in one of those ways; and if the indictment, contain in addition to these, a count charging the crime by means unknown, (as it did in Webster's case) that count is bad and will not support a conviction.

2. Assuming as above, an indictment consisting of a single count only, charging the homicide by means unknown is bad.

3. Upon a trial on an indictment, consisting of such count alone, a prisoner may prove that the means were, or by reasonable inference, might have been known to the Grand Jury, and therefore the evidence ought to have been received.

As to the form of the indictment, the learned counsel admitted, that there were two cases of some celebrity, which might be cited against him. *Commonwealth v. Webster,* 5 Cushing 295, and *State v. Williams,* 52 N.C. 446. He contested the principle on which these cases were decided, and also endeavored to distinguish them from the present.

Both the decisions referred to, are entitled to great respect, from the character of the Judges who made them, and one of them, at least, must be regarded as an authority in this State. Nevertheless, as they are comparatively recent, and stand alone as far as we know, as decisions on the precise points in question, and have been seriously ques-

tioned by the learned counsel, we accept his invitation to consider the question independently of them.

The law requires every indictment to set forth with reasonable
(458) certainty, the nature and circumstances of the crime. The reasons for this rule, applicable to the present question, are:

1. That the accused may know with what he is charged, so as to be prepared with his defence.

2. That in case of a second indictment, he may be able to plead his former acquittal or conviction.

The limits of the rule are to be measured by the reasons for it, and it will never be stretched to defeat the ends of justice. Ordinarily, an indictment for an injury to property, must describe the property, both by its own name, and the name of its owner; as in arson, burglary or larceny. Yet in these cases, if the name of the owner be unknown, it will suffice to say so. So on an injury to the person, ordinarily it is necessary to name the person injured; but if his name is unknown, it will suffice to say so. 1 Bish., Cr. Pro. 5297, where many cases are referred to. This was settled law and common practice long before the case of Webster, which has been called a novelty. But it must be admitted that for every purpose for which certainty of description is required, it is more important in reference to the description of the person whose goods, or body, may have been the subject of the crime, than any description of the means of killing in an indictment for homicide can be. Certainty in the description of the crime, must be more important than in the means of effecting it, which indeed in most cases, it is not necessary to state at all. Probably one accused of larceny might prove by the alleged owner, that he had lost no such goods: while if the name be omitted, he loses that means of defence. To one charged with the murder of A., he may prove that A. is alive, when he could not prove the same of a person described as unknown. Also it is obvious that one acquitted, or convicted of stealing certain goods, the property of A., and indicted a second time for the same offence, may, with much more facility establish the identity of the second charge with the first, than he could if the name of the owner had been stated as unknown.

If certainty may thus, for sufficient reason, be dispensed with
(459) in the more important circumstances: *a fortiori*, it may in the less important.

It is easy to see that under a contrary doctrine, which required the means by which a crime was committed, to be stated with certainty,

when they could only be conjectured, a conscientious jury might often fail to agree as to what means were the most probable, and thus the guilty would escape, upon a doubt as to a matter not essential to his guilt.

To dispense with certainty where it is unattainable, can rarely if ever embarrass a just defence, while to expect it, may defeat the ends of the law.

We think also there can be no doubt, that a prisoner charged the second time with the murder of an individual by any certain means whatever, could avail himself of a former acquittal upon a charge of the murder of the same individual by means unknown. Such a form of indictment would thus in that respect be more advantageous to the prisoner, than one that stated certain means, *e. g.* by shooting, for he may be again tried upon a charge of murdering by other and different means, *e. g.* by poisoning.

Both on principle and authority, a count in the form here used is sufficient, and will support a conviction.

Having reached this conclusion, we can see no necessity for the use of other, and additional counts, stating with certainty, the several different means which may be supposed; and no reason except caution on the part of the pleader, and a desire to avoid the possibility of a variance between the charge, and the proof. For this reason no doubt the additional counts were inserted in Webster's case. It is taken to be settled law, that if an indictment charges in different counts, that the crime was committed by several different means, if the jury believe it was committed by either of those means, they are not obliged to find by which in particular, but may find a general verdict of guilty on all the counts, notwithstanding the means charged in the several counts are inconsistent with each other. *State v. Williams*, 31 N.C. 140, *State v. Baker*, 63 N.C. 276. To the same effect is a very recent (460) case. *Carr v. Desmarteau*, 16 Gray 1 (Mass.)

Now if a jury may convict by a general verdict, which in effect says the crime was committed in one of several ways, but the particular one is unknown, of what advantage is it to a prisoner to have the several ways which may be conjectured as possible, separately set forth, rather than have them all combined, with no greater certainty in a single count "by means unknown?" That charge corresponds with the verdict, and the several counts substantially amount but to that; so it follows that alone should suffice.

Then as to the right of the prisoners to the evidence which was rejected. How it might have been if they had proposed that there was evidence before the grand jury different from that before the *petit* jury,

and showing clearly how the homicide was effected, we are not called on to say. It is conceded for the sake of the argument that they would have been entitled to it.

But the counsel for the prisoners did not suggest, that there was before the grand jury any evidence different from that before the *petit* jury. So the question is, whether the evidence given upon the trial proved the homicide to have been committed by any certain means, and therefore reasonably tended to prove that it was committed by such means, to the exclusion of all others. If the evidence when admitted, would not reasonably tend to support the allegation that the grand jury knew the means of the homicide, it was incompetent and properly rejected. Herein, the counsel for the prisoners attempt to distinguish this case from that of *State v. Williams*, 52 N.C. 446, as in that case no one way of killing was more probable than another. The difference between the cases in that respect is not so great as to be material. The most that can be said of the evidence in this case is, that it proved that probably the homicide was accomplished in one of four several ways, viz.: 1st, by shooting; 2nd, by worrying by (461) dogs; 3rd, by bruises made by sticks, stones, or other objects; 4th, by the combined effect of all these means.

Among these different means we can only conjecture which was the real one, while it is certainly possible, consistently with the evidence, that the real means were different from any of those supposed.

We think therefore the evidence offered did not tend to prove the allegation, and it was properly rejected.

There is no error.

Per curiam.

Judgment affirmed.

Cited: S. v. Van Doran, 109 N.C. 867.

THE STATE v. JOSEPH WALKER.

Article IV. Sec. 19 of the Constitution authorizing the Legislature to establish Special Courts in cities and towns, is confined to misdemeanors. The Legislature declared that larceny of less value than twenty-five dollars should be a misdemeanor. (Act of 1869-'70, chap. 37.)

The effect of the repeal of the aforesaid act was to deprive the Special Court of the city of Wilmington of jurisdiction of larceny.

STATE *v.* WALKER.

INDICTMENT for larceny tried before *Cantwell, J.*, of the Special Court for the city of WILMINGTON.

The evidence was that the defendant had committed larceny of value less than twenty-five dollars,—that it was committed within the corporate limits of the city of Wilmington, that complaint was made by the accused within six months from the commission of said offence, and without collusion between the accuser and the accused.

There was judgment against defendant from which he appealed.

Attorney General and Cantwell for the State. (462)
No counsel for the defendant.

PEARSON, C.J. We do not feel at liberty to decide the question mainly discussed in the very elaborate and able argument of Judge Cantwell; that is, has the General Assembly power to abolish a Special Court established in pursuance of a provision of the Constitution? For the reason that a preliminary question is decisive of the case, the Court will never go out of the way, and unnecessarily pass upon a power which the General Assembly has assumed to exercise.

"The General Assembly shall provide for the establishment of Special Courts, for the trials of misdemeanors in cities and towns, when the same may be necessary." Constitution, Art. 4, Sec. 19.

Under this provision, a Special Court was established in the city of Wilmington, Acts of 1868. But its jurisdiction could only extend to misdemeanors, and in order to embrace cases of larceny—by act 1869-'70, ch. 37—it is enacted, "That a larceny committed within the limits of the city of Wilmington, where the thing stolen is not of greater value than $25, shall be a misdemeanor, not a felony."

This act is repealed by act of 1871, and the effect is to exclude larceny from the jurisdiction of the Special Court.

There can be no question, that the General Assembly had the same power to repeal the act of 1869-'70, ch. 37, as to pass it.

It follows that the Special Court established for the city of Wilmington, has no longer any jurisdiction to try a person charged with the offence of larceny.

There is error. This will be enforced, to the end, that the judgment of the Special Court be reversed and judgment be entered in favor of the defendant.

Cited: Day's Case, 124 N.C. 379.

(463)

THE STATE v. NOAH SPRINKLE.

A misrecital of the proper County in the caption of an indictment furnishes no ground for arrest of judgment.

Semble. Such an indictment would have been sufficient before the act.

MOTION to arrest judgment on an indictment for an assault and battery with a deadly weapon heard before *Mitchell, J.*, at Spring Term, 1871, of WILKES Superior Court.

The facts of this case sufficiently appear in the opinion of the Court.

Attorney General for the State.
Armfield for the defendant.

BOYDEN, J. At the Spring Term, of the Superior Court of Wilkes, 1870, the defendant with others was indicted in the following words and figures:

"STATE OF NORTH CAROLINA,

"Iredell County.

"SUPERIOR COURT, Spring Term, 1870.

"The jurors for the State on their oath present that Noah Sprinkle, Wiley Myers and Mack Lynch, late of said County of Wilkes, on the first day of March, in the year of our Lord one thousand eight hundred and seventy, with force and arms in the County aforesaid, in and upon the body of Moses Cockerham, an assault with deadly weapons did make, and him the said Moses Cockerham, then and there did beat, wound and ill treat to the great damage of him the said Moses; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

The record shows, that at the Spring Term, 1870, of the Superior Court of Wilkes, a bill of indictment in the words and figures (464) above stated was sent to a regular grand jury of the said County, and that the same was returned into Court, endorsed a "true bill," with the name of the foreman, D. A. Leach signed thereto. Upon this indictment the defendant, Sprinkle was convicted: but upon motion of defendant's counsel his Honor arrested the judgment on account of the clerical mistake of the word Iredell in the caption.

There was error in ordering the arrest of judgment. We think this indictment would have been good before the act, Revised Code, chap. 35, sec. 20; *State v. Warden*, 4 N.C. 5, but however that may be, we

are clearly of opinion that this defect after verdict, is cured by the said statute. This will be certified that the Court may proceed to judgment agreeable to Law.

Per curiam.

Error.

Cited: S. v. Arnold, 107 N.C. 864; *S. v. Van Doran,* 109 N.C. 867; *S. v. Francis,* 157 N.C. 614; *S. v. Davis,* 225 N.C. 118.

THE STATE v. GEORGE QUEEN.

Where two are jointly indicted for a forcible trespass, and one of the defendants submits upon whom no judgment is pronounced, it is incompetent to introduce the record of his submission in a trial against his co-defendant, as evidence confirmatory of the testimony of the prosecutrix.

INDICTMENT for a forcible trespass tried before *Logan, J.*, at Spring Term, 1871, of CLEAVELAND Superior Court.

The defendant and one Newton were jointly indicted, and at a former term of the Court, the latter came into Court, and submitted.

The Solicitor for the State, with the view of confirming the testimony of the prosecutrix whose evidence had been impeach- (465) ed, introduced the record of the submission of Newton upon whom no judgment had been prayed, but was discharged upon payment of cost, to which defendant excepted. Verdict guilty. Judgment and appeal.

Attorney General for the State.
Bragg & Strong and Young for the defendant.

BOYDEN, J. If the defendant, Newton, the record of whose submission was admitted, had been present at the trial he would not have been a competent witness, for or against his co-defendant. *Vide Bruner's* case at this term, ante. How then can this record between other parties made in the absence of the defendant be evidence for any purpose?

It is admitted by the Attorney General, that the record is not competent evidence tending to establish the guilt of the defendant; but it

is urged that it is still evidence tending to corroborate the testimony of the witness attempted to be impeached.

The Court is wholly unable to perceive this tendency, and the Attorney General, in his argument, failed to explain in what manner the record could tend to corroborate the impeached witness. The admission of the record for the purpose alleged, would be establishing a principle as to the competency of evidence heretofore unheard of.

There was error.

Per curiam.

Venire de novo.

Cited: S. v. Howard, 222 N.C. 292.

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(466)

THE STATE v. CALDWELL HARGRAVE.

Under the act of February 22nd, 1861, acts of 1860-'61, chap. ....., the least penetration of the person of a female against her will, constitutes the crime of rape.

THIS was an indictment for rape, tried before *Logan, J.*, at Spring Term, 1871, of GASTON Superior Court.

The prosecutrix testified that she had been thrown down by the prisoner, and that he then had his will with her and effected a peneration of her person, and in consequence thereof she was rendered very sore in her body, that she was aged sixteen years, and that no blood was found upon her person or clothing.

The defendant's counsel insisted that the evidence was not sufficient to constitute the crime of rape, that there was no such penetration as required by law, since the *hymen* was not broken.

His Honor charged the jury that any, the slightest penetration was sufficient to constitute the crime, and that it was unnecessary that the hymen should be broken. To which the prisoner excepted. Verdict of guilty. Judgment and appeal.

Attorney General for the State.
Guion for the prisoner.

BOYDEN, J. There is no error. His Honor left it to the jury, upon the testimony, to find whether there had been any penetration; stating

that any, the least penetration was sufficient to constitute the crime of rape, and that it was not necessary to constitute this crime, that the hymen should be ruptured. His Honor was well warranted by authority in thus charging the jury. See 9 Carrington & Payne 572 and note. Bishop's Criminal Law, Vol. 2, Sec. 1078, American Criminal Law, Vol. 2, Section 1138.

In the case of the *State v. Grey*, 53 N.C. 170, decided at December Term, 1860, it was held that to constitute the crime of (467) rape there must be proof of emission, as well as penetration, to constitute this crime.

The act of the 29th February, 1861, changed the law and enacted that the offence of rape "should be deemed and taken in law to be complete upon proof of penetration 'only'."

There being no error, this will be certified, that the Court may proceed to judgment agreeable to law.

Per curiam.

Judgment affirmed.

Cited: S. v. Monds, 130 N.C. 699; *S. v. Lance*, 166 N.C. 413; *S. v. Bowman*, 232 N.C. 376; *S. v. Jones*, 249 N.C. 137.

JOHN STALEY, ET AL v. B. A. SELLARS, ET AL.

The Clerk of the Superior Court is not styled in the Constitution "Probate Judge," nor is he directed to be so styled by any act of assembly, and his Probate jurisdiction is incident to his office of Clerk.

Hence, a motion to dismiss a special proceeding because it was addressed to the Clerk of the Superior Court, instead of to the Judge of Probate, was properly refused.

THIS was a special proceeding begun April 8th, 1869, by summons and made returnable before the Clerk of the Superior Court of ALAMANCE County in twenty days after service, and was returned duly served on all except James Moore and Frances Sellers. The plaintiffs on April 12th following, filed this complaint. The party defendants served filed their several answers in the clerk's office.

At Spring Term, 1869, of Alamance Superior Court, and after the above proceedings were had, the above entitled cause was entered on the summons docket of that term, when and where an order was

(468) made referring it to the Clerk of the Superior Court to take and report the account of B. A. Sellers and others, as the administrators of Thomas Sellars deceased. The cause remained on the Superior Court docket under the order of reference until Spring Term, 1870, when the Clerk reported an account, etc., whereupon the Court made an order in the cause remanding the cause *to the Judge of Probate,* directing that all the issues involved be committed to said Judge of Probate, with all right of amendment of pleadings, so as to give that officer the same jurisdiction as if it originally had commenced in his Court. After this order, the clerk acting as Probate Judge issued notice to the parties to appear before him, etc., in November, 1870, when and where the plaintiffs appeared, and B. A. Sellars, Esq., in behalf of himself and as the attorney of seven other defendants made appearance for said defendants. On opening the cause, B. A. Sellars, Esq., moved to dismiss said special proceedings, on the grounds that the original process was returnable to the Superior Court which had not original jurisdiction, and that jurisdiction cannot now be given by consent, and also because defendants had no notice of any amendments to the proceedings now before the Court; which motion was overruled, and an appeal taken to the Superior Court. At Fall Term, before *Tourgee, J.,* the said B. A. Sellars, as Attorney for the defendants, moved to dismiss said proceedings for the reasons assigned before the Clerk of the Superior Court, which motion was overruled, and defendants appealed.

Dillard & Gilmer for plaintiffs.
Gorrell for defendants.

RODMAN, J. An objection to proceeding before the Clerk seems somewhat ungracious after the consent given to the order of the Judge of the Superior Court, remanding the case to him. That consent implied leave to make any formal amendments necessary to give
(469) the Clerk jurisdiction, if any should be necessary. The objection touches merely a form. It is conceded that the Clerk has jurisdiction of the cause: it has been several times so decided in this Court, *Hunt v. Snead,* 64 N.C. 176. But it is said that the summons should have required the defendants to appear before the Clerk as Judge of the Court of Probate, and not as Clerk. If there had been a mistake merely in the title of the Court, producing no uncertainty as to what Court was intended, it might have been amended, and under the order by consent, must be regarded as having been amended. It would also have been waived by appearance and pleading. But there was no mistake. The Clerk of the Superior Court has by law a certain jurisdiction

for the probate of deeds and wills, etc. But he is not styled in the Constitution, "Probate Judge," nor, so far as we know, is he directed to be so styled by any act of Assembly. His probate jurisdiction is incident to his office of Clerk, and his legal style and title is "Clerk of the Superior Court." It is permissible to speak of him in pleadings, and in common speech as Probate Judge, provided no ambiguity or uncertainty results. The question whether consent can give jurisdiction to a Court does not occur. The action was properly brought; the Clerk had jurisdiction; and the action was never regularly removed from before him. When it appeared on the docket of the Judge of the Superior Court, he properly ordered it to be taken off, and remanded it to the Clerk. No consent was required for this. The judgment below is affirmed, and this opinion will be certified to the Clerk of the Superior Court of Alamance to the end that he proceed in the action according to law.

Per curiam.

Judgment affirmed.

Cited: Bumpass v. Chambers, 77 N.C. 358; *Houston v. Howie,* 84 N.C. 354; *Gay v. Grant,* 101 N.C. 218; *Clark v. Homes,* 189 N.C. 711.

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(470)

E. E. GREENLEE v. W. S. SUDDERTH, ET AL.

1. The receipt by a Clerk of the Superior Court of Confederate money in satisfaction of a docketed execution from this Court, in pursuance of the provisions of the Rev. Code, ch. 33, sec. 6, after such money became depreciated (April 1862,) in contravention of the directions of the plaintiff, amounts to a satisfaction of the execution to the extent of the value of the Confederate money in gold, to be ascertained by the Legislative scale of the date of such payment, and the Clerk is liable on his bond to the same extent.

2. In such case, the plaintiff may elect to repudiate the action of the Clerk and recover the whole amount due in the execution from the defendant therein, or may ratify his action, and demand of him the amount of the gold value of the Confederate money so received, and recover the balance of his execution from the defendant therein: *aliter,* had the payment been made to the plaintiff.

3. A ratification of the action of the Clerk, beyond the extent of the value of the money, will not be presumed by reason of his demanding in his complaint, judgment for the whole amount of the execution.

4. As the Clerk's liability arises from his agency as above stated, he is not liable for interest until a demand, and in the absence of any evidence

of demand in this case, the defendants are liable for interest, only from the commencement of the action.

5. When an execution is issued from the Supreme Court returnable to the Superior Court according to the provisions of the Rev. Code, ch. 33, sec. 6, and was docketed on the execution docket of the latter Court, the execution is treated as received under color and by virtue of the Clerk's office, and he cannot be allowed to suggest irregularities therein.

6. In such case as that above stated, the judgment is not reversed, but judgment is rendered in this Court according to the modification resulting from the opinion, and in this case it was referred to the Clerk to ascertain and report the current rate of gold, and judgment was thereupon rendered in this Court in accordance with the decision.

THIS was a civil action brought by the plaintiff against the late Clerk of the Superior Court of BURKE County on his official bond, and was tried before his Honor, Judge Mitchell, and a jury, at the Fall Term, 1870, of BURKE Superior Court.

(471) The facts developed by the testimony were these:

The plaintiff recovered judgment at August Term, 1861, of Supreme Court against one McKesson for about $1,700 and interest. Execution issued thereon for $1,848.34, with interest on $1,486 from 22d November, 1860, returnable to Fall Term, 1861, of Burke Superior Court. No other execution was ever issued. On the 5th day of April, 1862, the defendant, W. S. Sudderth, then Clerk of the Superior Court of Burke County received from the defendant in the execution, McKesson, $2,000 thereon, in confederate money. The words "paid—see execution docket," were endorsed on the execution by said Sudderth. The plaintiff had before the receipt of the confederate money by the Clerk, notified him orally not to receive payment of the execution in anything but specie or greenbacks. The execution docket had been destroyed and there was no evidence of its contents as to the execution. The planitiff demanded payment of his execution from the defendant Sudderth, while he was still Clerk, but the date of the demand was not shown. The defendants objected that the action should have been brought in the name of the State, but his Honor deemed the objection waived, and that objection was not insisted on in this Court. On behalf of the defendant, his Honor was requested to instruct the jury, that if the defendant Sudderth had been notified not to receive anything but gold or greenbacks, and in violation of such order did thereafter receive confederate money, that it amounted to no satisfaction. This instruction was declined by the Court and the defendants excepted.

The defendants requested his Honor to instruct the jury as above, with the addition that if the defendants in plaintiff's execution were

still good for the debt, the plaintiff's damages would only be nominal. This request was also declined. The defendants' counsel requested his Honor to instruct the jury that if all the facts in evidence were true, plaintiff could not recover, which instruction his Honor also declined, but charged the jury that if the plaintiff had given the defendant, W. S. Sudderth, notice not to receive anything in payment (472) but specie or the lawful currency of the United States, and he afterwards did receive confederate money in payment, that the plaintiff was entitled to recover, and the measure of damages was the amount received by the defendant, W. S. Sudderth.

Under these instructions there was a verdict for the plaintiff. Rule for a new trial. Rule discharged, judgment and appeal by the defendants.

Furches and Fowle & Badger for plaintiffs.
Folk for defendant.

READE, J. The plaintiff obtained judgment in the Supreme Court, in a suit against McKesson and others; and McKesson paid to the Clerk of Burke Superior Court, the present defendant, $2000, and the Clerk gave McKesson a receipt for that amount as paid upon the plaintiff's execution against McKesson. The payment was on 5th April, 1862, in Confederate treasury notes, and was endorsed upon the execution "paid,—see execution docket." The execution docket was afterwards destroyed by accident.

1. The first allegation urged against the liability of the Clerk and his sureties, is that the execution on which the money was paid was irregularly in his office; for although the statute allows an execution to issue from the Supreme Court, returnable to the Superior Court, yet it directs when that is done, that a certificate of the judgment in the Supreme Court shall be transmitted to the Superior Court and docketed there. Rev. Code, ch. 33, sec. 6. And it did not appear positively that the certificate had been sent down.

The indorsement of the Clerk "paid, see execution docket," was evidence tending to show that it had been sent down and docketed, else what did he mean by—"see execution docket?" And probably it ought to be presumed that it was sent. But whether the certificate was sent or not, the execution was there docketed, and the Clerk (473) and the parties assumed that it was regular, McKesson paying the money, and the Clerk receiving it. He received it by color, and, as we think, by virtue of his office, and cannot be heard to say that there

was some irregularity in the proceedings. *Broughton v. Haywood,* 61 N.C. 386.

2. The Clerk and his sureties being liable, the second question is, for how much? The payment was in Confederate treasury notes, which were depreciated; the payment satisfied the debt, not to the nominal amount of the notes, but to the amount of their value in gold: *Emerson v. Mallett,* 62 N.C. 234. And that is the amount for which the Clerk is liable. If there is a remainder, the defendants in the execution are liable for that. It would have been otherwise, if the payment had been made to the plaintiff himself.

As the Clerk received the notes in April, 1862, when they were not much depreciated, and were generally received in the payment of debts, it would have been a discharge of the debt to the nominal amount of the notes, under the decision in *Atkins v. Mooney,* Phil. 31, but the Clerk had express notice not to receive them, and therefore the case of *Atkins v. Mooney,* 62 N.C. 234, does not apply.

The plaintiff is entitled to treat the clerk as his agent to the extent of the value of what the Clerk received for him, and hold him responsible for that amount; notwithstanding he had instructed him not to receive the notes.

It is true the plaintiff might have repudiated the action of the Clerk and still held the defendant in the execution liable for the full amount, but he was not obliged to do so. And when he seeks to make the Clerk liable for the value of what he received, it is not for the Clerk to say that he received it in disobedience to instruction. His Honor held that the Clerk was liable for the nominal amount of the notes $2,000, because he had received them contrary to instructions. We think that for that very reason he is not liable for their nominal, but only for (474) their real value.

If his receipt to McKesson had satisfied the execution to the nominal amount of the notes ($2,000), he would have been liable to the plaintiff for the amount; but inasmuch as he had no authority as the plaintiff's agent to receive the notes, and the plaintiff might have repudiated it altogether, it follows that the defendants, McKesson and others, are not discharged at all, except in so far as the plaintiff has subsequently ratified it.

And he has ratified it only to the extent of receiving from the Clerk the *value* of the notes. It is true that the plaintiff in his complaint, demanded of the Clerk the whole amount of his debt against McKesson, and therefore, it may be supposed that he has ratified the action of the Clerk, his agent, in receiving the notes; but that is not true, because

while he *demands* the whole amount, he does so, not because he ratifies the act of the Clerk in receiving the *notes* for him but as having received so much value for him, and McKesson will be discharged not to the amount the plaintiff demands, but to the amount of the value of his payment to the Clerk. It was error therefore in his Honor to hold that the Clerk was liable for the nomnial amount of the notes, $2,000; he is liable only for their actual value. Treating the Clerk as the plaintiff's agent, he is not liable for interest until the demand. It does not appear when the demand was made and therefore we must take it that he is liable for interest only from the commencement of this action.

The judgment below must be modified and judgment entered in this Court for the value of the $2,000 confederate treasury notes, applying the legislative scale of April, 1862, with interest from the commencement of this action.

This being a modification of the judgment below, each party will pay his own costs in this Court; the plaintiff will have judgment for all other costs.

Judgment modified and judgment here for plaintiff.

Per curiam.

Cited: Utley v. Young, 68 N.C. 392; *Purvis v. Jackson,* 69 N.C. 481; *Keener v. Finger,* 70 N.C. 52; *Smith v. Patton,* 131 N.C. 398.

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(475)

P. A. CARPENTER, ADMINISTRATOR OF ELIZABETH HAWKINS v. J. A. W. KEETER AND WIFE, CYNTHIA ANN.

A testator bequeathed to his wife certain slaves, horses, farming tools, etc., and devised to her one-half of his land, and in the latter part of said clause, he also bequeathed her "all my grain on hand for the support of the family; and should my wife wish to sell, or dispose of any of the above property, she can do so, with the advice and consent of my Executor." *Held,* that she took an absolute estate in the realty devised, and after the assent of the executor, she acquired an absolute estate in the personal property embraced in said clause.

THIS was a petition filed by the plaintiff, as administrator of Elizabeth Hawkins, deceased, to sell certain realty belonging to his intestate, to make the proceeds thereof assets in the payment of debt, heard before *Logan, J.,* at Spring Term, 1871, of RUTHERFORD Superior Court.

The facts were, that the intestate of the plaintiff intermarried with one James Cherry, who died leaving a last will and testament, which was duly admitted to probate, in which occurs the following clause: "I give to my wife Elizabeth seven negroes, (naming them) all my stock of horses except one, all my stock of cattle, hogs, all my farming tools, household and kitchen furniture, all my grain on hand for the support of the family, and should my wife wish to sell or dispose of any of the above property she can do so with the advice and consent of my executor, I also give to my wife one half of my land including the mansion house."

In another clause of the will, the testator bequeathed to his daughter Cynthia Ann, who afterwards intermarried with the defendant, J. A. W. Keeter, certain personalty, and directs his executor to sell any of said property for her support and education or put the money arising from said sale, at interest, as he deems best. In the event of the death of his daughter, the testator directed that the estate bequeathed (476) to his daughter should be given to certain other persons.

The defendant Cynthia Ann was the only child and heir at law of the testator James Cherry as well as of the plaintiff's intestate.

The plaintiff's intestate after the death of her husband, James Cherry, intermarried with one Terrell Hawkins; at the time of said marriage his wife had in her possession the slaves bequeathed to her by her former husband. Terrell Hawkins died thereafter intestate. His administrator took into his possession and sold as a part of the estate of his intestate the aforesaid slaves, when his widow became the purchaser of some of them. Thereafter she died intestate, and the plaintiff was duly appointed her administrator. The note given for said slaves has not yet been paid, and the estate of intestate is insufficient to pay off and discharge said note, without a sale of the real estate of his intestate.

The defendants in their answer insisted that the plaintiff's intestate, Elizabeth, took the personal property under the will of her former husband, Cherry, as trustee, for the use and benefit of herself and family: and that she only acquired a life estate in and to the real estate devised to her.

The questions of law arising under the pleadings were referred by the Clerk of the Superior Court to his Honor Judge Logan, who being of the opinion that plaintiff's intestate did not acquire such an estate in the personalty bequeathed to her by her former husband, Cherry, as would enable her to convey or dispose of the same, except with the advice, and consent of the executor of the testator, Cherry, and that an absolute property in said slaves did not pass to her second husband,

Hawkins, and therefore she was not legally bound to pay to the administrator of the said Hawkins, the purchase money for said slaves, refused to grant the order prayed, and dismissed the petition, from which plaintiff appealed.

Phillips & Merrimon for plaintiff. (477)
No counsel for defendant.

DICK, J. The intestate of the petitioner was the widow of James Cherry and was entitled to certain slaves and land under the will of her husband. The petitioner ask for a construction of said will in order that he may know how to administer properly the estate of his intestate.

The testator in his will made an equal division of his land and slaves, between his widow and only child, one of the defendants. As the widow was to have the principal care and support of the family, the testator bequeathed to her the household furniture, stock, farming tools, grain and other property generally used for such purposes. This care and support of the family was to be exercised, and the property intended for this purpose was to be managed under the advice and supervision of the executor. The land and slaves given to the widow were not fettered by any trust in the executor and were not limited over upon any subsequent contingency. In the case of the child the disposition was different. Here there was an express trust for certain purposes, and the estate was limited over to third persons, if the child died before arriving at the age of twenty one years. It was necessary for the executor to have control of this estate to effectuate the trusts and limitations expressly declared in the will.

As the widow took an absolute estate in the slaves, upon her subsequent marriage, they pased by operation of law to her second husband, Hawkins. When she purchased one of these slaves from the administrator of second husband, she created a debt for which she was personally liable, and upon her death it was a debt against her estate. As her administrator has not sufficient personal assets to discharge this debt, he is entitled to an order for the sale of the lands of his intestate for this purpose. There was error in the ruling of his Honor, and this will be certified that the proper orders may be made in the premises. (478)

Per curiam.

Judgment reversed.

W. H. HARRIS AND WIFE SUSAN v. JAMES JOHNSON, ET AL.

The pendency of a former action between the same parties, for the same cause, is a good defence in a second action.

In such a case at Common Law, advantage must be taken thereof by a plea in abatement. Under the C. C. P., advantage must be taken by answer, if the complaint does not show the pendency of such former action.

APPEAL from the judgment of a Justice of the Peace, tried before *Watts, J.*, at Spring Term, 1871, of NORTHAMPTON Superior Court.

The plaintiffs held two single bills on the defendants, the principal of which amounted to less than two hundred dollars, and issued separate warrants on each, on the 22d of September, 1869.

The defendants in their answer, as a bar to the action, alleged that prior to issuing the warrants by the Justice of the Peace, the plaintiffs had consolidated both single bills, and brought suit thereon to Spring Term, 1867, of the Superior Court of law of Northampton County, which said action is still pending.

The plaintiffs demurred to the answer.

The defendants moved the Court to dismiss the appeal, which his Honor declined, and gave judgment *respondeat ouster.*

Rule, etc. Appeal.

(479) *Barnes for plaintiff.*
W. W. & R. B. Peebles for defendants.

DICK, J. The defendants allege in their answer, by way of defence, that the plaintiffs have another suit against these defendants, now pending in the Superior Court of Northampton County, for the same cause; which said suit was commenced before this action was instituted.

There was a demurrer filed to this answer, and on the argument of the demurrer, all the allegations of fact in the answer, must be taken as true. As the matter does not appear on the face of the complaint, the defence was properly set up in the answer, and is in the nature of a plea in abatement of the present action.

The pendency of a former action between the same parties, for the same cause, is a good defence in a second action, and at common law, must be taken advantage of by a plea in abatement.

In a penal action, at the suit of a common informer, the priority of a pending suit, for the same penalty, in the name of a third person, may be pleaded in bar, because the party who first sues is entitled to the penalty. 1 Chit. Pl. 454; *Commonwealth v. Churchill,* 5 Mass. 174; 1 Saunders Pl., 19.

In our case, as it appears from the facts admitted in the pleadings, that there is a suit now pending between the same parties for the same cause, which was commenced before this action, in the Superior Court of Northampton, the present action must be abated, and the defendants go without day and recover their costs.

Per curiam.

Judgment reversed.

Cited: Webster v. Laws, 86 N.C. 181; *Redfearn v. Austin,* 88 N.C. 415; *Emry v. Chappell,* 148 N.C. 330; *Construction Co. v. Ice Co.,* 190 N.C. 582; *Cameron v. Cameron,* 235 N.C. 85; *McDowell v. Blythe Bros. Co.,* 236 N.C. 398.

(480)

THE STATE v. WILLIAM MASSAGE.

If two men fight upon a sudden quarrel, and one kills the other, the chances being equal, this constitutes manslaughter.

A Judge is not required to charge the jury in the words of the prayer, even if the prayer is right. The substance of the prayer is sufficient.

Rodman, J., (dissentiente.) The Judge below did not charge the law, as applicable to the facts. A general dissertation upon the law of homicide without reference to the evidence in the clause, is in violation of the act of assembly.

THIS was an indictment against the prisoner for killing Phillip Weaver, tried before *Logan, J.,* at Spring Term, 1871, of LINCOLN Superior Court.

The evidence was as follows:

Charles McLeod, a witness for the State, testified that when he first saw the prisoner, the latter was near a crib about three hundred yards distant from witness, and that the deceased was at the fence which enclosed the barn yard, and near the prisoner, who went to the fence. Heard rocks thrown. Deceased attempted to get over the fence when he was pushed back by the prisoner.

The deceased then crossed the fence at another place, and pursued the prisoner, who ran. That Alfred Mullins then came up, when the deceased took after Mullins, who retreated 15 or 20 steps; when near together, Mullins picked up a stick; the deceased then appeared to be

turning towards the prisoner who struck him, when the deceased fell. Only saw one blow. Mullins picked up a stick; witness then turned from the parties and ran for home; after running a few steps witness looked back, and saw the prisoner strike the deceased with both hands, when the latter left Mullins, and turned towards the prisoner who was four or five steps from the deceased; Mullins then started towards the yard gate. The prisoner lived at Mullins' and this occurred in the yard of the latter. The instrument used by the prisoner was a part
(481) of a wagon gate which was admitted to be a deadly weapon.

There was much other evidence tending to show that the deceased pursued the prisoner, when the latter struck deceased with the wagon gate, from the effects of which Weaver died in two or three days thereafter.

The counsel for the prisoner, asked the court to instruct the jury:

1. That if the prisoner took up the deadly weapon with the purpose to resist only in self defence and did so use it, he is not guilty.

2. That after words of anger and mutual assault with rocks, the prisoner retreats, and picked up the weapon on his retreat to use it in defending himself, and is afterwards assaulted with a deadly weapon by deceased, and killed the assailant in self defence, it is justifiable.

3. If the prisoner had reasonable grounds to believe that he was about to lose his life, or suffer great bodily harm, by the assault on him, and he killed the assailant to prevent it, it is justifiable homicide.

4. If it appears from the evidence of the State, in making out its case, that there is reasonable doubt as to the grade of the homicide, the prisoner has the benefit of that doubt.

The Court declined to give the instructions as prayed for, but charged the jury, that murder is where a person of sound memory and discretion, unlawfully kills any reasonable creature, with malice aforethought, whether expressed or implied.

The weapon being conceded to be a deadly one, and killing being proved, the law says 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 reasonable doubt, nor according to the preponderance of testimony, but to the satisfaction of the jury.

The State is required to prove the essential facts in the case beyond a reasonable doubt, for if the jury have any reasonable doubt
(482) as to the guilt of the prisoner, he is entitled to the benefit of it, and he has only to satisfy the jury of any matter in mitigation,

so as to reduce the offence below the degree of murder. If the offence is not murder, then the jury are to determine within what degree it is.

The Court further charged, that manslaughter is the unlawful killing of another without malice, either express or implied, which may be either voluntary upon sudden heat, or involuntary, but in the commission of some unlawful act; as if upon a sudden quarrel two persons fight and one of them kills the other, the chances being equal, this is manslaughter.

A blow amounts to legal provocation, though it does not threaten death, and if he on whom an assault is made with violence, or circumstances of indignity, resent it immediately by killing the aggressor, and act therein in the heat of blood, and under that provocation, it is but manslaughter.

It is a general rule that words are not, but blows are, a sufficient provocation to reduce the crime of homicide to manslaughter. A killing on a sudden quarrel to avoid a great bodily harm, is a homicide under legal provocation, and though such circumstances cannot justify or excuse the act, yet on account of human frailty it is deemed no more than manslaughter.

Self defence is whereby a man may protect himself from an assault, or the like, in the course of a sudden broil, or quarrel, by killing him who assails him. For example, if the slayer has not begun the fight, or having begun endeavors to decline any further struggle, and afterwards being closely pressed by his antagonist kills him to avoid his own destruction, this is homicide excusable by self defence, for which reason the law requires that the person who kills another in his own defence should have retreated as far as he can conveniently, or safely, to avoid the violence of the assault, and that not factiously, or in order to watch his opportunity, but from a real tenderness of shedding blood.

Though a person may engage in a fight willingly, yet if in its progress he be sorely pressed,—that is put to the wall, so that he (483) must be killed, or suffer great bodily harm unless he kills his adversary, and under such circumstances he does kill, it is excusable homicide. Verdict guilty of manslaughter. Rule etc. Judgment and appeal.

Attorney General and Batchelor for the State.
Hoke, Bragg & Strong and W. M. Young for the prisoner.

READE, J. The charge of his Honor is given at length, and it may be liable to the criticism, that it deals too much in general principles without practical application to the case in hand. But after a careful

consideration we are unable to see that it was calculated to mislead the jury; or to leave them without the necessary information as to the law applicable to the case. And that they were not misled, is evident from the fact, that they rendered the only verdict which could have been rendered upon the facts.

The main objection at this Bar, was that his Honor did not give the special instructions prayed for.

We think he did give them substantially.

It has been so often decided as to become familiar, that a Judge is not obliged to charge in the very words of the prayer, even when the prayer is right. It is sufficient if he does so in *substance*. If it were not so, the zeal of the advocate, or the craft of the Attorney would often confound the jury. For example, the second prayer in this case is as follows:

"2. That after words of anger and mutual assaults with rocks, the prisoner retreats and picked up the weapon in his retreat, to use it in defending himself, and is afterwards assaulted with a deadly weapon by deceased, and killed the assailant in defence, it is justifiable."

Probably the end aimed at by the prayer, was to have his Honor charge the jury, that if the prisoner quit the fight and retreated
(484) as far as he could, and was pressed by the deceased with a deadly weapon, and the prisoner killed in self defence, it was excusable homicide.

If this was the end, then his Honor had charged it in substance. But to have charged in the words of the prayer, would have been to assume facts, violate grammar, and pervert the usual and familiar definitions of crime. There is no error.

RODMAN, J. *Dissentiente.* I am compelled to dissent from the majority of the Court. It is the duty of a Judge to intelligibly apply the law to the evidence. A general dissertation upon the law of homicide is not what the act of Assembly intends. Of the present charge it may be said that it requires more intelligence to pick out from it the law which is applicable to the case, than a jury is expected to possess.

Per curiam.

No error.

Cited: S. v. Dixon, 75 N.C. 281; *S. v. Kennedy,* 91 N.C. 577; *S. v. Miller,* 112 N.C. 883; *S. v. Hicks,* 130 N.C. 710; *S. v. Quick,* 150 N.C. 824; *S. v. Pollard,* 168 N.C. 120; *S. v. Kennedy,* 169 N.C. 295.

D. C. THOMPSON v. B. A. BERRY, SHERIFF OF BURKE COUNTY.

A sheriff cannot be amerced for failing to collect a judgment based upon a note executed in November, 1865, unless he had actual notice that the judgment was granted upon a contract made after the 1st of May, 1865.

THIS was a *scire facias* issued from the County Court of Iredell, tested of May Term, 1868, and tried before *Mitchell, J.,* at Spring Term, 1871, of IREDELL Superior Court.

The facts were, that an execution from the County Court of Iredell County, returnable to May Term, 1868, of said Court, went into the hands of the defendant against W. F. Avery, and in favor of the plaintiff, that the defendant returned the same to May Term of (485) said Court, with a levy on realty endorsed thereon, and without a sale or satisfaction of the execution. The note on which the judgment was granted was executed in November, 1865. There was no evidence that the defendant had any actual notice of the date of the note on which the judgment was founded.

It was insisted for the defendant that his return of the execution without sale or satisfaction, was justified.

1. By the military order of Gen'l Sickles.
2. By the ordinance of the Convention of 1868.

His Honor being of opinion with the plaintiff, gave judgment against the defendant, from which he appealed.

W. P. Caldwell for plaintiff.
Bailey for defendant.

READE, J. The ordinance of the Convention "Respecting the jurisdiction of the Courts," ratified 14th March, 1868, sec. 7-9, made it the duty of the Sheriff to return the process as he did in this case; provided the debt upon which the judgment was obtained, was contracted prior to 1st May, 1865. See also sec. 16 of the ordinance. The debt in this case was not contracted prior to 1st May, 1865; but the Sheriff was not informed of that fact.

The question is, whether that was an excuse for the sheriff?

We think it was.

The ordinance was general, that the Sheriff "shall return *all fi. fa's.,*" etc. And those founded on debts contracted since 1st May, 1865, *are exceptions.* And it was the duty of the plaintiff to inform the Sheriff that his *fi. fa.* was within the exception.

An amercement is a *penalty,* and is for a fixed sum without regard to the little or much of the plaintiff's damage. The penalty is not to be inflicted upon the Sheriff for the negligence of the plaintiff, in not giving him the necessary information; especially is this so, when
(486) the execution as in this case issued from a court outside of the Sheriff's county, so that he could not by reasonable diligence ascertain the time when the debt was contracted.

A constable levied upon and sold a gun of the defendant in an execution, when the gun was exempt as "arms for muster." It was held, that the officer was not liable even in an action on his bond, much less would he be to the penalty of an amercement, altogether he knew that arms for muster were exempt; because he did not know, and was not presumed to know, that this particular gun was used for that purpose, and the owner of the gun did not inform him of the fact. *Henson v. Edwards,* 32 N.C. 43.

There is error.

Judgment reversed.

NOTE.—Justice Boyden, being of counsel, did not sit in this case.

J. T. LEACH v. THE WESTERN NORTH CAROLINA RAIL ROAD COMPANY.

A judgment is not void because no complaint has been filed.

The parties to an action may waive the *venue,* but cannot, by consent, give *jurisdiction* to a court.

MOTION to set aside judgment heard before *Watts, J.,* at Spring Term, 1871, of WAKE Superior Court.

The facts are, that the defendant acknowledged service of the summons in this action, and agreed to waive the question as to the suit being brought in a county other than the one through which the
(487) defendant's road ran. The plaintiff filed no complaint, nor did the defendant make any appearance. At the return term the plaintiff took judgment by default. The defendant moved to set aside the judgment because no complaint had been filed, and that the Court did not have jurisdiction of the subject matter.

His Honor being of opinion that the judgment was void, gave judgment accordingly, from which plaintiff appealed.

Fowle & Badger and Phillips & Merrimon for the plaintiff.
W. McL. McKay for the defendant.

READE, J. 1. The objection to the jurisdiction is not well taken. It was not a question of jurisdiction but of *venue,* and it is competent for the parties to waive that objection, as was done in this case. *Graham v. R. R.,* 64 N.C. 631. Where it is a question of the jurisdiction of the Court over the subject matter, the consent of the parties cannot give jurisdiction.

2. The judgment is not "void," because it was entered without a complaint in writing being filed.

A judgment without service of process is void, because the defendant is not in Court. But in this case the defendant was brought into Court by the summons, and being in Court he may confess judgment, or allow it to be entered by default, as was done in this case.

The "complaint" under the new system answers to the declaration under the old; and although regularly, it ought to be in writing, and filed at the commencement of the pleading; and although we do not wish to be considered as favoring loose practice, but the contrary, yet evidently, by consent, the complaint may be waived and judgment may be confessed or entered by consent. And even if the judgment for such a cause were irregular, it is certainly not void, and therefore the irregularity might be cured by allowing a complaint to be filed whenever some afterthought of the defendant makes an objec- (488) tion as in this case.

There is error in the order vacating the judgment.

This will be certified, etc.

Per curiam.

Error.

Cited: Edwards v. Comrs., 70 N.C. 572; *Vick v. Pope,* 81 N.C. 25; *Little v. McCarter,* 89 N.C. 237; *Vass v. B. & L. Assoc.,* 91 N.C. 62; *Gay v. Grant,* 101 N.C. 218; *Robeson v. Hodges,* 105 N.C. 50; *White v. Morris,* 107 N.C. 101; *Baruch v. Long,* 117 N.C. 512; *McLeod v. Graham,* 132 N.C. 474; *McArthur v. Griffith,* 147 N.C. 550.

J. E. PAINE ET AL V. F. CALDWELL ET AL.

Township trustees have no authority to contract for building bridges when such a contract is entered into without the sanction and supervision of the County Commissioners; it is a nullity.

MOTION to dissolve an injunction upon a case heard before *Mitchell, J.*, at Spring Term, 1871, of CATAWBA Superior Court.

The defendants as trustees of Mountain Creek Township, in the month of February, 1870, agreed to, and ordered the building of a public bridge over Mountain Creek, in said Township, and let out the contract for $326, which was a reasonable compensation for the work. The building of said bridge was deemed by the defendants necessary for the public convenience.

After the bridge was completed the defendants submitted it to the qualified voters of the Township whether they would receive and pay for the bridge, when a majority voted to receive and pay for the bridge by taxation.

After the bridge was built, application was made to the Board of Commissioners of the County to pay, or assume to pay for said bridge, and relieve the township, which was declined. The plaintiffs appeared before said Board, and opposed the application for payment.

After said refusal, the defendants in September, 1870, assess-
(489) ed the tax on the tax payers of said Township, for the payment of said debt, when the plaintiffs applied for and obtained an injunction, restraining the defendants from the collection of said tax.

His Honor refused to dissolve the injunction. Appeal.

McCorkle and Bragg & Strong and W. H. Young for plaintiffs.
Battle & Sons for defendants.

RODMAN, J. The complaint filed on behalf of the plaintiffs as well as all other tax payers in the Township, who choose to become parties, alleges that in February, 1870, defendants contracted with one Sherrill, to build a bridge across Mountain Creek, in the township of that name, for $326, which was accordingly built in September, 1870; the defendants levied a tax of one-fifth of one per cent. on the taxable property of the Township to pay the expenses of building the bridge, and for sundry reasons in their complaint set forth, the plaintiffs pray that the defendants be enjoined from collecting the tax.

The Judge granted the injunction, and on a motion before him to vacate it, it appeared that after the bridge was built, it was submitted to a vote of the Township whether they would accept and pay for it;

and a majority voted that they would; afterwards application was made to the County Commissioners to pay for the bridge, which they refused.

The Judge refused to vacate the injunction, and the defendants appealed.

We think the main question in this case is upon the power of the Township Trustees to make the contract for the building of the bridge, for if they had the power to make the contract, it would follow that they must have the power to perform it by levying the tax necessary for that purpose. The Constitution, Art. VII, Sec. 4, provides that the Board of Trustees in each Township "shall, under the *supervision* of the County Commissioners, have control of the taxes (490) and finances, roads and bridges of the Townships as may be prescribed by law."

Section 7 of the same Article, says, "no county, city, town, or municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein."

In what manner must this supervision of the County Commissioners provided for by the Constitution, be exercised in order that it may be effectual, as the Constitution intends that it shall be? It may confidently be said, that the supervision was intended to be *effectual*, because while the Constitution undertakes rigidly to limit the power of the Legislature and of the County Commissioners to tax, there is no such limitation to the power of the Township Trustees, and unless they can be effectually supervised by the County Commissioners, their power to contract debts, and to pay taxes for the payment of them, is unrestrained, so that a single unworthy Board might ruin a Township without hope of relief, except so far as the law might enforce the restraints of section 7.

In the matter of contracting a debt, it seems clear, that the only way in which the supervision of the County Commissioners can be effectual, is by requiring their approval before the contract is consummated. If the Township Trustees have the power to make a valid contract without the consent of the County Commissioners, given either previously or subsequently, then any supervision by the County Commissioners is impossible. The contract having been made is enforcible by law. The Township Trustees are independent of their supervisors; the constitutional check is absolutely removed.

We think, therefore, it is the duty of Township Trustees in all cases when they contemplate the building of a bridge, to present their plan

to the County Commissioners and obtain their assent to the con-
(491) tract, and to the necessary tax. Sec. 7 was intended to present *another* check to the imprudence of the Trustees. The building of a bridge, which is beyond the ability of an overseer of the road and his hands, cannot be called one of the ordinary expenses of a Township. Before any debt can be contracted for that purpose it must be put to a vote of the Township. These two securities against imprudence and recklessness are provided by the Constitution. Everybody is supposed to know the powers of the Township Trustees, and whoever contracts with them does so at his risk of their exceeding their useful but limited power. We think the tax illegal, and concur with his Honor in sustaining the injunction.

Per curiam.

Judgment affirmed.

STATE v. LEE DUNLAP.

When it appears from the affidavit of a person of color, charged with a capital offence, that he cannot have full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and that his rights cannot be enforced in the State Courts: *Held*, that under the act of Congress of 9th April, 1866, the State Courts will proceed no further in the prosecution until certified of the action of the Circuit Court of the United States under the act of Congress, March 3, 1863.

It is erroneous in such a case to order the *removal* of the indictments to the Circuit Court of the United States; but to suspend proceedings in the cause till certified to the Court under the aforesaid act of Congress.

THIS was a motion to transfer the cause to the Circuit Court of the United States for the District of North Carolina, heard before
(492) *Logan, J.*, at Spring Term, 1871, of MECKLENBURG Superior Court.

The prisoner was indicted for the murder of one Gleason, a white man, and at Spring Term, 1871, filed an affidavit in which he set forth that he was formerly a slave, and was emancipated by the result of the late rebellion—that at the time of the alleged homicide he was and had been heretofore an active member of the Republican party, whilst the said Gleason was an active member of the Democratic party—that at the time aforesaid a systematic effort was made by divers persons,

members of the Democratic party, to produce the impression that said Gleason was killed by defendant, and that he was killed from political motives—that the County Commissioners who prepared the jury lists are Democrats, as also the Sheriff, and all his Deputies, upon whom is devolved by law, in capital cases, the duty of summoning special jurors, and who have an unlimited discretion in the selection of jurors on a special venire—that colored men are seldom summoned on such juries, and that the juries are almost entirely composed of Democrats—that defendant is a colored man, and by reason of his having been a slave, he has reason to believe, and does believe that he has less chance of enforcing in the Courts of this State, his rights in this prosecution as a citizen of the United States, and the probabilities of the denial of them to him as such citizen in any trial which might take place in the Courts of the State, are much more enhanced, than if he was a white man—that the feeling against him has been greatly intensified by the attempt successfully made to give a political color to the alleged homicide, and the feeling against him by almost the entire body of the Democratic party is so bitter and rancorous, that he cannot as he believes obtain justice in Mecklenburg County, or in any of the Courts of this State—that the full and equal benefits of the laws of this State, and proceedings for the security of person and property as are enjoyed by white citizens, is denied to him, and cannot be enforced in his behalf on any trial on this indictment which may take place in any Court of this State, as he believes. (493)

His Honor being of opinion that the prisoner was entitled upon his affidavit, to a removal of the indictment to the Circuit Court of the United States for the District of North Carolina, so adjudged, from which the Solicitor of the State appealed.

Attorney General for the State.
Bailey for defendant.

PEARSON, C.J. This proceeding presents a question of great importance, both in a political and a legal point of view. With the former, we have no concern; and the application will be disposed of as a dry question of law.

By Act of Congress of 9th April, 1866, sec. 1, it is enacted, in substance, That all persons of color, born in the United States shall be citizens—"shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property; and to *full and equal*

benefit of all laws and proceedings, for the security of person and property, as is enjoyed by white citizens," etc.

Sec. 2. Prescribes penalty for depriving under color of any law, etc., persons of color, of any of the rights secured to them by sec. 1.

Sec. 3. Confers exclusive jurisdiction upon the Courts of the United States, of all causes, civil and criminal, *"affecting persons who are denied, or cannot enforce in the State Courts any of the rights secured to them by sec.* 1."—and provides for the removal from the State Courts, of such causes, upon *affidavit, etc.*

This application for a removal of the case, to the Courts of the United States is put on the ground, that the petitioner cannot have a fair trial in the State Courts, by reason of his being a freed negro.

The argument is, "white citizens enjoy the benefit of a *fair*
(494) *trial.* I cannot enforce that right, because I am a freed negro:

So in the State Courts, I have not the full and equal benefit of the laws and proceedings for the security of person and property, *as is enjoyed by white persons."*

Reply: "That may be so; but it results, not because of any discrimination made by the *laws of the State,* against persons of color, but by reason of the condition of things, and a deepseated prejudice against the political as well as the social equality of freed negroes."

"The object of the act of Congress is to prevent any discrimination from being made *by the laws of the State,* but it does not extend to an attempt to control or regulate the prejudice of one race against the other; that can only be cured by the amelioratory effect of time."

Rejoinder: "The object of the act of Congress is not merely to prevent discrimination by *the laws of a State,* but also to secure to freed negroes 'the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens;' and if by reason of prejudice that right cannot be *enforced in the State Courts,* the cause, whether civil or criminal, is to be removed to the Federal Courts."

So issue is joined upon the construction of the act of Congress, and the Court is to arrive at the object in view by a consideration of the words of the act, taken in connection with the evil which was to be met, arising out of the surrounding circumstances, and the known condition of things. Had the object been merely to prevent discrimination *by the laws of the State,* very few words would have answered the purpose, and there would have been no occasion for an affidavit in regard to matter which must appear on the face of the public law; but the act under consideration goes into details, and, among other things, guar-

antees to citizens of color "as full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens," and provides for the removal of all causes, civil and criminal, when such persons are denied, or cannot enforce in (495) the State Courts the rights secured to them, upon the affidavit of the party that such is the fact.

This I consider, after mature reflection, conclusive, as to the intention to extend the operation of the act of Congress, so as to make it include cases, where by reason of prejudice in the community, a fair trial cannot be had in the State Courts.

It is said, this construction will put it in the power of any person of color, on mere affidavit, to deprive the State Courts of jurisdiction of subjects of local concern, and transfer such jurisdiction to the Federal Courts. This is a result deeply to be regretted, but it grows out of the supposed prejudice of the white citizens, men, women and children, against the colored citizens; and the Courts can only say—*the law is so written.*

The order of his Honor should be modified by setting aside so much as directs the case to be *removed* into the Circuit Court of the United States; and providing that "the State Court will proceed no further in the prosecution," until certified of the action of the Circuit Court of the United States according to the provisions of the act of Congress, March 3rd, 1863. This opinion will be certified, to the end that such proceedings may be had as are agreeable to law.

RODMAN, J. *Dissentiente.*

Cited: Fitzgerald v. Allman, 82 N.C. 494; *Cox v. R. R.,* 166 N.C. 659; *S. v. Walls,* 211 N.C. 492.

(496)

STATE v. JOHN DEATON.

A husband who wilfully abandoned his wife prior to the ratification of the act of 1869, chap. 209, cannot be convicted therefor.

Justices of the Peace have concurrent jurisdiction with the Superior Courts under said act.

THE defendant was indicted under the 1st section of chapter 209, act of 1869, entitled "an act to protect married women from the wil-

ful abandonment, or neglect of their husbands," tried before *Cloud, J.*, at Spring Term, 1871, of ROWAN Superior Court.

The facts, were that in 1866, the defendant wilfully abandoned his wife, without providing her with adequate support, since which time he has never lived with her, nor in any manner provided for her maintenance. The defendant's counsel asked the Court to instruct the jury, that as the abandonment occurred prior to the ratification of the act of April 12th, 1869, that defendant was not guilty, which the Court declined doing, but informed the jury if they believed the facts to be true, as testified to by the witnesses, then defendant was guilty, to which defendant excepted. Verdict guilty. Rule, etc. Appeal to the Supreme Court.

Attorney General for the State.
Blackmer & McCorkle for defendant.

BOYDEN, J. The Court at first, thought that the decision of this case might be put upon the question of jurisdiction alone, and we were disposed to put the decision upon that ground, and thereby save the scandal that must and often does arise by the investigation of such cases in the Superior Courts; but upon a close examination of the wording of the statute, we think this cannot be done, as the act authorizes the infliction of both the fine *and* imprisonment, and
(497) not merely a fine *or* imprisonment for one month, as prescribed in Article IV, Section 33, of the Constitution.

The words, wilful abandonment, as used in the statute, include the act of separation, and not merely its continuance; and as this abandonment took place before the passage of the statute under which the defendant is indicted, he cannot be convicted.

Justices of the Peace may entertain jurisdiction of this offence under the act of 1869, chapter 178, by observing the rules prescribed in section 6, of sub-chapter IV. of said act, and we think it the more appropriate jurisdiction.

Per curiam.

There is error.

Cited: S. v. Dunston, 78 N.C. 420; *S. v. Bell,* 184 N.C. 717.

STATE EX REL JOHN H. PURSER v. ROBERT B. SIMPSON ET AL.

A guardian, who held a well secured ante-war note, and collected the same in Confederate currency in September and October, 1863, when there was no need for its collection, and immediately thereafter invested the same in 7-30 Confederate bonds, was guilty of *laches*, and is liable to his ward for the full amount of the principal and interest of said note.

After the 4th of July, 1863, no person acting in a fiduciary capacity, ought to have collected well secured ante-war debts, and invisted in Confederate securities.

THIS was a civil action tried before *Buxton, J.*, at Spring Term, 1871, of UNION Superior Court.

The relator of the plaintiff brought suit on the bond of the defendant, Simpson, who had been his guardian. After issues had been joined upon the pleadings filed, there was an order made directing the Clerk of Union Superior Court, to take the account of the defendant, Simpson, as guardian of the relator of the plaintiff, and (498) report to the next Term of the Superior Court.

The defendants in their answer admitted that the guardian, Simpson, received for his ward $383 in October, 1858, lent out the same directly after its receipt, and took a bond payable to him as guardian of the relator with security—that in September and October, 1863, he collected said note in Confederate securities, and immediately thereafter invested $300 of said currency in Confederate 7-30 bonds.

The Clerk in his account allowed the defendants the amount invested in 7-30 Confederate bonds, which is known in said account as voucher No. 13, to which the relator of the plaintiff excepted.

"Because in allowing credit for voucher No. 13, the referee did so without any sufficient proof. No certificate for said money being shown, nor any offer made for its absence, and especially because the allowance thereof is irreconcilable with the sworn answer of defendants, and because his answer shows that the money was received upon an *ante-war debt*, which was well secured, and at a time when he ought not to have done so."

His Honor sustained the exception, because there was no reason shown why the guardian collected a good ante-war debt and "immediately thereafter" invested it in Confederate securities.

From which ruling the defendants appealed.

Phillips & Merrimon for plaintiff.
Ashe for defendant.

BOYDEN, J. The defendant, the guardian, having an ante-war debt, well secured, payable to himself as guardian of his ward, and having no need of the money, his ward being only some sixteen years old, collected in September and October 1863, this ante-war debt, in Confederate treasury notes, and immediately thereafter invested
(499) the same in 7-30 Confederate bonds, the treasury notes and bonds being at the time of the receipt and investment, as a discount.

Why collect this ante-war debt, well secured, when he had no need of the money? Why invest in this worthless Confederate paper?

It will be remembered, that this was after the surrender of Vicksburg and the battle of Gettysburg, and after men of ordinary prudence had ceased to collect their well secured ante-war debts in Confederate currency.

The law will hold responsible all guardians who under such circumstances, unnecessarily collect and invest their wards' money. *Shuford vs. Ramsour,* 63 N.C. 622. There is no error.

Per curiam.

Judgment affirmed.

Cited: Love v. Johnston, 72 N.C. 420; *Longmire v. Herndon,* 72 N.C. 632; *Dockery v. French,* 73 N.C. 426; *Robertson v. Wall,* 85 N.C. 290; *Jennings v. Copeland,* 90 N.C. 578.

STATE v. HENRY BRUNER.

Where two persons are jointly indicted, and one of the parties submits, and judgment is suspended, he is still a defendant within the meaning of the act of 1870-'71, and is therefore incompetent to testify for or against his co-defendant.

LARCENY, tried before *Buxton, J.,* at Spring Term, 1871, of ANSON Superior Court. The State offered to introduce as a witness one David Dunlap, a co-defendant, who had entered his submission at a previous Term of the Court. The submission had been received by the Court, and the judgment thereon suspended.

His Honor admitted the testimony, to which defendant ex-
(500) cepted. Verdict guilty. Rule, etc. Judgment and appeal.

Ashe for the appellant.
Attorney General contra.

BOYDEN, J. It is well settled, that previous to the act of 1866, changing the common law, and making interested and infamous persons, as well as parties, competent witnesses, one defendant in an indictment could not be a witness for or against his co-defendant, until finally discharged, even where they had severed in their trials. *State v. Smith*, 24 N.C. 402.

The act of 1870-'71, expressly declares that parties defendants, shall not be witnesses for, or against each other, and thus restores the common law.

In this case the witness, whose testimony was admitted on the part of the State, was charged in the same indictment with the party on trial, but his submission had been entered at a previous term, and judgment suspended. This raises the question whether the witness continued to be a defendant within the meaning of the act of 1870-'71.

We think he did. He had not been finally discharged, and might still be brought into Court, and punished as a defendant in that indictment.

There is error.

Per curiam.

Venire de novo.

Cited: S. v. Queen, 65 N.C. 465; *S. v. Howard*, 222 N.C. 292.

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(501)

W. W. WALKUP v. H. M. HOUSTON.

Credits in currency, endorsed as such on a note payable *in specie*, are payments only to the amount of the value *in specie* of such credits at the respective dates of payment.

THIS was a civil action tried before *Buxton, J.*, at Spring Term, 1871, of UNION Superior Court.

The claim sued on was a sealed note payable to plaintiff *in specie*, and executed in January, 1867. Several payments were made on said note, and were endorsed as follows, to-wit: "Received $247.20 in greenbacks February 24th, 1869." "Received $588.20 in currency June

1st, 1869." "Received July 6th, 1870, $71.56 in currency." "Received September 10th, 1870, $2.78 in currency."

The only question submitted to his Honor was, how are payments in currency to be rated on a specie note? The premium on specie was agreed upon at the respective dates of payment. His Honor instructed the jury that the payments on said note should be rated and allowed at their specie value *when made;* and to the amount ascertained to be due upon the note, after deducting the value of payments, should be added the difference between specie and greenbacks at date of payment. To which defendant excepted. Verdict for plaintiff. Judgment and appeal.

Ashe for plaintiff.

When it appears to be the clear intent of a contract that payment shall be made in gold and silver, damage should be assessed in coin, and judgment rendered accordingly. *Butler v. Howitz,* 7 Wallace 258.

All contracts to be enforced according to the lawful intent and understanding of the parties. *Gibson v. Groner,* 63 N.C. 10.

(502)

J. H. Wilson for defendant.

DICK, J. The meaning of a contract is a question of law, which must be determined by the Court. In the construction of contracts, the first point is to ascertain what the parties themselves meant, but no construction ought to be adopted which will do violence to the rules of language, or to the rules of law. The parties to this contract agreed that it was to be paid in *specie.* The meaning of this word is well understood to be metallic money issued by public authority, and it is generally used in contradistinction to paper money.

In this country there are two kinds of money established by law, *i. e.,* coin and treasury notes. They are both made a legal tender in the payment of private debts; but they have a different value in the financial market. This fact was well understood by the parties when this express contract for *specie* was executed. The terms of the contract were not waived when the payments were subsequently received in greenbacks and currency, and so expressly endorsed on this note. These endorsements were thus specifically made for the purpose of ascertaining the *specie* value of the payments on a subsequent settlement. The payments only discharged the contract to the amount of their *specie* value at the date of payment. The manner of ascertaining the value of

the contract and entering judgment, is explained in *Mitchell v. Henderson,* 63 N.C. 643.

There was no error.

Per curiam.

Judgment affirmed.

Cited: Norment v. Brown, 79 N.C. 366; *Duke v. Williams,* 84 N.C. 77.

(503)

THE STATE v. E. F. LUTZ.

A Deputy Sheriff, who in his deputation is authorized to collect State and County taxes out of the persons named in said deputation, is not required to exhibit a certified copy of the tax lists from the officer required to make out said list, before he distrains property to enforce the payment thereof.

The tax list issued to a Sheriff has the force of an execution, and justifies the Sheriff in making seizures thereunder as fully as an execution issued from a Court of competent jurisdiction.

INDICTMENT for forcible trespass, tried before *Logan, J.,* at Spring Term, 1871, of LINCOLN Superior Court.

The facts are, that the defendant had received from the Sheriff of Lincoln County, a deputation to collect certain taxes which were mentioned in said deputation, including the taxes due from one Nancy Greenhill, for the years 1869 and 1870. It was in evidence that at the time the said transcript was delivered to the defendant, that the tax had been properly assessed, and was then due; that after giving said deputation, and without the knowledge of defendant, the said Nancy paid the Sheriff of Lincoln the tax for 1869. Prior to the seizure, Nancy Greenhill made search for said tax receipt, but was unable to find it. The defendant, after exhibiting his authority to collect said taxes, distrained a horse belonging to her, which he found in the possession of one Absolem Houser. Upon the production of the receipt of Mrs. Greenhill, the defendant delivered the horse to her.

The defendant offered to prove that the horse seized was the property of Mrs. Greenhill, which evidence his Honor excluded. He also asked the Court to charge the jury that the authority contained in the deputation was sufficient to justify the levy, if the taxes were due,

which were specified in the deputation, or any part thereof, which his Honor also declined doing.

His Honor instructed the jury that the paper writing was
(504) sufficient as a deputation, but was not sufficient authority to justify the defendant in making the seizure, whether the taxes were due or not due, and that it made no difference whether the horse seized was the property of Mrs. Greenhill, or not. Verdict guilty. Rule, etc. Judgment and appeal.

Attorney General and Batchelor for the State.
Bragg & Strong and W. M. Young for defendant.

READE, J. We are to consider the case as if Nancy Greenhill owed the taxes claimed, and as if the property distrained was hers, and as if the defendant was lawfully deputized to collect the taxes. The case will then stand upon the question: whether the list of taxables which he had in his hands was sufficient to authorize him to act? or whether it was necessary that he should have in his hands a list made out and certified by the Clerk?

It is certainly usual, and it is very proper, that a tax collecting officer have in his hands a tax list, certified by the Clerk of the Court, as a guide for himself, and as information for the tax payer, who may wish to inspect it. *Kelly v. Craig,* 27 N.C.129. And an officer wantonly failing to afford the people this reasonable satisfaction, would soon find the penalty in their displeasure, even if there were no more substantial means of reaching him.

But it does not appear that there was any demand for the inspection of the tax list in this case, or any wanton or oppressive conduct, on the part of the officer; so that whether he had a list or not, did not work any real mischief. The fact was, that the Sheriff had made a copy from the list of taxables in his hands, of certain persons, with the amount of their taxes, and gave the list to the defendant, and deputized him to collect the taxes in that list, and Nancy Greenhill was upon that list, and the defendant distrained her property for her taxes.

The order of the Court laying taxes is understood to have the
(505) force of a judgment, as in cases between parties; and the list of taxables issued to the Sheriff has the force of an execution, and justifies the Sheriff, in collecting the taxes as the law directs; just as an execution issuing upon a judgment between parties, justifies the Sheriff in collecting the amount therein named.

It is usual and proper, that the Sheriff should have *in hand* the execution under which he acts, but we do not see that it is *necessary* that

he should. If the execution has been issued to him, he may leave it in his office and rely upon his memory, or a copy, for his guide. So in this case, the tax list was in the Sheriff's office; and he gave a memorandum or copy to the defendant, his deputy, who then had all the powers which the Sheriff had. 3 Chitty's Pl. 782; *Meeds v. Currer,* 30 N.C. 298.

There is error.

Per curiam.

Venire de novo.

Cited: Comrs. v. Piercy, 72 N.C. 182; *Morrison v. McLaughlin,* 88 N.C. 255; *R. R. v. Lewis,* 99 N.C. 64.

THE STATE v. JAMES R. WILLIAMS.

A Judge has the power to stop an attorney who abuses his privileges in his comments on a witness and his testimony before the jury.

THIS was an indictment for assault and battery tried before *Clarke, J.,* at Spring Term, 1871, of NORTHAMPTON Superior Court.

The defendant offered as a witness one Forrest, who having conscientious scruples as to swearing upon the Bible, was permitted to affirm as prescribed by law.

There was no evidence as to the place of nativity of the witness, or the occupation in which he was engaged, in the argument of the cause, the Attorney who represented the Solicitor, attacked the (506) credibility of said witness; commented on the manner in which he had been sworn, and said, "Will you give a verdict upon the evidence of this Pennsylvania yankee — this Rich-square, Grog-shop keeper?

The defendant's counsel here interposed, and asked the Court to restrain the prosecuting officer from making such remarks. The Court declined to interfere, remarking that while the Court did not approve of the remarks of the counsel, yet it was allowable in the latitude of debate, and the Court had no power to prevent it. Verdict of guilty. Rule, etc., Judgment and appeal.

Attorney General and Batchelor for the State.

D. A. Barnes for the defendant.

READE, J. The question is, whether his Honor had the *power* to stop the Solicitor for the State, when he was, in the opinion of his Honor, abusing his privilege in his comments on a witness and his testimony.

It is a power which is usually exercised sparingly, but nevertheless, it is a power which the Court possesses; and which ought to be promptly and firmly exercised, where the abuse is gross, as was the case here. It is especially proper to exercise the power in a criminal case, when the State is prosecuting one of its citizens, and should not allow the jury to be improperly prejudiced against him.

The question has been before this Court in the case of *Devries v. Haywood,* 63 N.C. 53, and in *Jenkins v. Ore Company, Post* 565.

There is error.

Per curiam.

Venire de novo.

Cited: Jenkins v. Ore Co., 65 N.C. 565; *S. v. Smith,* 75 N.C. 308; *Coble v. Coble,* 79 N.C. 592; *Goodman v. Sapp,* 102 N.C. 483; *S. v. Tyson,* 133 N.C. 702; *Maney v. Greenwood,* 182 N.C. 584; *S. v. Tucker,* 190 N.C. 709; *Conn. v. R. R.,* 201 N.C. 160; *S. v. Smith,* 240 N.C. 635.

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(507)

JOHN COON v. THE NORTH CAROLINA RAILROAD COMPANY.

The North Carolina Railroad Company is not required under the 26th section of its charter to construct crossings and bridges over their tract except where public roads cross the same, which have been kept up by the public, by the appointment of overseers and hands to work and keep them in repair.

THIS was an action on the case brought under the old system, and tried before *Cloud, J.,* at Spring Term, 1871, of ROWAN Superior Court.

The plaintiff in his declaration alleged that by reason of the negligence of the defendant in failing to repair a certain bridge over their track where it crossed a certain public road, his horse had fallen through, producing a fatal injury, while being driven by him in a wagon across the bridge.

The only facts necessary to a proper understanding of the opinion of the Court are, that the road which passes over the road bed of the defendant, had never been kept up as a public highway, but that it had been used without interruption by the public as a mill and church road, for twenty-six years, as some of the witnesses testified, whilst according to the testimony of others, it has been used by the public for at least forty years.

The defendant asked the Court to instruct the jury that it was not such a public road, as was recognized in defendant's charter, and therefore, it was not the defendant's duty to keep up bridges and crossings over the same, which instruction his Honor declined giving, but instructed the jury that if said road had been used adversely as a public road for twenty years prior to the injury of plaintiff's horse, then defendant was bound to keep it in good repair, and plaintiff was entitled to recover, provided they were satisfied the injury arose from the negligence of defendant.

Blackmer & McCorkle for plaintiff.
Bailey and Fowle for defendant.

BOYDEN, J. The roads which the defendant was bound to make and keep in repair, by the provision in the 26th section of (508) their charter of incorporation, are public highways, recognized as such by the appointment of overseers and hands, to work and keep them in repair, for the use of a whole community, and not neighborhood mill and church roads, which have never been recognized as public highways.

As the point upon which this case was decided in the Court below, was whether the road where the plaintiff's horse was injured, was a public highway in the sense above described, and as we think it was not, we do not feel called on to decide, or to intimate, what remedy the people of the neighborhood, accustomed to travel this road to church and mill, may have against the defendant.

Per curiam.

There is error.

EBENEZER MORROW v. N. G. ALLMAN ET AL.

A negotiable instrument, the execution of which is admitted in the answer, must be produced on the trial, or its loss accounted for.

CIVIL action for money demand, tried before *Cannon, J.*, at Spring Term, 1871, of MACON Superior Court.

The plaintiff in his complaint alleged that the defendants executed their single bill to plaintiff for three hundred and sixty dollars, due and payable in gold coin, February 1st, 1867, and that no part thereof had been paid except eighty dollars and fifty cents, wherefore he demanded judgment, etc.

The defendants in their answer admitted the execution of the single bill, and alleged there were divers other credits against the said
(509) single bill, besides the one stated in the complaint.

Upon the trial the plaintiff declined to offer the single bill in evidence, and insisted that it was unnecessary under the pleadings, and that he was not compelled to do so.

The defendants demanded the production of the single bill, insisting that there were other credits endorsed thereon, besides the one admitted in the complaint.

One of the plaintiff's counsel admitted that he had the single bill but declined to produce it.

The defendant's counsel asked the Court to charge the jury "that the note not having been offered in evidence, nor its loss accounted for, and inasmuch as the plaintiff refused to offer the same in evidence to the jury, the plaintiff cannot recover." His Honor declined this prayer, but instructed the jury that the plaintiff was entitled to recover upon the complaint without the production of the note. Verdict for plaintiff. Judgment and appeal.

M. Erwin for plaintiff.
Battle & Sons for defendants.

READE, J. The only question necessary to consider in this case is, whether in an action on a negotiable instrument, the execution of which is not denied by the answer, it is necessary to produce the instrument on trial, or account for its loss?

We think it is necessary to produce and file the instrument, in this case, a bond. It is the practice to do it, and there is much propriety in it. Being negotiable, how can it otherwise be known whether it has not been transferred? Or if kept back it may be subsequently transferred,

and although such subsequent transfer would not subject the maker to its payment, yet he ought not to be kept in jeopardy of another suit. And furthermore, there may be, as was alleged in this case, payments endorsed upon the bond, of which the defendant ought to (510) have the benefit.

It was competent on the trial to require the plaintiff or his counsel to produce the paper, the same being admitted to be in their possession and in Court; and in a proper case they might have been put under a rule. The usual way, however, is to notify the plaintiff to produce the paper; and upon his failure to do so, having the power, to non-suit him. *Rev. Code,* chap. 31, sec. 82.

There is error.

Per curiam.

Venire de novo.

Cited: Shields v. Whitaker, 82 N.C. 518.

(511)

SOL BEAR ET AL v. P. COHEN.

A Superior Court Judge has no authority to vacate injunctions, or to set aside attachments regularly granted, except for causes pending in his own District. Therefore when an attachment was taken out in the third Judicial District, the Judge of the sixth Judicial District was unauthorized in law to vacate said attachment.

Whenever a Judge exchanges Districts with another, with the consent of the Governor, or whenever he shall be required by the Governor to hold a specified term of a Superior Court out of his proper District, the authority of the Governor should be of record in every County in which he holds a term, and should be attached to the record of every appeal to this Court. Judges who exchange Districts by the consent of the Governor for a whole riding, or series of Courts, take the place of each other for all purposes during that series of Courts.

When the Governor requires a Judge to hold a term of a Court (either regular or special) for some County outside of his proper District, the authority of the Judge is special: the jurisdiction of the proper Judge of the District is superseded by that of the substituted Judge in that County during the specified Term, but not elsewhere, nor for a longer time; the substituted Judge has, is respect to all cases pending in the specified County during the specified Term, all the powers of the proper Judge of the District; he still retains those belonging to him, as Judge of his own District.

An attachment or other provisional remedy will be vacated without any undertaking by the defendant, by a Judge, if on its face it appears to have been issued irregularly, or for a cause insufficient in law, or false in fact.

There is no authority for a Judge to decide any question of fact, as to the title to property, or to deprive a plaintiff of a security which he has obtained according to law.

APPLICATION to vacate an attachment heard at Chambers, before *Watts, J.*

The facts of the case are sufficiently stated in the opinion of the Court.

Faircloth and Bragg & Strong for plaintiffs.
Phillips & Merrimon and Seymour for defendant.

RODMAN, J. On 1st May, 1871, plaintiffs issued a summons (512) against defendant, returnable to WAYNE Superior Court, and demanded judgment for a sum due by note.

A complaint was regularly filed. Plaintiff's also on 2nd May, 1871, filed an affidavit to the effect that defendant had assigned his property in fraud of his creditors, to one Kurschbaun, and gave the proper undertaking. Thereupon the Clerk of Wayne Superior Court issued an attachment against the goods of the defendant, which were accordingly seized by the Sheriff. On 9th May, Kurschbaun made an affidavit that the goods were his, having been mortgaged to him by defendant and his partner J. H. Cohen, on 13th April, 1871, and the mortgage is annexed. The defendant and J. H. Cohen confirm the affidavit of Kurschbaun.

Upon these affidavits, the defendant applied to Hon. S. W. Watts, in Wayne County, to vacate the attachment; and his Honor thereupon ordered the defendant to appear before him at Newbern, on 12th May, and show cause, etc.

There is no date to the order. On the return day his Honor vacated the attachment, and ordered the property seized by the Sheriff to be restored to the defendant. From this order the plaintiffs appealed to this Court.

We know officially that Judge Watts is Judge of the sixth Judicial District, and that Wayne and Craven Counties are in the third Judicial District. The first question therefore is, by what authority Judge Watts undertakes to act in those Counties? It is agreed by the counsel in this case, that he was directed by the Governor, under Art. IV, sec. 12, of the Constitution, to hold the Spring Terms of the Superior Courts

for Wilson and Craven Counties, which are in the third district. Upon this part of the case, it is proper to say, that whenever a Judge shall exchange districts with another, with the consent of the Governor, or whenever he shall be required by the Governor to hold a specified term of the Superior Court in a County out of his proper district, the authority from the Governor should be entered of record in every County in which he holds a term, and should be attached to the (513) record of every appeal to this Court. Otherwise it cannot be seen, (except by the agreement of the parties as in this case,) that he had any authority at all, and his proceedings would run the risk of being held void.

In the present case, it sufficiently appears by the admission, that Judge Watts was authorized by the Governor to hold the Spring Term in Wilson and Craven counties. The question then occurs, was he thereby given jurisdiction to act in cases pending in other counties of the third District, viz.: in Wayne? The question is of general interest, and not without difficulty. But it is probably more important that it should be settled, than that it should be settled in any particular way. We have concluded as follows:

1. When Judges exchange districts by the consent of the Governor, for a whole riding or series of courts, each takes the place of the other for all purposes during that series of Courts.

2. When the Governor requires a Judge to hold a term of a Court, (whether regular or special) for some county outside of his proper District, the authority of the Judge is special; the jurisdiction of the proper Judge of the District is superseded by that of the substitute Judge in that county during the specified term, but not elsewhere, nor for a longer time; the substituted Judge has in respect to all cases pending in the specified county during the specified term, all the powers of the proper Judge of the district; he still retains those belonging to him as possessed of in his own district. It is unnecessary to give in detail the reasons for these conclusions. They are partly founded on a consideration of sections 111, 112, 113, C. C. P., and partly on general convenience. As we have heretofore said, in questions of mere practice, over which this Court, by sec. 394, C. C. P., has a certain legislative jurisdiction, such as all Courts of appeal must have, and where no injury is worked by a decision founded on it, the *argumentum ab inconvenienti*, avails much. And we think, after balancing the inconveniencies on both sides, the rule we here establish is the most (514) reasonable. This conclusion might dispose of the case. But we can scarcely do full justice to the parties, without noticing the other

questions arising upon the order made by his Honor Judge Watts, at Newbern, on 12th May.

An attachment or other provisional remedy will be vacated, of course, and without any undertaking by the defendant, by a Judge, if on its face it appears to have been issued irregularly, or for a cause insufficient in law, or false in fact. (C. C. P., sections 174, 186, 195, 212, 213.) But in this case there was no suggestion of that sort. The cause alleged as the ground for the attachments is admitted. The property is claimed by Kurschbaun, under a mortgage which we will assume, for the present, was not apparently fraudulent, and might therefore be good. He thereby entitled himself to come in and be made a party defendant, and to interplead with the plaintiff. (C. C. P., sections 61, 65.) In such a case, an issue would be made, which would be triable as other issues are.

Probably he might, under sec. 186, C. C. P., prevent the Sheriff from delivering the property to the plaintiff, until the plaintiff should enter into an undertaking of indemnity, as provided in that section, of which *Kurschbaun* would have the benefit. No doubt, too, a Judge would have the power to require a defendant, as a condition of discharging an attachment, to enter into an undertaking with sureties, to pay, in case of a recovery, the demand sued for, to an amount not exceeding the value of the property attached; and it would be his duty to do so, except when the attachment had issued under circumstances in which it is not given by law.

We suppose the Judge thought himself justified, in ordering the property to be restored to the defendant without security, by sec. 512, C. C. P. But this section applies only when the attachment is vacated because of irregularity, or because it was issued upon grounds insuffi-
cient in law, or false in fact. We can find no where in the Code,
(515) or in any principle in law, any authority given to a Judge to de-
cide an issue of fact, as to the title to property, or to deprive a plaintiff of a security which he has obtained according to law. We have been cited to no precedent in support of such a jurisdiction. More especially should a Judge refrain from such action, when the claim set up, if not absolutely fraudulent in law, bears on its face so many marks of suspicion. The property conveyed, consisting of a stock of goods, is not inventoried or particularized. And it is provided that the mortgagors shall continue to possess the goods, and sell them at their pleasure. Such an instrument can scarcely be called a security for a debt, as at any moment, at the pleasure of the debtor, the substance of

the security can be destroyed by a sale of it, leaving the mortgagee's debt still simply a debt without security.

In our opinion the order discharging the attachment was void.

It is ordered that the defendant immediately return to the Sheriff of Wayne County, the goods originally levied on by him, and delivered to defendant under color of the order of Judge Watts, dated the 12th of May, 1871; and that the Sheriff hold the same, subject to the order of the Judge of the Third Judicial District, or other lawful authority.

The plaintiff will recover his costs in this Court.

Per curiam.

Cited: In re Rhodes, 65 N.C. 518; *Morris v. Whitehead,* 65 N.C. 638; *Mauney v. Comrs.,* 71 N.C. 487; *Devries v. Summit,* 86 N.C. 131; *S. v. Ray,* 97 N.C. 514; *Harris v. Sneeden,* 101 N.C. 278; *Henry v. Hilliard,* 120 N.C. 484; *Herring v. Pugh,* 126 N.C. 865; *Lumber Co. v. Buhmann,* 160 N.C. 388; *Mitchell v. Talley,* 182 N.C. 688; *S. v. Scott,* 182 N.C. 872.

(516)

SAMUEL HIRSH v. J. D. WHITEHEAD & CO. ET AL.

An injunction taken out before issuing any summons is irregular, and will be vacated upon motion.

To entitle a party to maintain an action for *claim and delivery* of personal property, there must be a compliance with all the requisites specified in Chap. II of Title 9, C. C. P.

INJUNCTION heard before *Clarke, J.,* at Chambers, April 27th, 1871.

The facts of this case sufficiently appear in the opinion of the Court.

Phillips & Merrimon and Seymour for plaintiff.
Faircloth and Bragg & Strong for defendants.

RODMAN, J. The defendants recovered before a Justice of the Peace, of Wayne County, on 5th April, 1871, a judgment against Samuel Cohen, upon which an execution issued, which was levied by one Wood, a Constable, upon a certain stock of goods.

Hirsh, on the 11th of April, without having issued any summons or filed any complaint on affidavit, setting forth that the goods in question, belonged to him by virtue of a mortgage made to him by said Cohen, and that Whitehead & Co., were non-residents of the State, and that Wood was insolvent, applied to the Judge of the third Judicial District for an injunction to restrain the said Wood from selling the goods levied on by him as aforesaid. Whereupon the Judge ordered the defendants "to refrain from selling or otherwise disposing of the property mentioned in the said complaint, or from interfering with the same in any manner, until," etc.: and to appear on 27th April, and show cause, etc.

On the 27th of April, the parties appeared: and the Judge thereupon ordered: "that an injunction issue, restraining the defendants
(517) from interfering with the property of the said plaintiff; and that any of his said property seized by said defendants, or any of them, be returned to said plaintiff, on his entering into a written undertaking," etc.

From this order the defendants appealed to this Court.

It has several times been decided in this Court, that an injunction, granted before the issuing of a summons, is irregular. *McArthur v. McEachin*, 64 N.C. 72. The error of the Judge in this respect needs no comment.

Upon this ground alone, the injunction ordered by his Honor, must be vacated.

But there is a much more serious objection to the order of his Honor. If the plaintiff had any just claim to the property, it could only be prosecuted under sections, 176 to 187 C. C. P., section 177 requires that, "when a delivery is claimed by a plaintiff, an affidavit must be made before the Clerk of the Court, etc., showing:"

"That the same (the property) has not been taken for a tax, assessment or fine, pursuant to a statute; *or seized under an execution,* or attachment against the property of the plaintiff; or if so seized, that it it by statute exempt from such seizure;" and,

"The actual value of the property."

None of these requisites were complied with in the affidavit upon which his Honor acted. By the order which his Honor makes, he takes out of the custody of the law, property which it appeared had been seized under execution, and transfers it to the possession of the plaintiff, who claimed title under a deed, which if not absolutely void for fraud upon its face, bears with it marks of suspicion, enough to have put him on his guard. We forbear to say more.

The order appealed from is reversed, and it is ordered that the plaintiff restore to M. Wood, the Constable, the property put in the possession of the plaintiff, (Hirsh,) by force or color of the order of the Judge, made the 27th April, 1871, to be held and dealt with (518) by said constable according to law.

The defendants will recover costs in this Court.

Per curiam.

Judgment reversed.

Cited: Miller v. Parker, 73 N.C. 59; *Trexler v. Newsom,* 88 N.C. 14; *Grant v. Edwards,* 90 N.C. 32; *Griffith v. Richmond,* 126 N.C. 378; *Armstrong v. Kinsell,* 164 N.C. 127.

IN THE MATTER OF JOHN C. RHODES.

A fine for contempt is a punishment for a wrong to the State, and goes to the State.

Bear v. Cohen, ante, cited and approved.

ATTACHMENT for contempt heard at Chambers before *Watts, J.*

In the case of *Bear v. Cohen, ante* 511, his Honor directed that the goods seized under an attachment by the Sheriff of Wayne County, should be delivered to the defendants; and it appearing to the Court, that the Sheriff, who is the petitioner, had failed to re-deliver the goods he ordered at Wilson, on the 24th of May, 1871, "That the Sheriff, Rhodes, pay into Court two thousand dollars for the use of the defendants, (in that action,) as damages for the unlawful detention of the same, unless he, the said Rhodes, shall within twenty-four hours after the notice of the order, deliver said stock of goods to the Attorney of Record of said defendants, or his appointees."

The goods were accordingly delivered, and Rhodes obtained a *certiorari,* to review the action of his Honor.

Faircloth and Bragg & Strong for petitioner.
Seymour contra.

RODMAN, J. After the order of the 12th of May, in the case of *Bear v. Cohen,* reported *ante* 511, that the Sheriff of Wayne should re-deliver the goods to the defendants, his Honor Judge Watts, it

(519) appearing to him that the Sheriff had failed to re-deliver the goods accordingly, at Wilson on the 24th of May, ordered that the Sheriff (Rhodes) "pay into the Court two thousand dollars for the use of the defendants, (in that action,) as damages for the unlawful detention of the same, (the stock of goods,) unless he, the said Rhodes, shall within twenty-four hours, after the notice of the order, deliver said stock of goods to the Attorney of Record of said defendant, or his appointee."

The goods were accordingly delivered to the defendant.

The Sheriff, Rhodes, obtained a *certiorari* from this Court, under which, the order of his Honor comes up for review.

In the principal case, *Bear v. Cohen, ante,* p. 511, we have already decided, that his Honor had no jurisdiction to make an order for the re-delivery of the goods. For the same reason he had no jurisdiction to fine the Sheriff of Wayne, for disobedience of that order. His judgment to that effect was therefore void.

We think it our duty also, to notice another point in the present case, lest our silence may be considered an approval of the order fining the Sheriff. Supposing the Judge to have had jurisdiction of the case, and that his order of the 12th of May, was lawful, he might have fined the Sheriff for a contempt of Court, in disobeying it. But a fine for contempt is a punishment for a wrong to the State, and goes to the State. We know of no law by which a Judge can direct a fine for a contempt of his Court, to be paid to a party to a suit, or can assess in favor of such party, damages which he has sustained by the delay or refusal of the Sheriff to obey an order in the cause.

We asked to be referred to some precedent, for such an order, but none was found. The order of the 24th of May, above referred to, is void.

Per curiam.

Error.

Cited: Sc., 65 N.C. 518; *Morris v. Whitehead,* 65 N.C. 638.

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(520)

ROBINSON v. WILLOUGHBY.

When a debtor conveys realty to a creditor by deed absolute in appearance, and at the same time gives his note for the amount of such indebted-

ness, and takes a bond for title upon the payment of such note: *Held*, that such transaction is a mortgage.

To determine whether a transaction is a mortgage or a defeasible purchase, it will be regarded as the former, if at the time of the supposed sale the vendor is indebted to the vendee, and continues to be such with a right to a re-conveyance upon the payment of such indebtedness.

THIS was a civil action for the recovery of real estate tried before *Buxton, J.*, at Spring Term, 1871, of UNION Superior Court.

The facts are that both parties claimed title under one D. R. Christenbury. The conveyance from Christenbury to the plaintiff was in form an absolute deed in *fee simple*, reciting a consideration of $310, dated December 25th, 1865, and duly registered February 8th, 1869, and was for fifty-two acres of land. At the time of the execution of the foregoing deed, Christenbury being indebted unto the plaintiff in the sum of $310, the latter gave to Christenbury a bond, covenanting therein to convey the land in controversy to him, if he should pay off $310 and interest within two years, and at the same time Christenbury gave his note to plaintiff for $310. All the old evidences of indebtedness of Christenbury to the plaintiff were surrendered to him at the time of the execution of the deed, and bond for title, and the receipt of said note. The witness, Stillwell, who prepared both instruments of writing, testified that he regarded the sale of the land as absolute, and Christenbury was to have a re-conveyance of the land upon the payment of three hundred and ten dollars within two years from date of conveyance. He also testified that, prior to said conveyance by Christenbury to plaintiff, that the former was indebted to plaintiff, and applied to witness to become his personal security for a part of (521) this indebtedness, upon which he says he advised him to sell his lands to plaintiff to pay off his debt to him.

The defendant offered in evidence a deed from Christenbury for the same land, reciting a consideration of five hundred dollars, dated January 17th, 1867, and registered 3d June, 1867. Christenbury remained in possession of the land in controversy after his deed to the plaintiff, and without paying any rent, till the date of the deed to the defendant, when he left the State. The defendant gave to Christenbury a tract of land in South Carolina for the land in controversy.

The bond for title from plaintiff to Christenbury had never been registered, nor had the latter ever paid plaintiff any part of the money due him.

The plaintiff insisted that the facts showed the sale to plaintiff was absolute, coupled with a contract of re-sale, and that his deed being

the oldest, entitled him to recover. Whilst the defendant insisted that the transaction between Christenbury and plaintiff showed a mere mortgage, and that plaintiff could not recover.

His Honor charged the jury that inasmuch as the parties agreed as to the facts, that it devolved on the Court to decide the law applicable to the facts, and that the transaction between the plaintiff and Christenbury was not a mortgage, but that it was an actual sale, with an agreement to re-sell the same lands to Christenbury within two years; that as both parties claimed under Christenbury, and the plaintiff's deed being the oldest, he was entitled to recover, and the duty of the jury was merely to assess the plaintiff's damages.

Defendant excepted. Verdict for plaintiff. Judgment and Appeal.

J. H. Wilson for plaintiff.
Ashe for defendant.

RODMAN, J. As the entire contract between the plaintiff and
(522) Christenbury was in writing, and there was no evidence of any fact tending to show fraud or mistake, his Honor rightly considered the nature and effect of the contract, to be a matter of law, and for his decision. If his Honor permitted the evidence of Stillwell, that he considered the transaction a conditional sale, and not a mortgage, and that such was the intention of the parties, to have any weight with him, we think he erred in doing so. The evidence of the witness on that point, was not as to any matter of fact, but merely his opinion on a matter of law, and was therefore of no weight or value whatever.

We think his Honor committed an error in holding that the contract, or transaction, between the plaintiff and Christenbury was not a mortgage.

A mortgage is a conveyance by a debtor to his creditor, or to some one in trust for him, as a security for the debt. Whatever is substantially this, is held to be a mortgage in a Court of Equity and the debtor has a right to redeem; Coote. Mort. 22, Fisher Mort. 68.

It is immaterial whether the contract be in one writing or in several. *Mason v. Hearne*, 45 N.C. 88, and it is also immaterial (as between the parties) whether the agreement for redemption be in writing or oral; and such agreement may be implied from the attending circumstances. Of these principles, and of the circumstances, which will cause a deed absolute on its face to be construed as a mortgage, numerous illustrations may be found in the treatises above cited, and in our own Reports.

In the present case, the express terms of the writings indicate a mortgage, and the circumstances do not contradict, but sustain this view.

Christenbury being indebted to the plaintiff, applies to Stillwell to become his personal surety for a part of the indebtedness, upon which he says he advised him to sell his lands to the plaintiff to (523) pay his debts to him.

After this advice, and perhaps in consequence of it, the plaintiff and Christenbury apply to the witness to draw the writings necessary to carry out their understanding. He accordingly draws them, and they are executed by the parties.

1. A deed from Christenbury absolutely conveying the land to the plaintiff.

2. A note from Christenbury to the plaintiff for $310, that being the amount of his indebtedness.

3. A bond from the plaintiff to Christenbury, by which, he agrees, that if Christenbury shall pay him $310, on or before the 25th of December, 1867, to make him a title to the land on which he resides; which is the same that was described in the deed, and is that now in controversy. After the execution of these writings, Christenbury remained in possession, until after his conveyance to the defendant on 17th January, 1867, when the defendant took possession. In determining the question whether a transaction amounted to a mortgage, or to a defeasible purchase, it has always been considered of the greatest importance, whether the vendor was a debtor to the vendee: and if he was, and if after the supposed sale he continued to be a debtor, the inference was irresistible, that the transaction was a mortgage, and that he could redeem by paying the debt. (Coote. Mort. 24.) Otherwise the debtor would have parted with his land without any consideration whatever.

In this case, there was an antecedent debt, and it was provided as a part of the agreement, that the debt should continue for the plaintiff, while he surrendered the old evidences of indebtedness, and took a new note for the amount of them, which he still holds.

If a transaction be a mortgage in substance, the most solemn engagement to the contrary, made at the time, cannot deprive the debtor of his right to redeem; such a case being on grounds of equity, an exception to the maxim *"modus et conventio vincunt legem."* (524)

Nor can a mortgagor, by any agreement at the time of the execution of a mortgage, that the right to redeem shall be lost if the money be not paid by a certain day, debar himself of such right; for

in such a contract, time will not be regarded as of its essence. *Mason v. Hearne, supra.*

In addition to this the fact that the supposed vendor, continued in possession after the sale, without the demand or payment of rent, is a circumstance, which remaining unexplained, is inconsistent with the idea of an absolute sale. Taking this view of the case, Christenbury retained an equity of redemption, which at least his deed conveyed to Willoughby.

On the pleadings as they stand, however, no question arises upon that.

As we think his Honor erred, in holding the transaction not a mortgage between the parties, it follows that there must be a new trial, and it is unnecessary to consider the other question raised by the defendant, whether the deed to the plaintiff was fraudulent, as to a subsequent purchaser for value from the grantor.

Per curiam.

Venire de novo.

Cited: Sc., 67 N.C. 84; *Waters v. Crabtree,* 105 N.C. 399; *Watkins v. Williams,* 123 N.C. 173; *Porter v. White,* 128 N.C. 44; *Bunn v. Braswell,* 139 N.C. 140; *Wilson v. Fisher,* 148 N.C. 539; *Sandlin v. Kearney,* 154 N.C. 604; *Coxe v. Carson,* 169 N.C. 139; *Ray v. Patterson,* 170 N.C. 228; *Potato Co. v. Jeanette,* 174 N.C. 242; *Noland v. Osborne,* 177 N.C. 17; *Perry v. Surety Co.,* 190 N.C. 291; *Layton v. Byrd,* 198 N.C. 469; *O'Briant v. Lee,* 212 N.C. 801; *O'Briant v. Lee,* 214 N.C. 731, 735; *Ferguson v. Blanchard,* 220 N.C. 7; *Ricks v. Batchelor,* 225 N.C. 11; *Walston v. Twiford,* 248 N.C. 693.

(525)

R. F. SIMONTON, ADM'R. WITH THE WILL ANNEXED OF JOHN MILLER v. ALEXANDER CLARK, EX'R., ET AL.

A promissory note barred by the statute of limitations is not revived by an offer to pay in Confederate currency, or bank bills.

To repel the statute of limitations there must be such facts and circumstances as show that the debtor recognized a present subsisting liability, and manifested an intention to assume or renew the obligation.

READE and BOYDEN, J.J., dissenting.

SIMONTON *v.* CLARK.

MONEY demand tried before *Mitchell, J.*, at Spring Term, 1871, of IREDELL Superior Court.

The plaintiff's testator held a promissory note on Clark, Shuford & Co., for $1,625, executed and due the 30th of January, 1858. The defendant, A. Clark, is the executor of A. Clark, Sr., who was a member of said firm. The defendants in their answer did not deny the partnership nor the execution of the note, but relied upon the statute of limitations.

It was in evidence, that A. Clark, Sr., stated that in March, 1863, he had been over to the house of the plaintiff's testator, to pay him the note of about $1,600, which he held on the firm of Clark, Shuford & Co., that he offered to pay him the note first in Confederate money, and then in bank bills, which he refused to receive, and demanded specie.

The defendant's counsel asked the Court to instruct the jury, that if the facts stated were true, they did not remove the bar of the statute of limitations, and the plaintiff was not entitled to recover. Which instructions, his Honor declined giving, but instructed the jury, that if they believed from the evidence that the defendant's testator went to the house of the plaintiff's testator, and offered to pay off said note in Confederate currency, or bank bills, and that he intended thereby to recognize the debt as a subsisting debt, and that he then owed it, that the plaintiff would be entitled to recover. Defendants excepted verdict for plaintiff. Judgment and appeal. (526)

W. P. Caldwell for the plaintiff.
Armfield for defendants.

DICK, J. The principles of law which govern this case, have been so often considered by this Court, that they need no further discussion. 2 Battle's Digest, 877.

It is only necessary to consider the general results of decided cases, and apply the well settled rules of law to the case before us.

The statute of limitations operates upon the remedy merely, and does not extinguish the debt. To revive the remedy taken away by the statute of limitations, there must be an express or implied promise to pay the debt. Where a plaintiff relies upon an implied promise to sustain his action, he must show such an unqualified and direct acknowledgment on the part of the debtor, of a certain existing debt, and present obligation and willingness to pay the same, that the law can imply a promise to pay upon a future demand.

A mere acknowledgment of the debt, is not sufficient to repel the statute; but there must be such facts and circumstances, as show that the debtor recognized a present subsisting liability, and manifested an intention to assume or renew the obligation. In our case the defendant's testator offered in 1863, to pay the debt sued on, and which was barred by the statute of limitations, in Confederate money or bank bills. This offer of payment was refused by the plaintiff's testator, and specie was demanded. The debtor in no way accorded to this demand; and there is nothing from which the law can imply a promise on the part of said debtor, to pay in specie, or in any other kind of money upon a future demand.

The act of the defendant's testator, was a mere offer to pay in the currency then in circulation, and no intention was in any way (527) shown of assuming or renewing the obligation.

We think the proper inference to be drawn from the evidence, is, that the defendant's testator was willing to pay the debt in the currency of the country, which was then abundant; and as that was refused, his purpose was to rely upon the statute of limitations.

Questions like the present, will soon cease to be matters of controversy in the Courts, as the C. C. P., sec. 51, prescribes, "That no acknowledgment or promise shall be received as evidence of a new or continuing contract, whereby to take a case out of the operation of the statute of limitations, unless the same be contained in some writing signed by the party to be charged thereby," etc.

There was error in the ruling of his Honor.

READE, J. *(Dissentiente.)* I am of opinion that there was in this case an acknowledgment of a subsisting debt, from which the law implies a promise to pay.

I think the majority of the Court are mistaken in supposing that it was an acknowledgment, and a promise to pay, if the plaintiff would take Confederate currency. It was an unqualified acknowledgment of the debt, and an unconditional offer to pay; and the plaintiff refused the proffered payment, because it was offered in Confederate currency. The defendant had no other money, and therefore he could not pay. But that in no way qualified the acknowledgment of the debt, from which the law implies a promise to pay.

My brother Boyden agrees with me in this view.

Per curiam.

Judgment reversed.

Cited: Parker v. Shuford, 76 N.C. 220; *Wells v. Hill,* 118 N.C. 904, 909; *Trust Co. v. Lumber Co.,* 221 N.C. 94.

(528)

W. S. FONTAINE v. C. W. WESTBROOKS ET AL.

A judgment rendered against a certificated bankrupt, merely to ascertain the amount of his indebtedness to the plaintiff, is not such a judgment as will make the sureties of said bankrupt liable therefor on an Appeal bond.

THIS was an action of assumpsit begun in the County Court of GUILFORD County, wherein the plaintiff recovered a judgment against the defendants, Westbrooks and Albright, from which the said defendants appealed to the Superior Court of law of Guilford County, and gave as sureties to their appeal bond the defendants, Wm. A. Donnell and Wm. M. Albright, tried before *Tourgee, J.,* at a special term of GUILFORD Superior Court, held in August, 1870.

During the pendency of the appeal, the defendants, Westbrooks and Albright, were adjudged bankrupts on their own petition in the District Court of the United States for the district of Pamlico.

The account of plaintiff being disputed, the plaintiff, on the 25th February, 1869, filed a petition in said District Court against said bankrupts, alleging that said claim was litigated, and praying that he be permitted to prosecute his said suit to judgment.

The District Court made the following order, upon the hearing of said petition:

"It is determined, and the Court doth now so order and grant, that the plaintiff, Wm. S. Fontaine, have leave to proceed to the trial of his said cause, in the Superior Court of Guilford County, and to judgment in said Court, if the said Court shall determine that the plaintiff is entitled to judgment, for the purpose of ascertaining the amount due, but for no other purpose, and to no other extent is this permission granted."

The defendants, Westbrooks and Albright, filed their plea of discharge in bankruptcy, embracing in said plea a copy of (529) their said discharges as bankrupts.

During the progress of the trial, at the said Special Term of Guilford Superior Court, the defendants, Westbrooks and Albright, proposed to offer evidence of their discharge as bankrupts; this evidence

was excluded by the Court, upon the assurance of the plaintiff, that he did not propose to take a judgment, to be enforced by execution, but merely to ascertain his debt. To which ruling of the Court, the defendants excepted.

There was a verdict for the plaintiff for $95.00, with interest thereon till paid, upon which his Honor rendered up judgment, and ordered that no execution issue against the defendants Westbrooks and Albright, but that execution issue against their sureties on the appeal bond, for the amount of the judgment, interest and costs. From which defendants appealed, and assigned as errors:

1. That the Court refused to allow evidence to be given to sustain the plea of their discharge as bankrupts.

2. That the Court entered up judgment against the defendants, in favor of the plaintiff for the amount of the recovery, with interest thereon till paid.

3. That the Court rendered judgment against the defendants, Westbrooks and Albright, who were admitted to be discharged bankrupts, for the costs of the action to be taxed by the Clerk.

4. That the Court entered up judgment against Wm. A. Donnell and W. M. Albright, sureties on the appeal bond, for the amount of plaintiff's recovery, against the defendants Westbrooks and Albright, and the costs of action, and ordered that execution issue therefor.

Dillard & Gilmer for plaintiff.
Scott & Scott for defendants.

PEARSON, C.J. There has been no such judgment rendered against the principals, as is contemplated in the appeal bond; conse-
(530) quently there has been no breach of the condition of the bond.

The judgment rendered, was simply to fix the amount for the purpose of proving it, as a debt in bankruptcy, as is provided under the 21st section of the Bankrupt Act.

The discharge of the principals was a bar to any judgment against them, except for the purpose above indicated; and that is not the judgment which the sureties undertook to abide by and perform. In short, the bankruptcy of the principals made it impossible for the plaintiff to obtain judgment against them, within the meaning of the appeal bond; and the sureties have not been fixed with a liability to see the judgment performed, because there is no judgment.

There is error.

Per curiam.

Venire de novo.

Cited: Laffoon v. Kerner, 138 N.C. 286; *McCormick v. Crotts,* 198 N.C. 668; *Sutton v. Davis,* 205 N.C. 468.

TAYLOR & DUNCAN v. G. C. & J. N. RHYNE.

A Sheriff is not required to sell the excess of realty beyond the Homestead, or to lay off a Homestead, until the plaintiff has paid, or offered to pay his fees for so doing.

THIS was a motion to amerce George W. McKee, the Sheriff of Gaston County, for failure to make a lawful return of a *venditioni exponas* issued to him in the above stated cause upon the following facts, as appears from the original *venditioni exponas* and the endorsements thereon issued to said Sheriff from Spring Term, 1870, and returnable to Fall Term, 1870, commanding him to sell two certain tracts of land therein mentioned; that the same came to the hands of the Sheriff as appears from his endorsement on the 24th of June, 1870. That at Fall Term, 1870, he returned the same to the Clerk's office, (531) with the following endorsement: "November 8th, 1870, The seventy acre tract sold, and money applied to an execution in favor of W. W. Grier and D. M. Alexander, it having the priority. The other tract not sold because of the homestead law, and because the plaintiffs did not pay, or tender the fees due for laying off the homestead;" heard before *Logan, J.,* at Spring Term, 1871, of GASTON Superior Court.

The Court considering said return sufficient in law, refused the motion, from which ruling the plaintiffs appealed.

Battle & Sons for plaintiffs.
Bynum for defendant.

DICK, J. The land mentioned in the *vendi. expo.,* was subject to the homestead exemption of the defendant in the execution; and no part could be sold until the homestead was laid off as required by law. As the homestead was not claimed by the owner, the Sheriff was not bound to lay it off, unless his fees were paid or tendered by the creditor in the execution. *Lute v. Reilly,* 65 N.C. 20. Acts 1868-'9, ch. 279.

Only the interest of a debtor in land, in excess of the homestead, can be levied upon and sold; and this excess must be ascertained by

appraisers properly appointed. The costs of this proceeding may be charged in the officer's bill of fees, and collected out of the excess; but if there is no excess, the Sheriff has no direct means of obtaining his costs. The law therefore does not require the sheriff to act in the matter, until his fees are paid or tendered by the creditor, for whose benefit the services are to be rendered. In our case this precedent duty was not performed by the plaintiffs, and they have no right to complain that the Sheriff did not render the service of laying off the homestead, and selling the excess. An amercement is a penalty and ought not to be enforced by a Court of Justice, at the instance of a party, who (532) has not performed precedent duties required of him by the law.

The Sheriff was not in default as the plaintiff did not pay or tender the fees for the required service.

There is no error in the ruling of his Honor; and the judgment is affirmed.

Per curiam.

Judgment affirmed.

NOTE.—The same parties plaintiffs had another cause in this Court involving the same question which was decided in accordance with the principles enunciated in this case.

Cited: Stokes v. Smith, 246 N.C. 699.

THE STATE v. WILEY VANNOY.

If A pursues B with a stick or piece of board raised in a striking attitude, and is stopped by a third person when within two or three steps of B, this constitutes an assault, although A could not have stricken B with the stick in his hand at the place where he was stopped.

INDICTMENT for assault, tried before *Mitchell, J.,* at Spring Term, 1871, of ALLEGHANY Superior Court.

The assault was charged to have been on one Williams, who testified that the defendant came up to where he and other persons were standing, and called witness to come to one side and talk with him. That witness refused to go, when defendant cursed him, swearing he would make him come. At this time defendant was twelve or fifteen feet from witness; defendant then picked up a stick, or a piece of

board, three or four feet long, and made towards witness, with the stick or board raised. The defendant was stopped by a bystander, two or three steps from witness, and was prevented from (533) striking him. From the place at which defendant was stopped, he could not have struck witness with the board or stick in his hand.

His Honor instructed the jury to find whether these facts were true or not, and reserved the question of law.

The jury found the facts as above stated to be true, and say, "they are ignorant, whether in law the defendant be guilty of the assault or not guilty."

"If the Court shall be of opinion, that according to the facts as found, the defendant is guilty of an assault, then they find the defendant guilty of an assault as charged; but if the Court shall be of opinion, that the defendant is not guilty according to the facts as stated by the jury, then they say that they find the defendant not guilty."

The Court, upon consideration, being of opinion that the facts as found by the jury, in the special verdict, did not constitute an assault, ordered a verdict of not guilty to be entered.

From which judgment the Solicitor of the State appealed.

Attorney General and Batchelor for the State.
Armfield for defendant.

RODMAN, J. This case is clearly within the law, as decided in *State v. Davis,* 23 N.C. 125. In that case, Gaston, J., delivering the opinion of the Court, says, "So in a late case, before a very eminent English Judge, it was held, that where the defendant was advancing in a threatening attitude, with intent to strike the plaintiff, so that his blow would, in a second or two, have reached the plaintiff, if he had not been stopped, although when stopped he was not near enough to strike, an assault was committed." *Stephenson v. Myers,* 4 Car. and Payne, 349, (19 E. C. L. R.) This English case is approved of, and is the exact case now before us. We think it reasonable in itself, and sustained by the recent case of *State v. Hawles, ante,* 334.

Judgment reversed, and a verdict of guilty ordered to be entered on the special verdict. Let this opinion be certified. (534)

Per curiam.

Judgment affirmed.

Cited: S. v. Neely, 74 N.C. 426; *S. v. Jeffreys,* 117 N.C. 745.

G. W. CHIPLEY & W. B. JONES, SURVIVING PARTNERS v. SILAS KEATON ET AL.

If a partner purchases property with the partnership effects, and sells said property to a *bona fide* purchaser without notice, the other partners cannot follow the property in the hands of such purchaser.

ASSUMPSIT, tried before *Mitchell, J.*, at Spring Term, 1871, of IREDELL Superior Court.

The facts of this case sufficiently appear in the opinion of the Court.

Bailey and Blackmer & McCorkle for plaintiffs.
W. P. Caldwell for defendants.

RODMAN, J. The plaintiffs and one Tays were partners; it is not said that trading in slaves was a part of the partnership business; Tays purchased the slaves to recover damages, for whose conversion this action is brought, and paid for them partially with his own money, but mostly with that of the partnership; he took the bill of sale to himself alone, and kept possession of the slaves for several years when he sold them to the defendants, who converted them. Jones was with Tays when he purchased the slaves and took the title to himself, and made no objection to his doing so. We see no error in the charge of the Judge. If a partner without the consent or knowledge of his co-partners, misappropriates the funds and invests them in property in (535) his own name, he is of course liable to his partners. But if he afterwards sells the property to a *bona fide* purchaser without notice, the other partners cannot follow the property in the hands of such purchaser. Much less can they do this, when they acquiesced in the sole possession of the third partner for two or three years.

This conclusion rests on principles so plain and familiar that we consider it unnecessary to refer to any authorities in support of it.

Per curiam.

Judgment affirmed.

JOHN W. YORK v. AUGUSTINE LANDIS.

A surety to a note who pays off and discharges the same, is entitled to the benefit of all the securities which have been taken by the creditor from the principal.

In such a case the surety can assign over to any one his demand and equitable rights against the principal, and the assignee will be substituted to all of the rights of the original creditor.

MOTION to dissolve an injunction, heard before *Watts, J.*, at Spring Term, 1871, of GRANVILLE Superior Court.

The plaintiff alleges in his complaint, that he was indebted unto one John S. Burwell, in the sum of six hundred dollars, with D. C. Parish as one of his sureties; and that thereafter, to secure this and other debts which the plaintiff owed, he afterwards, to wit: on the 4th of December, 1857, executed a deed to the defendant, as trustee, conveying therein certain realty, which defendant was to sell, and apply the proceeds thereof to the payment of the debts embraced in said conveyance, if said debts were not fully paid off and discharged at the expiration of six months from the execution thereof. (536)

That all said debts have been paid off by defendant, except the claim of John S. Burwell, and that one of the sureties thereto, to wit: D. C. Parish, paid off and discharged said debt in 1862, in Confederate Treasury notes; that in 1863, plaintiff offered to repay the said Parish in Confederate currency, the amount he had paid as surety for plaintiff, which he declined to receive; that defendant now threatens to sell the land embraced in said deed in trust to satisfy the claim of the said Parish, or some pretended debt to one Addison Mangum, who is a stranger to said deed in trust. That defendant has already advertised said lands to pay off the debt due to the said Parish or Mangum.

The defendant in his answer, admits that he accepted the trust, and that in 1863, John S. Burwell, brought an action in the County Court of Granville, on his note secured in said deed in trust, against the plaintiff and his sureties; that judgment was obtained thereon, when a *fi. fa.* and afterwards a *ven. ex.* issued thereon; that in December, 1862, D. C. Parish, the surety of the plaintiff, paid off said *ven. ex.* in Confederate currency, when the said John S. Burwell endorsed said *ven. ex.* to the said D. C. Parish; that on the 15th June, 1866, Parish sold and assigned to Ellison Mangum, for value, all his interest arising out of the deed in trust, to defendant, an account of the moneys he had paid for plaintiff.

Upon the coming in of the answer of the defendant, a motion was made to dissolve the injunction heretofore granted, which was allowed. Appeal by plaintiff.

R. W. York for plaintiff.
Phillips & Merrimon for defendant.

RODMAN, J. When Parish, the surety for the plaintiff, paid the debt to the creditor, Burwell, and took an assignment from him,
(537) it operated to extinguish that debt at law. *Sherwood v. Collier*, 14 N.C. 380.

But by the payment, the surety acquired a right of action against his principal, to the value of his payment, and upon a familiar principle of equity, became entitled to the benefit of the security which had been taken by the creditor from the principal. *Nelson v. Williams*, 22 N.C. 118.

This equitable right he could assign, with the benefit of the security which was incident to it, and his assignee, Mangum, acquired the same right to require a sale of the property conveyed in trust, as his assignor, or as the original creditor had.

There is no ground for the plaintiff's injunction.

Per curiam.

Judgment affirmed.

Cited: Wilson v. Bank, 72 N.C. 626; *Holden v. Strickland*, 116 N.C. 191; *Pully v. Pass*, 123 N.C. 170; *Davidson v. Gregory*, 132 N.C. 396; *Tripp v. Harris*, 154 N.C. 298; *Liverman v. Cahoon*, 156 N.C. 207.

THE STATE v. JOHNSON ADAMS AND HAGAR REEVES.

It is not *fornication and adultery* where persons, who were formerly slaves, were married during the existence of slavery according to the forms then prevailing, and after their emancipation continued to cohabit together in the relation of husband and wife.

The act of 1865-'66, chap. 40, sec. 5, requiring such parties to go before the County Court Clerk, or a Justice of the Peace, and to acknowledge the fact of such cohabitation and the time of its commencement, makes it a *misdemeanor only* for failure to perform these duties.

INDICTMENT for fornication and adultery tried before *Cloud, J.*, at Spring Term, 1871, of SURRY Superior Court.

The jury found a special verdict that the defendants were formerly slaves and were married in 1864, according to the custom which then prevailed among slaves, and from that time commenced cohabiting together, passing, and recognizing each other as man and wife, which continued up to the finding of this indictment. They further find

that defendants have never complied with the provisions of the (538) acts of assembly of March 10th, 1866, and March 4th, 1867.

His Honor, upon the foregoing verdict gave judgment for the defendants from which the Solicitor for the State appealed.

Attorney General for the State.
..... *for defendants.*

BOYDEN, J. The act of 1866, ch. 40, sec. 5, enacts: "That in all cases where men and women, both, or one of whom were lately slaves, and are now emancipated, now cohabit together in the relation of husband and wife, the parties shall be deemed to have been lawfully married, as man and wife, at the time of the commencement of such cohabitation, although they may not have been married in due form of law."

This act, to all intents and purposes, rendered the parties thus cohabiting, man and wife, and devolved upon each of the parties the duties and responsibilities of the marriage state. It is true, that this same 5th section also imposes upon all persons, whose cohabitation has been thus ratified into a state of marriage, " the *duty of going* before the Clerk of the Court of Pleas and Quarter Session, at his office, or before some Justice of the Peace, and to acknowledge the fact of such cohabitation, and the time of its commencement," and a failure to perform this duty, is made an indictable misdemeanor; but the failure to perform this duty cannot avoid the marriage thus ratified by the act of 1866.

There is no error.

Per curiam.

Judgment affirmed.

Cited: S. v. Whitford, 86 N.C. 639; *Long v. Barnes,* 87 N.C. 332; *Baity v. Cranfield,* 91 N.C. 298; *Branch v. Walker,* 102 N.C. 37; *Jones v. Hoggard,* 108 N.C. 180; *S. v. Melton,* 120 N.C. 595; *Bettis v. Avery,* 140 N.C. 186; *Croom v. Whitehead,* 174 N.C. 309.

(539)

THE STATE v. HENRY ROYSTER.

The defendant is entitled to an acquittal, when the indictment charges the stealing of a *steer*, whilst the evidence shows that it was a *bull.*

HILLIARD *v.* MOORE.

LARCENY tried before *Watts, J.*, at Spring Term, 1871, of GRANVILLE Superior Court.

The indictment, charged the property stolen by the defendant as a *steer*, and the proof showed that it was a *bull*. The Jury found a special verdict to this effect and asked the opinion of the Court, etc. Thereupon his Honor adjudged that defendant was not guilty, from which the Solicitor for the State appealed.

Attorney General for the State.
No counsel for defendant.

BOYDEN, J. Among our domestic animals, such as horses, cattle, sheep and hogs, castrated males are known and called, geldings, steers, wethers and barrows; and those not castrated, stallions, bulls, rams and boars; and the question in this case, is this, can a defendant, indicted for stealing one of these animals by the name by which he is called when castrated, be convicted, when on the trial it turns out that the animal stolen was not castrated, and in that condition was known and called by a different name? As in our case, the defendant being charged in the indictment with stealing a steer, and on the trial, it appeared that the animal stolen was a bull.

The law in such a case, is too well settled, to require the citation of any authorities.

There is no error.

Per curiam.

Judgment affirmed.

(540)

LEWIS HILLIARD v. MOSES MOORE.

A note given 28th July, 1864, for one hundred dollars, and payable January 1st, 1866, which says, "This money to be paid in current funds at the time the note falls due," can only be discharged by a payment in such funds as are current at the time of the maturity of the note.

APPEAL from the judgment of a Justice of the Peace, tried before *Watts, J.*, at Chambers.

The plaintiff declared on the following promissory note:

"On or before January 1st, 1866, I promise to pay Lewis Hilliard, or order, one hundred dollars, for hire of negro girl, Cely, for the years

1864 and 1865. This money to be paid in current funds at the time the note falls due."

Dated July 28th, 1864.

The Justice admitted parol evidence as to the motives the defendant had in hiring the girl, and as to her value. The Justice rendered judgment according to the scale, for $5.23, which was affirmed by his Honor, upon the ground that the Justice acted upon a *quantum meruit,* from the evidence of the witness. Appeal by defendant.

Busbee & Busbee for plaintiff.
No counsel for defendant.

DICK, J. This case is governed by the rules of construction adopted in the case of *Chapman v. Wacaser,* 64 N.C. 532.

At the time the note was executed, Confederate money was the currency of the country, and if there was no express agreement to the contrary, the law would presume that it was solvable in such currency.

This presumption of law is raised by the statute of 1866, ch. 38, 39, and applies only to contracts made during the late war. This presumption is founded upon the supposed intent of the parties (541) to such contracts, derived from the facts and circumstances existing at the time the contract was made. When a different intent appears from the express stipulations of the parties, no such presumption can arise, and the provisions of the statute do not apply.

In our case, it is evident that the parties knew that Confederate money was rapidly depreciating, and they were willing to take the chances of a future and different condition of things; and they expressly agreed, that the note was to be paid in funds which were current when the note became due. It was a kind of speculating contract; and although the defendant is the loser, he must abide by his agreement, as he is not relieved by the statute.

There was error in the ruling of his Honor, and there must be judgment for the plaintiff, for the face of the note and interest.

Per curiam.

There is error.

Cited: McKesson v. Jones, 66 N.C. 262; *King v. R. R.,* 66 N.C. 282; *Palmer v. Love,* 75 N.C. 164; *Brickell v. Bell,* 84 N.C. 84.

(542)

JAMES A. HENDERSON v. PETER CANSLER.

Where two persons whose lands were contiguous had a suit pending about the boundaries thereto, and afterwards entered into a bond agreeing to submit all questions arising about the boundaries of said lands to A and B, and to abide by the award made by them, and also in the said bond covenanted "that the party who shall fail to keep, abide by, and observe the decision and award that shall be made according to the foregoing submission, will pay to the other the sum of one thousand dollars, as liquidated, fixed, and settled damages:" *Held*, that after the award had been made by A and B, and one of the parties placed a fence over the dividing line as fixed by the award, and on the land of the other, and that said damages were not of greater value than five dollars, that the sum specified in the bond is to be regarded as a penalty, and not as liquidated damages.

CIVIL action tried before *Logan, J.*, at Spring Term, 1871, of GASTON Superior Court.

The action was brought to recover the amount specified in a bond, a copy of which is as follows.

"NORTH CAROLINA

"GASTON COUNTY.

"Know all men by these presents, that whereas, a controversy is now existing between James A. Henderson and Peter Cansler, of the same place concerning the right and title to a piece of land, shoal, and fixtrap in Catawba river.

"Now, therefore we, James A. Henderson and Peter Cansler, do hereby submit the said controversy to the decision, and arbitrament of D. A. Lowe and John Tate of the County and State aforesaid, and do covenant each with the other, that we will in all things faithfully keep, observe and abide by the decision and award that they may make in writing under their hands in the premises, ready to be delivered; and it is further agreed that the party who shall fail to keep, abide by and observe the decision and award, that shall be made according to the foregoing submission, will pay to the other the
(543) sum of one thousand dollars, as liquidated, fixed and settled damages.

Witness our hands and seals the 9th of May, 1867."

[Signed.] J. A. HENDERSON, [SEAL.]
P. CANSLER, [SEAL.]

[Witness.]
W. M. ABERNATHY.

The plaintiff proved the execution of said bond, by the subscribing witness.

He next offered and proved the execution of the award made in pursuance of said bond, which is as follows:

"NORTH CAROLINA,

GASTON COUNTY.

"Know all men by these presents that we, D. A. Lowe and John Tate, to whom was submitted as arbitrators in the matter in controversy existing between J. A. Henderson and Peter Cansler, both of Gaston County and State aforesaid, as by the condition of their respective bonds of submission, executed by said parties respectively, each unto the other bearing date the 9th day of May, 1867, more fully appears."

"Now, therefore know ye, that we, the arbitrators mentioned in said bond having been first duly sworn according to law, and having heard the proofs and allegations of the parties, and examined the matters in controversy by them submitted, do make this award in writing, that is to say: Geginning at a boxed white oak, Henderson's and Cansler's corner, now standing in the corner of the fence on the side of the hill, thence North 22 East 44 poles, to a stone; thence North 51 East 34 poles with the ditch to a willow stump, on the bank of the ditch; thence with the ditch, the natural course to the river, and thence with the centre of the ditch at the river to the largest stone near the opposite bank of the river, all the land below to be Peter Cansler's, and all above this line J. A. Henderson's."

"The costs of suit at Dallas now pending between J. A. Henderson and Peter Cansler to be paid as follows:

"The said Henderson to pay the costs of his own witnesses, and one-half of the Court costs. Peter Cansler is to pay his own (544) witnesses, and one-half of the Court costs. This 9th May, 1867."

[Signed.] JOHN TATE.

D. A. LOWE.

M. H. Hand, a surveyor, testified that the defendant had built a portion of his fence over the line, described in the award, upon the plaintiff's land; and upon cross-examination by the defendant, stated that in his opinion, the actual damage to the premises by such trespass, did not exceed five dollars.

Other evidence was offered, but unnecessary to be stated.

The plaintiff's counsel asked the Court to instruct the jury, that plaintiff was entitled to recover the full amount of the bond, as fixed, settled, and liquidated damages, and nothing less, which his Honor declined, but told the jury, that according to the conditions of the bond entered into between the parties, it operated as a penalty, and that the plaintiff could only recover such damages as he had actually sustained. Verdict for five dollars.

Rule, etc. Judgment and appeal.

Guion for plaintiff.
J. H. Wilson for defendants.

READE, J. Whether a sum, stipulated to be paid for a breach of an obligation to abide by and perform an award, is to be regarded as liquidated damages, or as a penalty, depends not so much upon the mere terms used, as upon the circumstances of each particular case, and the intention of the parties. And this is the sum of all the authorities, which are abundant and familiar. Upon the supposition, that the sum mentioned in the bond in this case, was intended as liquidated damages, it would be at least doubtful, whether the plaintiff would be entitled to recover in this action; for, to entitle him to recover, he must show that the defendant refused to abide by and perform the
(545) award. Probably a bare trespass upon the premises which had been in dispute, would not be satisfactory evidence of a breach of the bond, or a failure to abide by and perform the award.

Suppose, for instance, it had been awarded that the defendant should make the plaintiff a deed to the land in dispute, and he had done so; and he had subsequently committed either a wanton or an unintentional trespass; would that have been a failure to abide by and perform the award? Certainly not. It would have been a bare trespass, unconnected with the award, just as if it had been committed upon any other land of the plaintiff's. But as the defendant has not appealed, this question is not decided.

Considering the case, as it seems to have been considered below, as involving the question whether the sum in the submission bond, is to be considered as a penalty, or as liquidated damages, we are of the opinion that it is to be considered as a penalty, and construed so as to indemnify the party against actual loss. It would shock our sense of justice, if for an unintentional injury of $5.00, as the finding of the jury shows this to have been, the defendant should be assessed damages of $1,000.

There is no error.

Per curiam.

Affirmed.

(546)

D. REDMAN ET AL v. THOMAS REDMAN ET AL.

Under the former Equity practice it was discretionary with the Chancellor to refer the issues of fact to a jury, but he could never refer them to a Master in Chancery, or a Referee or Commissioner.

Therefore it is erroneous to refer complicated questions of fact to a person designated by the Court to take the account and report to the Court.

Although the granting of an issue is a discretionary act of the Court, a mistake in the exercise of that discretion is a just ground of appeal. If an issue be refused, and the appellate Court should think that a contrary decision would have been a sounder exercise of discretion, it will correct the order of the Court below.

THIS was a Bill in Equity, filed in 1866, and returnable to Fall Term of Iredell Court, heard before *Mitchell, J.*, at Spring Term, 1871, of IREDELL Superior Court.

The plaintiffs are the legatees of H. Redman, and filed their bill against the defendants as administrators with the will annexed of H. Redman, deceased, calling upon them for an account and settlement of the estate, and specially charging them with the sum of five hundred dollars in gold and silver, as the property of their testator, which came to the hands of the defendant, Thomas Redman, and was claimed by him as his own.

The other administrators do not answer. Thomas Redman alone answers, and claims the $500 as his own. All the defendants submit to an account as prayed for. The depositions of a large number of witnesses were taken, as to whether the $500 was the property of the testator, or of the defendant Thomas.

At Fall Term, 1870, the case was referred to M. L. McCorkle, Esq., as Commissioner, to take and state an account, and report to the next Term of the Court. At Spring Term, 1871, Mr. McCorkle made a report which did not embrace the accounts of the whole estate,
but reported his finding on the evidence as to the ownership of (547) the $500.

To this report, exceptions were filed by the defendant, Thos. Redman. This report was set aside, and his Honor directed that it should be referred back to Mr. McCorkle, to state the account and report, etc.

Whereupon it was moved by the defendant, Thomas Redman, for reasons set forth in an affidavit, that the Court order an issue to be submitted to a jury, as to the ownership of the $500, which was objected to by all the other parties, and refused by the Court, from which the defendant Thomas, appealed.

W. P. Caldwell, Armfield and Blackmer & McCorkle for complainants.

Bailey for defendant.

The case having been commenced under the old system, it is submitted should be governed by the old Equity practice, and under that, "A reference was never made to establish a fact, put in issue by the pleadings, but always relates to some matter supplemental to the relief granted at the hearing." *Lunsford v. Bostion,* 16 N.C. 483.

When replication is filed to an answer, the complainant may have the opinion of a jury upon the facts in issue. *Marshall v. Marshall,* 2 C. L. R. 435.

Any fact stated in the bill and denied in the answer, may be inquired into, if required, and the Court will not refuse to submit it as an issue to the jury. *Smith v. Bowen,* 3 N.C. 296, 482.

So on a direct conflict of testimony, the Supreme Court will direct feigned issues. *Witherspoon v. Dula,* 22 N.C. 279.

And on a bill to set aside a deed as a forgery, and where the Court entertained no doubt of its having been forged, yet, the defen-
(548) dant was held entitled to have the question tried by a jury. *Cooper v. Cooper,* 17 N.C. 298.

Additional cases, *Arnsworthy v. Cheshire,* 17 N.C. 456.

DICK, J. This is a suit in equity, commenced before the adoption of the C. C. P., and is governed by the rules of pleading and procedure in Courts of Equity. When facts are presented by the pleadings and proofs, which are controverted and material, and the evidence is unsatisfactory or contradictory, a Chancellor usually directs issues to be submitted to a jury in a Court of Common Law.

The granting of an issue is discretionary with the Court; but in the exercise of a sound discretion, and upon timely application made by either party, the Chancellor ought to refer all questions of fact, which are rendered doubtful, by a conflict in the evidence taken in the cause.

In such cases, the Chancellor may decide the question himself; or he may direct proper issues to be tried by a jury; but he cannot refer them to a Master in chancery, or a referee, or commissioner.

The Master's office is a branch of the Court of Equity; and a reference to the Master is generally made for one of the three following purposes:

1. For the protection of absent parties, against the possible neglect, or malfeasance of the litigants.

2. For the more effectual working out of details, which the Judge, sitting in Court, is unable to investigate.

3. For supplying defects or failures in evidence. Adams' Eq. 379.

The business of the Master is to assist and enlighten the Court; but he cannot decide material questions of fact, which are controverted in the pleadings and proofs, and which determine the rights of the litigant parties involved in the cause. Such matters belong to the high prerogative jurisdiction of the Chancellor. In many of the United States, the discretionary power of Courts of Equity, in (549) determining controverted questions of fact, is greatly abridged by constitutional and statutory provisions, which require such questions to be submitted to a jury.

This power of Courts of Equity under our old system, was not restricted, but existed to the same extent, as in the Court of Chancery in England. There are many cases where a Court is more competent to decide questions of fact than a jury; as for instance, where the questions entirely depend upon conflicting documents. There are also cases where the weight of the testimony is so manifest and satisfactory, that the Chancellor needs nothing to enlighten his conscience. But the jury is the most appropriate tribunal when there is contradictory evidence, between persons of equal credit, who have had equal opportunities of information, and the evidence is so equally balanced on both sides, that it becomes doubtful which scale predominates, and the matter may be determined by the conduct and testimony of the witnesses under a rigid cross examination.

Although the granting of an issue is a discretionary act of the Court, a mistake in the exercise of that discretion is a just ground of appeal; and if an issue be refused, and the appellate Court should think that a contrary decision would have been a sounder exercise of discretion, it will rectify the order of the Court below accordingly. 2 Daniel, Ch. Pr. 1288. *Townsend v. Graves,* 3 Paige, 457.

In the case before us, his Honor erred in referring a controverted and material question of fact, to a commissioner, for determination.

We think upon our examination of the proofs, that the matter of fact in controversy, is rendered so doubtful, that his Honor in the exercise of a sound legal discretion, ought, upon the application of the defendant, Thomas Redman, to have directed issues, submitting the questions of fact to a jury.

There was error; and this opinion will be certified, that proper (550) proceedings may be had in the cause.

Per curiam.

Error.

Cited: Moye v. Cogdell, 66 N.C. 405; *Isler v. Murphy,* 71 N.C. 438.

JAMES PACE v. DAVID G. ROBERTSON, JUN., ET AL.

An endorser who pays off and discharges the note of his principal can only recover from the latter the amount actually paid by him.

THIS was a civil action tried before *Tourgee, J.,* at Spring Term, 1871, of CHATHAM Superior Court.

The action was brought upon a promissory note payable to T. S. Lutterloh for $699, negotiable and payable at the Branch Bank of Cape Fear in Fayetteville, at the Bank of Fayetteville, or at the Bank of Clarendon at the option of the holder, dated Feb. 26th, 1861, and payable eighty-eight days after date.

The summons in this case issued the 6th day of September, 1870, and a short time prior thereto, Lutterloh endorsed said note without recourse to the plaintiff for value.

The note sued on was given in renewal of a former note which had been discounted by the Bank of Clarendon, on which T. S. Lutterloh was an endorser, and he was also an endorser of the note sued on in this action.

In January, 1866, the note in controversy, was paid off by the said Lutterloh voluntarily to the Bank of Clarendon, without the knowledge of the defendants. That said payment was made in bills of the Bank of Clarendon, worth about five cents in the dollar. That prior to the indorsement of said note to the plaintiff, the defendants owned bills of the Bank of Clarendon sufficient in amount to pay off, and discharge said note, and interest, and tendered the same to Lutter- (551) loh and the plaintiff, which they refused to accept, whereupon

they produced said bills and claimed them as a set off in this action.

His Honor instructed the jury that upon the evidence, the plaintiff was entitled to recover the full amount of the note and interest, to which defendant excepted.

Verdict for amount of note and interest. Rule, etc. Judgment, and appeal.

Phillips & Merrimon and Headen for plaintiff.
Manning for defendants.

READE, J. The single question necessary to be decided, is, whether Lutterloh was entitled to recover of the defendants, more than the value of what he paid, as endorser, for them? We are of the opinion that he was not.

It was the privilege of the defendants, under an act of the Assembly to that effect, to pay off the note in bank, with the bills of the bank; and Lutterloh deprived them of that privilege, by officiously paying off the note, in the depreciated bills of the bank, worth some five or six cents in the dollar.

To allow Lutterloh, or his assignee, the plaintiff, to recover the full amount of the note in par funds, would be to allow a surety to speculate upon the principal; for which, we know no authority.

There is error.

Per curiam.

Venire de novo.

Cited: S. v. Freeman, 216 N.C. 161.

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(552)

MIXER, WHITMAN & CO. v. THE EXCELSIOR OIL AND GUANO COMPANY.

The defendant is a corporation, created by the laws of the State of Rhode Island, did business in this State, and owned property here. Within six weeks after a warrant of attachment had been executed on the estate of defendant situate in this State, it was declared a bankrupt on its own petition by the District Court of the United States for the District of Rhode Island, and a deed of assignment of all the estate of defendant was made to the assignee.

Held, (1.) That the warrant of attachment, although executed on the estate of defendant is but *mesne process*.

(2.) That the effect of the appointment of the assignee was to vest the entire estate of the defendant in such assignee, and that the order for the dissolution of the warrant of attachment, and the restitution of the estate of defendant to the assignee, was proper.

MOTION to dissolve an attachment under the Bankrupt Act of Congress heard before *Watts, J.*, at Spring Term, 1871, of CRAVEN Superior Court.

The defendant is a foreign corporation created by and under the laws of Rhode Island. It did business and owned property in the counties of Craven and Carteret in this State.

The plaintiffs are non-residents. They commenced suit against the defendant by summons, and a warrant of attachment on the 23d day of February, 1870, which was at that time executed on the estate of defendants.

On the 3d day of April, 1870, the defendant filed its petition in the District Court of the United States for the District of Rhode Island, praying that it might be adjudged a bankrupt, and on the 8th day of April, 1870, it was duly adjudged a bankrupt, and thereafter a deed of assignment was made by the Court of all the estate of defendant to Samuel Peckham, as assignee, who duly qualified as such assignee, and makes this motion as such.

His Honor upon consideration of the foregoing facts, dissolv-
(553) ed the warrant of attachment against the estate of the defendant, and ordered the sheriff of Craven county to return to the assignee, Peckham all the property he had taken under the same, from which, the plaintiffs appealed.

Manly & Haughton for the plaintiffs.
Lehman for the assignee of defendants.

RODMAN, J. The Bankrupt Act of the 2d of March, 1867, sec. 14, enacts: That the appointment of an assignee in bankruptcy shall vest in such assignee, by operation of law, the title to all the property and estate, both real and personal of the bankrupt, "although the same is *then attached on mesne process*, as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings," etc.

It is objected that the adjudication of the bankruptcy of the defendant in the present case, and the appointment of an assignee, should not be allowed to have the effect of dissolving the attachment, because:

MIXER *v.* OIL COMPANY.

1. The adjudication and appointment by a District Court of the United States for the District of Rhode Island, cannot have any effect in North Carolina.

2. The law of North Carolina gives to the attaching creditor a lien which is protected under the bankrupt act.

1. It is true that the District Court for Rhode Island, has no means of enforcing upon a Superior Court of North Carolina, a compliance with the act of Congress, or with the orders of the District Court. If the plaintiffs in the present action resided within the District of Rhode Island, the District Court could enforce its orders by process *in personam* against them. As they reside beyond the jurisdiction of the District Court, that means is not open. But every Court of the State of North Carolina, owes obedience to an Act of Congress, concerning a matter within the power of Congress, (as a bankrupt law confessedly is,) as fully as a Court of the United States does. Any (554) contumacious attempt to evade such obligation, would be defeated finally upon well recognized principles.

The District Court of Rhode Island, having jurisdiction over the person of the present defendant, and having adjudged it a bankrupt, no Court of North Carolina, can rightfully dispute such adjudication; and the legal consequences must be submitted to.

We consider the adjudication of the District Court of Rhode Island, as equal in all respects, for the present motion, to a similar adjudication by a District Court of the United States, for the District of North Carolina.

2. Does the act of Congress require the discharge of an attachment, such as this? By its express words it does. And we think Congress had a right so to enact.

An attachment under the C. C. P. of North Carolina, is prior to final judgment; if the plaintiff fails to recover, it is gone; it is therefore in its nature *mesne process*. By the adjudication of the bankruptcy of the defendant, the priority of the attaching creditor is lost; the property attached is mingled with the general fund of the bankrupt. The creditor may prove and come in for his share.

If the bankrupt shall obtain his discharge, the creditor's action is forever gone, under sec. 21, except for certain purposes, not material to be noticed at present. If he shall fail to obtain his discharge, or to use due diligence for that end, the creditor may proceed to judgment.

The case of *Carr v. Fearington*, 63 N.C. 560, to which we were referred, went upon the ground that the filing of the bill, was made by

the Act of Assembly, to have the effect of final process. It is distinguishable from the present case.

Per curiam.

Judgment affirmed.

Cited: Whitridge v. Taylor, 66 N.C. 275; *Ward v. Hargett,* 151 N.C. 368.

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(555)

J. M. BLACKWELL ET AL v. W. H. WILLARD ET AL.

Contracts existing between citizens and residents of the northern States and citizens of this State, prior to the commencement of the late war, were suspended during the existence of hostilities.

Where a citizen and resident of New York had a suit pending in this State previous to the late war, and during the war his debtor here pays up his indebtedness to the attorney or agent of such non-resident: *Held,* that such action was void, and that the relation of attorney and client was terminated by the war.

Any securities held by a citizen and resident of New York previous to the late war, upon persons resident in this State, could not be extinguished *durante bello,* either through the agency of the Courts here, or through the former agents and attorneys of such non-resident.

Therefore, where a debtor to a citizen or resident of New York paid off said claim to a Clerk and Master here in Confederate currency before such currency had depreciated to any extent, such payment is a nullity.

CIVIL action tried before *Jones, J.,* at Spring Term, 1871, of BEAUFORT Superior Court.

The facts of this case sufficiently appear in the opinion of the Court.

Fowle for plaintiff.
Warren & Carter for defendants.

DICK, J. Every material allegation in the complaint, not controverted by the answer, shall for the purposes of the action be taken as true. C. C. P. sec. 137.

All the allegations in the complaint which are admitted in the answer, are considered as part of the answer in determining the matters in controversy.

In this case there is a demurrer to the answer, and we have to consider, whether the facts thus admitted, are sufficient to determine the rights of the parties.

Certain property belonging to the plaintiffs, was sold under a decree of the Court of Equity for Beaufort County, made at Spring Term, 1860. The sale was made by John A. Stanly, Clerk and (556) Master of said Court; and the defendant, William H. Willard, became the purchaser of part of said property, and executed the four notes with the sureties as set forth in the pleadings. The sale was made on the 8th day of November, 1860, and the notes were payable at 6, 12, 18, and 24 months from that date. The sale was duly confirmed by said Court of Equity, and the Master was directed to collect the purchase money, when due, and hold the same subject to the order of Court.

At the Fall Term, 1861, the following order was made:

"In this cause, it is ordered by the Court, that the Master suspend the collection of the purchase money, as long as in his opinion the same continues solvent, with authority to receive payment of such bonds as the makers thereof may desire to pay."

The first note was paid by the defendant, Willard, to John A. Stanly, Clerk and Master, on the 2d day of January, 1862, by a check on the Bank of Cape Fear; and the other notes were paid at subsequent periods in that year, in currency, which had not materially depreciated.

It is also admitted, that said payments were made in good faith, and without any intention to defraud the plaintiffs.

The plaintiffs at the time of the sale of said property, and the collection of said notes, were citizens and residents of the State of New York; and said payments were received by the Clerk and Master, without their consent. The said suit in Equity, was pending at the commencement of the late war; and the plaintiffs, as citizens of the United States, were alien enemies, in the contemplation of the laws of the Confederate States.

One of the important consequences of a state of war, is the absolute interruption of all commercial intercourse and dealing between the subjects of the two countries. A non-intercourse Act was passed by Congress, on the 13th day of July, 1861, (12 U. S. Stat. at Large (557) 257,) interdicting all commercial intercourse between citizens of the United States and citizens of the insurrectionary States.

The plaintiffs could not have commenced or prosecuted a suit in our Courts, as then constituted, for their alienage could have been pleaded successfully in abatement of the action. 1 Saunders Pl. 86. Contracts existing prior to the war, were not extinguished; but the remedy only

was suspended; and this from the inability of a citizen of the United States, to sue in the Courts of an insurrectionary State, or to sustain a *persona standi in judicio.* 4 Bouv. Inst. 291.

The plaintiffs' said suit in Equity was pending at the commencement of the war; and thereupon their rights of action to collect or secure their debts, become suspended. As they could not assert their rights in the Court; they ought not to be prejudiced by the acts of adverse parties, or the officers of the Court. The suit might have been abated, upon the plea of alienage put in by the defendants; but their rights of property and the right of action, would not thereby have been extinguished and defeated. Among the civilized nations of the present day, the principle is well established, and generally observed, that war ought not to interfere with the property of the private citizens of an enemy's country, unless upon urgent necessity; and they ought not to be deprived of any securities which they held for their debts, which might be available upon a return of peace. Public policy requires non-intercourse laws to be enacted and strictly observed; but laws confiscating the property of the private citizens of an enemy's country, are justly odious. These humane and enlightened principles are fully recognized by the Courts of this country, and are founded upon the common law, and the modern laws of nations. 1 Kent. 63.

The relations between the plaintiffs and their counsel, in said suit in Equity, were terminated by the war; and the steps afterwards
(558) taken in the cause did not affect them. They had a good claim against the defendants before the war began; their remedy was only suspended, and was revived upon the return of peace. *Ex parte Brass Maker,* 14 Vesey, 71. *Bell v. Chapman,* 10 Johnson 183. *Bradwell v. Weeks,* 13 Johnson 1.

We are of opinion that the order made in the Court of Equity, for Beaufort County, at Fall Term, 1861, and the payments received by the Clerk and Master during the war, from the defendant, Willard, constitute no bar to the claims of the plaintiffs in the present action.

There is no error in the ruling of his Honor; the demurrer is sustained, and the judgment in the Court below is affirmed.

Per curiam.

Judgment affirmed.

NOTE.—Justice Rodman did not sit in this case, as he was counsel in the Court below.

Cited: Justice v. Hamilton, 67 N.C. 112; *Elliott v. Higgins,* 83 N.C. 461; *Erickson v. Starling,* 235 N.C. 656.

STATE EX REL A. McINTYRE v. A. H. MERRITT ET AL.

A Clerk and Master who failed to issue an execution based upon a decree obtained in 1866, until 1868, when the defendant had become insolvent, is liable in damages for whatever sum the plaintiff can show he has sustained by such *non-feasance*.

CIVIL action tried before *Tourgee, J.*, at Spring Term, 1871, of CHATHAM Superior Court.

The action was brought upon the official bond of the defendant Merritt, as Clerk and Master for Chatham County. The plaintiff alleged in his complaint that at Spring Term, 1866, of the Court (559) of Equity for Chatham County, he obtained a decree against one G. B. Guthrie for $417, with interest from September, 1862. That defendant was then, and continued to be till the office was abolished, Clerk and Master in and for said county, and the other defendants are the sureties on his bond. That the defendant was requested to issue an execution against the said Guthrie for the enforcement of said decree, which he neglected to do until the 14th July, 1868, when said decree was dormant. That the said Guthrie, from the rendition and enrolling of said decree to the summer of 1868, was seized and possessed of a large amount of real and personal estate out of which the whole amount of money due the relator could have been realized had the defendant issued an execution. That in the summer of 1868, Guthrie was adjudged a bankrupt upon his own petition, and that relator has never realized anything from said estate, nor can he ever do so, as the estate was wholly insolvent. Whereupon the relator demands judgment, etc.

The defendants demurred to the complaint, and assigned as a cause therefor that it "does not state facts constituting a cause of action against them warranting the prayer for judgment therein contained."

His Honor overruled the demurrer, and gave judgment against the defendants for the penalty of the bond, to be discharged upon the payment of $604, with interest thereon, until paid. The defendants appealed.

Manning for relator.
Phillips & Merrimon for defendants.

DICK, J. The decree mentioned in this case, was obtained by the plaintiff, at Spring Term, 1866, of the Court of Equity for Chatham County; and it was the duty of the present defendant, as Clerk and Master of said Court, to have issued an execution as provided by law. Rec. Code, ch. 45, sec. 29; ch. 32, sec. 4; ch. 20, sec. 2. (560)

As the defendant failed in the performance of this official duty, he became liable for any injury thereby sustained by the plaintiff.

The defendant is not relieved by the ordinance of the 23rd of June, 1866, as his liability accrued before the passage of said ordinance. *Badham v. Jones,* 64 N.C. 655.

There is no error in the ruling of his Honor, and the judgment is affirmed.

Per curiam.

Judgment affirmed.

Cited: Bank v. Bobbitt, 111 N.C. 197.

BRYANT D. AUSTIN v. MANOAH HELMS, ET AL.

It is not necessary that all the Commissioners appointed under the Act of April, 1869, chap. 158, entitled "An Act relating to special procedure in cases of mills," should sign the report required to be made, a majority being sufficient.

SPECIAL proceedings to recover damages for the ponding back water on the plaintiff's lands, so as to obstruct the mill wheels of the plaintiff, on an appeal from the Superior Court of Union County, tried before *Buxton, J.,* at Spring Term, 1871, of UNION Superior Court.

After the coming in of the answer of the defendants, the Clerk of the Superior Court appointed one commissioner, and the plaintiff and defendants respectively appointed each a commissioner, to assess the damage, if any, in accordance with the provisions of chap. 158, Acts of 1868-'69.

The Commissioners after due notice to the parties, met upon the premises and heard evidence from both plaintiff and defendants,
(561) and made their report to the Clerk of the Superior Court. The defendants excepted to said report:

1. In that the witnesses examined in the case before the Commissioners, were sworn by W. H. Simpson, Esq., one of the plaintiff's attorneys.

2. In that the evidence adduced in the case was not reduced to writing.

3. Because the report does not show that the Commissioners were sworn.

4. Because the report does not show that the witnesses were sworn.

6. Because one of the Commissioners, H. M. Houston, has not concurred in the report, and has refused to sign the same.

7. Because the Commissioners refused to admit evidence offered by the defendants, to contradict the material evidence of one William A. Gaddy, a witness, examined by the plaintiff.

8. In that the Commissioners declined to examine the parties to the proceeding.

The Clerk overruled all the exceptions of the defendants, and approved the report of the Commissioners, from which the defendants appealed to the Superior Court, where his Honor, after argument, decided as follows:

It is considered that Exception 1 be *overruled,* (1.) Because as the law stood at the time of said examination, an Attorney at Law might hold a magistrate's commission. (2.) The Attorney referred to, took no part in the examination of the witnesses, nor in the trial before the Commissioners, but merely swore the witnesses in their presence, and at their request.

2d Exception *overruled.* Because it was not necessary that the evidence should be reduced to writing, nor is there any law requiring it.

3d Exception *overruled.* Because the proof is, and the Court so finds, that the Commissioners were all sworn, and the Court under the authority of law, relating to special proceedings, chap. 93, sec. 7, Acts of 1868-'69, directs the report of the Commissioners to (562) be amended by supplying omissions.

4th Exception *overruled.* For reason assigned in overruling Exception 3.

5th Exception withdrawn.

6th Exception *overruled.* Because the Court considers the report of the majority of the Commissioners, as the report of the Commissioners. Rev. Code, chap. 108, sec. 2.

7th Exception *overruled.* Because the proof is, and the Court so finds, that the evidence offered to contradict the statement of one Wm. A. Gaddy, was offered, before Gaddy was offered as a witness, and was not renewed after Gaddy was examined.

8th Exception *overruled.* Because the proof is, and the Court so finds, that neither of the parties proposed either to examine each other, or to be examined.

It is further considered by the Court, that the reports of the Commissioners awarding, etc., be affirmed, etc. From which the defendants appealed.

J. H. Wilson for plaintiff.
Ashe for defendants.

DICK, J. We have considered the various exceptions filed by the defendants, and concur in the opinion of his Honor.

The 6th exception was the only one insisted upon by the counsel in this Court. Under the Act of 1868-'69, a person injured by the erection of a public mill, is entitled to have his damages assessed by three Commissioners, appointed in the manner prescribed in said Act.

There is no provision in the Act requiring all the Commissioners to concur in the report; and the action of a majority is sufficient, as in other cases, where three or more public officers, or other persons are entrusted with the exercise of joint authority. Rev. Code, chap. 102, sec. 2.

Per curiam.

Judgment affirmed.

Cited: Ballard v. Charlotte, 235 N.C. 488.

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(563)

ELIZABETH JENKINS, ADM'X. OF WM. JENKINS v. THE NORTH CAROLINA ORE DRESSING COMPANY.

Whatever is alleged in the complaint and not denied in the answer need not be proved.

It is discretionary with the Court to stop counsel at the time, who are making improper remarks to the jury, or to wait and correct the error in the charge.

Where counsel *grossly* abuses his privilege whilst addressing the jury to the *manifest prejudice* of the opposite party, it is the *duty* of the Court to stop him then and there; otherwise it is ground for a new trial.

Section 299, C. C. P., allowing appeals, applies only to "matters of law or legal inferences," and not to an order involving a mere discretion.

Whether a new trial ought to be granted because the verdict is against the weight of evidence, is a matter solely in the discretion of the Judge who tries the cause.

CIVIL action for services rendered the defendant, and for work and labor done by the plaintiff's intestate, tried before *Cloud, J.*, at Spring Term, 1871, of ROWAN Superior Court.

The facts in this cause, and the exceptions to the rulings of his Honor sufficiently appear in the opinion of the Court.

Blackmer & McCorkle for plaintiff.
Bailey for defendant.

READE, J. I. It is objected by the defendant that the plaintiff did not prove that the defendant was a corporate body with power to contract.

It is alleged in the complaint, and not denied in the answer, and therefore need not be proved, that the defendant is a corporation. C. C. P. sec. 127. It is in evidence that the defendant had officers and was doing the corporate business of mining, and was making contracts and performing them, and that is *prima facie*, if not conclusive, upon the defendant, that it had power to contract. (564)

II. The plaintiff offered the testimony of one Mauney, that he had been employed by Van Nest, the president of the company, to pay off the hands working for the company; that Van Nest told him to pay them off, and that he did so.

The defendant objected to this evidence. We think it was properly received. It was evidence that the defendant was holding itself out to the world as a corporation, with power to contract, etc.

III. The counsel for the plaintiff in his address to the jury, spoke of his client as a "poor widow," and of the defendant as a "wealthy corporation, attempting to cheat her out of her rights." The defendant's counsel, asked his Honor, to stop the plaintiff's counsel. His Honor did not interrupt the plaintiff's counsel at the time, but in his charge to the jury, he told them the poverty of the plaintiff had nothing to do with the case.

Zealous advocates are apt to run into improprieties; and it must generally be left to the discretion of the Judge, whether it bests comports with "decency and order," to correct the error at the time, by stopping

or reproving the counsel; or wait until he can set the matter right in his charge.

It must often happen that the Judge cannot anticipate that the counsel is going to say any thing improper; and it may be said before the Judge can prevent it, as in this case. The Judge could not know that the counsel was going to speak of his client as a "poor widow."

And then the question was, whether he was obliged to stop the counsel then and there, and reprove him, and tell the jury that they must not consider that, or whether he would wait and correct that, and all other errors, when he came to charge the jury. Ordinarily this must be left to the discretion of the Judge. But still it may be laid down as law, and not merely discretionary, that where the counsel *grossly* abuses his privilege to the manifest prejudice of the opposite (565) party, it is the *duty* of the Judge to stop him then and there. And if he fails to do so, and the impropriety is gross, it is good ground for a new trial.

In the case before us the impropriety was not gross; and it was somewhat provoked by the defendant's counsel; for he had spoken of the plaintiff's claim as "trumped up;" and in order to discredit one of her witnesses, who was also her surety, he had spoken of her poverty, etc.

It is difficult to lay down the line, further than to say, that it must ordinarily be left to the discretion of the Judge who tries the cause; and this Court will not review his discretion unless it is apparent that the impropriety of counsel was gross, and well calculated to prejudice the jury. An instance of which may be found in *State v. Williams, ante,* 505. See also, *Devries v. Phillips,* 63 N.C. 53.

IV. The defendant moved for a new trial upon the ground that the verdict was against the weight of the evidence. His Honor refused the motion.

The motion was a proper one for the consideration of his Honor.

It has always been understood to be within the province of the Judge who presides at a trial, to set aside a verdict which is *clearly* against the weight of the evidence, and grant a new trial. It is however a power which has been and ought to be cautiously and sparingly exercised. It has always been understood to be discretionary with the presiding Judge, and that the exercise of his discretion could not be reviewed in this Court. It is insisted, however, that under the C. C. P., sec. 299, an appeal does lie from the order of the Judge, allowing or refusing the motion. That section of the C. C. P., is as follows:

"An appeal may be taken from every judicial order or determination of a Judge of a Superior Court, upon or involving a matter of law or legal inference, whether made in or out of term, which affects a substantial right, claimed in any action or proceeding; (566) or which in effect determines the action and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial."

This clearly allows an appeal from an order *granting or refusing a new trial;* but still it must be an order "involving a matter of law or legal inference," and not an order involving a mere discretion. For instance, if, upon the motion for a new trial in the case before him, his Honor had said, the weight of the evidence is clearly against the verdict, and I would set the verdict aside, if I had the power, but I have no *power* to set the verdict aside for such a cause; or suppose he had said, I think the evidence sustains the verdict, but nevertheless the motion being made, I think the law compels me to set aside the verdict. In either of these cases an appeal would lie from the order, because the Judge had misconceived the *law.*

The order would involve a "question of law" as to the *power* of a Judge to set aside a verdict or to refuse a motion to set it aside. In such case this Court could review the order, and say that the Judge had the *power,* and then send back the case, for him to exercise his *discretion.* It would be strange if, after the Constitution has prohibited this Court from trying any issue of fact, we should be required by the Code to look into all the evidence, and determine whether the jury has found the facts correctly. And if we were not so prohibited, it would be almost impossible for us to do it, unless a *fac simile* of the trial could be made, not only of what the witnesses *said,* but how they *looked,* and what was their *behavior,* etc.

There is no error.

Per curiam.

Judgment affirmed.

NOTE.—Justice Boyden having been of counsel, did not sit in this case.

Cited: S. v. Williams, 65 N.C. 506; *S. v. Baker,* 69 N.C. 149; *S. v. Smith,* 75 N.C. 308; *Coble v. Coble,* 79 N.C. 592; *Cannon v. Morris,* 81 N.C. 142; *S. v. Braswell,* 82 N.C. 694; *Gay v. Nash,* 84 N.C. 335; *Goodman v. Sapp,* 102 N.C. 483; *Grant v. Gooch,* 105 N.C. 281; *S. v. Tyson,* 133 N.C. 701; *S. v. Horner,* 139 N.C. 606; *S. v. Peterson,* 149 N.C. 537;

S. v. Davenport 156 N.C. 613; *Maney v. Greenwood,* 182 N.C. 584; *S. v. Tucker,* 190 N.C. 709, 712; *Lamborn v. Hollingsworth,* 195 N.C. 353; *S. v. Beal,* 199 N.C. 304; *Conn. v. R. R.,* 201 N.C. 160; *S. v. Helms,* 218 N.C. 597; *Wells v. Clayton,* 236 N.C. 106; *S. v. Smith,* 240 N.C. 635.

(567)

A. MYERS v. J. T. HAMILTON.

A Judge of the 6th Judicial District has no power to vacate an order for claim and delivery of personal property, issuing out of a Court of the 3d Judicial District, unless he has been legally assigned to hold the Court of the County where the subject matter is pending.

MOTION to set aside an order of the Clerk of the Superior Court of Wayne County, granted in a civil action for claim and delivery of personal property, heard before *Watts, J.,* at Chambers, in WILSON County.

The plaintiff sued out process against the defendant, for claim and delivery of certain specified articles, from the Superior Court of Wayne.

The property was taken into possession by the Sheriff of Wayne County, and by him delivered to the plaintiff on the 29th of December, 1870.

On the 26th of May, 1871, after notice of the application to the plaintiff, his Honor, Judge Watts, ordered the plaintiff to re-deliver to the defendant, the goods mentioned in the proceedings, seized by the Sheriff of Wayne County, and heretofore delivered by him to the plaintiff. From which order the plaintiff appealed.

Faircloth for the plaintiff.
No counsel for the defendant.

PEARSON, C.J. It is enough to notice one of several fatal objections, to the proceeding had before his Honor, Judge Watts. He had no jurisdiction to set aside an order made in the County of Wayne. *Wood v. Morris, post,* 637.

The reasoning in support of this conclusion, assumes that Judge Watts had jurisdiction in the two counties, for which he had
(568) made an exchange with Judge Clarke, during the two weeks of the Court of each County.

This is a question about which we are not at liberty to express an opinion; and it is referred to, merely to "exclude a conclusion." The Constitution, art. 4, sec. 14, authorizes Judges to exchange Districts; it does not follow as a matter of course that Judges are thereby authorized to exchange one or two counties in their Districts, on the idea that "the greater includes the less;" for there are many grave considerations tending to a different conclusion, among others, the many difficult and perplexing questions, like the one now before us, which a splitting up of districts may give rise to.

The other branch of this section has no bearing on the question; by it, the Governor, for good reasons, "may require any Judge to hold one or more specified terms, in lieu of the Judge, in whose District they are." This has no reference to an exchange of one or more counties. There may be good reasons for requiring Judge A. to hold a special Term in a County of the District of Judge B., and no corresponding good reason for requiring Judge B. to hold a special Term in a County of the District of Judge A. So that provision does not bear upon our question.

There is error. Order appealed from reversed.

Per curiam.

Reversed.

Cited: S. v. Watson, 75 N.C. 137; *S. v. Ray,* 97 N.C. 514.

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(569)

JOSEPH K. BURKE, ASSIGNEE OF M. BROWN v. STOKELY & OLDHAM.

Where an attorney was written to by the defendant to appear in a cause then returnable to a Term of his Court in 1861, and he failed to make an appearance thereto, when a judgment by default and enquiry was obtained in 1863: *Held,* that it did not make out such a case of "mistake, inadvertence, surprise or excusable negligence," as to justify the Court in setting aside said judgment.

Where a final judgment is rendered in an action after the death of one of the defendants, it will be vacated upon motion, as it is "error in fact" to take judgment against one who is dead. The death of the defendant may be suggested, and the action proceed against the surviving defendant; and it is the business of the plaintiff to make such suggestion, but the judgment being joint, the objection may be taken by the surviving defendant.

BURKE *v.* STOKELY.

MOTION to vacate a judgment, heard before *Cloud, J.,* at Spring Term, 1871, of ROWAN Superior Court, upon the following facts:

The action was made returnable to Fall Term, 1861, of Rowan Superior Court, and judgment by default and enquiry was rendered at Fall Term, 1863.

It appeared from the evidence that the defendants wrote to the late N. N. Fleming, then an attorney of the Salisbury bar, and employed him to plead to the suit, stating that they had a meritorious defence. There was no evidence to show whether Mr. Fleming ever received this letter or not, but at all events he entered no appearance for defendants.

It further appeared that the defendants were not aware of the failure of Mr. Fleming to appear in the case, or of what had been done in it, until a few days before the application to vacate the judgment was made.

It also appeared that the defendants made application to va-
(570) cate the final judgment rendered in the case within one year after notice thereof, and that they had a valid and meritorious defence to the action.

The evidence also showed that at the time of the enquiry of damages and judgment thereon had, at Fall Term, 1869, the defendant Stokely was dead, but which fact did not then appear. That the letter retaining Mr. Fleming was sent by mail, and that the defendants received no reply thereto.

His Honor denied the motion, and the defendants appealed.

R. A. Caldwell for the plaintiff.
Fowle and Bailey for the defendants.

1. The defendant, Stokely, having died after judgment by default and enquiry, the execution of the enquiry and judgment thereon was irregular, and contrary to the course of the Court. *Colson v. Wade,* 5 N.C. 43.

For such irregularity, a writ of error *coram nobis* was the remedy under the old system. *Latham v. Hodge,* 35 N.C. 267. Writs of error being abolished by the C. C. P., sec. 296, we submit that the remedy by notice and motion is a proper substitute. *Ford v. Alexander,* 64 N.C. 69.

And as the judgment is joint, the error permeates it throughout, for to have supported error, all the plaintiffs in error should have joined, or there should have been a summons and severance which death in this case prevented.

2. Treating the judgment as regular in any respect, we submit that our case is on "all fours" with the recent case of *Griel v. Vernon, ante,* 76.

PEARSON, C.J. The motion to vacate embraced both the judgment by default and the final judgment. The attention of his Honor, seems not to have been called to this fact. We concur with him in the conclusion that the defendants do not make out a case of "mistake, inadvertance, surprise or excusable negligence." C. C. P., sec. 133. So the motion was properly refused, in respect to the judgment (571) by default; but to the final judgment, there was a further objection. It was rendered after the death of one of the defendants. At common law, this would have caused an abatement of the action. 8 and 9 Will. III, ch. 11, provides that the action shall not abate by the death of one of the defendants, but his death may be suggested, and the action proceed against the surviving defendant. It was the business of the plaintiff to make this suggestion; as it is "error in fact," to take judgment against one who is dead. *Colson v. Wade,* 5 N.C. 43. The judgment being joint, the objection may be taken by the surviving defendant, although, if he be present and take part in the "enquiry of damages," when judgment by default had been taken in the life time of his co-defendant, the Court could deprive him of this advantage, by allowing the suggestion to be entered *nunc pro tunc,* and the action to be treated as having abated in respect to the deceased party.

In our case, however, the surviving defendant took no part in the enquiry of damages; and the final judgment should be vacated, and new enquiry of damages created, at which the alleged meritorious defence may possibly be made available to some extent.

This will be certified. No costs are allowed.

Per curiam.

Judgment reversed.

Cited: Hyman v. Capehart, 79 N.C. 512; *Mebane v. Mebane,* 80 N.C. 40; *Hodgin v. Matthews,* 81 N.C. 292; *Hiatt v. Wagoner,* 82 N.C. 174; *McLean v. McLean,* 84 N.C. 368; *Henry v. Clayton,* 85 N.C. 374; *Lynn v. Lowe,* 88 N.C. 481; *Knott v. Taylor,* 99 N.C. 515; *Manning v. R. R.,* 122 N.C. 828; *Kerr v. Bank,* 205 N.C. 412.

(572)

THE STATE v. WILSON DEWER AND WILLIAM BATTLE.

Where A and B are jointly indicted with others, for wilfully setting fire to and burning a barn containing grain, and the evidence showed that A and B were not present, but were accessories before the fact: *Held*, that they could not be convicted as principals under this indictment.

The effect of the act of 1868-'69. chap. 167, entitled "an act in relation to punishments," was not to make "misdemeanors" of offences which were formerly felonies.

INDICTMENT for wilfully burning a barn containing grain, tried before *Tourgee, J.*, at Spring Term, 1871, of CHATHAM Superior Court.

The defendants with Henderson Nash, Hardy Stewart, Luke Olive and Wyatt Boylan, were jointly indicted for wilfully and feloniously setting fire to and burning a barn, containing grain, the property of one James H. Mimms.

During the progress of the trial the Solicitor for the State offered to prove that the defendants Wilson W. Dewer and William Battle, advised, abetted, aided and procured their co-defendants to burn the said barn, to which defendants objected. Objection overruled, and the evidence allowed.

The defendants' counsel asked the Court to charge the jury, that although they might find the defendants, Dewer and Battle, guilty as accessories before the fact, yet they could not convict under this bill, unless they were present and participated in the burning, which instructions the Court declined to give.

Verdict guilty, as to all the defendants, except Henderson Nash.

Judgment of the Court, that the defendants Olive and Stewart be imprisoned in the Penitentiary for fifteen years, and Dewer and Battle, for twelve years at hard labor.

Appeal by the defendants, Dewer and Battle.

(573) *Attorney General for the State.*
Howze for defendants.

PEARSON, C.J. The act 1868-'9, ch. 167, entitled: "An act in relation to punishment" abolishes the punishment of death, except for the crimes of murder and rape, and substitutes imprisonment in the State's prison for life or for years, for the crime of burning a barn with grain in it; the term is not less than five, nor more than sixty years. The act also abolishes whipping and other corporeal punishments, and substitutes imprisonment in the State's prison.

To support the ruling of his Honor, it is necessary to establish the proposition, that the effect of this statute, is to make all felonies, except murder and rape, "misdemeanors." If that be so, his Honor was right, for there are no accessories before the fact in mere misdemeanors; and all are treated as principals. The statute is entitled: "An act in relation to punishment." Its object is to substitute the Penitentiary for the gallows and the whipping post, that is all. How it can have the further effect, incidentally, to change the grade of crime, we are not able to see. No authority was cited, and no reason was suggested in support of the proposition.

The prisoners might have been indicted and tried as accessories before the fact, and it was error to convict them under an indictment, in which they, with others, are all charged as principals.

Per curiam.

Judgment reversed.

Cited: S. v. Green, 119 N.C. 900; *S. v. Bryson,* 173 N.C. 806; *S. v. Surles,* 230 N.C. 278; *S. v. Jones,* 254 N.C. 453.

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(574)

F. J. HAYWOOD v. J. F. HUTCHINS, EX'R. OF JOHN HUTCHINS, DECEASED.

Where a Physician had an account running through a period of many years against A for medical services rendered, whilst the latter had an account against the Physician for agricultural products furnished him at various times, and these transactions had no business connection with each other, but were entirely independent, and mere matters of set off: *Held,* that a bill in equity could not be sustained for an account and settlement of the demands existing between the parties.

BILL in Equity, transferred from the Court in Equity of WAKE County, at Spring Term, 1868.

The complainant alleges in his bill that he has an account against the defendant's testator, John Hutchins, for medical services rendered, commencing in the year 1834, and ending in February, 1863, amounting to the sum of eleven hundred and forty-eight dollars and seventy cents. That the testator died in 1863, and at the time thereof, was entitled to several credits amounting to about two hundred and fifty dollars, which the testator had paid on said account.

The Bill further alleges, that the testator in his life time had an account current against the complainant, for hay and other agricultural products, running through a period of many years, the amount and particulars whereof, the complainant is ignorant. The said account current never having been rendered unto him by the testator in his life time, nor by the defendant, his executor, since his death. That the defendant is the executor of the said John Hutchins, and received as such a large amount of personalty more than sufficient to pay off and discharge all the indebtedness of his testator.

The prayer of the bill is, that an account may be decreed to be taken, and the balance due from the testator to the complainant in respect of his said demand may be ascertained; and that the defendant (575) may be required to admit assets of his testator to an amount sufficient for the payment of complainant's said demand, and in the event of the failure of the said defendant so to do, that an account may be taken of the assets which may, or ought to have come into the hands of the defendant, etc.

The defendant filed a demurrer to the bill of the complainant, when by consent of the parties, the cause was transferred to this Court for trial.

Fowle & Badger and Haywood for complainant.
Bragg & Strong for defendant.

DICK, J. The jurisdiction of Courts of Equity in matters of account, is assumed where the Courts of law cannot conveniently ascertain and adequately administer the rights of the parties. It is ordinarily exercised where the defendant occupies such a position or relation as requires him to keep and render an account to the plaintiff; and also where there are mutual dealings between the parties, not constituting mere matters of set off, but requiring, in order to ascertain the balance, a more complicated account, than can practically be taken at law. Adams' Equity, 222.

In our case, the plaintiff as a physician, rendered professional services to the testator of the defendant, for a long series of years, and received at various times, partial payments, which were duly credited; and there was no difficulty in striking a proper balance.

The defendant's testator was a farmer, and at various times furnished agricultural products to the plaintiff at the market prices. There was no agreement between the parties that their cross demands should constitute items of account, and the claims of the one should be in satisfaction *pro tanto* of the other. These transactions had no business

connection with each other, but were entirely independent, and constituted mere matters of set off, which could be easily ascertained and adjusted in a Court of law. (576)

In *McLin v. McNamara,* 22 N.C. 82, the transaction between the parties consisted of a continuous course of dealing in the way of trade and merchandize, and created mutual and dependent demands.

There was no necessity for the plaintiff in this case, to resort to the extraordinary jurisdiction of a Court of Equity, as his remedy at law was plain and adequate.

The bill must be dismissed.

W. D. ROSS ET AL V. HARRISON ALEXANDER.

Prior to the adoption of the C. C. P., the lien acquired by *fi. fa* expired at its return.

Therefore, judgments obtained at Spring and Fall Terms, 1869, of Guilford Superior Court, and docketed respectively during the Terms of said Court, have priority over a judgment obtained in 1867, upon which *fi. fas.* regularly issued up to Fall Term, 1868, of the Superior Court of Alamance, and no returns made thereto, at which Term the said judgment was transferred and entered on the judgment docket of Alamance Superior Court, but not docketed in Guilford County till 24th December, 1869.

MOTION for the application of certain moneys in the hands of the Sheriff of Guilford County, heard before *Tourgee, J.,* at Spring Term, 1871, of GUILFORD Superior Court.

The facts were that one W. D. Ross obtained a judgment at Spring Term, 1869, of Guilford Superior Court, against Robert D. Thorn, and had the same docketed the 1st of March, 1869. Four other judgments were rendered at the Fall Term, 1869, of said Court, (577) against the said Robert D. Thorn. James S. Scott obtained a judgment against Thorn at Spring Term, 1867, of Alamance Superior Court of law; a transcript of which said judgment was docketed in Guilford County on the 24th of December, 1869.

The Sheriff returned at Spring Term, 1869, that he had in his hands five hundred and seventy dollars arising from the sale of the property of Robert D. Thorn, having the six executions based upon the foregoing judgments, and asking the advice of the Court as to how the said money shall be applied; and thereupon, the plaintiffs, other than James S. Scott, moved the Court for the application of the money to

the payment of their executions to the exclusion, of the execution of James S. Scott.

All of the said plaintiffs were present in Court, accepted service of a rule, and consented to go into a hearing of said motions. His Honor found as a fact, that executions were regularly issued on the judgment in favor of James S. Scott, to the Sheriff of Guilford County, up to Fall Term, 1868, of the Superior Court of Alamance County, at which Term the said judgment was transferred, and entered on the judgment docket of Alamance Superior Court. The executions issued as aforesaid were returned by the Sheriff of Guilford, without a levy, and that no execution on said judgment was issued from Fall Term, 1868, to Spring Term, 1869, nor from Spring Term, 1869 to Fall Term 1869, and no transcript of said judgment was docketed in Guilford County until December 24th, 1869.

Upon the foregoing facts, his Honor adjudged that the money brought into Court be applied first to the payment of the Ross judgment, then ratably amongst the four judgments docketed on the 6th of September, 1869, and the remainder to the judgment of James S. Scott. From which order Harrison Alexander, assignee of the said scott, appealed.

(578) *Scott & Scott for appellant.*

1. Causes in law and equity shall be transferred without prejudice by reason of the change. See Constitution, Art. 4, sec. 25.

2. By Legislative construction this has been made to apply to judgments as well. See C. C. P., sec. 403, and *Johnson v. Sedberry,* 65 N.C. 1. "No lien acquired before the ratification aforesaid, shall be lost by any change of process."

3. Docketed in Guilford Superior Court December 24th, 1869. That was in time, for by sec. 255, C. C. P., executions can issue any time within three years — this section applies to existing judgments. See *Harris v. Ricks,* 63 N.C. 653. Therefore, if a year and a few days did pass, from the time execution was last returned, that did not prejudice the defendant's rights.

4. The lien of an *alias* execution relates to the teste of the original. See *Allen v. Plummer,* 63 N.C. 307.

5. The execution of the oldest teste is entitled to priority. *Dunn v. Nichols,* 63 N.C. 107.

6. Defendant's execution was in hands of Sheriff at the time of sale and for near two and a half months before. See 65 N.C. 1.

If we ought to have docketed our judgment by transcript in Guilford before others, in order to procure our lien, then the Constitution and the Code secs. 400, 403, had as well not be passed — they are valueless. Without such provisions we would have been ahead of them by that means anyhow. See rules 17 and 18, 63 N.C. 638, 639.

Dillard & Gilmer for appellees.

PEARSON, C.J. A judgment gives a lien upon all of the real property of the defendant in the County, from the time it is docketed. So the judgment owned by Alexander was properly put last in the order of payment, unless there be some ground for making an (579) exception.

On the argument, Mr. Scott relied upon the provision in regard to existing judgments. "No lien acquired before the ratification aforesaid, shall be lost by any change of process." C. C. P. sec. 403. In this instance, there was a change of process, from an *alias* and *pluries fi. fa,* and a *venditioni exponas,* which might have followed in case of a levy, to the process of taking a transcript to the County of Guilford, and having the judgment docketed, and an execution issued from that county. But the case does not come within that provision, for the party had *"acquired no lien."* The lien acquired by *fi. fa.* expires at its return, unless there be a levy, and even the lien acquired by a levy is waived by taking out an *alias fi. fa.* instead of following up the levy, by a *ven. ex.*

This fatal defect, to-wit: The want of a lien, cannot be supplied by any analogy drawn from *Johnson v. Sedberry,* 65 N.C. 1, which was relied on for that purpose.

Per curiam.

There is no error.

Cited: Pasour v. Rhyne, 82 N.C. 150.

THE STATE ON THE RELATION OF JESSE SUMNER v. JAS. M. YOUNG.

When the pleadings fail to present an issue, the only course is to strike out all the pleadings, and direct a "repleader."

When there is but one cause of action, or but one defence, a *demurrer* must cover the whole ground, otherwise it will be a nullity.

(Observations as to the proper mode of preparing pleadings.)

SUMNER *v.* YOUNG.

CIVIL action, tried before *Logan, J.*, at Special Term of BUNCOMBE Superior Court, held in January, 1871.

The relator alleged in his complaint:

(580) 1. That he was duly elected Sheriff of Buncombe County, in April, 1868, for two years from 4th August, 1870.

2. That on the 5th September, 1870, the defendant usurped the said office, and has ever since unlawfully exercised and withheld the same from relator.

Wherefore, he demanded judgment with cost:

1. That the defendant is not entitled to said office, and that he be ousted therefrom.

2. That the relator is entitled to the office and to assume the execution of the duties thereof, on taking the oath, and filing the bonds required by law.

For a second cause of action, the relator says:

1. That he was duly elected Sheriff of Buncombe County in April, 1868, for the term expiring in August, 1872.

2. That on the 5th September, 1870, the defendant usurped the said office, and has ever since unlawfully exercised the duties thereof, and withheld the same from relator.

Wherefore, he demands judgment with costs:

1. That the defendant is not entitled to said office, and that he be ousted therefrom.

2. That relator is entitled to the office, and to assume the execution of the duties of the same on taking the oath, and filing the bonds required by law.

The defendant in his answer says that he was elected Sheriff of Buncombe County in August, 1870, and "that the term of the relator was to expire or did expire by law on or before the 5th day of September, 1870, and not being versed in the law, has not sufficient information on which to form a belief, touching the points of law last aforesaid, from the advice which he has received from his counsel in this cause on whom he relies in the premises."

Article II. That he has claimed the office since 5th September, 1870, so far as the opposition of relator would permit, till the 8th day of October, 1870, when relator turned over to him the papers
(581) belonging to said office, and has since then performed the duties

thereof, but denies that he has "unlawfully exercised the same," or that he usurped the office "so far as he is advised and believes on the authority of his counsel as aforesaid."

And for a further defence to the said first cause of action, the defendant alleges:

1. That he was duly elected Sheriff of Buncombe County for the term of two years from the 1st Monday in September, 1870.

2. That in pursuance of said election, he, on the 1st Monday in September, 1870, tendered his bonds with sureties required by law before the Board of County Commissioners of Buncombe, which were approved and received by said Board, when he was duly qualified as Sheriff and inducted into office.

3. That the relator failed on the said 1st Monday in September, 1870, to make any annual returns of his said official bonds, as required by law.

4. That the relator failed to produce his receipts from the Public Treasurer, County Treasurer, or other officers, whose receipts he was required to produce to and before the said Board of Commissioners on 1st Monday in September, 1870.

5. That he failed to renew his bonds and produce said receipts, whereby relator forfeited his office, which became vacant by operation of law.

6. That on the 1st Monday in October, 1870, at a regular meeting of the Board of Commissioners of said County, the relator still failed to produce the "receipts aforesaid," to and before the said County Commissioners, as required by law.

7. That by reason of all these failures to renew the said bonds and produce the receipts, the relator forfeited the said office, and it then became vacant unless lawfully filled by the defendant.

8. That the Board of County Commissioners "for greater caution and in order that there might be an undoubtedly lawful incumbent of said office, and on account of the said failures of the (582) said Jesse Sumner, did make an order, and declare the said office vacant on the said 1st Monday in October, 1870, and did forthwith appoint a successor in the said office, and did then appoint defendant to said office, and to be Sheriff of said County."

Upon the coming in of the foregoing answer, a motion was made to "dismiss the answer," which was overruled. Then leave was given relator to *reply* or *demur*.

Relator then filed his demurrer to certain parts of the answer not necessary to notice for a proper understanding of the opinion of the Court.

Afterwards the defendant was allowed to amend his answer. The only material changes being that the amended answer avers:

(1.) That relator was a candidate for Sheriff of Buncombe in 1870, and against the defendant "until the result thereof was ascertained."

(2.) That relator did not tender his bonds before the Board of Commissioners on 1st Monday in September, 1870, as required, nor ever tender any bond except one, and that of the penal sum of $5,000.

(3.) That the order of the County Commissioners declaring the office vacant, and appointing defendant Sheriff of said County was "still in force and unreversed; and no appeal therefrom, or other proceeding to reverse or vacate the same has been had or taken."

The relator then obtained leave to file, and did file a demurrer to the amended answer, because the matter set forth in the answer marked ("1") does not contain facts sufficient to constitute a defence; to the articles marked ("2") and ("3") that they do not show facts sufficient to constitute a defence; in this, that the action, or pretended action, or judgment of said Commissioners cannot prevent or stop the plaintiff from setting up his claims to the office of sheriff of Buncombe County in this Court."

Afterwards a motion was made to have the cause tried before
(583) a jury, which motion was disallowed, when the *demurrer* was overruled, and an appeal was taken by the relator.

Phillips & Merrimon for relator.
Bailey for defendant.

PEARSON, C.J. The object of pleading is to arrive at a single, certain and material issue, either of law or fact, which is decisive of the case, and enables the Court to act intelligently in rendering judgment for the plaintiff or the defendant. In this instance there has been a signal failure; and the whole matter is left in utter confusion. Under these circumstances the only course is to direct "a repleader." All of the pleadings will be stricken out, and the parties will begin at the *summons*, and take a fresh start, with the advantage of knowing that the law is settled in regard to the tenure of office; and that the old Sheriff is entitled to hold until August, 1872, unless there has been a resignation or a forfeiture; and that the mere fact of having been a

candidate and taken his chances before the people, does not, in legal effect, amount to a resignation, forfeiture or abandonment.

So, the only matter open would seem to be, the effect of not giving the bonds, nor producing the receipts, and the action taken by the Commissioners, referred to in the answers.

The Attorneys, it is hoped, will not again be under the necessity of having an amended complaint, and an amended answer; and will avoid prolixity and confusion by not setting out a first cause of action, and a second cause of action, when really there was but one ground to proceed on; and of lengthening out the answer by a first defence and a second defence, etc.; when, really all of the allegations combined, constitute but one defence, *i. e.* a right to the office; and the *desideratum* was a legal and logical statement, numbering the several facts that constitute the defence, as recommended in the C. C. P. Above all, by avoiding the legal absurdity of demurring to one or two (584) allegations and leaving the others unanswered, or only replied to, by implication. When there is but one cause of action, or but one defence, a demurrer must cover the whole ground, or else it will be a nullity.

This novelty in pleading, we presume, is to be traced to the practice in Equity, when it was allowable, as the bill asked for *discovery,* as well as relief; but under the C. C. P. the complaint demands judgment, and does not ask for discovery.

The plaintiff should also be well advised as to how far he can demand judgment to be inducted into a public office, and for the fees and emoluments, unless he has given the bonds, or has made a tender of them, to the proper authorities, and avers in his complaint a readiness to fill the bonds, as a concurrent act with the admission into the office; so that judgment for his admission may be accompanied by an order for the reception of the bonds.

Repleader ordered.

This will be certified. Each party pays his own costs, as there is no judgment in this Court. Remanded.

Cited: Speight v. Jenkins, 99 N.C. 144; *Cowand v. Meyers,* 99 N.C. 200; *Blackmore v. Winders,* 144 N.C. 218; *Wood v. Kincaid,* 144 N.C. 392; *Moore v. Ins. Co.,* 231 N.C. 730; *Duke v. Campbell,* 233 N.C. 265.

GEORGE B. HARRIS v. BURWELL & PARHAM.

A note transferred by successive endorsements to different persons, is subject to any set-off or other defence which the maker had against any one or all of the assignees at the date of the assignment, or *before notice thereof.*

THIS was a money demand tried upon a case agreed before *Watts, J.*, at Spring Term, 1871, of GRANVILLE Superior Court.

The facts are that on the 4th September, 1866, the defendants (585) being partners in trade, executed in the partnership name of Burwell & Parham their promissory note for $1,213.51, payable on the 25th December following to P. R. Merryman. On the 1st December, 1866, the payee for value endorsed said note to one T. C. Hughes. At the time of said endorsement the defendants had paid Merryman $329; also $83.50 to be credited on said note as of the date of its maturity.

On the 20th of January, 1867, the defendants paid Hughes on said note, $280.

At the time of the transfer of said note by Merryman to Hughes, the latter was indebted to the defendants in a sum which added to the sum of $280, exceeded the balance due upon said note, but the plaintiff had no express notice of said indebtedness except for the sum of $334.96, which was due by notes executed and due 1st November, 1861.

On the 7th May, 1867, Hughes endorsed and transferred the note to the plaintiff for value.

His Honor upon consideration of the foregoing facts, being of opinion that the demands which the defendants held on Hughes were not *sets off* against the plaintiff's demand, rendered judgment for plaintiff for $636.31, from which judgment the defendants appealed.

Bragg & Strong and Young for appellants.
Rogers & Batchelor contra.

PEARSON, C.J. The case presents the question, whether a note assigned after maturity, is subject in the hands of the assignee to any set-off or other defence existing at the time of the assignment, against the assignor.

In *Neal v. Lea*, 64 N.C. 678, it is held, that by the proper construction of C. C. P., sec. 101, no collateral demand against the assignor can be set up against the assignee, and "that to make it available, the demand must have attached itself to the note in the hands of the assignor; for instance, a payment made to him not entered on the

note, or a claim, which the assignor had agreed should be taken (586) in satisfaction;" and for reasons therein set forth, this Court adopts the principle of *Borough v. Moss,* 10 B. & C., 558, (21 E. C. L. 128,) which had been departed from, by *Haywood v. McNair,* 19 N.C. 283.

Section 55, C. C. P., was not called to the attention of the Court upon the argument or the consideration of *Neal v. Lea,* and was cited for the first time, upon the argument of this case, at the last term; we find that section has a most important bearing upon the question, and is expressed in words so plain and direct, as to control the construction of section 101 — for it abrogates the principle of the common law, that a chose in action cannot be assigned — confers an unlimited right to assign "anything in action," arising out of contract, and subjects the assignee to any set-off or *other defence,* existing at the time of, or *before notice of the assignment.* The only saving, being in regard to "negotiable promissory notes and bills of exchange, transferred in good faith, and upon good consideration before due." This language is as broad as it can well be; so that a note assigned after it is due, a half dozen times, will be subject to any set-off or *other defence* that the maker had against any one or all of the assignees at the date of the assignment, or *before notice thereof.* The effect will be to put a very effectual check to the trading of notes after maturity, and to put it in the power of debtors to buy up claims against their creditors and take the control entirely in their own hands — whether this be good or bad policy is a matter, with which the Courts have no concern — "it is ours," to expound the law, not to make it, and although not very pleasant, it is our duty to correct any misapprehension, into which we fall, and to do so in plain and direct terms, and as soon as may be, after becoming satisfied of the error, in order to avoid the inconvenience that might otherwise result. *Neal v. Lea* is overruled. It may seem strange that upon the argument of *Neal v. Lea,* the 55th sec. C. C. P., should have been overlooked, both by the learned counsel of the (587) defendant, Mr. Graham, and by the Justices of the Court, but so it was. This may be accounted for by the fact, that the C. C. P., which makes an entire revolution in the mode of procedure, was then new to the profession, and by the fact that this important change not only in the mode of procedure, but in regard to a settled principle of the common law is inserted under title V, "*parties* to civil actions," and is in no wise referred to, but on the contrary, the existence of such a provision is seemingly excluded by sections 100, 101, chap. 3, Title VIII — "Pleadings in civil actions."

So we feel justified in putting the blame upon the hasty manner in which the C. C. P. was gotten up, under a necessity imposed by the Constitution, and the members of the Court think themselves fortunate in being able to say, that amid all of the *"new points"* made by so entire a change as that effected by the Constitution and by the C. C. P., and all of the "new points" growing out of the results of the late war — financial difficulty and constitutional questions — this is, so far, the only instance in which the Court has had occasion to retrace its steps; which is to be ascribed to the fact that we have felt our way cautiously, and have at all times required from the bar full argument for our assistance.

The judgment in the Superior Court is reversed, and upon the case agreed, judgment that defendants "go without day and recover costs."

Per curiam.

Judgment reversed.

NOTE.—The same principles decided in this case were enunciated by the Court at this Term in the case of *Chandler v. Hunt,* from Caswell County. Attorney General, for plaintiff. Bailey and Hill, for defendants.

Cited: Martin v. Richardson, 68 N.C. 257; *Sloan v. McDowell,* 71 N.C. 359; *Francis v. Edwards,* 77 N.C. 276; *Hill v. Shields,* 81 N.C. 253; *Capell v. Long,* 84 N.C. 20; *Bank v. Bynum,* 84 N.C. 29; *Capell v. Long,* 86 N.C. 33; *Harrison v. Bray,* 92 N.C. 490; *Spence v. Tapscott,* 93 N.C. 249; *Lewis v. Long,* 102 N.C. 208; *Adrian v. McCaskill,* 103 N.C. 186; *S. v. Hargrave,* 103 N.C. 334; *Owens v. Wright,* 161 N.C. 137; *Pickett v. Fulford,* 211 N.C. 164; *Rickman v. Holshouser,* 217 N.C. 378; *Iselin & Co. v. Saunders,* 231 N.C. 647; *Amusement Co. v. Tarkington,* 247 N.C. 452.

(588)

S. B. HYMAN, EX'R., ETC. v. JOHN DEVEREUX ET AL.

Facts which are found by a referee, and approved by the Court, are not the subject of review by this Court.

Before judgment can be given upon an injunction bond, the party alleging that he has been damnified by reason of said injunction, must establish the *quantum* of damages sustained.

HYMAN *v.* DEVEREUX.

The *quantum* of damages recoverable by a party injured under the old system, as compared with the amount under the C. C. P., discussed.

MOTION for taxing costs heard before *Watts, J.,* at Spring Term, 1871, of HALIFAX Superior Court.

The plaintiff had obtained an injunction against the defendant in a suit theretofore pending in the Superior Court of Halifax County; and afterwards in the Supreme Court of this State, vide *Hyman v. Devereux,* 63 N.C. 624, there was a judgment for a dissolution of the injunction. In the Superior Court of Halifax a motion was made that judgment be granted on the injunction bond of plaintiff for the damages sustained by the defendant, by reason of the injunction. The parties agreed that the only damages sustained are the fees paid counsel, *by reason of the injunction.* Which question was by consent of parties referred to B. F. Moore, Esq., who after examining into the facts of the case, reported that "he was unable to see from the evidence that any counsel fees had been incurred because of the issuing of the injunction in this case," and he reported that the defendant had sustained no damage by reason of the said injunction. His Honor after hearing exceptions to the report of the referee adjudged that said report be confirmed. Defendants appealed.

Conigland for plaintiff.
Walter Clarke with whom were Rogers & Batchelor for defendants.

1. Reasonable counsel fees paid to procure dissolution of an injunction should be allowed as damages against the injunction bond. *Edwards v. Bodine,* 1 Paige 223; *Coates v. Coates,* 1 Duer, (589) 644; *Wilde v. Joel,* 6 Duer 671; *Corcoran v. Judson,* 24 N.Y. 106; *Littlejohn v. Wilcox,* 2 La. Ann. 620; *Fitzpatrick v. Flagg,* 12 Abb. P. R.; *Leay v. Greenwood,* 21 Ala. 491; *Morris v. Price,* 2 Blackf. (Ind.) 457, and cases generally cited in note to Sedgwick on Damages, pp. 451-453 (5th edition;) Vorhees N.Y. Code, 408, (9th ed.,) and authorities there decided.

2. One of the grounds for injunction specified in plaintiff's brief 63 N.C. p. 624, is the provision that a mortgage should be reduced to a judgment before a sale could take place. The Court impliedly overruled that ground and defendant was entitled to have reasonable counsel fees paid by him to enable him to get a discharge from such interference with his *rights.*

3. Mr. Moore, the referee, misunderstood the ground of injunction. It was not to restrain a threatened conveyance but to restrain a sale, and *obtain* a conveyance to the plaintiffs.

4. The sureties need not have notice. *Methodist Churches v. Barker,* 4 Smith, (N.Y.) 463.

RODMAN, J. The first objection of the claim of the defendant, is that the referee, Mr. Moore, has found, as a *matter of fact,* that the fees paid to his counsel were not paid in consequence of the injunction, but to resist the claims of the plaintiff in the action generally. This finding is approved by the Judge, and is not open to review in this Court, unless we can say that his Honor erred *in law* in not holding that *all* the fees paid to counsel by the defendant in the cause were the legal and necessary consequence of the injunction, which, in this case, we could not do.

But the referee has not said that no part of the fees paid was in consequence of the injunction; probably some part was. If therefore, we were of opinion with the defendant upon his general proposition, that money paid as counsel fees could be included in the damages
(590) sustained by the injunction, it would be necessary to send the case back, in order that the amount paid for services directly connected with the dissolution of the injunction might be ascertained.

It is therefore necessary for us to examine the general proposition, and see whether there is ground in law for any claim of the sort made by the defendant.

Section 192, C. C. P., requires a Judge, before granting an injunction, to take from the party applying for it an undertaking to pay the party enjoined *"such damages as he may sustain by the injunction,"* etc. Previous to the adoption of the C. C. P., in 1868, the law of North Carolina did not recognize fees to counsel as any part of the costs of the suit. It gave to the attorney of the successful party a certain small fee, to be taxed with other specified costs, such as the fees of witnesses and of the Sheriff and Clerk of the Court, and collected from the unsuccessful party. The sum thus allowed was well known to be, in all except a few cases, much less than was necessary to procure professional assistance of any sort; and it was given to the attorney and not to the party.

But beyond this, a plaintiff who prosecuted a just demand, and a defendant who repelled an unjust one, were left without any indemnity whatever, for their necessary expenses in doing so; expenses which were always a serious deduction from a recovery, and sometimes absorbed

it altogether. Every person injured in person or property, was invited to enter the Courts of law and obtain a just redress. The professed object was not to punish the wrong doer; that was done, if the wrong amounted to a crime, by a criminal proceeding, for the benefit of the public, and from which the injured individual received no advantage. The professed object of a civil suit was to redress the injured person, to indemnify him, and put him back where he was before the wrong, at the expense of the wrong doer. Yet, when the injured person had accepted the invitation of the law, and after a jury had weighed and measured the wrong done him, and carefully and exactly estimated and valued it in money, and the Court had approved the (591) verdict, that Court was obligated to say to him: This sum which the law gives you is the exact amount to which the defendant has damaged you by his first injury; we cannot give you one cent more than will compensate you for that; the money which you have been compelled to pay to your counsel to do for you, what you are necessarily too ignorant to have done for yourself, must be deducted from that sum, every cent of which without deduction, we have just said is barely sufficient to compensate your injury; you can get back no part of it; the law does not notice any such expense as attendant on a suit in its Courts, it is *damnum absque injuria*. To the legislature of 1868 this seemed a mockery, or at best, less than full justice. Upon that view, they enacted title XII of the Code of Civil Procedure. This act abolished all fees to attorneys; it left every suitor free to bargain with counsel as he thought proper, but it took notice of the fact to which it would seem that a just law should not be blind, that a suitor in the prosecution of his suit necessarily incurs some expenses beyond the fees of his witnesses, and of the officers of the Court, and recognized the principle, that without an indemnity from those, there could be no full reparation. So it gave to the injured party, a certain sum to be paid by the wrong doer, which it was thought in most cases would be a sufficient, though a moderate indemnity, against the necessary expense of his suit. It was thought but just, that the wrong doer who had caused the expense, should bear it, rather than the innocent party.

To avoid the labor, expense and uncertainty of investigating what would be a proper indemnity in each case, the law fixed a sum which, in the average of cases, seemed just and sufficient for the purpose; in some few, it provided that the sum might be enlarged by the Judge. But it never allowed the amount for the purpose, to be measured by the sum which might have been actually paid by the party by his bargain with his counsel. To have done so, would have opened a wide door for abuse. It is this sum so provided as an indemnity, which (592)

is regarded in law as damages sustained by the wrongful bringing an action, and for the wrongful suing out an order for injunction. Fees paid to counsel beyond this, can be regarded only as a gratuity, and not as the necessary expenses of a suit or defence. Before such fees can be regarded as necessary, they must be measured by the law. In this case the fees paid admittedly transcend the fixed limits, and they have not been passed on by the Court, under any rule allowing such an adjudication. The claim of the defendant is, to be allowed any sum, which in his judgment as to what was for his interest, he has paid, however unreasonable it may be. No such claim can be allowed.

The defendant is entitled to what the law has fixed as an indemnity; but he does not ask this, and has probably heretofore received it.

There is no error in the record.

Per curiam.

Judgment affirmed.

Cited: Dawson v. Hartsfield, 79 N.C. 337; *Cooper v. Middleton,* 94 N.C. 94; *Midgett v. Vann,* 158 N.C. 130; *Smith v. Bonding Co.,* 160 N.C. 576; *Roe v. Journigan,* 181 N.C. 183; *Parker v. Realty Co.,* 195 N.C. 646; *In re Will of Howell,* 204 N.C. 438; *Crutchfield v. Foster,* 214 N.C. 553; *Trust Co. v. Schneider,* 235 N.C. 454.

STATE v. JOHN TURNER.

A person found in possession of goods recently stolen, is presumed in law to be the thief; and it is not necessary for the State to show that any other suspicious circumstances accompanied such possession.

The defendant may rebut this presumption; but if he does not show that he received the goods honestly, it is the duty of a jury to convict him of larceny.

THE defendant was indicted for larceny, in stealing an ox, the property of James Banks, tried before *Pool, J.,* at Spring Term, 1871, of PASQUOTANK Superior Court.

The evidence showed that the defendant, on Thursday after-
(593) noon, was seen near the premises of James Banks, the prosecutor; that on Thursday night, Banks put his ox in a stall and securely shut him up; that late that night, the bars were removed, and the ox stolen; that on the following Friday morning, the defendant

was seen in possession of the ox, on his way to Norfolk; that the ox was found in the possession of the defendant in Norfolk and identified.

His Honor charged the jury, that if stolen property be found in possession of a person, shortly after the theft has been committed, and under suspicious circumstances, the person in whose possession it is found, is presumed to be the thief until the contrary be shown.

To this charge the defendant excepted. Exception overruled. There was a verdict of guilty, and from the judgment thereon, the defendant appealed.

Attorney General for the State.
No counsel for the defendant.

DICK, J. Where a person is found in possession of goods which have recently been stolen, there is a presumption of law that he is guilty of the theft; and it is not necessary for the State to show that any other suspicious circumstances accompanied such possession.

This presumption may be rebutted by the defendant, but if he does not satisfactorily account for such possession, by showing that he received the goods honestly, a jury ought to convict him of larceny. Roscoe 18; *State v. Williams,* 31 N.C. 140.

The charge of his Honor in this case, was more liberal than the law allows toward the defendant; and he has no right to complain.

Per curiam.

Judgment affirmed.

Cited: S. v. McRae, 120 N.C. 609; *S. v. Williams,* 219 N.C. 367.

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(594)

BASCOMB COVINGTON, JOHN P. COVINGTON, BY THEIR GUARDIAN, E. P. COVINGTON, AND VIRGINIA COVINGTON v. T. C. LEAK & H. C. WALL, EX'RS. OF MIAL WALL.

Where a party has it in his power to establish the truth of any disputed fact, it is his duty to do so.

A Guardian who took a note in October, 1860, with two sureties who were abundantly good, and continued so during the war, cannot be held responsible to his wards, by reason of the parties to said note having become insolvent by the results of the war.

COVINGTON *v.* LEAK.

A Guardian who receives a note for $1,100, without taking any security, is guilty of laches, and is accountable to his wards for the amount of such note.

It is not unreasonable to allow five per cent, commissions to a Guardian on his receipts and disbursements, which embraced a large number of receipts and vouchers, commencing in 1857 and ending in May, 1871.

A Guardian is accountable to his wards for a sum of money in the hands of an Administrator appointed in 1857, if such Administrator or his sureties were solvent at the time when the funds ought have been paid to the Guardian, or within the time thereafter, when a judgment could have been obtanied upon such administration bond.

APPEAL, from the ruling of the Clerk of the Superior Court of Richmond County, heard before *Buxton, J.*, at Spring Term, 1871, of RICHMOND Superior Court.

This was a special proceeding instituted before the Clerk of the Superior Court of Richmond County, for an account and settlement of the estate of the plaintiffs Bascomb, John P. and Virginia Covington, who were formerly wards of Mial Wall, deceased, and the defendants, who are his executors. A report of said estate was taken by the said Clerk, and exceptions filed both by the plaintiffs and defendants, and an appeal taken to the Superior Court.

His Honor found the following facts, as applicable to the exceptions made by the defendants to the account of the Clerk:

(595) 1st. Exception, objecting to the charge against them of $3,830.63, with compound interest from 20th October, 1863, is sustained; it appearing that James A. Covington who administered in 1857 upon the estate of John P. Covington, deceased, the father of the plaintiffs, Bascomb, John P. and Virginia Covington, filed his petition for a settlement in the County Court of Richmond, in 1863, in which proceeding there was a balance ascertained and reported against him on 20th October, 1863, for $3,830.63, and in favor of Mial Wall as guardian of the plaintiffs. This sum was tendered by James A. Covington on that day, in Confederate currency, to Wall who declined to receive it, not so much on account of the character of the money, but because the funds were received by John P. Covington before the late war and in good money.

Under all the circumstances His Honor thought there had not been a want of ordinary diligence necessary to charge the estate of defendant's testator.

Exception 2, objecting to the charge against them of a bond for $150, on E. P. Covington and James A. Covington, dated 12th January,

1859, from date, is overruled. The rent of land for 1859 is entered in the account as a separate item from the bond dated 12th January, 1859. There is no satisfactory evidence that the consideration of the bond was the rent of the land. The impression of the security is offered as proof of the fact. The Court thinks there ought to have been posi- 1859, and the other due 1st January, 1860, when dated does not appear. two bonds charged by the Clerk of $150 each, one dated 12th January,

Exception 3, to the ruling out as a credit a note for $1,337.46, payable to the defendants' testator as guardian of the plaintiffs against D. B. Nicholson, J. Luther and R. T. Slute, dated October 17th, 1860, which the defendants filed and offered to turn over as the property of the plaintiffs, is sustained.

This note appears to have been abundantly good when taken, continued good during the war, and the makers became insolvent by the results of the war. (596)

Exception 4, to the ruling out as a credit a note under seal for $32.50, payable to defendants' testator as guardian of plaintiffs against W. D. Dawkins and Mial T. Long, payable January 1, 1861, is sustained for reasons given under exception 3.

Exceptions 5, 6 and 7, sustained for reasons assigned under preceding exceptions.

Exception 8, to the ruling out as a credit, a note payable to the defendants' testator, as guardian of plaintiffs against J. C. Ellerbee for $1,286.14, due September 28th, 1860, which defendants filed and offered to turn over as the property of the wards, is overruled. It appearing that this note was received without security, and the guardian failed to have it renewed with security, his Honor thought that defendants' testator thereby guaranteed it himself, and his estate ought to make it good.

Exception 9, to all the rulings and to the whole account stated, as being unauthorized, and as not having been taken in the manner prescribed by law, is overruled, for the reasons that the allegations upon which this exception is based, are not sustained by the facts of the case.

The plaintiffs filed an exception to the report of the Clerk, for that he allowed the defendants 5 per cent. commissions on receipts and disbursements throughout the whole account, commencing January, 1857, and ending May 8th, 1871.

To this exception, his Honor thought that under all the circumstances the commissions allowed were not unreasonable, and therefore overruled said exception.

From the rulings of his Honor, the plaintiffs and defendants appealed.

Ashe for plaintiffs.
Leitch for defendants.

RODMAN, J. Exceptions of defendants:

(597) 1. That their testator is charged with $3,830.80 and interest, being the amount found owing to their testator, as guardian, by James A. Covington, administrator of John P. Covington, by a report made by the County Court of Richmond County, on the 20th of October, 1863, by commissioners appointed by that Court to state an account.

His Honor, the Judge, below sustains this exception, and finds as facts, that on the 20th of October, 1863, the said James, administrator of John P. Covington, tendered the sum found owing by him to Mial Wall, in Confederate money, who declined to receive it, and the said James has since become insolvent, and that under the circumstances, Wall was not guilty of negligence in attempting to make the debt out of the said James. For these reasons he acquits Mial Wall of negligence respecting the debt referred to. If his Honor had embraced in his view all the facts bearing on the point, we should have concurred with him in his conclusion. But it is singular that it escaped his attention, as it seems also to have done that of the counsel in this cause, that James, the administrator, must of necessity have given a bond with sureties, on becoming administrator. We are left entitrely in the dark, as to the solvency of his sureties. If they were solvent, surely it was the duty of the executors of Mial Wall to have made good the debt. In this point of view, also, it is worthy of notice, that although a report was made, showing a sum owing by James, as administrator, it does not appear that any judgment was ever rendered on this report. How far this may affect the question, it is not for us to say now. For this reason, the decision of his Honor on this point is not sustained, and the case is remanded, in order that the matters connected with this exception, which have been apparently overlooked, may be inquired into.

2. We concur with his Honor. This exception is overruled.

3. We concur with his Honor. This exception is sustained.

4, 5, 6, 7. We concur with his Honor for the reasons given; these exceptions are sustained. (598)

8. There are no facts stated by his Honor, connected with this exception; and notwithstanding the mass of papers sent up, constituting we suppose the evidence before the Clerk, all of which is impertinent on the appeal to us, we have not found any report of the Clerk, stating the facts relating to the matters excepted to. It seems that James, the administrator, sometime previous to October, 1863, paid to Mial Wall, two notes on Ellerbee, which together amounted to about $1,100.

The note for $1,286.14, which is filed, and is dated in 1866, it is assumed was taken in renewal of those two. *Prima facie,* the taking of the two notes without surety, was imprudent and unjustifiable. So was the renewal of them without surety in 1866. If there were any circumstances to justify such a course and exculpate the guardian, it was for the defendants to have shown them, which they have failed to do. We concur with his Honor. This exception is overruled.

9. The Judge below, has found facts which fully justify him in overruling this exception. We concur with him. Exception overruled.

Exceptions of the plaintiffs:

That the commissions allowed the guardian are excessive. It does not appear to us that they are so under the circumstances. The exception is overruled. Of course no commissions are allowed on the claims which have turned out to be worthless.

The case is remanded to the Superior Court of Richmond, in order that the matters connected with the first exception may be inquired into, and for further proceedings.

Neither party will recover costs of the other in this court. We feel obliged to notice that a large mass of papers, constituting the evidence before the Clerk, have been sent to this Court; they are useless and impertinent. The Clerk is not allowed any costs for the copy of these papers sent to this Court, unless they were sent by direction of some party; in which case they must be paid for by the party, but not be taxed as costs in the cause. (599)

Moreover, the papers were confusedly intermingled; they were not paged, nor was there on the margins any such brief statement of the subject of the text, as is necessary. Consequently the Court was obliged to order its Clerk to arrange and page the papers; for which he is allowed $10, one-half of which must be paid by each party. Said sum shall be deducted in favor of said parties, from any costs which

may be taxed in favor of the Clerk of the Superior Court of Richmond, on final judgment.

Let this opinion be certified.

Per curiam.

Cited: Sc., 67 N.C. 363; *Harris v. Harrison*, 78 N.C. 218; *Jennings v. Copeland*, 90 N.C. 578; *Bowser v. Wescott*, 145 N.C. 63.

W. T. WALKE AND WIFE SALLIE R. WALKE v. JNO. M. MOODY, ET AL.

Where the land of an infant was sold for partition in 1856, under a decree of the Court of Equity, and the Court decreed "that the Master proceed to collect the purchase money, tax the costs incurred, and pay over the residue to the parties entitled, and upon the payment of the purchase money the Master execute title to the purchaser:" *Held*, that the payment of the principal part of the purchase money and a note given to the Guardian of the infant for the residue, was not a compliance with the decree of the Court.

In such a case the plaintiff has a lien upon the land for the payment of the residue of the purchase money, and is entitled to a decree for a resale of the land for the payment thereof.

Where the purchaser went into bankruptcy, his assignee only acquired the interest which the bankrupt owned.

A purchaser at a Sheriff's sale, where the defendant in the execution has the legal title, succeeds only to the rights of the defendant in the execution, and is affected by all the equities against him.

CIVIL action, upon a case agreed and tried before *Clarke, J.*, (600) at Spring Term, 1871, of NORTHAMPTON Superior Court.

The facts of this case are sufficiently stated in the opinion of the Court.

Conigland and Moore & Gatling for plaintiff.
Smith for defendant.

BOYDEN, J. This case comes before this court, by way of appeal from the decision of his Honor Judge Clarke, holding the Superior Court of Northampton, in the place of Jurge Watts, upon a case agreed, by which it appears that the lands of the *feme* plaintiff, and her sister, then minors, were sold under a decree of the Court of Equity for

Northampton, under a petition filed for that purpose; and purchased for the sum of $2,730, by the defendant, John M. Moody. Whereof he paid in cash the estimated costs $75 and gave his bonds for the residue, to-wit: one for $1,050 and one for $240, payable at 12 months; and one for $1,025, and another for $240, payable at 24 months, with interest from the day of sale.

At the Spring Term, 1856, of the Court, the report of the sale was made and confirmed, and the cause was continued from term to term, till Fall Term, 1858, when it was ordered:

"That the Master proceed to collect the purchase money, tax the costs incurred, and pay over the residue to the parties entitled." And it was further ordered:

"That upon the payment of the said purchase money, the Master execute title to the purchaser; and that this decree be enrolled."

The two bonds payable at twelve months, were paid; and on the last two falling due, suit was instituted by the Clerk and Master, in the County Court of Northampton; judgment recovered, execution issued and delivered to the Sheriff, returnable to the December Term, 1858; and at that Term, returned by the Sheriff with his endorsement, "satisfied in full."

The payment was made in cash, by the said John M. Moody, as to all except the sum of $1,249.37, for which sum said Moody (601) executed his bond to David A. Barnes, guardian of Sallie R., the *feme* plaintiff, dated Nov. 29th, 1858, and bearing interest from the 30th of October previous, which the said D. A. Barnes agreed to accept, and did accept in payment and satisfaction of the execution aforesaid; and the same was so accordingly returned by the Sheriff.

This sum was the balance due the said Sally R. from said sale, as the residue of her share thereof, all the rest having been paid.

There was no agreement or understanding, that the land was to remain bound, for the balance so due, and for which the said bond was given.

No title has ever been made by the Clerk and Master.

The land aforesaid has been sold by the Marshal of the United States, for the district of North Carolina, under execution against said John M. Moody; and purchased by the defendant, Leigh, to whom the same has been conveyed by deed, previous to the commencement of this action, but without notice to plaintiffs.

After the last mentioned sale, and before the action was instituted, the defendant, Moody, filed his petition in bankruptcy; and has been adjudged a bankrupt, and obtained his discharge from all his debts,

owing on the day of filing the same, and has pleaded the same against this action, in an amended issue. The other defendants are the assignees in bankruptcy of the said Moody, and claim by virtue thereof.

The sale by the Marshall, and the appointment of the assignees were before the commencement of this action.

It is submitted upon this statement of facts, whether the plaintiffs are entitled to any, and what decrees or judgment, as claimed in their complaint?

It is the duty of the Court in decreeing the sale of the land of infants, to retain the title of the land as security for the payment
(602) of the purchase money, no matter what other security may have been taken for its payment; and our Courts have always been particularly cautious in their decrees of sale, so to order; and in this case the decree was so framed; and the Master was only to make title upon the payment of the purchase money. So, that if the Master had actually made title to the purchaser, it would have been without authority; and in Equity would have passed no title to the purchaser. *Singletary v. Whitaker,* 62 N.C. 77, cited by the counsel for plaintiffs. A purchaser at a Sheriff's sale, even where the defendant in the execution has the legal title, succeeds only to the rights of the defendant in the execution, and is affected by all the equities against him; *Freeman v. Hill,* 21 N.C. 339. And much more must this be so, says Chief Justice Ruffin, where the defendant has himself but an equity, as in this case; *Polk v. Gallant,* 22 N.C. 395. The purchaser in such a case, says the Chief Justice, can only claim to stand in the shoes of the debtor; and can get a title only by doing those acts on the performance of which the debtor himself would have been authorized to ask for a conveyance; that being in this case the payment of the residue of the purchase money.

The purchaser at the sale of the Marshal, and the assignees in bankruptcy, stand in the same relation to the debtor in regard to title, as a purchaser at a sale under execution made by the Sheriff. They too, must stand in the shoes of the debtor, affected by all the equities; and can only get a title by payment of the purchase money, due from the debtor. *Carr v. Fearington,* 63 N.C. 560.

It is true, that if the debt due the *feme* plaintiff had actually been paid, then there being nothing but an outstanding naked legal title, the sale by the Marshal, or by the assignees in bankruptcy, and a deed made by them to the purchaser would have transferred to him both the legal and equitable title, and would have divested the title of the *feme* plaintiff; but a sale of an equitable estate, when a considerable
(603) sum of money is still due as in our case, cannot have that effect.

The judgment of his Honor in the Court below was erroneous; and it is declared by the Court here, that the plaintiffs have a lien upon the *feme* plaintiff's share of the land, mentioned in the complaint, for the payment of the residue of the purchase money, and to a decree directing a resale of the *feme* plaintiff's interest in said land; and the payment of the said debt out of the proceeds thereof, unless the said John M. Moody, or some one in his behalf, will come in, and pay by a day certain, the principal and interest due upon the bond mentioned in the complaint, for $1,249.37, with interest, from the 30th day of October, 1858, together with the costs of this suit, to be taxed by the Clerk.

Per curiam.

There was error.

Cited: Williams v. Monroe, 67 N.C. 167; *Stith v. Lookabill,* 76 N.C. 466; *Pettillo, Ex parte,* 80 N.C. 53; *Davis v. Rogers,* 84 N.C. 416.

JOHN H. KING v. C. L. HUNTER, ET AL, AS THE BOARD OF COMMISSIONERS OF LINCOLN COUNTY.

The act of the Legislature of February 2d, 1871, authorizing the Board of Commissioners to appoint a Tax Collector for the County of Lincoln, is unconstitutional.

An office is property. There is here a contract between the Sheriff and the State that he will discharge the duties of the office, and it cannot be abrogated or impaired except by the consent of both parties.

CIVIL action tried before *Logan, J.,* at Spring Term, 1871, of LINCOLN Superior Court.

The facts are that the plaintiff was duly elected Sheriff of Lincoln County in 1868, and gave the bonds as required by law. In 1869, he likewise renewed his bonds. In 1870, he offered to renew (604) his bonds as required, but the defendants who are the Commissioners of said County, refused to accept said bonds, for the reason that the plaintiff's term as Sheriff had expired. The bonds given by the plaintiff in 1868 and 1869, and those tendered in 1870, embraced the collecting and accounting for the County, Poor and Public Taxes during the tenure of office of the plaintiff.

In March, 1871, the defendants appointed one W. R. Edwards to collect and account for the County, Poor and Public Taxes for the year 1871, by virtue of an Act of the Legislature of Feb. 2d, 1871.

The prayer of the plaintiff is,

1. To compel the defendants to accept his bonds, for the faithful collection and accounting for the County, Poor and Public Taxes, as required by law;

2. To require the defendants to place the tax lists for 1871, in his hands, as Sheriff, for collection;

3. That the defendants be enjoined and restrained from placing the tax lists in the hands of W. R. Edwards, etc.

Upon the coming in the answer of the defendants, his Honor adjudged that the defendants should accept the bonds of the plaintiff, for the collection and accounting for the County, Poor and Public Taxes for 1871, and that they be required to place in his hands for collection, the tax lists for 1871.

Defendants excepted; judgment and appeal.

Bynum for plaintiff.

1. No man shall be deprived of his property, but by the law of the land. Const. Art. 1, sec. 17. An office is the right to exercise a public or private employment, and receive the fees and emoluments belonging thereto. It is property. 2 Bl. 36. The Sheriff shall annually collect the public and county taxes, and account for the same. Rev. Code, ch. 28, secs. 1, 2. And this has been the general law from the creation
(605) of the office in 1738. Ire. Revisal, ch. 3, Laws of 1738, p. 57. The office of Sheriff is not a common law office in this State, but was created by the statute of 1738, in substitution of Provost Marshal, then abolished, and one of the duties annexed to the creation of the office, was the collection of the taxes, and it has ever since been incident thereto. And so when the new Constitution established the office of Sheriff, Art. 4, sec. 30, it also prescribed the incident duties of the office, by continuing the laws then in force, making it the revenue office, Art. IV, sec. 24.

It is therefore as competent for the Legislature to disannex the duties of serving legal process from the office, as that of collecting revenue, yet if both are done, the office is destroyed by taking away all its functions; the collection of revenue being as much a function of the office, as the service of a Court precept.

It is seen that the act in question, does not create a new office with new duties, but a new office by taking away the regular duties and emoluments of an old and constitutional office, during the term of the office. 1 Kent. Com., 413, 423, and cases there cited. *Hoke v. Henderson,* 14 N.C. 1; *Rutherford v. Green's Heirs,* 2 Wheat. 196.

2. The act impairs the obligation of contracts. The Sheriff's term began in September, 1868, and ends September, 1872. When elected by the general law, it was his duty to collect taxes, and he contracted to do it during his term, and gave his bonds therefor, which cover the term, and are durable during the entire term. His bonds were accepted and the contract was complete. Rev. Code, ch. 105, sec. 18; ch. 28, sec. 2, and 17. The Sheriff cannot refuse to perform this duty, nor can the State refuse him the compensation agreed on. *Hoke v. Henderson,* 14 N.C. 1; 1 Kent. 413, 423.

3. The Act is in conflict with the revenue laws and public policy and convenience. It intervenes not only during the term of office, but in the middle of a fiscal year.

The case shows that the tax collector was elected the 27th of March, 1871, and claims to file his bond and collect the taxes of (606) 1871.

There are two fiscal years, one for the State, and the other for the County. Prior to the last Revenue Act, the fiscal year of the State, was from October to October. The last Act extends it to December 1, 1871, and hereafter from December to December. So the fiscal year for 1871, is from October, 1870, to December 1, 1871.

By this last Revenue Act, the County fiscal year is from December 1, 1870, to January 8, 1872, and thence from January to January. So whether we take one of both fiscal years, this new office cuts them into, producing financial confusion, detrimental to the public welfare; for the duty of collecting tax is continuous, throughout the fiscal year, and the Sheriff had, as was his duty, collected a large part of the taxes of 1871, before the election of tax collector, as merchants' taxes and other unlisted taxes. Revenue Act 1870, sec. 35, ch. 225, p. 287; also, Revenue Act, 1871, secs. 34, 38.

4. The election of tax collector is illegal and void. By Act of 1868, Special Session, p. 22, sec. 5, the Board of Commissioners are required to hold their regular meetings the 1st Monday of September and February of each year, and special meetings at the call of the Clerk. By the laws of 1868-'69, ch. 259, sec. 1, the law in regard to special meetings is repealed and they are required to be held on the 1st Monday in every

month. The election was held the 27th of March, 1871, when no meeting could be held by law, and when its acts are as utterly void, as those of the Superior Court. held at a time not prescribed and impliedly forbidden by law.

5. The Act is contrary to the theory and principles of the Constitution. It not only creates a new office out of an old and constitutional one, but vests the election of the incumbent not in the people, as every other known officer is, but in five men and for a term, (one year,) not known to the Constitution or laws. The people, under the Con-
(607) stitution, have the right to choose all their officers, except in cases of vacancy or default.

6. The construction placed upon the Act by the defendants is erroneous. If two constructions can be put upon a legislative act, one of which is certainly consistent with the Constitution and laws, and the other construction conflicts with the general law of the land and statutes which are not repealed by the act, and involves doubtful constitutional power, the rule is that the former must prevail.

The Act in question fixes no time when the powers conferred on the Board of Commissioners may be exercised; they are therefore to be exercised, if at all, when they clearly may be, lawfully, which in the present case, cannot be before the expiration of the Sheriff's term of office.

7. This is a private act and to be construed strictly and differently from a public act. *Drake v. Drake,* 15 N.C. 110.

8. Void for uncertainty. *State v. Woodside,* 31 N.C. 496.

Hoke for defendants.

By common law the duties of Sheriff were, 1, judicial; 2, keeper of the King's peace; 3, ministerial, as Executive officer of the Superior Courts; 4, as the King's Bailiff.

In the last "He must seize to the King's use all lands devolved to the crown by attainer or escheat; must levy all fines and forfeitures; must seize and keep all waifs, wrecks, estrays and the like, unless granted to some subject; must also collect the King's *rents* within the bailiwick, if commanded by process from the Exchequer. 1st Black. Com. 343 and 344.

The collection of taxes did not pertain to the office at common law, but has by acts of the General Assembly been super-added, with bonds for the discharge of the duties thus imposed. *Crumpler v. Governor,* 12 N.C. 57 and 60.

From time to time many new duties have been imposed upon the Sheriff, and the power to do so repeatedly recognized and never disputed in our Courts. Collection of town taxes. *State v. Bradshaw*, 32 N.C. 232. School taxes. *Lindsay v. Dozier*, 44 N.C. 276.

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Taking runaway negroes into jail and safely keeping them. Laying list of retailers before grand jury. Taxes of Counties for Railroad purposes.

Tax Collectors appointed before the war. See acts 1858-'59, ch. 279, p. 378.

Article IV of Constitution, sec. 30 provides, "In each County a Sheriff and Coroner shall be elected, and shall hold their offices for two years. In each township there shall be a Constable elected in like manner, who shall hold his office for two years."

By sec. 23, same article, it is provided, "The General Assembly shall prescribe and regulate the fees, salaries and emoluments of all officers provided for in this article; but the *salaries of the Judges* shall not be diminished during their continuance in office."

The Legislature may increase or reduce the salaries of all such officers as are not protected by the Constitution during their term of office, but it cannot deprive them of their whole salary; for it is presumed offices are accepted with reference to a general power of which the Legislature has not divested itself, and in this particular the appointment to and acceptance of an office with a salary, differs from an ordinary contract, the terms of which cannot be altered without mutual consent. A statute which reduces a salary, and one which takes away the salary altogether, stand on a different footing. *Cotton v. Ellis*, 52 N.C. 548.

Chap. 46, sec. 10, Acts of 1868, page 66, "The Sheriff, Coroner and Register of Deeds of each County, and the Constables and Justices of the Peace of each township shall receive as a full compensation for all services required by law such fees as may by law be allowed to them respectively."

From the foregoing authorities it is evident that the Legislature has always exercised authority to change the duties of (609) Sheriffs, and the power has been sustained and acquiesced in.

If the plaintiff insist that the Legislature has no power to diminish his income by withdrawing his official duties and conferring them upon another, he is met by the language of the Constitution, which confines, in express language, such restriction to the salaries of the Judges. And the act of 1868 expressly notifies them that the increase or diminution of their pay is within legislative control.

For the power of the Court to interfere by injunction, see *Worth v. Commissioners*, 60 N.C. 617; *Patterson v. Hubbs*, 65 N.C. 119.

READE, J. The office of Sheriff, with well defined duties and emoluments, existed at the time of the adoption of the present Constitution. One of those duties with its emoluments, was the collection of taxes. The Constitution established the office of Sheriff, and prescribed the mode of his election by the people, and his term of office, with such salary and fees and emoluments, as should be prescribed by law. The plaintiff was elected Sheriff under the Constitution, and his term has not yet expired. At the time he was elected and inducted into office, the collection of the taxes was a part of his prescribed duties; for the performance of which he gave bond and took an oath. These duties he continued to perform until April last, when, under an act of the Legislature, ratified February 2d, 1871, the County Commissioners of Lincoln County appointed a tax collector, and inducted him into office and ousted the plaintiff of that duty. The question is, had the Legislature the power to pass the act?

Nothing is better settled than that an office is property. The incumbent has the same right to it that he has to any other property. There is a contract between him and the State that he will discharge the duties of the office — and he is pledged by his bond and his oath; and that he shall have the emoluments — and the State is pledged
(610) by its honor. When the contract is struck, it is as complete and binding as a contract between individuals; and it cannot be abrogated or impaired except by the consent of both parties. We do not wish to be understood as holding that there is any iron rule of construction of the details of the contract; on the contrary, there must be some flexibility to suit the public convenience and the convenience of the officer, such as would be implied from the nature of the contract, and such as circumstances make necessary, ex. gr. that if it happened that the emoluments are so inadequate that for them the officer cannot afford to serve the public, they may be increased, or if they be so extravagant as to be burdensome to the public, they may be diminished. But this must be done in good faith and in fair dealing, and with no view to evade, or directly or indirectly to impair the substance of the contract. Nothing needs to be better guarded than contracts with public officers; for although it is not to be supposed that the Legislature will be influenced by any but pure motives, yet as officers, and officers are of necessity connected with political parties, and are, insensibly, the objects of favor or prejudice, it is wise to protect the public against the former and the officer against the latter.

It is well known that the commissions for collecting taxes is an important, and, in many counties, the principal part of the emoluments of the office of Sheriff. Lincoln is a small county, and probably one-half

of the Sheriff's emoluments are from taxes. These is no allegation that the emoluments are large to the oppression of the public. If they were so, the evil might have been remedied without a violation of the contract, by a general law reducing the fees of Sheriffs. But even in that way it is at least questionable whether the Legislature could have deprived him of *all* commissions for the collection of taxes — certainly not unless the emoluments were extravagant and burdensome, and then the reduction, or deprivation, must have been for that reason. But here, there is no such excuse. The Legislature without explanation, and without apparent necessity, and, therefore, in contem- (611) plation of law, wantonly, takes the duties and emoluments from the Sheriff, and creates a new officer, and gives them to him! The error is so palpable, that, but for the respect due to the Legislature, whose act we are reviewing, and must sustain unless *plainly* unconstitutional, we should think it unnecessary to encumber the case with authorities.

"The King may grant the office of Sheriff *durante bene placeto,* and although he may determine the office at his pleasure, yet he cannot determine it for part, etc. Nor can he abridge the Sheriff of anything incident or appurtenant to his office." *Bacon's Abr. 7 Office* p. 202.

So in the State of New York, there was the office of "Clerk of the City and County of New York," who was also "Clerk of the Court of Common Pleas." The officer was elective by the people. The Legislature undertook to divide the office, and create a separate office of "Clerk of the Court." The Court appointed the Clerk and inducted him into office, just as the Commissioners of Lincoln did in this case. The Supreme Court of New York decided that the Legislature had no power to do it, saying, "In effect this statute divides the office of 'Clerk of the City and County of New York' into two parts; and as to the largest share in point of duty and emoluments, takes the choice of the officer from the electors of the county, and gives the appointment to the Court. If this can be rightfully done, I do not see any security for the residue of the office. The Legislature may take that also and give the appointment of the officer to some Court, or to the Governor and Senate; and thus the constitutional provision for a choice by the electors would be completely nullified." *Warner v. The People,* 2 Denio, 272.

The same case was carried to the Court for the Correction of Errors, and was elaborately argued by eminent counsel, and well considered by the Court, and the decision of the Supreme Court was affirmed; the Chancellor saying, "But where the Legislature, as (612) in this case, assumes the power to take from a constitutional officer the substance of the office itself, and to transfer it to another, who is to be appointed in a different manner, and to hold the office by

a different tenure than that which was provided for by the Constitution, it is not a legitimate exercise of the right to regulate the duties or emoluments of the office but an infringement upon the constitutional mode of appointment."

It would seem, therefore, that the division of the duties and emoluments of the Sheriff of Lincoln is liable not only to the objection that impairs the obligation of the contract with the Sheriff, and deprives him of his property and gives it to another, but to the more serious objection that it breaks faith with the people, by taking from them the right to choose the officer who may go into every man's house, and distrain his property, or otherwise collect the taxes. Probably there is no right of which the people are more jealous, and for the infringement of which they will hold the Legislature and the Courts to a more rigid accountability. If the people may be deprived of the election of this officer; and if his duties and emoluments may be transferred to an appointee of an irresponsible body, of what other similar right may they not be deprived? With as much propriety every other office in the State may be cut up, and those who have been put into the office by the people may be starved out, and irresponsible persons put in. The people have secured to themselves the election of Governor, because they would have the important interests of the State committed to an agent of their own choice. With as much propriety the duties with which he has been entrusted might be transferred to others, irresponsible to the people; and so with every other officer in the State. We need hardly refer to the familiar cases of *Hoke v. Henderson,* 15 N.C. 1, and *Cotton v. Ellis,* 52 N.C. 54, in our own Reports.

It has been considered how far an office or officer may be taxed. And it is considered as settled that the State has no power to tax an (613) officer of the United States, or *vice versa;* because "the power to tax includes the power to destroy;" as was said by Chief Justice Marshall in *McCulloch v. State of Maryland,* 4 Wheaton, p. 207. And if a State were allowed to tax a United States officer one dollar, it might tax him to the full amount of his salary, and thus "arrest all the measures of the Government." And so the United States cannot tax a State officer for the same reason.

It is not doubted, however, that the State may tax any other property, the object being revenue and not the destruction of the office. But the people have been so jealous of even this power, that it is provided in the Constitution, that the salaries of the most important officers shall not be altered during their term of office, and this is understood to exempt their salaries from taxation, because to tax is to diminish or, it may be, to destroy.

The act of the Legislature under consideration, providing for a tax collector, is not general but is confined to the County of Lincoln. No necessity for the change is recited in the act, and none appears in the case. The 3d section provides "that he shall have all the powers vested in the Sheriff for that purpose," etc. And the 4th section provides "that he shall have the same emoluments," etc. So that it is not left to inference but appears affirmatively that the act is purely arbitrary, and takes the property of one man and gives it to another. Private and particular legislation having only local application is never received with the favor of general legislation. The Legislature of course has the same honest purpose in both, but private or local legislation is generally conceived and contrived by some interested party, and not always from the purest motives.

There is no error. This will be certified to the end that other and further proceedings may be had according to law.

Per curiam.

Judgment affirmed.

Cited: Bailey v. Governor, 68 N.C. 475; *Bunting v. Gales,* 77 N.C. 285; *McNamee v. Alexander,* 109 N.C. 246; *Lowe v. Harris,* 112 N.C. 480; *Wood v. Bellamy,* 120 N.C. 217; *Day's Case,* 124 N.C. 366; *Wilson v. Jordan,* 124 N.C. 709; *Greene v. Owens,* 125 N.C. 215; *Abbott v. Beddingfield,* 125 N.C. 259; *In re Taxation of Salaries,* 131 N.C. 696; *Purnell v. Page,* 133 N.C. 128; *Mial v. Ellington,* 134 N.C. 170; *R. R. v. Cherokee Co.,* 177 N.C. 97; *Long v. Watts,* 183 N.C. 108.

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WYATT HAWKINS v. HENRY A. HOUSE.

A Judge need not charge in the very words asked for. It is sufficient to do so in substance.

Where a jury returned a verdict for the plaintiff "for $51.60, subject to an off set-of $26.80, if said off-set had not already been paid; but if it had been paid, then for $51.60, without off-set," it is proper to render the judgment for $51.60, and to reject the balance as surplusage.

APPEAL from a Justice's judgment, tried before *Clarke, J.,* at Spring Term, 1871, of HALIFAX Superior Court.

This was an action for a balance due on a bale of cotton, which the plaintiff alleged had been sold by the defendant for him.

The plaintiff testified that he carried a bale of cotton to the store of the defendant, and informed his Clerk thereof, that he (witness) wanted to make some purchases, when the Clerk replied, "bring it in and get what you want." The witness did so, and bought goods to the amount of $24.40, and received a bill therefor, which was produced, and is as follows:

"Wyatt Hawkins, to H. A. House: To 1 sack salt, $5; 20 lbs. coffee at 30 cts. Credit by one bale of cotton to sell, now in store to be weighed."

The Clerk who received the cotton afterward told the witness that the cotton brought $80, and a few cents. Witness then bought salt and coffee amounting to $24.40. Witness further testified that he had never received anything more from the defendant for the cotton. It was admitted, that the Clerk referred to by the plaintiff, was the Clerk and agent of the defendant. On the second interview, witness told the Clerk to sell the cotton, afterwards he was warranted for the goods referred to, and purchased by him.

James House, who was the Clerk of the defendant referred to in the plaintiff's evidence, testified that the plaintiff brought a bale of
(615) cotton to the defendant's store, and wished him to send it off for him to Todd, Pugh & Co. The cotton stayed in the defendant's store. The plaintiff said he did not care whether witness sent the cotton to New York or Petersburg. The cotton was afterwards sold to or by Todd, Pugh & Co. They failed, and the money was lost. Before the cotton was sent to Todd, Pugh & Co., the plaintiff told the witness, "do with the cotton as your own." The witness was asked if the cotton was held as collateral security for the purchase made by the plaintiff, to which he replied, "I do not know; I should have let the plaintiff have the goods any way."

His Honor charged the jury, that the matter for them to determine is, did the plaintiff put into the defendant's hands a bale of cotton to sell on his own account, and to be by the defendant accounted for to the plaintiff; or was it delivered to be sold on joint account between the plaintiff and the defendant; *i. e.* the defendant was to retain his pay for the goods sold, and the plaintiff was to receive the balance? Suppose the plaintiff had called on Todd, Pugh & Co. in person, and demanded the money for the cotton, would they have handed it over to him?

Was the defendant to get his pay from the pledge? Did the defendant receive any specific instructions? if so did he follow them? If the defendant received specific instructions, and he disobeyed or neglected them, then he is liable for any loss resulting therefrom. If the matter was left to the defendant's discretion, did he exert usual diligence, vigilance and care, such as may be expected from a prudent business man? If he did not, then he is liable. But if the defendant acted solely as an agent, having no interest in the venture, and acted fairly and honestly, then he is not liable.

The defendant's counsel requested his Honor to charge the jury, "That if they believed that the agreement was that the defendant took the cotton under an agreement to ship and sell without remuneration, and that the defendant did so, and took the same care of the cotton as he did of his own, they must find for the defendant, notwithstanding there might be an understanding that when the pro- (616) ceeds were received, a debt due by the plaintiff to the defendant was to be deducted." His Honor declined to give the instructions, because he had already substantially charged to that effect.

The jury returned a verdict "for the plaintiff for $51.60, subject to an off-set of $26.80, if said off-set had not already been paid; but if it had been paid, then for $51.60 without off-set."

The verdict was entered and the jury discharged, and immediately thereafter the defendant, standing in the bar said, the "off-set had been paid."

The defendant's counsel moved to set aside the verdict, as it was not responsive to the issues, and was too vague. Motion refused, and judgment entered for the plaintiff for $51.60.

Appeal.

Rogers & Batchelor for plaintiff.
Walter Clarke for defendant.

The Judge ought to have set aside the verdict. *Houston v. Potts,* 65 N.C. 41. Co. Litt. 227a. *Crews v. Crews,* 64 N.C. 537.

READE, J. I. A Judge is not obliged to charge in the very words asked, even when the instructions asked for are right. It is sufficient if he do so in substance. And especially is this so, if he assign that as the reason for refusing.

II. The verdict of the jury is informal, and we have to look for the substance. We regard it as a verdict for $51.60, rejecting what follows as surplusage. The jury found that the defendant owed the plaintiff

$51.60, "subject to a set-off of $26.80, if said set-off had not been paid; if it had been paid, then $51.60, without set-off." It in no way appears from the verdict, whether it had been paid or not; and therefore it is the same as if the verdict said nothing about it; *utile per inutile*
(617) *non vitiatur.*

It appears that no injustice will be worked in this case by reason of the informality, because it appears that the defendant admitted in open Court, after the verdict was rendered, that the set-off had been paid to him. And therefore in justice, it ought not to be deducted from the verdict.

There is no error.

Per curiam.

Judgment affirmed.

Cited: McCaskill v. Currie, 113 N.C. 317; *Stern v. Benbow,* 151 N.C. 464.

THE STATE v. R. B. PENDLETON.

Before a Justice of the Peace can have final jurisdiction of any criminal offence, it must appear *in the complaint and upon proof* that each and every requisite prescribed in sub. chap. 4, sec. 6, of chap. 178 of the act of 1869, has been strictly pursued.

(Observations as to the duty of Solicitors where parties have been *bona fide* punished before Justices of the Peace.)

ASSAULT and battery, tried before *Cloud, J.,* at Spring Term, 1871, of ROWAN Superior Court.

The defendant relied upon the plea of former conviction and judgment before a Justice of the Peace. The plea averred that there had been a literal compliance with all the requirements of sub. ch. 4, sec. 6, of ch. 178, Acts of 1869. It did not, however, aver "that the complaint was not made by collusion with the accused, and that it was made by the party injured by the offence." The Solicitor for the State demurred to said plea.

Demurrer sustained. Judgment and appeal.

(618) *Attorney General for the State.*
Bailey for the defendant.

BOYDEN, J. The act of 1869, chap. 178, which in sub. ch. 6, regulates "the final jurisdiction of Justices of the Peace in criminal actions," was intended to embrace the offences enumerated and committed under the circumstances stated in said act, and not such offences of which Justices of the Peace have original exclusive jurisdiction by the 33d sec. of Article IV of the Constitution.

This act sub. chap. 4, sec. 6, enacts that "no Justice of the Peace shall have final jurisdiction to determine any criminal action or proceeding for any offence whatever, unless it shall appear on the complaint and upon proof before him:

"1. That the offence was committed within his township;

"2. That the complaint is not made by collusion with the accused, and that it is made by the party injured by the offence;

"3. That it is made within six months after the commission of the alleged offence.

"The complaint shall be made in writing and under oath, but need not be in any particular form."

The defendant pleaded a former conviction before a Justice of the Peace of the township where the alleged offence was charged to have been committed.

This plea, it was admitted, contained every requisite of a perfect defence, except that it did not allege that it appeared on the complaint that it was made without collusion with the accused, although it did appear upon proof at the trial of the Justice that such was the fact.

The Solicitor demurred to this plea of the defendant, and his Honor sustained the demurrer, and fined the defendant one penny. There was no error, and the judgment must be affirmed.

The Court deems this act conferring upon Justices of the Peace final jurisdiction in these minor offences a remedial statute of much importance; as it is calculated to save much time and expense, (619) and the Court is disposed to give it a liberal construction, and to uphold this jurisdiction whenever it can be done, without violating the express provisions of the statute.

The question raised in this case, has already been settled by two adjudications in this Court. *State v. Johnson,* 64 N.C. 581, and *State v. Davis,* ante 298.

This Court cannot approve of the course adopted in this case. The defendant had already been sufficiently punished by the Justice of the Peace, and the only defect in the proceedings was the want of a mere formal averment in the complaint, that it was made without collusion.

We think that where parties have been fully punished by a proceeding before Justices, and where there has been no fraud or collusion, parties should never be indicted and punished a second time, for a mere oversight in the Justice, who tried the case.

Per curiam.

Judgment affirmed.

ISAAC STREET v. BLOUNT BRYAN.

The decisions of Justices of the Peace upon questions of fact are not the subject of review.

Damages to realty by wilful carelessness cannot be set up by way of *counter claim* or set off to an action of contract for the payment of money.

It is incumbent upon the party excepting, when the error alleged consists in rejecting evidence, to show distinctly what the evidence was, in order that its relevancy may appear, and that it may be seen that he has been prejudiced by its rejection.

Sec. 17 of chap. 227, acts of 1869-'70, does not apply to Justices' judgments which do not exceed the sum of twenty-five dollars.

APPEAL from a judgment of a Justice of the Peace, heard at (620) Chambers before *Jones, J.*, on the 13th October, 1870.

The plaintiff proved on the trial that he and other hands employed by him and rendered service to the plaintiff, as laborers, from the 21st January, 1869, to August 20th, 1870, and that defendant owed plaintiff for balance due him for such services, twenty-five dollars. Whereupon the Justice gave judgment for this amount against defendant and for costs.

The defendant appealed from the judgment thus rendered to his Honor Judge Jones, and assigned as exceptions to the rulings of the Justice:

1. That the Justice excluded evidence to show that the plaintiff did serious damage to the defendant's premises by wilful carelessness.

2. Upon the ground that one Hillar was not agent for defendant to pay the expenses of plaintiff to this State.

3. Because the Justice refused all evidence offered by defendant to show counter claim.

4. Because the Justice excluded evidence tending to show that plaintiff represented his daughter to be a good hand, when she could render but little service.

5. That the affidavit of Hillar was not evidence to be allowed in this case as defendant had no notice.

6. That the evidence of defendant ought to have been received by the Justice, to-wit: That defendant had authorized no one but his son, Julius Bryan, to hire hands in Petersburg, and that he had not authorized his son to pay expenses of hands to North Carolina.

It was in evidence that the defendant was present during the trial with his Attorney, and that no objection was offered to the reading of the affidavit of Hillar.

The plaintiff testified also that Julius Bryan, the son of defendant, promised to pay the travelling expenses of plaintiff and his hands to defendant's residence, provided they worked longer than one month.

Julius Bryan testified that it was *not* a part of the contract to pay the travelling expenses of the plaintiff and his hands, and (621) that he advanced the travelling expenses of plaintiff, which amounted to twenty-five dollars.

His Honor upon consideration, affirmed the judgment of the Justice of the Peace from which defendant appealed.

Badger and Devereux for plaintiff.

Cited and commented on *Campbell v. Allison,* 63 N.C. 568, Sec. 301, C. C. P. and Rule 15, adopted by this Court at June Term, 1869.

Busbee & Busbee for defendant.

BOYDEN, J. The defendant appealed from the decision of the Justice, and sets forth six reasons or grounds for his said appeal; no one of which is sufficient to reverse the decision of the Justice.

The 2, 4 and 6 are decisions of the Justice upon questions of fact, from which there is no appeal.

The 1st ground is as follows:

The Justice excluded evidence to show that Isaac Street, the plaintiff, did serious damage to the premises by wilful carelessness.

The Justice properly rejected this evidence, as such evidence of unliquidated damages could not be admitted as evidence of a counter claim, or as a set-off, in an action of contract, for the payment of

money; and besides, the statement is too indefinite, as no one can tell, in what this wilful carelessness consisted, by which serious damage could be done to the premises, by a mere laborer, who does not appear to have had any authority, but was merely to labor as directed.

The 3d ground is, "that the Justice refused all the evidence offered to show counter claim."

In what this evidence of counter claim consisted, we are not (622) informed. This is too indefinite and uncertain, as an objection for the rejection of competent or relevant testimony. *Whitesides v. Twitty,* 30 N.C. 431; *State v. Worthington,* 64 N.C. 594; and *Bland v. O'Hagan, Ib.* 471.

In the case in Iredell, Chief Justice Ruffin says: "That if the decision were erroneous, yet as the case is stated in the bill of exceptions, it is not in the power of the Court to assist the defendant; that it has been frequently declared by this Court, that it is incumbent on the party excepting, when the error alleged consists in rejecting evidence, to show distinctly what the evidence was, in order that its relevancy may appear, and that it may be seen that a prejudice has arisen to him from the rejection."

In the case of *Bland v. O'Hagan,* Justice Dick, in delivering the opinion of the Court says:

"A party who offers evidence upon a trial, ought to set it forth in distinct terms, so that the Court may pass upon its admissibility, and see that it is relevant to the matters at issue."

This has not been done by the defendant, and there was no error, as it does not appear how the defendant could be prejudiced by its rejection.

The 5th ground, is in these words: "That the affidavit of Hillar is not evidence to be allowed in this case, as defendant had no notice."

The case made by the Justice states, that the defendant was represented by the counsel, and that the affidavit was read without objection.

The defendant relies upon the Act of 1870, ch. 227, sec. 17, to sustain this exception. The defendant's counsel has mistaken the object of this provision in sec. 17. This section does not apply to cases when the judgment of the Justice is for $25, or under, and where there is to be no new trial in the Superior Court; but to cases, where the party upon appeal is entitled to a trial *de novo.* This provision was intended to prevent the objection being urged, that as the deposition had (623) once been read on a previous trial, without exception, it was, as

a matter of course, entitled to be read again on a second trial, without showing it had been regularly taken.

Per curiam.

Judgment affirmed.

Cited: S. v. Purdie, 67 N.C. 328; *Knight v. Killebrew,* 86 N.C. 402; *S. v. McNair,* 93 N.C. 630; *Stout v. Turnpike Co.,* 157 N.C. 368; *Newbern v. Hinton,* 190 N.C. 111.

JESSE SUMNER v. JACKSON SHIPMAN.

In an action of slander where the pleas are general issue and justification, the jury are not to consider the latter plea if they find the former one to be true.

Pleading general issue, *and* justification to an action of slander, does not dispense with the proving of the words spoken, nor is the latter plea an admission of the speaking of the words when the general issue has been pleaded.

Where several pleas are pleaded to the same cause of action, each is as separate and independent as if contained in different records.

ACTION on the case brought under the old system, and tried before *Cloud, J.,* at Fall Term, 1870, of BUNCOMBE Superior Court.

The plaintiff declared in two counts:

1. That the defendant had maliciously prosecuted him for perjury, and without probable cause.

2. That the defendant charged the plaintiff with having sworn to a lie, as a witness in a suit pending in the Superior Court of law of Buncombe County, where John Sumner was plaintiff, and Eli Ashley was defendant.

The defendant pleaded general issue, statute of limitations, justification. It is unnecessary to report the evidence.

His Honor, amongst other things, charged the jury that as to the plea of justification, if they should be of the opinion from (624) the evidence, that the plaintiff told the truth on the trial of *Sumner v. Ashley,* then they would find for him. On the contrary, if they should find that what the plaintiff swore to was not true, and the words

alleged to have been spoken were true, then the defendant had made out his plea of justification, and they would find for him on that plea.

The jury found, that as to the first count in the declaration the defendant was not guilty. That as to the second count the defendant was not guilty. Plaintiff appealed.

Bailey for plaintiff.
Phillips & Merrimon for defendant.

BOYDEN, J. The charge of his Honor, as to what would constitute a justification, if erroneous, could not have prejudiced the plaintiff, as the verdict for the defendant upon the plea of the general issue, precluded the consideration of the issue upon the plea of justification.

We would not be understood as intimating that his Honor's charge was erroneous upon that point, for, as we understand his charge, we are inclined to think it correct.

The counsel for the plaintiff insisted, that as the jury had not passed upon the plea of justification, he had a right to avail himself of the admission in that plea, and that he was entitled to a judgment *non obstante veredicto.*

There is no principle of law or reason, upon which such a position can be sustained. Have not the jury found that the slanderous words charged in the declaration, were never published by the defendant? and does not that put an end to the cause of the plaintiff? The counsel could not doubt this, had there been no other plea beside the general issue. Reason and common sense would seem to be sufficient to determine this question without the citation of any authority.

It has already been adjudicated that of the several pleas, each (625) is separate and independent, as if contained in different records. *Whitaker v. Freeman,* 12 N.C. 271.

Upon what does the defendant rely for his defence? and in what order are the jury to consider of their verdict?

First, it was the duty of the jury (and we are to suppose they were so instructed by his Honor) to consider of their verdict upon the plea of the general issue, and should they find for the defendant, upon that plea, then they would return into Court and deliver their verdict, as the finding for the defendant upon that plea precluded all consideration of the two remaining pleas.

But, should the plea of the general issue be found for the plaintiff, then it would be the duty of the jury to consider of their verdict, upon the plea of the statute of limitation; and should the jury find this issue in favor of the defendant, then, as upon the plea of the general

issue, they must return their verdict upon this plea without considering of their verdict upon the plea of justification.

There is no error.

Per curiam.

Judgment affirmed.

Cited: Reid v. Reid, 93 N.C. 465.

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(626)

HENRY BRINKLEY v. GEORGE SWICEGOOD.

A person hired for one year, who is wrongfully dismissed before the expiration of the year, is not required to wait till the end of the year, but can sue at once, and is entitled to recover such damages as he has sustained by such wrongful dismissal. He may treat the contract as rescinded, and recover upon a *quantum meruit.*

The repeal of a statute repealing a former statute, leaves the latter in force.

CIVIL action tried before *Cloud, J.,* at Spring Term, 1871, of DAVIDSON Superior Court.

The plaintiff alleged in his complaint that defendant hired him to keep his mill from the 24th of December, 1868, to the 24th of December, 1869, and that defendant discharged him without sufficient cause on the 24th of May, 1869.

The suit was instituted in August, 1869, and plaintiff asked for damages up to, and including the entire time for which he had been hired. There was evidence tending to prove that plaintiff had been wrongfully discharged.

The defendant's counsel asked the Court to charge the jury, that as the plaintiff had declared for the breach of a special contract, he could not recover therefor, till after the 24th of December, 1869, and that having brought his suit prior thereto, the action could not be sustained.

His Honor charged the jury that the plaintiff was not bound to wait till after the 24th of December, 1869, before bringing suit, but that he was entitled to recover such damages as the jury thought he was entitled to receive up to bringing suit, and they must not take into consideration any damages arising after the issuing of the summons. To

which instructions defendant excepted. Verdict for plaintiff for forty-five dollars.

The defendant, after the rendition of the verdict, asked the Court not to tax the defendant with any of the costs incurred by the (627) plaintiff, as the judgment was for a less sum than fifty dollars.

The Court adjudged that the plaintiff was entitled to his costs to be taxed by the Court.

The defendant appealed upon exceptions to the charge of his Honor, and to his ruling upon the question of costs.

No counsel for the plaintiff.
Blackmer & McCorkle for defendant.

PEARSON, C.J. The defendant certainly has no right to complain of his Honor's charge. When a man wrongfully violates his part of the contract, as a matter of course, the other party may sue for the breach; and as a further matter of course, the action may be commenced as soon as the injury is done. This is too plain to allow of discussion.

The matter is only complicated, and the judgment confused by reference to the many cases cited in the notes to *Culter v. Powell,* 2 Smith Lead. Cases, 38, 39. As to whether a servant or agent who is dismissed, without sufficient cause, may not treat the contract as rescinded, and sue immediately on a *quantum meruit,* for the work he had actually performed; or whether he may not wait until the expiration of the term of service fixed by the contract, and sue in *indebitatus assumpsit,* for his whole wages, relying on the idea of constructive performance of all the services. Here is a wilful breach of contract, for which the plaintiff has a present cause of action, to recover such an amount of damages as the jury may think will make full compensation for the injury which he has sustained.

There is some reason to suppose that the jury may have been misled to the prejudice of the plaintiff, in respect to the measure of damages, by the remark of his Honor, that "the jury should not take into consideration any damages arising after the issuing of the summons." That had no bearing on the case. In regard to the damages, it could make no difference, whether the summons issued in a week, or (628) a month, or a year after the injury was done, by the plaintiff's being wrongfully dismissed. Such a consideration would only be relevant, in a case, when the plaintiff waits until the expiration of the term, and then sues for the whole of the wages, on the idea of a constructive performance; in which case it seems the defendant may show in diminution of damages, that after the plaintiff was dismissed he had

engaged in other lucrative business. *Hendrickson v. Anderson,* 50 N.C. 248. But as the plaintiff did not appeal, the point is not presented.

Upon the question of costs, we concur with his Honor. The Act of 1870-'71, repeals the Code of Civil Procedure in regard to costs, and makes no provision for costs in the matter now under consideration; so, the effect is to restore the Rev. Code in that particular.

The repeal of a statute repealing a former statute, leaves the latter in force. Dwarris on Statutes, 676.

Per curiam.

Judgment affirmed.

Cited: Harris v. Separk, 71 N.C. 374; *Oldham v. Kerchner,* 79 N.C. 113; *Sc.,* 81 N.C. 433; *Hughes v. Boone,* 102 N.C. 163; *Markham v. Markham,* 110 N.C. 259; *S. v. Goulding,* 131 N.C. 716; *S. v. Edwards,* 134 N.C. 638; *Smith v. Lumber Co.,* 142 N.C. 33; *Odom v. Clark,* 146 N.C. 554; *Croom v. Lumber Co.,* 182 N.C. 221.

MARY H. RAMSOUR, EX'TRIX OF A. A. RAMSOUR v. L. E. THOMPSON AND WM. RAMSOUR, EX'RS OF JACOB RAMSOUR.

Where a testator was the surety for his son in an amount greater than the value of said son's interest in said estate: *Held,* that the son is not entitled to recover from the Executors of his father his distributive share of said estate, although the Executors of the father do not pay off the surety debt till after action brought by the son.

CIVIL action, tried upon a case agreed before *Logan, J.,* at Spring Term, 1871, of LINCOLN Superior Court.

The action was brought returnable to Fall Term, 1869, to recover from the defendants, who are the executors of Jacob (629) Ramsour, deceased, the distributive share of said estate due to the plaintiff, as the executor of A. A. Ramsour, deceased, who was one of the next of kin and legatees of the defendants' testator. It is admitted that the estate of A. A. Ramsour is insolvent, and that the plaintiff has already confessed judgment as executrix to an amount beyond the value of the estate including the distributive share due him from the estate of defendants' testator.

It is also admitted that the defendants' testator was the surety of his son, the plaintiff's testator, in an amount beyond the value of the son's interest in his estate; and that at Spring Term, 1870, of Lincoln Su-

perior Court, a judgment *quando* was taken against the plaintiff, and an absolute judgment against the defendants, as executors, on the note where their testator, was the surety of his son, and that it was paid off by defendants in March, 1871. It is also admitted that the amount thus paid by defendants is an amount greater than the distributive share of plaintiff's testator.

The Court, upon consideration of the foregoing facts, adjudged that plaintiff's testator was entitled to recover the amount of the distributive share due decedent, to-wit, the sum of $479.54, from which defendants appealed.

Battle & Sons for plaintiff.
Bragg & Strong and Rogers & Batchelor for defendants.

BOYDEN, J. The plaintiff in the action is the executrix of A. A. Ramsour, who was the son of the testator of defendants; and the object of this suit is to recover of the defendants the distributive share of plaintiff's testator in his father's estate. The testator of defendants was the surety for plaintiff's testator, in a sum greater in amount than his distributive share in his father's estate; but the debt, for which (630) the father was surety, was outstanding and unpaid at the time of the commencement of this action, but has since been discharged by the defendants, and that before the account in this case was closed.

It is also stated as a part of the case, that the estate of plaintiff's testator is insolvent; and that his whole estate is already exhausted, and that plaintiff has permitted judgments to be taken against her, sufficient to cover all the estate in the hands of plaintiff, or that will come to her hands, even should the plaintiff recover the sum, that would now be due her, had her testator himself paid this debt, which has been paid by the defendants; and it is insisted on the part of the plaintiff, that this debt cannot be allowed the defendants, because it was paid since the institution of this action; and the case of *Mizell v. Moore,* 29 N.C. 255, is cited as authority for this position.

It is true, under our old system in an action at law, this debt would not be a legal set-off, as it had not been paid, and was not then due the defendants.

But it will be recollected that under our former system, the plaintiff could not have instituted a suit at law for the recovery of this distributive share. Plaintiff's testator must have filed his bill or petition in Equity; and in taking an account in such suit, this sum paid by defendants would have been allowed as far as it would go, in payment of the distributive share of his father's estate; and even if this debt had

not been actually paid, before the account was closed, yet if it had appeared as in this case, that the estate of plaintiff's testator was insolvent, the Court of Equity would have compelled the plaintiff to have deducted this debt from the amount of his distributive share. *Jeffs v. Woods,* 2 Peere Williams; *Allen v. Smitherman,* 41 N.C. 341, 5 Mall Rep. 32; *Iredell v. Langston,* 16 N.C. 392.

Upon what principle of Equity (and this action is to be governed by the rules of Equity) can it be insisted, that the plaintiff should be permitted to recover money out of the creditor, who has it in hand, for the purpose of paying it over to another no more meritorious (631) than the defendant? *Qui prior est in tempore potior in jure.*

Error. Judgment reversed, and judgment for defendants.

Per curiam.

Judgment reversed.

JAMES CALLOWAY v. TRIPLETT HAMBY ET AL.

Where A contracted during the year 1863 or 1864 to convey a tract of land to B for life, remainder to her children in fee, in consideration of a number of negroes then sold and delivered by B to A, in which the latter was a tenant for life, and her children entitled to the reversion, all of whom joined in said conveyance except Eli, who was an infant, and one of the terms embraced in the contract to convey said land being that A would convey the said lands to B and her children whenever the infant Eli arrived at age, and would make "a good title" to his share of said slaves unto A, and the slaves were held by A till their emancipation: *Held,* that upon the coming of age of Eli, and his tendering a bond conveying his interest in said slaves to A, that this was a substantial compliance with the contract, and that A was bound to convey the land, according to the terms of his contract.

CIVIL action tried upon a case agreed before *Mitchell, J.,* at Spring Term, 1871, of WILKES Superior Court.

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

Armfield and Bragg & Strong for plaintiff.
Bailey for defendants.

The deed or other contract of an infant is not void, but voidable merely, and may be confirmed by him on his arrival at full age. *McCormick v. Leggett,* 53 N.C. 425. The contract is binding on the

(632) other party, for he made it with full knowledge of the non-age, until the infant after arrival at age shall repudiate it. *Yarborough v. Yarborough*, 59 N.C. 209; *Crawley v. Timberlake*, 37 N.C. 460; *Washburn v. Washburn*, 39 N.C. 306; *Barnawell v. Threadgill*, 56 N.C. 50. In our case the infant ratifies, in every way he can by law, the contract.

RODMAN, J. On the 6th of September, 1863, or 1864, (the complaint and answer say 1863, and the case agreed says 1864, but the precise date is not material,) Rebecca Hamby was possessed of certain slaves for her life, and her children, the defendants, were entitled absolutely after her death.

Eli C. Hamby, one of the remaindermen, was an infant. On that day the plaintiff purchased the slaves from Rebecca and her children, who with the exception of Eli, conveyed to him. By a covenant of that date, he agreed with Rebecca, and all the remaindermen by name, "that upon the last named, Eli C. Hamby becoming of full age, and conveying to me, the said James Calloway, or my heirs or assigns, by deed in due form, a good title to his share or part, or in case of his death, then by his legal representatives, in and to those negro slaves, and their increase, etc., (describing them,) I will convey by deed, with special warranty, to the aforesaid Rebecca Hamby, a life estate, and then in fee simple in remainder to the other persons above named, all the land," etc., describing the lands, and then, "upon the conveyance to me or my heirs, of the said share or part of said negroes, if done within two years after the said Eli C. Hamby, coming of full age, either by himself or his legal representatives; otherwise to be null and void."

The plaintiff took the slaves into his possession at the time; and the defendants took possession of the land.

The slaves having been emancipated, the plaintiff in March, 1869, commenced this action against the children of Rebecca, (she having died) to recover the possession of the land. The infant Eli came (633) of age, after the commencement of the action, and tendered to the plaintiff a conveyance of his interest in the slaves.

The defendants by their answer, demand a specific performance by the plaintiff of his covenant to convey the land.

The plaintiff resists the demands of the defendants upon the ground, that the conveyance by him, was to be made only upon a condition precedent, viz: the conveyance to him by Eli, of a good title to his share in the slaves; which has not been performed, and which by reason of their emancipation, had become impossible before his arrival at full age.

If we look at the whole transaction between these parties, it will be seen that the covenant of the plaintiff was only a part of it. The real agreement may be gathered to have been an exchange of the slaves for the lands. But as by reason of the infancy of one of the owners of the slaves, he was unable at that time to convey his estate; the vendor of the land retained the title as a security in the nature of a penalty, that when he came of age, he would convey. If we were entitled to take this view of the transaction, it would follow from plain and familiar principles of equity, that the Court might relieve against the penalty; and as the act intended to be secured by it, was a small part of the whole consideration for the land, and the omission to do it, could be compensated by damages, would decree a conveyance of the land with compensation. And it would be immaterial whether the condition be precedent or subsequent. 2 Story Eq. Jur. secs. 1315 and 1316, p. 536; *Hayard v. Angell,* 1 Vern. 223; *Bertie v. Lord Falkland,* 2 Vern. 340, S. C.; 1 Salk, 231; *Taylor v. Popham,* 1 Bro. C. C. 168.

In reply it is said, that we are not entitled to take that view, because if there was any other contract for the conveyance of the land, than the covenant, it was not in writing; and as it is settled in this State, that part performance will not take the case out of the statute, such contract cannot be enforced; but that all the Court could do in such a case, on a complaint framed to such an end, would be, to (634) decree that the plaintiff should repay the value of the slaves, as upon a failure of the consideration, and that as the present bill does not demand relief of the sort suggested, but a specific conveyance of the land, the only question for decision is, whether the condition can be said to have been performed within the meaning of the law?

Such a view of the case could only be necessary or useful in case it should be held, that the condition had not been performed. We therefore pass it over, and proceed to consider that question, which is the one on which the case was put by the counsel, for the parties, viz: whether the condition has in law been performed?

It has been contended by counsel, that a condition precedent must be literally performed. In one case, (1 Vern. 83, and perhaps in others,) that expression is used; but the very case shows that the word is not to be taken literally.

A condition precedent must be strictly performed, and no Court of Equity any more than a Court of Law can dispense with performance, or relieve from any forfeiture or loss in consequence of a failure. But a strict performance can in reason mean nothing more than a substantial performance, one which as *bona fide,* and gives to the obligor in effect, all that by the intent of his contract he was to receive. Many

cases establish this. A delivery of goods to a servant of the obligee, is a sufficient performance of a covenant to deliver to the obligee. *Staples v. Alden,* 2 Mood. R. 309; and so is *Turner v. Tebbutt,* 2 Y. and Coll. C. C. 225.

If a feoffment be upon a condition that the *feoffee* pay so much at such a day, and before the day, he dies, the heir may pay it. Lit. sec. 334, Co. Lit. 209, a. Eq. Ab. 107; *Marks v. Marks,* Str. 129.

In the note to "conditions," 6 Petersdorff's Abrid. XI, A. p. (68) 48, he collects the older authorities: "It is sufficient if the substance of the condition be performed. 1 Rol. 425, C. 8. If a condition be that he deliver letters patent, and he delivers an exemplification of them; (635) that he *enfeoff,* and he conveys by lease and release; that he withdraw his suit and he discontinues," etc.

In *Tollner v. Marriott,* 4 Sim. 19, the condition of a legacy was, that the legatee should claim it within five years, by writing under his hand delivered to the executor; the filing of a bill by the residuary legatee for a settlement of the administration, was held a substantial compliance, although the conditional legatee was not a party.

Consent to marriage not written, sufficient, although written consent required by the will. *Worthington v. Evans,* 1 Sim. and S. 165.

Marriage in life time of father with his consent, is equivalent to marriage after his death with consent of trustees. *Wheeler v. Warner,* 1 Sim. and S. 305. G. covenanted to leave his wife a certain sum by will; he died *quasi* intestate, and she received that sum as a distributee; held, a performance. *Goldsmid v. Goldsmid,* 1 Swaust 211. See also, 1 Williams, Saun. 216, note. In this case we are of opinion that the condition was substantially performed. In coming to this conclusion, we do not forget, that although the plaintiff had the possession of the slaves until their emancipation, that possession was by virtue of the conveyance from Rebecca, and that he never at any time had possession under the defendants; nor do we lose sight of the fact, that the condition was that Eli should "convey a good title" to his share; and that at the time he tendered a conveyance, it was ineffective and valueless by reason of the previous emancipation of the slaves. In putting a meaning on the words, "convey a good title," we must look at all the circumstances of the transaction, and put ourselves in the point of view of the parties who used the words. On doing this, it appears to us that the good title to be conveyed, was that which Eli had on the 6th of September, 1864, the date of the plaintiff's covenant; and this title alone it was that the defendants took the risk of his conveying. If Eli had died before coming of age, it cannot be doubted that a con- (636) veyance by his administrator would have sufficed. If the slaves

had died, it seems to us clear, that a tender of a conveyance by Eli, would have been a performance of the condition, although such a conveyance would have been as valueless as in the present case.

To put any other meaning on the words "good title," than that it was to be good at the date of the covenant, would make the defendants insurers, both of the lives of the slaves and of the permanency of their condition of servitude, and would give the contract an effect much beyond the intent of the parties. The whole transaction shows, that the risk of the destruction of the slaves by death, or the action of the government, was one of the incidents of ownership, which the plaintiff took on himself. What Eli was expected to do, was not so much to make an original sale of his share, as to confirm an invalid sale previously made for him; and such confirmation would have relation back to the original sale.

The contracts of an infant are not void, but only voidable; and when confirmed, the disability of infancy is regarded as if it had never existed.

There are two remarkable English cases which have some bearing on this question. *Watkey v. DeLancey,* 4 Doug. 354; and *Dudley v. Folliott,* 3 T. R. 584.

In each of these cases the defendants, during the American revolution, and while New York was in possession of the British, had sold lands within British occupancy to the plaintiffs, and covenanted for a *good title.* Afterwards the lands were confiscated under the laws of New York, and the confiscation was ratified by the treaty of 1783, which related retrospectively to the 4th July, 1776.

It was held, that there was no breach of the covenant.

Per curiam.

Judgment affirmed.

NOTE.—Justice Boyden having been of counsel, did not sit in this case.

Cited: Turner v. Lowe, 66 N.C. 414; *Isler v. Brown,* 66 N.C. 563; *Abbott v. Cromartie,* 72 N.C. 295; *Heyer v. Beatty,* 76 N.C. 32; *Hughes v. Mason,* 84 N.C. 475; *Allen v. Griffin,* 98 N.C. 123; *Hauser v. Morrison,* 146 N.C. 250.

(637)

JOSEPH MORRIS v. J. D. WHITEHEAD ET AL.

A District Court Judge is not authorized to dissolve injunctions, or to punish parties for a contempt in disobeying an injunction order, except in his own district, unless he has been duly assigned to hold the Court in the County where the original process is returnable.

It is a novelty unknown to the law, for a Judge to order the penalty inflicted upon a party for a contempt of Court to be paid to the party aggrieved. The State alone is entitled to the penalty.

MOTION, to dissolve an injunction, and for an attachment for contempt, heard before *Watts, J.*, at Chambers.

For a proper understanding of this case, the facts are sufficiently stated in the opinion of the Court.

Bragg & Strong and Faircloth for appellants.
Phillips & Merrimon and Seymour for plaintiff.

RODMAN, J. Statement of the case:

On 21st April, 1871, the plaintiff issued a summons against Whitehead, Whitehurst and Wood, returnable to Fall Term, 1871, of WAYNE Superior Court. This was served on Wood, alone, no publication was made for the other defendants. The plaintiff filed a complaint, in which he alleged that one Abram Cohen had mortgaged to him a certain stock of goods, by deed registered on 1st February, 1871. That Whitehead and Whitehurst, (non-residents of the State) in April, 1871, recovered a judgment against Cohen, and took out execution, which was levied by Wood, a constable, on the said goods. They pray an injunction against the defendants from selling or disposing of the goods. Upon the summons and complaint, the Judge of the Third District ordered that the defendants appear before him, on the 27th April, and show cause why they should not be enjoined from selling or otherwise disposing
(638) of the goods. This was served on Wood alone. The record does not show that any other enjoining order was ever made. On 27th April the plaintiff made oath, that Wood had attempted to sell the goods, notwithstanding the injunction. The Judge then notified Wood to appear before him on 3d May, and show cause why he should not be attached for a contempt. On the 4th May, Wood appeared before Judge Watts, and made an affidavit, in which he denied having attempted to sell the goods. How Judge Watts came to be acting in the 3d district, he being Judge of the 6th district, is stated in *Bear v. Cohen, ante,* p.

511, Judge Watts being in Craven County and holding a Superior Court there, adjudged that Wood had committed a contempt of court in disobeying the injunction and ordered him "into the custody of the Sheriff of Craven, to be discharged on paying into Court, for the use of the plaintiff, one hundred and fifty dollars, the said sum being the amount of damages sustained by said Morris, as assessed by the Court."

The Judge further issued an order to the Sheriff of Wayne, directing him to take from Wood the goods formerly taken by him from Cohen, and deliver them to the plaintiff Morris, which the Sheriff returns that he did. Whether Wood ever paid the damages assessed by his Honor, the record does not disclose, but it may be presumed that he did. In the case of *Bear v. Cohen, ante,* 511, we have decided that Judge Watts had no jurisdiction in a case pending in the Superior Court of Wayne. Consequently his orders in the present case were void.

We have also said in the matter of Rhodes, at this term, that even if he had jurisdiction of the case, he had no authority to fine the defendent Wood for contempt, and order the fine to be paid to the plaintiff, as his damages from the breach of the injunction, assessed by the Court. On the argument in this Court, these proceedings were not attempted to be justified, and it is therefore unnecessary to do more than refer to those cases. For obvious reasons, we forbear to say more upon these points than is strictly necessary. (639)

It is ordered that the plaintiff, Morris, restore to the defendant, Wood, the goods mentioned in the order of Judge Watts, of the 4th May; and also that he immediately restore to the said Wood the sum of one hundred and fifty dollars, paid by said Wood to said Morris, under color of the order of Judge Watts, dated 4th May, 1871.

Wood will recover of the plaintiff his costs in this Court.

Per curiam.

Judgment affirmed.

Cited: Myers v. Hamilton, 65 N.C. 567; *S. v. Ray,* 97 N.C. 514; *Herring v. Pugh,* 126 N.C. 865.

JOHN H. BONER v. HENDERSON ADAMS, AUDITOR OF THE STATE OF NORTH CAROLINA, AND DAVID A. JENKINS, TREASURER OF THE STATE OF NORTH CAROLINA.

The Auditor of the State is not a mere ministerial officer. When a claim is presented to him against the State, he is to decide whether there is a sufficient provision of law for its payment, and if in his opinion there is not sufficient provision of law, he must examine the claim and report the fact with his *opinion*, to the General Assembly.

Therefore, where a Clerk of the General Assembly had received a warrant for the entire number of days to which he was entitled, at seven dollars per day, he had no right to a *writ of mandamus* against the Auditor of the State because he refused to give him a warrant for three dollars per day additional for the same number of days for which he had heretofore obtained a warrant.

The mode of proceeding against the Auditor of the State, who refuses to issue a warrant, discussed and explained.

It is improper to join the Treasurer of the State with the Auditor in an application for a *writ of mandamus*, when the plaintiff has obtained no warrant from the Auditor of the State.

APPLICATION for a peremptory writ of mandamus heard before *Watts, J.*, at Chambers.

The plaintiff alleged in his complaint that he was Clerk of
(640) the House of Representatives of North Carolina from the first day of July, 1868, to the organization of the General Assembly, which was elected on the first Thursday in August, A.D. 1870.

That for services rendered the State as Clerk, aforesaid, for the time mentioned in the preceding allegation, he is entitled to ten dollars per day, for three hundred and four days, less seven dollars per day, that he has received. That said additional sum is due him, under and by virtue of an act of the General Assembly, ratified the 26th day of November A. D. 1869, entitled "An Act in relation to per diem and mileage."

That he has demanded of the defendant, Henderson Adams, Auditor of the State of North Carolina, a warrant for nine hundred and twelve dollars, the amount plaintiff is entitled to under the aforesaid act, and that the Auditor has refused to issue a warrant for said sum, and that in consequence thereof the defendant, David A. Jenkins, who is the Treasurer of the State, has refused to pay said sum. Wherefore, plaintiff asks for the *writ of mandamus*, commanding the defendant, as Auditor aforesaid, to issue his warrant to plaintiff for the sum of nine hundred and four dollars, and the defendant, Jenkins, as Treasurer of the State, to pay said claim upon presentation of a warrant from the Auditor for that amount.

1. The defendants, in their answer, deny that said sum or any part thereof is due plaintiff.

2. That the Judge, at Chambers, has no jurisdiction over the subject matter, and cannot issue a peremptory *writ of mandamus,* as prayed.

3. That the State cannot thus be sued for the recovery of a debt.

4. That the affidavit or complaint does not pray judgment for the debt, nor that the same may be audited, or ascertained according to law.

His Honor being of opinion that the plaintiff was entitled to the process prayed for, ordered that a *writ of mandamus* issue to the defendant, Adams, as Auditor of the State, commanding (641) him to issue a warrant for nine hundred and four dollars, and commanding the defendant Jenkins, Treasurer as aforesaid, to pay said claim upon presentation of the warrant of the Auditor.

From which the defendants appealed.

Fowle and J. C. L. Harris for plaintiff.
Attorney General and Battle & Sons for defendants.

1. There is here an improper joinder of parties.

The Treasurer must pay only upon the warrant of the Auditor. Acts of 1868-'69, ch. 270, p. 631.

2. This claim is immediately against the State, and a State cannot be sued.

3. The Constitution and laws provide the remedy for prosecution of such claims. Art. IV. sec. 11, C. C. P. secs. 415 and 416.

4. The act of 1869-'70 is prospective upon its face. (Chap. 1, p. 41.)

5. No appropriation act as to the Clerks. See Const. Art. XIV. Sec. 3.

6. Mandamus not a prerogative writ, but is now only an ordinary action at law. *Kentucky v. Dennison,* 24 Howard, 66. See also Tapping on Mandamus, 7-8.

7. Mandamus will not lie against a public officer where discretion and judgment are to be exercised, and can only be granted where the act is merely ministerial, and when there is *no other adequate legal remedy. United States v. Seaman,* 17 How. 225; *U. S. v. Guthrie, Ibid,* 284; *The Secretary v. McGarvashaw,* 9 Wal. 298; *Brashear v. Mason,*

6 How. 102, where it is held that *mandamus* will not lie against head of department to compel performance of his ordinary duties. *Reeside v. Walker,* How. 290.

8. Forms and practice in mandamus. *Eaton's Forms* 416, at (642) Eq., cases cited on page 489.

9. Distinction between this case and that of *Lutterloh v. Commissioners of Cumberland,* at this term. There was a *judgment unsatisfied in an action pending* in that case. Here none.

READE, J. The Treasurer, Jenkins, can pay no money out of the treasury, except on the warrant of the Auditor. Acts 1868-'69, ch. 270, sec. 71.

The plaintiff admits that he had no warrant from the Auditor; and so, according to the plaintiff's own showing, he can have no process against the Treasurer. And, therefore, the case must be dismissed as to him with costs.

The Auditor is an officer, named in the Constitution, "with duties to be prescribed by law." Art. III, secs. 1 and 13.

The Act of 1868-'69, ch. 27, prescribes his duties.

Sec. 63, paragraph 1, "To superintend the fiscal concerns of the State."

7. "To examine and liquidate the claims of all persons against the State in cases where there is sufficient provision of law for the payment thereof, and where there is no sufficient provision to examine the claim and report the fact, with his opinion thereon, to the General Assembly."

9. "To draw warrants on the Treasurer for the payment of all moneys directed by law to be paid out of the treasury, but no warrant shall be drawn unless authorized by law, and every warrant shall refer to the law under which it is drawn."

Sec. 65. "He has power to require any person presenting an account for settlement to be sworn before him, and to answer orally any fact relating to its correctness."

It is apparent that the Auditor is not a mere ministerial officer.

1. He is to pass upon the "correctness" of the claim. This is not a ministerial duty.

2. He is to judge whether there is "sufficient provision of law (643) for its payment." This is not ministerial.

3. If there is not sufficient provision of law, then he is to "examine the claim, and report the fact with his *opinion,* to the General Assembly." This is not ministerial. The plaintiff has a claim

against the State for services as Clerk of the General Assembly. He says, a part of his claim has been paid and a part is still due. The Auditor's first duty was to pass upon "its correctness." He has done that, and says it is not correct.

It seems that the plaintiff had already presented his claim for the whole time of his services, three hundred and four days, and the same had been allowed and paid. A second claim, not for other services or other times, but for the same services and times, was well calculated to excite the caution of the Auditor, who is charged with the "superintendence of the fiscal concerns of the State" generally, and of every particular claim against the State.

When this second claim was presented, we are to suppose that the Auditor enquired, "Why did you present a claim for the whole time at $7 per day, as the sum to which you supposed yourself entitled? and why do you present a different account now, for the same time and services at $10 per day? Is there no ground for supposing that the Legislature was thrown off its guard in passing the act, under which you claim, (which is a *quasi* private act) or that it does not mean what you suppose it does?" "Unless you make all this plain to me, I must hold you as estopped by the settlement, which we have heretofore made."

The most this Court could do, would be to order the Auditor to examine the claim and to allow it, if he thought it "correct;" and in that event to issue his warrant for it, if, in his opinion, there is "sufficient provision of law for its payment." And if he were to allow the claim as "correct," and determine that there is not "sufficient provision of law for its payment," and were to refuse to report the fact, with (644) his opinion, to the Legislature, we might compel him to do so. But he has audited the claim, and finds it "incorrect." We have no power to compel him to change his opinion. Nor can we pass upon the merits of the claim.

If the claim were before us, upon *ascertained facts,* we might, under art. IV. sec. 11. of the Constitution, declare the law and recommend it to the Legislature.

It seems to us that the plaintiff's remedy, if he has one, is an application to the Legislature, which through its appropriate committee, can pass upon the claim, and if found to be just, can, by appropriate legislation, make the duty of the Auditor plain.

It is not to be supposed that the Auditor has any other than an honest purpose to do his duty, or that the Legislature will fail to see that the just claims of its Clerk shall be paid.

There is error.

Per curiam.

Order reversed and mandamus refused.

Cited: Bayne v. Jenkins, 66 N.C. 358; *Koonce v. Comrs.,* 106 N.C. 200; *Burton v. Furman,* 115 N.C. 168; *Russell v. Ayer,* 120 N.C. 197; *Garner v. Worth,* 122 N.C. 257; *White v. Auditor,* 126 N.C. 597; *S. v. Scott,* 182 N.C. 875; *Person v. Watts,* 184 N.C. 504; *Bd. of Education v. Comrs.,* 189 N.C. 652.

(645)

BROWN, DANIEL & CO. v. P. B. HAWKINS.

It is sufficient to authorize a warrant of attachment, if the affidavit set forth "that defendant was about to assign, dispose of, or secrete his property with intent to defraud his creditors," and then specifies "that the said property was secretly removed out of its usual place, after night, and found several miles distant, and when it was overtaken late at night, the persons having possession thereof made conflicting statements as to where they were going, and whose property it was they had."

The Court has the power to allow the amendment of an affidavit upon which a warrant of attachment had issued, although the former affidavit is wholly insufficient.

MOTION to discharge a warrant of attachment, heard before *Moore, J.,* at Spring Term, 1871, EDGECOMBE Superior Court.

The plaintiffs in their complaint alleged that the defendant was indebted unto them in the sum of five hundred dollars, contracted on behalf of the defendant through his agent, one B. F. Hanks. The affidavit upon which the plaintiffs prayed for an attachment, alleged "that from information given to them, they are satisfied that the defendant is about to assign, dispose of, or secrete certain property, to wit: sundry mules, with intent to defraud his creditors." The warrant of attachment was levied upon four mules, and several other articles of property.

The defendant in his answer denies that he owes the plaintiffs anything, or that the said Hanks was in any way the agent of the defendant at the time the alleged goods were purchased.

The plaintiffs asked for, and obtained leave to amend their affidavit upon which the warrant of attachment issued, which amendment is as

follows: "That the facts upon which their apprehension that the defendant was about to assign, dispose, or secrete the property therein mentioned, with intent to defraud his creditors were based, are, that early in the night of March 10th, 1871, they ascertained (646) that certain mules of the defendant, (who resided in Franklin County,) which had been in Tarboro' for several months, has just been sent from Tarboro' after night, by order of one Wynne, the agent of the defendant, who had arrived in Tarboro in the afternoon of said 10th day of March, except two of said mules which had been detained by one Lipscomb, he having obtained possession in some way; that this affiant (R. C. Brown, one of the plaintiffs,) was deputed by the Sheriff of said County of Edgecombe, to serve the warrant of attachment issued on said night, in favor of W. M. Pippin, against the defendant, and in order to execute the same, pursued said mules and overtook them about eleven miles from Tarboro; that the drivers of said mules when asked whose mules they were, replied that they did not know, but afterwards admitted that they belonged to the defendant, and informed the affiant that they went out of Tarboro by way of a back street, and were told not to stop or rest till they had reached a point beyond the falls of Tar river, which is beyond the limits of Edgecombe County.

The defendant filed a counter affidavit, in which he alleged, that he was never a member of the firm of J. F. Pickerell & Co.; that he contracted with said firm to do certain work on the Wilmington & Tarboro Railroad; that he commenced work in May, 1869, and finished in May, 1870; that when he completed his work, at the request of Gen'l Lewis, the President of said road, he left six mules, two wagons, etc., and turned them over to B. F. Hanks, the agent of J. F. Pickerell & Co., with the understanding that he was to be paid for the use of them; that on the 8th or 9th of March, 1871, whilst the defendant was engaged in public duties as a State Senator, he spoke to James Wynne, in Raleigh, to go to Tarboro after his mules, who consented to go. The defendant informed him he would get to Tarboro about half past two o'clock, P.M., and the night train left at 8 o'clock, P.M., and that he thought he would have ample time; defendant gave him no instructions, nor intimation that anything was to be done secretly or clan- (647) destinely, for the defendant did not believe that he owed a dollar in Tarboro; that he paid off the plaintiffs' account in May, 1870, and after that time neither B. F. Hanks nor any other person was authorized to buy anything for him in Tarboro.

The defendant further averred, that he sent for said teams solely because he needed them on a large railroad contract he had in Chatham

county; and that he knows nothing as to what the drivers told the plaintiff, R. C. Brown.

B. F. Hanks in his affidavit declares that after the 4th of December, 1869, he was never the agent or the book-keeper of the defendant, and that since that time, he had never to his knowledge, made any purchases on account of the defendant; that he was the agent of J. F. Pickerell & Co., and made purchases in their name, and that the accounts with the plaintiffs, are all due either from J. F. Pickerell & Co., or from affiant individually. He also deposed that Wynne came after the mules and got them, first going over to the plaintiffs' store and purchasing chains, collars, etc.

Several other affidavits were offered by the plaintiffs and defendant, to sustain the respective affidavits offered by them.

The defendant moved to discharge the warrant of attachment; upon consideration whereof, his Honor adjudged that said warrant be, and the same is hereby discharged; from which the plaintiffs appealed.

Battle & Sons for plaintiffs.
Bragg & Strong for defendant.

PEARSON, C.J. The first affidavit is insufficient, but the amended affidavit comes fully up to the requirement of the statute. *Hughes v. Person,* 63 N.C. 548. It sets out facts and circumstances showing probable cause, and that in suing out the attachment, the plaintiffs
(648) acted with *bona fide,* and under a just apprehension that the property was about to be "put out of the way."

The counter affidavit of the defendant, explains the circumstances, and removes the appearance of a fraudulent intent, in respect to the defendant personally, but it leaves the very suspicious fact, that after night fall, the mules were clandestinely taken out of the town of Tarboro, and run off to a distance of some ten miles, when they were captured. Unexplained, there could be no satisfactory explanation, except by the affidavit of Wynne, the defendant's agent. No reason is given for not filing it. This leaves the case of the defendant under a cloud, and he falls within the operation of the rule, *facit per alium facit per se,* and is affected by the conduct of his agent Wynne, and of his subagents, the two men who were running the mules out of the County.

These facts and circumstances would have been held sufficient under the old system of procedure, to defeat a motion to discharge a sequestration, on the principle, that where there is reasonable ground of doubt in regard to the merits of the controversy, the property being in *custodia legis,* will be kept there, until the matter be decided.

Under the C. C. P., the principle applies with greater force, for the defendant has it in his power, as of course, to obtain an order for the discharge of the property, by giving an undertaking to pay the judgment, in the event that the plaintiffs should succeed. Unless the defendant should be insolvent and unable to give the undertaking, there is no reason why this course should not have been adopted, and an action brought against the plaintiffs, for wrongfully and maliciously suing out the attachment, and thus the matter would have been put squarely before a jury for final decision, instead of imposing on the Court the duty of hearing the matter upon affidavits, and passing on it, as a mere preliminary to the motion, which can have no further effect.

It is a circumstance in favor of the defendant that no allegation of his insolvency is made. As he is solvent, and able to give (649) the undertaking, he would, if well advised, have adopted the course indicated, without wasting time on the skirmishing line.

In regard to the amended affidavit, the facts are so obscurely set out on the record as to leave this Court in doubt as to the order in which the several movements were made. If the papers were before the Judge as a foundation for the motion to discharge the attachment on the counter affidavits filed by defendant, then the case falls under *Clarke v. Clarke,* 64 N.C. 150. But if the papers were before the Judge, with a view of allowing the plaintiff to amend the affidavit, we are of opinion that he had power to allow the amendment under C. C. P., sec. 131. The criticism on the affidavit that it is vague and uncertain in that it avers that the defendant was about to assign, dispose of or secrete the property—whereas it ought to have specified distinctly *one* of these three modes by which the alleged fraudulent intent was to be accomplished—is not tenable. The statute puts the three modes in the alternative, and, in this respect, the affidavit is sufficiently definite by following the words of the statute; for it may be out of the power of the party to designate the precise mode. Such was the construction put upon the statute in regard to stealing slaves. The words are, "shall by stealing or seduction, or by force, deprive the owner of his slave, with intent," etc., and it was held that the indictment need not specify any one of the three modes, but it was sufficiently certain to follow the words of the statute.

There is error.

Order discharging the attachment modified by refusing the motion, but allowing the defendant to take the property, provided an undertaking be filed as required by C. C. P., sec. 213.

Per curiam.

Error.

Cited: Ponton v. McAdoo, 71 N.C. 105; *Weiller v. Lawrence,* 81 N.C. 69; *Bank v. McArthur,* 82 N.C. 110; *Devries v. Summit,* 86 N.C. 130; *Penniman v. Daniel,* 90 N.C. 157; *Penniman v. Daniel,* 93 N.C. 334; *Cushing v. Styron,* 104 N.C. 341; *Sheldon v. Kivett,* 110 N.C. 410.

(650)

ELIAS BRYAN ET AL. v. ROBERT FAUCETT ET AL.

The identification of a lot of land described in the plan of a town only as lot No. 115, and not otherwise described in the deed, is a question of fact for the jury.

Therefore it was competent to offer parol evidence to show that when lot No. 115 was sold, it was publicly announced by the crier of said sale as "The Store House lot," the plaintiff and defendant both being present.

It is competent to show that when lot No. 115 was sold, that the plaintiff being present, (who now claims said lot by virtue of a deed conveying to him a lot numbered as lot 116,) asked "who purchased lot 115?" When informed by witness that defendant purchased it, he replied, "I would have made it bring a great deal more, for it is worth a great deal more."

CIVIL action for the recovery of a lot of land, in the town of Haywood, tried before *Tourgee, J.,* at Spring Term, 1871, of CHATHAM Superior Court.

The plaintiff introduced a deed from G. J. Williams, Sheriff of Chatham, conveying lot No. 116, situate in the town of Haywood, to plaintiff, the said lot having been sold under a *ven. ex.* as the property of Chesley Faucett. Also an act of incorporation of the town of Haywood, in 1832. A paper writing, purporting to be a plan of Haywood, was then offered in evidence, and Nathaniel Clegg testified that he was seventy-five years of age, was an old surveyor, had always resided in Chatham, and for about forty years near Haywood; that Archibald Corless, of said county, died in April, 1845, and he (Clegg) administered on his estate, and found this plat amongst his papers; that said Corless owned lots in said town of Haywood; that he ascertained the location of said lot by this plan, and that said location had never been disputed; that he had often surveyed many portions of said town to locate property situate therein for various persons, and amongst others, for the defendant, Scott; that he always used said plan in such surveys without objection; that he has never seen any plan, pur-

(651) porting to be a plan of said town, differing from this, although

he had seen others like this; that this plan of Haywood agrees with said town in regard to the river, streets, alleys, etc., and lots surveyed by him, excepting some slight particulars, caused by a variation of the compass, common to old surveys, and that he never heard the accuracy of said plan questioned except as to those variations, and that, mainly as applying to the boundary line of said town, which runs north and south. The defendant objected to said plan as evidence, but the Court admitted it.

The witness then stated that according to said plan, the lot in controversy on which Faucett's store house was located, was marked "116." It was agreed that plaintiffs need not produce the judgments and executions against Chesley Faucett, under which the sale was made.

On cross examination the witness, Clegg, testified that the numbering of the lots in said plan began at the South-east corner, in Olin street, next to Deep River, and ran northwest to the limits of the town, and then back to Olin Street, and so throughout the entire plan, and that the numbering was from left to right, the former being the lowest number, and the latter the highest; that this was observed on all the lots thus pointing, except lots Nos. 115 and 116, in which case the left hand lot numbered the highest, whilst the lowest lot was the highest number, whereas if the order of running had been preserved, the left hand lot would have been numbered 115.

The defendants then introduced a deed from Thomas Ruffin, dated the 3d February, 1835, to Robert Faucett and Richardson Faucett, conveying lots No. 115 and 116. Also, a deed from Richardson Faucett to the defendant, Robert, conveying the aforesaid lots 115 and 116, executed May 10, 1845, in which the store house lot is called No. 115. Also, a deed from G. J. Williams, Sheriff of Chatham County, to defendant, J. W. Scott, conveying lot No. 115 to defendant Scott,
by virtue of a *ven. ex.* against Chesley Faucett, both parties (652) claiming under him.

The defendant, Faucett, was examined, who testified that he was seventy-four years of age; had resided in Haywood forty-four years; that when he and Richardson Faucett, purchased lots Nos. 115 and 116, from Judge Ruffin, they were vacant lots, and that he built a store house shortly after said purchase, and that the lot has ever since been known as the storehouse lot. The defendants then prepared to prove by this witness that the plaintiffs and defendants were present at the sale of these lots in Pittsboro', by the Sheriff Williams, and that when the Sheriff came to sell lots Nos. 115 and 116, he made proclamation: "Now, I am going to sell you more valuable property. I offer for sale lot No. 115, *the store house lot.*" That said lot was purchased by the

defendant, Scott. The plaintiffs objected to this evidence, but it was admitted by the Court.

The defendants then introduced John C. McClennahan, who testified, that immediately after lot No. 115 was sold to the defendant Scott, and whilst the sale of 116 was going on, the plaintiff, Elias Bryan, asked: "Who purchased No. 115?" Witness replied that "John W. Scott purchased it for a son of Robert Scott, who was to redeem it," to which plaintiff, Elias, replied, "I would have made it bring a great deal more, for it is worth a great deal more." This evidence was admitted by the Court, after objections from plaintiffs.

Verdict for defendant. Rule, etc. Judgment and appeal.

B. I. Howze for plaintiffs.
Manning for defendants.

PEARSON, C.J. Lots Nos. 115 and 116, are two adjoining half acre lots in the town of Haywood. Bryan is the owner of lot No. 116, Scott is the owner of lot No. 115. There is a store house upon one of these lots; and the question is, on which lot does the store house stand;
(653) is it on lot No. 116, or lot No. 115? or in other words, is the lot on which the store house stands, lot No. 116 or lot No. 115?

The deed to the plaintiff conveys "lot No. 116 in the town of Haywood." No further description is given. If at the time the town was laid off and the lots numbered, a post or some other monument, with the number marked on it, had been erected, or if an accurate map of the town, with the lots numbered in regular order, had been made by public authority and duly authenticated and preserved, there would have been no difficulty "in fitting the description, (short as it is) to the thing." But neither of these modes of identification, seems to have been adopted, and the plaintiff is forced to resort to other evidence for the purpose of locating his lot. A plan of the town, (it does not appear by whom it was drawn) produced by Mr. Clegg, an old surveyor, was offered in evidence. The lot marked 116 on this plan, is the lot on which the store house stands, and the question depends upon the accuracy of the numbering.

Mr. Clegg says, and it is apparent from an inspection of the plan, that the order pursued in numbering the lots, is from left to right, the former being the lowest number, and the latter the highest; that this was observed throughout the entire plan, in all of the lots, except in respect to lots numbered 115 and 116; in which case the left hand lot instead of being the lowest is the highest number; while if the order of numbering had been preserved, the left hand lot would have been 115.

The store house stands on the left hand lot; how or why this deviation from the order of numbering was made by the draughtsman is not explained, and the matter is left open to other proof, as to whether this reversal of the order has been recognized and adopted, so as to make the left hand lot to be lot No. 116, or whether the left hand lot has not been known and treated as being lot No. 115, notwithstanding it is marked on the plan produced by Mr. Clegg, "Lot No. 116." To this end, the defendant offered a deed executed in 1844 by Richardson to Robert Faucett for those two "half acre lots, in the town of Haywood, one which is improved, known as the store house lot, (654) and numbered one hundred and fifteen, (115) and the other known as lot number one hundred and sixteen (116.)"

The evidence was objected to, but admitted. We concur with his Honor. The evidence was so material to the inquiry before the jury, that it would be strange, if there were any rule of law to exclude it. If the parties to the deed were strangers, we would be inclined to consider the evidence admissible, on the principle by which hearsay evidence is received in questions of boundary. But, here, both parties claim under Faucett. That fact relieves the question from all difficulty.

We also concur with his Honor, that what the Sheriff said at the time he put up the lots for sale, was admissible as part of the *res gesta*, and we can see no ground whatever, upon which the plaintiff could object to the admissibility of what he said himself in reference to the lots.

The objections made to the evidence, offered by the defendants, seems all to be referable to a misapprehension on the part of the plaintiffs' counsel, in regard to the ground on which it was admitted. He seemed to think that it was offered to contradict and vary the meaning of his deed, whereas no one denies that his deed conveys lot No. 116; and the difficulty grows out of a latent ambiguity, in regard to which is lot No. 116, and, which is lot No. 115. A question of identity, which is clearly assimilated to a question of boundary, in respect to which, every one concedes such evidence is admissible; in fact, it is the only kind of proof by which such questions can ever be settled, and the truth arrived at.

There is no error.

Per curiam.

Judgment affirmed.

Cited: Goff v. Pope, 83 N.C. 127.

(655)

JOSEPH D. CLARK, ADM'R., ETC. v. BENJAMIN F. CLARK, ET AL.

1. Where an administrator agreed with two persons that they should buy certain articles of personal property, and give their note to the Administrator therefor, and that the property was to be purchased for the common benefit of all three of the parties, and that each one should pay off and discharge one-third part of the note so given: *Held*, that upon a suit upon said note by the Administrator, it was competent for defendants to offer parol testimony to prove the agreement between the parties, and the plaintiff under the C. C. P. could recover of defendants but two thirds part of said note.

2. Under the C. C. P., a defendant may avail himself of any defence that would have been available under the old mode of procedure, either in a Court of Law or Court of Equity.

3. Such an agreement is not illegal, unless it be shown that the creditors of decedent, or his distributees, may be prejudiced by such conduct on the part of the Administrator.

4. If upon the cross-examination of a witness he is asked as to collateral matters, and is examined as to *particulars* not presented by the issues, the party is bound by the answer, and will not be allowed to go into evidence *aliunde*, in order to contradict the witness.

(Observations as "to double pleading" under the old system, and C. C. P.)

CIVIL action for money demand tried before *Watts, J.*, at Fall Term of the Superior Court of NORTHAMPTON County.

The plaintiff declared upon a single bill for twenty-eight hundred and fifty-eight dollars and forty-nine cents, payable to him as the administrator of James Clark, deceased, and executed January 1st, 1866. On said single bill was endorsed a credit of two hundred and two dollars and fifty cents, made December 28th, 1868.

The defendants, in their answer, admitted the due execution of the said single bill, but claimed credit for two payments in addition to the one endorsed on the bill, to wit: one for three hundred dollars, October 23d, 1866, and the other for twenty dollars, November 4th, 1866. They also claimed upon the ground of an equitable set-off, or counter claim,

(656) that said single bill should be abated one-third of its original amount and asked that judgment be granted the plaintiff for two-thirds only of the original amount of the single bill, less the three payments before mentioned. The answer was denied by the plaintiff.

The defendant offered to introduce evidence to show that the plaintiff, as the administrator of James Clark, deceased, had a sale of the personal property of his intestate, and that said bond was given for

articles purchased at said sale, to wit: corn, fodder, pork, farming utensils, a lot of staves, cotton and household and kitchen furniture, and that at said sale it was agreed between the plaintiff and the defendants, Benjamin F. and William E. Clark, that the defendant, Benjamin, should buy the said property, and all three would use them in common, and each pay for one-third thereof.

The plaintiff objected to the introduction of this evidence, which objection was overruled by the Court. The defendant, Benjamin Clark, testified that he and the plaintiff, with the defendant, William E. Clark, used the said articles in common, and they were purchased in common, and each one was to pay one-third part thereof. That beside the payment endorsed on the bond, he made a payment of three hundred dollars Oct. 23d, 1866, and another of twenty dollars Nov. 4th, 1866.

On his cross-examination the witness said that he and plaintiff did not use any of the said articles in common except the corn, fodder and pork. That plaintiff had received one bed and bedstead of said articles; that he had made out and given to a lawyer for collection, an account against plaintiff for board for himself and horse during the year they farmed together, and used in common the said corn, fodder and pork; that he (the witness) shipped the staves and cotton aforesaid, in his own name, and received the money therefor, and that he has not paid to plaintiff any part thereof.

The plaintiff's counsel asked the witness if he did not forbid the plaintiff to come on the plantation when they were farming together, and if he did not shoot and hit him with seven buckshot, (657) because he went on said plantation? The Court instructed the witness to answer the question or not, as he chose. The witness answered in the affirmative, and went on to explain, that he was plowing in one part of a field on their joint farm, and the colored laborers in another, when the plaintiff rode into the field, dismounted, tied his horse, and went to where the colored laborers were at work; that he (the witness) left his plow, and advanced towards the plaintiff, who met him; that so soon as they met, witness told plaintiff, that as they could not get along together, that plaintiff must leave, or he would shoot him; whereupon the plaintiff opened his bosom and told witness to shoot; when witness did shoot, but did not know the exact number of shot with which he hit the plaintiff. That he shot plaintiff because he had threatened to shoot witness' wife.

The plaintiff's counsel asked the witness if he did not, as soon as plaintiff left his horse, take said horse and go to the house after the

gun, with which he shot plaintiff. Witness declined to answer, to which plaintiff excepted.

The plaintiff offered to introduce evidence to show that the explanation made by witness of the shooting, and especially that part of it in which he charged that plaintiff had threatened to shoot the wife of witness, was false. The defendants objected to the evidence, and his Honor sustained the objection, upon the ground that all the evidence about the shooting was collateral matter, and that plaintiff therefore was bound by the answers of witness. Plaintiff excepted.

It appeared that the matters upon which plaintiff's counsel examined the witness, Benjamin F. Clark, touching their personal difference in regard to their farming transactions, and the shooting affair, occurred two years after making the single bill, sued upon, and upon a farm other than the one upon which they were living, when the agreement was made for the purchase of the articles for which said single (658) bill had been given.

The jury for their verdict said, that defendants were entitled to a counter claim of one-third of the single bill, declared on, and find all the rest of the issues for plaintiffs.

Judgment in accordance with the verdict, and appeal by plaintiff.

W. W. & R. B. Peebles for plaintiff.

1. In Equity as well as in Law, parol evidence will not be admitted to contradict or vary a written contract, unless there is an allegation of fraud, mistake, imposition or oppression. *Whitfield v. Cates,* 59 N.C. 136; *Parker v. Vick,* 22 N.C. 195; *Howell v. Hawks,* 17 N.C. 253; *Clark v. McMillan,* 4 N.C. 244; *Hawkins v. Hawkins,* 4 N.C. 431; *Gatlin v. Kilpatrick,* 4 N.C. 142.

2. When the cross examination is as to matters, which, although collateral, tend to show the temper, disposition or conduct of the witness towards the cause or the parties, the answers of the witness to these matters are not conclusive, but may be contradicted. *State v. Patterson,* 24 N.C. 346; *State v. Kirkman,* 63 N.C. 246.

3. Equity will not interfere where there is an adequate remedy at law. The claim of Benjamin Clark against plaintiff was an individual matter, and there is no allegation that the plaintiff is insolvent, and the said Benjamin Clark therefore had his remedy at law. *Wells v. Goodbread,* 36 N.C. 9; *Glasgow v. Flowers,* 2 N.C. 233 (267.)

4. The matter pleaded by the defendant does not constitute either an equitable off-set or counter claim.

The bargain for the purchase of the property, mentioned in the pleadings, was an individual matter, a debt due from Joseph D. Clark, individually, to Benjamin Clark, and cannot be paid out of the estate of Joseph D. Clark's intestate. It does not appear that (659) Joseph D. Clark ever promised or attempted to use the assets of his intestate to pay his individual debt, but the defendant is seeking to make him do it. *Exum v. Bowden,* 39 N.C. 281; *Foy v. Alexander,* 23 N.C. 340; *Bunting v. Ricks,* 22 N.C. 130; *Powell v. Jones,* 36 N.C. 337; *Lemly v. Atwood, et. al.,* 65 N.C. 46; *Wilson v. Doster,* 42 N.C. 231; *Smith v. Fortesque,* 45 N.C. 127.

D. A. Barnes for defendant.

PEARSON, C.J. The defendant, Benjamin F. Clark, in support of an equitable counter claim, alleges: "That the articles for which the note was given, were purchased at a sale by the plaintiff, as administrator of James Clark, on the joint account of himself, plaintiff, and the defendant W. E. Clark, in pursuance of an understanding previously had between them; and said articles were taken and used between them, in a joint business of farming; the proceeds of which farming, were equally divided between them." The articles consisted of corn, fodder, pork, stock, etc., and were used as the joint property of all; and insists that the plaintiff should abate one-third of his demand.

The plaintiff in reply to the answer, says, "that the facts set forth therein are not true." This issue is submitted to a jury and the verdict is in favor of the defendant, and the abatement of one-third is allowed.

The position, that evidence of the alleged understanding in regard to the purchase of the articles was inadmissible because it contradicted and varied the written instrument, is not tenable, and was assumed under an entire misapprehension of the application of the rule in respect to written and parol evidence. The fact of an understanding between the three brothers, in regard to the purchase of the articles, and how the price was to be paid, in no wise "contradicts or varies" the terms of the bond given for the price. The defendants admit that they are bound at law for the full amount of the bond, and set (660) up the understanding as an independent and collateral matter. Suppose an administrator procures a friend to buy property at the sale for him, and in pursuance of the understanding, the friend gives a note and sureties for the price; will any one say that the proof of this understanding will be excluded by the rule, that written instruments cannot be contradicted, or varied, or added to by parol evidence? This is

our case, except that the understanding was confined to *one-third* of the property.

The second position, that the defendants cannot be heard to set up an understanding, in which they are *particeps criminis*, and by which an administrator buys at his own sale, for one who goes into a Court of Equity is required to "have clean hands;" is likewise untenable. The principle only applies to cases where creditors or the distributees may be injured by such conduct on the part of the administrator. In our case there is no proof of the existence of creditors, and no allegation or proof of an injury to the distributees; so, as far as the Court can see, "nobody is hurt;" in short, no one save creditors and the distributees can complain of the fraud. Certainly the administrator himself cannot do so, as a means of enabling him to commit a greater fraud, and evade payment for one-third of the price of the articles, according to his agreement.

We concur in the position taken by the counsel of the defendants, that under C. C. P., the defendant may avail himself of any defence that would have been available under the old mode of procedure, either in a Court of Law, or in a Court of Equity.

The plaintiff takes a judgment at law for the amount of note and interest, minus the payments. The defendants file a bill, setting out the understanding, that the plaintiff was to pay one-third of the note, and praying to have it specifically performed, and for an injunction against the collection of one-third of the amount of the note. The plaintiff in his answer, denies that there was any understanding by which
(661) he was to pay one-third of the price. There was "replication and commissions. Cause set for hearing."

The Court declare the facts to be, that the plaintiff (at law) did, before the sale, have an understanding with the defendants, that he would discharge one-third of the price of the articles purchased; and it is declared to be the opinion of the Court, that the plaintiff (in Equity) is entitled to have a credit entered on the judgment at law, and to a perpetual injunction. Such is the relief to which he would have been entitled, under the old mode, by application to a Court of Equity. Under the C. C. P., he is entitled to the same relief in the one action, upon the exceptions to the points of evidence. There was no question made as to the ruling of his Honor, in respect to the privilege of the witness to answer or to refuse to answer questions tending to criminate him; but the exception is, that inasmuch as he had elected to answer, and to make certain statements as to particular circumstances, the plaintiff was at liberty to contradict him in reference to those particu-

lar circumstances, as tending to show his feeling in regard to the parties or the subject of the inquiry.

The fact, that by statute, a party is made a competent witness in his own behalf, presents the question in an aspect entirely new, and our conclusion is, had the question upon cross-examination, been general, "are your feelings towards the plaintiff friendly or unfriendly?" and the answer been, "my feeling towards him are friendly," evidence in contradiction, might have been offered as tending to show "the animus or feeling of the witness, in respect to the subject of the action or the parties;" but when the cross-examination, instead of being general, descends to particulars, then the party is bound by the answer, and cannot be allowed to go into evidence *aliunde* in order to contradict the witness, for it would result in an interminable series of contradictions in regard to matters collateral, and thus lead off the mind of the jury from the matter at issue. A juror is asked, "have you formed and expressed an opinion?" His answer is conclusive; a witness (662) is asked upon his *voir dire*, as to interest, his answer cannot be contradicted. When a party becomes a witness, his answer in regard to collateral particulars, is conclusive, although an answer to a general question as to his state of feeling, may not be so.

Upon the conference of the Judges, this question was mooted. The jury have found that the plaintiff had agreed to pay one-third of the price of the articles; suppose in point of fact, he has not been allowed to have the benefit of the one-third, but was excluded from the use and benefit of any, save a very small part, and the defendants had the use of the larger part; is the plaintiff to be subjected to an abatement of one-third of the price, or only of the value of the articles of which he had the benefit?

It is enough to say, this question is not raised by the pleadings, and the Court and jury are confined to "the issues arising upon the pleadings;" there must be *"allegata"* as well as *"probata."* Here the facts elicited upon cross-examination, were not relevant to the issue, and were only pertinent, as tending to contradict the witness in regard to the alleged understanding, that the plaintiff was to pay one-third of the price.

Under the old mode of procedure, when the plaintiff in his answer, denies that there was any understanding by which he was to pay one-third of the price, and the fact is declared against him, there was no way in which he could "change front" and say, "if there was such an understanding, I have not been allowed to have my third part of the articles purchased; and should only be charged in account with the value of such as I have had the benefit of."

The reply is: "You have, on oath, denied that there was any understanding that you were to pay for, and have the benefit of, one-third of the articles purchased. 'After blowing hot you cannot be allowed to blow cold,' and complain that you had been treated badly in respect to the third part, for, you say, you were not entitled to any
(663) part, and have a right to enforce the payment of the whole amount of the bond."

In the procedure, according to the course of Courts of Equity, a defendant never could take two grounds of defence that were inconsistent, for he was forced to swear to his plea or his answer; and although in Courts of Law, after the statute 4 Anne, there was sometimes in form and appearance an inconsistency in *double pleading;* yet, in fact, when submitted to the ordeal of a trial by jury, there was no inconsistency.

In the mode under C. C. P., inconsistency is prevented, because the defendant is required to demur or answer, and although the answer need not be on oath, (unless the complaint be verified on oath,) still, as the defence is made by way of *answer,* it does not admit of the same seeming inconsistency as is sometimes met with in *special pleas,* according to the procedure in Courts of Law. For illustration, in an answer, it would be absurd for a defendant to say "there was no understanding that I should pay one-third of the price and have one-third of the articles purchased; *but if there was such an understanding* you cannot hold me bound by it, because you did not let me have my share; and I should only be charged with the value of the articles I was allowed to enjoy."

It must be conceded that by the mode of "double pleading" in Courts of Law, this abusrdity did sometimes present itself, so as to justify the irony in a supposed case. "Action for a pot borrowed," plea, "defendant denies that he ever borrowed the pot," and by leave of the Court, for a second plea, avers, "that he returned the pot," and for further plea, sayeth "the pot was broken when he borrowed it."

We are inclined to the opinion, as a matter of fact, that the plaintiff did not have his equal share of the articles purchased. If so, it was his folly to *deny* the fact of an understanding that he was to pay for and have the benefit of one-third of the articles, instead of admitting the fact, (which by the verdict of the jury is true,) that there was such an understanding, and *avoiding the force of it* by the averment that
(664) the defendants had violated the contract on their part. In the absence of an allegation of that fact, the evidence tending to show it is irrelevant to the issue, and was only admissible to impeach the testimony of the defendant, B. F. Clark; but the jury fix the fact

that there was an understanding that the plaintiff was to pay one-third of the price, and have one-third of the benefit of the articles purchased.

Under C. C. P., there is no reason why the plaintiff might not, in his complaint or his replication, have confessed the fact of the understanding, and *avoided,* by alleging that he was not allowed to have the benefit of one-third of the property.

He chose to make a *flat denial* and must abide by his election.

No error.

Per curiam.

Judgment affirmed.

Cited: S. v. Elliott, 68 N.C. 126; *Hiatt v. Patterson,* 74 N.C. 158; *Jones v. Jones,* 80 N.C. 248; *S. v. Johnston,* 82 N.C. 591; *Black v. Baylees,* 86 N.C. 534; *S. v. Crouse,* 86 N.C. 620; *Kramer v. Electric Light Co.,* 95 N.C. 279; *S. v. Ballard,* 97 N.C. 446; *S. v. Goff,* 117 N.C. 764; *Burnett v. R. R.,* 120 N.C. 519; *In re Craven,* 169 N.C. 566; *S. v. Hart,* 239 N.C. 712; *S. v. Poolos,* 241 N.C. 383; *In re Gamble,* 244 N.C. 154.

ABNER LATTIMORE v. THOMAS DIXON.

Where a decree is made directing an account between the parties litigant to be taken without prejudice, and the account is taken and exceptions thereto are filed, it is too late for the defendant to demand a hearing of the cause by the Court, upon the question of his liability *to account.*

Objections to the power of the referee to pass upon the issues involved in the pleadings, should be made to the Court before the appointment of the referee, and before proceeding to hear the cause upon the report and the exceptions thereto filed.

BILL in Equity, heard before *Logan, J.,* at Spring Term, 1871, of CLEAVELAND Superior Court.

The complainant in his bill, filed at Spring Term, 1868, of Cleaveland Court of Equity, alleged that he was formerly a (665) slave, and belonged to Samuel Lattimore, who permitted him to accumulate money, by allowing him to work for himself, and by said means he was enabled to accumulate several hundred dollars; that about the year 1858 the defendant informed complainant that he could manage his notes and money to greater advantage than could complainant, and, confiding in the promises and integrity of the defendant,

he placed several notes in his hands to preserve and keep for complainant; that defendant purchased your orator, who remained his slave till 1862, when he was sold by defendant to one Bedford; that defendant has collected a good many of the notes due your orator, and wholly refuses to account for and pay over the money to complainant; the complainant then prays that defendant be required to account, etc.

The defendant, in his answer, denied the allegations of the bill, and averred that complainant, being anxious for defendant to purchase him, proposed to give him several notes to aid in said purchase. He then proceeds to give the names of the debtors to notes delivered to him, and the sums, etc.; refers to the great loss of time of complainant, the expense he was to defendant, and alleges that complainant owes defendant. The defendant filed a demurrer, (*vide* case 63 N.C., which was overruled;) and at Fall Term, 1869, defendant filed his answer. After replications and commissions, it was referred to the Clerk of the Superior Court to take the account without prejudice. The evidence taken is very voluminous, and the referee found the defendant indebted unto the plaintiff in the sum of one hundred and seventy dollars.

The plaintiff filed ten exceptions to the report of the Clerk; amongst others, because he allowed but $25 for the Spaylor note, when the evidence was that it was for $40 or $50, which said exceptions are not necessary to be reported.

The defendant also excepted to the report:

1. Because the Clerk had no jurisdiction to determine the
(666) "issues" made in the pleadings, as to how the notes were received by the defendant, that being an issue to be tried by a Judge; therefore the Clerk had no power to charge defendant with the notes.

2. That being a reference without prejudice, and so stated on the docket, the defendant has now the right to have the issues arising on the pleadings, to be tried by a jury.

The report of the Clerk and the exceptions filed thereto by complainant and defendant, coming on to be heard before his Honor, he adjudged that the exceptions of complainant to said report be sustained, except "No. 5," which is not sustained, and that the exceptions of defendants be overruled. From which decree the defendant appealed.

Bynum for complainant.
Bragg & Strong contra.

BOYDEN, J. In this case, when before this Court, at January Term, 1869, upon the demurrer of the defendant, the demurrer was overruled,

and it was decided that the plaintiff was entitled to a discovery. And at Fall Term, 1869, of the Superior Court of Cleaveland, the defendant filed his answer, and therein set forth the amount he had received of the plaintiff, and likewise the amount of the claims of the defendant against the plaintiff, according to which the plaintiff would be indebted to the defendant in the sum of one hundred dollars, or about that sum; and at the same term an entry was made referring the case to the Clerk to take the account without prejudice. Under this order, it is not doubted that if the defendant, in apt time, had required the cause to be heard, and the question of his liability to account, decided by the Court, he would have been entitled to have had his case brought on to a hearing, and the question of his liability to account determined by the Court.

But after this reference to the Clerk, without prejudice, to take the account, this right must be demanded in apt time, and (667) this apt time is before the account; and the exceptions are to be considered and passed on by the Court. So that if the defendant, instead of demanding that the cause shall be heard, and the question of his liability to account, determined by the Court, files his exceptions to the report, and then the Court proceeds to consider the report of the Clerk, and the exceptions filed thereto, on the part of the defendant and the plaintiff; he will be deemed and taken to have waived this right, and to have consented that the rights of the parties should be determined by the report, and the exceptions, just as if there had been a regular decree for an account upon the hearing, as upon a submission to account, in the answer.

The Court will never permit a defendant to take his chance of a decision in his favor, upon an account, taken without prejudice, and the exceptions thereto, and after that, demand a hearing of the cause, by the Court, upon the question of his liability to account, because the order to account was made without prejudice; such a course as that would be wholly irregular, a source of much inconvenience and delay, and contrary to the practice of the Courts, under such orders.

The defendant having consented to have this account taken, and when it was returned to the Court, filed his exceptions thereto without first insisting that the cause should be heard by the Court, cannot be heard thereafter to deny his liability to account. So, the cause here, as in the Court below, must be determined upon the account, and the exceptions thereto considered as exceptions to an account, where there had already been a decree fixing the liability of the defendant to account; in this way, and in this way only, can this case now be determined.

It is true, that in the exceptions, after first excepting as follows:

"1. That the Clerk charges him with the notes, received from plaintiff, amounting to $365.95, which defendant alleges were not re-
(668) ceived on account for plaintiff, but were given to defendant, to be used in payment for the purchase of plaintiff, and that they were so used as stated in defendant's answer."

The defendant files these two further exceptions:

"2. Because the Clerk had no jurisdiction to determine the issue made in the pleadings, as to how the notes were received by the defendant, that being an issue to be tried by the jury; therefore the Clerk had no right to charge the defendant with the notes."

"3. That this being a reference without prejudice, and so stated on the docket, the defendant has now the right to have the issue made on the pleadings, determined by a jury."

Of what avail to the defendants can these exceptions be, filed as exceptions to an account by the Clerk? They can have no tendency to show that the account is in any way erroneous or improper. These objections, if to be heard at all, should have been made to the Court, before filing exceptions to the report, and before proceeding to hear the cause upon the report, and the exceptions thereto filed.

There was much testimony taken in this cause, and some forty pages closely written, and much time spent thereon; and, upon examining this mass of testimony, it leaves many of the charges on the part of the plaintiff and defendant in much doubt and perplexity. We think, however, that it is clearly established, that the defendant should be charged with forty dollars, instead of twenty-five dollars, for what is called the Spaylor debt; the report of the Clerk must be reformed by making this addition to the amount found against the defendant by the report.

The ruling of his Honor upon this exception of the plaintiff, is sustained; but as to all the other exceptions of the plaintiff, sustained by his Honor, his decision is reversed, and these exceptions disallowed, there being such a conflict of testimony upon these items of the account, that we feel unwilling to interfere with the report of the Clerk,
where there is such a conflict, when the Clerk has had an op-
(669) portunity to hear and observe the witnesses and their demeanor when under examination before him, which has been denied to us. After reforming the account of the Clerk, by charging the Spaylor debt at $40, instead of $25, with interest thereon, from the time it is

charged in the account upon the twenty-five dollars, there may be a deficit for the amount due him by the report, as thus reformed.

This suit being *in forma pauperis*, the defendant must pay his own costs.

THE STATE v. JAMES HARGETT.

If A attempts to pursue B into a house, and the latter shuts the door so that A cannot enter, and A attempts to break the door open with an axe, and B opens the door, when he is collared by A, and a fight ensues, and B is killed by a deadly weapon, it is murder.

A Judge is not required to charge the jury upon a hypothetical case, and if the evidence does not justify the instructions asked for, it is improper to give them.

It is sufficient if a Judge gives substantially the instructions asked for.

INDICTMENT for the murder of one March Webb, tried before *Logan, J.*, at Spring Term, 1871, of GASTON Superior Court.

The evidence of the homicide was as follows: Amanda Williams testified that on the 2d December, 1870, the prisoner came to her house, intoxicated, and was cursing and offering to fight. That he caught hold of the deceased several times. Witness tried to get the prisoner to leave. Prisoner followed witness to the spring and threatened to strike her—did strike her slightly once or twice. When she got near the house prisoner picked up an axe, when witness and the deceased ran into the house, closing and fastening the door. Prisoner struck the (670) door several times with the axe. Prisoner then pulled a puncheon from between the logs of the building and pitched the axe into the room through the opening made by the removal of the puncheon. When this was done, the deceased took up the axe and walked to the door, saying at the time "d—n him, let me out." When the deceased got to the door, and was trying to open it, witness took the axe from him and threw it under the bed. The door was then opened and the deceased stepped out, when the prisoner caught him by the collar with one hand, holding the puncheon in the other. Deceased then placed both hands against the breast of the prisoner, when a slight struggle ensued. Prisoner took the puncheon in both hands and struck the deceased a severe blow on the head knocking him down and striking him twice after he fell, saying "I have killed him." Blood flowed from the mouth and ears of the deceased.

On cross-examination witness admitted that her feelings toward the prisoner were unkind.

Mary Scott, a witness for the State, testified that she was present when the homicide was committed. Her testimony corroborated the statement of the witness Amanda, as to what occurred outside of the house.

On cross-examination she testified that she saw the deceased, through the hole made by the removal of the puncheon, when he took up the axe and walked to the door, and the witness Amanda took it from him and threw it under the bed. Witness admitted that her feelings were unkind toward the prisoner.

Dr. J. D. McLean testified that he was called to see the deceased; that the injuries received by him were mortal, and caused his death. It was admitted that the puncheon was a deadly weapon.

The Court, after adverting to general principles of law applicable to different degrees of homicide, was asked by the prisoner's coun-
(671) sel to instruct the jury that if they find that the prisoner's fears were reasonably excited by the approach of the deceased, and he believed that his life was in danger, or that some great bodily harm would be inflicted upon him, the killing was only manslaughter.

His Honor declined to charge specifically as requested, but stated he had charged upon that point. The prisoner's counsel asked the Court to instruct the jury that if they find the temper and disposition of the witnesses towards the prisoner to be of such a character as to prejudice him in their eyes, or to influence their testimony to his injury, they should take that fact into consideration in making up their verdict.

The Court declined to charge specifically as requested, but stated that the jury could look at the conduct of the witnesses.

Verdict, guilty of murder. Rule, etc. Judgment and appeal.

Attorney General and Batchelor for the State.
No counsel for the prisoner.

BOYDEN, J. The only questions raised in this case, are upon the reply of his Honor, to the instructions asked for by prisoner's counsel.

The instructions asked, were as follows:

"That if the jury find that the prisoner's fears were reasonably excited by the approach of the deceased with the axe, and believed that his life was in danger, or that some great bodily harm would be inflicted upon him, the killing was only manslaughter."

His Honor, declined to charge specifically, as requested, but stated that he had charged upon that point.

There was no evidence in the case to warrant any such instruction, and all the testimony shows that the prisoner had been the aggressor, from the beginning.

It was the prisoner who received the axe and pursued deceased with it; and when the deceased, with one of the witnesses, (672) ran into the house and closed the door, fastened it and refused admittance to the prisoner, he struck the door several blows with the axe; but, being unable to force the door, he pulled out a puncheon from between the logs of the house, thus making an opening by the removal of this puncheon into the room where the deceased was, and through which the prisoner threw the axe. Upon the axe being thrown into the room, the deceased picked it up and advanced towards the door which was still closed and fastened, and cursed the prisoner; but the axe was immediately taken from him and thrown under the bed; and the deceased was unarmed when the prisoner approached him, and seized him with one hand by the collar, holding the puncheon in the other, when, after a slight struggle, the prisoner taking the puncheon in both hands, struck the deceased a severe blow, knocking him down, and giving him two blows after he had fallen.

The prisoner's counsel also asked his Honor "further to instruct the jury, that if they find the temper and disposition of the witnesses towards the prisoner to be of such a character as to prejudice him in their eyes, or to influence their testimony to his injury, they should take the fact into consideration in making up their verdict."

The Court declined to charge specifically as requested, but stated "that the jury could look at the conduct of the witnesses."

We understand his Honor as substantially complying with the request of the prisoner's counsel; and his Honor by saying the jury could look at the conduct of the witnesses, meant thereby, and was so understood by the jury, that they, in making up their verdict, would consider the deportment of the witnesses on the stand, and the admissions of the two female witnesses that their feelings towards the prisoner were unkind, and give such weight to their testimony as they might think it entitled to.

We think it would have been better, that his Honor should have given the instruction specifically as requested, when in (673) law, the party was entitled to it. But, it is sufficient, that his Honor, in other language, gave the charge substantially as requested, and in a way not to be misunderstood by the jury.

There is no error.

Per curiam.
Judgment affirmed.

Cited: Bost v. Bost, 87 N.C. 481; *Moore v. Parker,* 91 N.C. 281.

VERONICA REITZEL v. FANNY ECKARD.

Where A dies seized of land, leaving a widow, and B the son of A occupies the land jointly with A's widow, and thereafter B dies, when the widow of A applies and obtains dower in said land: *Held*, that the widow of B cannot be endowed of said land: the maxim, *dos de dote non peti debit*, applies

PETITION for Dower upon a case agreed, heard before *Mitchell, J.,* at Spring Term, 1871, of CATAWBA Superior Court.

The facts were: the plaintiff was the widow of one Daniel Eckard, and afterwards intermarried with one Reitzel. William Eckard, the father of Daniel, died in 1838, seized and possessed of several tracts of land, which, under an order of Court was partitioned amongst his heirs at law. The part allotted to Daniel, the former husband of the plaintiff, included this homestead. This partition was made in 1839.

Daniel Eckard went into possession of the homestead in 1839, and continued so in possession, his mother, the widow of William Eckard, living with him, until 1865, when the said Daniel died, leaving surviving him, the defendant, his only heir at law.

(674) The plaintiff, and the widow of William, continued the possession until 1867, when plaintiff intermarried with Reitzel. In October, 1870, the widow of William Eckard had her dower assigned her which embraced the homestead; she died in December, 1870, leaving the plaintiff and defendant living on the land. The plaintiff then filed this petition for dower, claiming the same on the said tract as the widow of Daniel Eckard.

Bragg & Strong, Battle & Sons and Ovide Dupre for plaintiff.
Bynum and Blackmer & McCorkle for defendant.

PEARSON, C.J. *Dos de dote peti non debet,* is a maxim of the common law. The principle on which it rests is this: although by the descent, the seizure is cast upon the heir, yet when dower is assigned to

the widow, her estate is an elongation of the estate of the husband; and her seizure relates back, so as wholly to defeat the seizure of the heir; and in respect to the part of which dower is assigned, the heir was not in contemplation of law, seized at any time during coverture.

The following passage from Littleton, renders all further illustration unnecessary: If a disseizor die seized, and his heir enter, who endoweth the wife of the disseizor, of the third part of the land, in this case as to this part, which is assigned to the wife in dower; presently after the wife entereth, and hath the possession of the same third part; the disseizor may lawfully enter upon the possession of the wife, into the same third part, and, the reason is, for that when the wife hath her dower, she shall be adjudged in immediately by her husband, and not by the heir; and so as to the freehold of the same third part, the descent is defeated. And so, you may see, that before the endowment, the disseizor could not enter into any part, and after endowment, he may enter upon the wife; but yet he cannot enter upon the other two parts, which the heir of the disseizor hath by descent. 2 Hargrave & But. Co. Lit. sec. 393.

The only case, to which the learned counsel were able to refer, which has the slightest tendency in opposition to the doctrine, (675) *dos de dote,* is *Bear v. Snider,* 11 Wend. 592. Savage, C.J., concedes the maxim, and confines the plaintiff, to the part not covered by the dower of Mary Hall; but adds: "and if she survives Mary Hall, she will be entitled to one third of the ninth part, which Mary Hall now has."

This is a new doctrine, and was not well considered; for the learned judge gives a reason for his conclusion, which is not sound, and manifestly falls into error, by not adverting to the distinction, between *descent* and *purchase.* He says:

The rule on this subject is plainly illustrated in *Reeves Domestic Relations* 58, and quoted and adopted by Chief Justice Kent, 4 Kent Com. 64:

"If A sells to B, and B to C, and C to D, and D to E, and the husbands all die leaving their respective wives living, the widow of A is entitled to be endowed of one third of the estate. The widow of B is entitled to be endowed of one third of what remains, after deducting the dower of the first wife; the widow of C of one third of what remains, after deducting the dower of the wives of A and B; and so on to the wife of D."

Leaving it to be inferred to be his conclusion, that at the death of the widow of A, the widow of B was entitled to dower in the whole

tract; and so on as to the widows of C, D and E. The correctness of this conclusion, cannot be questioned. But it will be noted that A, B, C, D and E all come in as purchasers. Lord Coke says, 31 b., 1 Hargrove & Butler's Co. Litt. "Note a diversity between a descent and a purchase. For, in the case aforesaid, if the grandfather had enfeoffed or made a gift in tail to him, then in the case aforesaid, the wife of the father, after the decease of the grandfather's wife, should have been endowed of that part assigned to the grandmother; and the reason of this diversity, is, for that the seizure, that descended after the death of the grandfather, to the father, is avoided, by the endowment of the
(676) grandmother, whose title was consummated by the death of the grandfather; but in the case of the purchase or gift, that took effect in the life of the grandfather, (before the title of dower of the grandmother was consummate,) and is not defeated, but only *quoad the grandmother,* and in that case, there shall be *dos de dote.*"

The learned counsel referred to another diversity taken by my Lord Coke; and relied upon it, not as directly supporting the plaintiff's right to dower, but as throwing a shade on the maxim, *dos de dote,* and tending to show, that it does admit of some exceptions. "For in the same case, after the decease of the grandfather, if the son entereth and endoweth his mother of a third part, against whom the grandmother recovereth a third part and dieth, the mother shall enter again into the land recovered by the grandmother, because she had in it an estate for the term of her life, and the estate of the grandmother is *lapse* in the eye of the law, as to her, than her own life."

An explication of this matter will be found, page 42 a. The amount of it is, that the son being bound, as representing the father, to assign dower to his grandmother, and being also bound as the heir of the father to assign dower to his mother; if he chose to enter and assign dower to the mother of one third of the whole, although she had to give way to the grandmother, yet after the grandmother's estate determined, there is nothing to prevent the mother *as against the son,* to set up the estate for her own life, in the whole, which she had by the act of the son; for there was no forfeiture, no surrender and no merger, and the matter rested between her and her son, who is concluded by his act, in assigning dower of the whole.

The diligent student may also consult 4 Co. 122, "Bustard's case."

No error.

Per curiam.

Judgment affirmed.

(677)

BENJAMIN JOHNSON v. ANDERSON NEVILL ET AL.

In an action to recover the possession of real estate it is sufficient to allege in the complaint, that the land was in the possession of the defendant at the time of the issuing of the summons, where the plaintiff alleges title to the tract described, and that defendant is in possession of a part thereof, without particularly describing what part.

In an action to recover the possession of specific property, the object in describing the property is to let the defendant know what is claimed, so that he may give up the property, or contest the claim of plaintiff.

When a defendant is uncertain as to what is claimed in an action for the recovery of specific property, the Court, upon motion, will require plaintiff to give a more particular description, so as to remove all uncertainty.

Under the writ of *habere facias possessionem*, it is the practice for the plaintiff at his peril to point out the land recovered, to the Sheriff who puts him in accordingly.

CIVIL action for the recovery of the possession of realty, tried before *Clarke, J.*, at Spring Term, 1871, of HALIFAX Superior Court.

The plaintiff, in his complaint, alleged that in 1851, he was seized and possessed of a certain tract of land of three hundred and eighty acres, in Halifax County, and described the same, and that sometime in the fall of 1867 "the defendants entered on a part of said land by force, and still hold possession of said part, about fifty acres," and demands possession of the said premises.

The defendants reply by a general denial of the plaintiff's title, and claim title in themselves. On the trial the plaintiff proved the title out of the State, and in himself, to the three hundred and eighty acres.

The defendants further insisted that the complaint was void for uncertainty, and that the evidence had failed to fix the defendants with the possession of any particular part, and that no recovery could be had upon the complaint, and asked the Court so to charge.

The Court charged that the complaint was sufficiently certain, and that if otherwise, the objection must be taken by demurrer. (678)

The Court did not charge that there was no evidence, or that there was any evidence of possession on the part of defendants, but stated if the defendants entered upon the premises or any portion thereof after the plaintiff's title accrued, he was entitled to recover.

The jury returned a general verdict for the plaintiff, and assessed damages. Rule, etc. Judgment and appeal.

Rogers & Batchelor for plaintiff.
Conigland and Walter Clark for defendants.

RODMAN, J. The defendants in this Court move in arrest of judgment, on the ground that the lands of which the possession is demanded, are too defectively described to admit of a certain judgment and execution.

The learned counsel admits that the 380 acres, which the plaintiff claims to be entitled to, is sufficiently described. But he contends, that the only land within the issue, is the fifty acres, of which the defendants are alleged to be in possession. In this he is correct; for it is necessary for the plaintiff to allege that he is entitled to the possession, and that the defendants withhold it, and the only land to which both these allegations apply, is the fifty acres.

As to this, the counsel contends, that it is described only as being a part of the larger body, but where situated within it, is left altogether uncertain. In this proposition, however, it is omitted to notice that one further mark of description is given, by which the land may be identified, viz: that it was in the possession of the defendants at the issuing of the summons. Section 361, C. C. P., speaking of executions, says "If it be for the delivery of the possession of real or personal property, it shall require the officer to deliver the possession of the same, *particularly describing it,* to the party entitled thereto, etc.

(679) The Counsel admits, and we agree with him, that the description would have been sufficient under the practice prevailing in the former action of ejectment. He contends, however, that the section above quoted changes the rule, and requires greater particularity, than was before in use. We do not think such a change was intended, or would be found advantageous. Particularity of description admits of many degrees, and what is sufficient in any given case, must depend on the objects to be answered by it.

In an action to recover the possession of specific property, there can be but two objects:

1. To let the defendant know what is claimed, so that he may give it up if he choose, or be prepared to contest the claim. As to this: if a defendant is really uncertain as to what is claimed, and likely to be misled, he can always obtain from the Court an order for a more particular description. Or if he claims title to any part of the land embraced, within the general description, he may set that forth with certainty, and defend as to that only; and, by so pleading, either compel the plaintiff to re assign, or fight the battle on a field of his own choice. Or, the jury in their verdict, may describe the land as to which they find for the plaintiff, according to the proof of his title. So, that this object can be obtained without any very great degree of particularity in the declaration.

2. To enable the Sheriff to know from the execution itself, what to put the plaintiff in possession of.

This reason certainly has some plausibility. But its weight is much diminished by the reflection, that however particular and definite, (short of a photograph) a description of an object may be, it always requires some evidence outside of the written description to enable a stranger to apply it to the parcel intended; so, that even in such a case, the Sheriff is obliged either to satisfy himself of the identity of the land, by witnesses, or to act on the representations of the plaintiff. It has, therefore, been the modern practice for the plaintiff, at his peril, to point out the land recovered, to the Sheriff, who puts him in possession accordingly. Such a practice sometimes produces in- (680) convenience, as when the plaintiff seeks to obtain possession of more or other land, than he has recovered. But, in such a case, the Court will always interfere and restrict the action of the Sheriff under the writ, to the land to which the plaintiff proved title on the trial. It was found by experience that the contrary course of requiring a precise and minute description of the land, in the declaration, was attended with inconveniences vastly greater. If a description be minute, it must be proved with exactness, or else the minuteness only misleads. Under such a rule, there is constant danger that a plaintiff may lose his cause from a variance in minute particulars, not entering into the merits, and the delay and expense of trials, is greatly aggravated. To avoid these evils, the constant tendency of modern opinion has been to reduce the certainty required in pleading, within the more moderate limits, which experience has shown to be reasonable and convenient.

It has never been customary in actions for the recovery of specific goods, to give any more than a general description, although a plaintiff may do so, if he chooses, at the risk of a variance, and cases may be easily conceived in which it would be necessary for him; as for instance, if he claimed an ancient and peculiar horn or unique vase, or other rare article for which a bill for specific delivery would lie in equity. But, in general, it cannot be necessary, and to require it in all cases, would frequently defeat right and justice.

The motion in arrest is overruled. There is no error in the judgment below, which is accordingly affirmed.

Per curiam.

Judgment affirmed.

Cited: Goff v. Pope, 83 N.C. 127; *Davis v. Higgins,* 87 N.C. 299; *Johnson v. Pate,* 90 N.C. 336; *Ferguson v. Wright,* 115 N.C. 568.

(681)

HENRY H. TATE v. JOHN L. MOREHEAD, ET AL.

Where an original attachment issued, and a summons of garnishment is served upon a party, who dies before the return day of process, his administrators cannot be required to answer said garnishment. In such a proceeding, the garnishee is required to answer upon oath whether he is indebted to the absconding debtor, and if so, how much? This being peculiarly within his own knowledge, the action cannot be prosecuted against his representatives.

History of the Common Law and of the enactments in this State, by which actions might be revived and carried on by, or against, the representatives of a deceased party—and in what cases the maxim *actio personalis moritur cum persona* does not apply.

ORIGINAL attachment, tried before *Tourgee, J.*, at Spring Term, 1871, of GUILFORD Superior Court.

The plaintiff issued an attachment against one James W. Burrows, for a debt due, and owing by the said Burrows, to plaintiff, and returnable to Fall Term, 1866, of the Superior Court of Law of Guilford County, and a garnishment against the late Hon. John M. Morehead.

At the return term of said process, the Sheriff returned the same endorsed "Executed May the 8th, 1866, by summoning John M. Morehead as garnishee."

At the return term of the attachment and garnishment, the death of Mr. Morehead was suggested of record, and an order made that a *scire facias* issue to John L. Morehead, J. A. Gray, and J. T. Morehead, his administrators, commanding them to appear at the next term thereof, and show cause why they should not answer the said attachment, which was served on their intestate.

The defendants, as administrators of J. M. Morehead, for answer to the *scire facias*, answered that their intestate having died before the return day of said garnishment, they were not compellable, by law, to answer the summons of garnishment.

The plaintiff moved for conditional judgment, which was re-
(682) fused by the Court.

His Honor, upon consideration, adjudged that the defendants are not compellable to answer to the garnishment served on their intestate, and are hereby discharged from making answer thereto, from which the plaintiff appealed.

Mendenhall and Scott & Scott for plaintiff.

1. No action, suit or *other proceeding,* of whatever nature, brought to recover money, property, etc., or to have relief of any kind whatever, etc., shall abate by reason of the death of either party. See Rev. Code, chap. 1, sec. 1.

2. An attachment served in the hands of the garnishee, J. M. Morehead, as a debtor, *is substantially an action at law by the defendant Burrows,* in the attachment, against Morehead, the garnishee; and as the said Burrows could in an action against Morehead, upon his death, have revived a suit against his representatives, so can the present plaintiff revive this action against said representatives. The two cases are strictly analogous: See *Patton v. Smith* 29 N.C. 438; *Parker v. Scott,* 64 N.C. 118.

3. The service of an attachment in the hands of a garnishee, creates a *lien* on the debt, or property, in his hands, or due by him to the debtor. See *Tindell v. Wall,* 44 N.C. 3. Suppose in the case of *Parker v. Scott,* 64 N.C. 118, the summons had been served on Bledsoe at 8 o'clock *personally,* and *he had died the next day,* would the lien created by the summons have been lost to the plaintiff? We think it certainly would not. It would have been a vested right, which could not have been divested by the death of the garnishee.

4. The garnishee must answer according to his ability and information, and so we think his administrator must; and if the administrator cannot, from want of knowledge or information, answer satisfactorily, or shall make "such a statement of facts that the court cannot proceed to give judgment thereon, an issue shall be made up," (683) etc. See Rev. Code chap. 7, sec. 9. Of course no judgment can be had against the administrator which could not have been had against the deceased garnishee. But the administrator only stands in his stead and represents him, and is liable in the same manner and to the same extent that the intestate was. *Russell v. Hinton,* 5 N.C. 468; *Gee v. Warwick,* 3 N.C. 354, 358, 398.

6. But the representatives of the garnishee insist—we presume they will here as they did below—that they cannot answer or plead, and if they did so, might be forced to commit a *devastavit,* and for this position rely upon the case of *Welch v. Gurley,* 3 N.C. 334. How does that case differ from this? In that the garnishment issued against the administrator and not against his intestate in his life time. Again, we submit that is not good authority and has been overruled; the administrator has the right to plead any plea whatever. See *Russell v. Hinton,* 5 N.C. 468, also, *Cowles v. Oaks, Adm.,* 14 N.C. 96. Again, this case

says there can be no oyer. In this is error. See Bouv. L. D. garnishment 555, and Brook's Abridgment, garnishee and garnishment. Again, they say in *Gee v. Warwick, supra,* that heir or devisee can answer; if so, why cannot representatives? They will be as able to answer as the others.

Dillard & Gilmer for defendants.

PEARSON, C.J. The proceeding was commenced under the old mode of procedure, and must be considered without reference to C. C. P.

"Actio personalis moritur cum persona" is a maxim of the common law. The action abates by the death of either plaintiff or defendant. When the matter originated in *contract,* the *Cause of action* still existed; and another original writ could be purchased, and another action brought by or against the executor or administrator of the party dying,

except in the actions of account and debt on simple contract, for
(684) the reason that the subject of the action was peculiarly within the knowledge of the original parties to the contract, which entitled the defendants to his "wager of law." 3. ed. 3. ch. 7, "actions may be brought by executors or administrators for injuries to personal property, when the estate of the one party has been increased, and that of the other diminished, by such wrongful act. So, as the law then stood, *all actions abated* by the death of either sole plaintiff or sole defendants; but for matters *ex contractu* and for matters *ex delicto,* arising out of an injury to personal *property,* an action might be brought by or against the executor or administrator; and the fact that an action had or had not been commenced between the original parties, was of no significance; that action was dead, and the question depended upon the right of the personal representative to institute a new one.

To remedy the inconvenience of the *abatement of actions,* and to save the expense of a new action, by or against the executors or administrators of a party dying, it is provided in 17 Car. II, ch. 8. sec. 1. "in all actions the death of either party between the *verdict* and *the judgment,* shall not be alleged for error, so as such judgment be entered within two terms after such verdict;" and by 8. and 9 Will. III ch. 11 sec. 6.

In all actions to be commenced in any Court of record, if the plaintiff or defendant happen to die, after interlocutory, but before final judgment, the action shall not abate by reason thereof; *if such action might be originally prosecuted or maintained by or against the executors or administrators of the party dying.* The executors or administrators of the party dying may be brought in by *scire facias,* and the

case proceeded in by inquiry of damages and final judgment. 2 Saunders, note 72. K. L.

The remedy is further extended by our statute, 1786: "It shall be lawful for the heirs, executors or administrators, to carry on every suit or action in Courts, after the death of either plaintiff or defendant, and every such suit or action may be proceeded in by ap- (685) plication of the heirs, executors or administrators of either party." Rev. Stat. ch. 1. sec. 1, (abatement.) Construing this statute by the settled rule, that general words are to be confined to the mischief which it was the intention to remedy, its operation is, beyond question, confined to suits and actions, which might be originally prosecuted or maintained by or against the heirs, executors or administrators of the party dying. In other words, the object being to prevent the inconvenience of the abatement of suit and action; the statute cannot, *incidentally*, have the effect of allowing further proceedings in actions or suits, which could not have been originally prosecuted or maintained by or against the heirs, executors or administrators of the party dying. For instance: an action of slander could not be proceeded in, by or against the personal representative of a party dying, because it had been commenced in the life time of the parties. For had it been the intention to make a change so fundamental, the purpose would have been expressed in direct terms.

The act of 1786, is re-enacted in the Rev. Code, ch. 1, sec. 1, (abatement,) in terms more amplified, but having the same legal effect; care is taken to "except suits for penalties and for damages merely vindictive;" showing the construction that was put on the act of 1786, and excluding the idea of an intention to extend the remedy beyond the mischief. But on the contrary, to confine the general words "actions, suits, bills in equity, or information in the nature of a bill in equity, or other proceeding of whatever nature," to cases, when the proceeding might have been originally instituted by or against the heirs, executors or administrators of the party dying. The express words of the exception being used by way of example merely, and not as excluding other cases of a similar nature and falling under the same principle. Broom's Leg. Max. 638. Suits for penalites and for damages, merely vindictive, we have seen, would have been excluded by construction from the operation of the general words, as going beyond the mischief; (686) so, the express exception, otherwise than as an example, falls under the rule, "an expression which merely embodies, that which would in its absence have been implied by law, is altogether inoperative" *Ibid.* 494.

For illustration, an action in the name of the Attorney General, against a person for usurping an office, setting out the name of the person rightfully entitled to the office, and demanding a surrender of the office, and an account of the fees and emoluments Code Civil Procedure, Section 369. The defendant dies, after summons served. The proceeding is at an end: For, although embraced by the general words of the statute, Rev. Code, ch. 1, s. 1, it is not within the mischief, as the proceeding could not have been originally commenced against the executor or administrator, of the alleged usurper of the office; for the proceeding is special in its nature, and can only be brought against the usurper in his life time. The cause of action does not survive, and the account for the fees and emoluments being a mere incident, falls with the principal. For the same reason that the action *quare impedit,* abates by the death of the incumbent of the office and cannot be proceeded in against his personal representative, inasmuch as he is not liable to an original proceeding of that kind. To apply this learning to our case, the proceeding by attaching a debt due to an absconding debtor by garnishment, in the hands of one, supposed to be indebted to him, for the purpose of compelling an appearance, is special in its nature, the garnishee is required to answer upon oath, whether he is indebted to the absconding debtor, and if so, how much? This is peculiarly within his knowledge, and for that reason, the proceeding like the action of account and of debt on simple contract, cannot be prosecuted or maintained against an executor or administrator. This is settled; (*Welch v. Gurley,* 3 N.C. 334,) and such has ever since been taken to be the law; consequently upon the death of John M. Morehead, the proceeding abated, and cannot be proceeded in, after his death, against his
(687) administrators, as they could not have been originally proceeded against, by the process of garnishment.

The suggestion that, by the service of the garnishment upon J. M. Morehead, in his life time, the plaintiff had acquired a lien on the debt due by him to Burrows, which was a "vested right" that could not be lost by his death, will be seen to have nothing to rest on, by adverting to the principles above set out. The plaintiff had a lien on the debt to compel the appearance of the defendant in the action; but since the act of 1866-67, the defendant may replevy and plead without giving a replevy bond. *Holmes v. Sackett,* 63 N.C. 58. So that the idea of a "vested right," is out of the question, and the inconvenience or hardship, is nothing like that of a plaintiff in an action of slander, who has what is called a "vested right" in the bail bond, when if the defendant happens to die before final judgment, all is gone by the *abatement of the action.*

We concur with his Honor. Judgment affirmed.
Per curiam.

Cited: Rankin v. Minor, 72 N.C. 426; *Dixon v. Dixon,* 81 N.C. 329.

(688)

J. N. HARSHAW AND J. C. HALLYBURTON, EXECUTORS OF JACOB HARSHAW v. W. F. McKESSON AND N. W. WOODFIN.

An agent acting under a parol authority, cannot bind his principal by any covenants, and when the principal never delivered them, they cannot be regarded as his *deeds.*

Where A is indebted to B by note, and the former gives to the latter a mortgage to secure the payment of the note, there is an implied promise on the part of B, that by the acceptance of said mortgage, he will suspend action upon the said note.

CIVIL action tried before *Mitchell, J.,* at Spring Term, 1871, of BURKE Superior Court.

The plaintiffs declared upon a single bill executed by the defendants and payable to the plaintiffs' testator, for thirty-one hundred and sixty-four dollars and seven cents, principal money.

The defendants in their answer admit the execution of the single bill, but say they executed to plaintiffs' testator mortgage deeds, conveying large tracts of lands in Burke, Buncombe and adjoining counties, to secure this and other debts due decedent. That at the time of the execution and delivery of said mortgage deeds, and as a part of the same transaction, the plaintiffs' testator, by his lawfully authorized agent, executed and delivered to them, covenants, whereby he obligated himself to give them indulgence for three, four and five years, one-third of said debt to be paid at the expiration of each period, and that this action is brought within and before the expiration of the time these defendants were to be indulged.

That the said covenants are a bar to this action.

The defendants introduced the mortgages and covenants. McKesson, one of the defendants, testified the covenants were given to him at the time of the delivery of the mortgages, and that the whole transaction of signing, sealing, and delivering the mortgages and covenants, and that J. N. Harshaw, son of decedent, represented himself as

(689) fully authorized by his father to do and perform all business connected with these debts and mortgages.

J. N. Harshaw and J. C. Halyburton, the plaintiffs, testified that the mortgages and covenants were delivered about the same time on the same day, but could not say which were delivered first. They expressly denied any power or authority from their testator, Jacob Harshaw, to do anything more than receive the mortgages, and have them proven and registered.

The defendants' counsel requested his Honor to charge the jury:

1. If J. N. Harshaw had authority under seal to execute the covenant, relied on as a defence, the plaintiffs are not entitled to recover in this action.

2. Whether he had authority under seal or not to execute said covenant, if the said covenants and mortgage deeds were delivered for, and by, J. N. Harshaw, for his father, at the same time, and as parts of one entire transaction, the plaintiffs could not recover in this action.

His Honor gave the first instruction, and substantially the second, adding, however, "But if J. N. Harshaw was the agent of his father to receive for him the mortgage deed of defendants only, and had no authority in writing, or in other form, to bind him to any agreement, such as the paper writing, purporting to be a covenant, purporting to be signed and sealed as agent of his father, said alleged covenant would not avail as a defence, and the authority to accept a deed for his father, wiuld not be ground to imply he had authority by such paper writing or alleged covenants.

Verdict and judgment for plaintiffs. Appeal by defendants.

Battle & Sons for plaintiffs.
Rogers & Batchelor for defendants.

RODMAN, J. This action was brought on a bond made by defendants to the testator of plaintiffs, on 25th December, 1860, pay-
(690) able one day after date. The defence is that the testator in 1867, accepted deeds by which defendants severally conveyed to him certain lands, with conditions to be void, if the several grantors should pay certain described debts, (of which this bond was one) one third in three years, one other third of four years, and the rest in five years; and thereby promised to suspend action on the bond until the conditions were broken.

All the facts which we consider material are admitted, or not denied. The mortgages were executed as pleaded. The testator was not personally present when they were delivered; but he had given to the present plaintiffs by parol, authority to accept the mortgages. At the same time at which the mortgages were delivered, J. N. Harshaw, one of the plaintiffs, executed covenants under seal, in the name of the testator, referring to the mortgages, and agreeing that no suit should be brought before the expiration of the periods mentioned in them. But he had no authority under seal from the testator, and he swore that he had no authority to do ony thing more than receive delivery of the mortgages. The supposed covenants must therefore be put out of the case.

The defendants in substance requested the Judge to instruct the jury, that whether J. N. Harshaw had authority under seal or not, to execute the covenants, if the mortgages were accepted and the covenants executed by him for the testator, the plaintiffs were not entitled to recover. The Judge gave the instruction with this addition: "But if J. N. Harshaw was the agent of his father (the testator) to receive for him the mortgage deeds of the defendants only, and had no authority in writing or in other form to bind him to any agreement, such as the paper writing purporting to be a covenant, purporting to be signed and sealed, as agent of his father, said alleged covenants would not avail as a defence, and the authority to accept a deed for his father, would not be ground to imply he had authority by such paper writing or alleged covenant."

The jury found for the plaintiffs, and the defendants appealed.

The instructions asked of the Judge, and those given by him, (691) enable the defendants to raise two questions:

1. Putting the supposed covenants out of view, was there implied from the acceptance of the mortgages, a contract on the part of the testator to delay suit for the periods therein specified?

2. Was such an implied parol contract valid to suspend the right of action on the bond now sued on?

Inasmuch as the learned counsel who argued this case, directed most of their attention to other questions, perhaps some observations are needed to show that these are the propositions on which the case must necessarily turn. On the one hand it is clear that as J. N. Harshaw had no power under seal to execute the alleged covenants, and as the testator never delivered them, they cannot possibly be regarded as his *deeds*. At the utmost they amount merely to a *parol* agreement on his part to suspend suit. So that any discussion of the effect of a *covenant* not to sue, is out of place.

On the other hand, it is admitted in the pleadings that the plaintiffs had authority to accept the particular mortgages with their provisions. As to what is said further in the pleantiffs' replication, that *after the delivery* of the mortgage by Woodfin, the testator entrusted it to him to have registered, and that he neglected to have it done for five months, and until prior liens had been acquired on the mortgaged property, by strangers; there is no evidence of the fact at all. It is pleaded by the plaintiff, but surely it cannot need to be said, that the pleading of a party, although evidence against him of the highest character, is no evidence for him. And even if the fact had been proved, although it might have been ground for an action against Woodfin for negligence, it could not have defeated the effect of the acceptance of the mortgage by the testator. Moreover, if it had been proved, there is no allegation of the kind in reference to the mortgage from McKesson, which would still remain as a sufficient consideration to support the promise (692) of the testator, if any was implied. This, therefore, must be put out of view. Putting aside these irrelevant matters, nothing remains but the two questions stated, which do legitimately and necessarily arise upon the facts, and upon the instructions of the Judge.

Upon the first of these questions, we have had no difficulty. The grantors could have had no consideration for making the mortgage *in its terms,* but an agreement on the part of the testator to suspend suit. The testator also received a valuable consideration for his agreement in the additional security for his debt. The authorities for this view of the case, (considered as distinct from the proposition involved in the second question) are abundant. For example, if the holder of a bill of exchange past due, take from the maker another bill on time, for the amount of the first; it is an accord and satisfaction of the first. *Kendrick v. Lomax,* 2 Cromp. & J. 405; 2 Pars. Cont. 684. This is because, in taking the second bill, there was an implied promise to suspend suit on the first. See also, to the same effect *Maillord v. Duke of Argyle,* 6 M. & G. 40, (46 E. C. L. R.) *Baker v. Walker,* 14 M. & W. 465. *Putman v. Lewis,* 8 John, 389. *Fishie v. Larned,* 21 Wend. 452. *Myers v. Welles,* 5 Hill 463, 1 Smith L. C. American note to *Cumber v. Wane,* p. 456-'57.

Parsons further says, (p. 685): "Nor is it necessary that the accord and satisfaction should go so far as to extinguish the original claim. If there be a new agreement resting on sufficient consideration and otherwise valid, to suspend a previous claim or cause of action, until the doing of a certain thing or the happening of a specified event, an action cannot be maintained on that claim in the meantime."

Mr. Parsons adds: "But such agreement to suspend or delay, will not be inferred from the mere giving of collateral security with power to sell the same at a certain time if the debt be not paid."

We have examined the case of *Emes v. Widdawson,* 4 C. & P. 151, to which he refers as authority for this last observation, and (693) the collateral security differs from this in its terms, so materially, as to make the case not applicable.

In this case we think it is a necessary implication from the conditions of the mortgage, that the mortgagee agreed to suspend suit on the bond.

On the second question we have had more difficulty.

If the bond which was the subject of the parol agreement to suspend suit, had been not a bond, but a writing only, the authorities cited would leave no doubt that the agreement was valid. The difficulty arises from the maxim thus stated in Blake's case, 6 Co. 43. *Nihil tam conveniens est naturali equitati quam unumquordque depolio eo ligamine quo ligatum est.*

This maxim cannot truly claim to be founded in natural equity. There is nothing contrary to equity in permitting a contract to be dissolved or altered, in any way. Reasons of policy or convenience may require the release or change to be evidenced in a particular manner to prevent surprise or fraud, or to furnish clear proof of the fact. But any law which requires a particular ceremony, such as attaching a seal, is purely arbitrary, and no more necessary to natural equity than the rule requiring two witnesses to a will. This is sufficiently clear from the consideration that the maxim is peculiar to the English and unknown to the jurisprudence of other nations. This maxim has long since ceased to be maintained in its integrity, if indeed it ever was. A judgment of record may be discharged by a release under seal. *Barker v. St. Quintin,* 12 M. & W. 453. It is settled upon the authorities that a specialty cannot be discharged by any thing less than a specialty *before breach.* Broom Leg. Max. 846-'7, and *Cope v. Jameison,* 32 N.C. 193. And in Blake's case *ubi. sup.* it is said that when a duty accrues by the deed in certainty, as by covenant, bill or bond, to pay a sum of money, it must be avoided by matter of as high a nature. (694)

But in *Neal v. Sheaffield,* Cro. James 254, a distinction was taken, which left this doctrine only a barren technicality, viz: that a plea of satisfaction, though bad if pleaded to the *bond,* was good, if pleaded as a satisfaction of *the sum* due by the bond. In the United States this distinction has been looked on as touching the form only, and the supposed rule has been substantially disregarded; *Strong v. Holmes,* 7 Cow. 225; *State v. Cordon,* 30 N.C. 179. This present view

of the law in England is stated in a note of Sergeant Manning to *May v. Taylor,* 6 M. & G. 262, (46 E. C. L. R. 259,) as follows:

"The distinction appears to be this: there can be no *dispensation* with a contract under seal, except by a release under seal. Accord and satisfaction *before breach* is therefore a bad plea in covenant, because it amounts to a dispensation. But accord and satisfaction *after breach* is a good plea, because the subject matter of the payment and acceptance in satisfaction is not the covenant which still remains entire, but the damages sustained by the particular breach of it for which the action is brought."

There is little use in holding on to a rule, after it has been reduced to such a shadow.

There is also a class of cases, arising out of arrangements made by a debtor with his creditors for a discharge of their debts on a partial payment, where the agreement is enforced and the creditor prevented from suing until a failure by the debtor to perform the condition, on the ground that his doing so would be a fraud upon the other creditors who had been induced to join with him in the agreement. *Good v. Cheseman,* 2 B. and Ald. 328, (22 E. C. L. R.), certainly it could never be held in such a case, that a creditor by bond, would stand on any different footing from one by writing only. In this case, the mortgages by McKesson and Woodfin, were each inducements for the other.

In all these cases, if the matter can be pleaded as satisfaction,
(695) it must be equally good when pleaded only in suspension of the action.

In fact it may fairly be doubted, whether the strict rules applicable to bonds before they were made negotiable, continued to be so, after they became, as they have with us, a common form of commercial paper.

We think that the defendants were entitled to the instructions asked for; and that his Honor erred, in saying that there was no promise to suspend action, implied by the acceptance of the mortgages. We think such a promise was implied, and that the acceptance of the mortgages suspended the right of action.

Per curiam.

Venire de novo.

Cited: Hemphill v. Ross, 66 N.C. 477; *Molyneux v. Highway,* 81 N.C. 114; *Carter v. Duncan,* 84 N.C. 679; *Stallings v. Lane,* 88 N.C. 218; *Bank v. Bridgers,* 98 N.C. 70; *Southerland v. Fremont,* 107 N.C. 573; *Brame v. Swain,* 11 N.C. 543; *Jenkins v. Daniels,* 125 N.C. 168; *Cherokee Co. v. Meroney,* 173 N.C. 655.

WILLIAM MASTIN ET AL. v. ELAM MARLOW ET AL.

After the pleadings are made up and whilst the trial is progressing, it is irregular to move to dismiss the complaint, or Bill in Equity, for defects apparent upon the face of the complaint or Bill in Equity, except where there is a manifest defect of jurisdiction in regard *to the subject matter*, as distinguished from a want of jurisdiction in respect to the *person*, or a *statement* of a *defective cause* of action, as distinguished from a *defective statement* of a cause of action.

Where there is no proof of positive fraud or imposition, the contract of an heir expectant to convey what may descend to him by the death of the ancestor, is obligatory upon him, and such contract will be enforced by the Courts.

Where the consideration is fair and adequate and no undue advantage has been taken, the decree is for specific performance, where advantage has been taken of the necessity of the heir expectant, the contract is held as a security for the return of the money actually advanced together with interest.

Where A, an heir expectant of B, executed a deed to C, for "his entire interest in all the personal estate of B, and also his entire interest in all the real estate of B, that he the said A may be entitled to as one of the children and heirs at law of B," it does not convey such an interest as could be enforced in a Court of Law under the old procedure, but resort must have been made to a Court of Equity.

BILL in Equity, heard before *Mitchell, J.*, at Spring Term, 1871, of WILKES Superior Court. (696)

The bill alleges that one James Marlow had, by inquisition, been found to be *non compos mentis*, and that the defendant, Linda, who intermarried with the defendant, Hilliar Marlow, conveyed by deed, for a valuable consideration, to the complaints, William B. Mastin and William B. Trausaw, all their interest and expectancy as heirs at law of the said James Marlow, in two tracts of land, belonging to him, and particularly described in said deed. That by the said deed of conveyance the said Hilliar Marlow and his wife, Linda, conveyed absolutely to complainants Mastin and Trausaw, in fee simple, their entire interest in and to the said lands of James Marlow, with a covenant of warranty of title to the said complainants, that the private examination of the *feme* defendant, Linda, was duly taken, and said deed was duly registered; that they also bought the expectancy of the defendant, Elam, also an heir at law of James Marlow, for value, in the lands above described, and received a deed therefor with full covenants of warranty, and paid all the consideration therefor except an inconsiderable amount, which they are ready to pay at any time.

The complainants further allege that since the death of James Marlow, they have repeatedly called on the defendants, Hilliar Marlow and Elam Marlow, and have respectively requested them to perform their agreements towards your orator, specifically, as complainants were advised that some further assurances by deed were necessary, fully and legally, to convey the interest and title of the said Hilliar and
(697) Linda, his wife, and the interest of the said Elam Marlow to complainants, according to the several agreements above set forth.

That the said defendants, Hilliar Marlow and wife, Linda, and Elam Marlow, have, since the execution of said deeds to complainants, sold their said respective shares in said lands to Dr. James Calloway, for the same prices respectively that complainants gave for said shares, and they have allowed the said Calloway to enter into possession of said lands; that the said Calloway has subsequently conveyed the whole or greater part of said shares to Phineas Marlow, now dead, who, prior to his death, sold and conveyed the whole or a part of said shares in said lands to the defendant Harrell Hays.

The complainants further allege that they are each entitled to five forty-second parts of said lands, and that the said James Calloway and Phineas Marlow had full notice and knowledge that the said Hilliar and wife, Linda, and the said Elam had agreed and contracted to sell their said interests in said lands, and has respectively executed the said instruments of writing above described to complainants for the same.

The complainants also aver their readiness to perform their agreements respectively, and specifically, in all things remaining to be done, and ask that all necessary accounts be taken of the rents and profits of said lands, etc., and that defendants be required to convey the above described shares of land to complainants.

At Spring Term, 1871, the defendants moved to dismiss the bill, because taking all the facts set forth therein to be true, the complainants were not entitled to the relief prayed for, and that said bill be dismissed on the ground that the plaintiffs' remedy at law was complete.

His Honor being of opinion with the defendants, ordered the bill to be dismissed with costs, and plaintiffs appealed.

W. P. Caldwell, with whom was Armfield for complainants.

A father is seized in fee of land. The son, in the life of the
(698) father, for a valuable consideration executes and delivers a deed of bargain and sale to the plaintiff, in fee, for his interest in the

land, and warrants his interest. The deed is duly proven and registered. the father dies intestate. The son, by deed, conveys to Calloway, with notice of the sale to plaintiff. Can the plaintiff maintain ejectment against Calloway or against his bargainee in possession?

1. Bargain and sale is a contract to convey the land, and the bargainor becomes a trustee, or is seized to the use of the bargainee. 2 Bl. 273, he must be seized at the time, so that this seizin can instantly pass, and if he is not seized at the time, or has no vested interest, the instrument is void as a conveyance. It is an executory contract.

2. Upon the descent to the son, does the title pass to the plaintiff, by reason of the estoppel? In *Rawlin's* case, 4 Coke Rep. 52, it was decided that when A, having nothing in land, *demised* it by *indenture* to B for 6 years, and afterwards obtained a term of 21 years, that term was bound by the estoppel, and it was not only a bar to A, but the estoppel passed the estate. And it was decided that a fine levied by a contingent remainderman, or by an heir expectant in the life of the ancestor, bound the estate by the estoppel, upon the happening of the contingency and the descent. Such was also the effect of a common recovery and of a feoffment; they not only concluded the parties, but transferred by estoppel, future estates.

But such was not the effect of grants and releases at common law; and it was early held that the conveyances by bargain and sale, lease and release, and all conveyances operating under the statute of uses, were mere grants, and for a want of the seizin, were governed by the same rule. It has been held in several of the States of the Union, that the estoppel grew out of the warranty usually contained in our conveyances under the statute of uses; and that if a deed had a general warranty, the parties were not only concluded, but subsequently acquired, estates actually passed by estoppel. But that a warranty (699) has no such effect see Smith's Leading Cases, 629-630. Warranty, in a bargain and sale, neither bars the grantor or those claiming under him, upon the subsequent *descent* of the estate, and the estate does not pass by the estoppel. The editor cites *Bivans v. Vanrant,* 15 Georgia 321. He also cites *Jacocks v. Gilliam,* 7 N.C. 47, and same case *Gilliam v. Jacocks,* 11 N.C. 310, which decides that a bargain and sale, with warranty by tenant, in tail, does not make a discontinuance. Taylor, C.J., says that the warranty in a bargain and sale is a personal covenant. To the same effect is cited in *Spruill v. Leary,* 35 N.C. 255, 408, the dissenting opinion of Pearson, J. With or without warranty, a deed of bargain and sale of an estate, not vested in interest at the

time the deed is executed, is void at law, but will be enforced in equity, as an executory agreement to convey, and will be rendered effectual by a decree, as soon as the interest intended to be conveyed actually vests. Sm. Ld. C. 641, and authorities there cited.

In our case, the land itself is not conveyed, and the deed only attempts to convey the expectancy, the interests of the bargainor; and the warranty is not of the land nor of any estate in the land, but of the bargainor's interest. It is nothing but a contract. Where lands is held adversely, and he who has the right, makes a deed, the bargainee cannot maintain ejectment against the tenant; 1st, because he has only a chose in action; 2d, for the reason, which I think is the true reason, that the full use cannot be raised out of anything whereof the possession cannot be instantly executed by the statute. If the bargainor afterwards gets the possession, the right in the bargainee is a *scintilla*, which, by his entry is enlarged into the full estate, and the bargainee may maintain ejectment against the disseizor of the bargainor, and it is not by virtue of the warranty or estoppel.

So, if the bargainor in possession has no title and makes a
(700) deed, and then gets the right, the bargainee gets the full estate, because the bargainor could raise the use and the statute executes the possession, and when he afterwards purchases, he only gets the right. A Court of Equity will hesitate to consider a deed, made in any terms, by an expectant heir, as an estoppel, for the reason that in equity the deed is *prima facie* fraudulent and void, and is an exception to the rule, that fraud must be alleged and proved; *White v. Tudor*, L. C. in Eq. 420, *et seq.*, and this suspicion extraordinary of the Court, will always induce it to claim the full jurisdiction of any case in which a question of such deed is involved. In *McDonald v. McDonald*, 58 N.C. 211, the plaintiff had sold by deed his expectancy, and the suit was for the personal estate. But the Court lays down the law, as contended for in this case. See cases there cited.

Bailey for defendants.

1. An heir presumptive or apparent in the lifetime of his ansectors, sells, or professes by writing to sell, to the plaintiff the real estate of such ancestor; afterwards the ancestor dies, and the same person conveys by deed to the defendant. We submit that such a bare expectancy was not the subject of a sale at law or in equity, and the attempted sale is a nullity. The doctrine is well settled, both in England and in America; *Jones v. Roe*, 3 T. R. 88; *Carlton v. Leighton*, 3 Mer. 667; 2 Shars. Black. 290 W.; 3 Washb. Real Pross. 302; *Davis v. Haden*, 9 Mass. 514.

2. If it could operate to any intent it can only be by estoppel, in which case the interest, when it accrued, would feed the estoppel and convey a *legal title;* but in no event can a bill in equity be maintained.

PEARSON, C.J. This is the second instance at the present Term of a case, when in the midst of a trial, the proceedings are (701) abruptly stopped by a motion to dismiss. One on the common law docket, *Garrett v. Trotter,* Ante. 430, and this case on the equity docket, when after "replication and commissions," depositions and order of publication, the case is set for hearing, and while being heard is put an end to, by a motion to dismiss.

This mode of procedure is irregular, and gives rise to great inconvenience and useless cost.

At law, the orderly mode of procedure is by demurrer; or else by motion in arrest of judgment, after the trial.

In equity, by demurrer, or else by reserving in the answer the same right to make the objection at the hearing, as if it had been made a special ground of demurrer.

This erratic course of a motion to dismiss, in the midst of the hearing, should never be allowed, except, when there is a manifest defect of jurisdiction in regard to the subject matter, as distinguished from a want of jurisdiction in respect to the person; or a statement of a defective cause of action, as distinguished from a defective statement of a cause of action; and the plaintiff by his own statement shows affirmatively, that he has no cause of action, and cannot be helped by the power of amendment, or any other indulgences in the reach of the Court.

His Honor considered this case as one of that extreme kind, for that, by the plaintiffs' own showing, they had a complete remedy at law, and a Court of Equity could, under no conjunction of circumstances, have anything to do with it.

We have here an illustration of the wisdom of adhering to the regular mode of procedure, for, as it turns out, the plaintiff's have not only no *complete remedy at law,* but the defendants seek to turn the tables, and say the plaintiffs have no remedy either *at law* or *in equity;* and so the bill should have been dismissed, because they have no *status* in any court, and no right at law or in equity.

The original position and the one on which his Honor acted, was, that the deed to plaintiffs conveyed the legal title, and so (702) they had a *complete remedy at law.* The deed on its face does not purport to convey the land, but "the entire interest of Elam Marlow, in all the personal estate of James Marlow, and also his entire in-

terest, in all the real estate of the said James Marlow, that *he, the said Elam Marlow, may be entitled to, as one of the children and heirs of the said James Marlow;* his share being one eighth part of the personal and real estate of the said James Marlow."

The defendants were compelled to abandon this position; for nothing is clearer, than that to make a grant operative, there must be a grantor, a grantee and a *thing granted;* here there was grantor and grantee, but nothing that was the subject of a grant! James Marlow being alive. The ingenious counsel for the defendants then fell back on a position in the same line; that although the deed could not take effect, to pass the title directly, yet it operated by way of estoppel; and the subsequent acquisition of the estate, by the death of James Marlow, and the descent cast *fed the estoppel,* and did in fact pass the estate. He was met by the rule, "an estoppel against an estoppel, doth put the matter at large," and when the *vente* is apparent on the face of the deed, the party shall not be estopped to take advantage of the truth. Coke Lit. 352 b.

Here, the *vente* did appear on the face of the deed, to-wit: that Elam Marlow, had nothing in the land, which could pass by the deed operating as a conveyance or by way of estoppel, for he had nothing which was the subject of a grant. So, that position was likewise abandoned on the argument.

The ingenious counsel then took a position on the other extreme of his line of defence, and assumed that the plaintiffs had no *status* in any Court, and no right either in a Court of law or of equity, for that Elam Marlow, the grantor, had but a bare expectancy, a possibility to inherit which, so far from being the subject of a grant, was not even a matter in regard to which a contract could be made.

There is a marked difference between what may be the sub-
(703) ject of grant, and the subject of an executory contract; any present estate, whether it be in possession, or to be enjoyed in possession, after the determination of a particular estate, as a reversion or a vested remainder, is the subject of grant, and the title passes thereby; but a thing not in esse, is not the subject of grant. If A makes a bill of sale to B, for his next year's crop, or the next colt of a certain mare, B acquires no title to the crop or to the colt. So a contingent remainder cannot be assigned, although it is transmissible by descent, and according to the modern cases, it may be devised, (therein overruling the more ancient cases, where it is held, that a contingent remainder, the person being certain, and the event uncertain, cannot be devised, for a devise is a species of conveyance,) so the expectancy of one named in a will as legatee or devisee, or of one who, as in our

case, is an heir apparent of his father, cannot be assigned, for he has nothing to assign.

So, if A makes a deed to B, setting out the fact, that he is in treaty for, and expects to purchase a certain tract of land, and in consideration of, (say $1,000) to him paid, he sells and conveys to B and his heirs, the said tract of land. The deed does not pass the title directly or by way of estoppel, for there is no estate that can be passed.

In all of these cases, however, although the title does not pass, if there be a valuable consideration to bind the bargain, the party is not without remedy, for in the case of the crop and the colt, "*ut res majis valeat quam pereat,*" the law will enforce the contract by allowing damages to be recovered, for the breach, and in the other cases, equity will enforce a specific performance, treating it as an executory contract, provided there be a valuable consideration, and the bargain was fairly made, and no undue advantage taken either of the party's ignorance or of his poverty. *McDonald v. McDonald,* 58 N.C. 211. Where the cases are all cited and it will be seen that most of them can be reconciled, on the ground, that in the cases where the Court refuses to recognize the contract of an expectant heir as binding on him, (704) the decision is put on proof of positive fraud and imposition.

The power of an heir expectant to bind himself by contract, in regard to what may descend to him by the death of the ancestor, is taken to be settled. In some cases, when the consideration is fair and adequate, and no undue advantage has been taken, the decree is for specific performance. In other cases, when advantage has been taken of the necessity of the party, the contract is held as a security for the return of the money actually advanced, together with interest, while in other cases, all relief is refused, because of fraud and imposition. Under which of these three classes, the case in hand will fall, it is not for us now to say, as the plaintiffs will no doubt ask the privilege of amending the bill, so as to make the allegation in respect to the price paid, and the fairness of the transaction more distinct and direct; and also to avoid the objection on account of multifariousness, both in respect to the parties and to the relief prayed for. These matters not being up for consideration before us, upon a motion to dismiss the bill for want of equity.

All of this tends to show how much better it would have been to have let the cause come on for final hearing in the Court below; so that when it did come up to this Court, it could have been disposed of finally.

Error.

Per curiam.

Judgment reversed.

NOTE.—Justice Boyden being of counsel in the Court below, did not sit at the hearing of this cause.

Cited: Long v. Bank, 81 N.C. 45; *Wilson v. Lineberger,* 82 N.C. 414; *Loftin v. Hines,* 107 N.C. 360; *Foster v. Hackett,* 112 N.C. 556; *Wright v. Brown,* 116 N.C. 28; *Brown v. Dail,* 117 N.C. 43; *Vick v. Vick,* 126 N.C. 126; *Boles v. Caudle,* 126 N.C. 355; *Boles v. Caudle,* 133 N.C. 534; *Kornegay v. Miller,* 137 N.C. 669; *Garrison v. Williams,* 150 N.C. 678; *Williams v. Bailey,* 177 N.C. 40; *Benson v. Benson,* 180 N.C. 109; *Anderson v. Atkinson,* 235 N.C. 301; *Price v. Davis,* 244 N.C. 232, 235; *Lumber Co. v. Banking Co.,* 248 N.C. 311; *Stewart v. McDade,* 256 N.C. 635.

RULES OF PRACTICE

ADOPTED AT JUNE TERM, 1871.

(705)

I. Clerks shall not make out transcripts of judgments to be docketed in another County, until after the expiration of the Term, at which such judgments are rendered. All judgments rendered in any County at the same Term and sent to another County to be docketed, shall be equal in respect to lien; provided they be docketed in reasonable time, say ten days, after the end of the Term. Adopted January Term, 1871. *Johnson v. Sedberry,* 65 N.C. 5.

II. All judgments rendered by a Justice of the Peace, upon writs of summons, returnable on the same day, shall, when docketed, stand on the same footing in respect to lien; provided such judgments be docketed within reasonable time, say ten days, after their rendition. Adopted, January Term, 1871. *Johnson v. Sedberry, supra.*

III. During the Term at which replication is filed, or as soon thereafter, as may be, the Attorney of plaintiff, will draw up in writing, such issues arising upon the pleadings, as he deems material to be tried, and submit the statement to the Attorney of defendant, and if he concurs, the statement signed by the Attornies, will be filed with the Clerk. Otherwise the defendant's Attorney will make a like statement, and the two will be handed to the Judge, who will "settle the issues," and file them with the Clerk, to stand for trial at the next Term.

IV. Issues should be framed in concise and direct terms, and prolixity and confusion should be avoided, by not having (706) too many issues.

V. Before the argument of an appeal, if the Court considers the trial of one or more other issues, necessary for the decision of the case, upon its merits, additional issues will be made up, under the direction of the Court, and be sent to the Superior Court for trial, and the case be retained.

VI. Many records are brought before this Court, in which the proceedings and papers are mingled in a confused way, without any regard to the order of time, without paging, or marginal reference, by which a knowledge of the subject matter may be facilitated.

Counsel in arguing a cause are thus embarrassed and delayed, in finding the matter they are seeking for, and the Court is put to much unnecessary labor, therefore, we have seen fit to make the following orders:

1. In every record of an action brought to this Court, the proceedings shall be set forth in the order of time, in which they occur, and the several processes, orders etc., shall be arranged to follow each other in such order, when possible.

2. The pages of the record shall be numbered, and there shall be written on the margin of each, a brief statement of the subject matter, opposite to such subject matter.

3. On some paper attached to the record, there shall be an index to the record, in the following or some equivalent form;

Summons — date,	Page 1
Complaint — first cause of action,	" 2
" second cause of action,	" 3
Affidavit for attachment, etc.,	" 4

4. If any case shall be brought on for argument, and the
(707) above rules shall not have been complied with, the case shall be put to the end of the district, or of the docket, or continued as may be proper: and it will be referred to the Clerk of this Court, or to some other person, to put the record in the prescribed condition, for which, an allowance of five dollars shall be made to him, in each case, to be paid by the appellant; and execution may immediately issue therefor.

APPENDIX

(709)

UNITED STATES v. AMOS S. C. POWELL.

Circuit Court of the United States for the District of North Carolina, June Term, 1871, Judges BOND and BROOKS presiding:

This was an indictment under the 15th section of the act of Congress of the 31st May, 1870, entitled "An act to enforce the rights of citizens of the United States to vote in the several States of this Union, and for other purposes."

The indictment charged that the defendant knowingly accepted and held office under the State of North Carolina, to which he was ineligible under the provisions of the 3d section of the 14th amendment of the Constitution of the United States.

A witness, in behalf of the prosecution, testified that the defendant, prior to the commencement of the late rebellion, held and exercised the duties of the office of constable, in Sampson County, to which office it was shown, by the records of the Court of Sampson County, the defendant had been first appointed by the County Court, upon a failure to elect by the people, and subsequently was elected by the people as the law provided; and in both instances qualified by taking the oaths required by law.

Another witness, in behalf of the government, testified that in 1863 he (the witness) was a captain, and was recruiting a company for the Confederate service, at Wilmington; that defendant came to him and proposed to enlist in his company, provided he would accept a substitute and relieve him from duty; that the defendant did enlist in the service and tendered a substitute, as agreed upon; and, therefore, he granted to the defendant a certificate of exemption, as provided by a Confederate law.

The prosecution further proved that the defendant applied for and received the appointment of Justice of the Peace for Samp- (710) son County, in 1863, and qualified as such; that he had been elected Sheriff of Sampson County in the year 1868, and qualified, and continued to perform the duties of the Sheriff up to the present time.

The defendant offered a witness to prove that after the passage of the conscript law by the Confederate Government, and when the authorities had commenced to enforce the same, he was notified by the conscript officer, in his County, that he would be required to perform

such service; that a day and place had been fixed for the meeting of conscripts, and he had been notified to attend; that he became alarmed, being averse to such service; volunteered to enable him to offer the substitute, and thereby obtain exemption for himself.

This evidence was objected to by the prosecution as irrelevant, but was admitted by the Court.

The defendant offered further to prove by witnesses, who lived in the same County, and near him during the rebellion, and with whom he frequently conversed during the time the conscript law was being enforced in this County and about the time the substitute was furnished by him, that he was opposed to the rebellion, and his opposition to serving in the army. This was also objected to by the prosecution, but was received by the Court.

The counsel appearing for the government asked the Court to instruct the jury, that the office of constable before the war was such an office as rendered those who had held it and thereafter engaged in the rebellion, ineligible to any office now, by the provisions of the 3d section of the 14th amendment, unless relieved, as that amendment provides.

The counsel for the government, further asked the Court to instruct the jury, that if the defendant had before the rebellion so held the office of constable, and thereafter volunteered, though he offered a substitute and did no actual military service himself, and though his purpose may have been to avoid the service, that he engaged in the
(711) rebel service within the meaning of the Constitution; and further asked the Court to instruct the jury that if the defendant (having been constable as aforesaid) accepted the office of Justice of the Peace under the rebel government of North Carolina, though he may have performed no duty as Justice promotive of the Confederate cause, that the acceptance of the office and taking the oath required of such office, was such aid or engaging in service of the enemies of the United States, as disqualified him from holding the office of Sheriff, without the relief required by law.

District Attorney Starbuck and Bragg & Strong for the United States.

Battle & Sons for defendant.

BOND, J. Gentlemen of the Jury. The facts in this case have been plainly presented and thoroughly argued to you, and it remains only for the Court to instruct you upon one or two strictly legal points, to enable you to find a true verdict.

And in the first place, gentlemen, if you find from the evidence that before the late war the defendant held the office of Constable in the State of North Carolina, and took the oath to support the Constitution of the United States required of such officer, and subsequently engaged in the rebellion, it is necessary for you to know whether or not he is within the meaning of the provisions of the act of Congress, under which he is now indicted.

The words of the statute, gentlemen, are broad enough to embrace every officer in the State.

There can be no office which is not either Legislative, Judicial or Executive; and there can be no question, it seems to the Court, but that, unless it be possible to find some external reasons for giving this broad language a narrower meaning, it embraces every office in the State.

But we can find no such reasons.

The act, to be sure, is primitive, and it is argued that it was passed to punish those high in authority in the rebellious States (712) at the time of the outbreak of the rebellion for their bad faith toward the Government they had sworn to support, and was not intended to reach those who held minor offices.

But while the act is primitive in its character, it was passed at a time when Congress was endeavoring to restore order and government throughout the rebellious States; and it was thought that in this effort those who had been once trusted to support the power of the United States, and proved false to the trust reposed, ought not, as a class, to be entrusted with power again — until Congress saw fit to relieve them from disability.

The words of the act were made just exactly comprehensive enough to include such persons, and, in the opinion of the Court embrace the office of Constable, which is an Executive office, and in North Carolina at the time defendant held it, was limited in its exercise and jurisdiction by County lines only.

If you find that the defendant did hold the office of Constable before the war, and took the oath to support the Constitution of the United States, you must, before you find him guilty under this indictment, find a further fact, and that is, that he engaged subsequently in insurrection and rebellion against the United States.

To establish this the prosecution offers evidence to prove two facts, which, if you find to be true, the question arises, do these amount in law to engaging in rebellion or insurrection?

The first is, that in February or March, 1863, he furnished a substitute for himself to the Confederate army.

This fact, if proved without explanation, would of itself, gentlemen, be sufficient to show the defendant was engaged in the rebellion.

But the defendant alleges and offers evidence to show that he did not do this voluntarily. That he was himself enrolled and was about (713) to be conscripted and was overcome by force, which he could not resist, and the question is whether if you find the facts alleged by the defendant, to be true, these exceed or justify his conduct in law. We are of opinion, gentlemen, that the word engage implies and was intended to imply a voluntary effort to assist the insurrection, or rebellion, and to bring it to a successful termination; and unless you find the defendant did that, with which he is charged, voluntarily, and not by compulsion, he is not guilty of the indictment. But it is not every appearance of force nor timid fear that will excuse such actual participation in the regellion or insurrection. Defendant's conduct must have been prompted by a well grounded fear of great bodily harm and the result of force, which the defendant was neither able to escape or resist.

And further, the defendant's action must spring from his want of sympathy with the insurrectionary movement, and not from his repugnance to being in an army, merely.

When you have determined these facts gentlemen, and have applied the law as we have stated it to these two points, you will have no further difficulty, for although it is further alleged by the prosecutor that the defendant held a commission of Justice of the Peace in 1865, under the Confederate Government we are of opinion that he might well have held that office without giving adherence or countenance to the rebellion.

It was absolutely necessary that during that commotion there should have been some to preserve order and to restrain the vicious and licentious, who without this, would have taken advantage of the turmoil to pillage and destroy friend and foe alike. He was a mere peace officer and unless it be shown that under his commission the defendant did some act in aid of the insurrection or rebellion, the fact that he was Justice of the Peace is of no consequence in the determination of his guilt or innocence under this indictment. Take the case and remember that every reasonable doubt is to be given in favor of defendant, (714) and by reasonable doubt we do not mean every indefinite uncertainty of mind which you may feel, but such a doubt as you can give a reason for on such a doubt as a reasoning man would entertain after careful consideration of the proof.

THE STATE OF NORTH CAROLINA v. THE TRUSTEES OF THE UNIVERSITY AND C. DEWEY, ASSIGNEE, AND OTHERS.

The Circuit Courts of the United States have not jurisdiction of a case either at Law or in Equity, in which a State is plaintiff against its own citizens. The Constitution of the United States does not confer such jurisdiction, nor is it conferred by any act of Congress. Such jurisdiction is not conferred upon the Circuit Court in this case by the Bankruptcy act of 1867, because there are other necessary parties than the Assignee in Bankruptcy, and without such parties the plaintiff could not sustain his suit in any Court.

BROOKS, J., delivered the opinion of the Court. The attention of the Court has not been invited to the question of jurisdiction in this case, by either the complainant or respondent, in their arguments. Yet, that is a question to be considered in the opinion of this Court, and the first properly demanding attention.

All the authority vested in the Courts of the United States to hear and determine causes, arises under the provisions of the Constitution of the United States, or acts of Congress.

By the provisions of the Constitution the Supreme Court of the United States is established, and its jurisdiction prescribed directly; and it is further provided that Congress shall have power to create or establish inferior Courts.

Then, we think that it necessarily follows that Congress has the power to prescribe the jurisdiction of such Courts. We are sustained in this view by the opinion in the case of *Osborne v. The* (715) *United States Bank,* 9th Wheaton, 738, and *Sheldon v. Gill,* 8th Howard, 448.

The second section of the third article of the Constitution relates to the subjects or classes of cases declared to be within the jurisdiction or power of the United States Courts, and is as follows:

"The Judicial power shall extend to all cases in law and equity arising under this Constitution; the laws of the United States and treaties made, or which shall be made under their authority; to all cases affecting embassadors; other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States," and lastly, "between a State or the citizens thereof and foreign States, citizens or subjects."

If the framers of our Constitution had proceeded no further, it might be contended with more reason that this suit, as instituted, comes within the jurisdiction intended to be conferred upon the Circuit Courts. But, as if to leave no doubt upon the subject, they proceed in the second clause of the second section of the third article to enumerate the classes of cases over which the Supreme Court shall have original jurisdiction, and with these we find all cases affecting embassadors, other public ministers and consuls, and those in which a State shall be a party; and it is further provided, that as to all other subjects included within the jurisdiction prescribed — the Supreme Court shall have appellate jurisdiction.

It may be said that though original jurisdiction is by this provision of the Constitution conferred upon the Supreme Court, it is not exclusive, but only concurrent with some other tribunal.

(716) We think that a fair construction of the language of the Constitution excludes such a conclusion, and we are happily sustained in this opinion by the opinion of the Court in the case of *Gale v. Babcock,* 4 Wash. Circuit Court Rep. 199.

It will be seen that in this case it is decided that the Circuit Courts have no jurisdiction of a cause in which a State is a party.

If more authority should be desired upon this point, we refer to the case of *Osborne v. The United States Bank,* 9th Wheat. 820, in which it is declared — that in such cases in which original jurisdiction is conferred upon the Supreme Court, founded on the character of the parties, the judicial power of the United States cannot be exercised in its appellate form.

In the case before us, the State of North Carolina is complainant and the only complainant, and it is the character of that party that brings the case within the original jurisdiction prescribed for the Supreme Court — and consequently, according to the opinion of the Court in the case last cited, is excluded from the appellate jurisdiction of that Court.

We hold that it was not intended by any provision of the Constitution or the laws to confer jurisdiction on this Court in any case involving many thousands of dollars, (as in this case) without the right of appeal in the event either party should be dissatisfied with the decision of this Court.

Again: In the cases of *Martin v. Hunter's Lessees,* 1 Wheat. 337; *Cohen v. Virginia,* 6 Wheat. 392, it is decided that in such cases as draw in question the laws, Constitution, or treaties of the United States, though a State may be a party, the jurisdiction of the Supreme Court is appellate; for in such a case the jurisdiction is founded, not

upon the character of the parties, but upon the nature of the controversy. Such cases may be taken by appeal, or writ of error, from the highest judicial tribunal of a State to the Supreme Court of the United States.

The great American Constitutional Judge, in delivering the opinion of the Supreme Court of the United Stattes in *Cohen v.* (717) *The State of Virginia,* before referred to, uses this language: "It has been also argued as an additional objection to the jurisdiction of the Court, that cases between a State and one of its own citizens do not come within the general scope of the Constitution, and were obviously never intended to be made cognizable in the Federal Courts. The State tribunals might be suspected of partiality in cases between itself, or its citizens and aliens, or the citizens of another State; but not in proceedings by a State against its own citizens. That jealousy which might exist in the first case could not exist in the last, and therefore the judicial power is not extended to the last. This is very true (says this learned Judge) so far as the jurisdiction depends upon the *character* of the parties.

"If the jurisdiction depended entirely upon the character of the parties, and was not given where the parties had not an original right to come into Court, that part of the second section of the third article which extends the judicial power to all cases arising under the Constitution and the laws of the United States would be mere surplusage. It may be true that the partiality of the State tribunals, in ordinary controversies between a State and its citizens was not apprehended, and therefore the judicial power of the Union *was not extended to such cases.*"

The ground, as it is seen, that the jurisdiction of this Court is claimed in this case depends upon the character of the parties, and not the character of the subject in controversy.

All we have said, it will be observed, relates more particularly to the the provisions of the Constitution, and in regard to the prescribing and the distribution of the judicial power of the United States.

The Act of 1789, section 24, is the first whereby Congress undertook to prescribe the jurisdiction of the Circuit Courts, and we find by the 17th section of that Act that such Courts are vested with original cognizance concurrent with the Courts of the several States, of all suits of a civil nature at common law or in equity, where the (718) matter in dispute exceeds a certain sum stated, and the United States are plaintiff or petitioner, or an alien is a party, or the suit is between a citizen of the State where a suit is brought and a citizen of another State.

It is quite clear, we think, that the provisions of this act do not embrace a case in which a State is a party.

This question, however, was raised soon after the passage of the act in the case of *Gale v. Babcock,* before referred to, and in this case it was decided that the Circuit Courts had no jurisdiction between a State and its citizens, or citizens of other States.

It was at one time supposed that the Constitution gave a broader power to the Courts. But it has been long since settled that the civil jurisdiction of the Circuit Courts is governed by the acts of Congress. *Turner v. Bank of North Carolina,* 4 Dall. 10; *McIntyre v. Wood,* 7 Cr. 506; *Kendal v. United States,* 12 Peterson 616; *Cary v. Curtis,* 3 How. **245.**

But the power to entertain this suit is claimed by counsel for this Court under the provisions of the bankrupt act of 1867. After a careful examination of the provisions of that act, we are of opinion that it was not designed to confer, and does not in fact confer such power.

If we could believe that the original jurisdiction conferred by that act upon the Circuit Courts was as full, or equal in all respects to that conferred upon the District Courts, we could not regard it as intending to produce so inevitable a conflict with the provisions of the Constitution before referred to, limiting and restricting, according to our construction, the original jurisdiction in cases in which States are parties to the Supreme Court.

We hold that no such jurisdiction as that contended for in this case was intended to be conferred upon this Court; and further, if it was clearly otherwise, that any attempt to do so on the part of Congress would be ineffectual; for, as has been before seen, the Constitu-
(719) tion having itself provided that the jurisdiction in such cases should be original in the Supreme Court, it must be regarded as exclusive of the other Courts of the United States — as much so as if the term *exclusive original jurisdiction* had been employed. And this appears to us to be the view entertained by the Court in the case of *Osborne v. The United States Bank,* before cited.

It has been suggested that there is a greater necessity for the exercise of jurisdiction by this Court in this case, because, as is insisted by the bankrupt law, the jurisdiction conferred upon the District and Circuit Courts of the United States is exclusive, and that no suit by or against an assignee can be maintained in the State Courts.

We agree that the only jurisdiction actually conferred by that act is with these Courts; but it does not follow that an assignee may not sue or be sued in the State Courts, and we think that an assignee may sue or be sued in the State Courts.

If we entertain the opinion that all controversies respecting a bankrupt's estate could only be heard and determined in the District or Circuit Courts of the United States, we confess that we would express the view we entertain with much more hesitation than we now feel.

Let the bill be dismissed.

Cited: Cogdell v. Exum, 69 N.C. 466.

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ABANDONMENT, WILFUL, OF WIFE.

A husband who wilfully abandoned his wife prior to the ratification of the act of 1869, chap. 209, cannot be convicted therefor.

Justices of the Peace have concurrent jurisdiction with the Superior Courts under said act. *State v. Deaton*, 496.

ACTION TO SURCHARGE, AND FALSIFY AN ACCOUNT.

See Jurisdiction. Ex'rs and Adm'rs.

ADVERSE POSSESSION.

Where the *locus in quo* was a peninsula formed by the bend of a river and the question was as to the adverse possession of that land by the defendant, and it appeared that he ran a fence partly on his own land and partly on that of another person, across the neck of the peninsula, so that it excluded the cattle of other persons from ranging upon it, except by crossing the river, and opened a gate in his fence for his own cattle to get upon it, *it was held* that the defendant had no adverse possession of the land in the peninsula, unless he had made the fence across the neck for the avowed and unequivocal purpose of taking possession of the peninsula, and using it for a pasture as his own land. *Osborne v. Johnston*, 22.

AGENCY.

An agent acting under a parol authority cannot bind his principal by deed. *Harshaw v. McKesson*, 688.

AMENDMENT.

1. Whenever, by any accident, there has been an omission by the proper officer to record any proceeding of a Court of record, the Court has the power, and it is its duty on the application of any person interested, to have such proceeding recorded as of its proper date; and such amendment should be made, even though the rights of third persons may be affected thereby. *Foster v. Woodfin*, 29.

2. An amendment supplying an omission in the record of a Court differs materially from one made for the purpose of putting into a process, pleading or return, something which was not in it originally; as an amendment for that purpose will not be allowed to the injury of third persons. *Ibid.*

3. Upon a motion to amend a record of a Court, it is not regular or convenient collaterally to consider what the effect of the amendment will be, or whether the Court had the right to do what it is alleged that it did. These questions must be decided in some proceeding directly for that purpose. *Ibid.*

4. A motion to amend the records of the County Courts which existed prior to the adoption of the present Constitution and the Code of Civil Pro-

AMENDMENT—*Continued.*

cedure, in any matter relating to the appointment of an administrator, or qualification of an executor, must now be made to the Judge of Probate, and not to the Superior Court of the County. *Ibid.*

5. Under sec. 132, C. C. P., the Courts possess the power at any time before or after judgment, to amend, by adding or striking out the name of any party, or by conforming the proceedings to the facts proved. *Bullard v. Johnson*, 436.

6. When a lessor, during the existence of a lease, conveys by deed the realty to a third person, and an action is afterwards brought for the rent by the lessor, the Court has the power to amend, by striking out the name of the lessor, and inserting that of the assignee. *Ibid.*

7. The Court has the power to allow the amendment of an affidavit upon which a warrant of attachment had issued, although the former affidavit is wholly insufficient. *Brown v. Hawkins*, 645.

AMNESTY ACT.

The Amnesty Act of December, 1866, does not embrace the case of a crime, such as rape, committed prior to the 1st day of January, 1866, and having no connection with war duties or war passions, but extends to the case of a prisoner who had committed a homicide prior to that time, which was directly connected with, and grew out of the events of the war, and the passions engendered by it, though he was not acting strictly under authority, or during active hostilities. *State v. Shelton*, 294.

AMERCEMENT.

See Sheriffs.

APPEAL.

1. The Code of Civil Procedure requires no surety on an appeal from a Justice's judgment. *Steadman v. Jones*, 388.

2. Appeals from interlocutory judgments are only allowed in civil suits, and this by virtue of Rev. Code, chap. 34, sec. 27. Therefore, when the Court found from *ex parte* affidavits that the defendant, during the trial of an indictment for larceny, was guilty of tampering with a juror, and for such conduct ordered a juror to be withdrawn and a mistrial made, the defendant had no night to appeal to this Court. *State v. Bailey*, 426.

ARBITRATION AND AWARD.

1. Where two persons are appointed as arbitrators, and it is provided in the submission or rule of Court, that they may select an umpire, it must appear on the face of the award that the appointment of the umpire was the act of the will and concurring judgment of both the arbitrators. *Crisp v. Love*, 126.

2. Where two persons whose lands were contiguous, had a suit pending about the boundaries thereto, and afterwards entered into a bond agreeing to submit all questions arising about the boundaries of said lands to A and B, and

ARBITRATION—*Continued.*

to abide by the award made by them, and also in the said bond covenanted "that the party who shall fail to keep, abide by, and observe the decision and award that shall be made according to the foregoing submission, will pay to the other the sum of one thousand dollars, as liquidated, fixed, and settled damages:" *Held,* that after the award had been made by A and B, and one of the parties placed a fence over the dividing line as fixed by the award, and on the land of the other, and that said damages were not of greater value than five dollars, that the sum specified in the bond is to be regarded as a penalty, and not as liquidated damages. *Henderson v. Cansler,* 542.

ARREST.

1. A private person may arrest for felony, when it appears that it is necessary, for want of an officer or otherwise, that he should do so, to prevent the escape of the felon. In making such arrest for a felony, the person making it must notify the felon of his purpose, or he will be guilty of a trespass. *State v. Bryant,* 327.

2. It seems that a private person who, when it is necessary for him to act, attempts to arrest a felon guilty of a capital offence, such as murder or rape, may kill him if he either resists or flies, but he has no right to kill a person guilty of a felony of an inferior grade, such as theft, if he does not resist, but only attempts to escape by flight. *Ibid.*

ASSAULT AND BATTERY.

1. Where a *feme covert* commits an assault and battery in the presence of her husband, it is presumed, in the absence of evidence to the contrary, that she did it under his constraint. *State v. Williams,* 398.

2. This presumption of law, however, may be rebutted by the circumstances appearing in evidence, and showing that, in fact, the wife acted voluntarily, and without constraint. *Ibid.*

3. *Semble.* That this principle applies only to misdemeanors committed by the wife in the presence of her husband. *Ibid.*

4. Where the defendant went to a prosecutor and said "I once thought we were friends, but I understand you have said thus and so about me, and you have to take it back;" the prosecutor refused to take it back, whereupon the defendant put his hand open and flat on the prosecutor's breast, and pushed him back some steps, when he fell over a flour barrel, *it was held,* to be an assault and battery. *State v. Baker,* 332.

5. In an indictment, under the Act of 1868-'69, ch. 167, sec. 8, for an assault with a deadly weapon with intent to kill, it is sufficient to charge that the assault was made "with a certain pistol then and there loaded with gun-powder and one leaden bullet," without stating that it is a "fire-arm" or "deadly weapon," because the Court can see and will take notice that a loaded pistol is both. *State v. Swann,* 330.

6. An assault with a deadly weapon with intent to kill is not made a felony by the Act of 1868-'69, ch. 167, sec. 8, and therefore it is not necessary to charge that the assault was made with a felonious intent. *Ibid.*

ASSAULT AND BATTERY—*Continued.*

7. If a person be at a place where he has a right to be, and four other persons having in their possession a manure fork, a hoe and a gun, by following him and by threatening and insulting language, put him in fear, and induce him to go home sooner than, or by a different way from what he would otherwise have gone, are guilty of an assault upon him, though they do not get nearer to him than seventy-five yards, and do not level the gun at him. *State v. Rawles*, 334.

8. When a number of persons meet together, and there is evidence tending to show a common design to commit an assault upon another, they may all be properly found guilty, though only one of them used threatening and insulting language to him. *Ibid.*

9. Where a number of persons were charged with having met together and then gone to commit an assault upon another person, and it was proved on the part of the State, that one of the number had just had a conversation with him, *it was held*, that the defendants had a right to prove the details of the conversation as a part of the *res gestae* to prove the *quo animo* of their coming together. *Ibid.*

10. If A pursues B with a stick or piece of board raised in a striking attitude, and is stopped by a third person when within two or three steps of B, this constitutes an assault, although A could not have stricken B with the stick in his hand at the place where he was stopped. *State v. Vannoy*, 532.

AUDITOR OF THE STATE.

1. The Auditor of the State is not a mere ministerial officer. When a claim is presented to him against the State, he is to decide whether there is a sufficient provision of law for its payment, and if in his opinion there is not sufficient provision of law, he must examine the claim and report the fact, with his *opinion*, to the General Assembly. *Bonner v. Adams*, 637.

2. *Therefore*, where a Clerk of the General Assembly had received a warrant for the entire number of days to which he was entitled, at seven dollars per day, he had no right to a *writ of mandamus* against the Auditor of the State because he refused to give him a warrant for three dollars per day additional for the same number of days for which he had heretofore obtained a warrant. *Ibid.*

3. The mode of proceeding against the Auditor of the State, who refuses to issue a warrant, discussed and explained. *Ibid.*

ATTACHMENT.

1. Where an original attachment issued, and a summons of garnishment is served upon a party, who dies before the return day of process, his administrators cannot be required to answer said garnishment. In such a proceeding, the garnishee is required to answer upon oath whether he is indebted to the absconding debtor, and if so, how much? This being peculiarly within his own knowledge, the action cannot be prosecuted against his representatives.

2. History of the Common Law and of the enactments in this State, by which actions might be revived and carried on by, or against, the representa-

ATTACHMENT—*Continued.*

tives of a deceased party — and in what cases the maxim *actio personalis moritur cum persona* does not apply. *Tate v. Morehead et al.*, 681.

3. Where, on an attachment against the payee of a negotiable note, the maker is summoned as garnishee and admits his indebtedness to the payee, and thereupon a judgment is given against him for the amount, it will be no defence to such maker when sued upon the note by one who became a *bona fide* endorsee before he was summoned as a garnishee in the attachment, even though such endorsement was made after the note was over due. *Shuler v. Bryson*, 201.

4. When one is summoned as a garnishee in an attachment, and owes a note which is negotiable, he has a right to insist upon the production and surrender of the note, or upon an indemnity as in the case of a lost note, before a judgment is taken against him upon his garnishment. *Ibid.*

5. A Superior Court Judge has no authority to vacate injunctions, or to set aside attachments regularly granted, except for causes pending in his own District. Therefore when an attachment was taken out in the third Judicial District, the Judge of the sixth Judicial District was unauthorized in law to vacate said attachment. *Bear v. Cohen*, 511.

6. An attachment or other provisional remedy will be vacated without any undertaking by the defendant, by a Judge, if on its face it appears to have been issued irregularly, or for a cause insufficient in law, or false in fact. *Ibid.*

7. It is sufficient to authorize a warrant or attachment, if the affidavit set forth "that defendant was about to assign, dispose of, or secrete his property with intent to defraud his creditors," and then specifies "that the said property was secretly removed out of its usual place, after night, and found several miles distant, and when it was overtaken late at night, the persons having possession thereof made conflicting statements as to where they were going, and whose property it was they had." *Brown v. Hawkins*, 645.

ATTORNEYS.

1. A Judge has the power to stop an Attorney who abuses his privileges in his comments on a witness and his testimony before the jury. *State v. Williams*, 505.

2. The Act of April, 1871, declaring that no Attorney shall be disbarred, until he may be convicted of, or confess in open Court some criminal offence, showing him to be unfit to be trusted in the duties of his profession, is Constitutional:

(a) *Therefore*, the action of a Judge who acted in disregard of the provisions of this Act, was void. *Ex parte Schenck*, 354.

3. It is discretionary with the Court to stop counsel at the time, who are making improper remarks to the jury, or to wait and correct the error in the charge. *Jenkins v. N. C. O. D. Co.*, 563.

4. Where counsel *grossly* abuses his privilege whilst addressing the jury to the *manifest prejudice* of the opposite party, it is the *duty* of the Court to stop him then and there; otherwise it is ground for a new trial. *Ibid.*

BANK BILLS.

See Practice.

BANKS' DEALINGS WITH THEIR CUSTOMERS.

1. The ordinary relation subsisting at common law between a bank and its customers on a general deposit account is simply that of debtor and creditor. A deposit by a customer, in the absence of any special agreement to the contrary, creates a debt, and the payment by the bank of the customer's checks, discharges such debt *pro tanto*. The bank or the customer may at any time discontinue their dealings, and the balance of the account between them can be easily ascertained by a simple calculation. *Bowden v. Bank Cape Fear*, 13.

2. The general rule in adjusting a running account between a bank and its customer is, "the first money paid in, is the first money paid out." The first item on the debit side is discharged or reduced by the first item on the credit side. But this rule is not strictly applicable to a case where the account commenced before the late civil war, and was continued during it, as that part of the account which was in Confederate currency is not to be governed by the principles of the common law, but by the ordinance of the 18th October, 1865, and the Acts of 1866, chs. 38 and 39. The account must be divided, and the amount due October 1st, 1861, must be estimated in par funds. To give full effect to the payments of the bank, and allow to the plaintiff the proper value of his deposits, each payment ought to be deducted from the next preceding deposit or deposits, and when the deposits are in excess of the payments, a balance ought to be struck, and the value of such excess ought to be ascertained according to the scale, and form a part of the general balance due the plaintiff. In this way the nominal amount of the payments will be deducted from the nominal amount of the preceding deposits. The value of the excess of the various deposits at the time they were made with the premium added, will constitute the true balance in the Confederate currency transactions; and this sum added to the amount of the par funds due October 1st, 1861, will constitute the amount due the plaintiff at the time of the demand made. *Ibid.*

3. Where a bank, during the late civil war, adopted a new usage and custom with its customers, with regard to their deposits in Confederate currency, proof of it cannot be admitted to affect one who had been a regular customer before the war, and continued such during the war, unless it be shown that he had notice of the change in the ordinary usage and custom of the bank as to general deposits. *Ibid.*

4. The fact that a regular customer sometimes made special deposits of bank bills with a bank, has no tendency to show that he had notice of change in the ordinary usage and custom of the bank as to genreal deposits, for a special deposit constitutes a contract essentially different from that which arises by implication of law from a general deposit. *Ibid.*

5. A special deposit is a naked bailment, and on demand of the bailor, restitution must be made of the thing deposited, and as the bank acquires no property in the thing deposited, and derives no benefit therefrom, it is only bound to keep the deposit with the same care that it keeps its own property of a like description. *Ibid.*

BANKRUPTCY.

1. A brings an action of replevin for the recovery of an Ox; during the pendency of the suit he is adjudged a bankrupt upon his own petition, and the Ox is allotted to him as a part of his exemptions under the bankrupt law: *Held*,

BANKRUPTCY—*Continued.*

that the legal title to the Ox remained in A, and that it had never vested in the assignee. *Scott v. Wilkie*, 376.

2. Although a tenant cannot dispute the title of his landlord, yet, in an action for the recovery of realty by an assignee in bankruptcy against the tenant of the bankrupt, he may dispute the assignment. *Steadman v. Jones*, 388.

3. The defendant, a corporation, created by the laws of the State of Rhode Island, did business in this State, and owned property here. Within six weeks after a warrant of attachment had been executed on the estate of defendant, situate in this State, it was declared a bankrupt on its own petition by the District Court of the United States for the District of Rhode Island, and a deed of assignment of all the estate of defendant was made to the assignee. *Mixer v. E. O. & G. Co.*, 552.

Held, (1.) That the warrant of attachment, although executed on the estate of defendant is but *mesne process. Ibid.*

(2.) That the effect of the appointment of the assignee was to vest the entire estate of the defendant in such assignee, and that the order for the dissolution of the warrant of attachment, and the restitution of the estate of defendant to the assignee, was proper. *Ibid.*

BOND OF CONSTABLE.

1. Where a person gave bond as Constable in February, 1856, and also in February, 1857, and received claims for collection in April, June and July, 1856; *Held*, if the claims were collected in 1856, that suit should have been brought upon said bond, and that it was incumbent upon the relator of the plaintiff to prove that the claims *were not collected in* 1856, and were in the Constable's hands after the date of the bond sued on.

2. The statute of limitation on a Constable's bond is suspended from 20th May, 1861, to January 1st, 1870. *Taylor v. Galbraith*, 409.

BONDS PAYABLE TO C. & M. FOR LAND.

1. A civil action to recover the amount of a bond given for the purchase of a tract of land sold by the Clerk and Master under an order of the late Court of Equity, will not be sustained, because the Superior Court has, under the present system, succeeded to the jurisdiction of the Court of Equity and has plenary power, by an order in the cause, to compel the purchaser to pay such a sum as the Court may, under the circumstances, deem right and proper. *Council v. Rivers*, 54.

2. The objection that another action can not be sustained, because the Court can give the desired relief by orders in a cause still pending, though not taken in the Superior Court by demurrer or otherwise, may be taken *ore tenus* in the Supreme Court, or the Court may take it *mero motu* to prevent multiplicity of suits and the accumulation of costs, but in such case the action will be dismissed without costs. *Ibid.*

BOUNDARY.

Where the call of a deed was for a boundary on the north by the land of J. R., and J. R. had a tract of land belonging to himself, part of the southern

BOUNDARY—*Continued.*

boundary of which was north of the land described, and had, as tenant in common with another person, another tract lying also north of the land in question, it seems to be erroneous in a Court to charge the Jury merely that the call in the deed, which was for the land of J. R., meant the land of J. R. lying north of the land in dispute. *Osborne v. Johnston*, 22.

CASES OVERRULED.

Neal v. Lea in *Burwell v. Parham*, 584.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

To entitle a party to maintain an action for claim and delivery of personal property, there must be a compliance with all the requisites specified in chap. II of title 9, C. C. P. *Hersh v. Whitehead*, 516.

CLERKS SUPERIOR COURT.

See Confederate money.

CONFEDERATE MONEY.

1. A person who sold mules to an agent of the Confederate government, with a knowledge that they were to be used in the military service of such government, cannot recover upon a bond given for the price. *Martin v. McMillan*, 199.

2. A bond given in March, 1864, for Confederate money borrowed at that time, payable the 1st of October of the same year, "in four *per cent.* Confederate bonds or certificates, or in Confederate currency to be issued after the 1st of April, 1864," is not illegal and void, and a recovery may be had upon it for an amount in United States currency, to be estimated according to the legislative scale. *Haughton v. Meroney*, 124.

3. A note given for land sold in November, 1864, upon credit, with the understanding at the time of said sale that payment would be required in "*undepreciated money*," does not mean specie, or its equivalent. *Blackburn v. Brooks*, 413.

4. The time and circumstances under which said note was given are to be considered in ascertaining the intention of the parties, and these things, together with the conditions of sale, indicate that payment was to be made in money receivable in the ordinary commercial and business transactions of the country. *Ibid.*

5. Before entering the Confederate service, A placed in the hands of B Confederate currency to be applied to the support of A's family. The latter died in December, 1862, when B administered upon his estate, paid off the debts of his intestate, and retained *in kind* the money deposited with him by A: *Held*, that B was not liable for the value of said currency. *Hagans v. Huffsteller*, 443.

6. The receipt by a Clerk of the Superior Court of Confederate money in satisfaction of a docketed execution from this Court, in pursuance of the pro-

CONFEDERATE MONEY—*Continued.*

visions of the Rev. Code, ch. 33, sec. 6, after such money became depreciated (April, 1862,) in contravention of the directions of the plaintiff, amounts to a satisfaction of the execution to the extent of the value of the Confederate money in gold, to be ascertained by the legislative scale of the date of such payment, and the Clerk is liable on his bond to the same extent. *Greenlee v. Sudderth*, 470.

7. In such case the plaintiff may elect to repudiate the action of the Clerk, and recover the whole amount due in the execution from the defendant therein, or may ratify his action, and demand of him the amount of the gold value of the Confederate money so received, and recover the balance of his execution from the defendant therein: *aliter*, had the payment been made to the plaintiff. *Ibid.*

8. A ratification of the action of the Clerk, beyond the extent of the value of the money, will not be presumed by reason of his demanding in his complaint judgment for the whole amount of the execution. *Ibid.*

9. As the Clerk's liability arises from his agency as above stated, he is not liable for interest until a demand, and in the absence of any evidence of demand in this case, the defendants are liable for interest, only from the commencement of the action. *Ibid.*

See Guardian and Ward, Executors and Admr's.

CONTEMPT.

1. A fine for contempt of Court is a punishment for a wrong done the *State*, and is payable to the State. *In the matter of Rhodes*, 518.

2. It is a novelty unknown to the law, for a Judge to order the penalty inflicted upon a party for a contempt of Court to be paid to the party aggrieved. The State alone is entitled to the penalty. *Morris v. Whitehead*, 637.

CONTRACT.

1. Where A is indebted to B by note, and the former gives to the latter a mortgage to secure the payment of the note, there is an implied promise on the part of B that he will suspend suit brought upon the note. *Harshaw v. McKesson*, 688.

2. Where there is no proof of positive fraud or imposition, the contract of an heir expectant to convey what may descend to him by the death of the ancestor, is obligatory upon him, and such contract will be enforced by the Courts. *Masten v. Marlowe*, 695.

3. Where the consideration is fair and adequate and no undue advantage has been taken, the decree is for specific performance; where advantage has been taken of the necessity of the heir expectant, the contract is held as a security for the return of the money actually advanced, together with interest. *Ibid.*

4. Where A, and heir expectant of B, executed a deed to C, for "his entire interest in all the personal estate of B, and also his entire interest in all the real estate of B, that he the said A may be entitled to as one of the children and heirs at law of B," it does not convey such an interest as could be enforced

in a Court of Law under the old procedure, but resort must have been made to a Court of Equity. *Ibid.*

5. A person hired for one year, who is wrongfully dismissed before the expiration of the year, is not required to wait till the end of the year, but can sue at once, and is entitled to recover such damages as he has sustained by such wrongful dismissal. He may treat the contract as rescinded, and recover upon a *quantum meruit*. *Brinkley v. Swicegood*, 626.

6. When the terms of a contract are in writing, or otherwise ascertained, the construction of the contract is for the Court and not for the jury. Hence, where it appeared that a person having pork to sell in the year 1863, wrote to the buyer as follows: "Owing to the great fluctuation in Confederate currency, I prefer not selling for that money. Therefore let me know what you will pay in N. C. bank notes, or check on the Cape Fear Bank at Greensboro'," and the buyer took the pork, and sent a check in the following words:

"YANCEYVILLE, N. C., 3d Dec., 1863.

$3688. Cashier of the Bank of Cape Fear, Greensboro', N. C., pay to the order of Thomas D. Johnson, thirty-six hundred and eighty-eight dollars.

(Signed,) JOS. J. LAWSON, Cash'r.,

and endorsed "Pay Thomas Sellars or order.

(Signed,) THOMAS D. JOHNSON."

It was held, that the contract did not require the buyer to send a check payable in N. C. bank notes, and the check he sent was a compliance with the terms of it. *Sellars, et. al. v. Johnson*, 104.

7. If a seller receive a check drawn on a bank, which is endorsed to him, and which he might have refused as not being in accordance with his contract, but kept it, presented it to the bank for payment, and sued upon it, instead of repudiating it and returning it to the buyer, it amounts to an acceptance of the check in satisfaction of the article sold, and the liability of the buyer is then only upon his endorsement. *Ibid.*

8. The true meaning of a contract in the following words: "Twelve months from date, with interest from date, I promise to pay William Richards $6,662 in the event the Rhodes Gold mine continues to prove at the expiration of said opened and worked, continued to be as good a mine at the end of the year as it was at the beginning, and not that it was a good mine in the estimation of miners, without reference to its quality at the time the contract was made. *Richards v. Schlegelmich*, 150.

9. The enactment in the Revised Code, ch. 31, sec. 84, that "in all cases of joint obligations or assumptions or co-partners in trade or others, suits may be brought and prosecuted on the same against all or any number of the persons making such obligations, assumptions or agreements," is repealed in effect as to suits upon parol contracts made after the adoption of the C. C. P., by the 62d section of that Code, but such contracts made before that time are exempted from its operation by section 8, sub. div. 2 of the same. *Merwin v. Ballard*, 168.

10. Where it appeared that the plaintiff on the 1st of January, 1865, hired his slaves to the defendant upon the express understanding that he was to take

CONTRACT—*Continued.*

Confederate money in advance, or whenever he should apply for it, and the defendant was always ready to pay the Confederate money, but the plaintiff never applied for it, *it was held* that he was not entitled to recover the value of the hire of the slaves. *Erwin v. W. N. C. R. R.*, 79.

11. Where a person was, before the late civil war, the *bona fide* holder of two bonds of the State, which had been issued ten years before for purposes of internal improvements, and which were then due and payable, and in 1862, received from the State in payment thereof treasury notes to the amount of the bonds, which expressed on their face that they were fundable in the bonds of the State, thereafter to be delivered, and the bonds had never been delivered, *it was held*, Rodman, Justice, dissenting, that the claim was founded upon an illegal consideration and the State was not bound to pay it. *Read v. The State of N. C.*, 194.

12. Where several owners of land lying on a swamp, some above and some below a mill situated on it belonging to A, bought and paid for it, and took a deed to themselves in fee with the site and all rights appurtenant thereto, to be held in trust for the benefit of the lands of which they were the owners, and to prevent any mill dam or other obstruction from being placed across said swamp, to the damage and injury of their said lands, *it was held*, that the said purchasers had a right to prevent the erection of a mill dam across the swamp one hundred and fifty yards below the site of the old mill, by A or by one who purchased his land, and who proposed to build the dam partly on the land purchased of A, and partly on the land which he owned before. *Barnes v. Barnes*, 261.

13. As a general rule every contract ought to be enforced specifically, but an exception to this rule is permitted when damages can be recovered at law, which are an adequate satisfaction, and the exception is confined to cases in which there is a certain measure of damages, and money must be a satisfactory compensation. *Ibid.*

14. Contracts existing between citizens and residents of the northern States and citizens of this State, prior to the commencement of the late war, were suspended during the existence of hostilities. *Blackwell v. Willard*, 555.

15. Where a citizen and resident of New York had a suit pending in this State previous to the late war, and during the war, his debtor here pays up his indebtedness to the attorney or agent of such non-resident: *Held*, that such action was void, and that the relation of attorney and client was terminated by the war. *Ibid.*

16. Any securities held by a citizen and resident of New York previous to the late war, upon persons resident in this State, could not be extinguished *durante bello*, either through the agency of the Courts here, or through the former agents and attorneys of such non-resident. *Ibid.*

17. Therefore, where a debtor to a citizen or resident of New York paid off said claim to a Clerk and Master here in Confederate currency before such currency had depreciated to any extent, such payment is a nullity. *Ibid.*

18. Where A contracted during the year 1863 or 1864 to convey a tract of land to B for life, remainder to her children in fee, in consideration of a number of negroes then sold and delivered by B to A, in which the latter was a tenant for life, and her children entitled to the reversion, all of whom joined

CONTRACT—*Continued.*

in said conveyance except Eli, who was an infant, and one of the terms embraced in the contract to convey said land being that A would convey the said lands to B and her children whenever the infant Eli arrived at age, and would make "a good title" to his share of said slaves unto A, and the slaves were held by A till their emancipation: *Held*, that upon the coming of age of Eli, and his tendering a bond conveying his interest in said slaves to A, that this was a substantial compliance with the contract, and that A was bound to convey the land, according to the terms of his contract. *Calloway v. Hamby*, 631.

See Confederate money.

COUPONS.

Coupons, when detached from the bond to which they were annexed, bear interest from the time when they were due and payable. *Burroughs v. Commissioners of Richmond*, 234.

DAMAGES, MEASURES, ETC.

A Clerk and Master who failed to issue an execution based upon a decree obtained in 1866, until 1868, when the defendant had become insolvent, is liable in damages for whatever sum the plaintiff can show he has sustained by such *non-feasance*. *McIntyre v. Merritt*, 558.

See Contract, Arbitration, etc.

DEED, ABSOLUTE IN APPEARANCE, WHEN A MORTGAGE.

1. When a debtor conveys realty to a creditor by deed absolute in appearance, and at the same time gives his note for the amount of such indebtedness, and takes a bond for title upon the payment of such note: *Held*, that such transaction is a mortgage. *Robinson v. Willoughby*, 520.

2. To determine whether a transaction is a mortgage or a defeasible purchase, it will be regarded as the former, if at the time of the supposed sale the vendor is indebted to the vendee, and continues to be such with a right to a reconveyance upon the payment of such indebtedness. *Ibid.*

DEEDS, AND DEEDS IN TRUST.

1. When a debtor executed a deed conveying a tract of land in trust to pay specified debts, and it was provided in the deed in which no money consideration was recited, that if the debts were not paid on or before a particular day, the trustee should sell the land and "pay off and discharge all costs and charges for the drawing and execution of this trust," and, the debts not having been paid, the trustee did sell the land and pay them out of the proceeds, *it was held*, that the deed in trust not being upon a valuable consideration, there was a resulting use for the grantor, subject, however, to a *scintilla juris* in the trustee sufficient to feed the contingent use that might be created by an exercise of the power of sale, and that when the sale was made, and the purchase money was received by the trustee and paid to the creditors mentioned in the trust, the purchaser acquired a good title against the grantor and his other creditors. *Hogan v. Strayhorn*, 279.

DEEDS, AND DEEDS IN TRUST—*Continued.*

2. Under the Act of 1715, (Rev. Code c. 37, s. 1) the want of a valuable consideration will not prevent a deed for land, registered in the county where the land lies, from passing the title thereto. *Ibid.*

3. The act of 1861, ch. 4, sec. 12, which provides "that all deeds of trust and mortgages hereafter made, etc., to secure debts, shall be void as to creditors, unless it is expressly declared therein that the proceeds of sale thereunder shall be appropriated to the payment of all the debts and liabilities of the trustor or mortgagor equally *pro rata*," was confined to pre-existing debts, and did not apply to a transaction when there was no debt save that which grew out of the transaction itself, and formed a material part of it. *McKay v. Gilliam*, 130.

4. If a person lend money, and to secure the payment take a mortgage instead of personal security as a part of the transaction, it is a valuable consideration under the statute of 27th Elizabeth, as against prior donees, and he stands on the footing of a purchaser for a valuable consideration; but, if he have a pre-existing debt only and take a mortgage or a deed in trust to secure his debt, although it was valid under the 13th Elizabeth as against other creditors, it is not valid as against prior donees. *Ibid.*

See Contract, Judgment, Executors and Administrators.

DEMURRER.

In a suit upon a contract made prior to the adoption of the C. C. P., if the defendant demur for want of parties in the Superior Court, and the demurrer be sustained and the plaintiff appeals to this Court, the plaintiff will be entitled to a final judgment here upon the overruling of the demurrer. *Merwin v. Ballard*, 168.

DISCRETION, JUDGES.

Although the granting of an issue is a discretionary act of the Court, a mistake in the exercise of that discretion is a just ground of appeal. If an issue be refused, and the appellate Court should think that a contrary decision would have been a sounder exercise of discretion, it will correct the order of the Court below. *Redman v. Redman*, 546.

DISSENTS.

By RODMAN, J. *State v. Message*, 480; *Rand v. The State of N. C.*, 198; *State v. Dunlap*, 491. READE, J. and BOYDEN, J., in *Simonton v. Clarke*, 525.

DOCKETING, JUSTICES' JUDGMENTS.

The 503d section of the C. C. P., which provides for the docketing of a Justice's judgment in the office of the Clerk of the Superior Court of the county, so as to make it a judgment of the Superior Court from the time of its being docketed, is not repealed by the Act of 1868-'9, ch. 76, entitled "An act suspending the Code of Civil Procedure in certain cases." *Bates v. Bank of Fayetteville*, 81.

See Judgment.

DOMICIL.

In bastardy cases the jurisdiction of the justice to issue the warrant before the birth of the child, depends upon the domicil of the mother at the time, and not on her legal place of settlement; and if the mother continues to reside in the same county until the birth of her child, making her whole residence therein more than twelve months, the full jurisdiction of the case will be in that county. *State v. Hales*, 244.

DOWER.

When A dies seized of land, leaving a widow, and B, the son of A, occupies the land jointly with A's widow, and thereafter B dies, when the widow of A applies and obtains dower, the widow of B cannot be endowed of such land after the death of the widow of A. *Reitzel v. Eckard*, 673.

EMBEZZLEMENT.

See Larceny.

ENDORSER.

An endorser who pays off and discharges the note of his principal can only recover from the latter the amount actually paid by him. *Pace v. Roberson*, 550.

EQUITABLE SET-OFF.

1. Where the defendant purchased a note on the plaintiff during the week of the trial term of the cause, he is not entitled to have his demand applied in satisfaction of the plaintiff's claim. Such a case is not embraced by the second clause of sec. 101, C. C. P., because it was not "existing at the commencement of the action;" nor by the first clause of said section, as it is not "connected with the subject of the action." Neither has the defendant any right to an equitable set-off upon the mere ground of the insolvency of the plaintiff. *Riddick v. Moore*, 382.

2. To authorize an equitable set-off, some equitable grounds must be shown by the defendant why he should be protected against his adversary's demand. The mere existence of cross demands, or the insolvency of the plaintiff, is not sufficient. *Ibid.*

EQUITY PRACTICE.

1. Where no replication is filed to an answer in equity, and the cause is set down to be heard upon bill and answer, the bill must be dismissed when the allegations in it are not admitted in the answer. *Carrow v. Adams*, 32.

2. Where an equity is disclosed in an answer different from that which is alleged in the bill, the plaintiff ought to have his bill amended to meet such state of facts, and to obtain the appropriate relief. *Ibid.*

3. To a bill for a specific performance of a contract to convey land, the assignee of the vendor, who has not received the whole of the purchase money, and who has become bankrupt, must be made a party. *Swepson v. Rouse*, 34.

EQUITY PRACTICE—*Continued.*

4. Where a defendant to a bill for the specific performance of a contract to convey land, alleges and relies upon his certificate of discharge as a bankrupt, the fact of a proper assignment of his estate to his assignee will be presumed, though it is not specifically alleged where there is no allegation or proof to the contrary. *Ibid.*

5. When a bill is filed for the specific performance of a contract to convey a tract of land, and the defendant alleges that the tract consists of two parts, of which he admits that he is the owner of one, but avers that the other belongs to his wife, and sets up a defence, which, if good, applies to the whole contract, it is erroneous to make a decree in favor of the plaintiff as to the part of which the defendant admits he is the owner, and to reserve the question as to the other part. *Ibid.*

6. Under the former equity practice it was discretionary with the Chancellor to refer the issues of fact to a jury, but he could never refer them to a Master in Chancery, or a Referee or Commissioner. *Redman v. Redman*, 546.

7. Therefore it is erroneous to refer complicated questions of fact to a person designated by the Court to take the account and report to the Court. *Ibid.*

See Practice.

EVIDENCE.

1. The identification of a lot of land described on the plan of a town only as lot No. 115, and not otherwise described in the deed, is a question of fact for a jury. *Bryan v. Faucett*, 650.

2. It is not competent to introduce as evidence against a third person, entries made by a decedent containing accounts in his own favor. *Bland v. Warren*, 372.

3. It is admissible to introduce such books under Rev. Code, chapter 15, to the amount of sixty dollars. *Ibid.*

4. Entries made by merchants' clerks, and other persons acting as agents and servants in their usual course of business, who are dead, are competent evidence against third persons. *Ibid.*

5. A person may be convicted of larceny upon evidence connecting him with the theft, though the article stolen may not be identified, or even found. *State v. Kent*, 311.

6. A person indicted in the same bill as an accessory with the prisoner in the murder, although not on trial with him, is an incompetent witness. *State v. Dunlap*, 288.

7. What the bystanders may say immediately after a homicide has been committed is not competent evidence. *Ibid.*

8. Where, upon a trial for murder, there was a question whether the prisoner was in the military service of the United States on or before the 17th day of August, 1865, in order to ascertain whether he was entitled to the benefit of the Act of "Amnesty and Pardon," ratified the 22d December, 1866, and a witness testifying five years after the transaction, said that the homicide was committed "about the last of August, 1865," *it was held*, that there was some

EVIDENCE—*Continued.*

evidence, which ought to have been submitted to the jury, tending to show that the homicide was committed on or before the 17th day of August, 1865, and that it was error for the Court to instruct the jury that there was no evidence of that fact. *State v. Shelton*, 294.

9. Where two persons are jointly indicted, and one of the parties submits and judgment is suspended, he is still a defendant within the meaning of the act of 1870-'71, and is therefore incompetent to testify for or against his co-defendant. *State v. Bruner*, 499.

10. Where two are jointly indicted for a forcible trespass, and one of the defendants submits, upon whom no judgment is pronounced, it is incompetent to introduce the record of his submission in a trial against his co-defendant, as evidence confirmatory of the testimony of the prosecutrix. *State v. Queen*, 464.

11. It is not competent on the cross-examination of a witness to ask him if he made the same statement before the grand jury as he now makes, when the counsel state that their object in asking such question is not to impeach the credibility of the witness. *State v. Parker & Gilmer*, 455.

12. In putting a construction upon a deed or other written instrument, facts existing at the time to which the words used point, may be proved as a key to the meaning; just as the condition of a testator's family and estate at the date of his will may be proved, to aid in arriving at his meaning. *Richardson v. Schlegelmich*, 150.

13. In an action upon a simple contract, usury may be given in evidence under the general issue, treating the contract as void. And though, in a suit upon an usurious bond, it is necessary to plead the statute, it is not to bar the action, but to put the Court in possession of the facts whereby it is shown that the contract was wholly void. *Pond v. Horne*, 84.

14. Where the testator of the plaintiffs and the defendant went, in the lifetime of the testator, to a third person and had a conversation with him in relation to the subject of the controversy, and at the trial both the testator and the said third person were dead, *it was held* that, according to the true intent and meaning of the *proviso* to the 343d section of the Code of Civil Procedure, the defendant could not testify to the conversation between the testator and such third person. *Hallyburton v. Dobson*, 88.

15. The revenue act of 1869-'70, ch. 225, makes, by implication in the 34th section, the auditor's certificates evidence of the amount of taxes due from the sheriffs, but it is only *prima facie* evidence, and may be rebutted. *Jenkins v. Briggs*, 159.

16. Though a plaintiff could not be admitted as a witness, under the C. C. P., sections 342 and 343, to prove a special contract with the intestate of the defendant for the services of slaves before their emancipation, yet he is competent to prove that the intestate had the slaves in possession and enjoyed their services. *Gray v. Cooper*, 183.

17. When the administrator of an intestate asks of the plaintiff, who had offered himself as a witness, whether there was not a special contract between himself and the intestate, with the view to defeat a recovery on an implied contract, it is competent for the plaintiff to prove by himself, or by another witness, all the particulars going to make up or qualify such fact, and put it in its proper light. *Ibid.*

EVIDENCE—*Continued.*

18. In an action against several co-obligors to a bond in which one only pleads *non est factum*, it is not competent for the plaintiff on the trial of the issue with him to prove that he and another of the obligors were strong personal friends, and it is also incompetent for the plaintiff to prove that all the co-obligors of the contesting defendants were men of good character. *Heilig v. Dumas*, 214.

19. Where a party has it in his power to establish the truth of any disputed fact, it is his duty to do so. *Covington v. Wall*, 594.

20. It is incumbent upon the party excepting, when the error alleged consists in rejecting evidence, to show distinctly what the evidence was, in order that its relevancy may appear, and that it may be seen that he has been prejudiced by its rejection. *Street v. Bryan*, 619.

21. If, upon the cross-examination of a witness. he is asked as to collateral matters, and is examined as to *particulars* not presented by the issues, the party is bound by the answer, and will not be allowed to go into evidence *aliunde*, in order to contradict the witness. *Clark v. Clark*, 655.

EXECUTORS AND ADMINISTRATORS.

1. An administrator is guilty of gross *laches* who sells property on a credit, and takes no other security than the bond of the purchaser. *Roseman v. Pless*, 374.

2. Real estate is not assets for the payment of the debts of decedent before the same has been sold, and the proceeds received by the administrator. *Ibid.*

3. Whether an administrator can be sued on his bond where he has been guilty of negligence in not applying for and obtaining an order to sell the real estate of his intestate: *Quere? Vaughan v. Deloatch*, 378.

4. A, domiciled in Virginia, dies, leaving a note on a resident of this State; his administrator being duly qualified in Virginia, sends said note to an attorney in this State, with instructions to collect, compromise, or sell the same, as he may deem advisable: *Held*, that a transfer of said note by an administrator passed the legal title thereto to the purchaser. *Riddick v. Moore*, 382.

5. Although A's administrator appointed in Virginia could not have maintained a suit in his name in this State against the maker of the note, yet for all purposes *in pais*, he was as much the owner of the note as he was of any personal property which he took into his possession in Virginia, and brought to this state and sold. *Ibid.*

6. Under the Act of 1868-'9, ch. 113, sub-ch. 4, sec. 24, explained by the Act of 1869-'70, ch. 58, an executor who has taken out letters testamentary since the 1st of July, 1869, must pay all the debts due from the estate of his testator *pro rata*, according to their class; and the testator cannot give to a debt a preference over other debts of the same class by a bequest of it to the creditor. *Moore v. Byers*, 240.

7. If a petition be filed by an administrator for the sale of land for the payment of the debts of the intestate, and the heir-at-law be made a party defendant, and the Court adjudges that the sale is necessary, and orders it, the heir-at-law will be estopped to deny the title of his ancestor, whether the order

EXECUTORS AND ADMINISTRATORS—*Continued.*

was made after a defence, or by confession or default; but, if the heir die insolvent, so that it becomes necessary to sell his land to pay his debts, then as the estoppel could only operate as a conveyance, and would be liable to be impeached by creditors as voluntary and therefore fraudulent as to them, his administrator, as representing creditors, has the right to impeach it on the same ground as not binding on him. *Hardee v. Williams*, 56.

8. A proceeding to restrain the operation of a judgment to sell lands for the payment of the debts of an intestate as an estoppel against the administrator of an heir-at-law whose land is required for the payment of his debts should be commenced in the Superior Court. But if such personal representative had commenced proceedings for the sale of the land in question for the payment of the debts of the heir in the Court of Probate and the administrator of the ancestor plead his judgment as an estoppel, the plaintiff may in that Court reply the fraud which would be produced by allowing the judgment to operate as an estoppel; and the Court of Probate might thus retain the jurisdiction of the cause which it had originally acquired. *Ibid.*

9. An administrator, whose sale of the personal property of his intestate has been, after due public notice, conducted fairly and without any connivance with the widow, shall not be held responsible because of her having purchased many articles at a nominal or very low price on account of the by-standers forbearing to bid against her. *Woody v. Smith*, 116.

10. If an administrator has properly sold a horse, belonging to the estate of his intestate and taken a note therefor, he may nevertheless rescind the sale and take back the horse, provided he does it *bona fide* because he suspects the solvency of the parties to the note, but in such case he must sell the horse again immediately, or he will be held liable for his value at the time; and he must, if he can, collect from the first purchaser what the use of the horse was worth to him while in his possession, or be held liable for that also. *Bland v. Hartsoe*, 204.

11. An administrator has no right to an order for the sale of land for the payment of the debts of his intestate until the personal estate is exhausted, and if he has made a distribution of part of the personal effects among the next of kin, the value of such effects must be charged against him, in taking an account for the purpose of ascertaining whether he has exhausted the personal estate of his intestate. And the same rule will apply as to personal effects advanced to the widow as a distributee, but not to such as she may take for her year's provisions. *Ibid.*

12. Where, upon a lease of turpentine boxes for four years, the lessee covenanted to pay the lessor at the end of each year a certain rate per thousand boxes, and the lessor died before the expiration of the second year leaving a will devising the land, *it was held*, that the executor could only recover for the rent of the first year, the rent for the remaining years having followed the reversion to the devisees. *Rogers v. McKensie*, 218.

13. If an executor or administrator refuse to bring an action to surcharge and falsify an account by which his testator's or intestate's estate has been injured, such action may be brought by the legatees or next of kin, and in doing so, they should make the executor or administrator a party defendant together with the other defendant. *Murphy v. Harrison*, 246.

EXECUTORS AND ADMINISTRATORS—*Continued.*

14. A testator bequeathed to his wife certain slaves, horses, farming tools, etc., and devised to her one-half of his land, and in the latter part of said clause, he also bequeathed her "all my grain on hand for the support of the family; and should my wife wish to sell, or dispose of any of the above property, she can do so, with the advice and consent of my Executor." *Held*, that she took an absolute estate in the realty devised, and after the assent of the executor, she acquired an absolute estate in the personal property embraced in said clause. *Carpenter v. Kuter*, 475.

15. Where a testator was the surety for his son in an amount greater than the value of said son's interest in said estate: *Held*, that the son is not entitled to recover from the Executors of his father his distributive share of said estate, although the Executors of the father do not pay off the surety debt till after action brought by the son. *Ramsour v. Ramsour*, 628.

16. Where an administrator agreed with two persons that they should buy certain articles of personal property, and give their note to the Administrator therefor, and that the property was to be purchased for the common benefit of all three of the parties, and that each one should pay off and discharge one-third part of the note so given: *Held*, that upon a suit upon said note by the Administrator, it was competent for defendants to offer parol testimony to prove the agreement between the parties, and the plaintiff, under the C. C. P., could recover of defendants but two-thirds parts of said note. *Clark v. Clark*, 655.

17. Such an agreement is not illegal, unless it be shown that the creditors of decedent, or his distributees, may be prejudiced by such conduct on the part of the Administrator. *Ibid.*

18. Though it may be that a note payable to a testator may be assigned by one of three executors, yet a note payable to three persons as executors of their testator cannot be assigned by one of them without the concurrence of the others, so as to enable the assignee to sue the makers either for the whole amount of the note, or for any part of it; the Code of Civil Procedure, sec. 55, not being applicable to such a case. *Johnson v. Mangum*, 146.

19. An administrator will not be allowed to retain out of the assets of his intestate, a note payable to him as guardian where his intestate is surety, when he has paid over to the principal of said note, who was insolvent, a claim on his intestate for a sum more than sufficient to have paid off and discharged the indebtedness of the principal. *Redman v. Turner*, 445.

FALSE PRETENSES, OBTAINING GOODS UNDER.

1. To sustain an indictment for obtaining goods by a false pretense, under our Statute, Rev. Code, ch. 34, sec. 67, there must be a false representation of a subsisting fact, calculated to deceive, and which does deceive, whether the representation be in writing, or in words, or in acts, by which the defendant obtains something of value from another without compensation. But this does not extend to what are called "mere tricks of trade" by which a man puffs his goods. *State v. Phifer*, 321.

2. The doctrine of cheating by false tokens at the common law and under the Statute of Henry VIII. and by false pretences under the Statutes of 30, George II. ch. 24, and our Act, discussed and explained. *Ibid.*

FIERI FACIAS, AND VEND. EX.

See Judgment, Growing Crops.

FORGERY.

1. To constitute an "order for the delivery of goods," within the meaning of Rev. Code, chap. 34, sec. 59, a forgery, there must appear to be a drawer, a person drawn upon, who is under obligation to obey, and there must appear to be a person to whom the goods are to be delivered. *State v. Lamb*, 419.

2. If the paper writing set forth in the indictment as a forgery does not contain these requisites, there cannot be a conviction for forgery under such statute. *Ibid.*

3. The writing set forth in the indictment is such an instrument as will constitute at common law a forgery, *hence*, the conclusion "against the form of the statute" may be rejected as surplusage, and under the conviction in this case the defendant may be punished for a misdemeanor, as at common law. *Ibid.*

FORNICATION AND ADULTERY.

1. It is not *fornication and adultery* where persons, who were formerly slaves, were married during the existence of slavery according to the forms then prevailing, and after their emancipation continued to cohabit together in the relation of husband and wife.

2. The act of 1865-'66, ch. 40, sec. 5, requiring such parties to go before the County Court Clerk, or a Justice of the Peace, and to acknowledge the fact of such cohabitation, and the time of its commencement, makes it a *misdemeanor only* for failure to perform these duties. *State v. Adams and Reeves*, 537.

GROWING CROPS.

1. When a *fi. fa.* was levied upon the land of the defendant in the execution, in 1861, and successive writs of *vend. expos.* were issued thereon until the Fall of 1867, when the land was sold by the sheriff, and in the meantime in the year 1866 the same land was conveyed by the defendant in the execution by a deed in trust, *it was held*, that the crops growing on the land in 1867, did not pass to the purchaser of the land under the execution, but belonged to the bargainee under the deed in trust. *Walton v. Jordan*, 170.

2. Crops growing on land pass, by presumption of law, with the title of the land, but the presumption may be rebutted even by parol evidence. *Ibid.*

GUARANTOR.

The assignor of a note not negotiable is liable only as guarantor, and as such, is entitled to notice of the default of the principal debtor. *Sutton v. Owen*, 123.

GUARDIAN AND WARD.

1. If a guardian, or his personal representative after his death, for his own benefit dispose of a bond which was on its face payable to him as guard-

GUARDIAN AND WARD—*Continued.*

ian, the ward may follow the bond or its proceeds in the hands of the assignee or holder. And in such case, the face of the bond will be of itself express notice to the assignee or holder of the breach of trust by the guardian, or by his executor or administrator. *Lemly v. Atwood*, 46.

2. In a case in which, under the circumstances, a guardian was justified in taking Confederate treasury notes for his wards, during the late civil war, he will be justified in having converted them into Confederate bonds even so late as the year 1864. *Sudderth v. McCombs*, 186.

3. Where a guardian, in the years 1859 and '60, received bank notes for his wards and failed to invest them for their benefit, he will be charged with the amount of the notes, with interest from the date of their receipt, unless he can show some good excuse for his apparent default. *Ibid.*

4. The reception by a guardian of Confederate money in the early part of the year 1865 for the solvent debts due his wards was apparently inexcusable, and it will be for the guardian to show circumstances in justification of his act. *Ibid.*

5. The Superior Court has no original jurisdiction of an action for an account by an existing guardian of infant children against their former guardian; such action must be brought in the Court of Probate. *Ibid.*

6. Under the provision of the Revised Code, ch. 54, sec. 23, authorizing a guardian to lend the money of his ward "upon bond with sufficient security," he might, upon a loan before the late civil war, have taken a bond secured by a mortgage of slaves, and cannot now be made responsible for the loss of the debt by the emancipation of the slaves. *Whitford v. Fox*, 265.

7. A guardian who, before the late civil war, took from the administrator of the father of his wards certain promissory notes as a part of the effects of his wards, but did not collect them and lend the money upon bonds with sufficient security taken to himself as guardian, is not responsible for the amount of them if they were lost by the events of the war without any neglect or default on his part, but he is responsible for the annual interest which he might have collected and invested for their benefit. *Ibid.*

8. A bailee who misuses the thing bailed, thereby converts it to his own use, and becomes liable for its value whether any loss occurs from such misuser or not; but that rule does not apply to a trustee, who, when no fraud is imputed, is only liable for a loss resulting from his culpable negligence with regard to his trust. *Ibid.*

9. A guardian is not responsible for having received bank notes and Confederate money before March, 1862, and did not invest it for the benefit of his wards, when it is shown that he made a *bona fide* effort to do so, but was prevented by the events of the war. *Ibid.*

10. In taking an account of a fund in the hands of a guardian in which two or more wards are interested, it is proper to state a general account of the whole fund in the end of each year, and also a separate account with each ward to the end of the same year, crediting the ward with his share of the balance found owing on the general account, and debiting him with any proper debits peculiar to himself. In this way the balance due to each ward at the end of each year is ascertained; and, upon the death or coming of age of one

GUARDIAN AND WARD—*Continued.*

of them the sum due to him will be payable immediately and will cease to bear compound interest. *Ibid.*

11. A guardian will be allowed for reasonable counsel fees paid for advice and assistance in the management of his trust, and he may be allowed also for the fees paid to counsel in making a fair defence to the suit brought against him for an account and settlement of his guardianship. *Ibid.*

12. Reasonable commissions will always be allowed to a guardian unless in cases of fraud or very culpable negligence. The rate will depend upon a variety of circumstances, such as the amount of the estate, the trouble in managing it, whether fees have been paid to counsel for assisting him in the management, the last of which will lessen it. *Ibid.*

13. Commissions should be allowed a guardian, or amount of the notes and other securities for debt delivered to the ward upon the termination of the guardianship. *Ibid.*

14. A guardian, who held a well secured ante-war note, and collected the same in Confederate currency in September and October, 1863, when there was no need for its collection, and immediately thereafter invested the same in 7-30 Confederate bonds, was guilty of *laches*, and is liable to his ward for the full amount of the principal and interest of said note. *Purser v. Simpson*, 497.

15. After the 4th of July, 1863, no person acting in a fiduciary capacity, ought to have collected well secured ante-war debts, and invested in Confederate securities. *Ibid.*

16. A guardian who took a note in October, 1860, with two sureties who were abundantly good, and continued so during the war, cannot be held responsible to his wards, by reason of the parties to said note having become insolvent by the results of the war. *Covington v. Wall*, 594.

17. A guardian who receives a note for $1,100, without taking any security, is guilty of laches, and is accountable to his wards for the amount of such note. *Ibid.*

18. It is not unreasonable to allow five per cent. commissions to a guardian on his receipts and disbursements, which embraced a large number of receipts and vouchers, commencing in 1857 and ending in May, 1871. *Ibid.*

19. A guardian is accountable to his wards for a sum of money in the hands of an administrator appointed in 1857, if such administrator or his sureties were solvent at the time when the funds ought have been paid to the guardian, or within the time thereafter, when a judgment could have been obtained upon such administration bond. *Ibid.*

HEIR EXPECTANT.

See Contract.

HOMESTEAD.

1. When the owner of land does not petition for a homestead, it is the duty of the sheriff, or other officer who has an execution against him, to have it laid off under the act of 1868-'9, ch. 137, at the expense of the creditor, and

HOMESTEAD—*Continued.*

if he refuse to pay or tender the fees of the officer, he will, by virtue of the Code of Civil Procedure, sec. 555, be justified in refusing to execute the process. *Lute v. Reilly*, 20.

2. The act of 1869-'70, ch. 121, exempting from execution the reversionary interests in Homesteads, is constitutional. *Poe v. Hardie*, 447.

3. The object of this act was to protect the owner thereof against any vexatious litigation which might be instituted by the purchaser of reversionary interest. *Ibid.*

4. The estate in the Homestead is a *determinable fee*, and the owner thereof is not impeachable for waste. *Ibid.*

See Sheriffs, Judgment.

HOMICIDE.

1. If A attempts to pursue B into a house, and the latter shuts the door so that A cannot enter, and A attempts to break the door open with an axe, and B opens the door, when he is collared by A, and a fight ensues, and B is killed by a deadly weapon, it is murder. *State v. Hargett*, 669.

2. If two men fight upon a sudden quarrel, and one kills the other, the chances being equal, this constitutes *manslaughter*. *State v. Massage*, 480.

INDICTMENT.

1. Where, in an indictment for larceny, it was charged that the article stolen was the property of H. Hoffa, whose given name was to the jurors unknown, and it was testified by witnesses that they knew of no other name of the owner of the article than H. Hoffa, *it was held*, that there was no variance between the allegation and the proof. *State v. Bell*, 313.

2. The owner of an article charged to have been stolen, may have a name by reputation, and if it be proved that he is as well known by that name as any other, a charge in an indictment by that name will be sufficient. *Ibid.*

3. If a person usually signs his name with only the initials of his christian name, and he is thus generally known and designated, he may be properly indicted by such name. *Ibid.*

4. Upon a conviction for larceny, a sentence "that the defendant be imprisoned in the State prison for one year, and in the meantime and until he is carried there, that he be imprisoned in the county jail," is sufficiently definite as to the term of imprisonment in the State prison to be valid under the Act of 1868-'9, ch. 167, secs. 9 and 10, which declares that the term "shall begin to run upon and include the day of conviction." *State v. Gaskins*, 320.

5. A change in the punishment of larceny from whipping and imprisonment at common law to imprisonment in the State's prison or county jail for not less than four months nor more than ten years, is not liable to the objection of an *ex post facto* law. The rule is, not that the punishment cannot be *changed*, but that it cannot be *aggravated*. *State v. Kent*, 311.

6. An indictment for tearing down a dwelling house, under the Act in the Revised Code, ch. 34, sec. 103, cannot be supported by proof that it was torn

down by the owner or his tenant, though it was occupied at the time by a tenant at sufferance; but, if the tenant, at sufferance, were present, forbitting the act when the house was torn down, an indictment for a forcible trespass might have been supported. *State v. Mace*, 344.

7. Where A and B are jointly indicted with others, for wilfully setting fire to and burning a barn containing grain, and the evidence showed that A and B were not present, but were accessories before the fact: *Held*, that they could not be convicted as principals under this indictment. *State v. Derver*, 572.

The effect of the act of 1868-'69, chap. 167, entitled "an act in relation to punishments," was not to make "misdemeanors" of offences which were formally felonies. *Ibid.*

8. When it appears from the affidavit of a person of color, charged with a capital offence, that he cannot have full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and that his rights cannot be enforced in the State Courts: *Held*, That under the act of Congress of 9th April, 1866, the State Courts will proceed no further in the prosecution until certified of the action of the Circuit Court of the United States under the act of Congress, March 3, 1863. *State v. Dunlap*, 491.

9. It is erroneous in such a case to order the *removal* of the indictments to the Circuit Court of the United States; but to suspend proceedings in the cause till certified to the Court under the aforesaid acts of Congress. *Ibid.*

10. A misrecital of the proper County in the caption of an indictment furnishes no ground for arrest of judgment. *State v. Sprinkle*, 463.

Semble. Such an indictment would have been sufficient before the act, Rev. Code, chap. 35, sec. 14. *Ibid.*

11. An indictment for murder which charges that the prisoners on the deceased "did make an assault and in some way and manner, and by some means, instruments, and weapons to the jurors unknown, did then and there feloniously, wilfully, and of their malice aforethought deprive him, the said A of his life, so that the said A did then and there instantly die," etc., is sufficient, although the evidence presents different ways and means by which the deceased might have been killed. *State v. Parker & Gilmer*, 453.

12. It is error to quash an indictment which charges in one count the stealing one otter, confined in the trap of one J. D. P., and in another count "a certain dead otter of the value of one dollar of the goods and chattels of the said J. D. P." *State v. House*, 325.

13. A count in an indictment must be complete in itself, and contain all the material allegations which constitute the offence charged. Therefore, a count charging defendant with receiving of stolen goods, is defective, which does not contain the name of the defendant in the proper place, and distinctly charge him with receiving the stolen goods. *State v. Phelps*, 450.

This defect is not cured by the statute, Rev. Code, ch. 35, sec. 14, and judgment will be arrested. *Ibid.*

INJUNCTION.

1. Where an injunction is issued under an order that the plaintiff shall give an undertaking with sufficient sureties in a certain sum as prescribed in

INJUNCTION—*Continued.*

the C. C. P., sec. 192, it seems that a deposit in money of the sum named, will be sufficient, but whether so or not, the giving by the plaintiff of the required undertaking before the hearing of a motion to vacate the injunction for the want of it, will supply the alleged defect and prevent the injunction from being vacated on that account. *Richards v. Baurman*, 162.

2. An injunction taken out before issuing a summons is irregular, and will be vacated on motion. *Hersh v. Whitehead*, 516.

See Contract, Warranty of Title.

INTERPLEADER.

The right of interpleader given by the C. C. P., under which a sheriff, who has money in his hands, raised under executions in favor of different creditors against the same defendant, may bring in the plaintiffs, in the executions to contest their respective claims, was intended to apply to a controversy or action properly constituted in Court. *Bales v. Lilly*, 232.

JUDGMENT.

1. Where a vendor of land receives a part of the purchase money, and takes notes for the residue thereof, retaining the title until such notes shall be paid, and afterwards a judgment is obtained and docketed against him, and he then dies, the judgment will not be a lien upon the land or the notes in the hands of his executors, but the notes will be assets when collected for the payment of debts. *Moore v. Byers*, 240.

2. Where two or more plaintiffs had, prior to the adoption of the new Constitution and the Code of Civil Procedure, obtained judgments at the same term of the County Court of a county, and then after such Constitution and Code had been adopted, transferred them to the docket of the Superior Court, at different times, but all within six months, as required by the sections 400 and 403 of the C. C. P., and had then issued executions on them at different times, but all came to the sheriff's hands before the sale of the defendant's land; *it was held*, that under Art. 4, sec. 25 of the Constitution, which ordains that "actions at law, and suits in Equity, pending when this Constitution shall go into effect, shall be transferred to the Courts having jurisdiction thereof, without prejudice by reason of the change," the proceeds of the sale under the executions shall be applied *pro rata* to all of them. *Johnson v. Sedberry*, 1.

3. Where there is a judgment and *fi. fa.* or *vend. expo.* issues during the life of the defendant, the sheriff may proceed to sell, although the defendant dies before the sale; and so he may, when the *fi. fa.* or *vend. expo.* issues after the death, if *tested* before. But if the sheriff, for any cause, return the process without a sale, no *alias* can issue *tested* after the death of the defendant without a *sci. fa.* against his heirs. *Aycock v. Harrison*, 8.

4. A judgment confessed by executors will bind them in their individual capacity, though they style themselves as executors in making such confession. *Hall v. Craige*, 51.

5. If a number of Justice's judgments be docketed in the Superior Court, they will, under the C. C. P., be a lien upon the land of the defendant from the time, where they were docketed, and will have a priority over a judgment ob-

tained in Court by another person against the same defendant at a subsequent time, and though an execution be issued on the latter, and the sheriff levies it on the land and advertises it for sale, yet, if before the sale executions are issued on a part of the Justice's docketed judgments and are placed in the hands of the sheriff, the proceeds of the sale of the land must be first applied to the payment of all the Justice's judgments. *Perry v. Morris*, 221.

6. The lien on the land of the defendant acquired by a docketed judgment shall not be lost in favor of a judgment subsequently docketed, unless the plaintiff in the latter take out execution and give the plaintiff in the former twenty days' notice before the day of sale by the sheriff, and the plaintiff so noticed fail to take out execution and put it into the sheriff's hands before the day of sale as is prescribed in the 19th rule of practice adopted by the Supreme Court at June Term, 1869. *Ibid.*

7. The fact that a judgment docketed in one county is afterwards docketed in another, does not deprive it of the lien it had on the defendant's land in the first county. *Ibid.*

8. A judgment is not void because no complaint has been filed. *Leach v. W. N. C. R. R. Co.*, 486.

9. A judgment rendered against a certificated bankrupt, merely to ascertain the amount of his indebtedness to the plaintiff, is not such a judgment as will make the sureties of said bankrupt liable therefor on an Appeal bond. *Fontaine v. Westbrooks*, 528.

10. Prior to the adoption of the C. C. P., the lien acquired by *fi. fa.* expired at its return. *Ross v. Alexander*, 576.

11. *Therefore*, judgments obtained at Spring and Fall Terms, 1869, of Guilford Superior Court, and docketed respectively during the terms of said Court, have priority over a judgment obtained in 1867, upon which *fi. fas.* regularly issued up to Fall Term, 1868, of the Superior Court of Alamance, and no returns made thereto, at which term the said judgment was transferred and entered on the judgment docket of Alamance Superior Court, but not docketed in Guilford county till 24th December, 1869. *Ibid.*

12. Before judgment can be given upon an injunction bond, the party alleging that he has been damnified by reason of said injunction, must establish the *quantum* of damages sustained. *Hyman v. Devereux*, 588.

The *quantum* of damages recoverable by a party injured under the old system, as compared with the amount under the C. C. P., discussed.

See Practice.

JUDGE'S CHARGE.

1. A Judge is not required to charge the jury upon a hypothetical case, and if the evidence does not justify the instructions asked for, it is improper to give them. *State v. Hargett*, 669.

2. It is sufficient if a Judge gives substantially the instructions asked for. *Ibid.*

3. When, on the trial of a prisoner, a prayer on his behalf for instructions assumes certain facts to be in proof, and in the opinion of the Judge there is no

evidence tending to prove them, he ought to say so, and thus disembarrass the jury of the consideration both of the assumed facts and of the questions of law predicated on their assumption. *State v. Dunlap*, 288.

4. When instructions are asked for upon an assumed state of facts, which there is evidence tending to prove, and thus questions of law are raised which are pertinent to the case, it is the duty of the Judge to answer the questions so presented, and to instruct the jury distinctly what the law is, if they shall find the assumed state of facts to be true, and so in respect to every state of facts, which may be reasonably assumed upon the evidence. *Ibid.*

5. If the charge of a Judge on a trial for murder is correct as a general essay on homicide, and his propositions taken generally are supported by the authorities; still it is not a full compliance with the statute, Rev. Code, ch. 31, sec. 130, which requires the Judge to declare and explain to the jury the law arising on the evidence. *Ibid.*

JUDGES EXCHANGING DISTRICTS.

1. Whenever a Judge exchanges Districts with another, with the consent of the Governor, or whenever he shall be required by the Governor to hold a specified term of a Superior Court out of his proper District, the authority of the Governor should be of record in every County in which he holds a term, and should be attached to the record of every appeal to this Court. Judges who exchange Districts by the consent of the Governor for a whole riding, or series of Courts, take the place of each other for all purposes during that series of Courts. *Bear v. Cohen*, 511.

2. When the Governor requires a Judge to hold a term of a Court (either regular or special) for some County outside of his proper District, the authority of the Judge is special: the jurisdiction of the proper Judge of the District is superseded by that of the substituted Judge in that County during the specified term, but not elsewhere, nor for a longer time; the substituted Judge has, in respect to all cases pending in the specified County during the specified term, all the powers of the proper Judge of the District; he still retains those belonging to him, as Judge of his own District. *Ibid.*

3. A Judge of the 6th Judicial District has no power to vacate an order for claim and delivery of personal property, issuing out of a Court of the third Judicial District, unless he has been legally assigned to hold the Court of the County where the subject matter is pending. *Myers v. Hamliton*, 567.

4. A District Court Judge is not authorized to dissolve injunctions, or to punish parties for a contempt in disobeying an injunction order, except in his own district, unless he has been duly assigned to hold the Court in the County where the original process is returnable. *Morris v. Whitehead*, 637.

JURISDICTION OF JUDGES OF PROBATE.

1. A civil action in the nature of a bill in equity to surcharge and falsify an account stated, must be brought before the Judge of the Superior Court at the regular term of the Court, and not before the Judge of Probate. *Murphy v. Harrison*, 246.

2. The Judge of the Court of Probate has jurisdiction of a complaint by a ward against his guardian, demanding an account and payment. From his

JURISDICTION OF JUDGES OF PROBATE—*Continued.*

judgment an appeal will lie to the Judge of the Superior Court, who having thus obtained jurisdiction of the cause will retain it until it is finally disposed of. *Rowland v. Thompson*, 110.

3. The Judge of the Court of Probate has no jurisdiction of a suit on a guardian bond. Such suit must be brought in the Superior Court. *Ibid.*

4. Where a suit for the settlement of a guardian account is before the Judge of Probate, his deputy cannot perform any functions in taking an account but only such as are merely ministerial, such as recording testimony, swearing witnesses, calculating interest and the like. He cannot decide upon the competency of testimony, or upon any other legal question, and if he do so, the adoption and confirmation of his decision by his principal afterwards will not make it good. *Ibid.*

See Judgment, Ex'rs and Adm'rs.

JURY.

Where a jury returned a verdict for the plaintiff "for $51.60, subject to an off-set of $26.80, if said off-set had not already been paid; but if it had been paid, then for $51.60, without off-set," it is proper to render the judgment for $51.60, and to reject the balance as surplusage. *Hawkins v. House*, 615.

JUSTICES OF THE PEACE.

1. On an application to a Justice of the Peace for a suspension of execution after a recovery by a landlord against his tenant, the Justice has a discretion as to the sufficiency of the surety, which a Judge will not review, in the absence of any suggestion that the Justice acted dishonestly or capriciously. *Steadman v. Jones*, 388.

2. A summons in a civil action before a Justice of the Peace does not require to be executed by leaving a copy with the defendant; the C. C. P., secs. 82 and 504, Rule 15, not embracing such process returnable before a magistrate. *Kirkland v. Hogan*, 144.

3. Where a suit before a Justice is for a money demand, it is erroneous for him, after giving a judgment for the amount claimed, to add "to be paid in Old North Carolina bank money at par, of any bank in the State;" and upon the return of a writ of *recordari* and the assignment of such error in the Justice's judgment, the Superior Court should not order the case to be placed on the trial docket, but should reverse the judgment, and enter the proper judgment for the plaintiff. *Swain v. Smith*, 211.

4. Sec. 17 of chap. 227, acts of 1869-'70, does not apply to Justices' judgments which do not exceed the sum of twenty-five dollars. *Street v. Bryan*, 619.

5. The decisions of Justices of the Peace upon questions of fact are not the subject of review. *Ibid.*

JUSTICES' JURISDICTION.

1. On an indictment for an affray, a plea of *autre fois convict*, before a Justice of the Peace, "in his own proper township, and that no deadly weapon was used, and no bodily injury inflicted," is insufficient, when the complaint

JUSTICES' JURISDICTION—*Continued.*

does not set forth that the offence was committed in the township of the Justice, or that the complaint was made by the party injured, as expressly required by the Act of 1868-'9, ch. 178, sub-ch. 4, secs. 6 and 7. *State v. Davis*, 298.

2. A Justice of the Peace may have final jurisdiction of that kind of an affray, which consists of the fighting by consent of two or more persons in a public place, but not that of kind which is committed by one or more persons making a display of deadly weapons with violent or threatening words, or by other similar means, calculated to terrify the people. In the latter sort of cases, as no one in particular is injured, there is no injured party to complain to the Justice, and he cannot have jurisdiction, except to bind over the party to the Superior Court. *Ibid.*

3. In the Act of 1868-'9, ch. 178, sub-ch. 4, sec. 6, the provision "that the complaint shall not be made by collusion with the accused," does not apply to the case of a misdemeanor, such as a battery, where there is both a public wrong, and a private injury, and the party injured accepts from the aggressor satisfaction for his injury, but to the case where the complaint is not made *bona fide*, but under terror, or is induced by some fraudulent practice, or is for some fraudulent end. In such latter case the Justice should decline the final jurisdiction, and bind the offender over to the Superior Court. *Ibid.*

4. A warrant issued by a Justice of the Peace at the instance and upon the oath of a prosecutor, may be taken as the complaint of such prosecutor, but to give final jurisdiction to a justice of the offence therein charged, it must under the Act of 1868-'9, ch. 178, sub-ch. 4, sec. 6, allege that the complaint is not made by collusion with the accused, and without such allegation, a conviction under it will not sustain the plea of *autre fois convict. State v. Hawes*, 301.

5. A warrant for an offence within the jurisdiction of a Justice of the Peace, under the Act of 1868-'9, ch. 178, sub-ch. 4, sec. 6, may be issued by a Justice who does not reside in the township where the offence was committed, but it must be returned before, and tried by, a Justice who does not reside in such township. *Ibid.*

6. Before a Justice of the Peace can have final jurisdiction of any criminal offence, it must appear *in the complaint and upon proof* that each and every requisite prescribed in sub-ch. 4, sec. 6, of chap. 178, of the act of 1869, has been strictly pursued. *State v. Pendleton*, 617.

7. Observations as to the duty of Solicitor, where parties have been *bona fide* punished before the Justices of the Peace. *Ibid.*

LANDLORD AND TENANT.

1. The 31st section of the Act of 1868-'9, ch. 156, entitled an Act in relation to landlord and tenant is unconstitutional, because it professes to confer upon Justices of the Peace jurisdiction to administer the same remedies to purchasers of land under execution against the defendant therein, as to landlords against their tenants, contrary to the 15th and 33d sections of the 4th article of the Constitution, which confer exclusive original jurisdiction upon the Superior Courts of all civil actions, in which the title to real estate may come in question. *Credle v. Gibbs*, 192.

LANDLORD AND TENANT—*Continued.*

2. Those sections of the Act of 1868-'9, ch. 156, which give summary proceedings before Justices of the Peace, in favor of landlords, to recover possession of lands from their tenants who hold over after the expiration of their leases, are not unconstitutional, because, in consequence of the doctrine of estoppel, the title to the real estate cannot come in question. *Ibid.*

LANDS OF INFANT SOLD UNDER DECREE OF COURT.

1. Where the land of an infant was sold for partition in 1856, under a decree of the Court of Equity, and the Court decreed "that the Master proceed to collect the purchase money, tax the costs incurred, and pay over the residue to the parties entitled, and upon the payment of the purchase money the Master execute title to the purchase;" *Held*, that the payment of the principal part of the purchase money, and a note given to the Guardian of the infant for the residue, was not a compliance with the decree of the Court. *Walke v. Moody*, 599.

2. In such a case the plaintiff has a lien upon the land for the payment of the residue of the purchase money, and is entitled to a decree for a resale of the land for the payment thereof. *Ibid.*

LARCENY.

1. The turning of a barrel of turpentine which was standing on its head, over on its side, with a felonious intent, is not such an asportation as constitutes larceny. *State v. Jones*, 395.

2. Where a prosecutor, being drunk and partially paralized, and having a belt with money around his body, was sitting with his head bent down, and alone with the defendant in his bar-room, the latter gently removed the belt and money from the prosecutor's body, upon which the prosecutor, raising his head and seeing the belt in his hand, asked him to give back his money, to which he replied, "no, I'll keep it," and afterwards, upon the prosecutor's stepping out for a moment, the defendant refused to let him come in again, and never returned his belt or money, *it was held*, that these facts tended to prove a *larceny* of the belt and money by the defendant. *State v. Jackson*, 305.

3. It is a sufficient carrying away to constitute the crime of larceny, that the goods are removed from the place where they were, and the thief has, for an instant, the entire and absolute possession of them. *Ibid.*

4. An otter is an animal valuable for its fur, and though it be one *ferae naturae*, yet, if it be reclaimed, confined or dead, the stealing it from its owner is larceny. *State v. House*, 315.

5. A person employed as a "field hand," working by the day, week or month, has no charge of his employer's money, and if the latter entrust him with money and he embezzles it he is not guilty of larceny. *State v. Bunn*, 317.

6. An indictment at common law for larceny in stealing a cow, is not supported by proof that the cow was shot down and her ears cut off by the defendants. Such acts would have supported an indictment for malicious mischief, or an indictment under the Act of 1866, ch. 57, for injuring live stock with intent to steal them. *State v. Butler*, 309.

LARCENY—*Continued.*

7. A person found in possession of goods recently stolen, is presumed in law to be the thief; and it is not necessary for the State to show that any other suspicious circumstance accompanied such possession. *State v. Turner*, 592.

8. The defendant may rebut this presumption; but if he does not show that he received the goods honestly, it is the duty of a jury to convict him. *Ibid.*

LEASES.

1. Where there is a lease for years, and before the end of the term, the interest of the lessor in the land is conveyed to a third person, or is sold under execution and purchased by such person, the rent reserved, which is not due at the time of the conveyance, or sale and Sheriff's deed, passes with the reversion to the purchaser, and cannot, therefore, be subjected afterwards to the debts of the lessor. *Kornegay v. Collier*, 69.

2. The doctrine of the different kinds of rents in England, and of rent in this State discussed and explained. *Ibid.*

3. Where A made a lease for a term of years, and during the existence thereof he conveys the land by deed to B., the latter can recover for the rent which had accrued after the title to the land passed to him. *Ballard v. Thomason*, 436.

See Executors and Administrators.

LEGACIES.

Though the Court of Probate has exclusive original jurisdiction of special proceedings to recover legacies and distributive shares, yet, if the executor has so assented to a pecuniary legacy as to amount to an express or implied promise to pay the legacy, it must be recovered by a suit in the Superior Court. *Miller v. Barnes*, 67.

LIQUIDATED DAMAGES.

See Award.

LIMITATIONS, STATUTE OF.

1. The statute of limitations was suspended in this State by different acts of the Legislature from the 11th May, 1861, to the 1st day of January, 1870, and hence a parol contract which was not barred by the said statute on the said first mentioned date could not have been so prior to the 1st day of January, 1870. *Plott v. W. N. R. R. Co.*, 74.

2. The 14th section of the Act of 10th March, 1866, ch. 17, entitled an "Act to change the jurisdiction of the Courts and rules of pleading therein," which repealed the Act of 11th September, 1861, and 14th December, 1863, which had suspended the statutes of limitations, did not repeal the Act of 21st February, 1866, ch. 50, which had suspended the operation of these statutes until the 1st of January, 1867, so that there was no statute of limitations in operation during the year 1866. *Smith v. Rogers*, 181.

3. A promissory note barred by the statute of limitations is not revived by an offer to pay in Confederate currency, or bank bills. *Simonton v. Clark*, 525.

LIMITATIONS, STATUTE OF—*Continued.*

4. To repel the statute of limitations there must be such facts and circumstances as show that the debtor recognized a present subsisting liability, and manifested an intention to assume or renew the obligation. *Ibid.*

See Bond of Constables.

MANDAMUS.

1. The Board of Commissioners of a County have a perpetual existence, continued by members who succeed each other, and the body remains the same, notwithstanding a change in the individuals who compose it. Hence, when a writ of *mandamus* is obtained against a Board of Commissioners, and there is a change in the individual members between the time when the writ is ordered, and when it is served, those who compose the Board at the time of service must obey it. *Pegram v. Commissioners of Cleaveland Co.*, 114.

2. A plaintiff who has obtained a judgment against a County is not entitled to an execution against it. His remedy is by a writ of *mandamus* against the Board of Commissioners of the County, to compel them to levy a tax for the satisfaction of the judgment. *Gooch v. Gregory*, 142.

3. The 8th section of the Ordinance of the Convention of 1868, having provided that, when the President and Chief Engineer of the North-western North Carolina Railroad Company should have complied with certain terms in respect to the first division of the said road, the Governor should direct that the Public Treasurer should make a loan to the company by the issue of a certain amount of State bonds, and the terms having been complied with, *it was held*, that the company was entitled to have a peremptory *mandamus* to compel the Treasurer to issue the bonds, notwithstanding the subsequent legislation contained in the Acts of 1868-'9, ch. 32, of 1869-'70, chs. 71 and 100, as all those Acts taken together left the Ordinance above mentioned in full force and effect. *North-western N. C. R. R. Co. v. Jenkins*, 172.

4. Where a party has established his debt against a County by judgment, and payment cannot be enforced by an execution, he is entitled to a writ of *mandamus* against the Board of Commissioners of said County, to compel them to levy a sufficient tax to pay off and discharge his said judgment. *Lutterloh v. Commissioners of Cumberland Co.*, 403.

5. There is no provision in the C. C. P. regulating the proceedings in writs of *mandamus*, and in such cases "the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice." C. C. P., sec. 392. *Ibid.*

6. This writ can only be used by the express order of a Court of superior jurisdiction, and is not embraced in the rule established in *Tate v. Powe*, 64 N.C. 644, which marks out the distinction between civil actions and special proceedings. *Ibid.*

7. Where the plaintiff's demand may involve disputed facts, the proper application is for an alternative *mandamus*. Where, however, the plaintiff's claim is based upon a judgment, then the proper process is a peremptory *mandamus*. *Ibid.*

See Coupons.

MILITARY ORDERS.

The military order of Gen. Sickles, forbidding corporal punishment, could not have had any greater effect than merely to *suspend* the law; and as soon as the order ceased, the law was restored, to be administered as before. *State v. Kent*, 311.

MILLS.

It is not necessary that all the Commissioners appointed under the Act of April, 1869, chap. 158, entitled "An Act relating to special procedure in cases of mills," should sign the report required to be made, a majority being sufficient. *Austin v. Helms*, 560.

NOTES NOT NEGOTIABLE.

A bond to pay money, and also to clothe a slave is not negotiable, and before the adoption of the C. C. P., would not be sued on in the name of the assignee. *Sutton v. Owen*, 123.

NUISANCE.

The plaintiff owned an ass, which he knew to be dangerous, and in the habit of pursuing and injuring stock, and with a knowledge of such vicious qualities he permitted him to run at large: *Held*, that if such an animal is found pursuing a cow which he threw down, and was in the act of stamping her, when the defendant, believing it was necessary to kill him to save the life of his cow, killed the ass, that defendant was justifiable. *Williams v. Divon*, 417.

PARTNERSHIP.

1. Where a partnership is formed for a definite term which has not expired, the Court will not decree a dissolution except under special circumstances; neither will it, where circumstances render a dissolution inconvenient, as where a large operation has been commenced, which cannot be arrested without serious loss. But, where the Court does order a dissolution, it will appoint a receiver upon a disagreement between the partners in the course of the winding up; and the same rule must apply where a dissolution has taken place by consent or otherwise, and a serious disagreement arises afterwards. *Richards v. Baurman*, 162.

2. If a partner purchases property with the partnership effects, and sells said property to a *bona fide* purchaser without notice, the other partners cannot follow the property in the hands of such purchaser. *Chiply v. Keaton*, 534.

PAYMENTS.

Payments made on a debt contracted before the late civil war, in confederate currency during the war, are to be taken according to their face values. Having been accepted by the creditor, they amount to a discharge to the extent of their nominal value, notwithstanding the fact that they were made in depreciated currency. *Hall v. Craige*, 51.

PENALTY.

See Arbitration and Award.

PETITIONS BY ADMINISTRATORS TO SELL LANDS.

1. Where proceedings are taken, upon a petition by an administrator to sell land for the payment of debts, before the Judge of Probate, and he orders a sale of the land and it is sold, and the purchaser, upon the confirmation of the sale, gets a deed for the land before the purchase money is paid, through the proceedings may be very irregular, yet the heirs-at-law cannot have the sale set aside by the Judge of the District at the regular term of the Superior Court. *Hyman v. Jarnigan*, 96.

2. A petition by an administrator to sell land for the payment of debts is a special proceeding, and belongs to the original jurisdiction of the Probate Court; and parties injured by such proceedings ought to apply to the Judge of Probate for relief, and if he refuse to act, or acts erroneously in the matter, an appeal will lie to the Judge of the District in Court. *Ibid.*

3. On a petition to sell land by an administrator for the payment of debts, it is erroneous for the Judge of Probate to make an order for the sale of the land before the parties defendant have been served with process by publication when they were non-residents: or, before he had adjudged upon the proofs required by the C. C. P., sec. 89, that the defendants had been regularly served with process by publication. *Ibid.*

4. On a petition by an administrator to sell land for the payment of debts, where the heirs are minors, it is erroneous for the Judge of Probate to make an order of sale, where there is no order for the appointment of the person who appears as guardian *ad litem;* and no order for such appointment can be made until the summons be properly served, and the other requirements of the C. C. P., sec. 59, be complied with. *Ibid.*

5. It is erroneous for a Judge of Probate to order a deed to be made to a purchaser of land sold by an administrator to pay debts, until the purchase money has been paid. *Ibid.*

PETITION TO REHEAR A DECREE.

A petition to rehear a decree of this Court, when the error complained of is one of fact committed in making an interlocutory order of reference, and in confirming the report made by the commissioner is not strictly a petition to rehear, but may be treated as a motion to set aside the order of reference and the order confirming the report, and the decree made pursuant thereto. *Eason v. Sanders*, 216.

PERSONS OF COLOR—THEIR RIGHTS TO TRANSFER CAUSES TO U. S. COURTS.

See Indictment.

PLEADING.

1. The rules of pleading, at common law, have not been abrogated by the C. C. P. The essential principles still remain, and have only been modified as to

PLEADING—*Continued.*

technicalities and matters of form. The effect of pleading, both in the old and new system, is to produce proper issues of law or fact, so that justice may be administered between parties litigant with regularity and certainty. *Parsley v. Nicholson*, 207.

2. Every material allegation of a complaint which is denied by the answer must be sustained in substance by proofs; and though a plaintiff may prove a cause of action, he cannot recover upon it unless it be alleged substantially in his complaint. *Ibid.*

3. Under the old system, if the declaration is *in case*, and it does not further appear whether the action is in tort or contract, it will be regarded as ambiguous or doubtful pleading. *Hughes v. Wheeler*, 418.

4. Where the defendant understood the action to be *in tort*, and the plaintiff did not disclaim it, but offered evidence to establish a breach of contract, such action cannot be sustained. *Ibid.*

5. Whether in a complaint for the recovery of realty, it is sufficient to allege that the defendants are in possession of the *locus in quo*, and withhold the possession thereof from plaintiff. *Quere? Garrett v. Trotter*, 430.

6. Assuming that the complaint is defective, advantage ought to have been taken thereof in "apt time." and it cannot be considered "apt time," to have filed an answer to the merits, and make the objection at the trial term. *Ibid.*

7. Such a complaint is sufficient, and the defect, if any, is aided by the defendants' answer, which shows that they understood the complaint to charge *an illegal* withholding of the possession. *Ibid.*

8. The doctrine of *aider*, express or implied, and the principles applicable to defective pleading discussed and explained. *Ibid.*

9. The pendency of a former action between the same parties, for the same cause, is a good defence in a second action. *Harris v. Johnson*, 478.

10. In such a case at common law, advantage must be taken thereof by a plea in abatement. Under the C. C. P., advantage must be taken by answer, if the complaint does not show the pendency of such former action. *Ibid.*

11. Whatever is alleged in the complaint, and not denied in the answer, need not be proved. *Jenkins v. N. C. Ore D. Co.*, 563.

12. When the pleadings fail to present an issue, the only course is to strike out all the pleadings, and direct a "repleader." *Sumner v. Young*, 579.

13. When there is but one cause of action, or but one defence, a *demurrer* must cover the whole ground, otherwise it will be a nullity. *Ibid.*

14. Where several pleas are pleaded to the same cause of action, each is as separate and independent as if contained in different records. *Sumner v. Chipman*, 623.

15. It is improper to join the Treasurer of the State with the Auditor in an application for a *writ of mandamus*, when the plaintiff has obtained no warrant from the Auditor of the State. *Bonner v. Adams and Jenkins*, 637.

PLEADING—*Continued.*

16. Under the C. C. P., a defendant may avail himself of any defence that would have been available under the old mode of procedure, either in a Court of Law or Court of Equity. *Clark v. Clark*, 655.

17. In an action to recover the possession of specific property, the object in describing the property is to let the defendant know what is claimed, so that he may give up the property, or contest the claim of plaintiff. *Johnson v. Neville*, 677.

18. When a defendant is uncertain as to what is claimed in an action for the recovery of specific property, the Court, upon motion, will require plaintiff to give a more particular description, so as to remove all uncertainty. *Ibid.*

See Practice.

PRACTICE.

1. After the pleadings are made up, and whilst the trial is progressing, is is irregular to move to dismiss the complaint, or Bill in Equity for defects apparent upon the face of the complaint, or Bill in Equity, except where there is a manifest defect of jurisdiction in regard to the *subject matter*, as distinguished from a want of jurisdiction in respect to the *person*, or a *statement of a defective cause* of action, as distinguished from a *defective statement* of a cause of action. *Mastin v. Marlow*, 695.

2. The C. C. P., sec. 133, makes it discretionary with a Judge whether he will relieve a party against a judgment taken against him through his "inadvertence, mistake, surprise, or excusable neglect." If a Judge refuses to entertain a motion to set aside a judgment for any of the enumerated causes, because he thinks he has no power to grant it, then there is error, and he has failed to exercise *the discretion* conferred on him by law. *Hodgins v. White*, 393.

3. After hearing the evidence and finding the facts under the above recited section of the C. C. P., the action of the Judge is conclusive upon the parties, from which there is no appeal. *Ibid.*

4. This discretion, however, is not arbitrary, but implies a legal discretion. As for instance, if the Judge mistake the meaning of the statute as to what is "mistake, inadvertence, surprise, or excusable neglect." In such cases his judgment is the subject of appeal and review. *Ibid.*

5. The proper mode of obtaining relief under the act of 1868-'9, which makes bank bills a set-off against judgments and executions already obtained, is by a rule upon the plaintiff in the judgment of execution, which is sought to be enjoined, founded upon proper affidavits, requiring him to show cause why he shall not accept the bills of the bank in payment of the debt, and have satisfaction of the judgment entered of record. And a notice of the rule served upon the Sheriff, who has the execution in hand, will operate as a *supersedias. Mann v. Blount*, 99.

6. It is the rule of a Court of Equity, or of any other Court, which proceeds upon the same principles, not to entertain a bill or action, which seeks no other relief than that which can be had by orders in a cause than then pending. *Ibid.*

7. The Supreme Court cannot determine between conflicting records of a Superior Court, nor will it pass on an opinion of a Judge, which proceeds upon

PRACTICE—*Continued.*

a state of facts different from that agreed to by the parties, and different from that certified as of record to this Court. *Williams v. Council*, 10.

8. It is the privilege of an appellant to make up his case, and it is his duty to do it, so as intelligibly to exhibit the error in the judgment, of which he complains; and the rules of practice give him all the necessary power to do so. Ordinarily, if he fail to do so, the only course open to the Supreme Court is to confirm the judgment below, not because it is thought to be right, but because it cannot be seen to be wrong. *Ibid.*

9. In an action of debt upon a bond for a certain sum of money, to which the defendant has plead the general issue, usury and fraud, if the jury render a verdict, which is received by the clerk in the absence of the Court, that they find all the issues in favor of the plaintiff, and assess his damages at (the sum mentioned in the bond) principal money without interest, the only redress which the judge can give the plaintiff, is to set aside the verdict and grant a new trial. He cannot render a judgment upon such verdict for the principal of the bond and the lawful interest thereon. *Houston v. Potts*, 41.

10. If a jury persist, in the presence of the Court, in rendering an irregular and improper verdict, the Judge may set it aside and fine the jury for contumacy. *Ibid.*

11. Where an action of trespass *vi et armis* was commenced before the adoption of the C. C. P., and tried since that time upon the plea of the general issue, it was held that the defendant, not having availed himself of the right of objecting to the non-joinder of a plaintiff by demurrer or plea under the 95th and 98th sections of the C. C. P., cannot do so under the plea of the general issue. *Lewis v. McNatt*, 63.

12. In a case involving the settlement of a complicated account, the C. C. P. (see sections 245 and 246) require that it be referred to referees to state an account, and objections to their report must be made by way of exceptions to it, and neither party has the right to require the facts to be passed upon by a jury. *Kluttz v. McKenzie*, 102.

13. A proceeding by a motion supported by affidavits after a notice to the opposite party, to have satisfaction of a judgment entered of record upon the ground that it has been paid since its rendition, is the appropriate remedy in such a case, but is neither a special proceeding nor a civil action. It is only a motion in a cause still pending. *Foreman v. Bibb*, 128.

14. When the Clerk of a Court refuses to issue an execution to which a plaintiff is entitled on his judgment, he has two remedies for enforcing his rights. He may obtain a rule on the clerk as an officer of the Court to compel him to perform his duty, or be subject to an attachment for a contempt; or he may sue the clerk on his official bond. He is not entitled to a writ of *mandamus* against the clerk. *Gooch v. Gregory*, 142.

15. When one of the parties to a cause is not ready for trial, and upon his application, it is ordered to be continued for him "on payment of costs," it means the costs of the term, and not the whole costs of the action. *Kirkman v. Dixon*, 179.

16. When a sheriff has money in his hands raised under executions against the same defendant in favor of two or more different creditors, and the money is claimed by one of the creditors to the exclusion of the others, he may, for

PRACTICE—*Continued.*

the purpose of asserting his claim, obtain a rule against the sheriff, and under the C. C. P., sec. 65, cause the other creditors to be brought in by notice, and then upon the answer of the sheriff the Court may proceed to adjudicate upon the rights of the parties, and in doing so, will not be bound by the returns which the sheriff may have previously made upon the executions in his hands. *Dewey v. White*, 225.

17. The C. C. P., sec. 65, does not embrace a case where a sheriff has an execution in favor of one person, and levies it upon property claimed by another, as in such a case the sheriff cannot require these persons to interplead, because, if the claim of the person, against whom there is no execution, be just, the sheriff is a wrongdoer as to him. *Ibid.*

18. The practice of the Courts of England prior to the Stat. of 1 and 2, William IV. ch. 58, and under that statute, upon conflicting claims to money in the hands of a sheriff raised under executions in favor of different creditors, and also the practice in like cases in the Courts of the several States of the Union, and of the United States, and of this State prior to the adoption of the C. C. P. stated and explained. *Ibid.*

19. The Clerk of the Superior Court is not styled in the Constitution "Probate Judge," nor is he directed to be so styled by any act of assembly, and his Probate Jurisdiction is incident to his office of Clerk. *Staley v. Sellars*, 467.

20. Hence, a motion to dismiss a special proceeding because it was addressed to the Clerk of the Superior Court, instead of to the Judge of Probate, was properly refused. *Ibid.*

21. When an execution is issued from the Supreme Court returnable to the Superior Court, according to the provisions of the Revised Code, ch. 33, sec. 6, and was docketed on the execution docket of the latter Court, the execution is treated as received under color and by virtue of the Clerk's office, and he cannot be allowed to suggest irregularities therein. *Greenlee v. Sudderth*, 470.

22. In such a case as that above stated, the judgment is not reversed, but judgment is rendered in this Court according to the modification resulting from the opinion, and in this case it was referred to the Clerk to ascertain and report the current rate of gold, and judgment was thereupon rendered in this Court in accordance with the decision. *Ibid.*

23. A negotiable instrument, the execution of which is admitted in the answer, must be produced on the trial, or its loss accounted for. *Morrow v. Alman*, 507.

24. Where a final judgment is rendered in an action after the death of one of the defendants, it will be vacated upon motion, as it is "error in fact" to take judgment against one who is dead. The death of the defendant may be suggested, and the action proceed against the surviving defendant; and it is the business of the plaintiff to make such suggestions, but the judgment being joint, the objection may be taken by the surviving defendant. *Burke v. Stokely*, 569.

25. Where a Physician had an account running through a period of many years against A for medical services rendered, whilst the latter had an account against the Physician for agricultural products furnished him at various times, and these transactions had no business connection with each other, but were entitrely independent, and mere matters of set-off: *Held*, that a bill in equity

PRACTICE—*Continued.*

could not be sustained for an account and settlement of the demands existing between the parties. *Haywood v. Hutchins,* 574.

26. Where a decree is made directing an account between the parties litigant to be taken without prejudice, and the account is taken and exceptions thereto are filed, it is too late for the defendants to demand a hearing of the cause by the Court, upon the question of his liability *to account. Lattimore v. Dixon,* 664.

27. Objections to the power of the referee to pass upon the issues involved in the pleadings, should be made to the Court before the appointment of the referee, and before proceeding to hear the cause upon the report and the exceptions thereto filed. *Ibid.*

28. Under the writ of *habere facias possessionem,* it is the practice for the plaintiff, at his peril, to point out the land recovered to the Sheriff, who puts him in accordingly. *Johnson v. Neville,* 677.

See Pleadings, Judgment. See Term of Sheriff's Office.

PROCESS.

See Sheriffs.

PURCHASER AT SHERIFF'S SALE.

A purchaser at a Sheriff's sale, where the defendant in the execution has the legal title, succeeds only to the rights of the defendant in the execution, and is affected by all the equities against him. *Walke v. Moody,* 599.

PURCHASER OF LAND.

1. When a purchaser of land, upon taking a bond for title, gives in payment therefor a note expressing on its face that it is so given, the note itself will be notice of the vendee's equity in case the title of the land shall prove defective, and an assignee or holder of the note cannot, in case of such defect in the title of the land, recover on the note though he took it before it became due. *Howard v. Kimball,* 175.

2. A purchaser of lands is entitled to all that he bargained for, and is under no obligation to accept a part only, with warranty as to the other part, or to accept compensation, unless the part as to which a good title cannot be made, does not materially affect the value, and it is seen that the objection is not taken upon the merits, but only as a pretext to get rid of the purchase. *Ibid.*

3. In a suit upon a note, expressed on its face to have been given for the purchase of a tract of land, the title to which has proved defective, as the plaintiff cannot recover upon the note, the proper judgment now to be rendered is, that the contract of sale be rescinded, and that the title bond and note be cancelled, so as to effect what would have been done in equity under the old mode of procedure. *Ibid.*

RAILROADS.

1. A Railroad Company may dispense with the assessment of damages by commissioners for passing over the land of a proprietor, by promising to settle

RAILROADS—*Continued.*

and pay it without assessment, and the land owner may recover upon the special promise. *Plott v. W. N. C. R. R. Co.*, 74.

2. The North Carolina Railroad Company is not required under the 26th section of its charter to construct crossings and bridges over their track except where public roads cross the same, which have been kept up by the public, by the appointment of overseers and hands to work and keep them in repair. *Coon v. N. C. R. R. Co.*, 507.

RAPE.

The least penetration of the person of a female against her will, constitutes rape. *State v. Hargrave*, 466.

REALTY, CIVIL ACTION TO RECOVER.

1. A civil action to recover the possession of land under the new Constitution and the Code of Civil Procedure, abolishes the fictitious proceedings of the old action of ejectment, but does not surrender its advantages. Hence, in such action no more is put in issue than the right of entry, or the right to the present possession. This is so, at least when no certain estate is alleged and claimed in the complaint, and put in issue by the pleading. *Quere*, whether a judgment, where a certain estate is alleged and demanded, would be an estoppel between the parties as to the right to the estate alleged? *Harkey v. Houston*, 137.

2. Under the Code of Civil Procedure, section 61, a landlord may be joined as a defendant with his tenant; and by the Act of 1869-'70, ch. 193, the tenant and landlord thus defending must each give bond with good security to pay costs and damages if the plaintiff recovers, or if he be not able to give such bond, he must make affidavit of that fact, and get the certificate of an attorney practicing in the Court that, in his opinion, the plaintiff is not entitled to recover. *Ibid.*

3. When the tenant fails to give such bond, or to swear to his answer when the plaintiff has sworn to his complaint, the plaintiff may take a judgment against him, but he cannot have an execution against him, until the further order of the Court which will not be made until after the trial of the issues between him and the landlord defendant, and the damages against the tenant will be matter of enquiry on the trial of such issue with the landlord, or separately as the Court may determine. *Ibid.*

4. In an action to recover the possession of real estate it is sufficient to allege in the complaint, that the land was in the possession of the defendant at the time of the issuing of the summons, where the plaintiff alleges title to the tract described, and that defendant is in possession of a part thereof, without particularly describing what part. *Johnson v. Neville*, 677.

RECORDARI.

1. Before an application for a *recordari* can be entertained, petitioner must aver that he has paid, or offered to pay, the Justice's fees. *Steadman v. Jones*, 388.

2. An order for a *recordari* should be accompanied with an order for a *supersedeas*, and suspension of execution. *Ibid.*

RECORDARI—*Continued.*

3. Where the right of a party to a *recordari*, as a substitute for an appeal from a Justice's judgment, depends upon the facts proved or admitted before the Judge of the Superior Court, it is his duty to find and state the facts upon which he proceeds to act, and if, upon an appeal to the Supreme Court, such facts do not appear to have been found and stated, that Court must overrule the decision of the Court below, because the Supreme Court cannot try any "issue of fact." *Collins v. Gilbert*, 135.

4. Where, but for errors alleged, the record would sustain the judgment given in the Court below, it must be sustained by the Supreme Court, unless the errors are shown. But the case is otherwise when there is nothing in the record to sustain the judgment of the Court below. *Ibid.*

5. When the writ of *recordari* is used as a writ of false judgment, as it may be in this State, upon its return in which the proceedings before the Justice of the Peace are certified, the plaintiff in the writ must assign his errors, and then the proceedings will be the same as in other writs of error. *Swain v. Smith*, 211.

6. Where a Justice's judgment is given for the plaintiff and the defendant brings error, there shall only be a judgment to reverse the former judgment, for the writ of *recordari* is only brought to be eased and discharged of that judgment. But where the plaintiff brings the writ, the judgment, if erroneous, shall not only be reversed, but the Court shall also give such judgment as the Court below should have given; for his writ is to revive the first cause of action, and to recover what he ought to have recovered by the first suit, wherein the erroneous judgment was given. *Ibid.*

REFERENCE UNDER C. C. P.

Under the C. C. P., sections 244 and 245, a compulsory reference cannot be ordered by the Court in a suit on a judgment confessed by the defendants as executors before the late civil war, where the only matters of defence are payments made by them in Confederate currency during the war, and alleged counter claims for notes due from the plaintiffs to them as executors. Such a case does not require "the examination of a long account on either side," nor is the "taking of an account necessary for the information of the Court." *Hall v. Craige*, 51.

REFEREES.

1. Referees appointed by an order of Court need not have a formal or written notice of their appointment. It is sufficient that they are appointed, meet, and make an award. *Allison v. Bryson*, 44.

2. A reference may be made, by consent of the parties, to persons who are interested in the subject matter of the suit. *Quere*, whether it would make any difference if the parties, or either of them, were ignorant of the fact of interest in the referees? *Ibid.*

3. Referees are not obliged to report the evidence upon which their award is founded. *Ibid.*

4. An exception to an award that it is contrary to law is too indefinite. In the absence of fraud, or the mistake of law, where they intend to decide according to law and mistake it, the arbitrators are a law unto themselves. *Ibid.*

REFEREES—*Continued.*

5. If a suit which involves the taking an account be referred, it is the duty of the referees to state distinctly in their report their conclusions both as to matters of fact and matters of law, so that the Judge may review their findings both as to the facts and the law, and that the Supreme Court may, in case of an appeal, review his decision upon questions of law. *Kluttz v. McKenzie*, 102.

6. It is error in an order to refer the matters in controversy in a suit without the consent of the parties to the attorney of one of them, it being the same as if the reference were made to the party himself. *Eason v. Saunders*, 216.

7. Facts which are found by a referee, and approved by the Court, are not the subject of review by this court. *Hyman v. Devereux*, 588.

REMOVAL OF CAUSE TO THE FEDERAL COURTS.

Where a suit was brought prior to the adoption of the C. C. P., by a citizen of another State in the Court of Equity of one of the counties of this State against a citizen of this State, and at a term of the Superior Court of the county after the adoption of the C. C. P., a motion was made to refer the issues in the cause to a referee, which was ordered, and the defendant appealed to the Supreme Court, where the order was held to be erroneous, and issues were directed to be made up to be tried in the Court below, and the cause was retained in the Supreme Court until the issues should be tried, *it was held*, that there was not a final hearing on trial of the suit so as to prevent its being removed at the instance and upon the affidavit of the plaintiff to the Circuit Court of the United States for the District of North Carolina, under the act of Congress of March 2d, 1867, which provides that a non-resident party in a State Court shall be entitled to remove it, on making proper application, "at any time before the final hearing or trial of the suit." *Douglass v. Caldwell*, 248.

RETAILERS OF SPIRITUOUS LIQUORS.

In an indictment, under the act of 1868-'9, ch. 213, for selling spirituous liquors within three miles of the Western North Carolina Railroad, during the period of its construction, "unless licensed by the State," it is a complete defence to show a license granted by the County Commissioners of the county in which the selling takes place, as such Commissioners are the agents of the State for that purpose. *State v. Dobson*, 346.

SET-OFF, AND COUNTER CLAIMS.

1. A note transferred by successive endorsements to different persons, is subject to any set-off or other defence which the maker had against any one or all of the assignees at the date of the assignment, or *before notice thereof*. *Harris v. Burwell*, 584, overruling *Neal v. Lea*, 64 N.C. 584.

2. Where a person is indebted to the State of North Carolina, and is sued on such indebtedness, he cannot offer as a set-off or counter claim, the indebtedness of the State to him arising out of coupons of the State which are overdue, and which the State legally owes. *Battle v. Thompson*, 406.

3. A set-off is allowed to avoid *circuity* of actions, hence it cannot be entertained in this case, as none of its citizens can bring suit against the State. *Ibid.*

SET-OFF, AND COUNTER CLAIMS—*Continued.*

4. Where the State sues one of its citizens who has a claim against the State which falls under clause 1, sec. 101, C. C. P., and arises out of the contract, or is connected with the subject of the action, it may be that the defence can be made against the State, not however upon the principle that a set-off or counter claim could be offered by the defendant, but upon the ground that the claim is in the nature of a payment or credit. *Ibid.*

5. Damages to realty by wilful carelessness cannot be set up by way of *counter claim* or set-off to an action of contract for the payment of money. *Street v. Bryan*, 619.

SHERIFFS AND THEIR LIABILITIES.

1. Under the C. C. P., secs. 75 and 555, a Sheriff is not required to *execute* process until his fees are paid or tendered by the person at whose instance the service is to be rendered; but this does not excuse him for a failure to make a return of the process. A writ of summons is a mandate of the Court and must be obeyed by its officer, and if he has any valid excuse for not executing the writ, he must state it in his return. *Jones v. Gupton*, 48.

2. The duties and liabilities of a Sheriff in relation to the execution of process are nearly the same under the C. C. P. as under the old system, (see C. C. P., sec. 354,) but the mode of procedure for enforcing a judgment *nisi* against him is changed from a *scire facias* to a civil action, as prescribed in C. C. P., sec. 362, and the summons must be in the same Court as the judgment, and must be returned to the regular term thereof. *Ibid.*

3. After a judgment has been given summarily on motion under the act of 1869-'70, ch. 225, sec. 34, against a defaulting Sheriff and his sureties, it should not be vacated upon a mere motion founded upon the allegation that the Sheriff's bond did not appear to have been accepted by the County Commissioners and registered by their order, when it did appear to have been registered. *Jenkins v. Howell*, 61.

4. Under the act of 1869-'70, ch. 225, sec. 34, which, in the case of a defaulting Sheriff, authorizes a summary judgment on motion against him without other notice than is given by the delinquency of the officer, the word "him" ought to be construed, in connection with other provisions of the act, to mean "them," so as to authorize the judgment to be taken against the Sheriff and his sureties. *Ibid.*

5. The act of 1869-'70, ch. 71, which repealed certain acts in relation to appropriations for railroads, and directed that the taxes which had been collected under them for paying interest, etc., should be "credited to the counties of the State upon the tax to be assessed for the year 1870, in proportion to the amounts collected from them respectively," justified the Sheriffs in retaining the amount of such taxes in their settlements with the Public Treasurer, until it was repealed by an act passed the 21st December, 1870. *Jenkins v. Briggs*, 159.

6. Where a Sheriff has money in his hands, raised under executions in favor of different creditors against the same defendant, and the creditors set up conflicting claims to the money, it is not such a case as may be submitted to a Judge, without an action under the C. C. P., sec. 315, by the adverse claimants. *Bates v. Lilly*, 232.

SHERIFFS AND THEIR LIABILITIES—*Continued.*

7. Under the former system, if a Sheriff had doubts as to the proper application of money in his hands raised under different executions, he might apply to the Court for advice, which advice would be given upon the facts disclosed in his return; and the Court would refuse to give it if the Sheriff claimed an interest in the fund, or had incurred an independent liability to any of the execution creditors. *Ibid.*

8. A Sheriff cannot be amerced for failing to collect a judgment based upon a note executed in November, 1865, unless he had actual notice that the judgment was granted upon a contract made after the 1st of May, 1865. *Thompson v. Berry*, 484.

9. A Deputy Sheriff, who in his deputation is authorized to collect State and County taxes out of the persons named in said deputation, is not required to exhibit a certified copy of the tax lists from the officer required to make out said list, before he distrains property to enforce the payment thereof. *State v. Lutz*, 503.

10. The tax list issued to a Sheriff has the force of an execution, and justifies the Sherif in making seizures thereunder as fully as an execution issued from a Court of competent jurisdiction. *Ibid.*

11. A Sheriff is not required to sell the excess of realty beyond the Homestead, or to lay off a Homestead, until the plaintiff has paid, or offered to pay his fees for so doing. *Taylor v. Rhyne*, 530.

See Practice, Judgment, Term of Sheriff's Office.

SLANDER.

1. In an action of slander where the pleas are general issue and justification, the jury are not to consider the latter plea if they find the former one to be true. *Sumner v. Chipman*, 623.

2. Pleading general issue, *and* justification to an action of slander, does not dispense with the proving of the words spoken, nor is the latter plea an admission of the speaking of the words when the general issue has been pleaded. *Ibid.*

SPECIE NOTES.

Credits in currency, endorsed as such on a note payable *in specie*, are payments only to the amount of their value *in specie* of such credits at the respective dates of payment. *Walkup v. Houston*, 501.

SPECIAL COURTS IN TOWNS AND CITIES.

1. Article IV, Sec. 19, of the Constitution authorizing the Legislature to establish Special Courts in cities and towns, is confined to misdemeanors. The Legislature declared that larceny of less value than twenty-five dollars should be a misdemeanor. (Act of 1869-'70, chap. 37.) *State v. Walker*, 461.

2. The effect of the repeal of the aforesaid act was to deprive the Special Court of the City of Wilmington of jurisdiction of larceny. *Ibid.*

3. Special Courts for cities and towns are not put by the Constitution upon the same footing as the Court for the trial of impeachments, the Supreme

SPECIAL COURTS IN TOWNS AND CITIES—*Continued.*

Court, the Superior Courts and Courts of Justices of the Peace. *State v. Smith*, 369.

4. These latter Courts are established by the Constitution, and owe their existence to that instrument *alone*, and are in no wise dependent upon an act of the Legislature. *Ibid.*

5. Special Courts for cities and towns are creatures of the legislative will and discretion, and owe their origin to the expression of such legislative will and discretion by constitutional permission. *Ibid.*

6. Such discretion is not exhausted by an act erecting such Courts, but may be directed as well to their abolition. *Ibid.*

7. The Judge of such a Court has not a "vested right" in his office within the meaning of the Constitution, as that principle only applies where the office remains. *Ibid.*

8. The act of March 30, 1871, (act 1870-'71, ch. 160,) had the effect to abolish the office of Judge of the Special Court of the city of Wilmington. *Ibid.*

STATUTES, REPEAL OF.

The repeal of a statute, repealing a former statute, leaves the latter in force. *Brinkley v. Swicegood*, 626.

STATUTES, CONSTRUCTION OF.

See Vagrancy.

SURETIES, RIGHTS OF, AND THEIR ASSIGNEE.

1. A surety to a note who pays off and discharges the same, is entitled to the benefit of all the securities which have been taken by the creditor from the principal. *York v. Landis*, 535.

2. In such a case the surety can assign over to any one his demand and equitable rights against the principal, and the assignee will be substituted to all of the rights of the original creditor. *Ibid.*

SURPRISE, ETC. UNDER SEC. 133, C. C. P.

1. The Judges, and not the Clerk of the Court, has jurisdiction under the C. C. P., sec. 133, to relieve upon motion a party from a judgment taken against him through his mistake, inadvertence, surprise or excusable negligence. *Griel v. Vernon*, 76.

2. A judgment taken by default for want of a plea is a surprise upon a party under the C. C. P., sec. 133, when he has employed an attorney to enter his plea, and such attorney has neglected to do so; and the neglect of the client to examine the records to see whether his pleas have been entered is an excusable one. *Ibid.*

3. The finding by the Judge of the Superior Court of the facts which, under the C. C. P., sec. 133, are alleged to constitute surprise and negligence, is conclusive, and cannot be appealed from; but whether such facts, when found

SURPRISE, ETC. UNDER SEC. 133, C. C. P.—*Continued.*

constitute surprise or excusable negligence is a question of law, and from the decision of the Judge upon it an appeal may be taken. *Ibid.*

4. Where an attorney was written to by the defendant to appear in a cause then returnable to a term of his Court in 1861, and he failed to make an appearance thereto, when a judgment by default and enquiry was obtained in 1863: *Held*, that it did not make out such a case of "mistake, inadvertence, surprise or excusable negligence," as to justify the Court in setting aside said judgment. *Burke v. Stokeley*, 569.

TAX COLLECTOR.

1. The act of the Legislature of February 2d, 1871, authorizing the Board of Commissioners to appoint a Tax Collector for the county of Lincoln, is unconstitutional. *King v. Commissioners of Lincoln Co.*, 603.

2. An office is property. There is here a contract between the Sheriff and the State that he will discharge the duties of the office, and it cannot be abrogated or impaired except by the consent of both parties. *Ibid.*

TERM OF OFFICE OF COUNTY TREASURER.

1. The Constitution in Art. 7, under the head "Municipal Corporations" provides for the election biennially in each county of a Treasurer, Register of Deeds, etc., and as there is nothing in that article or any other to extend the term of office of Treasurer elected at the first election in 1868 beyond two years, his term expired in 1870. *Aderholt v. McKee*, 257.

2. The term of office of a Treasurer appointed by the Board of Commissioners in a county to fill a vacancy is only that of the unoccupied term of his predecessor. *Ibid.*

TERM OF SHERIFF'S OFFICE.

1. The terms of the offices of the Sheriffs chosen at the first election held under the present Constitution are, by force of Art. 4 and Art. 2, sec. 29, extended to the year 1872, after which time such terms will be for two years only. *Loftin v. Sowers*, 251.

2. An action by the Attorney-General in the name of the people of the State and of the person who claims the office of Sheriff is by force of the 366th and 368th sections of the C. C. P., the proper mode of proceeding against the person, who is alleged to be usurping it, to try the question as to which of the parties is entitled to the office. *Ibid.*

TENDER.

1. When a debtor tenders money in payment of his debt to the creditor, who says he has no use for it, and thereupon the debtor concludes to retain the money awhile longer and does so, he thereby waives the tender. *Terrell v. Walker*, 91.

2. To make a tender effectual, the debtor must be ready, willing and able to pay, and must so inform his creditor, and must also produce the money, un-

TENDER—*Continued.*

less such production be waived by the absolute refusal by the creditor to receive it. *Ibid.*

3. A note given for money borrowed during the late war was, by force of the acts of 1866, chs. 38 and 39, and the act, 1865, presumptively payable in Confederate money in the absence of any evidence to rebut it, yet the acts did not so far interfere with the contract as to change it into one for the delivery of specific articles; it is still to be treated as a money contract, solvable in money, and not in specific goods. *Ibid.*

4. A tender of Confederate treasury notes in payment of a debt solvable in such notes, will not, upon the refusal to receive them, vest in the creditor the property in any certain Confederate notes, so that, by virtue of such ownership, he will become liable to their depreciation. But such tender will prevent the recovery of interest after that time. *Ibid.*

5. If a creditor cause his debtor to desist from making a tender in payment of a note at a particular time in the Confederate currency in which it was then solvable, by a promise that he will receive it at a future time, and then refuses to receive it, it will not be such a fraud (if a fraud at all) for which damages would be allowed to defeat the action on the note, or be used as a set-off or recoupment. *Ibid.*

6. A plea of tender is of no avail unless it is accompanied by a payment into Court of the amount admitted to be due. *Jenkins v. Briggs*, 159.

TIME.

1. The law takes notice of the fractional parts of a day when there is a conflict between creditors arising as to the application of money received on Justices' judgments filed and docketed on the same day. Sec. 503, C. C. P. *Bates v. Hinsdale*, 423.

2. Therefore, judgments filed and docketed at 2 o'clock, 30 minutes P.M., have priority over judgments filed and docketed at a later hour of the same day. *Ibid.*

TOWNS AND CITIES.

1. The Legislature cannot confer on the Mayor of a town the judicial powers of a Justice of the Peace in civil actions. Article 4, section 33, confers exclusive original jurisdiction on Justices of the Peace, wherever the sum demanded does not exceed two hundred dollars. *Town of Edenton v. Wool*, 379.

2. The State Constitution requires that Justices of the Peace shall be elected by townships, whilst Mayors are elected only by towns and cities. *Ibid.*

TOWNSHIPS.

Under the Constitution and act of 1868-'9, ch. 165, townships have not the power of taxation for school purposes, either through their trustees or committees. Nor have the Commissioners of a county the power to levy a township tax as distinguished from the general county tax for school purposes. And in laying the county tax for school purposes, the equation of taxation must be observed. *Lane v. Stanley*, 153.

TOWNSHIP TRUSTEES.

Township trustees have no authority to contract for building bridges; when such a contract is entered into without the sanction and supervision of the County Commissioners, it is a nullity. *Paine v. Caldwell*, 488.

TRUSTS AND TRUSTEES.

1. An Administrator who procures the sale of the land of his intestate for the payment of debts, and has himself appointed Commissioner to make the sale, is subject to the rule which prohibits a trustee from purchasing the land, either personally or by an agent. *Roberts v. Roberts*, 27.

2. A trustee can purchase at his own sale only when he does so without fraud, and with the consent of the *cestui que trust* at the time, or by his subsequent sanction. *Ibid.*

3. A vendor, who has contracted to sell his land, is in equity a trustee for the purchaser, but if he has not received the whole of the purchase money, he is not a mere naked trustee, and upon becoming a bankrupt, his interest in the land will, by proper assignments, pass to the assignee in bankruptcy under the 14th section of the bankrupt act. *Swepson v. Rouse*, 34.

4. The distinction between actions in law and suits in equity, as to the forms of procedure has been abolished in this State, but the distinction between legal and equitable rights still remains. *Matthews v. McPherson*, 189.

5. The rights of a *cestui que trust* under the old system were administered in a Court of Equity. In trusts relating to real property where the purposes of the trust were completed, and the trustee had been paid his reasonable charges and expenses, the *cestui que trust* could compel a conveyance of the legal estate. Until a *cestui que trust* has acquired such a perfect equitable title, he cannot, under the C. C. P., maintain a civil action to recover possession of real estate held by a person under the legal title. *Ibid.*

6. Where a husband purchased and paid for a lot of land, and procured the vendor to convey it by a deed of bargain and sale to a trustee in trust for the sole and separate use of the wife, "to dispose of to any person she may wish by deed or appointment in writing in the nature of a will," and she having died without disposing of the land by deed or will, *it was held*, that as the trust was not declared for her and her heirs, there was a contingent resulting trust in favor of her husband, which upon his death intestate before his wife had descended to his heir-at-law. *Levy v. Griffis*, 236.

7. A devise to a trustee in trust for the sole and separate use of a married woman with a power given to her of appointing the estate in fee by deed or will, will vest the trust in her in fee under the Rev. Code, ch. 119, sec. 26, and it will not be inconsistent with the power of appointment, because without such power she could not dispose of real estate by will while she remained a married woman. *Ibid.*

8. The distinction between executory and executed trusts, and the doctrine of powers of appointment given to any person, and particularly to a married woman, discussed and explained. *Ibid.*

TURPENTINE.

The crude turpentine which has formed on the body of the tree, and is called "scrape," is personal property, and belongs to the lessee of the trees, who

TURPENTINE—*Continued.*

has the right of ingress and egress to take it away after his lease has expired, provided that he does so in a reasonable time, which must be before the sap begins to flow in the subsequent Spring of the year. *Lewis v. McNatt*, 63.

USURPING AN OFFICE, HOW SUIT TO BE BROUGHT.

1. A civil action, in which the plaintiff in his own name sets forth in his complaint that he is the tax collector for a certain county, and that the defendant has usurped the office, and has unlawfully received the fees and emoluments thereof, cannot be brought under the 189th section of the C. C. P., and thereby obtain an injunction to restrain the defendant from acting in said office. *Patterson v. Hubbs*, 119.

2. The 189th section of the C. C. P., which provides as to a civil action that "when, during the litigation, it shall appear that the defendant is doing or threatens, or is about to do, or procuring or suffering some act to be done in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act," does not apply to cases of the usurpation of a *public office*, but is confined to cases where some *private right* is a subject of controversy, and the act sought to be restrained would produce injury to the alleged right of the plaintiff during the litigation. *Ibid.*

3. When the subject of controversy is the right to a public office, the action should be brought by the Attorney-General, under the 366th section of C. C. P., in the name of the people of the State, and if it be against a person for usurping a public office, the Attorney-General, in addition to the statement of the cause of action, "may also set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by a Judge of the Supreme Court for the arrest of such defendent, and holding him to bail;" as in other civil actions where the defendant is subject to arrest. *Ibid.*

USURY.

1. A bond given for money lent upon usurious interest during the existence of the statute against usury, Rev. Code, ch. 114, was made void *ipso facto* by that statute, and was not revived when it was repealed by the act of 1866, ch. 24. *Pond v. Horne*, 84.

2. Where a note tainted with usury is endorsed to a third person, who purchases it for value, and without notice of any illegality attending the execution thereof, and the maker gave to the payee a mortgage to secure the payment of said note: *Held*, that the defence of usury could not avail the maker, and that the mortgage given to secure the payment of the principal and interest due thereon could be enforced. *Coor v. Spicer*, 401.

VAGRANCY.

1. In the act of 1866, ch. 42, which prescribes "that if any person who may be able to labor, has no apparent means of subsistence, and neglects to apply

VAGRANCY—*Continued.*

himself to some honest occupation for the support of himself and his family, if he have one; or, if any person shall be found spending his time in dissipation, or gaming, or sauntering about without employment, etc., the word "*or*, " in the beginning of the second paragraph must be construed "*and.*" *State v. Custer*, 339.

2. An indictment for vagrancy, under the act of 1866, ch. 42, must charge that the defendant was able to labor, and that he or she neglected to apply him or herself to some honest occupation. And in charging that he or she was endeavoring to maintain him or herself by any undue or unlawful means, it must state what the undue or unlawful means are. *Ibid.*

3. A special verdict on an indictment for vagrancy, under the act of 1866, ch. 42, which finds that the defendant "was frequently seen sauntering about and endeavoring to maintain herself by whoring," entitled her to a judgment of not guilty, as the verdict finds that she was *endeavoring* to do something wrong, and not that she did it, and the thing she was endeavoring to do, was something immoral only, and not unlawful. *Ibid.*

4. If there be two statutes relating to the same subject, and the latter contains no repealing clause, and there is no positive repugnancy between them, both may be in force. But if there be such repugnancy, the latter will operate as a repeal of the former. Hence the act of 1866, ch. 42, in relation to vagrancy is a repeal of the 43d section of the 34th chapter of the Revised Code, which relates to the same subject, because the two statutes differ materially as to the punishment of the offence of vagrancy, the Revised Code prescribing a fine *and* imprisonment *and* security for good behavior, while the act of 1866, ch. 4, declares that the Court *may* fine, or imprison, or both, or sentence the party to the work house. *Ibid.*

VARIANCE.

The defendant is entitled to an acquittal, when the indictment charges the stealing of a *steer*, whilst the evidence shows that it was a *bull*. *State v. Royster*, 539.

VENUE.

Venue may be waived by the consent of parties, but they cannot confer jurisdiction on a Court by consent. *Leach v. W. N. C. R. R. Co.*, 486.

WARRANTY.

1. In a written bill of sale which contains no warranty of title, none can be implied or proved. *Sparks v. Messick*, 440.

2. Although there seems to be an implied warranty of title in the sale of personalty, made by parol, yet no such rule is applicable to sales made by executors, administrators, etc. *Ibid.*

3. Where these is a warranty of title to personalty which is broken, the vendee can take no advantage thereof to have the contract rescinded, and refuse payment of the purchase money, when he has kept the property for many years, and had the benefit thereof, until it is destroyed. *Ibid.*

[APPENDIX.]

APPENDIX, JURISDICTION OF FEDERAL COURTS.

The Circuit Courts of the United States have not jurisdiction of a case either at law or in equity, in which a State is plaintiff against its own citizens. The Constitution of the United States does not confer such jurisdiction, nor is it conferred by any act of Congress. Such jurisdiction is not conferred upon the Circuit Court in this case by the Bankruptcy act of 1867, because there are other necessary parties than the assignee in bankruptcy, and without such parties the plaintiff could not sustain his suit in any Court. *The State of N. C. v. The Trustees of the University*, 714.