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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA,

JUNE TERM, 1873.

VOLUME LXIX.

BY TAZEWELL L. HARGROVE, ATTORNEY GENERAL.

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1873.

JUSTICES OF THE SUPREME COURT.

AT JUNE TERM, 1873.

RICHMOND M. PEARSON, C. J.,
EDWIN G. READE,
WILLIAM B. RODMAN,
THOMAS SETTLE,
NATHANIEL BOYDEN.

JUDGES OF THE SUPERIOR COURTS.

FIRST CLASS.		SECOND CLASS.	
JONATHAN W. ALBERTSON,	1st Dist.	WILLIAM A. MOORE,	2d District
WILLIAM J. CLARKE,	3d "	SAMUEL W. WATTS,	6th "
DANIEL L. RUSSELL,	4th "	JOHN M. CLOUD,	8th "
RALPH P. BUXTON,	5th "	ANDERSON MITCHELL,	10th "
ALBION W. TOURGEE,	7th "	JAMES L. HENRY,	11th "
GEORGE W. LOGAN,	9th "	RILEY H. CANNON,	12th "

ATTORNEY GENERAL,

TAZEWELL L. HARGROVE.

CLERK OF THE SUPREME COURT,

WILLIAM H. BAGLEY.

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CASES

ARGUED AND DETERMINED IN THE

Supreme Court of North Carolina,

AT RALEIGH.

JUNE TERM, 1873.

SUSAN F. STANLEY *v.* WILLIAM S. MASON, Adm'r.

Under the Act of 1868-'69, chap. 258, an administrator or executor must be sued as such in the county in which he took out letters of administration or letters testamentory, provided he or any one of his sureties lives in that county, whether he is sued upon his bond or simply as administrator or executor.

This was a CIVIL ACTION against the defendant as administrator of Henry D. Turner, and at the last term of the Superior Court of the county of CRAVEN, before *Clarke, J.*, a judgment was rendered against him, from which he appealed. The facts of the case are stated in the opinion of the Court.

Green, for the defendant.
Battle & Son, for the plaintiff.

READE, J. The Act of 1868–'69, chap. 258, sec. 1, provides, "That all suits upon official bonds, or against executors and administrators in their fiduciary capacity, shall be instituted in the county where the bonds were or shall be given, if the principal or any of the sureties on the bonds is in the county; if not, then in the plaintiff's county."

The defendant resides, and took out letters of administration on the estate of his intestate in the county of Wake;

and the plaintiff resides and brought suit in the county of Craven. His Honor held that Craven county was the proper venue of the action. In this we think there was error.

It is said in support of his Honor's ruling that the statute should be construed as if it read, all suits upon official bonds or against executors and administrators *upon their bonds* shall be brought in the county where the bonds were given. And that suits against administrators or executors in their representative character, but not upon their bonds, may be brought as against other persons. But such does not seem to us to be the proper construction of the Act.

The object of the statute was to have suits against these persons, whether upon their bonds or not, in the county where they took out letters, and where they make their returns and settlements, and transact all the business of the estates in their hands.

C. C. P., sec. 69, provides that when an action is commenced in the wrong county it may be transferred for trial to the proper county. And in this case the defendant made two motions, one to dismiss and the other to remove to the county in which he resides and took out letters. To one or the other of these motions the defendant was clearly entitled.

There is error. This will be certified to the end that such further proceedings may be had as the law allows.

PER CURIAM. Judgment accordingly.

WILLIAM T. PETTIS v. WILLIAM SMITH, *et al.*

Where a testator gave to his wife all his lands, and many articles of personal property, and added "all of which property to be her's during widowhood; in the event of her marriage, the one-third of the above property to be her's forever, and the balance to be divided among my children, and subject to the same restrictions as hereafter mentioned," which restrictions were that other property given to his children should be their's for life with limitations to their children: *It was held*, That as the wife never married again the interest which she had taken in the lands was for life only, and upon her death they descended to the heirs-at-law of her husband.

This was a CIVIL ACTION for one-fifth part of a tract of land tried at the last term of the Superior Court of the county of MECKLENBURG, before his Honor *Logan, J.* The plaintiff had a verdict and judgment, and the defendant appealed. The case is sufficiently stated in the opinion.

Dowd, for the defendant.
Shipp, for the plaintiff.

SETTLE, J. The will of William Burton contains this clause: "Item 2. I will to my beloved wife, Mary Burton, the tract of land on which I live and another small tract on the river, with my horses and stock of every description, farming utensils, household and kitchen furniture, also the following negroes, Frank, Bob and Jim, and two negro women, Jude and Sal, all of which property to be her's during her widowhood; in the event of her marriage, the one-third of the above property to be her's forever, and the balance to be divided among my children, and subject to the same restrictions as hereafter mentioned."

The restrictions hereafter mentioned are limitations of other property to his children for life, and then to their children, &c. It is clear that the testator intended to control *all* of his property, real and personal, until it reached the hands of his grandchildren, except that in the case of

his widow's marriage, instead of allowing her to hold and enjoy for life all that passed to her under item second of the will, she should then take only one-third, absolutely and in fee simple.

She died in 1860 without marriage, upon which event the children of the testator became entitled to the immediate possession of this property, notwithstanding that the widow had conveyed the land, by deed in fee simple, to the party under whom the defendants claim title.

This disposes of the point and the only point presented by the record; but the learned counsel who argued the case for the defendants in this Court, feeling as it would seem, the weight of his burden, had but little to say upon the main point, but endeavored to interpose a question of pleading as a shield to his clients. He contends that it does not appear that the plaintiff is one of the heirs of William Burton, or if he is, what portion of the estate he is entitled to. The plaintiff alleges distinctly in his complaint that he is an heir, and as such entitled to one-fifth part of the estate, and the defendant does not distinctly deny it.

The record recites that the Court reserved by consent of parties the decision upon the issues of law arising upon the will of William Burton, and it proceeds to state that the issue of law submitted to the Court was, "Is the plaintiff as heir of William Burton entitled to one-fifth of the land in the pleadings described?"

The very issue submitted admits that he is an heir and entitled to one-fifth of the land, unless upon the construction of the will the widow was entitled to the whole in fee simple.

There is no error.

PER CURIAM. Judgment affirmed.

J. F. E. HARDY, Cashier, &c., v. DANIEL REYNOLDS.

If upon confessing judgment in a suit by a bank against one of its debtors, it be agreed and entered upon the docket at the foot of the judgment, that it may be discharged upon the payment of a certain per cent. of the amount in United States currency, or the full amount in the notes of the bank, the plaintiff will be bound by the agreement, and an execution issued for the full amount in United States currency more than two years afterwards may be set aside, and the bankruptcy of the bank will not alter the case.

This was a MOTION to set aside an execution heard before his Honor *Henry, J.*, at the Fall Term, 1872, of the Superior Court of BUNCOMBE county.

At the Special Term, 1869, of Buncombe Superior Court, judgment was taken by consent for want of an answer by the plaintiff against the defendant for the sum of $632.40, the amount of the principal and interest due to that date upon the promissory note sued upon. At the time of taking the judgment, the following agreement was made by the parties and entered at the foot of the same: "It is agreed that this judgment may be discharged upon payment of 40 per cent. of the amount in United States currency, or the full amount in Cape Fear Bank notes." The bank authorities were then allowing its debtors to make settlement of their indebtedness on the basis of 40 per cent. in currency, or the full amount in its own notes; the 40 per cent. being at the time equivalent to the full amount in its own notes.

In October, 1871, the bank was adjudged to be a bankrupt upon the petition of its creditors, and an assignee was appointed, who at once instructed the attorneys of the bank that no further settlements should be made with the debtors except for the full amount in currency; and when the tender was made, at the Fall Term, 1872, of the Court aforesaid of the 40 per cent. in currency, the said attorneys who were the same that represented the plaintiff when the judgment was rendered, in obedience to said instructions, declined to receive it.

His Honor being of opinion that the plaintiff was bound by the agreement above mentioned, directed the execution to be set aside, from which order the plaintiff prayed for and obtained an appeal to the Supreme Court.

Smith & Strong, and *Battle & Son*, for the plaintiff.
Merrimon, Fuller & Ashe, for the defendant.

RODMAN, J. The plaintiff contends that the agreement that he would receive in satisfaction of the judgment confessed, 40 per cent. thereof in United States currency, or the full amount in notes of the bank of Cape Fear is void, as being without consideration, and further, that the defendant has forfeited the benefit of it, by his delay in making payment.

The first position cannot be maintained. This is not like the case where a creditor accepts a part of the sum due to him, and by parol agrees to release the residue. In that case the agreement to release is held void, because it is held that a payment of a part of a sum cannot be a consideration for a discharge of the whole. Whether the doctrine be a reasonable one or not, it is settled on authority. It is held, however, that the giving to the creditor an article of property without regard to its value, or a negotiable note for less than the amount of the debt, if that be not negotiable, or the note of a third person, or any change in the security for the debt which *may* be beneficial to the creditor is a sufficient consideration for a release. In this case the confession of the judgment was a sufficient consideration to support the agreement.

It is common elsewhere to give a *cognovit actionem*, which is a power to confess judgment as a security for a debt, and it was so in this State until it was enacted that such a power of attorney should be void for that purpose, and effectual only as a common bond. Rev. Code, chap. 31, sec. 88.

But it is a well recognized practice to confess a judgment with a defeasance, and the Courts will take notice of the condition, and will not permit an execution to issue in violation of it. 1 Tidd, Pr. 560. The practice is regulated in England by 3 Geo. iv, ch. 39. The bankruptcy of the bank cannot alter the rights of the parties under the agreement made before. Neither can the delay of the defendant to make payment forfeit his right. There is no condition of that sort in the agreement, and the plaintiff could at any time have issued execution and enforced its performance.

We think the Judge was right in suspending the execution, but it should have been on terms that defendant immediately pay according to the agreement, and the costs of the process.

A judgment may be drawn here in conformity with this opinion, giving the defendant twenty days after service of notice of the judgment to comply with his agreement.

PER CURIAM. Judgment accordingly.

JONATHAN E. COX, *et al.*, Trustees, *v.* B. L. LONG.

If a person agree to purchase articles to be delivered by a certain time, and which are promised to be of a certain good quality, and after payment for the same, and after it is too late to return them without prejudice to himself, he finds out that they are of inferior quality, he may sustain an action to recover damages on account of the inferior quality of the articles, although he has taken and used them.

This was a CIVIL ACTION, brought to the Superior Court of the county of GUILFORD, in which the defendant demurred to the complaint of the plaintiff. His Honor, *Tourgee, J.*, at the last Spring Term of the Court sustained the demurer, and ordered that the plaintiffs amend their complaint upon

the terms of paying all the costs, or that the suit be dismissed. From this order the plaintiffs prayed and obtained an appeal to the Supreme Court. The case is sufficiently stated in the opinion of the Court.

Mendenhall & Staples, (with whom was *W. H. Bailey*,) referred to the following cases: *Caldwell* v. *Smith*, 4 Dev. & Bat. 64; *McIntyre* v. *McIntyre*, 12 Ired. 302; *Barnes* v. *Barnes*, 65 N. C. Rep. 262; *Waldo* v. *Halsey*, 3 Jones 110; *Sapona Iron Co.* v. *Holt*, 64 N. C. Rep. 335; *Mendel* v. *Steel*, 8 M. & W. 858; *Harrington* v. *Stratton*, 22 Pick. Rep. 510; *Jones* v. *Bright*, 15 Eng. C. L. Rep. 529; *Riggs* v. *Burridge*, 15 M. & W. 598; *Gardiner* v. *Long*, 4 Camp. 144; *Laing* v. *Fidgeon*, Ibid. 169. The counsel also cited the following authorities: Brown's Com. 354; 1 Arch. N. P., 306; 3 Black. Com. 164, note 24; 1 Par. on Con. 465, note N; 2 Smith's L. Cas. 32; Broom's Legal Maxims 747 and 768; Benjamin on Sales, 680, 682.

J. T. Morehead, Jr., for the defendant cited Stark on Ev. 1,646 and 1,647, and the following cases *Caldwell* v. *Smith*, 4 Dev. & Bat. 64; *McIntyre* v. *McIntyre*, 12 Ired. 299; *Dickson Jordan*, 11 Ired. 166. and *Matthews* v. *Smith*, 67 N. C. Rep. 374.

SETTLE, J. The defendant contracted to deliver to the plaintiffs on the railroad at Newbern, sixty thousand cypress shingles, four inches wide and twenty inches long. The shingles were paid for, shipped and hauled from the railroad in Guilford county to the plaintiffs' building, before the plaintiffs were aware of the fact that they only measured three inches in width and seventeen inches in length.

The plaintiffs allege, and the defendant admits by his demurrer, that the shingles were received too late for the plaintiffs to secure others in their stead without immense damage to a new building then being erected by them, and

great delay in its completion, and that they were compelled to use these shingles or a part of them for the protection and completion of their building.

The defendant says that by receiving the shingles and using them the plaintiffs waived any want of conformity to the contract, and right of action they might have had for breach of the contract. The principle governing this case is so well stated in the notes to *Cutter* v. *Powell*, 2 Smith, leading cases, pages 32 to 35, that we will content ourselves by making a few extracts therefrom:

"It is settled by *Street* v. *Blay*, and *Poulton* v. *Lattimore*, that where an article is warranted, and the warranty is not complied with, the vendee has three courses, any one of which he may pursue: 1. He may refuse to receive the article at all; 2. He may receive it and bring a cross action for a breach of the warranty; or, 3. He may, without bringing a cross action, use the breach of warranty in reduction of the damages in action brought by the vendor for the price. * * * But although *Street* v. *Blay*, and *Poulton* v. *Lattimore*, clearly establish these principles, yet it is the opinion of a writer of great merit and learning (Mr. Starkie) that where there is a specific bargain as to price, but no warranty, and goods inferior in value to those contracted for have been delivered, the vendee must, *where it is practicable to do so, without prejudice*, return the goods and thus rescind the contract *in toto;* and if he does not he must be taken to have acquiesced in the performance of the contract."

The author says it is not apprehended that this position leads to any very extensive consequences, because it is confined by Starker himself to those cases in which "it is practicable to return the goods without prejudice," &c. Neither, it is apprehended, can Mr. Starkie's position apply to any case in which the vendee's necessity for the goods is urgent,

and where it is better for him to have goods worse than the description in the contract than to have none at all.

In such a case he certainly cannot rescind the contract without prejudice, &c. The position therefore of Mr. Starkie applies to a comparatively small number of cases, &c. It will be observed that the principle here contended for grows out of cases where there has been an express warranty; but as the learned author says of certain promises in the cases he was discussing, we say what difference is there in reason between the effect of an express warranty and such a promise as was broken by the defendant in our case. What was his promise but an express warranty? It is apprehended that anything said at the time of making a contract, if it be not a mere representation, is an express warranty."

The cases cited by the defendant's counsel from our own reports, so far from conflicting with these principles, recognize and support them.

Let this be certified that in sustaining the demurrer and dismissing the action there was error.

PER CURIAM. Judgment reversed.

HOWELL MITCHELL and wife *et al.* *v.* R. M. SLOAN, Ex'r, *et al.*

A Judge of the Superior Court has no power to make an order authorizing a person who has been permitted to sue *in forma pauperis* to appeal to the Supreme Court without giving security for the costs of the appeal, and for the want of such security the appeal will be dismissed with costs.

The cases of *Felton* v. *Elliott*, 66 N. C. Rep. 196, and *Weber* v. *Taylor*, Ibid. 412, cited and approved.

The plaintiffs upon a proper application therefor, obtained from his Honor, *Tourgee, J.*, an order allowing them to sue *in forma pauperis* in the Superior Court of the county of

GUILFORD. The suit was brought and at the last term of the Court a judgment was given against them, whereupon his Honor made an order allowing them to appeal to the Supreme Court *in forma pauperis* without giving security for the costs of the appeal.

Gorrell, for the plaintiffs.
Dillard, Gilmer & Smith, and *L. M. Scott*, for the defendant.

BOYDEN, J. This suit was commenced by order of the Judge *in forma pauperis*, and after a decision against the plaintiffs, his Honor, upon motion of the plaintiffs to appeal without security, made an order in the following words, to-wit: "It appearing to me that the plaintiffs have heretofore, for sufficient cause shown, obtained leave to prosecute this action *in forma pauperis*, it is ordered for the same cause, that the plaintiffs have leave to prosecute said appeal, to the Supreme Court *in forma pauperis*, without giving any bond or making any deposit for securing costs on said appeal, and without payment of costs to any officer of said Court." In this there was error. This case is governed by the case of *Felton* v. *Elliott*, 66 N. C. R. 196, and the case of *Webb* v. *Taylor and another*, same volume, page 412. The statute only allows the Judge of the Superior Court to allow a suit to be prosecuted in his Court *in forma pauperis*, and it would seem to be absurd that a Judge of an inferior Court should be allowed the right to say that the officers of a Superior Court, over whom he has no control, should perform service without compensation.

The suit is dismissed for want of security for the appeal.

The plaintiffs must pay the defendants their costs in this Court. This will be certified.

PER CURIAM. Judgment accordingly.

D. G. McRAE, Assignee, v. MALCOLM McNAIR.

In a suit on a bond given in January, 1864, and expressed to be for value received, the value of the property for which the bond was given is the rule to be applied under the Act of 1866, chap. 38, in ascertaining the amount to be recovered, and this is not varied by the fact that the parties agreed at the time when the bond was given that it might be paid in Confederate money. Nor will it be varied by the assignee in bankruptcy of the obligor having given the following receipt: "Received of M. M., $60, on account of a note held by me as assignee of W. J. B., and which I have agreed to settle according to the scale as adopted by law."

This was a CIVIL ACTION tried at the Spring Term, 1873, of ROBESON Superior Court before his Honor, *Buxton, J.*, when there was a verdict and judgment, with which the plaintiff was dissatisfied, and prayed and obtained an appeal. The facts of the case are sufficiently stated in the opinion of the Court.

N. McLean and *Leitch*, for the plaintiff.
N. A. McLean and *W. M. L. McKay*, for the defendant.

SETTLE, J. This action was brought upon the following bond: "One day after date I promise to pay W. J. Brown or order thirty-three hundred dollars, value received, witness my hand and seal. January 13, 1864.

"M. McNAIR, [SEAL.]"

Brown becoming a bankrupt his assignee was substituted by leave of the Court as plaintiff.

It is admitted that the consideration for which this bond was given was one-half of a tract of land of 660 acres; and the plaintiff introduced evidence to prove that the land was worth three dollars per acre.

The defendant testified that there was an understanding that this debt was to be paid in Confederate money, that "some time after the maturity of the note he procured the Confederate money and tendered it to Brown in payment,

who refused to receive it, remarking that it had become so depreciated that he could not take it;" that he, (the defendant) stated the matter to the assignee of Brown, and made him a payment in national currency of $60, on the 12th day of April, 1870, and received from the assignee a paper writing as follows:

"Received of Rev. Malcolm McNair, sixty dollars, on account of a note held by me as assignee of W. J. Brown, now in suit in Robeson county, and which I have agreed to settle according to the scale as adopted by law."

His Honor instructed the jury that according to the case presented, the scale ought to be applied, and a verdict was returned for the value of the Confederate money. The defendant relies upon the original contract (the terms of which, by the way, were never submitted to the jury, but assumed by his Honor to be in accordance with the defendant's testimony,) and also upon the paper writing which he received from the plaintiff as the assignee of Brown.

The Act of 1866, chap. 38, establishes the rules of evidence applicable to this case, and directs the manner in which juries shall arrive at the value of contracts made during the war. This legislation, establishing as it does the value of the property for which the debt was contracted, as the value of the contract, has often received the commendation of this Court as being just and equitable.

Take it that when the contract was made in January, 1864, the understanding was that it could be discharged in Confederate money; does not the legislation referred to embrace the case in terms and spirit?

The defendant tells us that *some time* after the maturity of the note he offered payment, &c. How long the time after does not appear, and was the plaintiff to receive worthless or greatly depreciated paper for his land?

We see nothing to take the case out of the rule established by the Legislature for the construction of contracts

where property was the consideration. Nor is there anything in the instrument which the plaintiff, as assignee, gave to the defendant to change this view of the case. He agrees "to settle according to the scale as adopted by law."

What is the scale adopted by law? Are there not two? One scaling contracts where the consideration was Confederate money to the value of that money at the different stages of its depreciation; and the other scaling contracts in which the nature of the obligation is not set forth, but where the consideration was property to the value of that property. The scale "adopted by law" in the case before us is the value of the land, and as the jury have not ascertained that fact there must be a *venire de novo.*

PER CURIAM. *Venire de novo.*

WILLIAM B. WRIGHT and wife v. DUNCAN MCCORMICK.

In a petition for partition, if the plea of "sole seizure" is not put in before the order of partition is made, it will be considered as waived, and the parties to the proceeding will be taken to be tenants in common.

In a proceeding for partition in which the petition sets forth a particular description of the land, and upon an order for partition the commissioners appointed to make it return a report of their proceedings in the division of the land, and the defendant objects to the confirmation of it, upon the allegation that they have not divided the land described in the petition, he cannot complain of an order of the Judge referring it to the clerk to take and state the evidence with regard to the identity of the land.

This was a PETITION for the partition of land, heard before his Honor, *Buxton, J.*, at the Spring Term, 1873, of the Superior Court of CUMBERLAND county, and upon the hearing his Honor made an order from which the defendant appealed. Enough of the case is stated in the opinion of the Court for understanding the points decided.

B. & T. C. Fuller and *Guthrie,* for the defendant.
J. C. McRae, for the plaintiff.

PEARSON, C. J. We see no error of which the defendant has a right to complain. The petition states a particular description by "*metes and bounds,*" so as clearly to identify the land. The order to the commissioners is to divide the land mentioned in the pleadings, and to accompany their report with a survey and plot, this extra particularity being, as it would seem, suggested by the difficulty which had been started in regard to the date of the grant, but which had been removed. The plea of "sole sezure" must be put in, before the order for partition is made, otherwise it is waived, and the parties are for the purposes of the proceeding taken to be seized as tenants in common.

In the face of the report of the commissioners his Honor, as it seems to us, gave more importance to the suggestion of the defendant, that the commissioners had divided the wrong tract of land, than it was entitled to; after the particularity of description observed in the petition, and in the order of partition, and in the report, his Honor, might well have treated the objection in regard to the identity of the land as captious and frivolous. Certainly the defendant has no right to complain of the order that it be referred to the clerk to take and state the evidence upon the point whether the commissioners have divided the land according to the order of partition.

There is no error.

PER CURIAM. Judgment affirmed.

THE STATE v. HARDY JONES.

The Supreme Court has no power to entertain a petition to rehear a criminal action. It never passes judgment in such cases, but only gives its opinion and orders it to be certified to the Court below to be carried into effect by that Court.

A point which the bill of exceptions or case stated shows was not taken in the Court below cannot be taken in this Court.

This is a PETITION to rehear the case of an indictment for murder which was before the Supreme Court at the last term upon an appeal, when an opinion was given that there was no error, and it was ordered that the opinion should be certified to the Superior Court of the county of CRAVEN from which the appeal was taken.

After an argument by the *Attorney General* for the State and *Haughton* for the prisoner, the following opinion of the Court was given:

READE, J. The defendant was tried for murder and convicted, and appealed to this Court. At the last term of this Court we decided that there was no error, and directed that our opinion be certified to the Court below, that that Court might proceed to judgment. At this term of the Court the defendant files a petition to have the case reheard in this Court, upon the ground that his counsel was not present when the case was heard in this Court, and that on that account the attention of this Court was not called to a defense which would have availed him.

Neither the learned counsel for the prisoner nor the Attorney General has been able to cite any authority showing that we have the *power* to rehear the case. In equity cases and in civil actions the practice has been common, but in criminal cases never to our knowledge. In the former cases this Court makes decrees and passess judgments,

which may be reviewed. But in criminal cases we do not pass judgment. Such cases are sent up for our opinion only which we certify to the Court below, and there our jurisdiction ends.

We should regret this if it appeared that any injustice had been done the defendant, either by reason of the fault of his counsel or the oversight of this Court; but in considering the defense set out in his petition in connection with the record in the case, it is apparent that it could not have availed him if it had been made in this Court upon the hearing.

The defendant was arrested not by a regular officer, but by one deputized for the purpose. And upon the trial below his Honor charged the jury that in order to make the killing of the deputy murder, it must appear that the defendant knew that he was authorized to arrest him, and that unless they were satisfied that the defendant knew that fact, they must acquit him of murder. This was all right. But the defendant in his petition says that there was *no* evidence that he did know it, and therefore it was error in his Honor to leave it to the jury. Suppose that to be so for the sake of the argument, the proper course was for the defendant to move for a new trial upon that ground, and then his Honor would have stated what the evidence was, and we could have reviewed him.

But no such objection was taken below, and therefore could not have been taken here, unless it had appeared in the record. It is true that the record does not state the evidence as to the knowledge of the defendant that the officer was deputized, nor does it state that there was any evidence upon that point. But then it is not usual to state all the evidence, but only so much as is necessary to present the points made below. And we infer that there was evidence of that fact, because his Honor distinctly calls the attention of the jury to it as one thing about which they must

be satisfied; and this he would scarcely have done if there had been *no* evidence; or if it had escaped his Honor's attention, it would not have escaped the attention of his learned counsel. But no such point was taken below, and no such point was taken upon the hearing in this Court, although the defendant's counsel was attendant upon the Court at that term, and is put down in the report as appearing in the cause, and our recollection is that he did appear, and did argue the case in person, when the case was first called, when there was a *certiorari* ordered. Upon the return of the *certiorari* we suppose the counsel was absent, but a *brief* would have presented the point. But we repeat that the point, if made here and not made below, would not have availed him.

PER CURIAM. Petition dismissed with cost.

THE COMMISSIONERS OF GRANVILLE COUNTY *v.* WM. H. BALLARD.

The Act of 1872-'73, chap. 143, which changes the dividing line between the counties of Granville and Franklin, and thereby adds a portion of the territory of the former to the latter county, is constitutional, not being necessarily in conflict with the provision of the 5th section of the 2d article of the Constitution relating to the Senatorial Districts, nor with the provision of the 6th section of the same article, which relates to the apportionment of members in the House of Representatives.

Where a statute may be construed, without violence to its provisions, in a sense which would make it constitutional, a Court will give it that construction, rather than a contrary one, which would make it unconstitutional and void.

The case of *Mills* v. *Williams*, 11 Ired. 558, cited and approved.

This was a CIVIL ACTION, in which the plaintiffs sought by an injunction to restrain the defendant from proceeding to act under the Act of 1872-'73, chap. 143, entitled, "an Act to change the dividing line between the counties of

Franklin and Granville," and thereby to take away a portion of the territory of Granville county, and to add to the county of Franklin. Upon presenting the complaint to *Watts, J.*, at CHAMBERS, on the 26th day of March, 1873, he granted the injunction prayed for, and the defendant having filed his answer, the case came on to be heard upon a motion to dissolve it before his Honor, *Albertson, J.*, at the Spring Term, 1873, of GRANVILLE Superior Court. The motion to dissolve was granted, and the plaintiffs appealed.

Venable, with whom was *B. F. Bullock, Jr.*, for the plaintiffs.
J. J. Davis, Cooke and *Spencer*, for the defendants.

RODMAN, J. The view which we take of this case on the merits, dispenses with the necessity of noticing any other objections to the complaint.

The plaintiffs contend that the Act of 1872-'73, chap. 143, page 224, is unconstitutional, because a result of it will be to transfer a part of Granville county from the Twenty-first Senatorial district to the Seventh, to which the county of Franklin belongs. Sec. 5, of Art. 2, of the Constitution provides that after each census the Legislature shall divide the State into districts, each of which shall elect one or more Senators, as may be prescribed, and the districts so laid off shall remain unaltered until after another census.

The general power of the Legislature to alter the boundaries of counties, to create new ones or to destroy a county by consolidating it with another, is not denied. *Mills* v. *Williams*, 11 Ired. 558. If therefore the supposed unlawful result is not a necessary one in the present case, the objection has no application.

The Act in question does not in terms produce such a result; it does not refer in any way to Senatorial districts. It is a familiar rule of construction that where a statute may be construed without violence to its provisions in a sense

which would make it constitutional, a Court will give it that construction rather than a contrary one, which would avoid it.

In the present case we see no sufficient reason why the Act in question should not be valid for all the purposes that it apparently contemplates, and invalid so far as it might change the Senatorial districts. The voters in the detached territory may still vote in the Twenty-first district for Senator, though for all purposes but voting, inhabitants of Franklin. There may be some inconveniences in this, but none that we can foresee which are insuperable, or so great as to require us to declare an Act of Assembly void which a Court can do only when there is a *necessary* conflict with the Constitution.

The counsel for the plaintiff in his well considered and and able argument, insists that this view of the effect of the Act is inadmissible, because it would make a part of a county (viz: Franklin,) belong to a different district from the rest of it, which is forbidden by the section of the Constitution cited above. But we think that provision only applies to the original laying off of the districts, and not to a change in the line of a county subsequently made, by which the result is incidently brought about.

The learned counsel referred us to a case from New York and one from Massachusetts. We feel great respect for the judgments of those Courts, and upon all questions of general law they are authorities of much weight. But upon a question as to the effect of purely local legislation, the decisions of other States can rarely be considered guides. There are almost constantly differences greater or less which affect the conclusion. The conclusion of the Virginia Court in *Wade* v. *City of Richmond*, 18 Grat. 583, seems to us the better one.

These observations also meet a similar argument of the plaintiff, founded on sec. 6, of the same Article of the Con-

stitution, which requires an apportionment of members of the House of Representatives, to be based in part on the population of the several counties after each census. So far as the Act would operate to defeat this provision of the Constitution it is inoperative.

PER CURIAM. Judgment of the Superior Court dissolving the injunction affirmed, and as the action has no object but the injunction, it is dismissed.

JAMES I. MOORE *et al.*, *v.* WILLIAM H. BALLARD.

The Act of 1872-'73, chap. 143, changing the dividing lines between the counties of Granville and Franklin, and thereby adding a portion of the territory of the former to the latter county, is not unconstitutional, and the carrying out of its provisions cannot be enjoined at the instance of a creditor on behalf of himself and the other creditors of the former county.

This was a MOTION made before his Honor, *Albertson, J.*, at the Spring Term, 1873, of GRANVILLE Superior Court, to dissolve an injunction which had been theretofore granted by Judge WATTS, upon the complaint of the plaintiff Moore in behalf of himself and the other creditors of the county of Granville against the defendant to prevent the defendant Ballard, from proceeding to act under the Act of 1872-'73, chap. 143, entitled, "an Act to change the dividing line between the counties of Franklin and Granville," whereby a part of the territory of the latter county was to be added to the former. The motion to dissolve was granted, and the plaintiff appealed.

Venable and *B. F. Bullock, Jr.*, for the plaintiffs.
J. J. Davis, Cooke and *Spencer*, for the defendant.

RODMAN, J. This case was argued with that of the Commissioners of Granville against the same defendant. The ground of objection to the Act of 1872–'73, insisted on in this case, is, that by the detaching of a part of the territory and population of Granville, the security of the plaintiff, who is a creditor of that county, will be impaired or altered.

This objection can only be derived from an idea that a creditor merely as such has some sort of a lien on the property of his debtor, so that he cannot honestly part with any of it under any circumstances as long as the debt is unpaid. The moment it is put in this shape the objection is seen to be untenable. In the case of an individual debtor, he can sell his property, provided it be not done with a fraudulent intent, and even in that case, the conveyance is good as to him, though void as to his creditors..

In this case the suspicion of any such intent, even if otherwise it could be entertained, is rebutted by the provision in the Act, that Franklin as between it and Granville, shall assume a just part of the debt of Granville, while as to the creditor, Granville remains liable for the whole. This objection is novel, although if it had force, it might often have been made before in similar cases.

PER CURIAM. The judgment of the Superior Court dissolving the injunction affirmed, and action dismissed.

STATE *v.* HENDERSON ALLEN.

An indictment under the Act of 1868-69, chap. 253, (Batt e's Revisal, chap. 32, sec. 95,) for killing live stock under certain circumstances, which charges that the defendant on &c., at &c., "A certain mule of the value of one hundred dollars, the property of one J. S. E., the said mule being then and there within an inclosure not surrounded by a lawful fence, unlawfully and wilfully did abuse, injure and kill contrary," &c., is sufficient, though it would have been more satisfactory if it had stated whose the inclosure was, whether the defendant's, or some other person.

This was an INDICTMENT under the Act of 1868–'69, chap. 253, (Battle's Revisal, chap. 32, sec. 95,) in the following words, "That Henderson Allen, on &c., at &c., a certain mule of the value of one hundred dollars, the property of one John S. Ellis, the said mule being then and there within an inclosure not surrounded by a lawful fence, unlawfully and wilfully did abuse, injure and kill contrary," &c. Upon the trial at the Fall Term, 1872, of the Superior Court of GRANVILLE county, before his Honor, *Watts, J.*, the Court, among other things, instructed the jury that it was a violation of the statute referred to for a person wilfully to abuse, injure and to kill a mule the property of another in any inclosure whatever or whomsoever, not surrounded by a lawful fence, and such person would be guilty under the said statute, to which the defendant excepted. The jury found him guilty, and his counsel thereupon moved first, for a new trial for misdirection, which being refused, at Spring Term, 1873, of said Court, before his Honor, *Albertson, J.*, to which Term defendant was bound over, he moved in arrest of judgment, because of the uncertainty, informality and insufficiency of the indictment. This motion was also overruled and a judgment pronounced, from which the defendant appealed.

No counsel for the defendant.

Attorney General Hargrove and *Edwards*, for the State, referred to the case of *State* v. *Staton*, 66 N. C. Rep. 640.

READE, J. 1. The defendant moved for a new trial for "misdirection," without stating in what the misdirection consisted. The case states that his Honor, "among other things, charged the jury that it was a violation of the statute referred to in the indictment for a person wilfully to abuse, injure and kill a mule the property of another in any inclosure whatever, not surrounded by a lawful fence."

This charge seems to be in the terms of the statute substantially, and we regret that the defendant is not represented by counsel in this Court to suggest any error which may have escaped our attention.

2. The defendant moved in arrest of judgment "because of the uncertainty, informality and insufficiency," of the indictment, without specifying in what the uncertainty, informality and insufficiency consisted. This is at least as uncertain, informal and insufficient as the indictment is alleged to be; and the defendant has no counsel here to aid us. The indictment charges that the defendant killed the mule, &c. "The said mule being then and there within an inclosure not surrounded by a lawful fence, "without stating whose inclosure it was. We suppose that the objection was, that the indictment ought to have charged that it was the inclosure of the defendant. And that if he killed the mule in the inclosure of some other person not surrounded by a lawful fence he was not indictable. It would certainly have been more satisfactory to have charged that it was the inclosure of the defendant, or whose else inclosure it was, as a part of the description of the offense, and as a defense against a second conviction; but the mule and its ownership is given, so that the defendant can never be convicted again for killing that mule. But still it is with some hesitancy that we support the indictment, and we deprecate looseness and want of certainty and precision in pleading, and especially in criminal proceedings.

There is no error. This will be certified.

PER CURIAM. Judgment affirmed.

ROBERT N. GREEN, Ex'r, v. J. M. GREEN, Ex'r, *et al.*

Where a testator, who died in 1863, bequeathed that a certain slave should be sold and the proceeds equally divided between two sons who were appointed executors, and one of the sons bought the interest of his brother in the slave, and kept him until he was emancipated by the results of the late civil war: *It was held*, That the purchaser of his brother's interest had not thereby converted the slave, and was not responsible for his value or any part of it, but that he was responsible for the services of him and of the slaves which he had kept up to the time when they were emancipated.

When lands are divided in separate parcels to different persons, and it becomes necessary to sell land to pay the debts of the testator, the debts are a charge upon all the lands, and must be raised out of them all according to their respective values.

The case of *Fike* v. *Green*, 64 N. C. Rep. 665, cited and approved.

This was a PETITION filed by the plaintiff as executor of his father, John Green, who died in the year 1863, in the Court of the Clerk of the Superior Court for the county of CHATHAM, for the purpose of obtaining an order to sell land to pay the debts of his testator. The defendant Winslow, who had purchased a tract of land belonging to the testator of one of his heirs, upon his application was made a party and objected to the sale. The clerk decided that a sale was necessary, and made an order to that effect, from which the defendant Winslow appealed to the Judge of the Superior Court. In that Court by consent of the counsel of both parties it was referred to John G. Rencher, Esq., to take and report the separate accounts of R. N. Green and J. M. Green, the executors of John Green; 2. To ascertain the value of the hire of the slaves which came into the possession of each of the executors; 3. To ascertain the value of the slave Norwood, and of his hire from the time he came into the possession of R. N. Green, to the time of the emancipation of the slaves; 4. Whether R. N. Green is chargeable with the value of Norwood, or with his hire, or the hire of any of the other slaves; 5. To report the date of the deed from J. M. Green to the defendant Winslow; 6. The

amount of the debts unpaid of the estate of John Green and what part of his lands, if any, was necessary to pay the debts.

The referee reported, among other things, that the testator died in 1863, leaving many slaves, which the executors kept until they were emancipated; that the slave Norwood, was left to be sold and his proceeds equally divided between his sons, who were his executors and only children; that Norwood was not sold, but the interest of J. M. Green was bought by his brother, R. N. Green, who kept him until he was emancipated; that the slaves might have been hired out and considerable sums of money have been obtained, but the money would have been Confederate Treasury notes, which the only creditor of the estate would not receive; and the deed from J. M. Green to the defendant Winslow, was dated in the Fall of 1863, less than two years after the death of the testator The referee then found as matters of law that the executors could not be charged with the value or the hire of any one of the slaves; that R. N. Green could not be charged with the value or hire of the slave Norwood; and that the deed from J. M. Green to Winslow was void as to creditors, and that a sale of the land was necessary to pay the debts of the testator.

The defendant Winslow excepted to the report, because the referee had failed to charge the plaintiff with the value of the slave Norwood, or with the value of his hire; 2. Because he failed to charge the executors with the hires of the slaves until the time of their emancipation. At the Fall Term, 1872, the case coming on to be heard before *Tourgee, J.*, his Honor overruled the exceptions of the defendant, confirmed the report of the referee, and gave judgment in favor of the plaintiff, from which the defendant appealed.

Gorrell, for the defendant.
Manning, for the plaintiff.

RODMAN, J. 1. Exception of defendant Winslow: The only ground on which it can be contented that Robert N. Green (the plaintiff) should be charged with the value of Norwood or with half his value, is, that by purchasing from John the half given to him, and by subsequently keeping him in his own exclusive possession, he thereby took him out of the general mass of the property, and converted him to his own use. We do not think that what he did, amounted to such a conversion. The other slaves remained in the possession of the respective executors, to whom the testator had given them, until their emancipation, and we decided in *Fike v. Green*, 64 N. C., Rep. 665, that the continuance of a possession, begun in the testator's life time, did not, under the circumstances, amount to a conversion, such as to make the executors liable for their value. The circumstance which differs the case of Norwood from that of the other slaves, is, that he was directed to be sold, and the proceeds divided between Robert and John. But no sale was made. What was done, amounted only to a division of the common property. If two slaves had been so given, and an actual division had been made, each legatee taking one, the mere division could scarcely be thought to take the case out of the general rule. Nor would the fact that one party paid a sum to the other for equality of partition, and there can be no substantial difference when one purchases the entire interest of the other, an actual partition being impossible. We think the plaintiff is not chargeable with any part of the value of Norwood.

Second and third exceptions: We think the plaintiff is chargeable with the value of the services of Norwood, and of all the other slaves, which he had and kept in his employment after the testator's death up to their emancipation. The value of the services is what they could have been hired out for, after deducting the support of those who were unable to earn anything. This value was actually

received by the plaintiff, and went into his estate. It is assets which have not been lost, but converted.

The account will be reformed in these respects. A sale of the land, or of some part thereof is evidently necessary, and the case is remanded in order that the proper proceedings may be had for that purpose.

The debt which will remain after the application of the personality, is a charge on all the lands devised by the testator, according to the value of each devise. It will be for the District Judge to determine how this distribution of the burden shall be made most advantageously to all the parties. Perhaps the parties may agree on the valuation of of their respective lands, and proportion the burden accordingly, and so make any sale unnecessary.

Per Curiam: Exceptions sustained, judgment below reversed, and case remanded. Defendant Winslow will recover the costs of this Court.

We again call the attention of counsel for appellants to the impropriety of sending up as part of the case the evidence taken before the referee. No more should be sent up than is necessary to make the report and exceptions intelligible.

PER CURIAM. Judgment accordingly.

STATE *v.* ALEXANDER RUSHING.

If a person receive stolen goods, knowing them to be such, not for the purpose of making them his own, or of deriving profit from them, but simply to aid the thief in carring them off, he is guilty of the crime of receiving stolen good, knowing them to have been stolen.

This was an INDICTMENT against the defendant for receiving some stolen cotton, knowing it to have been stolen. At the trial before his Honor, *Clarke, J.*, at the last Superior Court for WAYNE county, the jury found the following facts as a special verdict :

One John Newsom stole the cotton at night from one Coor's barn and started with it to one Roberts, a merchant, to sell it, and came to the house of Rushing, who lived on a public road between Coor's and Roberts'. Newsom then hired Rushing to put a part of the cotton in his Rushing's bag, and go along with him, Newsom, and thus help him to get the cotton to Roberts' store, to whom they offered to sell the cotton, it being under Newsom's control. Rushing then and there told Roberts that the cotton belonged to Newsom and not to himself. Roberts refused to buy, but kept the cotton until next day. Newsom sent Rushing next morning to get pay for the cotton, when Roberts still refused to pay, and Rushing said Newsom might come and get his pay or his cotton.

During the next day Coor got his cotton from Roberts, and went to see Rushing, who said he knew the cotton was stolen, because he knew Newsom was a hireling and not a cotton raiser. Upon these facts, his Honor was of opinion that the defendant, Rushing was guilty of the charge of receiving the stolen cotton, knowing it to have been stolen, and pronounced a judgment from which the defendant appealed.

Faircloth & Grainger, for the defendant.
Attorney General Hargrove, for the State.

READE, J. After another had stolen the cotton, the defendant, knowing it to have been stolen, put a part of it in his bag, and helped the thief to carry it to a merchant, to sell it. The question is, whether that is receiving stolen goods? It is insisted that it is not, because the defendant did not intend to make them his own, or to derive any profit from them, but simply to aid the thief, as a friendly act.

It is said by a respectable writer that it is not necessary that he should act from motives of personal gain. If his object is to aid the thief, it is sufficient. 2 Bish. Cr. L. S. 1092. A pickpocket passes the thing stolen to one, and he to another and another in the crowd, who receive it to aid the thief; all are guilty. Guilty of the theft if there was preconcert; guilty of receiving stolen goods, knowing them to be stolen, if they only aided the thief after the act.

There is no error, this will be certified.

PER CURIAM. Judgment affirmed.

WILLIAM A. COX *v.* A. H. HAMILTON.

Where the plaintiff in a suit for land at the Spring Term of the Superior Court of a county recovers judgment and the defendant appeals, but gives an undertaking for the costs only, and at the next ensuing term of the Supreme Court in June, the judgment is affirmed, and then the plaintiff takes out a writ of possession from the Superior Court which is executed, he will be entitled to the crops growing on land for that year.

This was a CIVIL ACTION, tried at the last term of the Superior Court for JONES county, before his Honor, *Clarke, J.*, where the plaintiff had judgment, from which the defendant

appealed. The case is sufficiently stated in the opinion of the Court.

Green, for the defendant.
Haughton and *Battle & Son*, for the defendant.

READE, J. Isler, the principal of the defendant, had recovered of the plaintiff, Cox, a tract of land, and at Spring Term, 1872, of the Court below, Isler had judgment and a writ of possession. The present plaintiff, who was defendant in that suit, appealed to the Supreme Court, the effect of which would have been to suspend the writ of possession, if the appellant had given the necessary undertaking. But not doing that, the execution or writ of possession was not suspended. C. C. P., sec. 307. At June Term, 1872, of this Court the judgment was affirmed, and after that Isler had his writ of possession executed, and he went into the possession of the land and the crop, by his agent, the present defendant. Under this state of facts we are of the opinion that Isler was entitled to the crop growing on the land in 1872, when he went into possession, and that the plaintiff is not entitled to recover the same.

There will be judgment here, as agreed, against the plaintiff on his undertaking for $250 in favor of the defendant.

PER CURIAM. Judgment accordingly.

JOSEPH L. CARSON, Adm'r, v. COLUMBUS MILLS.

It is too late to object to the reading of a deposition, after a trial has begun, merely on account of irregularity in the taking of it, provided, it shall appear that the party objecting, had notice of its being taken, or had notice that it had been taken, and was on file long enough before the trial to enable him to present the objection.

This was a CIVIL ACTION on the trial of which, at the last term of the Superior Court of RUTHERFORD, before his Honor, *Logan, J.*, the defendant offered the deposition of Susan Stovall, to the reading of which, the plaintiff objected on account of irrugularities in the taking of it. The objection was sustained by the Court, and the deposition was rejected, and the defendant appealed.

W. P. Bynum, for the defendant.
Hargrove and *Argo & Harris*, for the plaintiff.

PEARSON, C. J. Assuming the irregularities in reference to the deposition which were pointed out by the counsel, we are of opinion that the objections are waived, not being taken in apt time. "Good matter must be taken advantage of in due form, proper order, and in apt time." This is a rule of practice, and in our case full force is given to it by the Act 1869–'70, chap. 227, sec. 12, which covers the case.

"No deposition shall be quashed or rejected on objection first made after a trial has begun, merely because of an irregularity in taking the same," "provided, it shall appear that the party objecting either had notice of its being taken as herein prescribed or had notice that it had been taken, and was on file long enough before the trial to enable him to present the objection as presented in the next section."

Here there was ample proof of such notice.

There was error in ruling out the deposition of Susan Stovall.

PER CURIAM. *Venire de novo.*

NOTE BY THE REPORTER: The Act of 1869-'70, chap. 227, which was ratified the 28th of March, 1870, was repealed by the Act of 1871-'73, ratified the 8th of February, 1872, and the provisions of the Revised Code, chap. 31, in relation to the taking of depositions, were re-enacted, but the deposition in the above case was taken the 1st day of June, 1871, when the Act of 1869-'70, chap. 227, was in force.

S. W. LATHAM, Ex'r, *et al. v.* HENRY P. WHITEHURST.

The 9th section of the Act of 1868-'69, chap. 76, which enacted that "no property shall be sold under any deed of trust or mortgage, until the debts secured in said deed are reduced to judgments according to the provisions of this act," was unconstitutional, because it not only attempted to impair the obligation of a contract, but to alter it by adding a condition. (The above section was repealed by the Act of 1869-'70, chap. 28.)

In an action to foreclose a mortgage, the Judge may, if necessary, refer the matter to the clerk to settle the details and report the balance due, but if nothing is to be done except to calculate interest, the Judge may do it himself, or direct the clerk to do it *instanter*, and give judgment accordingly.

The case of *Jacobs* v. *Smallwood*, 63 N. C. Rep. 112, cited and approved.

This was a CIVIL ACTION commenced the 4th of October, 1869, to foreclose a mortgage given by the defendant, bearing date in the year 1854, to secure the payment of notes of the defendant, due at the date of the mortgage, tried before *Watts, J.*, at the January (Special) Term, 1873, of CRAVEN Superior Court. The defendant demurred to the complaint, and assigned as cause of demurrer that it did not appear upon the face of the complaint that at the time of the commencement of the action the debt secured by the mortgage had been reduced to judgment. There was a joinder in the demurrer. His Honor overruled it, and was about to render judgment, when the defendant's counsel moved that a

reference be made to the clerk to ascertain and report what was due on the mortgage; but it appearing to the satisfaction of the Court, without the aid of a reference, what was the amount due on the mortgage debt from the note, the interest on which could be computed, the reference was refused, and the Court gave judgment that the mortgaged premises be sold, &c., from which judgment the defendant appealed.

No counsel for the defendant in this Court.

Hubbard, for the plaintiff, cited *Jacobs* v. *Smallwood*, 63 N. C. R. 112, to show that the 9th section of the 76th chapter, of the Acts of 1868–'69, on which the demurrer was based, was unconstitutional.

PEARSON, C. J. The demurrer rests upon the Acts of 1868–'69, chap. 76, sec. 9, "No property shall be sold under any deed of trust or mortgage until the debts secured in said deed are reduced to judgments according to the provisions of this Act."

This section is in violation of the Constitution of the United States; it not only attempts to impair the obligation of a contract, but to alter the contract, by adding a condition. This is too plain for discussion. The purpose of adding this condition, was to bring all debts within the operation of the "stay laws." In reference to laws of that kind see *Jacobs* v. *Smallwood*, 63 N. C. Rep. 112.

The other objection is likewise untenable; the Judge may if so needed, refer the matter to the clerk to settle the details, and report the balance. This is the usual course, and ought to be followed when there is any complication, so that the subjects of controversy may be distinctly presented on exceptions to the report.

But where there is nothing to be done except to calculate interest, we see no reason why the Judge may not make the

calculation himself, or direct the clerk to do it *instanter*, as when judgment is rendered "according to specialty filed" in an action of debt.

The defendant certainly has no right to the former course, for the voluntary service of the Judge saves him from the cost of a reference to the clerk.

No error.

PER CURIAM. Judgment affirmed.

THE STATE *v.* MALCOLM McJ. TATOM.

A sheriff having an execution in his hands is not indictable for levying upon and seizing property in the possession of and belonging to a son of the defendant in the execution, when he acts *bona fide* under a bond of indemnity. He is liable civilly but not criminally.

The cases of *Pearson* v. *Fisher*, 1 Car. Law Repository 460, and *Denson* v. *Sledge*, 2 Dev. 36, cited and approved.

The defendants were INDICTED for a forcible trespass, in seizing and taking from the actual possession of one Lucian H. Gilmore, he being present and forbidding the same, two mules, the property of the said Gilmore. Upon the trial at the Fall Term, 1872, of BLADEN Superior Court, before his Honor, *Russell, J.*, the jury found a special verdict as follows: That Sikes had in his hands, as Sheriff of Bladen county, an execution against W. T. Gilmore in favor of one Mrs. Purdie; that the defendants Smith and McDowell, tendered the sheriff a bond of indemnity and procured him to seize the mules in the possession of L. H. Gilmore; that Sheriff Sikes directed defendant Tatom to seize the mules; that Tatom went to the house and took one of the mules in the absence of L. H. Gilmore, and had a bridle on it when L. H. Gilmore came up and forbade him from taking the mules, but

Tatom carried them off, Gilmore yielding because he had been told by the sheriff that if resistance was made he would summon a posse and seize the mules; that the mules were not the property of W. L. Gilmore, the defendant in in the execution, but that the title to them was in L. H. Gilmore, his son, that the sheriff and Tatom acted in good faith, believing that they were performing a lawful duty, and whether upon these facts the defendants are guilty or not guilty, as charged in the bill of indictment, the jury are ignorant, and submit the same to the Court, and if the Court says that the defendants are guilty then the jury find them guilty in manner and form as charged in the bill of indictment, but if the Court says that the defendants are not guilty, then the jury so find. Whereupon it is considered by the Court that the defendants are not guilty, and from this judgment the State appealed.

Attorney General Hargrove and *W. McJ. McKay*, for the State.

No counsel for the defendant.

BOYDEN, J. This is a case of the first impression, to-wit: an indictment of the sheriff and those who indemnified him for levying upon property in the possession of a son of the defendant in the execution, and which was honestly supposed or rather alleged to be in fact the property of the father.

That it was the duty of the sheriff to make this levy upon the property which the plaintiff honestly believed and alleged to be the property of the defendant in the execution upon being indemnified, has been regarded as a well-settled law by the Courts and the bar in this country and in England, time whereof the memory of man runneth not to the contrary; and yet it is urged upon the Court to sanction this novel doctrine, which, if accorded, would en-

able fraudulent debtors to defeat the recovery of all the debts sought to be enforced by legal process.

In the case of *Pearson* v. *Fisher*, 1 Car. Law Repository 461, the sheriff was sued for not selling a slave upon which he had levied to satisfy the plaintiff's execution. On the day of sale, the son of the defendant in the execution claimed the slave and forbid the sale, and the sheriff for the purpose of satisfying himself as to the ownership of the slave, summoned a jury to try the question of ownership, and the jury found that the slave was not the property of the father, but was the absolute property of the son.

Thereafter the plaintiff Pearson tendered to the sheriff a bond of indemnity and required the sheriff to sell, which he refused to do, and thereupon Pearson sued the sheriff for refusing to make the sale and recovered the value of the slave. So that according to the view of the Attorney General, the sheriff was between two fires, one in front and the other in the rear, and if he discharges his duty by seizing the disputed property, he is liable to an indictment for a forcible trespass, and so also all who indemnified him; but if he fails to seize the property, then he will be liable to the plaintiff for the value of the property in dispute, should it in truth turn out to be the property of the defendant in the execution.

It is true the office of sheriff is one of heavy responsibility, and one in which error or mistake of the law on the part of the sheriff may involve him in difficulty, and subject him to loss, but surely the law will not place him in such a dilemma as to indict him for an honest discharge of a duty for which he would be responsible to the plaintiff if he refused its performance.

Such cannot be the law. In the case of *Denson* v. *Sledge*, 2 Dev. 36, it is said that a sheriff may recover upon a bond given him as an indemnity for discharging a supposed duty, as levying an execution upon disputed property, but

that no recovery can be had upon a bond to indemnify him for forbearing to make the levy.

There is no error. This will be certified.

PER CURIAM. Judgment affirmed.

WITKOUSKY & RINTELS *v.* W. F. WASSON.

Under the Constitution, art. 4, sec. 30, where there is no coroner in the county, the Clerk of the Superior Court may appoint one to execute process against the sheriff, where he is interested in, or a party to the suit; or in such case, under the C. C. P., sec. 73, it may issue to the sheriff of an adjoining county.

This was a CIVIL ACTION in which the summons was served by one who had been appointed by the Clerk of the Superior Court a coroner to execute it, there being at the time no coroner in the county, and the defendant being the sheriff of the county. At the last term of the Superior Court of IREDELL, before his Honor, *Mitchell, J.*, a motion to dismiss was made for want of a proper service, which was granted, and the plaintiffs appealed.

Furches, McCorkle & Baily, for the plaintiffs.
Armfield, for the defendant.

READE, J. The only point in the case is whether the Clerk of the Superior Court had the power to appoint a coroner to execute process against the sheriff of the county, there being no regular coroner.

Constitution, art. 4, sec. 30, provides, that "where there is no coroner in the county, the Clerk of the Superior Court for the county may appoint one for special cases."

This would seem to be decisive of the question.

But the objection is made that inasmuch as before the Constitution three justices of the peace might appoint a coroner, where there was none in a county, for the special purpose of holding an inquest over a dead body, the Constitution means no more than to transfer that power to the Clerk of the Court; and that now the Clerk can appoint a coroner to hold an inquest only. But the Constitution seems to be broader than that, and allows the Clerk to appoint for "special cases;" that is, for any purpose, and for all purposes, within the scope of a coroner's duties. The objection is sought to be strengthened by the fact that it is provided in C. C. P., sec. 73, "when the sheriff is a party, process may issue to the coroner or to the sheriff of an adjoining county." And so it is said in this case the process ought to have issued to the sheriff of an adjoining county. But we are of the opinion that just as the process may issue either to the *regular* coronor, or to the sheriff of an adjoining county, so it may issue to a *special* coroner or to the sheriff of an adjoining county.

There was error in the order appealed from.

Let this be certified.

PER CURIAM. Judgment reversed.

THE STATE *v.* GILBERT EVANS.

Where an indictment charged the larceny of a horse to have been committed at a certain time since the passage of the statute which prescribed the punishment of such a larceny, and the defendant was found guilty, judgment cannot be arrested upon the ground that prior to that time there had been several statutes prescribing different modes of punishment.

It is no ground for the arrest of judgment that the indictment charged the offence to have been committed in the said "count," as it had caption, "Cumberland county," and the defendant was stated to be of that county. It is an informality which is saved by the Rev. Code ch. 35 sec. 14.

The case of *State* v. *Wise*, 66 N. C. Rep. 120, cited, distinguished from this and approved, and that of *State* v. *Smith*, 63 N. C. Rep. 234, cited and approved.

This was an INDICTMENT for larceny in stealing a horse. The caption of the indictment was as follows: "North Carolina, CUMBERLAND county, Superior Court, Spring Term, 1873." It charged in the usual form that the defendant, late of the county of Cumberland, on the 1st day of February, 1873, in the count aforesaid, committed the act of stealing. The defendant pleaded not guilty, and after his trial and conviction moved in arrest of judgment. 1st. Because there had been several statutes which were passed in the years 1866, 1868 and 1869 which prescribed different modes of punishment for horse stealing, and the indictment did not show under which statute the defendant was charged and convicted. The case of the *State* v. *Wise*, 66 N. C. Rep., 120, was relied upon in support of this ground of objection. 2d. Because it did not appear from the indictment that the offense alleged was committed in any county of the State. In support of this it was contended that the Court could not read the word "count" for county.

Both objections were overruled by his Honor, *Buxton, J.*, and the defendant was sentenced to confinement in the penitentiary for five years, and from the judgment he prayed and obtained an appeal to the Supreme Court.

Hinsdale, for the defendant.
Attorney General Hargrove, for the State.

READE, J. At the time charged in the indictment when the offense was committed, and at the time when it was proved to have been committed, there was but one statute in existence prescribing the punishment of the offense charged, although there had been years before several statutes changing the punishment from time to time. And on this ground the defendant moved in arrest of judgement. His argument is that inasmuch as the time stated in the indictment is not traversable, and need not be proved, its office is not to inform the Court when the offense was committed, and that although the indictment charges the offense to have been committed after the statute, yet a conviction might have been had although the crime had been committed before. And the defendant relies on *State* v. *Wise*, 66 N. C. Rep., 120. But that case was not like this. The indictment in Wise's case charged the crime to have been committed the 1st day January, 1871, at which time the punishment was confinement in the penitentiary. Subsequently an Act was passed making the punishment death. This Act was ratified 4th April, 1871. The offense was proved to have been committed after this last Act, although it was charged in the indictment to have been committed before, and the punishment was laid under the last Act, death. The Court arrested the judgment because it could not see from the indictment on the record that the offense was committed after the Act of the 4th April, 1871.

But in the case before us there was but one statute in existence and the indictment charges the offense to have been committed after the statute, and the verdict is guilty in manner and form as charged.

So that it does appear to the Court at what time the offense was committed and what is the proper punishment.

The second objection made by the defendant is that the indictment does not charge the offense to have been committed in the county, but in the "count."

The indictment is headed "Cumberland county," and states that the defendant was "of Cumberland county," and that he committed the offense in the "count aforesaid." Now there is no "count aforesaid" to which this can refer, and it is palpable that it refers to the *county* aforesaid, and the defendant could not have been misled. It is an informality (may be an inexcusable negligence) which is cured by our statute, Rev. Code chap. 35, *State* v. *Smith*, 63 N. C. Rep. 234.

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

PER CURIAM. Judgment affirmed.

GEORGE D. FLACK, Adm'r *v.* JOHN DAWSON *et al.*

An answer which avers that "no allegation of the complaint is true," is not a compliance with the C. C. P., sec. 100, which requires that the answer must contain "a general or specific denial of *each* material allegation;" that is, it must deny either the whole of *each* material allegation, or some material or specific part thereof. Such an answer is a sham plea, and ought to be stricken out on motion as provided in C. C. P., sec. 104.

A plea that the Court had no jurisdiction of the action is a sham plea. The objection to the jurisdiction must be taken by demurrer, C. C. P., sec. 95, sub sec. 1.

In a suit upon an administration bond, the next of kin of the intestate are not necessary parties, C. C. P., sec. 57, and in such a suit, the administrator of the principal in the bond need not be joined.

A plea alleging the want of parties is a sham plea, as the objection ought to be taken by demurrer, C. C. P., sec. 95, sub sec. 4.

A plea in an answer to a complaint on an administration bond of "performance of the condition of the bond by payment to the next of kin," is good in substance, and an issue may be taken upon it; and such issue is the subject of a compulsory reference under the C. C. P., sec. 245, sub sec. 1.

A reference of issues upon sham pleas is erroneous, but if the reference embrace an issue on a good plea which may be referred, it will be sustained as to that while it is reversed as to the others.

FLACK, Adm'r, v. DAWSON *et al.*

This was an ACTION on an administration bond, and when it came on to be tried before his Honor, *Russell, J.*, at the January Term, 1873, of NEW HANOVER Superior Court, he made an order for a compulsory reference of the whole case to a referee, and the defendants appealed.

The case is sufficiently stated in the opinion of the Court.

Strange, for the defendants.

W. J. & J. D. Devane, for the plaintiffs.

RODMAN, J. It is necessary to state as briefly as possible the pleadings in this case.

1. The plaintiff in his complaint says O'Reily died intestate in 1862. Baxter became his administrator. Baxter died in 1862. Ryan qualified as his executor, Ryan also became administrator *de bonis non* of O'Reily, and on the 12th of December, 1862, gave a bond to which the defendants were sureties with the usual conditions. In 1869 Ryan died intestate, and Murphy became his administrator. In January, 1870, administration *de bonis non* of O'Reily was granted to plaintiff. The action is against the defendants as surities to the bond given by Ryan when he became administrator *de bonis non* of O'Reily. The first breach assigned is a failure by Ryan to pay $13,594.90, received and held by him after payment of all claims against the estate of his intestate. The second breach is for converting the said sum. The third breach alleges a judgment in favor of plaintiff against Murphy as administrator of Ryan, recovered in the Probate Court of New Hanover on the 6th of October, 1870, for $13,594.90, wherein it was adjudged that Murphy had assests applicable to plaintiff's demand to the sum of $291.30, and that no part of said judgment has been paid.

Plaintiff demands judgment for the penalty of the bond to be discharged, &c., and damages, $13,594.90, &c.

2. The defendants answer, *for a first defenee*, that no allegation in the complaint is true.

Second. Performance of the conditions of the bond by payment to the next of kin.

Third. That the Court had no jurisdiction of the action.

Fourth. That the next of kin of O'Reily and the administrator of Ryan were not parties.

3. *The reply* of the plaintiff need not be noticed.

After the joining of issues the Judge referred the whole case to a referee without the consent of the defendants, who appealed.

The first plea is evidently not a compliance with C. C. P., sec. 100. "The answer of the defendant must contain, 1. A general or specific denial of *each* material allegation," &c. That is to say, it must deny either the whole of *each* material allegation or some material and spicefic part thereof. The plea disregards the best known and most important rules of pleading. It professes to put in one issue several matters of fact, some of which are triable by the Court, and others by a jury. Such a plea is not issuable. It is a sham plea, which the Court below would have stricken out on motion, C. C. P., sec. 104.

Of the third plea. The want of jurisdiction was not the subject of a plea at all. If it existed, it was ground for a demurrer. But the Court clearly has jurisdiction of an action on an administration bond. This was a sham plea.

Of the fourth plea. This also was a sham plea. In an action like this, the next of kin are not necessary or proper parties, C. C. P., sec. 57. It is equally clear that the sureties to the administration bond could be sued without joining the administrator of their principal.

The second plea is good in substance.

The sham pleas being stricken out, as they should have been at once, and before the order of reference was made, there remained, but the issue joined on the second plea,

which was clearly a subject of compulsory reference under C. C. P., sec. 245, sub sec. 1.

Whether a Court has power, without consent, to order a reference upon such an issue as the execution of an administration bond, it is unnecessary to inquire. There is no such issue in this case.

The order of the Judge, so far as it refers the issue joined on the second plea, is affirmed; as far as it refers the issues supposed to be made by the other pleas, it is reversed. The Judge below will strike out the sham pleas on such terms as he shall think proper to impose.

The plaintiff will recover his costs in this Court.

PER CURIAM. Judgment accordingly

JAMES C. BRYAN *v.* WILLIAM FOY.

An agreement by a creditor to take from his debtor one-half of the amount of his debt then due in discharge of the whole is without consideration and void, and this is so though the debtor is a surety and the debt is due by bond.

A Court of Equity never regards a seal, and since law and equity is now administerd in the same Court, a seal has lost much of its ancient force and dignity.

The case of *McKenzie* v. *Culbreath*, 66 N. C. Rep. 534, cited and approved.

This was a CIVIL ACTION tried before his Honor, *Watts, J.*, at the special January Term, 1873, of CRAVEN Superior Court.

The plaintiff declared on a sealed promissory note or bond given by five obligors, of whom the defendant was one, and it appeared on the face of the bond that he was a surety and he was the only person sued. The defendant proposed to show that the plaintiff had agreed to take from him, in consideration that he was the only solvent party to the bond, and the plaintiff was pressed for money, one-half of the amount

due if paid at once. He offered to show further that in compliance with this agreement that he had tendered the amount agreed on to the plaintiff, and that he had refused to take it. This evidence was objected to by the plaintiff's counsel and was rejected by the Court, and the plaintiff obtained a verdict and judgment for the whole amount of his debt, and the defendant appealed.

Haughton, for the defendant cited and relied upon. *Goode* v. *Cheesman* 22 Eng. C. L. Rep., 91, opinion of *Parke, J.; Howe* v. *O'Malley*, 1 Murphy 289; *Noblet* v. *Green*, 2 Dev. 517; *Brown* v. *Ray*, 19 Ired. 72; *Very* v. *Levy*, 13 Howard 357; opinion of *Curtis, J.; Harshaw* v. *McKesson*, 65 N. C. Rep., 688.

Battle & Son, for the plaintiff, relied on *McKenzie* v. *Culbreth*, 66 N. C. Rep. 534, as directly in point.

SETTLE, J. We see nothing in the record to distinguish this case from *McKenzie* v. *Culbreth*, 66 N. C. Rep. 534.

It is there said that an agreement by a creditor to receive a part in discharge of the whole of a debt due to him by bond is an agreement without consideration, and therefore void, and that that principle is too well established and too long acquiesced in to be disturbed. There are many exceptions to this rule, but after a careful examination of all the authorities cited by the defendant's counsel, we cannot perceive that this case falls within the principle of any recognized exception.

From the statement in the record that the instrument upon which this action is founded is under seal, we presume that some importance was attached to that fact, and that the plaintiff relying upon the maxim, "*eadem ligamine quo ligatum est dissolvetur*," was of opinion that parol evidence could not be heard to contradict his sealed instrument.

A Court of Equity never regards a seal, and since we now administer law and equity in the same Court, a seal has

lost much of its ancient dignity and importance. In this instance we attach no consequence whatever to the seal.

We put our opinion upon the ground that there is nothing in all the defendant proposed to show to constitute a consideration, and therefore his agreement was a *nudum pactum.*

PER CURIAM. Judgment affirmed.

SINCLAIR, OWENS & BROWN *v.* THE STATE OF NORTH CAROLINA.

The Act of 1868-'69, chap. 108, sec. 32, which declares that every non-resident who shall sell any spirituous liquors, by sample or otherwise, whether delivered or to be delivered, shall pay an annual tax of fifty dollars, and a tax of like amount as is payable by residents on their purchases or sales, as the case may be, of similar articles," is an act of the State imposing a discriminating tax upon non-resident traders trading in the State, and is repugnant to the Constitution of the United States and void.

That provision in the Constitution of the State, Art. 4, sec. 11, which ordains that "the Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory," &c., ought not to be invoked in matters of small value, particularly when there is no doubt about the law. The claimant should apply at once to the Legislature for relief.

This is the case of a CLAIM against the State, presented to the Court at the last term, under the 11th section of Article 4th of the Constitution. The claimants, who are traders and dealers in spirituous liquors, &c., in the City of Baltimore, and State of Maryland, allege that in June, 1869, they paid to the sheriff of Cumberland county, in this State, a tax of $50 for the State, under the Act of 1868-'69, chap. 108, sec. 33, which enacts as follows: "Every non-resident, who shall sell any spirituous or malt liquors, goods, wares or merchandise, by sample or otherwise, whether delivered or to be delivered, shall pay an annual

tax of fifty dollars, and a tax of like amount as is payable by residents on their purchases or sales as the case may be, of similar articles," &c. They represent that the said tax is a discriminating tax upon non-residents, and therefore contrary to the provisions of the Constitution of the United States and void. They exhibit a copy of the receipt of the sheriff of Cumberland for the tax of $50, dated June 14th, 1869, but they do not allege, nor exhibit any proof, that the tax was paid under protest.

Upon a reference to the clerk of the Court, he reports the facts to be true as stated in the complaint.

Hinsdale, for the claimant.
Attorney General Hargrove, for the State.

SETTLE, J. We have no hesitation, following the authority of *Ward* v. *Maryland*, 12 Wallace 418, in declaring the provision of the Act of 1868–'69, chap. 108, under which this tax was collected, unconstitutional.

The opinion of the Court in the case referred to is clear and explicit. We will not repeat the reasoning upon which it is founded, deeming it sufficient to say that the Act in question imposes a tax which discriminates against traders who are non-residents, and in doing so violates the Constitution of the United States, which ordains in Art. 4, sec. 2, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

And further it would seem to be an infraction of Article 1, sec. 8, which ordains that "Congress shall have power to regulate commerce among the several States."

We have thought proper to say this much upon the question of law raised by the pleadings; but we are inclined to regard the present application as an abuse of the jurisdiction conferred upon the Court by our State Constitution, which ordains Art. 4, sec. 11, that "the Supreme Court shall

have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of an execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action."

As our decisions are merely recommendatory, and are to be reported to the General Assembly, which is the only branch of the government that can afford relief, it is fair to presume that that body would give due consideration to a decision of the Supreme Court of the United States. Then why invoke our decision upon a point of law which has so recently been decided by the highest judicial authority in the land?

As a general rule taxes paid without protest will not be refunded. So far as we can see the plaintiffs paid this tax, which in view of the jurisdiction invoked, is so small as to fall within the maxim *de minimis non curat lex*, without protest, and after the expiration of three years ask to have it refunded.

The matter is without legal embarrassment, and proper only for the consideration of the Legislature.

PER CURIAM. Complaint dismissed.

B. F. MOORE *v.* W. H. SHIELDS *et al.*

Where a guardian purchases a claim against his wards he cannot charge them with more than he paid, and the fact that he was the creditor by having made proper advances to his wards, and afterwards became bankrupt, and then purchased the claim from his assignee, does not alter the principle. But the guardian must be taken to have paid himself as soon as funds of his wards came to his hands, which he could lawfully so apply, and the assignee took the claim subject to these deductions.

A guardian, who is a merchant, may, if he acts in good faith, supply the necessary wants of his wards from his own store, and may charge a reasonable profit upon them.

While a guardian cannot be allowed in a settlement with his wards for fees paid to his attorney to aid him in keeping them out of their just rights or in supplying an uncertainty, or confusion in his accounts, produced by his own negligence, or even in defending an action brought by them for a settlement, yet he may claim the allowance of a reasonable fee paid in a suit for the protection of their interests.

After the decision of this case at the last term (sec. 68, N. C. Rep., 327) it was referred to Spier Whitaker, Esq., as a referee, to state an account between the defendent W. H. Jones and his wards, who were the heirs-at-law of J. H. Harrison, and upon his report being returned to the present term of the Court, exceptions to it were filed by Jones and the defendant Medora Harrison. The character of the exceptions sufficiently appears in the opinion of the Court which disposes of them.

B. F. Moore, for the plaintiff.

Clark & Mullen, Gatling, and *Batchelor, Edwards & Batchelor,* for the defendants.

RODMAN, J. 1st *Excepiton:* The view of the referee as to the accounts of the guardian against his wards for goods sold to them by him before his bankruptcy is in the *main* correct. It is a settled principle that if a guardian buys up the claim of a creditor of his ward for less than its amount, he cannot charge his ward with more than he actually pays.

If the guardian in this case had not been originally the creditor, and had not bought from his own assignee, the application of the principle would probably not have been disputed. But these circumstances have no real weight to take the case out of the principle. The assignee as trustee for the creditor of Jones was the creditor of the wards to the extent that Jones was by virtue of those accounts. The interest of Jones as a creditor had wholly passed out of him, and the transaction was in reality the simple one about which we have supposed there could be no dispute.

We think, however, that Jones was entitled to retain the income of his wards as it came into his hands, and apply it to the payment of these accounts for articles supplied by himself, just as he was to apply it in payment of services or articles furnished by a third person, for example, in payment of board or schooling. To the extent that he could thus lawfully apply the income, it must be considered that it was so applied on the principle which presumes that an administrator who is a creditor of his intestate when he comes into possession of assets, immediately applies them to extinguish his debt if he may lawfully do so. To the extent that such an application could lawfully have been made, the accounts of Jones must be considered as actually paid, and thereby reduced in amount, and the assignee took them subject to such deductions. The report of the referee must be modified to meet this view.

2nd *Exception:* The referee erred in deducting from the accounts of Jones for articles sold to his wards since his bankruptcy the supposed profit of 33 per cent. on the cost of the articles to him. There can be no obligation on a guardian, who happens also to be a retail merchant, to go elsewhere to buy articles which his wards may need, or to sell to them at cost price which he pays in another market and buying by the wholesale. It is sufficient if the articles are proper and necessary, and the price not unreasonable, and

not in excess of the prices elsewhere in the same place. It is true that to permit such a mode of dealing may present some slight temptation to a guardian to make an excessive expenditure for his ward, and in that point of view it will require greater vigilance on the part of the Courts in passing his accounts. But public policy no more forbids a guardian from supplying his ward with necessary goods out of his own store, than it forbids him to take his ward to his own house to board.

As to the exceptions of Medora Harrison. 1st *Exception:* To the sum allowed Jones as paid his attorneys.

It is admitted that a guardian will not be allowed to charge his wards for any sum paid to an attorney to aid him in keeping them out of their just rights, or in supplying an uncertainty or confusion in his accounts produced by his own negligence, or even in defending an action brought by them for a settlement. For in none of such cases can the expenditure be said to have been made for the benefit of the wards. In the present case, however, the action was originally begun by the plaintiff to determine for his protection the rights of the several defendants to the fund in his hands; the guardian was brought in and compelled to engage an attorney in order to protect his legitimate claim as guardian. No part of the purpose of the suit was to recover from the guardian his wards' property, for they are not yet of age. The statement of his accounts became incidentally necessary. We think the case is one in which the guardian, by reason of his office, has been compelled to incur expenses, and that he ought to be indemmified by his wards. We think the sum paid was excessive as between him and his wards, and the account will be modified so as to allow him only $25.

2nd. *Exception:* This exception does not seem material to the present account, the only object of which was to ascertain the sum which the guardian is entitled to receive out of the fund in the hands of the plaintiff. When the ac-

counts of the wards come to be finally adjusted, the sums owing by each will be charged to them respectively.

The report will be modified to conform to this opinion. The costs will be paid out of the fund in the hands of the plaintiff, and in the costs will be taxed an attorney's fee for the plaintiff, one for the administrator, one for all the infants together, and one for the guardian.

PER CURIAM. Judgment accordingly.

HENRY ROWLAND *et al. v.* WILLIAM GARDNER.

When the pleadings have been made up and the case called for trial, it is too late for the defendant to demand of the plaintiff's attorney his authority for appearing.

Under the C. C. P., the failure to join a proper party is an important matter, but the joinder of unnecessary parties, either as plaintiffs or defendants, is immaterial, save only as it may affect the question of costs.

The case of *Rice* v. *Rice*, 66 N. C. Rep. 377, cited and approved.

This was a CIVIL ACTION to recover possession of a tract of land, tried before his Honor, *Henry, J.*, at the Spring Term, 1873, of the Superior Court of YANCEY county.

After answer filed at the trial term, but before the trial, the defendant's counsel moved the Court for a rule upon the plaintiff to produce the authority under which the suit is brought in the name of the heirs of Thomas Wilson, deceased. This motion was overruled, and the defendant's counsel excepted. He then moved the Court to compel plaintiffs to amend their complaint so as to aver the death of Thomas Wilson, and that the plaintiffs, George, Rachel, Mary and Meredith Wilson, are his heirs-at-law, or to dismiss the complaint for not containing averments necessary to entitle the plaintiffs to recover in the action. This mo-

tion was also overruled, and defendant excepted. Plaintiffs offered a grant dated in 1798 for the land of which defendant was in possession, and produced a chain of conveyances showing a perfect title in Thomas Wilson in the year 1840, but did not prove any possession by him since that time. It was proved by the plaintiffs that Thomas Wilson had been absent from the State for forty years and upwards, and that it was generally reported among his relatives in this State that he was dead. The plaintiffs then offered a deed from George Wilson to the plaintiff, Henry Rowland, dated in 1840, and prove his continuous notorious adverse possession of it until the entry of the defendant upon that portion of it in controversy in 1868.

The defendant's counsel moved the Court to dismiss the suit for a misjoinder of plaintiffs, which motion was refused, and the defendant excepted. He then moved the Court to compel the plaintiff to elect which of the plaintiffs they would retain, and render a judgment in favor of the defendant for his costs against the others. This was also refused, and the defendant excepted. The defendant then offered in evidence a grant from the State dated in 1796 for the land in question, and a deed to himself in 1859, and possession since 1868. The jury found a verdict for the plaintiff, upon which a judgment was given, and the defendant appealed.

No counsel for the defendant.

Malone, for the plaintiffs, cited the case of *Rice* v. *Rice*, 66 N. C. Rep. 377, and referred to the C. C. P., sec. 61.

SETTLE, J. None of the defendant's exceptions are well taken.

The demand, when the case was called for trial, that the plaintiff's counsel should show his authority for using the names of the heirs of Thomas Wilson as plaintiffs, came too late. *Rice* v. *Rice*, 66 N. C. Rep. 377.

The objection that there is a misjoinder of parties is of no consequence.

Under our new practice the failure to join a proper party is an important matter, but the joinder of unnecessary parties, either as plaintiffs or defendants, is immaterial, save only as it may affect the question of costs.

The plaintiff, Rowland, after showing a grant from the State in 1798 covering the lands in controversy, and mesne conveyances making a perfect title down to Thos. Wilson, who has been absent from the State from forty to forty-six years, and the general report of his death among his relatives in this State, produced a deed from George Wilson to himself bearing date in 1840, and showed a continuous possession of the part in controversy, open and adverse to all others, from 1840 to the date of the defendant's entry in 1868.

There was color of title, and adverse possession for twenty-eight years, when only seven years were required to ripen into a perfect title.

No error.

PER CURIAM. Judgment affirmed.

WILLIAM TERRELL *et al.* v. ELIZA A. TERRELL.

Where three persons upon receiving a deed from their father J. T. made with him the following covenant: "That J. T. and his family shall have their home upon the land he has this day as executor of J. C., conveyed to them, and that he and his family shall have the use of all the personal property this day conveyed so far as is necessary for their use and convenience, and further, that they shall have a support out of what shall be made upon said land during the life of J. T.: *It was held*, That the limitation in the last sentence, "during the life of J. T." applied to all the clauses in the deed, and that after the death of J. T., his said sons were entitled to the possession and enjoyment of all the property conveyed by the deed.

When a defendant admits that the plaintiffs are the owners of the remainder in fee of the land sued for, but contends that he is tenant for life of the said land under a certain deed executed by the plaintiff, he cannot controvert the title of the plaintiffs to the land, but is confined to his claim under that covenant, and the validity of his claim to a life estate will depend upon a proper construction of it.

This was a CIVIL ACTION for the recovery of a tract of land, tried before his Honor, *Tourgee, J.*, at the Spring Term, of CASWELL Superior Court.

On the trial the plaintiffs derived title, 1. Under a deed from Jas. Terrell to John Crisp; 2. Under the will of John Crisp, their grandfather; 3. Under a deed from James Terrell, their father, as executor of John Crisp to them, dated 2d November, 1866.

The defendant admitted possession of the land in controversy, and admitted further that the plaintiffs had a fee simple title in remainder to said land, but claimed a life estate in it for the life of herself, or of any of her children who constituted the family of James Terrell, on the 2d day of November, 1866, under a deed of the plaintiffs to the said James Terrell, deceased, executed on that date. It was admitted that the defendant was the wife of James Terrell, and that she and her children constituted his family at that time. The claim of the defendant was under the following covenant contained in the said deed: John C. Terrell, William Terrell and Logan Terrell do hereby covenant and bind themselves and their heirs, &c., to and with James

Terrell, that James Terrell and his family shall have their home upon the land which he has this day as executor of John Crisp, deceased, conveyed to them, and that he and his family shall have the use of all the personal and perishable property this day conveyed to them so far as is necessary for their use and convenience, and further that they shall have a support out of what shall be made upon said land during the life of James Terrell.

It was insisted for the plaintiffs that the deed from them to James Terrell above mentioned, conveyed to the said James Terrell a life estate for his life only upon the land for the benefit of himself and his family, and that upon his death, which it was admitted had taken place, they were entitled to the possession of the land.

The defendant contended that the said deed conveyed to the said James Terrell and his wife and their children, who constituted his family when the said deed was executed, an estate for life in the said land to the said James Terrell, and to his wife and their children, and to the survivors of them. His Honor ruled in favor of the plaintiffs, and gave a judgment for them from which the defendant appealed.

W. H. Bailey, for the defendant.
W. A. Graham, for the plaintiff.

SETTLE, J. This was an action for the recovery of land, and the only matter for our consideration is the construction of the following instrument: "John C. Terrell, William Terrell and Logan Terrell do hereby covenant and bind themselves and their heirs, executors and administrators to and with James Terrell, that James Terrell and his family shall have their home upon the land which he has this day as executor of John Crisp, deceased, conveyed to them, and that he and his family shall have the use of all the personal and perishable property this day conveyed to

them so far as is necessary for their use and convenience, and further that they shall have a support out of what shall be made upon said land during the life of said James Terrell," which was signed and sealed by John C., William and Logan Terrell, on the 2d day of November, 1866.

The learned counsel who argued the case for the defendant in this Court suggested, that as the defendant was in possession of the premises, the plaintiffs could only recover by showing a perfect title, and this they had failed to do that upon the death of Crisp, the ancestor, the land descended to his heirs, subject to a special power to the executor to sell to pay debts and legacies; that the executor had no such power as he had executed, and that the plaintiffs have not shown that they are the heirs and the only heirs of John Crisp. The argument is very ingenious, but it is evident from an inspection of the record that no such point was relied upon below, or intended to be presented here.

The case for the Supreme Court, signed by the defendant's attorney, recites that " the defendant admitted possession of the lands in controversy, *and admitted that the plaintiffs had a fee simple title in remainder to said lands*, but claimed a life estate in said lands for the life of the defendant or any of her children who constituted a part of the family of James Terrell, on the 2d of November, under a deed of the plaintiffs to the said James Terrell, deceased, executed the 2d of November, 1866."

The record then precludes the ingenious defense set up by the counsel of the defendant. She only claims such estate as she is entitled to enjoy under this deed, and we are unanimously of opinion that the limitation in the last sentence to-wit: "during the life of James Terrell," applies to all the clauses in the deed, and that upon the death of James Terrell the plaintiffs became entitled to the possession and enjoyment of all the property conveyed by the deed.

This we think the fair construction of the deed upon its face, without seeking for the intention of the parties *aliunde*. But when we look to the circumstances of the case and see that the plaintiffs were entitled to this property upon the death of their grand-father, and that any postponement of the enjoyment of the same was prompted by filial affection, it is hardly to be supposed that they intended to part with it for a longer period than the life of their father; especially if they be as poor as the defendant alleges, "wholly unable to satisfy any judgment that may be obtained against them."

Let it be certified that there is no error.

PER CURIAM. Judgment affirmed.

ATLANTIC & NORTH CAROLINA R. R. CO. *v.* T. M. COWLES *et al.*

The condition of a bond given by the Treasurer of a Railroad Company that he "shall faithfully discharge the duties of the office, and well and correctly behave therein," does not bind him to keep the money of the Company safely against all hazards. It only binds him to an honest, diligent and competently skillful effort to keep the money. Hence, where the Treasurer deposited the money of the Company to his credit as such in a banking-house, which was at the time in good standing and credit, and was considered by the community a safe place of deposit for money: *It was held*, That he and his sureties were not responsible for its loss by the sudden and unexpected failure of the banking-house.

Though the officer of a Railroad Company is bound to know the by-laws of the corporation, it does not follow that the sureties to his bond are presumed to know them unless there be a reference to them in the bond. The obligation of the sureties is confined to the words of their bond, and cannot be extended beyond them.

The case of *Ellis* v. *N. C. Institution, &c.*, 68 N. C. Rep. 423, cited and approved.

This was a CIVIL ACTION brought against the defendant, Cowles, and his sureties, upon the bond which he gave upon being elected Secretary and Treasurer of the plaintiffs. At

the last Superior Court of CRAVEN county, the following case agreed was submitted to his Honor, *Clarke, J.:*

While the defendant, Cowles, was Secretary and Treasurer of the plaintiff, and during the period covered by the bond in suit, he deposited money of the plaintiff with the firm of S. T. Jones & Co., bankers in the city of Newbern, to the credit of "T. M. Cowles, Treasurer of A. & N. C. R. R. Co. On the 1st day of March, 1870, the said firm of bankers failed. The defendant, Cowles, who had previously been depositing and checking out money in his business, with the said firm from day to day, had on that day $8,725 of money belonging to the plaintiff, and in the custody of himself as such Treasurer, on deposit with said firm of S. T. Jones & Co., of which sum a part has been paid, leaving a balance still due and unpaid of $4,671.25.

It is admitted that at the time of making said deposits, and up to the 1st of March, 1870, S. T. Jones & Co. were bankers in good standing and credit, and were considered by the community as affording a safe place of deposit for money.

No instructions as to how or where he should keep the money of plaintiff were given to Cowles. The Treasurer of the Company preceding him, elected in 1868, had been accustomed to deposit the Company's funds with the same firm of bankers, and the present Treasurer, his successor, elected in October, 1872, deposits in a banking institution, but in each of these two cases, without the official knowledge, consent or authority of the stockholders and Board of Directors, or either of them.

Previous to the insolvency of the Merchants' Bank of Newbern, and the Newbern Branch of the Bank of the State, the former Treasurer of the Company deposited with such banks.

It is admitted that the defendant, Cowles, executed to the plaintiff the bond sued on in the penal sum of $50,000,

with the other defendants as sureties, and that the condition of the said bond was that "if the said T. M. Cowles shall faithfully perform the duties of said office, and well and correctly behave therein," then the bond should be void. The charter and by-laws of the Company are admitted.

If the Court shall be of opinion for the plaintiff, judgment is to be entered for it for $50,000, the penalty of the bond against the defendants to be discharged upon the payment of $4,671.25 damages and cost, otherwise judgment to be entered for the defendants. His Honor being of opinion with the plaintiff, gave judgment accordingly, and defendants appealed.

Seymour and Green, for the defendants, contended that the defendant, Cowles, as the Treasurer of a Railroad Company, was not to be held to the strict accountability of a Government officer, but was only responsible for ordinary care, skill and diligence in performing the duties of his office, and they cited and relied on the following authorities: Southcote's case, 4 Rep. 83; 1 Smith's Lead. Cas. 286; Morse on Banks and Banking 202, and the cases cited in Note 3; *American Bank* v. *Adams*, 12 Pick. 303.

Lehman, for the plaintiff, argued to the contrary, and cited the following cases and authorities: *State Bank* v. *Lock*, 4 Dev. 529; *United States* v. *Prescott*, 3 Howard or 15 Curtis 560; *United States* v. *Dashiel*, 4 Wallace 182; *United States* v. *Morgan*, 11 Howard 154; *United States* v. *Keeler*, 9 Wallace 83; *Barrington* v. *Bank of Washington*, 14 Serg. and Rawles 405; Morse on Banks and Banking 200 and 201; *American Bank* v. *Adams*, 12 Pick. Rep. 303; *Ellis* v. *N. C. Institution for the Deaf, &c.*, 68 N. C. Rep. 420.

RODMAN, J. The condition of the bond declared on is in the following words: "Now, therefore, if the said T. M. Cowles shall faithfully discharge the duties of said office

and well and correctly behave therein, then the above obligation to be void," &c.

The defendant, Cowles, while in the service of plaintiff, received money for them and deposited it in the banking-house of S. T. Jones & Co. to his credit as "Treasurer of the Atlantic and North Carolina Railroad Company." The bank was then in good credit, and the deposit was not a dishonest or imprudent one. The bank suddenly failed on 1st March, 1870, being then indebted to Cowles on his account as Treasurer in over $8,000, all of which has been since paid to the plaintiff, except $4,671.25. The breach assigned is a failure to account for and pay this sum.

The plaintiff contends that the defendants contracted that Cowles should keep the money of the plaintiff safely, and that any loss thereof, from any cause whatever, is a breach of the contract. His contention is based upon:

1. The words of the condition; and 2. Upon the words taken in connection with the by-laws of the Company, which define the duties of the Treasurer.

1. We do not think that the cases which have been cited (such as *United States* v. *Prescott*, 3 How 578) to establish that the bond given by an officer of the United States Government, whose duty it is to receive the money of the Government, is a security for its absolute safety and against loss by any means, have any bearing on the present case. The words of the bonds of such officers are materially different from those of the one declared on, and the decisions go greatly on considerations of public policy. We do not know of any case in which the doctrine of these cases is applied to any but a Government officer. The fact that the State is a large stockholder in the plaintiff corporation does dot invest it with any of the attributes of sovereignty. Its officers are not Government officers.

As to the meaning and force of the words in the condition, the words "faithfully discharge the duties," &c., stipulate

for the fidelity and honesty of the Treasurer, and either by themselves, or in connection with the words "well and correctly behave therein," also stipulate for his competence and diligence. To constitute a breach of the bond the officer must have acted either dishonestly or without competent skill and knowledge, or without due diligence. The breach alleged in this case does not fall under any of these heads.

The counsel for the plaintiff refers us to *Barrington* v. *Washington Bank*, 14 Serg. and Rawle (Pa.) 405, as an authority that words very like the present cover losses caused by innocent mistake. That was an action on a bond given by Barrington, as cashier of the defendant bank. The condition was that "John Barrington shall well and truly perform his duties as cashier to the best of his abilities." The breach alleged, so far as it is material to the question, was, that one Pentecost, being indebted to the bank by sundry notes, with sureties, to a large amount, the cashier, without the knowledge or consent of the Board of Directors, allowed him to substitute for those notes his own bond, payable in instalments, by which change of securities the bank lost. The Court held this to be a breach of the bond. DUNCAN, J., says: "If he (the cashier) transcends the *known powers of a cashier* by changing the securities of the bank without their knowledge, and loss has occurred *by the abuse of his trust*, the loss fall within the words of the condition, and the sureties are responsible for the amount of such actual loss." The Court evidently thought that an act beyond the *known* duty of a cashier was a fraudulent one, (whether for the sake of gain to himself or not) and hence not a performance of his duty to the best of his abilities. With this understanding of the decision, it seems to be right, and not liable to the criticism of Mr. Morse, (on Banks, p. 200), which are made on a different understanding of it.

The true rule for the construction of such contracts as the present is laid down in *Minor* v. *Mechanics' Bank*, 1 Pet. 46,

and in *American Bank* v. *Adams*, 12 Pick. 303, viz.: That a stipulation for the faithful discharge of duty and for well and correctly behaving in office, is a stipulation against dishonesty, and also against incompetence, ignorance and negligence, but not against inevitable accident or *vis major*.

2. *How far can the meaning of the words of the obligation be extended by a reference to the by-laws?* Certainly an officer of a corporation is bound to perform the duties of the office as prescribed by the by-laws, and he is bound to know the by-law laws. *Ellis* v. *North Carolina Institution*, 68 N. C. Rep. 423. This duty arises from his acceptance of the office. And it does not follow that the obligation of his bond, which binds his suseties as well as himself, is for the absolute performance of the duty so prescribed, or that it is measured by the by-laws. The sureties are not bound or presumed to know them unless there be some reference to them, which makes them a part of the contract. Their obligation is confined to the words of their bond. It may embrace an absolute performance of all the duties of the office, or the sureties may have refused to become bound for anything beyond fidelity, competence and diligence.

In this case the bond stipulates that the Treasurer shall faithfully discharge the duties of his office, and to ascertain what those duties are, we must look to the by-laws, and for this purpose they are made part of the bond. We will assume one of them to be to keep the money of the Company absolutely safe against all hazards whatever. But the bond does not stipulate that the money shall be safely kept, or that the principal shall discharge his duty absolutely or successfully, but merely that he will *faithfully* discharge the duty of keeping the money safe; that is to say, that he will not fail in the discharge of it by reason of dishonesty, incompetence or want of diligence, thus excluding losses by *vis major*, and by accidents which happen, notwithstanding fidelity. Unless the word "faithfully" has the effect to

qualify the covenant, and the limit what without it would be a general and absolute covenant that the duty should be discharged at all events, into one such as we interpret this to be, then it has no meaning or effect whatever, and its insertion was idle and purposeless, which we cannot suppose. The breach alleged is not within the condition of the bond.

PER CURIAM. Judgment below reversed, and judgment in this Court for the defendants.

W. P. LOVE & CO., *v.* G. W. YOUNG *et al.*

An affidavit for a warrant of attachment, under the C. C. P., sec. 201 (Battle's Revisal chap. 17, sec. 201) which states "that the defendant is absent so that the ordinary process of law cannot be served upon him" without an averment, that the absence "was with intent to defraud his creditors and to avoid the service of a summons" is fatally defective.

Though a Judge of the Superior Court may refuse a motion made by the defendant to dismiss a suit upon a ground which appears upon the record, yet he may entertain a like motion at a subsequent term, and dismiss the cause upon the same ground.

The case of *Brown* v. *Hawkins*, 68 N. C. Rep. 111, explained, distinguished from the present case, and approved.

This was a MOTION made by the defendants to dismiss the case heard by *Logan, J.*, at the last Term of the Superior Court of CLEVELAND county. The motion was granted, and the case dismissed, and from the order of dismissal, the plaintiff appealed. The facts explanatory of the case are sufficiently stated in the opinion of the Court.

Busbee & Busbee, for the plaintiffs.
W. P. Bynum, for the defendant.

PEARSON, C. J. The warrant of attachment may be issued "whenever it shall appear by affidavit," &c., and that the

defendant is a non-resident, or *has departed therefrom with intent* to *defraud* his *creditors*, and to *avoid the service* of a *summons* or *keeps himself concealed with like intent, &c.*," C. C. P., sec. 201.

The affidavit in this proceeding is "that the defendant *is absent*, so that the ordinary process of law cannot be served on him." He may have gone on a visit of pleasure or of business, but *non constat*, that he left with intent to defraud his creditors or to avoid service of process.

The affidavit on which the warrant issued, and by which the proceeding was instituted, does not conform with the statute, either in letter or spirit.

The astute counsel of the plaintiff fell back upon the position that at Fall Term, 1872, a motion to dismiss was considered and refused; which as he insists, was final and conclusive, not being appealed from, and consequently that the Judge had no power to entertain the same motion, on the same state of facts at Spring Term, 1873, and for this, he relied on an ingenious "*reading*" of the opinion in *Brown* v. *Hawkins*, 68 N. C. Rep. 444. In that case the rights of the parties had been adjudicated by the Supreme Court, and it was held to be an irregularity approaching, if not passing, the line of judicial subordination, for the Judge to entertain the motion a second time upon the same state of facts existing at the time of the first motion, no new matter being alleged or proved.

In our case there had been *no adjudication of the Supreme Court.* At Fall Term, 1872, his Honor refused the motion to dismiss; at Spring Term, 1873, his Honor allowed the motion, and ordered the proceeding to be dismissed.

We are not aware of any rule of law which forbids his Honor, at Spring Term, 1873, from reconsidering an interlocutory order made at Fall Term, 1872. According to the old equity practice, petitions to rehear were of every-day occurrence. If, while the proceeding was pending, the

Judge became satisfied, that because of the insufficiency of the affidavit, or for other reason, the case was not properly constituted before him, it was his duty to dismiss the proceeding, notwithstanding he at Fall Term, 1872, failed to take the same view of the case.

The concluding general remarks of Justice Boyden, in *Brown* v. *Hawkins*, sup., are to be construed in reference to the facts of that case, and particularly in reference to the fact that there had been an appeal to the Supreme Court, and an adjudication of the questions of law.

No error.

PER CURIAM. Judgment affirmed.

MARY E. CREECY *v.* EDWARD PEARCE, Adm'r, *et al.*

The widow of a mortgagor, as against the legatees and next of kin as well as against the heirs and devisees of her deceased husband, has a right to have the mortgaged land exonerated from the mortgage debts, but as against his other creditors she has no such right. As to them, she has only the right to have the two-thirds of the land not embraced in the dower, and the reversion of the dower sold, and the proceeds applied to the payment of the mortgage debt, and to have the residue of that debt, if any, paid rateably with the other debts of the deceased out of the personal assets, and if there still be any part of the mortgage debt unpaid, it will be a charge on the dower.

This was a PETITION for dower, first heard before the clerk of the Superior Court of CHOWAN county, and afterwards before his Honor, *Albertson, J.*

The facts of the case were shortly these: Augustus R. Creecy died in the county of Chowan in November, 1872, leaving the petitioner, his widow, and several children, who are defendants. In his life-time he owned a tract of land, which he mortgaged to one John Roberts, for fifteen hun-

dred dollars, which remained unpaid at the time of his death. The defendant, Pearce, administered on his estate and found it to be insolvent.

In her petition, the widow prayed to have the third part of the land exonerated, by having the mortgage debt paid out of the personal estate, and that part of the land not assigned to her for dower. The defendant, Hathaway, as a creditor, on behalf of himself and the other creditors, was made a party defendant and opposed the petition. The clerk of the Superior Court gave judgment in favor of the petitioner, which was approved by the Judge, and the defendant, Hathaway, prayed and obtained an appeal to the Supreme Court.

No counsel appeared in this Court for the defendants.
Smith & Strong, for the plaintiff.

1. Debts which are a specific lien on the property of an intestate, must first be paid to the extent of the value of the property to which the lien attaches. Act of 1868–'69, chap. 113, sec. 24.

2. The plaintiff has a right to require the application of the whole of the personal estate, or so much as is necessary to pay off the encumbrance, and exonerate her dower from the lien, and this through a payment of the debt. *Thompson* v. *Thompson*, 1 Jones 435; *Klutz* v. *Klutz*, 5 Jones' Eq. 80; *Caroon* v. *Cooper*, 63 N. C. Rep. 386. See also *Smith* v. *Gilmer*, 64 N. C. Rep. 546.

PEARSON, C. J. A widow as against the legatees or distributies has an equity for exoneration, that is, to have a debt of her husband, which is a charge upon the land, paid out of the personal estate, it being the primary fund for the payment of debts. So a widow as against the divisees or heirs has an equity for exoneration. *Carson* v. *Cowper*, 63 N. C. Rep 386. *Smith* v. *Gilmer*, 64 N. C. Rep. 546.

In this case, the question is in regard to the right of the widow as against *creditors* of her husband. But for the mortgage on the land to secure the debt due to Roberts, the right of dower has priority over creditors in respect to the real estate. Suppose the widow relieves the land from this incumbrance, and take an assignment of the Roberts debt, she then stands in his shoes, and has a right to have the land sold, and proceeds of sale applied for the exoneration of her right to dower. This is clear, and there is no difficulty in respect to the land.

When the widow, standing in her own shoes, or in the shoes of the creditor Roberts, insists that for her exoneration, the other creditors must give way, and let the debt of Roberts be first paid out of the personal estate, upon which neither she or Roberts have any lien or priority, this Court is unable to see any ground on which the claim can be supported. True, the personal estate is the primary fund for the payment of debts, but the defendant, Hathaway, and other creditors have the same right as against the personal estate as Roberts has; so the widow can take nothing by standing in his shoes, for his priority by force of the mortgage is only in respect to the land.

Dower is not subject to the debts of the husband, except debts charged on the land, but on what principle is it, that a debt, because charged upon the land, is also to have priority in respect to the personal estate? We can see none, and the able counsel of the plaintiff did not suggest any that needs further comment.

The judgment in the Court below will be modified so as to direct a sale of the two-thirds of the land not embraced by the dower, and the reversion in the other third, the proceeds of sale to be applied to the Roberts debt, and the residue of the Roberts debt to be paid rateably out of the personal estate in the course of administration, and if there

be still any part of the Roberts debt unsatisfied, it will be a charge on the dower land.

We considered the question whether in the distribution of the personal estate, the Roberts debt ought to be taken *pro rata* on the whole debt, or on the debt, minus the amount that may be realized out of the mortgage. We are satisfied the latter is the true principle, for if the whole debt draws a dividend, the other creditors would have a right of subrogation so as to have the benefit of the collateral security. So the result would be the same; and we adopt the analogy in bankrupt cases where a creditor having collateral security is only allowed to prove the balance after exhausting the collateral security.

The decision will be modified accordingly, and the cost be paid out of the fund realized by a sale of the real estate.

This will be certified.

PER CURIAM. Judgment accordingly.

C. G. LOVE and wife *v.* J. W. LOGAN *et al.*

A guardian who acted in good faith was held not to be responsible for omitting to collect a note during the late war, when it appeared that both of the two obligors were solvent during the war, and were made insolvent by its results.

This was an ACTION upon a guardian bond, and upon a reference for an account the clerk allowed the guardian a credit for $140, the amount of a bond taken by him from Sullivan & Fronebarger, although he had failed to collect it. His Honor, *Mitchell, J.*, at CATAWBA Superior Court reversed the order of the clerk in allowing this item, and the defendants appealed. There were other matters of difference which were settled by the counsel, and the above-mentioned

item was the only one brought before the Court, as will appear by the opinion.

W. P. Bynum, for the defendants.
Busbee & Busbee, for the plaintiffs.

SETTLE, J. When this case was called the record was found to be so imperfect that we should have sent it back had not the counsel, both for the plaintiffs and defendants, relieved us, by announcing on the next morning that they had agreed upon all points of difference except the item of $140.44, being one-half of the Sullivan & Fronebarger note. It is not contended that the defendants were in any wise in default in respect to this note before the war.

During the war, leaving out of view stay laws, it was not prudent to collect it, as both of the obligors were solvent. After the war the evidence shows that Sullivan became insolvent by the emancipation of his slaves, and in point of fact Fronebarger was also insolvent, although he did not admit it until 1867. The Federal soldiers had entered the defendants' store in 1865 and mislaid this note, so that the defendants did not find it for some time thereafter; but if it had not been mislaid, and the defendants had used all diligence, we do not think, in view of the evidence, that they could have collected it.

The guardian seems to have acted in good faith, and has not been guilty of culpable negligence. This is only another of the many instances of losses consequent upon the war.

The clerk allowed this item to the defendants, but was overruled by his Honor. In this there was error.

Let this be certified to the end that the Superior Court may proceed to judgment in accordance with the agreement of the parties and this opinion.

PER CURIAM. Judgment reversed.

STATE v. JOHN T. SPEIGHT.

On an indictment charging the defendant in the first count with stealing, and in the second with receiving stolen goods, he may be found guilty generally, because the offenses are of the same grade and the punishment is the same, and the verdict may be sustained, though on a trial at the preceding term, the jury found the defendant guilty of receiving stolen goods, which verdict the Judge set aside and ordered a new trial.

A witness is not competent to testify as to the general character of another witness, simply because he had known him several years, when the question is asked without explanation, and without the preliminary question, whether he knew the general character of the witness, and the means by which he had acquired the knowledge.

The *State* v. *Williams*, 9 Ired. 140, cited and approved.

This was an INDICTMENT consisting of two counts, the first for larceny and the second for receiving stolen goods, to-wit: ten gallons of spirits of turpentine, knowing them to have been stolen. The defendant was first tried on the indictment at October Term, 1872, of the Superior Court of NEW HANOVER county, when his Honor, *Russell, J.*, charged the jury that if they were satisfied that the defendant either stole the turpentine or received it, knowing it to have been stolen, then they should say guilty, and no more, whereupon the jury returned a verdict "guilty of receiving stolen goods." A motion was then made by his counsel that the defendant should be discharged; but his Honor overruled the motion and ordered a new trial.

At January Term, 1873, the defendant was again put upon his trial on the same indictment, and offered to plead "former acquittal," but his Honor refused to admit the plea, and allowed the plea of "not guilty" to be entered.

On this trial the defendant introduced one P. O'Brian, who testified to material facts for him, and then to strengthen this evidence, he offered to prove by one Vagris that he had known the witness O'Brian several years, and though he had not known the community or any considerable portion thereof to speak of O'Brian's character, yet he

had never heard anything against him from any one. His Honor excluded the testimony, and the defendant excepted.

His Honor charged the jury as he had done on the former trial, that if they were satisfied that the defendant either stole the turpentine, or received it, knowing it to have been stolen, they must return a general verdict of guilty and nothing more. Defendant excepted. The jury rendered a general verdict of gullty, upon which a judgment was pronounced, from which the defendant appealed.

M. London, for the defendant.
Attorney General Hargrove, for the State.

PEARSON, C. J. The prisoner was charged in two counts, first, for stealing the spirits of turpentine; second, for receiving the spirits of turpentine, knowing the article to be stolen. On the first trial the Judge charged that it was not necessary for the jury to decide whether he stole the article or received it, knowing it to have been stolen. This charge was authorized by *State* v. *Williams*, 9 Ired. 151, where it is held it is sufficient if the jury be satisfied that the prisoner is guilty in one of the modes well charged, because as the offenses are of the same grade, and the punishment the same, "the instruction relieved the jury of some trouble, and could work no prejudice to the prisoner."

The jury, according to our construction of this record, instead of availing themselves of this mode of being relieved from the trouble of investigating the question, went into an investigation, and concluded to find the prisoner guilty only upon the second count. His Honor not taking this view of the verdict, but treating it as senseless and unmeaning, set it aside, and ordered another trial. At the next trial the prisoner was found guilty upon both counts. In regard to the first count, this makes an inconsistency in the record, and we are compelled to hold that the conviction

of the prisoner on the count in which he is charged with stealing the article is erroneous, unless on the ground that the Judge had power to treat the finding of the first jury as a nullity, and to consider the case as if there had been nothing done. This question is not presented, for as we construe the record, the prisoner was found guilty upon the second count at the first trial, and he is found guilty upon that count at the second trial, so upon this count he is convicted at both trials, and can take no benefit of the inconsistency; that by implication he is acquitted on the first trial of stealing, and at the second trial he is found guilty of the stealing as well as of the receiving of the goods, knowing them to have been stolen. There is no greater inconsistency on the face of this record than in the case of Williams *supra*. There it was impossible to tell whether the prisoner stole the slave or took and conveyed him out of the State by violence, or got him into possession by seduction, and then conveyed him out of the State, and the Court for the purpose of punishing crime and bringing malefactors to justice, in other words, for "the administration of the law," decide that it made no difference whether the prisoner stole the slave or got him by seduction or violence, and conveyed him out of the State, *the grade of punishment being the same*, taking it one way or the other.

In this case it may be that the prisoner stole the spirits of turpentine, or it may be, which the first jury thought the most probable, that he received the spirits of turpentine, knowing it to have been stolen. The grade of offense and the punishment is the same, and the joinder of the two counts is allowed by statute, because of the difficulty of proving whether the prisoner stole the thing himself or got some one else to steal it for him, or received it from some person, knowing it to have been stolen. The injury to the public is the same, and the object of the statute was to "stop the holes" out of which malefactors had been escaping.

Upon the question of evidence we also concur. As the facts are set out, the witness Vagris did not by his answer show that he had such a knowledge of the *general character* of the witness O'Brian as to make his opinion in respect to such general character competent evidence. Before a witness can give his opinion as to handwriting, he must say he is acquainted with it, by having seen the party write, or having seen papers in his handwriting, about which there could be no dispute. In this case the witness is not asked "if he knew the general character of the witness O'Brian;" nor does he state that he had any opportunity of knowing it, except that "he had known him for several years, and never heard anything against him from anybody." He does not say he had any intercourse with O'Brian, or any business transactions, or any reason or opportunity for finding out his general character. I may have known a thousand men for several years, never heard anything said against them, and still have no knowledge of their general character.

The law presumes every person to be of good general character until the contrary appears. So this evidence, if competent, was wholly immaterial; it simply affirms an implication of law. Had this witness been asked the usual preliminary questions, to make his opinion as to general character competent, to-wit: are you acquainted with the general character? and then the embarrassment had occurred, because of his not exactly comprehending the legal idea of "general character," it would have presented a different question.

We concur with his Honor in the opinion that there is no rule of evidence by which, without explanation and without the preliminary question, whether he knew the general character of the witness, and the means by which he had acquired that knowledge, a witness can be competent to give his opinion as to the general character of an-

other witness, simply because he had known him for several years and had never heard anything said against him.

This would be stretching evidence as to general character farther than is done by the old cases. We are unable to see how "the greater liberality in respect to evidence as evinced by recent legislation" effects our question.

There is no error.

PER CURIAM. Judgment affirmed.

SALLY ROUNTREE *et al. v.* J. A. BARNETT *et al.*

Where a petition to sell land was filed in the Court of Equity prior to the adoption of the constitution in 1868, and orders were made therein before that time, and after that year a motion was made against the clerk and master in the same cause, the new mode of procedure will apply to it, and upon an appeal, the Supreme Court will not take jurisdiction to rehear any issues of fact decided by the Judge in the Court below, but if it appears that such issues were decided by the Judge without objection from the parties, and that his decision was clearly right, the Supreme Court will proceed to act upon it and confirm his judgment.

When money is invested by a clerk or other officer under the orders of a Court, the clerk or other officer cannot change the investment without the sanction of the Court or the parties, and if he does so, he will be responsible for any loss that may accrue, for he will be held to a much stricter accountability than a guardian or trustee would be under similar circumstances, because the clerk or other officer might get the consent of the parties or the advice and direction of the Court, while the guardian or trustee would be compelled generally to act upon his own judgment.

While generally a clerk or other offices cannot change an investment which he has made under the order of a Court, yet if a sudden and unexpected loss is threatened, he may do so, but in such case he must show a necessity for such prompt action, and that he acted in good faith and with ordinary prudence; and he must, as soon at he can, report his action to the Court.

This was a PETITION for the sale of land filed in the Court of Equity for PERSON county, at the May Term, 1855, and thereupon an order was made for the sale upon the usual terms. At the November Term, 1856, it was decreed that the clerk and master invest the purchase money in loans

upon bond, taking two or more good sureties, and that he collect the interest annually on the 1st day of January, of every year, and pay the sum to the plaintiff, Sally Roundtree. The cause was then retained for further directions. At the Fall Term, 1871, of the Superior Court of Person county, a notice was ordered to be issued to the defendant, John A. Barnett, the late clerk and master and his sureties, that at the next term of the Court a motion would be made for a judgment against them for money received and not accounted for. At the ensuing Term of the Court it was referred to the clerk of the Court to state and report on account, &c. Upon the return of the report with the evidence upon which it was founded, the counsel of the defendant, Barnett, filed exceptions thereto:

1. That the defendant is charged with the sum of $582, alleged to have been received from John Bradsher, former clerk and master, and interest thereon when no such sum was so received or came to the hands of the said defendant.

2. That the defendant is not allowed credit for the sum of $1,000 invested in a bond of the *de facto* government of the Confederate States, such investment being justified at the time it was made by the state of the country, and the example of prudent men of business.

3. That the defendant is not allowed credit for the sum of $—— the fund of this cause in the office, which were passed over by this defendant or his deputy in office, to his successor, which is shown by the evidence of W. R. Webb.

These exceptions were passed upon and overruled both as to the law and facts embraced in the issues by his Honor, *Tourgee, J.*, at the Fall Term, 1872, and the defendant appealed. A sufficiency of the evidence is stated in the opinion of the Court.

W. A. Graham, and *Battle & Son*, for the defendant.

J. W. Graham, for the plaintiff.

RODMAN, J. This case comes to us upon exceptions to certain findings of facts by his Honor, the District Judge, in accordance with the report of a referee. Although the action in which the proceedings were had began before 1868, yet as the motion against the clerk and master and his sureties was made after 1868, we consider that we have no jurisdiction to rehear any issues of fact decided by the Judge below. In this case the controverted matters arise upon what are substantially issues, which would have been made upon the pleadings if the plaintiff had set forth more particularly the matters alleged by her, and the defendants had answered as regularly as they should have done. The parties have waived the irregularities, and have treated the exceptions to the report of the referee as raising the issues. Neither party asked that the issues thus treated as made should be tried by a jury, nor did they in writing waive a trial by jury and consent that the Judge should find the facts. They have made no objection to his doing so, and if his doing so was irregular it has been waived. Under these circumstances, while we would refuse to decide any issues of fact, if it appeared to us that any of the findings of the Judge were plainly mistaken, we might remand the case to him, in order that the parties might if they chose have the doubtful questions passed on by a jury.

For this purpose we have carefully examined all the testimony which was before his Honor, and we do not see that he has erred in his conclusions:

1. As to the sum of $582, the defendant, Barnett, is charged with, as received from his predecessor, Bradsher, it is true that Webb, who received it as the deputy of Bradsher, says it was never paid to the defendant, Barnett, that he knows of, and there was no direct evidence that it was. But it was the duty of Barnett to have called on his predecessor for an account, and he did so, and received some of the property, viz.: the notes. Although he would not become liable by

reason of his failure to demand an account, except perhaps for the damage which resulted from the omission, yet the existence of this duty gives force to the fact that he paid to Mrs. Rountree interest before he received anything for her, if he had not received this sum, and that the sum paid so nearly corresponded with the interest on this amount.

2. We also concur with his Honor in his decision on the second exception, and we think his decision should have been the same, assuming what is testified to by Webb as true.

The original order directed the sale to be made on a credit of twelve months. The subsequent order at Fall Term, 1856, directed the clerk to invest the proceeds in notes with security, and to pay the interest to Mrs. Rountree annually during her life. No form was prescribed for the note, but evidently a form was contemplated by which it would not have been in the power of a debtor to pay at any time he might choose to do so. The purchasers at the sale were entitled to tender the money at the expiration of the credit. But it may be doubted whether, under the circumstances, Harvey Rountree had not lost his right to make a tender in 1859. Certainly the clerk was not obliged to accept a partial payment, nor would a tender of part have stopped the interest. Neither was the clerk bound to accept payment of the residue in Confederate money in 1862. Was he justified in doing so under the circumstances? The fund was safe as it was; any change in the investment involved some loss of interest in the interval before reinvestment; the new security might be more precarious. The clerk in unnecessarily accepting these two payments without previous authority from the Court, without consulting the parties interested in the fund, and without afterwards reporting the fact to the Court and obtaining its sanction, was guilty of imprudence, to say the least of it. And when afterwards he repeatedly changed the investment, first by lending the

money to Mason and receiving payment from him a short time afterwards in Confederate money, and then to Smith, with the same result, and finally by purchasing a Confederate bond, all without the sanction of the Court or of the parties, he was guilty of official misconduct, and became liable for any loss resulting.

Public policy and the safety of the funds held by the officers of Courts for the use of suitors under the orders of the Courts, require a different and stricter rule of responsibility to be applied to them than to administrators and guardians and trustees of a like character. These last are compelled to act upon their own judgment. They can rarely consult their *cestui que trust.* Only under extraordinary circumstances are they entitled to apply to a Court for its advice. But an officer of a Court may generally consult the parties in interest as to any change in the disposition of the fund, and he may always ask the advice of the Court, and that if given without fraud on his part will be a protection. The Court in such cases is really the trustee, and the officer only its agent to obey its orders. He has no power and no discretion beyond what is contained expressly or by implication in the orders of the Court. He is personally liable for every loss which may happen by reason of his acting without or beyond them. In this case the question is not, did prudent, business men receive Confederate money at the times when the clerk in this case did; nor even whether a guardian would have been justified in receiving it. But whether the clerk was authorized by the orders of the Court in dealing with the fund in the way he did in receiving payment unnecessarily, and in a new currency which had never been sanctioned by the Courts, in investing and reinvesting in individual notes, whether with or without security, and finally in a Confederate bond without consulting the Court or even reporting his dealing. The assent of the parties interested would have estopped them from complaint, but

they were not consulted. We do not say that there can be no case in which a clerk or like officer would not be justified in calling in or changing an investment without the previous sanction of the Court or of the parties. But to justify his conduct in such a case he must show a necessity for prompt action, to prevent a threatened loss, and must report his action to the Court. In such a case where the necessity was clearly proved, a Court would deal liberally with him, and require nothing but *bona fides* and ordinary prudence. But when he assumes the power to change and rechange an investment at pleasure, without consulting or informing the Court, he does so at his own risk of the safety of his course. Mere *bona fides* will not save him.

3. The third exception seems to have no foundation in fact. The defendant was allowed all he paid to his successor.

Judgment in this Court.

PER CURIAM. Judgment affirmed.

MOSES A. BLEDSOE *v.* MARY NIXON *et al.*

Upon an appeal from a judgment of the Superior to the Supreme Court, the whole case is taken up to the latter Court, whether the appellant give an undertaking with sufficient security (or in lieu thereof make a deposit of money) to secure the amount of the judgment, or to secure the costs, only as provided in sections 303 and 304 of the C. C. P., the right of the appellee to issue execution in case of the undertaking being to secure the costs of the appeal only is given instead of the deposit of money to abide the event of the appeal.

When an appeal is taken from the Superior to the Supreme Court, a proceeding to obtain a new trial on account of newly-discovered testimony cannot be instituted in the Superior Court, but must be brought in the Supreme Court, and upon a proper case that Court will remand the cause so that the Superior Court may take jurisdiction and proceed to do what may be right. But if the newly-discovered testimony applies to only a part of the judgment, the Supreme Court will retain the cause and order proper issues to be made up

upon the alleged newly-discovered testimony and sent down for trial in the Superior Courts and will impose such terms upon the applicant for the new trial as may be deemed proper.

The rules in relation to applications for new trials upon the ground of newly-discovered testimony and the principles upon which they are founded, discussed and explained in the opinion filed by the Chief Justice.

The cases of *Jarman* v. *Sanders*, 64 N. C. Rep. 367 and *Heileg* v. *Stokes*, 63 N. C. Rep. 612, cited and approved.

This was a CIVIL ACTION commenced in the Superior Court of WAKE county on the 5th of April, 1873, and brought for the purpose of obtaining a new trial on account of newly-discovered testimony, under the following circumstances:

The plaintiff had brought the original suit against the defendants for the purpose of obtaining an account and settlement of certain matters of difference between him and Jere. Nixon, the intestate of the defendant, Macy. The case was referred to a referee, and upon stating the account, the plaintiff claimed as a credit the price of a certain tract of land called the Meadow land, which he alleged that he had contracted in writing to sell to the intestate, Jere. Nixon, in January, 1852, and had delivered the said written instrument to the said Nixon. The defendants denied in their answer the existence of such instrument, and the plaintiff entirely failed to prove it or its contents, and the referee thereupon rejected the claim. The referee afterwards made his report to the January Term, 1873, of the Superior Court, and his Honor, *Watts, J.*, confirmed the same, and rendered a judgment from which the plaintiff appealed, giving undertaking for securing the costs of the appeal only. The Supreme Court at its January Term, 1873, affirmed the judgment so far as it affected this part of the case (sec. 68, N. C. Rep. 521.) After this judgment was rendered, the plaintiff discovered a copy of the written contract of the sale of the Meadow tract of land in the hands of a gentleman who he had no reason to suspect had possession of it; and as he expected by means of this copy to

prove this existence of the original, he brought this action in the Superior Court of Wake in order to get the benefit of it, and the case coming on to be heard at the June Term of the Superior Court before his Honor, *Albertson, J.*, he gave a judgment for the plaintiff, from which the defendants appealed.

Haywood and *Fowle*, for the defendants.
Smith & Strong, for the plaintiff.

PEARSON, C. J. Under the present system *justice* is administered according to the principles of law and equity as heretofore established, by one tribunal. The distinction between actions at law and suits in equity, and the forms of all such actions and suits is abolished, and the Courts proceed according to C. C. P. and the other statutes concerning pleading and practice, and such rules of procedure as this Court may from time to time adopt.

It follows that the cases cited by the counsel of the defendant in regard to the mode of proceedure before the Chancellor in England on the equity side of his docket, and before Courts of equity in this country, that acted under the old system, have no application to our case, except so far as they may furnish remote analogies, and suggest reasons for the rules to be adopted by this Court in the absence of legislation. In *Jarman* v. *Sanders*, 64 N. C. Rep. 367, it is established as a rule of practice that a Judge of the Superior Court in which final judgment had been entered for plaintiff, may, upon satisfactory proof by affidavits, of *fraud* on the part of the plaintiff in obtaining the judgment, allow the defendant, as a motion in the cause, to ask that the judgment be set aside, and that a trial *de novo* be had, and may thereupon grant the restraining order for twenty days, and on motion, an injunction until the trial of the action. This preliminary motion may be allowed *ex*

parte, unless the Judge desires the aid of the argument of counsel in regard to the sufficiency of the affidavit and the like. The motion for a proceeding of this kind, which has a remote analogy to a *writ of error* for *matter of fact* may, in accordance with allowance of a motion to rehear, *for error in law* under the 16th rule, 63 N. C. Rep. 668, be entertained within two years after the final judgment, unless the party be guilty of laches in not making the motion as soon as he has an opportunity to do so, after a knowledge of the fact on which the motion was based. Such motions are not embraced under C. C. P., sec. 132, *Jarman* v. *Sanders*, *supra*.

Our case differs from *Jarman* v. *Sanders* in this: The case was brought to this Court upon appeal and final judgment has been entered, and the motion does not seek to have the whole judgment set aside on the ground of fraud, but simply to have the finding of the referee ("that the alleged agreement in respect to the sale of the Meadow tract was not in writing signed by the parties,") set aside on the allegation of new matter, which did not come to the knowledge of the defendant until the case was being heard upon exceptions in this Court, not embracing the finding in regard to this contract of sale.

The fact that final judgment was entered in this Court makes a material difference. By the appeal *the cause* was brought up to this Court, and as a matter of course a "motion in the cause" can only be entertained by the Court where the cause is. This was admitted by the counsel of plaintiff, but they took the position that inasmuch as C. C. P., title XIII, requires two undertakings, one to cover costs, the other to perform the final judgment, and the latter undertaking had not been perfected. This failure on the part of the client left "the cause" in the Superior Court. This is not the meaning of C. C. P. in regard to appeals. If the undertaking to perform the final judgment is not perfected, or a money deposit made, the purpose was to raise this money

deposit by means of an execution, after "the cause" had been carried up to the Supreme Court by the appeal; but "the cause" is by the appeal taken out of the Superior Court and carried up to the Supreme Court, no matter in which of the three ways provision be made for the performance of the final judgment.

The fact that the motion does not seek to have the whole judgment set aside on the ground of fraud, but only to set aside one item on the allegation of new matter, also making a material difference in regard to the mode of procedure. Under the present system we are sailing without a compass, and can only look to the statutes and "the reason of the thing" in navigating this unknown water. If the objection had extended to the whole judgment and the whole of the finding of the referee, the difficulty could possibly have been met by remanding the cause, with directions that the Superior Court make such orders as were necessary and proper on a motion in the cause to give the plaintiff (Bledsoe), should the facts be found, as he alleges, on the newly discovered evidence, appropriate relief, treating the finding of the referee and the concurrence of the Judge as the finding of the fact by a special verdict of a jury, under the instructions of the Judge, and in no wise as the award of arbitrators; but the objection only extends to one item in the judgment and the finding of the referee. So it seems to be manifest that "the cause" cannot be remanded; to remand a part and retain the other parts would be an absurdity.

After hearing full arguments, and upon much consideration, our conclusion is (under the provision of the constitution which authorizes this Court to "issue any remedial writ necessary to give it a general supervision and control of the inferior Courts," Art. 4, sec. 10, and in analogy to the rule by which this Court may before the trial send other issues down to be submitted to a jury,) to send a writ to the

Superior Court directing that an issue be submitted to a jury, so as to test the sufficiency of the newly-discovered evidence to establish the allegation of a written contract of sale signed by Nixon and Bledsoe, and sealed and delivered as their deed, this latter fact being requisite to repel the statute of limitations. We consider the general doctrine settled that when a decree or judgment has been rendered against a party by reason of his ignorance of a fact that would have caused the decision to have been in his favor, relief will be given without an allegation of fraud, except so far as it may be implied from a willingness to take benefit of an accident and enforce a demand, which, although he may not have known before the trial, he is obliged to know after the new matter is discovered, to be unjust. The doctrine is founded upon the broad principle that it is against conscience to enforce an unjust claim. *Standish* v. *Radley*, 2 Atk. 178, is a leading case. There the party was relieved from a decree which was shown manifestly to be unjust, by the discovery of receipts that had been placed in the hands of a third person for safe keeping.

The Courts, however, aware of the importance of the rule "*interesse reipublicæ ut sit finis litium*," lend a reluctant ear to applications for leave to call in question final judgments and decrees, either on the ground of fraud, accident or ignorance of material evidence, and requires satisfactory proof that the party has been guilty of no laches, and that there is probable cause to believe that on a second trial the result will be different. For the same reason a motion to rehear upon a suggestion of error in a matter of law is only allowed upon the certificate of two members of the Bar, which is taken to be evidence of probable cause. 16th rule, *supra*.

Here a difficulty presents itself. This Court cannot try *issues of fact*, but we think it is met by the case *Heilig* v. *Stokes*, 63 N. C. Rep. 612.

Acting on the ruling in that case we find that Bledsoe has

not been guilty of such laches as to shut the door of the temple of justice against him. When the administrator and the widow and children of Nixon denied that they had in their possession the written agreement alleged by Bledsoe, and further averred that they had never seen or heard of it, and did not believe there ever was such an agreement, and when Cook could not help him, and when Cantwell (in whose hands he swears the instrument was the last time he ever saw it) swore he never had in possession any such instrument, and produced the skeleton of a deed, with *blanks* for the name of the bargainor, as the only paper writing in regard to the matter that he had ever had in his possession, Bledsoe could do nothing more, and was forced to submit to the finding of the fact against him. Whether the newly-discovered evidence of what purports to be a copy of the agreement, alleged by Bledsoe to have been executed by Nixon and himself, will enable him to establish his allegation, is a matter about which we express no opinion farther than to say that we think it lays a sufficient foundation for his motion to be allowed to have another trial upon such terms as the Court may deem it just to impose.

The suggestion of laches in not moving upon this Court in the matter, as soon as he discovered the new matter pending the trial, at the last term, is met by the fact that soon thereafter he applied to the Judge of the Superior Court and instituted the present proceeding under the advice of counsel learned in the law.

We must do the counsel the justice to say that in the "*transition state*" of our rules of practice, we hold them in no fault, for supposing that the remedy was by action in the Superior Court, and not by motion in this Court. Had the hearing of the cause been interrupted by a motion of the kind it would not have then been considered, and would have stood over to this term for argument, so there has been no time lost, and the effect will be as to costs only.

Had this been a cause in the Superior Court, according to our liberal practice, the summons and complaint could have been taken as an affidavit on motion, in support of a motion "in the cause," but unfortunately "the cause" was in this Court, and not in that, so we are unable, with the utmost stretch of liberality, to treat the proceeding as a motion "in the cause" before this Court. It follows that the proceeding before his Honor must be dismissed with costs.

We have, however, been put judicially in possession of certain matters, upon which it is our duty to take action. We consider the complaint and affidavits as a sufficient foundation for a motion in this Court to have relief, to the extent of directing an issue to be tried in the Superior Court.

The clerk will issue a writ to the Judge of the Superior Court to have the following issue tried by a jury, that is to say, "was a contract for the sale of the Meadow tract, of which the paper hereunto attached marked "M." is a copy, signed, sealed and delivered by Jere. Nixon and Moses Bledsoe, or was the agreement under which Nixon took possession of the meadow tract a verbal one?"

This order is made upon these conditions precedent:

1. That within twenty days after service of a copy thereof Bledsoe pays into the office of this Court the balance of the judgment rendered January Term, 1873, minus the sum of $—— claimed as a credit on account of the contract of sale of the Meadow tract, (unless the same had been already collected by execution from the Superior Court.)

2. That within the said twenty days Bledsoe files with the Clerk of the Court a deed (to be approved of by the clerk, and to be held subject to the order of this Court,) to the heirs of said Nixon, in fee simple for the Meadow tract.

3. That Bledsoe gives an undertaking in the sum of $250, with sureties, to be approved by the clerk for the cost of this proceeding.

During the twenty days execution for the sum of $——

now in controversy is enjoined. Should the conditions precedent be complied with the injunction will be continued until the hearing. The deed being accepted by the Court as a security for the performance of its final judgment and as a means of executing the judgment, so as to make it a final determination of the rights of the parties; for if the contract was binding, Bledsoe will have credit for the price and interest as agreed on, and the deed will be delivered to the heirs of Nixon. If the contract was not binding, the heirs of Nixon or their assignees will be required to surrender the possession to Bledsoe and to account for the rents and profits.

So really the controversy only involves the difference between the present value of the land together with the rents and profits, and the price agreed on and the interest.

Order of the Court below reversed, and the proceeding in that Court dismissed at the cost of Bledsoe.

The motion of Bledsoe in this Court allowed.

PER CURIAM. Order of the Court below reversed, and motion of the plaintiff in this Court allowed.

MOSES A. BLEDSOE *v.* MARY NIXON *et al.*

When a promissory note is given with a stipulation that the interest is to be paid annually or semi-annually, the maker is chargeable with interest at the like rate upon each deferred payment of interest, as if he had given a promissory note for the amount of such interest. By this mode of computation compound interest is not given, but a middle course is taken between simple and compound interest.

The case of *Kennon* v. *Dickens*, Conf. Rep. 357; S. C. Tay, Rep. 231, cited and approved.

This is the same with the case immediately preceding it. The following is the written agreement referred to:

"This agreement made and entered into this 27th day of January, A. D. 1852, between M. A. Bledsoe and Jere. Nixon, both of the city of Raleigh, witnesseth that the said Bledsoe for and in consideration of the sum of eighteen dollars and fifty cents per acre has bargained and sold to the said Nixon and his heirs, a certain tract or parcel of land lying in the county of Wake, on both sides of the Wild-cat branch, and bounded as follows: (Here the boundaries are giving.) And it is hereby agreed by both the parties hereto that the said Nixon shall execute and deliver to said Bledsoe three several notes, payable the first, on the 1st day of January, A. D. 1853; the second, on the 1st day of January, A. D. 1854; the third, on the 1st day of January, A. D. 1855; for an amount equal to the amount of the purchase money; interest on the said notes to be paid semi-annually. And the said Bledsoe binds himself, his heirs and executors to make and execute to said Nixon a good and lawful title in fee simple to the above-named land, whenever the said notes above-named are given for the purchase money, with the interest on the same, shall be fully paid and discharged.

Witness our hands and seals.

M. A. BLEDSOE, [SEAL.]
JERE. NIXON, [SEAL.]

WITNESS: GEO. T. COOKE.

When the case came on to be heard at the June Term, 1873, of the Superior Court, before his Honor, *Albertson, J.*, the plaintiff claimed to be entitled to interest on the deferred payments of interest on the above-mentioned notes, which his Honor refused to allow, and allowed only simple interest on them from the time when they respectively became due. From the judgment on this part of the case the plaintiff applealed.

Smith & Strong, for the plaintiff.
Haywood and *Fowle*, for the defendant.

PEARSON, C. J. Interest is the price agreed to be paid for the use of money. Rent is the price agreed to be paid for the use of land. Hire is the price agreed to be paid for the use of a horse or other article of personal property.

Call it interest, rent or hire, it becomes a debt at the time the party promised to pay it, and from that time he is using the money of the creditor or of the landlord or of the bailor, and ought to pay for the use of it, unless he be allowed to take advantage of his own wrong in not making payment at the day.

A lessee is to pay $100 a year rent, payable *on the first day of January in each and every year.* The rent is in arrear. The lessor may accept a promissory note of the lessee, which of course will bear interest, or he may sue and take judgment, and that will bear interest until paid. So when a horse is hired, the price to be paid at the *end of each month;* so when money is lent or there is a forbearance to sue for a debt upon an agreement that interest is to be paid annually, &c.

The rule being that "when a certain sum of money is to be paid at a specified time, on failure to pay, the party is to be charged with interest." The price for the use of the money, like rent due for land or the hire of a horse, being the money of the one, which the other party is having the use of, and should pay for.

Mr. Haywood in a well-considered argument put this case: "Three years after date I promise to pay A. B. $1,000, with interest from date." The note is not paid until the expiration of five years; why should not interest be charged upon the interest due at the end of the three years? The reply is: The parties having by *acquiescence* extended the credit from three to five years, the interest, which is an incident of the debt, goes with it, and *was not due* at the end of three years.

and could not have been sued for as an independent debt. It is otherwise when the note contains an express promise to pay interest at specified times. At each time there is a certain sum of money *due*, for which an action lies.

On our part we will put this case: "Three years after date I promise to pay A. B. $1,000 with *eight* per cent. interest from date, the *interest to be paid on the 1st day of January in each and every year.* The note is not paid until after the expiration of five years; why should *eight* per cent. interest instead of *six* be computed after the first three years?" The reply is: The parties having by *acquiescence* extended the credit from three to five years, the interest, as an incident of the debt, goes with it, so that the debtor is not only bound to pay eight instead of six per cent. for the last two years, but he is bound to pay eight per cent. interest upon each defered instalment of interest, the legal effect of the indulgence given by the creditor being only an extension of the time of credit upon the terms set out in the note. A lessee for years who holds over becomes a tenant at sufferance; is bound for the same rent, may be ejected at any time, and is chargeable with interest upon the defered instalments of rent.

In our opinion the doctrine that "when there is an agreement set out in the note for the payment of interest annually or semi-annually, the maker is chargeable with interest at the like rate upon each defered payment of interest in like manner as if he had given a promissory note for the same amount," is sound on principle. By this mode of computation compound interest is not given. But a middle course is taken between simple and compound interest.

In mediam viam tutissimus ibis. By computing interest in this way effect is given to the stipulation to pay interest at fixed times; whereas, if simple interest be computed no effect whatever is given to the stipulation in regard to

interest, and the Court assumes the power to expunge it as surplusage, although it is manifest that the parties intended it to have some effect. Finding this doctrine settled by old cases in our State, *Kennon* v. *Dickson*, Con. Rep. 357, Taylor 231. We will not open the door for further agitation, although from the briefs of counsel, we see the cases are conflicting, and "much may be said on both sides."

There is error. Interest must be computed annually. Report of Clerk confirmed.

PER CURIAM. Order accordingly.

EMILY MOYE *v.* DAVID COGDELL.

An attorney cannot compromise his client's case without special authority to do so, nor can he without such authority, receive in payment of a debt due his client anything except the legal currency of the country, or bills which pass as money at their par value by the common consent of the community. A subsequent ratification of the acts of the attorney is equivalent to a special authority previously granted to do those acts, but it must be the ratification of the client himself and not of his agent.

This was a MOTION to set aside an execution made before his Honor, *Tourgee, J.*, at the Special Term of the Superior Court held for the county of WAYNE, in January last, when his Honor granted the motion in part and refused it for the residue, whereupon the defendant appealed.

The case is fully stated in the opinion of the Court.

Faircloth & Grainger, for the defendant.

Battle & Son, for the plaintiff, cited and relied on the following cases and authorities: *Ward* v. *Smith*, 7 Wallace, 447; *Howard* v. *Chapman*, 4 Car. & Payne, 508; *Law* v. *Cross*, 1 Black's Rep. 533; Story on Prom. Notes, sec. 115–389.

SETTLE, J. His Honor, the presiding Judge, states the case as follows: This was a motion to set aside an execution, and to have satisfaction of the judgment on which it issued entered of record.

The plaintiff gave the note on which suit was brought to her son, F. M. Moye, who was her general agent, to place in the hands of an attorney for collection, which was done by her son. Neither the plaintiff nor her son gave their attorney any special instructions, nor did they impose any limitations or restrictions on the powers of their attorney.

On the 5th of October, 1870, after a levy had been made on defendant Cogdell's property, he drew a draft on A. J. Finlayson & Bro., commission merchants in Goldsboro, payable to said attorney in sixty days, which was accepted by the merchants and received by said attorney on the same day.

At the same time of said acceptance the defendant, Cogdell, gave his promissory note to said Finlayson & Bro. for their acceptance, and afterwards paid said note. Finlayson & Bro. failed in business on the 23d of December, 1870, and were then insolvent. The plaintiff's agent was informed by the attorney before said failure that the attorney had received said draft, but did not repudiate his action, and said agent applied to Finlayson & Bro. soon after their failure for a part payment of said draft. A few days after the failure of Finlayson & Bro. the plaintiff's attorney for the first time notified defendant, Cogdell, that said draft was not paid, and demanded payment of the judgment, which was refused by Cogdell. At the time a small balance of Cogdell's note to Finlayson & Bro. was unpaid, which Cogdell thereafter paid to the holder thereof.

On the 14th of January, 1871, the plaintiff caused another execution on said judgment debt to be issued against defendants, to set aside which, this motion was made. The

findings of the jury upon the important issues submitted to them are as follows:

Did plaintiff's attorney receive the draft in payment of the execution debt? Answer, yes.

Did plaintiff's agent ratify said attorney's action? Answer, yes.

And thereupon, his Honor being of opinion that the draft should be considered as a discharge of the judgment, and allowed in satisfaction of the execution to the amount which the defendants had paid upon the note given to Finlayson & Bro., for their acceptance of the draft by the acceptors, gave judgment accordingly, and from this judgment the defendant appealed. We acknowledge the hardship which the principles of law, too well established to be questioned, impose upon the defendant in this case.

An attorney cannot compromise his client's case without special authority to do so, nor can he without such authority receive in payment of a debt due his client anything except the legal currency of the country, or bills which pass as money at their par value by the common consent of the community. And yet in this case it is contended that an attorney, after having obtained a judgment and execution and a levy on property, can discharge the whole and bind his client by taking a draft at sixty days, when it might be that suit would have to be brought after the sixty days on the draft, and the matter litigated for years in the Courts.

In *Ward* v. *Smith*, 7 Wallace, 447, Mr. Justice Field in delivering the opinion of the Court, says "that it is establishe by all of the authorities that the power of a collecting agent by the general law is limited to receiving for the debt of his principal that which the law declares to be a legal tender, or which is by common consent considered and treated as money, and passes as such at par."

A subsequent ratification of the acts of an attorney or

agent is equivalent to a special authority previously granted to do those acts.

But it will be observed here that there is no evidence that Mrs. Moye ever gave to her son or to her attorney any special authority to take anything in payment of her debt, save that which the law directs, nor is there any evidence or finding that *she* ever ratified the acts of her attorney.

True, the jury have found that her *agent* ratified the acts of her attorney, but the agent had no authority to bind her by such ratification.

The jury have passed upon the acts of the agent and sub-agent, but are silent as to the conduct of the principal. The defendant seems to have acted in good faith, but the sixty days' indulgence was given solely for his accommodation, and the measure would be equally as hard upon the plaintiff if she should be compelled to lose her debt by an unauthorized act of her attorney as it is for the defendant to answer for the consequences of an act done at his request and for his accommodation.

There was error. The motion to set aside the execution should have been refused.

Let this be certified.

PER CURIAM. Judgment accordingly.

JOHN BOND v. ALEXANDER H. BOND.

If, in the case of proceedings supplemental to execution, an order be made appointing a receiver and directing a certain person to deliver a bond alleged to belong to the execution debtor to the receiver, he is *prima facie* guilty of a contempt of Court if he hand the bond to an attorney for collection instead of delivering it to the receiver, though he may be discharged upon swearing that he only intended for a certain purpose to get a judgment and not to collect the money, and that thereby he had not *intended* any contempt of the Court, but his discharge should be granted on his paying the costs.

Ex parte Moore, 63 N. C. Rep. 397, cited and approved.

This was a RULE upon the defendant to show cause why an attachment as for contempt should not issue against him, heard by *Watts, J.*, at CHOWAN Superior Court, Spring Term, 1873.

The cause was heard upon affidavits of plaintiff's counsel and the defendant's answer, and by his Honor it was ordered that the rule be discharged upon defendant paying the costs. From this judgment the defendant prayed an appeal. The facts are sufficiently stated in the opinion of the Court.

Gilliam & Pruden, for the defendant.
A. M. Moore and *John A. Moore*, for the plaintiff.

READE, J. In November, 1870, in a suit of *Norfleet* v. *John Bond*, a receiver was appointed to take charge of certain effects of John Bond, which was alleged to be in the hands of others, among which effects was a bond in the hands of defendant, Alex. H. Bond. And said Alex. H. Bond had notice of the appointment of the receiver, and was forbidden to interfere in any way with the effects. Instead of delivering over the bond to the reciever, he put it into the hands of an attorney, who at Spring Term, 1871, brought suit on it and obtained judgment at Fall Term, 1871, and sued out execution. An order was then made for him to

show cause why he should not be attached for contempt. Upon the return of the rule he alleged that he had not violated the order, that he was not obliged to deliver the bond to the receiver, that he had bought it for value, and had put it in suit only to secure it, and with no purpose to collect it, and that in anything that he had done he had not *intended* any contempt of the Court.

Upon this state of facts the defendant was clearly in contempt, and it was within the power of the Court to punish him with fine and cost. There was abundant cause *prima facie* to make the rule. In consideration, however, that the defendant purged himself of any intentional disobedience to the order of the Court, the Court in its discretion ordered the rule to be discharged upon the payment of costs. This is the least that could have been done. Cost had been incurred by reason of at least the apparent fault of the defendant, and he was *excused* upon payment of that cost.

See *ex parte* Moore, 63 N. C. Rep. 397.

No error.

PER CURIAM. Judgment affirmed.

JOHN B. McRAE *et al. v.* KEMP P. BATTLE Ex'r *et al.*

If a husband obtain from his wife a provision in his favor much more beneficial to him than that which was stipulated for him in an antenuptial marriage settlement, it comes within the principle applicable to other intimate fiduciary relations, and raises a presumption of fraud unless rebutted by evidence to the contrary.

The rule that a person cannot take advantage of an allegation of fraud, unless it be made in the pleadings, does not apply to a case agreed where all the facts are stated, and the matters of law or legal inferance left to the Court.

The case of *Lee* v. *Pearce*, 68 N. C. Rep. 76, cited and approved.

This was a CONTROVERSY without action, submitted to *Watts, J.*, upon the following facts agreed, to-wit:

1. Cameron F. McRae and Julia T. Burgwyn in contemplation of a marriage to be solemnized between them on the 29th day of December, 1839, entered into a marriage contract or agreement, the material parts of which are as follows: All the property of the intended wife is conveyed to trustees; first, for her use until the marriage; second, she reserves the right to make provision out of the property for her father; third, the husband is to receive during his life all the rents and profits for the joint use of himself and wife; fourth, if she shall outlive her husband, then to the sole and absolute use of herself and her heirs, &c.; fifth, if the husband shall outlive his wife, then after his death, for the use of such persons, for such estates, &c., in such proportion, &c., subject to such changes as the wife shall by any last will or writing in the nature of a last will, direct, limit or appoint, in this case she having absolute power, &c., and the trustees to hold, convey, &c., as she may appoint; and she may execute this power by deed, with the assent of her husband; sixth, in default of such appointment, if she shall have children, which shall outlive her said husband, then for the children living at his death; in default of children, then to her father, brothers and sister.

2. Thereafter the said marriage was solemnized, and on the 26th of April, 1842, the said Cameron F., and wife, Julia T., conveyed by deed to John Burgwyn the property mentioned in said marriage settlement for the following purposes: first, the husband to have complete control of the property during the joint lives of himself and wife, he to use it as his own; second, upon the death of the husband, if his wife survive him, then the whole of the principal of the property to return to her as if she had never been married; third, but if the husband survives, then he is to be entitled to one-half of the principal, and hold the same to him and his heirs free of all trust; and the other half he shall hold upon certain trusts, &c.; fourth, the second half

he shall hold, if his wife shall not otherwise appoint for himself and his heirs, &c.; but his wife may appoint as she will as to this half, and he will carry into effect her directions, &c.; fifth, provides that the trustees shall convey to the said John Burgwyn.

3. And thereafter, on the 27th day of April, 1842, the said John Burgwyn reconveyed the same property, for certain purposes mentioned in the said deed to the said Cameron F. McRae, to-wit: the same trusts, &c., as those provided in the deed to him from the husband and wife.

4. That thereafter the said Julia T., wife of the said Cameron F., made her last will and testament with certain codicils, which upon her death was duly admitted to probate in the State of Pennsylvania, on the 13th day of August, 1853, and the said Cameron duly qualified as executor to said last will and testament. The will bears date the 11th Feb., 1846; and, first, ratifies and confirms the deed she and her husband made to John Burgwyn, and make it part of her will; second, she gives *one-half* of her property to her husband; giving him power to dispose of absolutelly $6,000 of this half; and as to the other half she gives small sums to Miss Nash and Mrs. Nash, and the residue thereof to her children, &c., and in default of children to her brothers and sister.

The first codicil is dated 11th day of February, 1846, and makes provision for her brothers and sister, and regulations as to how they shall enjoy, &c., if the property shall go to them.

The second codicil is dated the 14th May, 1853, and provides: first, that the item of $6,000 in her will shall stand as therein specified, and revokes the legacies to Miss and Mrs. Nash; second, she says "all the rest and residue of my estate, real, personal and mixed, I give and bequeath to my beloved husband during his life, and after his death to my children and their heirs in equal parts." If her children is

without issue she gives it to her sister Emily Burgwyn and her heirs.

5. That thereafter the said Cameron F. McRae, on the 2d day of April, 1870, made his last will and testament, and on the 1st day of August, 1872, died and thereupon his said will was duly admitted to probate, and thereupon the defendant, Susan, the sole executrix therein named, qualified as such and took into her possession certain bonds and notes, representing, in part, the trust fund originally conveyed in the aforementioned marriage settlement.

The will of Cameron F. McRae, dated 22d April, 1870, first, gives his wife Susan certain property in Fayetteville, subject to a change; second, all the rest and residue of his estate, (which includes all he obtained from his first wife) he gives to his wife Susan for life, and after her death to all his children; but if he cannot do this, then he gives her the $6,000 for life, and after her death to his children by her; third, if he has power to dispose of the one-half got from his first wife, then he gives to his second wife $6,000 for life, and then to his children by her, and the residue of this half to all his children, &c.; fifth, the rest of his estate, with some trifling exceptions, he gives to his second wife absolutely.

6. The plaintiffs are the only children of the marriage of the said Cameron and Julia, and the defendant, William P., Julia T. and Edward M. McRea are the children of the said Cameron and Susan.

7. After the death of the said Julia, the said Cameron gave to his children, the plaintiffs, such sums of money as were necessary for their support and maintenance, and took no receipts for the same, and made no charges against them for the sums so given, and did not at any time inform them that the money so given them belonged to them of right as a part of the said trust fund, but on the contrary,

informed them that the said sums so given were a donation from himself to them.

8. The said Cameron made no account nor return, either as executor of the will of the said Julia, or as trustee under the deeds, in the Court where letters testamentory were granted to him, nor in any other Court as far as can be ascertained.

Upon this state of facts the plaintiffs insisted that they were entitled to the whole of the fund share and share alike, except the sum of six thousand dollars.

The defendants insisted, on the contrary, that the defendant, Susan, is entitled during her life to one-half of said fund, and at her death that the defendants, William P., Julia T. and Edward M. are entitled to six thousand dollars of the said one-half, and the residue of the said one-half is to be equally divided between the plaintiffs, John B. and Catharine, and the defendants, William P., Julia T. and Edward M. share and share alike. After the case agreed was made up, the defendant, Susan McRae, died, leaving an infant son, who was born after the death of his father, and her executor, Kemp P. Battle, and the said infant were made parties defendants.

His Honor being of opinion with the plaintiffs, gave judgment accordingly, from which judgment the defendants appealed.

Battle & Son., for the defendants, of whom *R. H. Battle, Jr.*, filed the following brief on the question of fraud, being presumed from the deeds of 1842:

1. In this case there is no allegation or suggestion of fraud. Courts of Equity will not give relief on the ground of *fraud*, unless fraud is distinctly alleged, *McLane* v. *Manning*, Wins. Eq. 60, *Witherspoon* v. *Carmichael*, 6 Ired. Eq. 143.

2. That the wife may give her separate property to her husband on the ground that she is a *feme sole* as to such property. All the writers agree with Roper on Husband

and Wife, (32 Law Lib. 220), McQueen on Husband and Wife, (66 Law Lib. 297), Sch. Dom. Relations, 226, Clancy on Rights of Husband and Wife, 347.

3. In *Grigby* v. *Cox*, 1 Ves. Sen. 578, Lord Hardwick says that though (in regard to such transactions between husband and wife alone) a Court of Equity will regard them more jealously, and if there is any proof that the husband had any improper influence over the wife by ill or even extraordinary good usage to induce her to it, the Court might set it aside, but not without that. So other cases cited in Clancy on Rights, &c., 348 to 350. In *Rich Crocket*, 9 Ves. Jun. 369, no doubt was expressed of the validity of the gift by wife to husband, and the question was whether there was evidence of such gift; and in *Parkes* v. *White*, 11 Jun. 222, Lord Eldon says a wife may give her separate property "to her husband as well as to anybody else; that the cases never intended to forbid that; and that if he conducts himself well, his Lordship did not know that she could make a more worthy disposition of it, though certainly the particular act ought to be looked at with jealousy."

4. Here if the Court is inclined to look with jealousy at the transaction embraced in the deeds of April, 1842, we suggest as a complete answer to the difficulty, first, that the gift left her ample provision, and he received only part of what the law would have given him by the marriage, without the settlement, and which she reserved to herself power to give him (or to anybody else) after her marriage by deed, if she saw proper; second, that she never complained of said deed in her lifetime as a fraud upon her rights, nor has it been attacked as fraudulent since her death, either by the next friends of her children, or by them since they became of age several years ago; third, that the other party to the deeds was the father of the wife, whose right and duty it was to protect his daughter, and his grandchildren by her.

5. The case of *Lee* v. *Pearce*, 68 N. C. Rep. 76, is not directly

in point, because the relation of husband and wife is not one of those there discussed; but if it were in point, the circumstances attending the transaction here (as above) rebut any presumption of fraud, and place the burden on the other side, if fraud be alleged.

6. We suggest whether, in the absence of the charge of fraud, those representing the estate of the deceased should be required to meet a suggestion of fraud after the death of all the parties to the transaction—husband, wife and father of wife—and after all concerned have acquiesced for many years, by silence at least, in the transaction.

A. S. Merrimon and *J. C. McRae,* for the plaintiffs.

PEARSON, C. J. The last will and testament of Mrs. Julia McRae called a second codicil, is a plain, direct and well written instrument, which makes a reasonable disposition of her estate under the power set out in the marriage settlement without verbiage or circumlocution.

By it the legacy of $6,000 given absolutely to her husband is confirmed, and all the rest of her estate is given to her husband for life, and then to her children and their heirs.

The life estate having fallen in, her children now claim all the rest of the estate, save the $6,000. We concur with his Honor in the opinion that they are so entitled. The will of the 11th of February, 1846, presents no difficulty, for the last will not only makes it by implication, but contains an express clause "revoking all and every part of former wills as inconsistent herewith," showing that the good lady had become aware that she had fallen into some confusion and inconsistency in regard to the prior disposition of her estate.

The only difficulty is presented by the deed of McRae and wife to John Burgwyn the 26th of April, 1842. This

deed purports to be made in pursuance of the power given in the marriage settlement and in execution of that power; besides the life estate which the marriage settlement allows to the husband, this deed in case he survives his wife gives to him an absolute estate in one-half of the whole fund, and an absolute estate in the other half "should the said Julia not see fit to dispose of it to any other person or persons by writing in the nature of a will."

We are of the opinion that this deed, so far as it seeks to "*modify*" and change the provisions of the marriage settlement in favor of the husband and to give to him an absolute estate in the whole or in one-half of the principal of the fund, is inoperative and of no effect.

We put our opinion on two grounds. 1. The condition of the parties and their surroundings, and the words of the marriage settlement show that the purpose was to allow the wife in case there should be no issue of the marriage to appoint in favor of her brothers and sister or any of them, which right in respect to her father is expressly provided for by the deed of marriage settlement, the husband being content with the unrestricted right to dispose of "the rents, issues and profits of the whole estate during their joint lives, and during his own life if he survived. Upon this general view it would seem that the husband was not contemplated as an object of the power of appointment under the deed of marriage settlement.

The peculiar wording of the instrument adds force to this conclusion, "and if it shall so happen that the said Cameron shall out live the said Julia, then, from and *after* the *death* of *said Cameron* for such person or persons as the said Julia may by writing in the nature of a will appoint." The idea that the wife should appoint the husband as a person to take the estate from and after the death of the husband involves an absurdity, and shows that the husband was not in the contemplation of the parties to be an object

of the power of appointment, and the purpose was to enable the wife on failure of issue to provide for her brothers and sister, it being assumed that the husband was amply provided for by his right to all of the rents and profits free of account during his lifetime.

The other clause in the deed of settlement adds force to this view of its construction "or the said Julia may execute this power of appointment by deed, *in that case having the assent of the said Cameron;*" if the objects of the appointment were to be some person or persons other than the husband, this was a reasonable and prudent precaution in restraint of an excessive liberality on her part towards the members of her own family, but if it was intended to include the husband as one of the objects of the power then this veto power of the husband involves another absurdity, to wit: that of enabling him to prevent the exercise of the power of appointing by deed unless the whole estate or one-half of it should be given to him as the price of his assent.

2. This deed falls within the principle announced in *Lee* v. *Pearce*, 68 N. C. Rep. 76, that in certain fiduciary relations if there be dealing between the parties on the complaint of the party under the influence of the other, the relation raises a presumption of fraud which annuls the act unless such presumption be rebutted. "The doctrine rests on the idea not that there *is* fraud, but that there *may be* fraud, and gives an artificial effect to the relation beyond its natural tendency to produce belief. The doctrine was adopted from motives of public policy to prevent fraud as well as to redress it, and to discourage all dealing between parties standing in these fiduciary relations." On this policy *femes covert* are incapacitated from devising land under the statute 32, Henry 8th. The danger of influence by the husband to produce a devise in his favor.

In the case of *Lee* v. *Pearce*, the instances stated are trustee and *cestui que* trust, attorney and client, and guardian

and ward, but the principle applies with greater force when, as here, a fiduciary relation exists between husband and wife under a deed of marriage settlement, and in some two years after the marriage the wife in executing a power in favor of her father which was provided for in the deed of settlement is likewise inclined to modify and change the provisions of the deed of settlement so as to give the husband an absolute title to one-half of her estate in the event of his being the survivor and a contingent title to the other half. There is nothing to rebut this implication of law; on the contrary, there are circumstances which it is not necessary to set out tending to indicate it. The position taken by the counsel of the defendants on the argument that the question growing out of the fiduciary relation of the parties is not presented by the pleadings is untenable. This is "a case agreed;" all of the facts are set out, and the matters of legal inference left to be made by the Court. It was not necessary in "a case agreed" for the plaintiffs to make a direct charge of fraud against their father or to aver that he contrived by the deed to John Burgwyn the 26th of April, 1842, if allowed to take effect to pass to his second wife and her children the larger part of the estate of his first wife, who was the mother of the plaintiffs.

No error.

PER CURIAM. Judgment affirmed.

RACHEL HAGER *et al. v.* A. M. NIXON and wife *et al.*

A widow cannot, under the Constitution and Act of 1868–'69, chap. 137, sec. 10, have a homestead laid off for herself and minor children after the death of her husband when he died without leaving debts.

This was a CONTROVERSY without action, submitted to his Honor, *Logan, J.*, Judge of the Ninth Judicial District, at the last term of LINCOLN Superior Court, under the 315th sec. of the C. C. P.

The following is the statement of the controversy and the decision of the Judge upon it;

1. John Hager died in Lincoln county in September, 1872, where he resided. At his death he was seized in fee of a tract of land in said county, worth about five hundred dollars, and no other real estate.

2. A. J. Morrison administered on his estate on the 2d day of September, 1872. The time for presenting claims has not yet expired, but as far as known there are no outstanding debts against the estate.

3. The inventory of the administrator shows personal property worth about five hundred dollars.

4. John Hager in his lifetime did not apply to have his homestead allotted to him.

5. John Hager left him surviving, Rachel Hager, his widow, one of the plaintiffs, and Ellen Hager, his daughter, aged 13 years, the other plaintiff, and Rachel Nixon, wife of A. M. Nixon, one of the defendants, aged 22 years, and Jane Hager, a daughter, aged 18 years, who is the other defendant.

6. Rachel Hager, the widow, applies to have the tract of land allotted to her as a homestead for the benefit of herself and minor child, Ellen, who lives with her and for the other children if they desire it, and this application is resisted, and her right to the said homestead denied by the

defendants, A. M. Nixon and wife, and Jane Hager, who appears by A. M. Nixon, her guardian. Rachel Hager is the mother of Rachel Nixon and Jane and Ellen Hager, parties to this controversy.

It is agreed that the Judge of this Court shall thereupon hear and determine the case, and render judgment therein, as if an action presenting this point were depending before him.

W. S. BYNUM,
Attorney for plaintiffs.
D. SCHENCK,
Attorney for defendants.

May 1st, 1873.

It is the opinion of the Court that Rachel Hager is entitled to the homestead asked for, and that the same be laid off for her according to law.

G. W. LOGAN,
Judge Superior Court Ninth District.

May 3d, 1873.

From this judgment the defendants prayed an appeal, which was granted.

D. Schenck, for the defendants, contended that the policy and object of the Constitution and laws in relation to homesteads applied only to cases of persons indebted, and were never meant for the benefit of those who did not need them. He cited and commented on *Watts* v. *Leggett,* 66 N. C. Rep. 197.

W. P. Bynum, for the plaintiffs argued that the homestead was intended for the benefit of the citizen, and that therefore the Constitution and laws relating to it should be construed liberally. If a citizen was indebted to ever so small amount, say $50 or $100, he would be entitled to a homestead, and to make a distinction between so small a sum, and not being indebted at all, is not at all reasonable.

RODMAN, J. No precise definition of a homestead is given in the Constitution, and it would only mislead us if we should look into dictionaries or the laws of other States and take the definitions there given as fixing the meaning of the word as given in our laws. We must look to our own legislation alone to ascertain what it is.

It seems that the idea of a homestead which the framers of our Constitution had in mind was ownership and occupancy of land exempted from execution *obtained on any debt* during the life of the owner. (Art. X, sec. 2.) To this original conception was added a continuance of the exemption during the minority of any one of the owner's children; (sec. 3) and if he died leaving *no* children, but a widow, the exemption continued during her life. (Sec. 5.) The idea apparently was that the exemption should attach to the property of the owner, or to some part of it, during her lifetime, which implied that the property should be valued and designated, or set apart from his other property during the debtor's lifetime. We infer this from sec. 3. "The homestead after the death of *the owner thereof* shall be exempt, &c., during the minority of any one of the children." It is implied that the ancestor had been the owner of the homestead, by which, in this connection, must be meant a part of his property set apart and designated as exempt, and not merely land occupied and owned by him. So in sec. 5: "If the *owner of a homestead* die leaving a widow, &c., the word must have the same meaning."

The whole design of the Constitution, so far as it can be gathered from Art. X, was to exempt property of a debtor to a certain value from execution for debt.

No trace appears of any intention to enlarge the dower or *post obit* estate of a widow at the expense of the heirs of her husband. She was not to take the homestead of her husband except in the event of there being *no* children, either minors or adults. (Sec. 5.)

In 1869 (Acts 1868–'69, chap. 137,) the Legislature undertook to carry the provisions of the Constitution into effect, and to prescribe under what circumstances, how, and by whom, the homestead should be valued, designated and set apart for and during the time fixed by the Constitution, to wit: the minority of the youngest child.

It is argued that the Legislature did more than this. For example, by sec. 7, they allowed a homestead to be laid off to any resident of the State, whether he was a debtor under execution or not. And also that by sec. 10, they allowed the widow of any person entitled to a homestead, although it had not been laid off in his lifetime, either upon her separate action, and then successively to the minor children of the deceased owner of land, or else jointly with the minor children to have a homestead laid off to her or them from the land of the deceased, whether he left creditors who might have execution upon the land or not.

It is under this section, and under this interpretation of it that the plaintiff claims in this case.

We will note here that throughout this discussion we omit from consideration the personal property exemption altogether, and nothing said herein is intended to have any application to that, except so far as the reasoning may incidentally and necessarily affect it.

It may also be said incidentally, and not as having any direct bearing on the present case, that the language of sec. 10 is so vague that however we may interpret it in the present case, unless changed by the Legislature, a good many obscure and embarrassing questions will arise upon it. For example, must the widow join with the minor children, or may she or they sue alone without the consent and against the interest of the other? Is the widow entitled to have the homestead laid off to her as her sole property first; and *then* (after her death) may it be laid off to the minor children? If laid off to all jointly, what is the nature of the estate?

Can it be partitioned, and in the event of a disagreement, who is to control and manage the property? We do not now consider, much less undertake to decide, such questions.

The question before us, is, whether under sec. 10, the widow and minor children can jointly or separately (for we omit for the sake of the argument the consideration that in this case one minor child dissents from the claim) require a homestead to be assigned to her or them under the circumstances? The material circumstances are that the intestate owes no debts or none beyond the ability of his personal property to pay; that his land is worth $500, and that he left a widow and three children of whom two are minors, and one only of these joins in the petition.

More generally expressed the question is, can a homestead be laid off for a widow after the death of her husband, he owing no debt?

We will not question that the Legislature had the general power to increase the widow's dower or other estate in her husband's lands after his death, and to give her all his lands (not exceeding $1,000 in value) for her life to the exclusion of an immediate estate in the heirs. It is simply a question of intention.

The subject matter of the Act of 1868–'69, is the homestead as provided for and in a general sense defined by the Constitution. The purpose of a homestead law is to regulate between a debtor and his creditors, and to affect other interests incidentally only, and to the least possible degree consistent with its main purpose.

The present Act does not profess to deal with any other subject but homesteads. To undertake in it the regulation of the respective estates of a widow and the heirs when there were no debts, would be an abrupt and unnatural departure from the subject in hand. We think the Legislature still had in mind the idea of a homestead as property needing exemption, and that sec. 10 applies only where there

are creditors of the deceased owner. It may be laid off as a protection against creditors, but it is valid and available against them only. As between the widow and the heirs, the estate goes under the general laws. It is asked, suppose there be a small debt, can the homestead then be laid off? It can. But if the heirs procure the creditor to release and extinguish the debt, the homestead being no longer necessary, can have no existence. It is possible that the Act under this or any other interpretation may lead to unexpected results. But that is only what happens in the case of all experimental legislation, as that on homesteads confessedly is. Our duty is simply to ascertain the intent and meaning of the Act; if it shall turn out to need amendment, the Legislature can provide the remedy.

Judgment below reversed, and complaint dismissed.

PER CURIAM. Judgment reversed, and suit dismissed.

N. M. WILSON *v.* S. S. PETERSON.

The disqualifications of the persons who hold an election for State and county officers will not affect the validity of the election. Such persons are *de facto* officers, whose acts are valid as to third persons, and cannot be collaterally impeached.

In the absence of fraud it is not material to the validity of an election that the persons appointed judges to hold it electioneered, or were absent from their posts at different times during the day.

Under the Act of 1871-'72, chap. 185, sec. 16, (Battle's Revisal, chap. 52, sec. 18,) it is unlawful for a voter to vote for different county officers on separate tickets; but he is not bound to vote for more of the candidates for the different officers than he chooses, and if a ticket be found in the ballot box containing a vote for only one of the proposed officers, it must be counted for him, unless it can be shown that the person who voted it voted also for other candidates on another ticket, in which latter case his tickets must all be thrown out.

If there be two candidates for different offices having the same name, and a ticket be found in the ballot box having that name and no other on it, it may be proved by intrinsic evidence for which of the candidates it was given.

This was an ACTION brought in the name of the State, with the consent of the Attorney General, on the information of the plaintiff against the defendant, to inquire by what authority the defendant usurped and held the office of sheriff of Yancey county. It came on for trial at the last term of YANCEY Superior Court before his Honor, *Henry, J.*, when a jury was dispensed with by the consent of the parties, and the Judge found the facts, and thereupon decided the law in favor of the defendant, and from his judgment the plaintiff appealed.

The facts as found by the Judge which raised the questions decided by this Court are fully and clearly stated in the opinion.

Malone and *McCorkle & Bailey*, for the plaintiff.
No counsel for the defendant in this Court.

RODMAN, J. An election for sheriff and other county officers for the county of Yancey was held in 1872. The relator and the defendant were candidates for the office of sheriff. The judges of the polls returned that the relator had received 434 votes and the defendant 428. The County Commissioners were of opinion that seven or more of the votes returned for the relator were illegal and should not be counted, and declared the defendant elected, and inducted him into office. Upon the trial of this action before his Honor, the District Judge, he was of a like opinion, and the relator appealed to this Court.

1. The first objection to the votes returned for the relator respected the whole vote given at Township No. 1. One of the judges was not a registered voter, nor was he qualified to vote, not having resided within the State for the twelve months next preceding the election. Also "the officer appointed by the sheriff to open and protect the polls was a boy under twenty-one years of age." We are at a loss to know

what officer is here alluded to, as the only officers mentioned in the Act 1871–'72, chap. 185, are the four judges of the election and the registrar of the township. It is not material, however. For we think that the validity of the vote is not affected by the disqualification of the officers who held the election. They were *de facto* officers, whose acts are valid as to third persons, and cannot be collaterally impeached. Neither in the absence of all proof of fraud is it material that the judges electioneered or were absent at different times during the day. We think his Honor errer in his conclusion on this point.

2. His Honor finds "that at No. 7 Township several tickets were handed in folded up and unrolled and deposited in the box, and that near a dozen or at least six votes were counted for N. M. Wilson (the relator) which had been deposited on a separate piece of paper with no other name upon it, and the count of the poll warrants the conclusion that the voters casting them voted also for other county candidates in the same box."

We do not understand his Honor to find that the number of votes for sheriff, as shown by the tickets, exceeded the number of votes on the list; but merely that an inspection of the tickets in the box showed that some voters (six) had voted for some or all of the county officers except sheriff on one ticket, and for sheriff on another ticket. His Honor was of opinion that under section 16 of the Act of 1871–'72, which requires the names of all the county officers voted for to be on one ticket, these six votes for the relator as sheriff were illegal and should not be counted, and therefore deducted them from his returned vote.

Certainly it is the duty of the judges of election to permit no voter to vote more than one ticket for county officers. The object of the law was to prevent multiplied voting for the same office, which, if the judges performed their duty, would be impossible. If the judges inadvertently or igno-

rantly permit A B to vote for sheriff on one ticket and for some other officers (County Commissioners for example) on another, both the tickets voted by A B should be rejected on the count on the same principle upon which they should have been rejected when they were offered. But suppose this voting for several officers on separate tickets escapes notice at the time, and it is discovered on examination of the box that there are tickets for sheriff only, and tickets for County Commissioners only, and it is not known that any two of these tickets were voted by one person. In such case the question as to how the votes shall be treated becomes a very different one. No voter is required to vote for candidates for all the offices to be filled, or what may be called a full ticket. He may vote for sheriff only or for County Commissioners only, if he so please. It cannot be known without extrinsic evidence that any one of these tickets is unlawful, and it is not reasonable to reject them all on the bare possibility that they may be so, or on the certainty that some of them are so, unless it can be shown which of them are. In the present case it is possible that the six voters who deposited their tickets for Wilson for sheriff did not deposit any other ticket, in which case their votes were regular and lawful. It is not more probable that they voted two tickets than that other voters did. Before a vote can be rejected for illegality, the illegality must be attached to it by at least probable proof. We think his Honor erred in rejecting these votes.

3. The relator being a candidate for sheriff and a man named Wilson a candidate for County Commissioner, there were found in the box at Township No. 7 three tickets with the word "Wilson" written on them, and nothing else. As the matter stood these votes could not have been counted for any one; they were as void as so many pieces of blank paper. But it was proved for the relator, and his Honor so finds,

that one of these tickets was intended by the voter to be for the relator for sheriff.

It seems on the verge of the law to permit such a ticket, presenting what in conveyancing would be called a *patent* ambiguity, to be aided by external proof. But we believe the general practice in such cases has been to allow it, and we accordingly hold the relator entitled to that vote.

The judgment below is reversed, and judgment is given here for the relator.

PER CURIAM. Judgment reversed, and judgment in this Court for plaintiff.

JORDAN C. PHILLIPS *v.* D. A. DAVIS *et al.*

Where the premises in a deed of bargain and sale omitted the word heirs in the limitation of the estate to the bargainee, but the habendum and warranty clauses were as follows: To have and to hold free and clear from all just claims, I, the said J. B., doth warrant and defend the right and title of the said tract of land, to have and to hold free and clear from me and my heirs, and the claims of any other persons, unto him the said G. P., his heirs and assigns: *It was held*, That the clauses were not a mere warranty to the bargainee and heirs, but were in effect, in addition to the warranty, a habendum to him and his heirs, thus conveying to him an estate in fee simple.

Where, upon the sale of land, a bond to make title upon the payment of the the purchase money was given to the purchaser, and afterwards upon the assignment of his interest, the money was paid by the assignee: *It was held*, That he, before a deed was executed to him had such an unmixed trust as was liable to be sold under execution. Battle's Revisal, chap. 44, sec. 5.

Where, under the former practice, it was necessary to sell the land of an intestate to pay his debts, after the plea of fully administered had been found in favor of the administrator, the record showed an order for a *sci. fa.* to be issued to the "heirs" of the intestate without naming them, but showed that they were named in the order appointing a guardian *ad litem*, and then, though the fact that a *sci. fa.* had issued was not stated, it appeared that there was an entry of judgment according to *sci. fa*, and thereupon the land was condemned and ordered to be sold: *It was held*, That these proceedings were sufficient to uphold the sale of the land made under them.

PHILLIPS *v.* DAVIS *et al.*

This was a CIVIL ACTION to recover real property tried at the last term of the Superior Court of ASHE county, before his Honor, *Mitchell, J.*, when the defendants, under the ruling of the Court, had a judgment, from which the plaintiffs appealed. The facts of the case are sufficiently stated in the opinion of the Court.

W. P. Caldwell and *Armfield*, for the plaintiff.
Folk, Fowle and *Snow*, for the defendants.

READE, J. In 1836, George Phillips, under whom the *feme* plaintiff claims as heirs, went into the possession of the land in controversy and continued in possession up to the time of his death in 1843. So that if said Phillips had title it descended to the *feme* plaintiff, and she had title. So the first question is did George Phillips have title? His title to the 160 acre tract was a deed from James Blevins, in regard to which the question is, whether it conveys a fee simple or a life estate only. The deed is inartificially drawn. The premises are to "George Phillips," omitting the word heirs, "To have and to hold free and clear from all just claims whatsoever." And then follows the warranty, and in the same sentence there is a continuation as follows: "To have and to hold free and clear from me and my heirs and the claim or claims of any other person or persons whatsoever, unto him the said George Phillips, his heirs and assigns forever." This would seem to be not a mere warranty to him and to his heirs, which would have no effect to enlarge the estate, but by transposing the sentence it is the *habendum* itself to him and his heirs, and makes a fee simple. But if this were not so, then it would be a case for reforming the instrument, so as to make the estate a fee simple, which the Court under its equity jurisdiction has the power to do.

His title to the 275 acre tract was a sale by one Ballow to

said Blevins with a bond for title when the money should be paid, and an assignment of said bond for title by Blevins to Phillips, and a payment of the money by Phillips to Blevins who paid the same Ballow. It is not pretended that this passed the title to Phillips, but that it gave him the equity to have a specific performance of the contract, which the Court under its equity jurisdiction has the power to compel, and whenever necessary, to consider as done what ought to have been done. So that the case may be considered as if the title was complete in Phillips. It was a pure unmixed trust, in which he had the right to call for the entire legal estate, and it was the subject of sale under execution under Act of 1812. This disposes of the first objection on the part of the plaintiff—that George Phillips had no interest in the land which could be sold by execution.

Supposing that to be so, then the plaintiff says that the proceedings under which the land was sold and bought by the person under whom defendant, Davis, claims, were irregular and void.

The proceedings were as follows: The creditors of George Phillips after his death in 1843, sued his administrator, and the plea of fully administered was found for the administrator. As the law then was, in order to subject the land to the payment of the debts of the deceased, it was necessary to issue a *sci. fa.* to the heirs-at-law to show cause why the land should not be sold. The heir in this case was an infant, and the clerk of the Court was appointed guardian *ad litem*, and a *sci. fa.* was ordered. It does not appear whether in *fact* a *sci. fa.* actually issued, or whether the clerk upon whom the *sci. fa.* would have been served, waived the *sci. fa.*, the only purpose of which was to give him notice, which he already had. But at the next term the record is, "judgment according to *sci. fa.*," and then the lands that descended to the heir was condemned and a sale ordered and made by the sheriff and bought by the person under whom defendant

claims. The record does not direct a *sci. fa.* against the heirs of Phillips by their individual names, but simply against the heirs, but the order in the cause appointing the clerk guardian *ad litem*, does give the names of the heirs.

In the first place we think it is to be assumed from what appears upon the record that a *sci. fa.* did issue. "Judgment according to *sci. fa.*" must mean that there was a *sci. fa.* And again, the object of the *sci. fa.* being *notice* to the heirs, to be served on the guardian in this case, who was the clerk of the Court and had notice, it would be assumed if necessary that he waived formal notice. And it would seem that this would be sufficient.

In the second place it sufficiently appears from the record that the heirs were made parties by their individual names, as the order in the cause appointing their guardian does set out their names and directs *sci. fa.* to them.

There is no error.

PER CURIAM. Judgment affirmed.

Den on dem of CHARLES MOORE *v.* N. THOMPSON *et al.*

The operations of building a shed, quarrying rock, erecting a lime-kiln and cutting wood to burn it for the purpose of making lime on the land in dispute, continued uninterruptly for more than seven years, constitute such a possession as will give a good tittle to the person claiming adversely under it.

The case of *Loftin* v. *Cobb*, 1 Jones 406, cited and approved.

This was an ACTION OF EJECTMENT commenced before the new Constitution, tried before his Honor, *Henry, J.*, upon the report of a referee at the last term of the Superior Court of HENDERSON county. The plaintiff had a judgment, and the defendants appealed. The facts are sufficiently stated in the opinion of the Court.

Merrimon, Fuller & Ashe, for defendants.
McCorkle & Bailey, for the plaintiff.

SETTLE, J. The plaintiff claims title to the lands in controversy under a grant from the State issued to John Miller in 1834, and it is admitted that he must recover, unless the defendants who claim under a grant from the State issued to George and Ephram Clayton in 1836 are protected by a peaceble, open, uninterrupted and adverse possession of seven years.

The writ issued on the 10th of March, 1860. The facts (as found by the referee and stated in his award) are that in the month of January, 1853, the defendants put Winfield Fletcher in possession of the premises in dispute in order that he might test a vein of rock on the premises and ascertain whether or not it was a lime vein, and if it proved to be lime to work it; that in January, 1855, he built a shed, quarried rock, built a kiln and cut wood to burn it on the land in dispute; that in the month of February, 1853, he burned the kiln which yielded about five hundred bushels of lime, and having tested the quarry and ascertained it to be lime, he cut wood and quarried rock on the premises for another kiln during the following Spring and Summer, leaving his tools in his shed during his absence until the Fall of 1853, when he took a written leave from the Claytons, which had been promised in January, 1853, and erected permanent improvements, and that the defendants have been in possession ever since. The authorities on this subject are collected and revised with care in *Loftin* v. *Cobb*, Jones 406, and we deduce from them the principle that the possession which will ripen into a title must be indicated by such acts as are sufficient to notify mankind that the party in possession is claiming the land as his own, and must be so repeated as to show that they are done in the character of owner and not of an occasional trespasser.

The leading idea is that there shall be notice to the world, so that any one claiming adversely may have an opportunity to assert his title. The acts of ownership in this case were of a nature calculated to attract more than ordinary notice. The discovery of a lime quarry and the working of it, like mining operations, from the very nature of things, would be discussed throughout the neighborhood, and attract, more attention than the ordinary operations of the farm, and the acts set forth were so connected and continuous as to constitute uninterrupted possession in contemplation of law.

There is error.

Let judgment be entered here for the defendants.

PER CURIAM. Judgment reversed and judgment for defendants.

J. L. CARSON *v.* L. A. MILLS.

When the complaint in an action for libel says the defendant "published concerning the plaintiff in a newspaper, &c., a certain article containing the false and defamatory matter following," &c., it sufficiently avers that the defamatory matter was concerning the plaintiff. The article—which is the whole article and every part of it—is averred to be concerning the plaintiff, and as the whole includes all its parts, the defamatory part must be concerning the plaintiff.

An article in a newspaper containing the following words: "No! counsellors and friends of the Adairs, (who had been convicted of murder,) I blame not an attorney or attorneys for taking fees and defending the most guilty criminals as far as the law and respectable evidence will justify in giving them a fair trial, but after that, going to the streets among people, proclaiming their innocence, trying to influence public opinion, hiring or otherwise procuring false-hearted and unprincipled scoundrels to purjure themselves by giving affidavits and implicating other innocent persons to obtain the pardon or release of the Adairs. Your slanderous and false charges against innocent men must fall to the ground, but they show your unprincipled course," is apparently libelous.

This was a CIVIL ACTION for libel, in which the complaint alleged as follows:

1. That on the 2d day of July, 1872, the defendant maliciously composed and published concerning the plaintiff in a newspaper called the *Western Vindicator*, published at Rutherfordton, in Rutherford county, a certain article containing the false and defamatory matter following, viz: "I have learned that the late executed Adairs at the time of their execution implicated several young men of this county, who are absent, my son among the rest, in that foul and most inhuman murder of the Weston family. Now every one of these young men, I have no doubt, can prove by the best of witnesses, both white and colored, of their whereabouts at the very hour when that fiendish murder was committed. The counsel and friends of the Adairs have caused an affidavit from Govan Adair to be taken of the same effect, to be read at the trial of the other Adairs, in order to screen the most guilty, in my opinion, among them. No, counsellors and friends of the Adairs, I blame not an attorney or attorneys for taking fees and defending the most guilty criminal as far as the law and most respectable evidence will justify in giving them a fair trial, but after that, going to the streets among people, proclaiming their innocence, trying to influence public opinion, hiring or otherwise procuring false-hearted and unprincipled scoundrels to perjure themselves by giving affidavits and implicating other innocent persons to obtain the pardon or release of the Adairs. Your slanderous affidavits and false charges against innocent men must fall to the ground, but they show your unprincipled course. L. A. MILLS."

2. That by means of the said publication the plaintiff was injured in his reputation to his damage five thousand dollars. Therefore plaintiff claims judgment for five thousand dollars and costs of suit.

At the last term of the Superior Court of RUTHERFORD county the defendant demurred to the complaint. 1st. In that the complaint is too vague, indefinite and uncertain in

statement and charge to warrant a judgment against the defendant. 2d. In that the matters as charged are not in themselves actionable or libelous, and the complaint does not set forth and allege any loss or damage to the plaintiff, and how sustained.

His Honor, *Logan, J.*, overruled the demurrer, and ordered the defendant to answer, and he appealed from the order.

W. P. Bynum, for the defendant.
Argo & Harris and *Busbee & Busbee*, for the plaintiff.

RODMAN, J. The ingenious argument of the counsel for the defendant has failed to satisfy us that the complaint is defective. C. C. P., sec. 124 was intended to do away with the refined and subtle distinctions which had found a place in the law of pleading in actions for libel.

When the complaint says that the defendant "published concerning the plaintiff in a newspaper, &c., a certain article containing the false and defamatory matter following," &c., it sufficiently avers that the defamatory matter was concerning the plaintiff. The article—which is the whole article and every part of it—is averred to be concerning the plaintiff, and as the whole includes all its parts, the defamatory part must be concerning the plaintiff.

We think the words set forth are apparently libelous.

Judgment affirmed, and case remanded to be proceeded in, &c.

Let this opinion be certified.

PER CURIAM. Judgment affirmed.

STEPHEN W. ISLER *v.* ISAAC BROWN *et al.*

When an appeal is taken from the final judgment of the Superior to the Supreme Court, the whole case is taken up to the latter Court, and if the judgment be affirmed, remains there, so that the Judge of the Superior Court has no power to set aside the judgment upon the ground of mistake, &c., under the 133 section of the C. C. P.

This was an APPLICATION under the C. C. P., sec. 133, made to the Judge of the Superior Court of JONES county, to set aside a judgment between the parties upon the ground that it had been obtained by a mistake. His Honor, *Clarke, J.*, made order to set the judgment aside and granted a new trial at the last term of the Court, and the plaintiff appealed. The case is sufficiently stated in the opinion of the Court.

Green, for the plaintiff.
Haughton and *Battle & Son*, for the defendants.

READE, J. At a former term of the Court below there had been judgment against the plaintiff, and he appealed to this Court, and at —— Term of this Court there was a new trial granted; and at Spring Term, 1872, of the Court below there was judgment for plaintiff, and the defendant appealed; and at the June Term of this Court the judgment was affimed, and judgment here for plaintiff; 67 N. C. Rep. 175.

At Spring Term, 1873, of the Court below, the defendant moved to vacate the judgment rendered against him at Spring Term, 1872, upon the ground of mistake under C. C. P. sec. 133, and his Honor vacated the judgment and granted a new trial, from which the plaintiff appealed to this Court.

In this there was error. There was no judgment below which his Honor could vacate. The appeal to this Court vacated the judgment below, and then there was judgment in this Court at June Term, 1872, in favor of the plaintiff.

There being no judgment below to vacate, and his Honor having no power to vacate the judgment of this Court, it follows that the order below vacating the judgment and granting a new trial was erroneous.

This will be certified.

PER CURIAM. Order reversed.

L. D. CHILDS *et al. v.* S. N. MARTIN *et al.*

Where two or more Courts have equal and concurrent jurisdiction of a case, that Court in which suit is first brought acquires jurisdiction of it, which excludes the jurisdiction of the other Courts.

The persons who allege that the judgment had been obtained in the first action by a fraudulent combination and contrivance, instead of bringing a second action, in another Court, ought to have made themselves parties to the first action and to have asked as "a motion in the cause" to have the judgment reheard, and in the meantime for a supersedias, &c.

This was a CIVIL ACTION brought to the Superior Court of the county of MECKLENBURG, in which the plaintiffs complained of a judgment which the defendants had obtained in the Superior Court of New Hanover county by a fraudulent combination and contrivance, and they prayed for an injunction against it. The case coming on to be heard before his Honor, *Logan, J.*, he made an order granting the injunction, and the defendants appealed.

Strange and *W. P. Bynum*, for the defendants.
Busbee & Busbee, and *H. W. Guion*, for the plaintiffs.

PEARSON, C. J. "The rule is where there are Courts of equal and concurrent jurisdiction, the Court posseses the case in which jurisdiction first attaches." *Merrill* v. *Lake*, 16 Ohio, 373.

This rule is so consonant with reason, and the necessity for such a rule in order to prevent confusion and conflict of jurisdiction is so obvious, that further comment is unnecessary, and we will simply refer as a matter, within the knowledge of every member of the profession, to the deplorable condition of things in the State of New York, resulting from a violation of this rule exhibited in the newspapers under the title of the "Erie Row."

The Judge of the Superior Court of the county of New Hanover was possessed of the case. Suppose the judgment before him was obtained by a fraudulent combination and contrivance between the bondholders and the President and directors of the Wilmington, Charlotte and Rutherford Railroad Company, the plaintiffs in this action were at liberty to make themselves parties to the action in New Hanover, and to ask as "a motion in the cause" to have the judgment reheard, and in the meantime for a *supersedias* of the order of sale.

Instead of pursuing this regular and orderly mode of proceeding, the plaintiffs in this action adopt the erratic and unprecedented course (except that exhibited in the "Erie Row") of bringing another action before the Judge of the Superior Court of the county of Mecklenburg, and actually obtain an injunction not only against the parties to the action in the Superior Court of New Hanover but against the commissioners appointed by that Court, and ordered to make sale, and the result is this, if the commissioners obey the order of the Superior Court of New Hanover they are in contempt of the Superior Court of Mecklenburg, and if they obey the order of the latter Court, there is a contempt in regard to the former. "*Reductio ad absurdum.*"

The order appealed from is reversed, as improvidently granted, and the action is dismissed for want of jurisdiction.

This opinion will be certified.

PER CURIAM. Order reversed and action dismissed.

STATE on rel. of SILAS N. MARTIN *et al. v.* WILLIAM SLOAN *et al.*

As a general rule the Supreme Court will not decide a case where nothing but the question of costs is involved; but if some important substantial right be involved an exception will be made and an opinion given.

In an application for an injunction, an affidavit for it made by a person not a party, that what he has stated in the complaint as of own knowledge is true, &c., is insufficient, because not being a party he has stated nothing.

A bond for $5,000 given by a party upon obtaining an injunction, and one for $10,000 given by a receiver upon being appointed such, are palpably insufficient where several hundred thousand dollars are involved in the issue.

This was a CIVIL ACTION in which an injunction was applied for and granted by his Honor, *Logan, J.*, at MECKLENBURG, in December, 1870, and which was brought to the Supreme Court upon the appeal of the defendants. The case with reference to the points decided will sufficiently appear in the opinion of the Court.

Guion, for the defendants.

W. P. Bynum, Dowd and *Attorney General Hargrove* for the plaintiffs.

READE, J. It was stated at the Bar that the Wilmington, Charlotte and Rutherford Railroad having been sold, neither party has any interest in the case except as to cost. When that is the case we are not in the habit of deciding the case. After the emancipation of the slaves we declined to try any case involving title to a slave. And we put the cases off the docket. Suppose parties at the beginning of a suit and in the pleadings were to admit that they had no rights involved, but that they would carry on the suit to see which could make the other pay costs, of course we would not try it. Upon the supposition, however, that there is in this case some substantial right to be litigated, we have no hesitation in saying that the granting the injunction and the appointment of a receiver were improvident. The affidavit

of Fremont is wholly insufficient. He swears that what he has stated in the complaint as of his own knowledge is true, and what he has stated not of his own knowledge he believes to be true, whereas he has stated nothing at all, not being one of the plaintiffs.

And again, the bond for the injunction, $5,000, and the bond of the receiver, $10,000, were palpably insufficient. There were probably several hundred thousand dollars involved.

There is error in the orders appealed from. Let this be certified.

PER CURIAM. Order reversed.

B. C. McMILLAN, Adm'r., v. NEILL McNEILL et al.

Under the former system if an equity cause was set down for hearing upon the bill, answer, proofs, reports, accounts, exceptions, &c., the Chancellor might himself find the facts and pronounce the law thereupon, and was not bound to adopt the facts reported by the clerk and master, nor to confirm his report, though no exceptions were filed thereto.

This was a SUIT IN EQUITY, commenced under the former system, in which a decree was made by *Buxton, J.*, at the Spring Term, 1873, of the Superior Court of ROBESON county, from which there was an appeal by the defendant. The case is sufficiently stated in the opinion of the Court.

W. McL. McKay and *N. McLean*, for the defendant.
Leitch and *N. A. McLean*, for the plaintiffs.

READE, J. This was an original bill in equity commenced before the Code, and governed by the old rules of practice.

It was referred to the clerk to take an account of the matters in controversy and report. The clerk reported a balance against the defendant of $168. The defendant filed exceptions, some of which were sustained, and it was referred again under instructions. The second report found the balance in favor of the defendant some $800. And no exceptions were filed by the plaintiffs. The usual course in such cases is to confirm the report and decree accordingly. The case was, however, set down for hearing upon the bill, answer, proofs, reports, accounts, exceptions, &c., taken in the cause, and the Court declares that there is nothing due either way to either party; and after declaring the rights of the parties, and how their business shall be conducted in the future, directs that each party shall pay half the cost. And from this the defendant appeals.

The question is, whether his Honor had the power to find and declare the facts and decide the law, or was he obliged to adopt the facts reported by the clerk, and to confirm his report in the absence of exceptions?

Under the former equity practice the Chancellor finds the facts and declares the law. "For the working out of details" he might refer to the master, or submit issues to a jury. But this was not to *conclude*, but to *aid* him. And the whole case was still under his control, with the little or much aid thus afforded by the report. Daniel's Ch. Pr.

We see no error in his Honor's finding of the facts or in his conclusions of law.

There is no error.

PER CURIAM. Decree affirmed.

H. P. WHITEHURST, Trustee of S. E. COHEN v. ELIZA B. GREEN, Ex'r.

A perpetual injunction against issuing an execution on a judgment at law, granted upon *motion* and *affidavits* is erroneous. It is not in accordance with any allowable mode of proceeding under the old system or the new.

This was a MOTION for a perpetual injunction against the issuing of an execution on a judgment at law, heard upon affidavits by his Honor, *Watts, J.*, at the last Superior Court of CRAVEN county.

The judgment had been obtained in a suit commenced before the adoption of the C. C. P., upon a bond given by the defendant's testator to one Adolphus Cohen, and by him assigned to the plaintiff. On the trial of that suit the defendant's counsel contended that the bond was given for the purchase of a lot of land which the plaintiff's assignor had contracted to sell to the defendant's testator, and to which the obligee in the bond had no title. The plaintiff's counsel objected to the evidence offered to prove the defense, saying that it was of an equitable nature, and could not be admitted in a trial at law under the old practice. The Judge, however, admitted the evidence, but the jury found a verdict for the piaintiff, upon which he had a judgment.

The motion for a perpetual injunction against this judgment founded upon affidavits, was granted by his Honor, and the plaintiff appealed.

No counsel appeared for the plaintiff in this Court.
Haughton, for the defendant.

PEARSON, C. J. This case presents errors, irregularities and informalities such as we had not supposed could occur in January, 1873—after the profession were presumed to have become somewhat familiar with the workings of the C. C. P.

The action was commenced before the adoption of the

C. C. P., and as an existing suit was to be conducted up to final judgment according to the old mode of procedure, consequently his Honor erred in holding "that any equitable defense was admissible to defeat the action on the note." But this error is corrected by the verdict in favor of the plaintiff for the amount of the note and interest.

We assume from the subsequent action that the plaintiff had judgment on the verdict, and we assume also that the amendment offered by the counsel of defendant, to the statement of the case made out by the counsel of the plaintiff, was accepted; but *there is no entry to that effect*, and we must remind the gentlemen of the Bar that such want of attention to the formal mode of procedure is the source of much perplexity and embarrassment to this Court. Counsel are paid for this labor, and ought to devote it to the preparation of their cases.

Making an order, decree or judgment, by whatever name it may be called, for a *perpetual injunction* against issuing an execution on a judgment at law, heard upon a *motion* and *affidavits*, is a proceeding without precedent in the annals of judicial procedure in any Court claiming an English original.

Under the old system the course was to file an original bill in equity praying for a decree that the contract of purchase be rescinded, on the ground that the vendor could not make title, and in the meantime for an injuction until the final hearing.

Under C. C. P. the course is a civil action commenced by summons and a complaint demanding judgment that the contract of purchase be rescinded, and for a restraining order and an injunction on notice until the final hearing.

Our surprise that the learned Judge should have granted a *perpetual injunction* on motions and affidavits, is only equaled by our surprise that the learned counsel should have made the motion. We are unable to account for a

proceeding so irregular and unprecedented except on the supposition that as the action on the note was under the old mode of procedure, his Honor and the counsel took it for granted that in this state of *transition* all forms might be disregarded. It may be that the order for a perpetual injunction meets the merits of the case, but that cannot warrant a departure from all forms and precedent, either under the old or the new mode of procedure.

Order of the Superior Court granting the motion for a perpetual injunction reversed.

This will be certified to the end that a motion for a perpetual injunction be refused without prejudice to the right of the defendant to demand a rescission of the contract of purchase according to the course of the Court, and in the meantime for a restraining order and injunction on notice.

Error.

PER CURIAM. Judgment reversed.

SETZER and RHODES, Adm'rs v. J. G. LEWIS, Adm'r, *et al.*

An action commenced before the adoption of the C. C. P. in the name of an administrator *de bonis non* on a bond given to the first administrator as such, may be sustained, although such administrator *de bonis non* has paid it over to one of the next of kin of the intestate in a settlement of the estate with him, and has taken his receipt therefor.

The case of *Eure* v. *Eure*, 3 Dev. 206, cited and approved.

This was an ACTION OF DEBT brought before the adoption of the C. C. P., and tried at the Spring Term, 1873, of the Superior Court of the county of GASTON, before his Honor, *Logan, J.*

On the trial the plaintiffs had a verdict and judgment, and the defendants appealed. The facts of the case are sufficiently stated in the opinion of the Court.

W. P. Bynum and *Schenck*, for the defendants.
Busbee & Busbee and *J. H. Wilson*, for the plaintiffs.

SETTLE, J. This action was brought in 1867, before the adoption of the Code of Civil Procedure, by Sitzer and Rhodes, the administrators *de bonis non* of Peter Rhyne, upon a bond given to Daniel Rhyne, deceased, as executor of Peter Rhyne.

It appears from the record that Setzer and Rhodes, into whose hands the bond had fallen upon the death of Daniel Rhyne, the executor, had delivered the same, without indorsement to Barbara Froneberger, a daughter and distributee of Peter Rhyne, before this suit was brought as a payment of her distributive share of said Peter Rhyne's estate, and took her receipt for the amount thereof as a voucher, which they used in the settlement of the estate of Peter Rhyne.

The defendants contends that the bond sued on having been distributed as cash, it amounted to an administration thereof so far as Peter Rhyne's estate is concerned, and that therefore the plaintiffs had no right to bring the action.

We do not regard the question as an open one. It is fully discussed in *Eure* v. *Eure*, 3 Dev. 206, and decided adversely to the views of the defendants. It is true there is a very able dissenting opinion in that case by RUFFIN, J., but we are not inclined to disturb a decision which is in consonance with reason, and has met, as we believe, with the approbation of the profession. The counsel for the defendants attempted to distinguish this case from *Eure* v. *Eure*, *supra.*, upon the ground that this bond had been administered, and no longer constituted a part of Peter Rhyne's estate.

It is true that the administrators *de bonis non* had passed the bond to Barbara Froneberger and taken her receipt for the same as cash, and the administrators *de bonis non* became trustees for her, and there was a tacit condition annexed to

the transfer that Barbara Froneberger should have the use of their names for the collection of the same.

They had received the benefit of her receipt in the settlement of the estate of Peter Rhyne, and on the other hand she was to have the use of their names to enforce this evidence of a debt which she had received from them.

Had they attempted to dismiss the suit, a Court of Equity would have enjoined them from so doing, and compelled them to allow the use of their names.

A further discussion of the matter and a review of the authorities *pro* and *con* would be of no practical use, since the Code of Civil Proceedure, title V, has declared who shall be the parties to every civil action.

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

PER CURIAM. Judgment affirmed.

JAMES F. LATHAM *v.* NOAH BELL.

Where an administrator wastes the personal assets and does not apply them to the payment of the debts of his intestate, and then is removed for misconduct and another person is appointed administrator *de bonis non*, the latter must sue on the bond of the former administrator, if the sureties thereon are solvent, before he can apply by petition for the sale of the land of the intestate.

The case of *Badger* v. *Jones*, 66 N. C. Rep. 305, cited and approved

This was a PETITION by an administrator *de bonis non* to sell real estate for the payment of the debts of the intestate. The defendant, Noah Bell, was made a party and opposed the petition, and the case was brought in a regular manner before his Honor, *Moore, J.*, at the Spring Term, 1873, of the Superior Court of BEAUFORT county, where the following was submitted to him as a case agreed:

In the year 1869 Aquilla Davis died intestate, leaving real property, and also personal property sufficient to pay his debts. On the 7th December, 1860, R. D. Davis was appointed administrator and took possession of the personal property sufficient to pay the debts of his intestate as was shown by an inventory returned to the Probate Court, on 4th day of January, 1871. R. D. Davis wasted the personal property by not applying it to the payment of debts. He is also sole heir and distributee of Aquilla Davis, and to him descended the land described in the petition, and he within two years after the death of his intestate and ancestor, to-wit: on the 7th day of January, 1870, sold the land to the defendant, Noah Bell for valuable consideration, the sale being *bona fide* and for value. R. D. Davis, gave bond upon taken out letters of administration. On the 16th of January, 1871, the said Davis was removed from his office of administrator for waste and mismanagement, and the petitioner was appointed administrator *de bonis non* of the said intestate, and then filed this petition to sell the land for the purpose of paying the intestate's debts. His Honor decided that the point raised by the interpleader, Noah Bell, viz: that the plaintiff should have first proceeded on the bond of the former administrator, or have alleged its insolvency, before the land could be subjected to the payment of the intestate's debts was good, and dismissed the petition at the costs of the plaintiff, from which judgment he appealed.

Warren & Carter, for the plaintiff.

Satterthwaite & Brown, for the defendant.

READE, J. In *Badger* v. *Jones & Watson*, 65 N. C. Rep. 305, it is said that "for *devastavit* on the part of the previous administrator, the administrator *de bonis non* ought to recover the value of the goods and effects wasted by an action on the bond of his predecessor." That is decisive of this

case. It is true that in the case cited the administrator *de bonis non* was allowed to sell the land without a suit upon the bond for the *devastavit* of personal property; but that was put expressly on the ground that the sureties to the bond were insolvent, which is not alleged in the case before us.

There is no error.

PER CURIAM. Judgment affirmed.

WILSON & MILLER *v.* J. W. DERR.

The rule that when a contract has been reduced to writing, no evidence of its contents is admissible except the writing itself, is confined to contracts, and does not extend to receipts on the payment of money, unless they contain something more, so as to amount to contracts.

If a plaintiff offer in evidence a receipt which he had given to the defendant, and which he had obtained from the defendant upon a notice to him to produce it on the trial, he is not hereby precluded from showing that the receipt had the words "in full" in it when it was given, but that they had been since obliterated.

The cases of *Smith* v. *Brown*, 3 Hawks, 580; *Matthis* v. *Matthis*, 3 Dev. & Bat., 60; *Dunn* v. *Clements*, 7 Jones, 58; *Spencer* v. *White*, 1 Ired., 236, and *Stith* v. *Lockabill*, 68 N. C. Rep. 227, cited and approved.

This was a CIVIL ACTION to enforce a mechanics' lien, tried at the Spring Term, 1873, of the Superior Court of LINCOLN county, before his Honor, *Logan, J.*

On the trial, the plaintiff had a verdict and judgment, and the defendant appealed. The case is sufficiently stated in the opinion of the Court.

W. P. Bynum, for the defendant, made the following points:

1. The construction of a written contract is for the Court, and not for the jury. *Brown* v. *Hatton*, 9 Ired., 327; *Fesper-*

man v. *Parker*, 10 Ired., 23; *Sizemore* v. *Morrow*, 6 Ired., 53; *Collins* v. *Benbury*, 5 Ired., 118.

2. If a party introduce in evidence a writing to claim a benefit or advantage under it, he cannot impeach it any more than he can his own witness. Here he makes the writing his witness, and then introduces other witnesses to prove that his own witness has been bribed, or is committing perjury. 1 Stark. on Ev. 147; 1 Greenl. on Ev. sec. 276, 277, note to sec. 280. If a witness be examined upon a collateral matter, evidence will not be admitted to disprove it in order to discredit the witness. *United States* v. *White*, 5 Cr. C. C. 38, (Bright's Dig. p. 409.)

3. Whether there was spoliation of a deposition offered in evidence is a question for the Court to be decided on inspection, and it is error to submit the same to the jury. *Stith* v. *Lockabill*, 68 N. C. Rep. 227.

Schenck, for the plaintiffs.

RODMAN, J. The plaintiffs complain that defendant was indebted to them in $407.12, due the 1st of December, 1871, for work done, that defendant paid them $102 in cash, and had an account against them for $37.47, which they allowed as a further deduction, leaving a balance due of $267.65 for which they claimed judgment.

Defendant denies that he owes plaintiffs, and for a second defence, by way of counter claim, says that plaintiffs owe him $12 for the board of their horse, and $75 damages for breach of contract in not finishing the work by the time agreed on.

The only matter in controversy which need be noticed was the counter claim. Plaintiffs alleged that when defendant presented his account for $37.47 which they allowed, it was agreed by defendant that he had no other claim against plaintiffs. For the purpose of proving this, they required

defendant to produce a receipt which they had given him upon the partial settlement before had, and upon its being produced, they gave the receipt in evidence, they then offered, and were allowed to give in evidence that when the receipt was given, it contained the words "in full" as applied to defendant's account, and that those words had been since obliterated. Defendant excepted to the reception of his evidence. The plaintiffs were under no necessity, although they were at liberty to introduce the receipt in support of their view of the nature of the settlement. The rule that when a contract has been reduced to writing, no evidence of its contents is admissible, except the writing itself, is confined to contracts, and does not extend to receipts on the payment of money, unless they contain something more, so as to amount to a contract. *Smith* v. *Brown*, 3 Hawks, 580.

Having introduced it, we know no reason why they were not at liberty to show what it contained when given, and that some words had since been obliterated. A party who sues upon a bond which has apparently been altered may show that the alteration was made by the obligor or by accident. *Matthis* v. *Matthis*, 3 D. & B., 60; *Dunn* v. *Clements*, 7 Jones, 58.

It is true that a party who has introduced a witness cannot afterwards impeach his general character, although he may show that he was mistaken in a part of his testimony. *Spencer* v. *White*, 1 Ired. 236.

But there is no analogy by which this rule can be extended to embrace a case like this. The writing which the plaintiffs made their witness, was the writing which they signed, *and as they signed it*, and it was for the purpose of showing what this was that they offered the evidence objected to. *Stith* v. *Lockabill*, 68 N. C. Rep. 227 has no bearing. In that case a deposition was offered in evidence from which it was contended that apparently a portion had

been torn off, and it was objected to on that ground. The Judge let it go to the jury to find whether any part had been torn off or not, and if it had been to disregard it. Clearly the Judge must pass on the competency of evidence; but in that case he left that question to the jury.

Here, evidence of the original form of the receipt was competent, and also evidence of the obliteration, and the Judge received them. The effect of the evidence and the bearing of the receipt on the question at issue was with equal propriety left to the jury.

There is no error.

PER CURIAM. Judgment affirmed.

STATE on the rel. of FELL & BROTHER *v.* JAMES A. PORTER *et al.*

A Justice of the Peace has no jurisdiction under the Constitution, Art. 4, sec. 15 and 33 of a suit on a constable's bond, the penalty of which is more than $200, although the damages to be assessed are less than that sum, and the Act of 1869-'70, chap. 169, sec. 13, cannot be allowed the effect of conferring such jurisdiction.

It seems that as against the officer alone a Justice of the Peace has jurisdiction of a suit for a sum less than $200 collected by the plaintiff and not paid over.

This was an ACTION on his official bond against the defendant, Porter, as constable, and his sureties to recover the sum of $66.19, which he had collected and failed to pay over to the plaintiffs.

The penalty of the bond was five hundred dollars, and the plaintiffs demanded judgment against the defendants for the sum of five hundred dollars, and for costs of suit.

The defendants demurred to the complaint upon the ground that the plaintiffs claimed that the sum of $66.19 had been collected and not paid over, and that therefore their demand was for less than two hundred dollars, and

the suit ought to have been brought before a Justice of the Peace. In support of their demurrer his counsel relied on the Act of 1869–'70, chap. 169, sec. 13, whereby it is provided that when any constable or other officer shall have received any money by virtue of his office, and shall fail to pay the same to the person entitled to receive it, a Justice of the Peace may issue a summons against him and his sureties, whether he be in office or out, and gave judgment for any sum demanded not exceeding two hundred dollars, notwithstanding the penalty of the bond sued on.

His Honor, *Albertson, J.*, at the June Term, 1873, of the Superior Court of WAKE County sustained the demurrer, and gave a judgment dismissing the suit, from which the plaintiff appealed.

Moore & Gatlin, for the plaintiffs.
L. W. Barringer, for the defendants.

PEARSON, C. J. The jurisdiction of the Superior Courts and of Justices of the Peace is fixed by the Constitution, Art. 4, secs. 15, 33. It follows that the General Assembly has no power to make any change in reference thereto, and the Act, ch. 169, sec. 13, Acts of 1869–'70, relied on by the defendants' counsel, can only be allowed the effect of being a legislative expression of opinion concerning the construction of these two sections of the Constitution.

The question depends upon the meaning of the words, "a civil action founded on contract, wherein the sum demanded shall not exceed two hundred dollars." Here we have a bond for five hundred dollars, to be void if certain conditions are complied with, otherwise to be of full force. It is agreed there has been a breach of the condition, so that according to the common law, the plaintiff was entitled to judgment for $500. True, says the counsel of defendants, but by 8 and 9 Will. and Mary, in actions on bonds with con-

dition, the plaintiff *may* (construed to mean "*shall*") suggest breaches and have the damages assessed, and that amount is the *sum demanded.* To which it is replied, the plaintiff has judgment for the amount of the bond, the *execution* to be satisfied by payment of the damages assessed and costs, but the bond is merged in the judgment, which stands as a security for any further breach, that may from time to time be suggested, until the judgment is satisfied. Rejoinder, that is so in regard to a common law bond, but this is an official bond which is not merged in the first judgment. Rev. Code, chap. 78, sec. 1. This is met by the fact that the statute provides that no judgment shall be taken upon an official bond, after "the whole penalty shall have been recovered," and how can this matter be considered by a Justice of the Peace, except upon a plea of payment or satisfaction of the whole penalty of the bond, which of necessity brings before him a contract, where the sum demanded exceeds two hundred dollars? It may be conceded that as against an officer who receives money and fails to pay it on demand, there is an implied contract, and the amount, if it do not exceed $200, may be sued for as "money had and received to plaintiffs' use." This would be on a principle of the common law, and not by force of the Act of 1869–'70; but in regard to the sureties there is no implied contract, and no other contract save that which is set out in the bond, to-wit: an obligation to pay $500, subject to conditions, &c.

We do not concur in the opinion of his Honor, and suppose he was misled by the practice under the old system of taking summary judgments upon official bonds on notice, where money had been collected and not paid over on demand. Rev. Code, ch. 78, sec 5. But under that practice the judgment was entered for the amount of the bond, the *execution* to be satisfied on payment of the sum collected and costs.

There is error. This will be certified to the end that the demurrer be overruled, and judgment be entered that plaintiffs recover according to the course of the Court.

PER CURIAM. Judgment reversed and judgment for plaintiff.

STATE *v.* WILLIAM H. HARRISON.

Where an indictment charged the forgery of the name of a firm with intent to defraud two persons whose names were stated, but it was not alleged that they composed the firm, and the testimony proved the forgery with an intent to defraud the firm, but it was not proved that the two persons named composed the firm, *held* that the allegations of the indictment were not proved, and that it was error in the count to charge otherwise.

This was an INDICTMENT for forgery tried at the January Term, 1873, of the Superior Court of NEW HANOVER county, before his Honor, *Russell, J.* The charge was for forging a due bill in the following words: "Due to William H. Harrison for filling of rosin and storing of sprirts $50, payable 25th of August, WILLIAMS & MURCHISON, with intent to defraud one George W. Williams and one Daniel M. Murchison, against the form of the statute in such case made and provided, and against the peace and dignity of the State."

On the trial a witness for the State said that he saw the defendant with the due bill referred to in the bill of indictment at the office or store of Williams & Murchison.

This or some other witness spoke of such a firm as Williams & Murchison, but no witness mentioned the names of George W. Williams or Daniel M. Murchison. The defendant's counsel prayed the Court to instruct the jury that the State was required to prove the intent as charged in the bill of indictment, and that there was no evidence to show that the defendant intended to defraud George W. Williams

and Daniel M. Murchison. His Honor refused the instruction, and said that there was some evidence to be left to the jury. The jury were instructed that if the State had not shown the intent to defraud the individuals named in the bill of indictment, the defendant was entitled to a verdict of not guilty, but that there was evidence (it being that above mentioned) to be left to the jury, and that they might infer if they thought proper to do so, that the individuals mentioned as a firm by the witness were the same as these named in the bill of indictment.

No counsel for the defendant.

Attorney General Hargrove and *Solicitor Cantwell*, for the State referred to *State* v. *Britt*, 3 Dev. 122; *State* v. *Morgan*, 2 D. & B. 348.

READE, J. The indictment charges that the defendant forged the name of the firm of Williams & Murchison with intent to defraud George W. Williams and Daniel M. Murchison. And there was evidence tending to show that he did forge the name of the firm with intent to defraud the firm, but there was no evidence that George W. Williams and Daniel M. Murchison were the individual members of the firm, and therefore there was *no evidence* that the intent was to defraud George W. Williams and Daniel M. Murchison. And his Honor ought so to have charged the jury in response to the prayer of the defendant. His refusal to do so was error, for which there must be a *venire de novo*.

Let this be certified.

PER CURIAM. Judgment reversed.

GILBRAITH & CO., *v.* L. LINEBERGER & CO.

If a manufacturing company knowingly permit a person to sell goods in a store-house with their name over the door, though in a town distant from their place of business, it is a circumstance which taken with others, such as that he sold their manufactured articles, and bought bacon and other country produce for them, must be considered as tending to prove the fact that he was acting as their agent.

When one permits another to hold himself out to the public as his agent to sell and buy certain kinds of goods for him, he is bound by the acts and contracts of such agent within the scope of his authority, but that authority does not extend to the borrowing of money or buying clothes for himself.

If one buy goods of a manufacturing company from time to time, and sell them on his account, the company not participating in his profits, nor being liable for his loss, it does not afford the slighest evidence of a partnership between him and the company.

This was a CIVIL ACTION to recover the balance of an account, tried before *Logan, J.*, at the last Term of the Superior Court of GASTON county, where the defendants obtained a verdict and judgment, and the plaintiffs appealed. The facts necessary to a proper understanding of the questions decided, sufficiently appear in the opinion of the Court.

Vance & Burwell, for the plaintiffs.
W. P. Bynum and *Schenck*, for the defendants.

PEARSON, C. J. The plaintiffs were entitled to the first instruction asked for. Having "Lineberger & Co." over his store door was some evidence that Fleming was the agent of the defendants to sell their cotton yarn and sheeting, and that fact together with the fact that Mason, an avowed agent of the defendant, from time to time delivered cotton yarn and sheeting to Fleming by the wagon load, and received from him return loads of bacon, lard and other country produce, that this country produce was procured by Fleming as the agent, and in the name of the defendants, and that one of the defendants had visited Greenville and of course

knew how things were being done was some evidence that Fleming was the agent of the defendants to buy country produce for them. So his Honor erred in refusing to instruct the jury that if the defendants permitted Fleming to hold himself out to the public as their agent, that constituted an agency, and "Fleming's acts done within the scope of the business in which he was engaged" were binding on the defendants. But upon examining the plaintiffs' account, which is a part of the complaint, we find but three items of country produce furnished, to-wit: bacon and flour, in all $118; and one credit for feathers received $175 on the 12th of November, 1860, leaving a balance at that date of $57 in the defendants' favor.

After this, plaintiffs let Fleming have, November 19th, *cash*, $75; November 29th, cash, $60.89; December 12th, one overcoat, $10.50. In this way, the balance is put against defendants. There is no proof whatever that the defendants permitted Fleming to hold himself out as their agent, to borrow money or to buy ready-made clothing, and if his Honor had charged as requested, that the acts of Fleming done within *the scope of the business* bound the defendants, this would have excluded the cash items and the over-coat, and left the balance in favor of defendants, as the credit for feathers had been entered before this latter dealing.

It is clear therefore that the plaintiffs could not have been prejudiced by the error of the Judge, and on the whole, the verdict meets the justice of the case, and we are not at liberty to disturb it.

His Honor did not err in refusing to charge that the evidence established a copartnership between the defendants and Fleming. There is not a single feature of a co-partnership presented by any view in which the matter can be looked at.

There is no community of interest in "the profit and loss."

The defendants sold the yarn and sheeting to Fleming at factory prices, received country produce in payment, and had no concern whatever with the subsequent disposition that Fleming might make of the yarn and sheeting; if he sold at a higher price, it was his gain; if obliged to sell for a less price, it was his loss; in short, there is nothing in the evidence to give color to the suggestion of a copartnership. The matter will not admit of discussion.

No error.

PER CURIAM. Judgment affirmed.

STATE *v.* JOSEPH BAKER.

Where, on a trial of a white man for the murder of a negro, the Solicitor for the State in the closing argument stated to the jury that he had been informed that there was a general feeling and purpose among the white citizens of the county, which had been pretty generally expressed during the trial, that no white man was to be convicted for killing a negro until a certain negro should be convicted for killing a white man in the county, and that he referred to the rumor not to create a prejudice in the minds of the jury against the prisoner, but to remove all prejudice from their minds opposed to a fair, manly and independent verdict according to their oaths, and to the law and testimony in the case: *It was held*, That the prisoner had no ground for complaint against the remarks of the Solicitor as being improper for the occasion.

A prisoner has no right to an instruction from the Court that if the jury do not believe the testimony of two named witnesses he is entitled to an acquittal, when the case stated shows that there were other witnesses who gave material testimony tending to prove his guilt.

The case of *Jenkins* v. *N. C. Ore Dressing Co.*, 65 N. C. Rep. 563, cited and approved.

INDICTMENT of a white man for the murder of a negro, tried before *Logan, J.*, at the last (Spring) Term of the Superior Court for MECKLENBURG county.

Upon the trial the prisoner was found guilty and appealed from the sentence of death which was pronounced upon

him. The facts are sufficiently stated in the opinion of the Court.

J. H. Wilson & Son and *W. H. Bailey*, for the prisoner.
Attorney General Hargrove, for the State.

SETTLE, J. The first exception of the prisoner, who is a white man, charged with the murder of a negro, is, "that the Solicitor for the State in his concluding argument to the jury, and in reply to the argument of the prisoner's counsel, stated to the jury that he had been informed by a number of persons during the progress of this trial, that there was a general feeling and purpose among the white citizens of the county, which had been pretty generally expressed during the trial, that no white man was to be convicted for killing a negro until a certain negro (meaning Lee Dunlap) was convicted for the murder of a white man by him in this county—that he referred to this rumor, not to create in the minds of the jury a prejudice against the prisoner, but to remove all prejudice from their minds opposed to a fair, manly and independent verdict according to the oath they had taken, and to the law and testimony in the cause," and that his Honor being requested to instruct the jury that the remarks of the Solicitor were extraneous to the testimony in the cause, and should be disregarded by them, failed to do so.

"It may be laid down as law, and not merely discretionary, that where the counsel *grossly* abuses his privileges to the manifest prejudice of the opposite 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."

It is difficult to lay down the line farther 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 dis-

cretion, unless it is apparent that the impropriety of counsel was gross and well calculated to prejudice the jury. *Jenkins* v. *N. C. Ore Dressing Co.*, 65 N. C. Rep. 563.

We cannot know that the remarks of the Solicitor in the case before us were improper. They certainly import a grave charge upon a portion of the people of Mecklenburg county. But if untrue, they were calculated to arouse the indignation of the jury against the Solicitor and the cause he was pressing, and thereby prejudice the cause of the State instead of the prisoner. But if true, the course of the Solicitor, so far from being reprehensible, is to be commended.

If such a diseased sentiment as he portrays pervades any portion of a community, it poisons the very fountain of justice, and calls for the denunciation of all good men as well in Court-houses as out of them. Trials would be but the merest mockeries in communities where such a feeling exists, if it cannot be spoken of and rebuked.

2. The prisoner's counsel asked his Honor to instruct the jury that if they did not believe the testimony of Henry Severs and Dorcas Alexander the prisoner was entitled to a verdict of acquittal. The prisoner was clearly not entitled to this charge. Several witnesses had been examined on behalf of the prosecution and also of the defense, who testified to many material facts, and it would have been error had his Honor made the case turn upon the testimony of these two witnesses.

The prisoner being told by Severs to let the deceased alone, that he (Severs) could manage his own house; the prisoner having a knife about 12 o'clock that day; his washing his hands shortly after the fatal stab; his being told that if he stabbed the deceased he had better "git;" and his leaving and running across a field; his subsequent flight when parties approached to arrest him; his having a knife in his possession when arrested with discoloration upon it;

which witness thought was blood; his having purchased a knife a short time before like the one found upon him, and his attempt to show that he had no knife that day, were all facts testified to by witnesses other than the two upon whose testimony his counsel asked his Honor to make the case depend.

And further, the witness, Cross, introduced by the prisoner, testified that when the deceased was cursing another colored man about some whiskey, the prisoner "spoke up and said, you must not talk that way for there are white men in the house," and when the same witness passed the prisoner's house a half an hour afterwards, and told him that the boy who was stabbed at Severs' was dead, the prisoner asked him, who do the people say did it? Witness replied, the negro woman, Dorcas Alexander, said you did it, to which prisoner replied, "I did no such thing, for I had no knife, the woman is a negro and will not be believed."

It would appear from the testimony of this witness that the prisoner at least was relying upon the prejudice against negroes to screen him, although he complains of the Solicitor's caution against such prejudice.

The third and last exception has no foundation; his Honor's charge, upon reasonable doubt, was even broader and more favorable to the prisoner than his prayer for instruction.

There is no error. This will be certified.

PER CURIAM. Judgment affirmed.

W. S. BRYAN to the use of JEROME RICKS v. W. D. HARRISON *et al.*

Where, under a parol contract for the purchase of land in January, 1862, the purchaser took possession, and in September of the same year gave his note for the purchase money with interest from the preceding January: *It was held*, That in a suit upon the note, the value of the land and not the value of Confederate currency according to the legislative scale, was the amount which the plaintiff was entitled to recover.

This was a CIVIL ACTION upon a note given for the purchase of a tract of land, and upon the trial before his Honor, *Watts, J.*, at the August Term, 1872, of the Superior Court of NASH county the plaintiff obtained a verdict and judgment, from which the defendants appealed. The case is sufficiently stated in the opinion of the Court.

J. J. Davis, for the defendants.
Moore & Gatling, for plaintiff.

SETTLE, J. The case, settled by the attorneys of the parties, shows that it was in evidence upon the testimony of Bryan that in January, 1862, one Earle and the said Bryan made a contract not in writing, by which the said Bryan was to sell to the said Earle 219 acres of land for $3,300, to be paid for in cotton at ten cents per pound as far as the quantity of cotton which the said Earle had would go, and the balance in notes. That the cotton was worth ten cents per pound in specie in January, 1862, and that there was no difference in January, 1862, between the value of Confederate money and specie in his section of country. That this contract was not complied with by the said Earle, who had been put into possession of the land, and the said Bryan had endeavored to eject him, but had failed. Afterwards, to-wit: on the 10th of September, 1862, the said Earle executed two notes to the said Bryan, with the defendants as sureties, one for $2,100 and the other for $1,200, each bearing

interest from January 1, 1862, in payment for said land. The note for $1,200 had been assigned to the plaintiff, and is the subject of the present suit. Nothing was said about the currency in which the note was to be paid. The defendants offered evidence to show the value of the land, which was objected to by the plaintiff, and his Honor sustained the objection. The defendant then asked his Honor to charge that the scale of depreciation of September, 1862, applied to the note. This his Honor declined to do. The defendants then asked him to charge that the scale of January, 1862, applied. This was also refused.

His Honor then instructed the jury that if they believed the facts as stated by the witness Bryan, as above set forth, the plaintiff was entitled to recover the sum of $1,200, with interest from January 1, 1862.

There was a verdict and judgment in favor of the plaintiff in accordance with his Honor's charge.

The plaintiff contends that although the note bears date in September, 1862, it is but the evidence of the contract made in January, 1862, and the ordinance of October 18, 1865, and the legislation of 1866, chap. 38 and 39, do not apply.

The defendant, on the other hand, contends that the contract of January, 1862, was abandoned, as is shown by the fact that Bryan actually attempted to eject Earle, whom he had let into possession, and that in September a new contract was made, with which they became connected as sureties for the purchase money. That if there was a contract in January they were no parties to it, nor to any other contract previous to the 10th of September, 1862. That the alleged contract in January stipulated for the payment of certain cotton, whereas the contract in September was silent as to cotton, and was for notes. It may be remarked here that there is not one word in the case to show that any cotton ever passed in payment of the $2,100 note.

But the plaintiff contends that as the notes bore interest from January, 1862, we must conclude that they were a part of that contract.

This does not follow. It is more reasonable to suppose that interest was intended to answer for the rents and profits which Earle had enjoyed.

We think it clear, after an examination of the decisions on this subject since the ordinance of 1865 and the legislation of 1866, that the defendants can only be held liable upon their contract in September, 1862, and that they ought to have been allowed to show the value of the land for which their note was given. But his Honor virtually took the whole case from the jury, and declared that if they believed the evidence, the plaintiff was entitled to recover the full amount of the note, whereas, upon his own showing, he could only hold these defendants responsible for the value of the land.

There must be a *venire de novo.*

PER CURIAM. Judgment reversed.

HOPPOCK, GLENN & CO. *v.* CHARLES C. SHOBER.

By virtue of the C. C. P., sec. 254, (Battle's Revisal, chap. 17, sec. 254,) a judgment from the time it is docketed has a lien on all the interest of whatever kind the defendant has in real estate, whether it be such as can be seized under an execution or not.

The United States Government has an undoubted right to priority of payment in case of a general conveyance of his property by an insolvent, but that right is subject to a prior lien, and if a lien be acquired by a docketed judgment it will not be defeated by a subsequent assignment, unless the insolvent be thrown into bankruptcy by proceedings commenced within four months thereafter.

The case of *McKeithan* v. *Walker*, 66 N. C. Rep. 95, cited and approved.

This was a CIVIL ACTION tried before *Tourgee, J.*, at the Spring Term, 1872, of GUILFORD Superior Court.

On the trial the following issues were submitted to the jury: 1. Was the purchase of the land in question made with the money of one Crane? 2. Did one Owen hold the lands for the use and benefit of Crane, or adversely to him? 3. Was the judgment of the plaintiffs against Crane transferred to the docket of the Superior Court of Guilford county before the execution of the deed in trust, made by the said Crane and Owen of the land in question and other lands to the defendant to secure a *bona fide* debt to the United States, mentioned in the pleadings? These issues were found in favor of the plaintiffs, and the case was then continued until the Spring Term, 1873, when his Honor gave a judgment for the plaintiffs, from which the defendant appealed.

L. M. Scott, for the defendant.
Dillard, Gilmer & Smith, for the plaintiffs.

RODMAN, J. We need not consider the questien whether there was such an estate in Crane as would have been liable to sale under execution. The only question is, did the docketing of the plaintiff's judgment give him a lien on the estate, or right, or whatever else it may be called, of Crane, which he could not divest by a conveyance to a trustee, to secure a debt to the United States. We are of opinion that it did. This case is governed by *McKeithan* v. *Walker*, 66 N. C. Rep. 95. The language of C. C. P., sec. 254, is that the docketed judgment shall be a lien on all the real *property* of the defendant in the county. Before the Code, the filing of a bill to enforce the collection of the judgment debt was held to give a lien. Certainly it was competent for the Legislature to make the change. The words "real property," are broad enough to permit such a construction, and we know of no reason in the nature of an argument *ab inconvenienti* why the construction should not be allowed. If any

such could be found, it would have great weight. None has been presented to us. Of course in this as in all other cases the lien of a docketed judgment is subject to all prior equities, and to all paramount subsequent claims.

It is said that the claim of the United States is paramount by reason of its priority in all cases of insolvency or bankruptcy, and that the conveyance to the defendant was an act of bankruptcy. Perhaps it might have been so held by a bankrupt Court if application for an adjudication of bankruptcy had been made in due time. As none such was made, we cannot notice it in that light. The priority of the United States in case of a general conveyance of his property by an insolvent is not disputed. But that priority is subject to liens previously acquired. The docketed judgment of the plaintiffs was a lien which was not divested by the subsequent conveyance by Crane to the defendant, and would not have been divested by Crane's bankruptcy, unless proceedings to declare him a bankrupt had been commenced within four months thereafter. The plaintiffs are entitled to the fund under the agreement.

Judgment below affirmed. Let this opinion be certified.

PER CURIAM. Judgment affirmed.

GEORGE L. GIBSON, Adm'r, *v.* MARY E. PITTS *et al.*

Upon a petition by an administrator to sell land for the purpose of making assets to pay debts, any person who claims to be the owner of the land has the right to be made a party and to have an inquiry made as to his title in due course of law.

This was a PETITION by the plaintiff as administrator of Moses Pitts, filed before the clerk of the Superior Court of CABARRUS county, for the sale of certain lands of his intes-

tate to make assets for the payment of the debts of the intestate. It was taken by appeal to the Superior Court, where at the last term it was decided by *Logan, J.*, in favor of the plaintiff, and the defendants appealed. The case is sufficiently stated in the opinion of the Court.

R. Barringer, for the defendants.
W. H. Bailey, for the plaintiff.

READE, J. The plaintiff's administrator asks for license to sell two tracts of land of the estate of his intestate to pay debts, and we agree with his Honor that he is entitled to the license. But Sally Pitts, the widow of the intestate, comes in and asks to be made a defendant, and claims as her individual property one undivided eighth part of one of the tracts, the Miller tract, and that the same shall be allotted to her. The clerk refused to allow her to litigate her rights, upon the ground that he had no power to try the title. The case was appealed from the clerk to the Judge, and he affirmed the decision of the clerk.

In this we think his Honor erred. Upon the supposition that Sally Pitts had an interest in the land as claimed, the plaintiff had no right to cloud her title by a sale under an order of the Court. And his Honor ought to have had an inquiry as to her title, and if found for her to have allotted her share, or else provided that a share of the proceeds of sale equal to her interest in the land should be paid over to her by the plaintiff. Her rights might have been passed upon by submitting an issue to a jury.

There is error. This will be certified, that further proceedings may be had in conformity with this opinion.

NOTE.—The tract of land not in dispute may be sold in the meantime.

PER CURIAM. Order accordingly.

KENNETH H. WORTHY *et al. v.* GEORGE S. COLE *et al.*

Where, upon the purchase of a chattel personal, the purchaser gave his note with sureties for the price, and it was agreed by parol between the parties at the time that the chattel should belong to the sureties until the note was paid: *It was held,* That the effect of the agreement was to pass the title to the chattel from the seller to the sureties, and not from the seller to the purchaser, and then from him to his sureties for their indemnity, for in the latter case it would have been a mortgage which would have been void for want of registration.

Where the sureties to a note given by the purchaser for the price of a personal chattel took the title to themseves until the note should be paid, and afterwards the chattel was wrongfully converted by another person, and a judgment was obtained by the seller on the bond against the sureties: *It was held,* That the amount recovered by the sureties for the wrongful conversion of the chattel might be adjudged to be applied to the satisfaction of the judgment obtained on the note.

This was a CIVIL ACTION brought to recover the value of a still which had been taken and converted to their own use by the defendants, tried before his Honor, *Buxton, J.*, at the last term of the Superior Court of MOORE county.

On the trial the facts appeared to be substantially as follows: The still originally belonged to one McKenzie and another, and was sold by them to one J. N. F. Baker, who paid a part of the purchase money in cash, and for the residue thereof gave his note with the plaintiffs, Worthy and John Baker, as sureties. To induce these persons to become his sureties, it was agreed by parol at the time that the title to the still should be in them until the note for the purchase money should be paid. J. N. F. Baker afterwards died and the defendant, Cole, administered upon his estate and sold the still, when the other defendant, Williams, bought it and took it away, both knowing that it was claimed by the plaintiffs. In the meantime a suit had been brought upon the note by the seller and a judgment obtained thereon.

The present suit was brought in the name of the plaintiff, Worthy alone, but afterwards John Baker, the other surety, was by an amendment made a party plaintiff with

him. Upon the issues submitted to the jury a verdict was rendered for the plaintiffs, assessing their damages to $300, whereupon his Honor gave the following judgment: "Judgment of the Court upon the finding upon the issues that the plaintiffs have judgment against the defendants for $300, which amount being paid into Court shall be applied in exoneration of the plaintiffs' liability upon the note given for the purchase of the still, which note has been reduced to a judgment now pending in this Court as appears of record." From this judgment the defendants appealed.

B. Fuller, M. Fuller and *Ashe*, for the defendants.
N. McKay, for the plaintiffs.

PEARSON, C. J. The amendment by which John Baker, the co-surety of the plaintiff, was made party plaintiff, removed all difficulty in respect to parties and to the *quantum* question of damages, for which the plaintiffs were entitled to judgment.

We concur in the view of his Honor in respect to the effect of the parol understanding made at the time of the contract of purchase for the one-half interest of McKenzie in the still, by J. N. F. Baker, who, to induce the plaintiffs to become his sureties for the price, agreed that the title should pass to them until the price was paid. If the title had passed to J. N. F. Baker, and *afterwards* he had agreed that the title should pass from him to his sureties for their indemnity, the statute requiring mortgages and deeds of trust to be in writing and registered would have applied; but in our case, the title did not pass from McKenzie to the plaintiffs to indemnify them as sureties, and so the statute did not apply.

We also concur with his Honor in the mode of equitizing the whole matter between the parties, so as to require the amount of the judgment to be paid into Court to be applied

pro tanto in discharge of the judgment for the purchase money. Under C. C. P., a judgment is "the final determination of the rights of the parties to an action," and this final determination called for an application of the amount for which the plaintiffs had judgment to the debt for the price of the still, thus relieving the sureties and also relieving the defendant, Cole, as administrator of J. N. F. Baker, the principal. This is a more equitable disposition of the fund than if the administrator had been allowed to apply the value of the still in the general course of administration, and fortunately for the sureties they had, by the stipulation that the title should pass from McKenzie to them, put themselves in a condition to enforce the equity.

No error.

PER CURIAM. Judgment affirmed.

JOHN C. McCOWN, Adm'r, *v.* HERBERT H. SIMS.

Under the new Constitution, and since the adoption of the C. C. P., a civil action may be brought upon a note without seal, and an allegation may be made that the note was intended to be under seal, but that the seal was omitted by accident or mistake, and upon sufficient proof the accident or mistake may be corrected and a recovery had accordingly.

In an action involving the correction of a mistake in omitting to put a seal to a note, the circumstances that the note was taken by way of accommodation for another, to which the seal was attached, that the words "witness my hand and seal" were in the note, and that the parties were a sister and brother of the half blood living in the same house on terms of the most intimate family relations, are all admissible in evidence tending to prove that a seal was intended to be put to the note, but was omitted by accident or mistake.

This was a CIVIL ACTION brought upon a promissory note without a seal, but it was alleged in the complaint that the parties to it intended to annex a seal, but it was omitted by fraud, accident or mistake. This was denied in the answer,

and upon the trial at the last Superior Court of ORANGE county, before his Honor, *Tourgee, J.*, the following appeared to be the case:

The plaintiff introduced one Link, who testified that he gave his note in 1856 to defendant's intestate for the purchase of a negro; that on calling upon her to pay it, she referred him to the defendant, who was her half brother living in the same house with her; that the note was endorsed to the defendant, and witness paid it and took it up. The note was produced by witness and had the usual scrawl for a seal annexed to it. This testimony was objected to by the defendant's counsel, but upon the plaintiff's counsel contending that it was relevant and proper, because, as they alleged, it was the foundation of a transaction between the defendant and his sister, by which he had given his note to her in exchange for the Link note, and because it afforded evidence tending to show that it was intended by the parties that the new note should also have a seal, it was admitted by the Court.

The plaintiff was then introduced and testified that he and the intestate, who was his sister of the whole blood, and the defendant, who was brother of the half blood, all lived in the same house on terms of the most intimate family relations; that the defendant gave the note now in suit which was written by himself, in exchange for the Link note, which had been collected by the defendant as testified by Link.

The defendant's counsel moved the Court to instruct the jury:

1. That there was no evidence before them that it was intended by the intestate and the defendant that there should be a seal to the note sued upon, and

2. That according to the evidence the action was barred by the statute of limitations.

These instructions were refused, and his Honor instructed the jury upon the following issue, which had been sub-

mitted to them: "Did the parties to the note intend the same to be an instrument under seal, *or* did the payee suppose the same to be under seal at the time of delivery." He told them that if they believed the parties intended there should be a seal to the instrument, or that the intestate supposed there was a seal to it, they should find for the plaintiff. Under this charge the plaintiff had a verdict, upon which the Court rendered judgment, from which the defendant appealed.

W. A. Graham, for the defendant.
Battle & Son, for the plaintiff.

PEARSON, C. J. "Equity will relieve by reforming an instrument which does not carry into effect the intention of the parties by reason of 'fraud, accident or mistake.'" The application of this doctrine to our case was not drawn in question in the Court below, or on the argument and brief filed in this Court. So the only matter for our consideration is, has "fraud, accident or mistake" been proved according to law?

We see no error in the ruling as to the questions of evidence. The fact that A assigns to B the note of C, who comes to make payment, and that the assignment is made for the *accommodation of B*, taken in connection with the fact that the note assigned was *under seal*, raises an inference that the note taken in *substitution* was, as a matter of course, to be also under seal; connect this with the fact that the substituted note is written "witness *my hand and seal*;" connect this with the fact that B, is the half brother of A, living in the same house on terms of the most intimate family relations and confidence. These facts and circumstances in our opinion furnish evidence fit to be considered by a jury.

The issue is in the *disjunctive:* "Did the parties to the

note intend the same to be an instrument under seal, *or* did the payee suppose the same to be under seal at the time of its delivery? But the jury find *both of these facts in the affirmative*, and thus make the issue in the *conjunctive*, to-wit: the parties intended that the note should be under seal, *and* the payee supposed it was under seal; the latter part of the proposition being a mere corollary of the first, for if the parties intended the note should be under seal, of course the payee had a right to suppose that such was the fact, as the maker was relied on to do the writing, and its not being so must be ascribed either to fraud, accident or mistake. So the case is brought within the operation of the principle announced above.

There is no error.

PER CURIAM. Judgment affirmed.

WILLIAM P. HADLEY *v.* WILLIAM A. NASH and wife *et al.*

When land is sold and the title is retained by the vendor until the payment of the promissory notes given by the vendee to secure the purchase money, and these notes are assigned by the vendor with the knowledge and consent of the vendee, the assignee will have a right to have the notes paid out of the land in preference to any claims which may have been acquired by other persons subsequent to the time when the sale was made and the notes were given.

Under the former system a judgment did not bind lands *proprio vigore*, but if a *fieri facias* execution were taken out upon the judgment it would bind the land from its *teste*, and the lien thus acquired could be continued by the issuing of *alias* and *pluries* executions regularly from term to term without intermission, but not otherwise.

The case of *Bell* v. *Hill*, 1 Hay. 85, cited and commented on.

This was a CIVIL ACTION, and upon the trial, before his Honor, *Tourgee, J.*, at the Spring Term, 1873, of the Superior Court of CHATHAM county, a jury was waived by consent,

and his Honor found the facts and stated his conclusions of law, which were in favor of the plaintiff; and from the judgment rendered thereon, the defendant, Nash, appealed.

These facts and conclusions of law are sufficiently stated in the opinion of this Court.

Headen, for the defendant.
Manning, for the plaintiff.

SETTLE, J. In this case, by consent of parties, a jury was waived, and his Honor found the facts, and upon them, declared his conclusions of law.

The very clear and explicit manner in which he has discharged his duty relieves this Court of much labor, and affords a striking illustration in favor of that mode of trial.

It appears that on the 13th day of November, 1857, one Spencer McLenahan contracted to sell and convey in fee simple the lands in controversy to the defendant, W. A. Nash. McLenahan gave his bond for title, and Nash gave his notes for the payment of the purchase money. McLenahan, for value received, and with the knowledge of Nash, indorsed said notes to the plaintiff, and Nash, from time to time, up to the 10th of October, 1868, made payments to the plaintiff on said notes, and this action is brought to recover the balance of the purchase money unpaid and past due on said notes.

At November Term, 1855, of the Court of Pleas and Quarter Sessions for Chatham county one Bynum obtained a judgment against the said McLenahan and one Taylor for the sum of twenty-two hundred and sixty dollars, and executions issued from term to term on said judgment, but they did not purport to be *alias* and *pluries* writs.

The counsel for the defendant contends that this judgment, *propria vigore* and independent of any execution, was a lien upon this land from the time of its rendition, and

that McLenahan had no power to convey said land or to contract to convey it as he had done with the defendant, Nash, and as an authority for this position, he cites *Bell* v. *Hill*, 1 Haywood, 85.

In that case, McCOY, J., upon the idea, we suppose that when the plaintiff sued out an *elegit*, the judgment bound a moiety of the land from the time of its rendition, says, "we are agreed that a judgment binds the land from the time it is pronounced, but in this wise only, it hinders the the debtor from disposing of the land himself," &c.

The counsel cited no other case to sustain his position; and we do not deem it necessary to cite authority in support of the proposition that if the plaintiff resort to a *fieri facias* the land is bound only from the *teste* of the execution.

But the defendants, building on that foundation, and seeking to avoid the contract of the 13th of November, 1857, and to set up title in Elizabeth Nash, (under the sheriff's deed, who sold the said land on the 9th of August, 1858, to the defendant, Taylor, who conveyed the same to the defendant, John L. McLenahan, in trust for the defendant, Elizabeth Nash,) rely not only upon the Bynum judgment and executions issued thereon, but also upon other judgments and executions against the said Spencer McLenahan in favor of other parties.

But unfortunately for the defendants none of the executions under which the sheriff sold were *tested*, or went back by relation further than May Term, 1858, of the Court of Pleas and Quarter Sessions of Chatham county, whereas the equities between McLenahan and Nash had attached on the 13th of November, 1857.

The defendants' counsel made a labored argument as to the effect of these judgments and executions, but since his foundation is destroyed there is nothing for his superstructure to rest upon. The defendants are in this dilemma, if the sheriff had no right to sell, either by reason of a defect in

the process, or because the land was not liable to sale under execution by reason of the contract between McLenahan and Nash, then the purchaser at execution sale got nothing, but if there was anything which the sheriff had a right to sell, then the purchaser took the land subject to all the equities attached, and the equity of the plaintiff to have the purchase money can only be detached by the payment of the same.

Let it be certified that there is no error.

PER CURIAM. Judgment affirmed.

WALTER D. BARRINGTON, by his Guard'n, *v.* THE NEUSE RIVER FERRY COMPANY.

Under the Act of 1813, the County Court had no authority to make an irrevocable grant of an exclusive ferry.

And the General Assembly, by its Act of 1872, granting to a company the privilege of establishing a ferry, within two miles of another which had been used for over forty years, did not divest any vested right belonging to the owner of such old ferry.

Article 8, sec. 2, of the Constitution, giving to the commissioners of counties a general supervision and control over schools, roads, bridges, &c., does not deprive the Legislature of the power of special legislation over these subjects

The Legislature, under its right of eminent domain, has the power to grant the franchise of a ferry to any one, and to authorize the condemnation of the land of a riparian owner as a landing place.

(*Pipkin* v. *Wynns*, 2 Dev. 402; *Saunders* v. *Hathaway*, 3 Ired. 402; *Taylor* v. *W. & M. R. R. Co.*, 4 Jones, 277, cited and approved.)

APPLICATION for an injunction, heard before *Watts, J.*, holding the Special (January) Term, 1873, of CRAVEN Superior Court.

The plaintiff, an infant, claims to be the owner of a public ferry across Neuse river, which has been in use by the public for over forty years, and alleges that the defendants,

a private corporation, under authority of a law passed by our General Assembly, 17th January, 1872, are preparing to open another ferry within one and a half miles from the plaintiff's, and that defendants by virtue of said Act have taken possession of some of the plaintiff's land to enable them to open the said ferry.

There are many other allegations *pro* and *con*, and much evidence filed with complaint and answer; not being pertinent, however, to the point, upon which a decision of the case rests in the Court, such allegations and affidavits are not reported.

The Judge below refused to grant the injunction, and dismissed the complaint.

Plaintiff appealed.

Haughton, for appellant:—

Plaintiff claims under prescription, right of ferry, &c., for more than forty years is the owner of the land on which his ferry is located, and *also owner* of the land on which the defendants have located their ferry.

Defendants claim under a charter of the General Assembly:

1. It is insisted that the Constitution, Art. 7, sec. 2, which provides that the county commissioners shall exercise a general *supervision* and *control* of the penal and charitable institutions, roads, bridges, &c., as may be prescribed by law, confers a general and exclusive jurisdiction over bridges, ferries, &c., as may be prescribed by law, and that it contemplates a general *system* applicable to all parts of the State, and requires the Legislature to prescribe a general and uniform system by which roads, bridges and ferries shall be established by law.

It had a two-fold object:

1. To prevent an unnecessary consumption of time by the Legislature in relation to matters of this sort.

2. Because it was very wisely considered that matters of this kind, as one strictly of county police, could be much better managed by the county commissioners, who have knowledge of all the facts, and thereby to prevent the Legislature from being imposed upon as they often will be in matters of this description.

Independent of this provision, and before the adoption of the present Constitution, the principle is recognized by our Supreme Court, that where a ferry is established by law, if the right is shown to have existed and enjoyed long enough to raise the presumption of an original grant from the Legislature, or by the act of the County Court, such party was by virtue of the common law entitled to his action for damages for withdrawing his customers from his ferry. *Taylor* v. *W. & M. R. R. Co.*, 4 Jones, 277. And this right of action is applied to that case, although the defendants (as here) claim under a charter from the Legislature.

The law will never sacrifice individual interest unless it is manifestly for the public good, and when, as in this case, the defendants claim to do or intend to do an act that will promote the public convenience and interest, and that there is a necessity for the new ferry that must be shown, and this is expressly disproved by the affidavits and the memorials or petitions, made part of the plaintiff's case.

In the language of the Court in *Beard & Merrill* v. *Long*, 2 N. C. Law Repository p. 71, the plaintiffs may say to the law you have granted to me the right of a ferry many years ago, which has always been and is now in good repair, I have been at great expense, or that it was understood between us both that my interest should not be impaired but for my own neglect, &c., and I invite particular attention to the whole opinion of the Court in this case.

Again, as the plaintiff is the owner of the land on which

his is located, as well as that on which defendants propose to establish their ferry, if there is necessity for another ferry, the Legislature cannot take the land of the plaintiff and grant it, or the use of it to the defendants, unless plaintiff has the opportunity first allowed him to establish the new ferry on his own land, and unless it appears: 1st. That there is a real public necessity for the new ferry; 2d. That plaintiff, as owner of the land, has been called upon to establish this new ferry, and has refused or failed to do so. *Pipkin* v. *Wynns*, 2 Dev. Rep. 402. Hence the charter under which defendants claim is null, because it violates these two principles, and because it violates vested rights. *Hoke* v. *Henderson*, 4 Dev. Rep. 17.

Green, contra.

RODMAN, J. The plaintiff claims an exclusive right of ferriage between a certain point on the north side of Neuse river and the city of Newbern, and within a reasonable distance above and below that line. He says that the defendants, under an Act of Assembly ratified 25th of January, 1872, threaten to establish a ferry between Newbern and a point on the north side of Neuse river, about one and a half miles above his terminus on that side of the river.

The proposed ferry will materially interfere with his rights and destroy his profits, and he asks for an injunction against its establishment.

At an early period the General Assembly gave to the County Courts the power "to appoint and settle ferries, and to order the laying out of public roads, and to appoint where bridges shall be made, and to discontinue such roads," &c. Rev. Stat. chap. 104, sec. 1; Act 1784, chap. 227, sec 1.

In 1813 it was enacted that the County Courts should not appoint or settle any ferry or lay out, discontinue or alter any public road except on petition and after notice to all

persons over whose lands the road may pass, or whose ferry theretofore established should be within two miles of the ferry proposed to be established, and thereupon the Court shall have full power to appoint and settle the said ferry, and to lay out, alter or discontinue the roads. A right to appeal was given to the Superior Courts. Rev. Stat. chap. 104, sec. 2, 3; Rev. Code chap. 101.

Whether the Court by appointing a ferry to a particular person and establishing rates of toll, thereby granted to him an exclusive franchise which the Court reserved the power to regulate, but which neither the Court nor the General Assembly could deprive him of, or materially impair without compensation; or whether the right remained in the State by any of its organs to discontinue or alter the ferry or to establish a new one in proximity to it, whenever the public interest or convenience might require, we believe has never been precisely determined in this State. Nor has it been determined whether such a grant, without words of inheritance, descended to the heirs, or whether it was necessarily appurtenant to a particular piece of land so as to be prescribed for as a *que* estate.

We do not propose to touch upon any of these questions any further than may be necessary for the purposes of the present case. The plaintiff does not produce any record of an appointment from the County Court except an order made in 1866 fixing certain rates of toll which Stephen G. Barrington (an ancestor of plaintiff) was allowed to charge at the ferry claimed by plaintiff.

He alleges that he, and those under whom he claims, for forty years or more before the acts of the defendant complained of, and before the Act of 1872, have used and had the exclusive right of ferriage set forth.

There can be no doubt that a grant from the County Court, as well as from the State directly, or from an individual, may be proved by an user for forty years or even less. *Pip-*

kin v. *Wynns*, 2 Dev. 402; *Saunders* v. *Hathaway*, 3 Ired. Eq. 402. It is assumed, if not decided, in those cases, that an appointment of a ferry to a particular person, when the appointment is general, as it must be where it is proved by prescription only, is the grant of a franchise in fee, which passes to the heirs.

It is decided that the franchise is an exclusive one not only between the particular termini, but for a reasonable distance above and below the usual line of passage. The Act of 1813 is not alluded to in those cases, (perhaps because the user began before 1813) and the Court seems to have assumed that the English common law respecting ferry franchises existed in North Carolina. What that law is may be seen in the dissenting opinion of STORY, J., in *Charles River Bridge Company* v. *Warren Bridge*, 11 Pet. 583.

What that reasonable distance is the Court had no occasion to consider, as in both cases the termini were identical, or in very close proximity. Perhaps no better determination of it can be made than what is implied in the Act of 1813, viz: two miles on either side of the line of passage. The defendant's ferry is within that distance. The Act of 1764, Rev. Code chap. 101, sec. 60, is confined to *unauthorized* persons, and to those who take pay. *Taylor* v. *W. & M. R. R. Co.*, 4 Jones 277.

Then on these principles, assuming the facts alleged by the plaintiff to be true, they establish a grant to him of an exclusive ferriage between the prescribed termini, and for two miles on either side thereof.

As to the tenure by which the franchise is held, the more important question remains whether it is a perpetual vested right which the State cannot divest without compensation, or whether it was a grant with a power to regulate, to impair, and even to revoke at pleasure, reserved. There is no decision on the question in this State. In an anonymous case in 1 Hay. 457 (1797) the question arose: HAYWOOD, J.,

said that orders for keeping ferries were like the King's grants—they were exclusive—and the County Court had no right by a second grant to establish a ferry so near a former one as to injure its profits. But STONE, J., said the Courts could establish two ferries at the same place, and no decision was given.

In *Beard* v. *Long*, 2 C. L. Rep. 69 (1815) the Court evidently considered that the County Court had the *right* to establish a second ferry in close proximity to an older one, but refused the application for reasons of expediency.

In *Pipkin* v. *Wynns*, 2 Dev. 402, the County Court had assumed to take away an old ferry from the plaintiff who owned it by prescription, and also owned the land on both sides of the river, and to give it to the defendant without compensation; and no notice was given as required by the Act of 1813. The Court declare the second grant void, and put the decision on the ground that the right to use the land at the termini could not be taken from the owner without compensation, which was undoubtedly correct. But it is not said that compensation must also have been made for the ferry franchise as distinct from the ownership of the land. In *Saunders* v. *Hathaway*, 3 Ired. Eq. 402, the plaintiff's bill was brought in 1844. There was no proof of a grant, but in 1801, the County Court had rated his ferry, and he had constantly since continued in the use and enjoyment of the ferry, or of a bridge which he erected in its place. The defendant without any authority erected a bridge "about two miles" from it. The Court enjoined the defendant from opening his bridge. As the defendant was without authority, the decision is not in point to the present case, but the Court say "the truest policy therefore, as well as good faith to the plaintiff, might forbid the County Court from granting the defendants an order for their bridge," &c. "From the nature of the subject the necessity for a new ferry or bridge is like that for a road, to be judged of by the

public authorities, and that decision must be final. In this State the jurisdiction to appoint and settle ferries, &c., is conferred on the County Courts. Therefore whoever sets up a ferry or builds a toll bridge, knows that he does so subject to the future action of the County Court or Legislature in authorizing other ferries or bridges at other points on the same stream, though so near to his own as to interfere with his tolls. But one may very willingly trust to the benign respect of the regular tribunals of the country," &c.

The question being seen to be clear of the controlling authority of any decided case, is open to be considered on the Act of 1813. Rev. Code, chap. 101, secs. 1, 2, 3.

Without resorting to any aid from the principle that nothing is implied in a grant from the State, (11 Pet. 547–8,) and assuming that the County Court granted all that they were authorized to grant, we think that the Court had no power to make an irrevocable grant of an exclusive ferry. Section 1 gives the Court power to settle and discontinue a ferry. Section 2 requires notice to be given of the petition for a new ferry within two miles, which necessarily implies the power to establish the new ferry on such terms as to the Court shall seem just. This construction is in accordance with the *dicta* above cited, and no reasonable objection can be urged against it. The grantee took the estate with its known instability. In the language of RUFFIN, J., he trusted to the "benignant respect" of the Legislature for his protection. We are of opinion that the Legislature did not divest any vested right in allowing a new ferry within two miles of the plaintiff's.

That is all which the Act of 1872 does. It does not give to the defendant any exclusive right; it does not exclude the plaintiff from his right of taking tolls; it only establishes a new ferry with a similar right in another person. If the Act had taken from the plaintiff without compensation his right to carry passengers for pay between his usual

termini, that might have been a different question, on which we express no opinion.

The counsel for the plaintiff further contends that the Constitution, Art. VII., sec 2, which gives to the commissioners of counties a general supervision and control over the schools, roads, bridges, &c., of their counties as may be prescribed by law, deprives the Legislature of the power of special legislation over those subjects. This construction would deprive the Legislature of too considerable a part of the powers usually exercised, to permit us to impute such an intention except upon express words. The clause, like many others in the Constitution, is addressed to the Legislature alone, and if disregarded (though we do not say it has been in this instance) cannot be enforced.

The counsel objects to the validity of the Act on a third ground, viz: that it authorizes the defendant to locate the northern terminus of their ferry on the land of the plaintiff, and that they have actually so located it.

For this, he relies on *Pipkin* v. *Wynns*, in which HENDERSON, J., says the County Court before granting the ferry to the defendant should have offered it to the plaintiff, who by owning the land on *both* sides of the river had a preferable right. But this is said in reference to the ownership in that particular case, and rather as a statement of what was equitable and just, than of positive obligation beyond the power of the Legislature to disregard. There can be no doubt of the power of the Legislature under its right of eminent domain to grant the franchise of a ferry to any one, and to authorize the condemnation of the land of a riparian owner as a landing place. It is analogous to condemnation for a public road. There is no obligation on the Legislature, at least, none which the Courts can enforce, to offer the franchise first, to the riparian owner.

Of course there must be compensation. And it seems that condemnation for a public road does not authorize the

grantees of a ferry franchise to use the land as a landing place.

There are several authorities that the right of preference in the owner of the bank on both, or either side of a river, is the creation of a statute, and does not exist independently.

Some of these are collected in a note in 3 Kent. Com. 421. *Allen* v. *Fransworth*, 5 Yerger, 189; *Nashville Bridge Co.* v. *Shelby*, 10 Yerger, 280; *Somerville* v. *Wimbish*, T. Gratt. 205; *Mills* v. *County Commisssoners*, 2 Scam. 53; *Young* v. *Harrison*, 14 C. Geo. 130, S. C. 9 Geo. 359. To which may be added *Miller* v. *Learns*, 3 Oregon, 215.

In this case the Act provides for compensation to the owner of the land taken by the defendant. On what principles it should be calculated, it is not our duty to inquire.

We must at present assume that full indemnity has been or can be obtained. Nor are we called on to express any opinion on the rights of the defendant, except so far as they are involved in the question of the plaintiff's right to an injunction.

PER CURIUM. Judgment below affirmed. Injunction refused, and case remanded.

STATE on the relation of O. SPRINKLE and wife NANCY *v.* JOHN W. MARTIN.

An instrument intended as a guardian bond, in which the names of the wards are recited in the wrong place, and in another part of said bond the names are inserted, A, B and others, wards, by a just and liberal construction is sufficient as a guardian bond under the statute.

CIVIL ACTION, tried before *Mitchell, J.*, at Spring Term, 1873, of WILKES Superior Court.

Plaintiff declared on the following bond, claiming the same as a guardian bond:

"STATE OF NORTH CAROLINA,

"WILKES COUNTY.

"Know all men by these presents, that Benjamin P. Martin, John Martin and N. G. Martin, all of Wilkes county, in the State aforesaid, are held and firmly bound unto the State of North Carolina in the sum of twenty thousand dollars, current money, to be paid to the said State in trust for the benefit of the child—hereafter named, committed to the tuition of the said S. J. Martin, J. O. Martin, N. E. Martin, E. S. Martin and Felix Martin, to which payment well and truly to be made, we bind ourselves and each of us, each and every one of our heirs, executors and administrators, jointly and severally firmly by these presents. Sealed with our seals, and dated the day of 4th November, in the year of our Lord, 1857.

"The condition of the above obligation is such, that whereas, the above bounden Benjamen P. Martin is constituted and appointed guardian to S. J. Martin, J. O. Martin and others, a minor orphan; now if the said Benjamin P. Martin shall faithfully execute his said guardianship, by securing and improving all the estate of the said S. J. Martin and others, that shall come into his possession for the benefit of the said S. J. Martin and others, until he shall arrive at full age, or be sooner thereto required, and then

render a true and plain account of his said guardianship on oath before the Justices of our said Court, and deliver up, pay to, or possess the said S. J. Martin and others of all such estate or estates as he ought to be possessed of, or to such other persons as shall be lawfully empowered or authorized to receive the same, and the profits arising therefrom, then the obligation to be void, otherwise to remain in full force and virtue.

"BENJAMIN P. MARTIN, (SEAL.)
"NATHAN G. MARTIN, (SEAL.)
"J. W. MARTIN, (SEAL.)

"Test: W. MARTIN.

"A true copy. Test: GEORGE H. BROWN, Clerk."

Plaintiffs showed from the records of the late Court of Pleas and Quarter Sessions of Wilkes county, that "B. P. Martin was appointed guardian of S. J. Martin, J. O. Martin, N. E. Martin, E. S. Martin and Felix Martin, and give bond in the sum of $20,000, with N. Y. Martin and J. W. Martin, securities," and that the bond, of which the foregoing is a copy, was found among the proper files in the office of the present clerk.

Defendant introduced no evidence, and insisted that the plaintiff could not recover in this action, for defects apparent upon the face of the bond, and asked the Court so to instruct the jury.

His Honor gave the instructions prayed, and the jury returned a verdict in favor of defendants. Motion for a new trial; motion refused. Judgment against plaintiffs for costs and appeal.

Furches, for appellant:

1. There is no doubt as to the fact that B. P. Martin was appointed guardian of the *feme* plaintiff, upon his giving the bond required by the Court.

2. It is equally certain that the said B. P. Martin, with Green Martin and the defendant, his sureties, undertook to comply with the order of the Court and the requirements of the law by executing and filing the bond upon which suit is brought.

3. The bond is certain to a certain intent. The name of the *feme* plaintiff appears in the bond, and although it does not appear in the conditions, yet it is certainly referred to by the word "others," and therefore is sufficient. *Id certum est quod certum reddi potest.*

4. In construing a deed, such a construction must be put upon its effect, rather than to destroy. *Ut res magis valeat quam pereat.* See *Iredell* v. *Barbee,* 9 Ired. 273.

5. Bond was sufficiently executed for an official bond, by delivering it to Mastin, Clerk. *Vankook* v. *Barnett,* 4 D. S. L. 270. *Fitts* v. *Green,* 3 Dev. 296–9, where it is said that deputy clerk is the agent of the clerk to receive an official bond, &c., and of course if the deputy is the agent of the clerk, the clerk must be the principal.

6. But if a guardian bond has been improperly prepared on account of the ignorance or inadvertence of the clerk, equity will perfect the same against the surety as well as against the principal. *Armstead* v. *Boseman,* 1 Ired. Eq. 117.

7. Under the present organization of the Courts they have jurisdiction of questions of equity, as well as of law, in cases brought since the adoption of the C. C. P. And the complaint in this case is framed with a view to both reliefs.

Armfield and *Folk,* for defendant.

READE, J. Benjamin P. Martin was appointed guardian of the *feme* plaintiff and four of her brothers and sisters, and entered into a bond payable to the State in the sum of $20,000, "in trust for the benefit of the child hereinafter

named, committed to the tuition of the said S. J. Martin, J. O. Martin, N. E. Martin, E. S. Martin and Felix Martin." These were the names of the wards, which it seems were inserted in the blank, instead of the name of the guardian, by mistake as we suppose. So that the bond recites that the wards were committed to their own tuition, instead of to the tuition of the guardian.

The condition of the bond recites that "whereas the above bounden Benjamin P. Martin is constituted and appointed guardian to S. J. Martin, J. O. Martin and others a minor orphan. Now if the said Benjamin P. Martin shall faithfully execute his said guardianship by securing and improving all the estate of the said S. J. Martin and others that shall come to his hands for the benefit of the said S. J. Martin and others until he shall arrive at full age, and then render a true and plain account of his said guardianship, &c., and shall deliver up, pay to, or possess the said S. J. Martin and others of all such estate," &c.

It is evident that the instrument was intended as a guardian bond, and we suppose it was a printed form with the blanks filled up by a careless or ignorant clerk. But informal as it is, we think that by a just and liberal construction it is sufficient as a guardian bond under the statute, and that the defendant is liable upon it. The names of the wards are all inserted in the bond, although their names are put in the blank in which should have been put the name of the guardian; and their names are not all mentioned again in the instrument, but it is stated in the condition that "Benjamin P. Martin is constituted guardian of S. J. Martin, J. O. Martin and others." These two names are the first two names of the wards inserted in the bond; and "others" must refer to the other wards named in the bond. So that it appears that Benjamin P. Martin was the guardian of all the named wards, and that this bond was given as his guardian bond.

If the instrument were not sufficient as a guardian bond under the statute, then it is insisted that it would be good as a common law bond. And so we think. But it is not necessary to consider it in that light, as we think it sufficient as a guardian bond under the statute.

It is also insisted that if it were insufficient in form, enough appears to see what was intended, and that the Court will reform it, so as to make it what it was intended to be. That is also true; but for the reason already stated it need not be further considered.

There is error.

PER CURIAM. *Venire de novo.*

JOHN BARRINGER *v.* L. E. BARRINGER.

In a suit for divorce, *a vinculo matrimonii*, the plaintiff, (the husband,) is a competent witness to prove the impotence of his wife.

Prior to the 1st day of July, 1872, suits for divorce were properly instituted before the Superior Court Clerk, but since that date, by virtue of the Act of 1871-'72, chap. 193, the Superior Court in term time alone has jurisdiction.

SPECIAL PROCEEDING, petition for divorce, a *vinculo matrimonii*, filed before the Clerk of the Superior Court of CABARRUS county, and thence transferred to the Superior Court, where it was tried before *Logan, J.*, at Spring Term, 1873.

The chief allegation in the plaintiff's complaint, entitling him to the judgment prayed, and upon which an issue was framed and submitted to the jury, was * * * * * *

"That almost immediately after their said marriage, the plaintiff discovered that his said wife was entirely impotent and incapable of sexual intercourse, from some malformation or organic interruption or derangement, the name or

nature of which was and still is unknown to plaintiff, except that it utterly prevented all penetration and sexual enjoyment."

The defendant failed to answer. On the trial of the issues submitted to the jury, the plaintiff was the only witness called; and his Honor reserving the question as to the admissibility of his evidence, allowed him to be examined.

The jury returned their verdict in favor of the plaintiff and find all the issues true.

His Honor, upon consideration, being of opinion that the plaintiff was not a competent witness to prove the allegation in his complaint, set the verdict aside, and gave judgment against the plaintiff for costs.

Plaintiff appealed.

R. Barringer, for appellant.

No counsel for defendant in this Court.

SETTLE, J.—The record in this case was made up with a view of presenting a sinple point, to-wit:

Is the husband a competent witness in a proceeding seeking to have the marriage declared a nullity, to prove the impotence of the wife?

The complaint alleges "that almost immediately after the marriage, the plaintiff discovered that his wife was entirely impotent and incapable of sexual intercouse from some malformation or organic interruption, or derangement, the name and nature of which was, and still is unknown to plaintiff, except that it utterly prevented all penetration and sexual enjoyment."

The defendant did not appear nor answer. Proper issues were submitted to a jury, and the plaintiff was the only witness introduced upon the trial.

The record states that "the Court reserving the question as to his admissibility, allowed him to testify; and he proved

fully all the facts maintained in each issue, and the jury returned a verdict that they were true. Thereafter, the Court being of opinion that the plaintiff was not a competent witness set the verdict aside, and the plaintiff prayed an appeal which was granted."

We think that the Code of Civil Procedure, sec. 341, makes him a competent witness. It might possibly be argued upon the first part of this section that husbands and wives are only competent witnesses for or against each other in suits where a third party is concerned, and not in a suit where they alone are the parties, if it were not for the concluding portion of the section, which enacts that "nothing herein contained shall render any husband or wife competent or compellable to give evidence for or against the other in any criminal action or proceeding (except to prove the fact of marriage in case of bigamy,) or in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery, (except to prove the fact of marriage,) or in any action or proceeding for or on account of criminal conversation."

The conclusion is irresistable that husbands and wives are competent and compellable to give evidence for or against each other, save only in the particular cases above specified.

This is neither a criminal proceeding nor a proceeding in consequence of adultery, nor a proceeding for divorce on account of adultery, nor a proceeding for or on account of criminal conversation.

It may be that the omission to exclude husbands and wives from being witnesses in cases like the one before us was an oversight; or it may be that on account of the peculiar nature of such a complaint, and the great indelicacy and difficulty of establishing it by other proof, it was though advisable to hear those who have the best knowledge on the subject.

But this innovation upon the ancient law of evidence

will certainly afford much greater opportunities for collusion between the parties, then when the competency of the woman, who was alleged to be impotent by reason of malformation had to be "tried by the careful inspection of grave and honest matrons of her parish, who attested on oath, if the woman was found to be impotent, that she could never be a mother or proper wife."

The Courts were very cautious in guarding against collusion between the parties, and it seems that in a suit of nullity by reason of the man's impotency, the report of medical men who had inspected the man, was not alone sufficient evidence of his impotency, but the Court always required a certificate of medical persons as to the state and condition of the woman, and if she was found *virgo intacto*, yet *apta viro*, after three years cohabitation, which the law required, (except in such cases as malformation) before a suit could be entertained for annulling a marriage by reason of impotence, it afforded the strongest reasons to presume the impotency of the man. Shelford on Marriage and Divorce, 33 Law Lib., 202.

As we have learned that there is a diversity of opinion in the profession as to the proper jurisdiction of proceedings for divorce, we have examined the legislation on the subject, and our conclusion is, that prior to the first day of July, 1872, such proceedings should have been instituted before the Superior Court Clerk, but since that date, by virtue of the Act 1871-'72, chap. 193, the Superior Courts in term time alone have jurisdiction of proceedings for divorce.

There is a marked difference between proceedings for divorce and other special proceedings, and a very substantial reason why they should be originally brought to the Superior Court in term time.

It does not necessarily follow in other special proceedings that any issues will arise which must be sent to the Court to be tried in term time, for as a general rule, the clerk can

give all proper relief; but the issues in proceedings for divorce must necessarily go to the Court to be tried in term time; then why institute a proceeding before the clerk when it is known in advance that it must be transferred? We think the change a wise one.

This proceeding instituted on the 13th of November, 1871, was properly commenced before the clerk. The plaintiff was a competent witness to prove the impotence of his wife, and his Honor having reserved the point of law, erred in setting aside the verdict of the jury.

The case will be remanded in order that the Superior Court may proceed to judgment upon the verdict.

PER CURIAM. Judgment reversed.

JOHN TULL *v.* WM. J. POPE.

Entries in a book showing a state of facts not materially different from those appearing on a trial, will not entitle to one of the parties to have the judgment set aside and a new trial, although the existence of such entries was unknown at the trial and was subsequently discovered.

(*James* v. *Saunders*, 64 N. C. Rep. 367; *Bledsoe* v. *Nixon*, at this term, cited and approved.)

CIVIL ACTION, tried before *Clarke, J.*, at Fall Term, 1873, of the Superior Court of LENOIR county.

In his complaint the plaintiff alleged that John C. Washington, of Lenoir county, on the 31st of January, 1861, executed to him a note for $512.80 with interest, which note, he, the plaintiff, indorsed to one Stephen White, now deceased, with the understanding and agreement on the part of both White and Washington that the plaintiff was not to be called on for the payment of the same, the indorsement being merely for the purpose of vesting title in the

note to White, and that White was to look alone to Washington for its payment; that the note was passed to White in payment of plaintiff's store account, he, White, stating that it was the same as cash to him, as he himself owed Washington, and receiving the note with this understanding, gave the plaintiff credit for the amount of the note on his books; that this credit was given 6th March, 1864, as appears from White's books, and the note and interest, to-wit: $638.94, charged to Washington's account; that the entries on the books of White, was made by one Coleman, who after the death of White, was employed by his administrator to post his intestate's books.

Plaintiff further alleged that Stephen White was dead, and that Wm. White administered on his estate; that in 1871, the administrator dying, one Harper was appointed administrator *de bonis non* of Stephen White's estate, and that he, acting under an order of the Probate Court, sold the said note at auction, when the defendant purchased it for less than $100.

That the defendant sued on the note, and at Spring Term, 1872, obtained judgment on the same, and intends issuing execution thereon; that on the trial, the plaintiff, in that action the defendant, was precluded from proving the facts, understanding and agreement between himself, White and Washington, in consequence of the death of White; that since the trial, he, the plaintiff, has had an examination of the books of White, and finds the entries before stated, and is now prepared to prove the agreement with White, and that he ought not to be held responsible for the payment of said note on account of his indorsement.

Plaintiff demanded judgment that defendant be restrained from collecting the judgment, &c.

A temporary order being issued by Judge CLARKE, restraining the defendant from proceeding to collect the judgment he had obtained against the plaintiff at Spring Term,

1872, the defendant appeared and answered, and stated that on the trial of his action against the plaintiff it was in evidence that when the note sued on was the property of Stephen White, the maker, Washington, held large claims against White, and the question being, had there ever been any settlement between White and Washington of their respective claims, White also having other unadjusted claims against Washington, he, Washington, swore that there had been an executory agreement that their several claims should be settled and allowed, but that he could not say there had ever been any actual settlement; that if there had been such settlement the books of White would show it; that the entries on White's books were made by Coleman since the death of White; that at the time of the trial the books were in town, and also the administrator, the latter being in the Court-house, and could have easily been made evidence.

It appears from the case agreed, in addition to the facts stated in the complaint and answer, that on the first trial the plaintiff here was ignorant of the existence of the books of White containing the entries before set out, and that those entries were taken by Coleman from a memorandum book kept by White himself, which book had been accidentally found after the death of White.

Upon the foregoing facts his Honor ordered the judgment obtained at Spring Term, 1872, by defendant against the plaintiff to be set aside and a new trial granted. From this judgment defendant appealed.

Smith & Strong and *Batchelor, Edwards & Batchelor*, for appellants:

1. The plaintiff has misconceived his remedy, if remedy he has. When the distinction between actions at law and suits in equity prevailed, it may be conceded that the plain-

tiff's remedy was by bill, and in the meantime to enjoin the collection of the judgment. But now the remedy is by motion in the cause in the form of a petition supported by affidavits. *Mason* v. *Miles*, 63 N. C. Rep.; *Jarman* v. *Saunders*, 64 N. C. Rep. 367; *Gee* v. *Hines*, Phill. Eq. 315; *Rogers* v. *Holt*, Ibid. 108.

But if we are mistaken:

2. The assignment of the bond by Tull to White was in blank. Tull now proposes to prove that at the time of his assignment in blank to White, it was agreed that he was not to be liable for the debt, as the purpose of the assignment was only to pay Tull's debt to White, and give White a cause of action or right of set off against Washington. Is parol evidence admissible to show this? We think not. See Smith on Con., 28. *Reynolds* v. *Magniss*, 2 Ired. 30 Admitting it to be competent as between Tull and White, still it cannot be as between the assignee for value and without notice, being a negotiable instrument.

3. But again, it is said the debt was extinguished before the bond became by purchase into the hands of Pope; and that Tull can show this by White's books. White's books show simply that Tull's store account with him was paid by the transfer of this bond. But White's books not only do not show that Washington has paid this bond, but they show that Washington was debited with this bond in his account, and the bond is found in White's possession by his administrator after his death, which is almost conclusive evidence that Washington never *satisfied* this bond debt to White.

4. A Court of Equity will not set aside a judgment at law except for fraud, circumvention or perjury practiced upon the trial. *Wilson* v. *Leigh*, 4 Ired. Eq. 100. Nor ought this power of a Court of Equity to set aside a judgment at law be exercised in any case when the party applying has been guilty of any *laches*. *Dyche* v. *Patton*, 8 Ired. Eq. 296, and in *Houston* v. *Smith*, 6 Ired. Eq. 268, it is said "only for *new*

matter, not known at the trial at law, has equity ever interfered to grant a new trial, and then not for matter to repel the charge by opposing proof, but such as destroys the proof."

See also *Powell* v. *Watson*, 6 Ired. Eq., and particularly *Burgess* v. *Lovingood*, 2 Jones Eq. 460, where all the cases in our Courts are collected and commented on.

And further:

A party cannot ask equity for a new trial at law merely because he failed to make good a legal defense at law. *Gatlin* v. *Kirkpatrick*, 1 Car. Law Rep. 534; *Fentress* v. *Rollins*, Term Rep. 177; *Peace* v. *Nailing*, 1 Dev. Eq. 289; *Bizzell* v. *Bozeman*, 2 Dev. Eq. 154; *Champion* v. *Miller*, 2 Jones Eq. 194; *Martin* v. *Harding*, 3 Ired. Eq. 603.

Nor because he can adduce cumulative evidence as to the facts on which his defense rested at law. *Pemberton* v. *Kirk*, 4 Ired. Eq. 178; *Alley* v. *Ledbetter*, 1 Dev. Eq. 449; and where defendant while plaintiff, concealed facts at law. *Fish* v. *Lane*, 2 Hay. 342.

One who does not prove on trial at law payment which he alleges he has made, can have no relief in equity unless he can show fraud and circumvention practiced to prevent his making proof. *Deaver* v. *Erwin*, 7 Ired. Eq. 250.

Cases where it was alleged witness for opponent had perjured himself: *Peagram* v. *King*, 2 Hawkes 295; *Ibid* 605; *Dyche* v. *Patton*, 8 Ired. Eq. 286; 3 Ired. Eq. 332.

Cases of newly-discovered evidence where the relief was refused: *Wilson* v. *Leigh*, 4 Ired. Eq. 100; *Powell* v. *Watson*, 6 Ired. Eq. 94.

Character of new evidence must be decisive. *Houston* v. *Smith*, 6 Ired. 264; *Burgess* v. *Lovingood*, 2 Jones Eq. 457.

Battle & Son, contra:

This is a civil action brought by plaintiff to obtain a new trial in a case in which he was defendant in the Superior

Court. It is a proceeding in the nature of a bill in equity, and as such the case of *Peagram* v. *King*, 2 Hawkes 295 and 605, is directly in point, and in our favor.

The circumstances under which the newly-discovered testimony was found show that the plaintiff in this suit was not guilty of any negligence in not having produced it on the former trial, and the evidence is of such a character that it not only repels the adversary's charge, but it destroys his proofs.

The principles laid down in *Peagram* v. *King* are fully recognized in *Houston* v. *Smith*, 6 Ired. Eq. 264.

PEARSON, C. J. The newly-discovered evidence on which this proceeding is based, to-wit: the entries in the books of White amount only to this: Tull is credited with the principal of Washington's note, $512, on what Tull owed White, and Washington is charged in account with the principal and interest of his note, $638.

This adds little if any force to the evidence which Tull offered on the trial of the issue, to-wit: Did White and Washington have a settlement in which the note of Washington was allowed as a set off in satisfaction *pro tanto* of White's indebtedness to Washington? This issue was found against Tull, and the weight of the evidence, throwing into the scale the entries alone referred to, is decidedly against Tull. White and Washington did not have the settlement set out in the issue. So the case does not fall within the principle of *Bledsoe* v. *Nixon*, at this term, nor of *James* v. *Saunders*. 64 N. C. Rep. 367.

Had Tull been well advised he might have "bought his peace" at the sale of the note, probably for a trifling amount, but he took his own course, and must abide by it. If Pope collects the money there may be a question of usury by White's entries, but it is not now presented.

The point in regard to adding to the indorsement by

proof of a verbal agreement that it was to be without recourse on Tull was properly abandoned in this Court. The action will be dismissed with cost.

Let this opinion be certified.

PER CURIAM. Action dismissed.

JAMES R. WOODY *v.* HENRY T. JORDAN and others.

A plaintiff having an action pending, cannot maintain a second action against the same defendant for the same cause. Such pending action should be pleaded in abatement.

But a judgment in an action brought to recover certain property specifically is no bar to a subsequent action between the same parties seeking to recover damages for the taking and conversion of such property.

A defendant is not bound to assert a set off or counterclaims in an action brought against him whenever he may do so; nor does the plaintiff's recovery bar a subsequent action for such counterclaim, which the defendant might have, but did not plead in the original action.

Irregular process, after it has been set aside, is no justification to the plaintiff in the action, or his attorneys and aiders.

Eborn v. *Waldo*, 5 Jones 438; *Pannell* v. *Hampton*, 10 Ired. 463; *Skinner* v. *Moore*, 2 Dev. & Bat. 138, cited and approved.

CIVIL ACTION, tried at the Fall Term, 1872, of the Superior Court of PERSON county, before his Honor, *Tourgee, J.*

On the 2d October, 1869, at the instance of the plaintiff, a summons issued to the defendants, commanding them to appear, &c. In his complaint the plaintiff alleged that the defendants had theretofore brought an action against him for the possession of certain property, and at their instance the sheriff of Person county had seized the same and delivered it to C. H. Williams, one of the defendants; that the defendants entered into bond in the sum of $1,600 for the prosecution of the suit and the payment of costs and damages; that the suit was dismissed for want of jurisdiction by the clerk of Person Court, and that in consequence of

said suit he has been endamaged to the extent of $800, for which he demands judgment.

In an amended complaint afterwards filed, the plaintiff charges defendants with seizing certain property, describing it, amounting in the aggregate to $1,485; that the property was seized by the sheriff at the request of the defendant, Jordan, aided and abetted by the other defendants; demanding judgment for $1,485 for the seizing and converting said property and the further sum of $1,000 damages for its detention.

The defendants deny the allegations of the complaint, and for further defense say, that the plaintiff heretofore obtained a judgment in the Superior Court of Person against them, for the return of the property mentioned in his complaint, and now has full and complete remedy by virtue of, and by motion in said action.

It appeared that the plaintiff was in possession of the property in May, 1869, when the sheriff seized the same and delivered it as above set forth to the defendant, Williams, the other defendants being present. To connect the defendant, Brooks, with the seizure, &c., the plaintiff offered in evidence an undertaking, purporting to be signed by Brooks, with the other defendants, as sureties for one M. A. Harris, in an action for the claim and delivery of personal property against the plaintiff in this action, being the property mentioned by plaintiff in his complaint filed in this action. This evidence was objected to, and ruled out by his Honor. Plaintiff excepted. Plaintiff then offered to ask the defendant, Jordan, if he did not sign the undertaking above mentioned. Objected to, ruled out, and the plaintiff again excepted.

The defendants afterwards offered in evidence the record of a suit wherein M. A. Harris was plaintiff, and James R. Woody, the plaintiff in this action, was defendant. With this record, was the undertaking offered by plaintiff as

above set out, and which was now read. Further, the defendants to justify seizure of the property, offered the record of a judgment of the United States Circuit Court for this District, rendered at November Term, 1868, in favor of the said M. A. Harris and against the plaintiff, and a sale of the property in controversy in this suit by the United States Marshal, on the 26th of May, 1869, and the purchase of the same by defendant, Jordan, for his client, Harris, the then plaintiff. It further appeared, that after that sale, Jordan permitted the property to remain in the possession of Woody. It was also in evidence, that on the morning of the sale day, 26th of May, 1869, Jordan, as attorney of Harris, was served with a notice of a motion to set Harris' judgment aside. The property was demanded by Jordan, from Woody, the plaintiff here, who refused to deliver it, whereupon Harris, on the day of ——, 1869, sued out a summons, returnable within 20 days before the Clerk, against Woody, and having filed the affidavit prescribed by the Code of Civil Procedure, the Clerk issued an order directing the sheriff to take the same into possession, and upon Harris' filing the proper undertaking to deliver the property to him. That upon the return of this summons both parties appeared by their attorneys before the Clerk, and after the pleadings were filed, the defendant, (the plaintiff here,) moved to dismiss the proceedings, which was done, and the plaintiff, Harris, appealed. At the regular term of the Court, the plaintiff, Harris, asked leave to amend, the necessary notice of the motion having been given to the defendant. Motion to amend was granted. At the Term, 187—, thereafter, the action was dismissed, and judgment for costs in favor of Woody against Harris rendered, as also a judgment that he should return the property delivered to him by the sheriff. The introduction of this record was objected to: 1. That the undertaking required by law had not been complied with; and 2d. The judgment was void, because the sum-

mons was originally returned before the clerk and not to Court in Term time. The objections were overruled, and the plaintiff again excepted.

The plaintiff in reply introduced the record of the U. S. Circuit Court, at June Term, 1870, showing that the judgment in favor of Harris was set aside and the execution issued thereon, vacated. His Honor intimated to the plaintiff that the judgment in the action of Harris against him was a bar to his right of recovering in this action, whereupon the plaintiff submitted to a verdict and appealed.

W. A. Graham, for appellant:

1. The sale by the Marshal was simply void, the judgment and the execution being set aside and annulled, the title remaining in the plaintiff.

2. The defendants who encouraged the taking of the goods by the sheriff are liable to the plaintiff as if they had acted without process. *Burgin* v. *Burgin*, 1 Ired. 453.

3. The judgment rendered against the present defendants and Harris, upon the dismission of his action for want of jurisdiction, ordering the return of the goods, is no bar to the recovery sought in this action, because: 1st. The undertaking given on suing out the process of claim and delivery was not taken according to the statute. C. C. P., sec. 179. It does not bind the obligors for the return of the property, if a return thereof be adjudged; nor for the payment to him of such sum, as for any cause may be recovered against the plaintiff. It is therefore, simply a common law bond and does not authorize the judgment actually taken, and this judgment and the writ for the return of the property are now only to be noticed in mitigation of the damages to be rendered in the present action. 2d. Because it was rendered, not in the same cause of action as the present, nor any cause of action at all, it being a dismission of the suit

for want of sufficient surety in the delivery bond, and was for the return of the goods. While this seeks to recover damages for the taking and conversion of the goods and their loss to the plaintiff, it is competent for the defendant to show, in reduction of the recovery, that the articles in part or whole, have been restored to the plaintiff, but this is no bar to the action.

The test of the plea of recovery by former judgment is, was the recovery for the same cause of action, and were the merits passed upon? 7 Bac. Ab. 635, 6, 7, 8, 9; *Benton* v. *Duffey*, Con. Rep.; *Carter* v. *Wilson*, 2 Dev. & Bat. 276; *Bond* v. *McBride*, 3 Ired. 440. So, on a Justice's judgment. *Ferrell* v. *Underwood*, 2 Dev. 111; and in Equity. *Ray* v. *Scott*, 6 Jones Eq. 283.

Batchelor, Edwards & Batchelor, contra, submitted:

1. If the plaintiff can have same remedy in pending action, he cannot sustain this action. *Rogers* v. *Holt; Mason* v. *Miles*, 63 N. C. Rep. 564; *Council* v. *Rivers*, 65 Ibid. 54; *Harris* v. *Johnson*, Ibid. 479.

2. The same relief could have been obtained by the plaintiff in this action, in the action of *Harris* v. *Woody*, which was pending when this was brought. C. C. P., 251; *Johnson* v. *Sedbury*, 65 N. C. Rep. 6; and that action is still pending, *Ibid.* *Ballard* v. *Johnson*, 65 N. C. Rep. 436.

3. The judgment in *Harris* v. *Woody* was substantially a judgment of the Court in favor of the plaintiff in this action; and if it was not such a judgment as the law directs that action is still pending, and he may still have it brought forward on motion and have the former judgment set aside and a proper judgment now rendered. If he has lost his right to a judgment in that action it is no fault of our clients, and the plaintiff is not entitled to remedy it here. *Dunn* v. ———, 3 Dev. & Bat. 52.

4. Plaintiff cannot maintain this action, because: 1st. The same issues both of law and fact were made in the pending action of *Harris* v. *Woody*. 2d. Plaintiff was bailee of defendant, Jordan, when this action was brought, and had not terminated the bailment by redelivery of the property to his bailor. 3d. The plaintiff had no title which would sustain this action; and 4th. The bare possession without evidence of title will not sustain this action (in the nature of Trover,) against the bailor.

5. The defendants got a good title by the purchase under the execution from the United States Circuit Court. The judgment was regular and could not be set aside. *Murphy* v. *Merritt*, 63 N. C. Rep. 502; *Jennings* v. *Stafford*, 1 Ired. 404; *Oxley* v. *Mizzell*, 3 Mur. 250.

6. Woody's remedy was not for the last taking, but for the injury arising out of the action in the Federal Court and proceedings therein.

7. If on the whole case it appears that a party is entitled to a judgment, the Court will not give a new trial for matters which could not change the rights of the parties. *Reynolds* v. *Magniss*, 2 Ired. 26.

RODMAN, J. To a proper understanding of this case, it is necessary to extract from pleadings by no means definite, the issues between the parties.

The plaintiff by his amended complaint alleges in substance, that the defendants in July, 1869, took from his possession, and converted to their own use, certain property for which he claims damages.

The defendants plead jointly, and,

1. Deny the taking and conversion.

2. The second article in the answer only denies the value of the property, and may be rejected as immaterial.

3. Admits that Barrett, sheriff of Person, seized the property under process in an action of Harris against the

plaintiff, Woody, but denies that it was done at their request, &c.

4. Denies that plaintiff has been damaged, and is immaterial.

5. That some part of the property has been turned to the plaintiff. By an amended answer, the defendants, say:

1. That every allegation of complaint is untrue. This is not in accordance with C. C. P., and may be disregarded.

For a second defence. 1. That plaintiff has a complete remedy in the action of *Harris* v. *Woody.*

2. That the property has been returned to plaintiff under the judgment in *Harris* v. *Woody.*

The two defendants, Williams and Brooks, by leave, filed separate answers in substance, denying the taking and conversion.

Under the opinion of his Honor that "the judgment against the defendants in the action of *Harris* v. *Woody* was a bar to the plaintiff's right to recover in this action," the plaintiff submitted to a verdict against him and appealed.

In what particular way, or for what particular reason, the judgment in *Harris* v. *Woody* barred the present plaintiff, we are not told either in the pleadings, or by his Honor, or in the argument of the counsel. It may be supposed that it was considered to do so in one of two ways, as being an adjudication of the same matter now in controversy between the same parties, or that the action of Harris was still pending and that it was open to Woody to obtain in that action the relief which he seeks in this.

To examine either of these views, it is necessary to look at the record of the case of *Harris* v. *Woody.*

It was an action to recover from Woody the property, the taking and conversion of which is the ground of complaint in this suit. The summons was issued the 5th of July, 1869, and was made returnable before the clerk in twenty days

ter service as required by C. C. P., secs. 73, 74.

Harris made the affidavit required by sec. 176, whereupon the clerk issued to the sheriff process, under which the property was taken by him and delivered to Jordan as the agent of Harris.

All the present defendants were sureties to the undertaking given by Harris under sec. 176. But the undertaking does not appear to be in the form prescribed.

The defendants answered, and afterwards the Judge dismissed the action for want of jurisdiction. At the next Term, Fall, 1869, on motion of Harris, the judgment of dismissal was set aside, and the case redocketed. At that or some subsequent term of the Court, it was ordered that Harris should give further security for the prosecution, or justify within thirty days, or on his failure, the action should be dismissed, and Woody have judgment against Harris and his sureties for a return of the property and for costs. Harris failed to comply with the order, and on the 6th of December, 1870, the clerk entered judgment according to the order, and issued an order to the sheriff commanding him to return the property, and a part of it was returned on the 8th of April, 1871. There was no inquiry as to the value of the property, nor for the damages of detention.

As to the first view, a mere inspection of this record is sufficient to show that as a matter of fact, the judgment did not decide upon the present cause of action. In this action, the thing claimed is damages for the taking and conversion of the property, whereas in that, the judgment was only for the taking and detention.

As to the second view that Woody can still obtain in the action of *Harris* v. *Woody*, the relief which he seeks in this.

As to the general principles bearing more or less directly on the question, there can be but little doubt.

No plaintiff who has an action pending can maintain a second action against the same defendant for the same cause;

the pending of such first action may be pleaded in abatement of the second, but not generally in bar.

Bac. Abr. Abatement. A defendant in replevin is an actor, and may obtain in that action damages for the taking and detention. *Eborn* v. *Waldo*, 5 Jones, 438. So that it must be conceded that Woody could at one time have recovered against Harris, and *perhaps* against his sureties, (though that is doubtful,) substaintially the same damages he claims in this action. But was he obliged to do so, and could he have done so at the time when the plea we are considering was pleaded?

It is not a general rule that a defendant is *obliged* to assert a set off or counter-claim in an action against him whenever he *may* do so. If he does plead a counter-claim, he cannot during the pendency of that action have a separate action upon it, and he is bound by any adjudication on it. But he is not bond by the plaintiff's recovery as to any set off or counter-claim which he did not plead. And in the action of replevin, he is at liberty to have his damages found or not, and whether they are found or not, he can maintain his common law action in the replevin bond. At least this is the practice in England, and there is no reason why it should be otherwise here. *Perrean* v. *Bevan*, 5 B. & C., 284, (5 E. C. L. R., 230.)

Ordinarily, a suit upon the replevin bond (or undertaking) would be the only remedy to a defendant for the *taking* under the process, because the process, if regular, would be a justification for the *taking*, and no recovery could be had for it in an action of trespass.

At common law, the defendant could only have judgment for a return of the goods, and in this State, as late as 1849, he could have no other judgment in case the plaintiff became non-suit. *Pannell* v. *Hampton*, 10 Ired., 463. It must be then that the common law gave him full indemnity by means of a separate action (of what sort, I have no

where found stated, but probably on the case,) for the damages from the taking and detention. That the common law remedies have not been abolished, and the statutory ones are only cumulative, is proved by *Perrean* v. *Bevan* above cited.

We think Woody was not obliged to have his damages found in Harris' action against him, and did not by failing to do so, forfeit his right to whatever remedy he had at common law.

Neither can he now obtain redress by any proceeding in the case of Harris, for that action is dismissed, and is no longer pending for such a purpose. In *Pannell* v. *Hampton*, and in *Waldo* v. *Eborn*, it is assumed that a plaintiff in replevin may take a non-suit or dismiss his action. Whether this remains true in general we need not inquire, but it must necessarily be so where the defendant requires further security for the prosecution which the plaintiff fails to give. A judgment of non-suit or dismissal is final in that action.

We have not noticed another objection to the defence supposed, regarding it as a plea in abatement of the pendency of another action, viz: that it is not pleaded as such, and is pleaded along with pleas in bar. It is familiar learning that a plea in bar waives a plea in abatement, and this is not from any artificial or obsolete reason, but from the essential difference in the character and effect of the two species of plea. We do not think that there is anything in C. C. P., abolishing this rule. But it is not necessary to put our decision on this principle, conceiving that the reasons above given which go to the merits of the defense are sufficient.

There is a third view in which the answer setting up the proceedings in *Harris* v. *Woody* must be considered, and which was probably the one intended by defendants in the third article of their joint answer. We think the defendants intended to plead the process in that action as a justification for the taking, and we proceed to examine the answer

as such. Certainly the process was a justification to the sheriff, and if it had been regular it would also have been to the plaintiff and to those who merely aided the sheriff as to the taking. But the process was irregular. The summons was irregular, because it was not returnable in term time, as it was required to be by the Act of 1868–'69, chap. 76, which was ratified in the March preceding the summons, and went into immediate effect. It is not necessary to say that this process was void. We do not think it was. But it was irregular, and irregular process after it has been set aside, is no justification to the plaintiff in the action or to his attorneys and aiders. *Barker* v. *Braham*, 3 Wils. 368; *Skinner* v. *Moore*, 2 Dev. & Bat. 138. In this case the action was dismissed, which we consider equivalent to setting aside the irregular process.

If, however, the process had been regular, although it would have been a justification to the *taking*, it would not have been to the *conversion* alleged in the complaint. It is a well-known principle that an abuse of a power in law makes the officer and all who concur with him in the abuse trespassers *at initio*. Six Carpenter's case; 1 Smith L. C. 62, and notes.

It is true that regular and orderly pleading required the plaintiff to omit the allegation of the conversion from his complaint, and to reply it to the plea of justification. Borey's case, 1 Vent. 217, cited in notes to Six Carpenter's case. But we nowhere find it said that a complaint is bad because it leaps too soon and charges an abuse, or that the defendant is not bound to deny the abuse. Here the defendants do deny the abuse; but that raises an issue of fact with which we have not to deal. We only say that the process is no justification either of the taking or of the conversion if they be proved.

We have dealt only with the questions of law raised by the plea of defendants setting up the proceedings in *Harris*

v. Woody. The issues of fact remain to be tried by a jury. We have not alluded to the record of the proceedings in the Circuit Court of the United States, because that does not bear on the plea we have been considering. That can only be pertinent to the issue upon the right of property in the goods as evidence of Jordan's title. In that view he will have upon the future trial whatever benefit he may be entitled to from it. But in answer to an argument by the defendants' counsel in this Court, we may say that neither a Superior Court nor this Court has jurisdiction to declare null or to revise a judgment of the Circuit Court setting aside a former judgment of its own. The effect of that record for the purpose mentioned in a question of law, but one not before us on this appeal.

Judgment reversed and case remanded. Let this opinion be certified.

PER CURIAM. Judgment reversed.

JAMES LEE and wife, SUSAN, and others *v.* R. P. HOWELL and others.

A guardian had a right to purchase the land of his wards at a sale by a clerk and master of our former Courts of Equity, made by order of such Court.

And our present Courts have the power to order their clerks to make title directly to subsequent *bona fide* purchaser, when it appears that no title was made by the clerk and master to the first purchaser, or if made was lost.

(*Simmons* v. *Hassell*, 68 N. C. Rep. 213; *Hutchison* v. *Smith*, Ibid. 354, cited and approved.

CIVIL ACTION, tried before *Tourgee, J.*, at the January Term, 1873, of WAYNE Superior Court.

The plaintiffs, as heirs at law of one Gaston H. Alford claim a certain tract of land in the possession of the defendants, and bring this suit for a recovery of the same, and for $10,000 damages.

The defendants admit that the land belonged to the said Gaston H. Alford at the time of his death, and say that at Fall Term, 1853, the plaintiffs, who were minors, together with a sister, by their guardian, one Wm. K. Lane, filed a petition in the Court of Equity of Wayne county, praying a sale of the land described in the complaint of the plaintiffs, and which had descended to them from their father, the said G. H. Alford; that a decree for the sale was duly obtained, and that under the order of said Court of Equity, a sale thereof was made by the clerk and master; that the said Lane, the guardian of the petitioners and plaintiffs in this action, purchased the land for the sum of $3,025, for which he executed a bond with sureties, and that the master reported the sale to the next term of the Court, when it was in all respects confirmed, and the master was ordered by the Court to pass the said bond, given for the purchase money, to the guardian as cash, or to collect the same, and after retaining costs and allowances, to pay over the balance to the said guardian and make title; that a settlement was had between the master and guardian and the money was paid, but the master failed to execute a deed for the land by him so sold to the said guardian, or if he made one it was lost before registration.

These allegations in the defendants' answer, were submitted as issues to the jury on the trial, and found by them true.

The guardian, Lane, subsequently sold the land to various parties, and it was re-sold until it came by purchases into the hands of the defendants, who had no notice of the claims of the plaintiffs.

The defendants further alleged, which was likewise found true by the jury, that the said Lane had paid to Lee and wife, one of the plaintiffs in this suit, their share of the purchase money, and had received from them a receipt or release in full for the same, the *feme* plaintiff being pri-

vately examined, and had also settled in full for the several shares of the other plaintiffs.

The defendants demanded that the plaintiffs execute a conveyance to them, releasing all title to said land, or that title be made to them in lieu of to Lane, whose deed was never executed, or if made was lost, as before set out.

The jury having found all the issues submitted to them in favor of the defendants, his Honor gave judgment against the plaintiffs for costs, and further ordered that the clerk of the Superior Court make title in fee for said land to the defendants according to their respective shares and interest therein, as set forth in their answer.

From this judgment defendants appealed.

Isler, for appellants, relied on the following authorities:

1. As to the jurisdiction of the Court: Const. Art. 4, sec. 25; *Green* v. *Moore*, 66 N. C. Rep. 424; *Walton* v. *McKesson*, 64 N. C. Rep. 454; *Simmons* v. *Hassell*, 68 N. C. Rep. 213.

2. Stat. Lim: *Whitford* v. *Hill*, 5 Jones Eq. 321; *Robinson* v. *Lewis*, Busb. Eq. 58; Rev. Code, chap. 65, sec. 19.

3. Question of payment in this case is a question for the Court: *Fesperman* v. *Parker*, 10 Ired. 474.

4. As to notice: *Thompson* v. *Blain*, 3 Mur. 583; *Davis* v. *Colton*, 2 Jones Eq. 430; *West* v. *Sloan*, 3 Jones' Eq. 102.

5. Whether the claim set up by defendants is a mere right or a trust: See Bouvier's L. Dic. Trust; and if a mere right it is barred by Stat. Lim. *Davis* v. *Colton*, 2 Jones' Eq. 430; *West* v. *Sloan*, 3 Jones Eq. 102.

6. Power of the Court to review the facts as found below: *Graham* v. *Kiner*, 4 Jones Eq. 94; 68 N. C. Rep. 53.

Faircloth & Granger, with whom was *Green*, contra.

A judgment cannot be impleaded collaterally: *Jordan* v.

James, 3 Hawks 110; *White* v. *Albertson*. 3 Dev, 241; nor a decree: *Watson* v. *Williams*, 6 Ired. Eq. 232; *Sinclair* v. *Williams*, Ib. 235; *Savage* v. *Hussey*, 3 Jones 149.

Every decision of a Court of competent jurisdiction is to be deemed according to the law and facts, until the contrary appear. *Wade* v. *Dick*, 1 Ired. Eq. 313.

A sale thus ratified, money received, cannot be re-opened, and title be decreed. *Sinclair* v. *Williams*, supra.

A stranger gets title even if judgment is set aside. *Skinner* v. *Moore*, 2 Dev. & Bat. 138.

BOYDEN, J. In this case the land in controversy had been ordered to be sold upon the petition of the plaintiff. A sale had been regularly made by the clerk and master, a report thereof to the Court, this report had been regularly confirmed, the purchase money all paid to the petitioners, the two owners of the land, and most of the proceeds of the sale by a regular proceeding in our Court, had been by order of Court, transferred to the State of Alabama, and passed over to the then guardian of the petitioners; and now the plaintiffs seek to recover this land on the ground that the first guardian, Lane, while guardian had purchased this land of the minor children the then owners on the ground that a guardian cannot purchase his wards' land at a sale made by the clerk and master. It is well settled that a guardian cannot purchase at his own sale, and that all such purchases may be treated as invalid, at the option of the wards, even when no unfairness in the sale and purchase has been shown. But this principle does not apply to a sale made by the master. *Simmons* v. *Hassell*, 68 N. C. Rep. 213.

Why may not the guardian purchase at such a sale? Must he stand by and see the property sold at an under value, *cui bono?* The sale is not of any validity until it has been reported to Court, nor then until the Court is satisfied that the land brought a fair price. Why then may

not the guardian become a purchaser? What reason is there to deny him the right to purchase? Is it possible that after a sale as in this case, and after by proceeding in Court the owners have received the proceeds of the sale and appropriated the same to their own use, that they can turn round and claim title to the land? Surely there is no principle of law, justice or common sense that would authorize such a proceeding.

The case of *Hutchison* v. *Smith*, 68 N. C. Rep. 354, is authority for the order of his Honor directing a title to the land to be made to the defendants.

There is no error. This will be certified.

PER CURIAM. Judgment affirmed.

J. A. NORWOOD, Guard'n, *v.* WM. HARRIS and J. L. HARRIS.

Pending a motion for final judgment, the Judge below has a right to allow an amendment striking out a demurrer which had been adjudged during the same term to be frivolous and the defendants to answer, especially when satisfied that the demurrer was interposed in good faith, and that the defendants had a valid, *prima facie* defense.

CIVIL ACTION, brought to recover the amount of a bond, tried before *Tourgee, J.*, at Spring Term, 1873, of PERSON Superior Court.

Plaintiff alleges that in August, 1857, the defendants borrowed from him $1,500, which belonged to his wards, for which they gave their bond with compound interest, and which has never been paid, &c.

Defendants filed the following demurrer:

* * * "That it appears upon the face of the complaint that the ward of the plaintiff is the real party in interest, and this action can only be maintained in the name of said

ward," which was overruled as frivolous. Plaintiff then moved for judgment upon the bond, and that such judgment be docketed as of last term. Pending this motion, defendant, Wm. Harris, with leave, filed the affidavit of J. L. Harris, his co-defendent, as to whom, however, the action had been discontinued on his plea of "Bankruptcy," and also the affidavit of Wm. Harris, Jr., agent of defendant, and asked leave to file his answer. "And it appearing to the Court from said affidavits and the statement of counsel that the demurrer had been interposed in good faith, though frivolous in its character, and that the defendants, by the affidavits filed, had a good defense, the motion is allowed and answer filed." From this order, plaintiff appealed.

W. A. Graham, for appellant.
Jones & Jones, contra.

PEARSON, C. J. His Honor adjudged that the demurrer be omitted, and held it to be frivolous; but *pending* a motion for final judgment, he entertained a motion to amend by striking out the demurrer and allowing the defendant to answer. This latter motion was heard upon affidavits, and "his Honor being satisfied that the demurrer was interposed in good faith, and that the defendant had a valid, *prima ficie* defense, allowed the motion."

In this his Honor did not exceed his powers. He surely had a right during the time to change an opinion expressed on the first impression, and to act upon a more deliberate opinion found after hearing affidavits as to the merits, especially as this was done pending the motion for final judgment; indeed we can see no reason why he might not have done so at any time during the term. For the matter was still "*in fieri*."

There is no error.

PER CURIAM. Judgment affirmed.

P. N. HEILEG *et al. v.* I. A. DUMAS *et al.*

Evidence of the friendly feeling existing between two of the joint obligors of a bond offered for the purpose of proving that one of them, who denied the fact, signed the same, is inadmissible.

CIVIL ACTION, tried before *Cloud, J.*, at the Spring Term, 1873, of the Superior Court of DAVIDSON county.

Action of covenant originally brought (under the old system) to the Superior Court of Rowan county, from whence it was removed to Davidson, and there tried upon the plea of *non est factum* as to the defendant, Dumas.

The bond declared was in the words following:

"One day after date, we, Angus Martin, Isham Dumas and A. H. Sanders as principals, and Parson Harris and Thomas L. Colton as surieties, promise to pay Sarah Heileg fifteen hundred dollars in gold coin, for value received.

"July 25th, 1859.

"A. MARTIN, (SEAL.)
"A. H. SANDERS, (SEAL.)
"I. A. DUMAS, (SEAL.)
"T. L. COLTON, (SEAL.)
"P. HARRIS, (SEAL.)"

Defendant, Dumas, was the only one of the parties who denied the execution of the bond, and the only issue submitted to the jury was as to his signature.

In behalf of the plaintiff, five witnesses were examined, who testified that they knew the handwriting of the defendant, Dumas, and the signature to the bond sued on, was in his own proper hand, and was genuine.

For the defendant, six witnesses swore that they were acquainted with the handwriting of Dumas, and that the signature to the bond, purporting to be his, was not his handwriting.

On the examination of Sanders, a witness and defendant,

it was proposed to prove the execution of the note by all the other signers, except Dumas. Objected to by Dumas, but received by the Court, whereupon he excepted.

Plaintiff further offered to prove by Sanders that only the name of Angus Martin was signed to said note when he, the witness, signed it. To this defendant, Dumas, again objected. The Court received the evidence, and he accepted.

On the cross examination of the witness, Patterson, who had testified, that in his opinion, the signature purporting to be Dumas' was written by some one, who at the time was nervous, and who was examined after the deposition of Dumas himself, denying the genuineness of the signature was read, it was proposed by the plaintiff to prove by him, from reputation, that Dumas was a free drinker. This evidence being objected to, and received by the Court, defendant, Dumas, excepted.

Plaintiff further proved by Patterson, who is a physician, that the sudden cessation from drinking spirits by a person accustomed to it, or a free drinker, would have the effect of making him nervous. The introduction of this evidence was objected to by defendant, but was received by the Court. Dumas again excepted.

By the defendant, Sanders, the plaintiff proved that the signers of the bond, at the time of its execution, other than the defendant, Dumas, were men of wealth. To the reception of this evidence by the Court, Dumas objected, and excepted.

By the same witness the plaintiff was allowed by the Court, after objection, to prove that Dumas and the defendant, Angus Martin, at the time of the execution of the bond, were friendly and on the best of terms. Defendant, Dumas, again excepted. This witness also stated, after objection noted, that the bond was brought to him to sign by the said Martin. Again excepted to.

The deposition of Dumas, taken *de bene epe*, was allowed

to be read, his inability to attend the trial being first established, and his counsel in commenting upon the same, called the attention of the jury to the signature to the deposition, and proposed for the jury to notice the difference. He was stopped by his Honor, when the counsel insisted that the exclusion of comparison of handwriting did not apply to any writing which had been introduced in evidence; at least did not apply to the right of jury to compare. His Honor being of a different opinion, decided the points against the defendant, and did not permit the jury to have the deposition. Dumas again excepted.

His Honor charged the jury that there was but one issue for them to try, and that was, whether Dumus signed the bond in question; that the evidence was conflicting, and they must determine the matter by weight of evidence, and in so doing they were not bound by the number of witnesses. If they saw fit they could believe three of plaintiff's witnesses against six of defendants. Having recapitulated the evidence, his Honor stated to the jury that if the weight of the evidence was on the side of the plaintiff, they should find for the plaintiff; if on the contrary, it was on the side of the defendant, they should find for the defendant. If, in the opinion of the jury, the evidence is equally balanced, tbe plaintiff fails to make out his case, and your verdict will be for defendant. To this charge the defendant, Dumas, excepted.

There was a verdict for the plaintiff; rule for a new trial; rule discharged. Judgment and appeal.

Fowle and *Bailey*, for appellant:

I. It was allowed to be shown, despite the objection of defendant and the opinion of this Court in *Heileg* v. *Dumas*, 65 N. C. Rep. 214, that defendant, Dumas, and Angus Martin. whose name is signed first to the note were friendly—

"on the best of terms," as the witness expressed it. It is submitted that the case referred to is decisive of this the sixth point in order, and it is therefore transferred.

II. 3d point. Dr. Patterson, after he had testified that the signature in question was a forgery, stated that the signature looked as if made by a nervous man.

He was then permitted by the Court to state that Dumas had the reputation of being a free drinker.

We submit that such an inquiry, even as to the fact, was calculated to mislead the jury, and is rendered doubly obtionable when proved by *reputation.*

The same point conversely stated was decided in *Beal* v. *Robeson*, 8 Ired. 276.

In civil actions evidence of character of parties is not admissible unless put directly in issue by the nature of the proceeding. *McRae* v. *Lilly*, 2 Ired., 118; *Bottoms* v. *Kent*, 3 Jones 154.

III. 1st point. Admission of proof as to the genuineness of the other signatures, the only issue being as to that of Dumas, and fifth point that the other signers were men of wealth may be considered together.

Neither circumstance tended to prove that Dumas signed, and it has long been settled that it is error to receive evidence irrelevant which is calculated to mislead or prejudice the minds of the jury. *State* v. *Arnold*, 13 Ired. 184.

The cases of *Holmesley* v. *Hogue*, 2 Jones, 391, and *Jenkins* v. *Troutman*, 7 Jones 169 at p. 173, are illustrative of this rule.

IV. The 1st, 5th and 4th points. That Dr. Patterson was allowed to express an opinion that the sudden cessation in the use of ardent spirits by a free drinker would have the effect to render him nervous may be considered together as inadmissible on the ground that at best such evidence could only raise a mere conjecture that Dumas signed the note. 1. That before signing he had been drinking hard. 2. That

about that time he had suddenly ceased, thus mounting conjecture upon conjecture without evidence of either fact.

This Court has repeatedly held that such evidence is inadmissible and its reception error, of which parties have a right to complain. *Sutton* v. *Madre*, 2 Jones 320; *Matthis* v. *Matthis*, 3 Jones 132.

McCorkle, contra.

I. The Judge below did not err in receiving the evidence that defendant had the reputation of being a free drinker. The witness to whom this question was put, had testified that in his opinion the signature purporting to be that of defendant's, was written by a man who was nervous; then it became pertinent to inquire into the habits of defendant as to drinking spirits, because it would be a circumstance for the jury to consider, whether defendant when under a nervous excitement from drinking, had not executed the note; besides, prior to the examination of the witness, Patterson, the deposition of the defendant had been read, and his whole character was the *legitimate subject of inquiry.*

II. It was competent also to prove the intimacy existing between Martin, who was according to the evidence of the defendant, Sanders, the principal of the note sued on, and defendant; it was a strong circumstance tending to show there was nothing unreasonable in the defendant's executing the note; and for the same reason it was competent to show that all the parties to the note were solvent at the time of the execution. It is not reasonable to suppose that three or more solvent men would commit forgery to procure the signature of one whose name could add but little if anything to the security of the note.

III. To have allowed defendant's counsel to have exhibited to the jury the note sued on, together with the signature of the defendant to the deposition, and let the jury

form their opinion from such evidence, was liable to the objection that it was an effort to compare handwritings, which is incompetent; but to the further objection that it would have been equivalent to defendant's making evidence for himself. Exhibit such a signature as he might make to the deposition *ante motam litem*, with the note sued on. If this is competent, what would be incompetent?

IV. The Judge charged the jury that they must be governed by the weight of the evidence, and defendant cannot complain that his Honor instructed them that they were not necessarily in making up their verdict as to the weight of evidence to be governed solely by the number of witnesses on either side. This was competent, because otherwise he who offers the most witnesses who testify to the same matter must prevail over his adversary who offers a less number of witnesses, whose intelligence, means of forming an opinion, and freedom from bias, is far superior to that of the witnesses offered adversely. It is the credit due to evidence offered, to the facts proven, which the jury are to consider, and not the number of witnesses offered.

READE, J. This case has been before us heretofore, 65 N. C. Rep. 214. And one of the exceptions in the case then is precisely the sixth exception in the case before us now, to-wit: that in order to show that the defendant, Dumas, signed the bond, the plaintiff was allowed to show that Dumas and Martin, another obligor in the bond, were on friendly terms. This was excepted to by the defendant, and we sustained the exception then, and of course we sustain it now.

There is error.

PER CURIAM. *Venire de novo.*

URIAH VAUGHN, Adm'r, *de bonis non*, *v.* W. T. STEPHENSON, Adm'r, &c.

No Court except that of the Probate Judge, or some Court acting on appeal from him, has jurisdiction to issue execution against the assets of a decedent.

An action may be brought in any Court having jurisdiction against an administrator, and judgment obtained, but no issue of fully administered can be tried, and a judgment for the plaintiff merely ascertains the debt.

Acts of 1868-'69, chap. 113, and of 1871-'72, chap. 213.

NOTICE, in the nature of a *scire ficias* to defendant, heard before *Cloud, J.*, at the January (Special) Term, 1873, of the Superior Court for NORTHAMPTON county.

Plaintiff, as administrator *de bonis non*, of W. W. Powell, obtained at Spring Term, 1869, of said Court, a judgment against S. A. Warren, the intestate of defendant. In September, 1872, plaintiff issued notice reciting the foregoing facts to the defendant to appear and show cause why execution should not issue against the estate of the intestate in his hands.

At the return term of the notice defendant moved to dismiss the proceeding, which motion was not allowed, and the defendant appealed.

Barnes, for appellant.
Peebles & Peebles, contra.

RODMAN, J. In September, 1872, the plaintiff caused to be issued to the defendant a *scire facias*, reciting that plaintiff, as administrator, had recovered a judgment against Warren and Martin; that Warren had afterwards died intestate, and defendant had become his administrator, and requiring the defendant to appear at the next term of the Superior Court and show cause why execution should not issue against the goods and chattels of the intestate in his hands, &c.

Defendant moved to dismiss the writ because the Court had no jurisdiction to give the judgment demanded. The

judgment recited was recovered at Spring Term, 1869. In May, 1872, Warren died intestate. Administration was granted to defendant in August, 1872.

The case comes within the provisions of the Act of 1868–'69, chap. 113, p. 257, and the Supplemental Act of 1871–'72, chap. 213, p. 375, which are *in pari materia*, and must be construed together.

By the Act of 1868–'69, sec. 24, it is provided that all the debts of a decedent shall be divided into seven classes which shall be paid in a certain order, and that all debts shall be paid *pro rata* in their respective classes. Preferences are forbidden.

The greater part of the provisions of the Act relate to the voluntary settlement of an estate by the executor or administrator.

Section 82, however, provides that a creditor of the decedent may bring an action against the executor, &c., but no execution shall issue without leave of the Court upon notice of twenty days and proof that the executor, &c., has refused to pay the creditor his rateable part.

This section implies that there has been a previous statement of the administration account by the Probate Judge. So far as it is inconsistent with the later Act of 1871–'72, it must give way to that.

The object of that Act is to provide means by which, in case the executor, &c., delays a voluntary settlement of the estate, a creditor on behalf of himself and other creditors may compel it.

Section 1. Any creditor may prosecute a special proceeding before the Probate Judge in his own name, and in behalf of all the creditors of the deceased to compel an account by the executor, &c. The other sections prescribe in detail the manner in which claims against the estate shall be proved. Section 6. Creditors shall file their claims. Section 7. How the claims shall be evidenced. Section 10. Representative

to admit or deny claims within five days. If he denies a claim, the pleadings shall be as in other cases. Section 11. The issues thus joined shall be tried in the Superior Court. Section 23. No judgment of any Court against a personal representative shall fix him with assets, except a judgment of the Probate Judge on the particular point. Judgments of other Courts simply ascertain the debt.

These provisions sufficiently show that no Court except that of the Probate Judge, or some Court acting on appeal from him, has jurisdiction to issue execution against the assets of a decedent. An action may be brought in any Court having jurisdiction, and judgment obtained, but no issue of fully administered can be tried, and a judgment for the plaintiff merely ascertains the debt.

The proceeding of the plaintiff is irregular, and without the jurisdiction of the Superior Court, and should have been dismissed.

PER CURIAM. Judgment below reversed, and proceeding dismissed.

STATE *v.* WM. LINKHAW.

The disturbance of a religious congregation by singing, when the singer does not intend so to disturb it, but is conscientiously taking part in the religious services, may be a proper subject for the discipline of his church, but is not indictable.

INDICTMENT for misdemeanor, tried before *Russell, J.*, at ROBESON Superior Court, Spring Term, 1873.

Defendant was indicted for disturbing a religious congregation. The evidence as detailed by several witnesses was substantially this: Defendant is a member of the Methodist Church; he sings in such a way as to disturb the con-

gregation; at the end of each verse, his voice is heard after all the other singers have ceased. One of the witnesses being asked to describe defendant's singing, imitated it by singing a verse in the voice and manner of defendant, which "produced a burst of prolonged and irresistible laughter, convulsing alike the spectators, the Bar, the jury and the Court."

It was in evideuce that the disturbance occasioned by defendant's singing was decided and serious; the effect of it was to make one part of the congregation laugh and the other mad; that the irreligious and frivolous enjoyed it as fun, while the serious and devout were indignant. It was also in evidence (without objection) that the congregation had been so much disturbed by it that the preacher had declined to sing the hymn, and shut up the book without singing it; that the presiding elder had refused to preach in the church on account of the disturbance occasioned by it; and that on one occasion a leading member of the church, appreciating that there was a feeling of solemnity pervading the congregation in consequence of the sermon just delivered, and fearing that it would be turned into ridicule, went to the defendant and asked him not to sing, and that on that occasion he did not sing. It also appeared that on many occasions the church members and authorities expostulated with the defendant about his singing and the disturbance growing out of it. To all of which he replied: "That he would worship his God, and that as a part of his worship it was his duty to sing." Defendant is a strict member of the church, and a man of exemplary deportment.

It was not contended by the State upon the evidence that he had any intention or purpose to disturb the congregation; but on the contrary, it was admitted that he was conscientiously taking part in the religious services.

Defendant prayed the Court to instruct the jury that if

the defendant did not *intend* to disturb the congregation he was not guilty.

This instruction his Honor refused, and among other things, told the jury that it would not excuse the defendant to say that he did not intend to disturb the congregation. The question is, did he intend to commit the act which *did* disturb the congregation? The jury must be satisfied that there was an actual disturbance occasioned by the defendant's act. It is a general principle that every man is presumed to have intended the necessary consequences of his own acts.

There was a verdict of guilty. Judgment, and appeal by the defendant.

W. McL. McKay, and *N. A. McLean*, for appellant.
Attorney General Hargrove, for the State.

SETTLE, J. The defendant is indicted for disturbing a congregation while engaged in divine worship, and the disturbance is alleged to consist in his singing, which is described to be so peculiar as to excite mirth in one portion of the congregation and indignation in the other.

From the evidence reported by his Honor who presided at the trial, it appears that at the end of each verse his voice is heard after all the other singers have ceased, and that the disturbance is decided and serious; that the church members and authorities expostulated with the defendant about his singing and the disturbance growing out of it; to all of which he replied that he would worship his God, and that as a part of his worship it was his duty to sing. It was further in evidence that the defendant is a strict member of the church, and a man of most exemplary deportment.

"It was not contended by the State upon the evidence that he had any intention or purpose to disturb the congre-

gation; but on the contrary, it was admitted that he was conscientiously taking part in the religious services."

This admission by the State puts an end to the prosecution. It is true, as said by his Honor, that a man is generally presumed to intend consequences of his acts, but here the presumtion is rebutted by a fact admitted by the State.

It would seem that the defendant is a proper subject for the discipline of his church, but not for the discipline of the Courts.

PER CURIAM. *Venire de novo.*

G. W. McKEE, Sheriff, *v.* JACOB LINEBERGER.

Proof without allegation is as ineffective as allegation without proof: *Hence*, The Court cannot take notice of any proof unless there be a corresponding allegation.

A sheriff selling land under execution, may maintain an action in his name against the purchaser for the amount bid, upon tendering a deed for the land sold.

The relation of creditor and debtor exists between the sheriff and such purchaser, by force of contract of sale, and the sheriff is left to enforce his rights by the usual remedy of action, unless he elects to rescind the contract of sale and sell the land again.

Nor is it necessary to enable the sheriff to bring such action, that he should first make a return of the sale on the execution.

A bidder at a sheriff's sale occupies a relation altogether different from a bidder at a sale made by order of a Court of Equity. In the latter case, the Court takes the bidder under its protection and control, and manages the whole proceeding until the sale is in all things carried into effect: *Whereas*, In the former the sheriff makes the sale by himself, without any confirmation or other act of the Court, and acts by force of a statutory power to sell, &c.

A bidder at a sheriff's sale of a tract of land, known as the "Neagle tract," cannot avoid his bid, because the sheriff refused to convey a narrow strip of land and mill site and water power adjoining the same, and which the sheriff did not sell, although such water power, &c., was some six months before the sale, advertised as belonging to the "Neagle Tract."

CIVIL ACTION, at first commenced in Gaston county, and thence regularly removed to LINCOLN, where it was tried before *Logan, J.*, at Spring Term, 1873.

The following is the case, signed and sent by the counsel of the parties, with the record to this Court.

This is an action brought by the plaintiff in his official capacity as sheriff of Gaston county, to recover of defendant the amount of a bid made by him for a tract of land sold by plaintiff at a judicial sale under a *venditioni exponas*, and which bid the defendant after said sale refused to pay.

The plaintiff in his own behalf testified that having in his hands a *fieri facias* against H. W. Rumfelt, Wm. R. McLean and J. E. Neagle, returnable to the Spring Term, 1869, of Gaston Superior Court, and before levying and advertising the lands of defendant, Rumfelt, for sale, he summoned Wm. McKee, Rufus J. Beatty and James Wagstaff as commissioners to lay off to said defendant his homestead and personal property exemption; that he met said commissioners on the day appointed on the premises, and after administering the oath to them he left and did not return; that the lands of Rumfelt consisted of several different tracts all adjoining each other, and after laying off the homestead he advertised the same in written notices posted at the Court-house door, and three other public places in the county, to be sold on the 3d day of April, 1869; that at the request of said William R. McLean, he consented for McLean to make an advertisement in the Charlotte *Democrat*, in his, McKee's name, as calculated to attract the attention of a larger number of persons; that said Wm. R. McLean wrote the advertisement and procured its insertion in the *Democrat*, but witness was not positive as to whether he saw the advertisement in writing before its publication, but thinks he did. He saw it afterwards. The advertisement is in words and figures as follows:

"IMPORTANT SALE OF REAL ESTATE.—At the Court-house in Dallas, on Saturday, the 3d of April, 1869, I will sell that valuable tract of land known as the 'J. B. Neagle Tract,' on the Catawba river, containing 208 acres, more or less, with a good mill site and water power.

"Also one other tract, known as the 'Rumfelt Home Tract,' containing 200 acres, more or less, on which is the well-known and valuable Rumfielt gold mine.

"Also one other tract, known as the McLean Gold Mine tract, containing 50 acres, more or less, levied on as the property of H. W. Rumfelt, to satisfy executions in my hands in favor of *J. M. Hutchison*, assignee, v. *H. M. Rumfelt*, *W. R. McLean* and *J. E. Neagle*. The above land will be divided to suit purchasers. Terms cash.

"G. W. McKEE, Sheriff.

"March 1st, 1859."

"In regard to the valuable quality of the above lands, reference is made to W. F. Davidson, Esq., M. L. Wriston, Esq., and W. J. Yates, editor of the Charlotte *Democrat*."

Witness further testified that he did not sell the lands aforesaid on the 2d of April for want of bidders, and he made such return on the execution; from the Spring Term a *venditioni exponas* issued to sell the lands levied on, and he advertised them by notices posted as usual, but in them merely recited the J. B. Neagle tract as containing 208 acres, without saying anything as to a mill site and water power; on the 4th of October he offered for sale the lands of Rumfelt, stating the Neagle tract as containing 208 acres without mentioning a mill site and water power when the defendant at a single bid offered the sum of $2,625, and the same was knocked off to him at that sum; that shortly before the sale commenced, the defendant came to him and said he thought of bidding for some of the land, and wished to know if he did so, whether he would give him some little time in which to raise the money; and he agreed that he would

give him such time; after the defendant bid off the land he came to witness to know within what time he must raise the money, and two weeks were given as the time for the payment of the money; at the end of that time the defendant came to pay the money, alleging that he had it, and demanded a deed. After referring to the Register's books, plaintiff offered to convey the "J. B. Neagle tract" by metes and bounds of the original tract; but defendant insisted that they did not include the mill site and water power, which he alleged were the principal objects of his purchase, and if he did not get them, he did not want the land; plaintiff said he did not sell any mill site and water power to defendant; in fact, he did not know anything about them, but was willing to convey the J. B. Neagle tract of 208 acres as described in the original on the Register's books to which he had reference for the metes and bounds; defendant refused to take any such deed, and went off without paying his money; above six or eight week afterwards and two weeks after Gaston Court, he, plaintiff, prepared a deed and went to defendant's house and tendered it to him containing the 208 acres by the metes and bounds in the original deed, and demanded the amount of the bid; defendant asked if it contained the mill site and water power opposite the narrow strip of land; plaintiff told him it did not; the defendant replied he would not have it witness then told him he had sold the narrow strip of land at the foot of the shoal to his father, Wm. McKee, and he defendant, could get it for twenty-five dollars; defendant replied he had bought it once and did not wish to buy it again from a third person; plaintiff then told him that he had not yet made a deed to his father, and he could control the matter, and he would insert the mill site and water power in the deed if defendant would pay the money defendant said he believed he would buy other lands with the money; he also testified that he had never been on the

land, and knew nothing about the shoal or mill site at that time; plaintiff thereupon left him.

Witness further testified that upon the *venditioni exponas* he had indorsed a return of the sale to Lineberger, and after he refused to pay he went into the clerk's office with the *venditioni exponas* and asked the advice of the clerk as to what he should do; the clerk told him he had no advice to give; that if he made a return it would be entered on the execution docket, and if he made no return it would be his duty to issue an *alias venditioni exponas*; he then asked the clerk if he could not make no return and let an *alias* issue and then sell the land again, and hold Lineberger responsible for the difference; clerk said he did not know; he must advise for himself; that he, the plaintiff, concluded to make no return, and took his pen and erased the return of sale already written upon the *venditioni exponas;* that he did not order any of the *alias fi fas* to issue, nor did his counsel; that the tendering of the deed was in accordance with the advice of his counsel obtained at Court after the sale; that he also said in the conversation with the clerk that he would strike out the return until he could see his counsel at Court; that the clerk did issue an *alias venditioni exponas* which was returned to the Spring Term, 1870; another returnable to Fall Term, 1870; and another to Spring Term, 1871, on which last he made returnable as follows: "The within named property, the fifty acre tract known as the Gold Mine tract, was sold, bid off by J. L. Rumfelt; the J. B. Neagle tract was sold and bid off by Jacob Lineberger, for which there is a suit now pending. The forty-three acres, part of the Mine tract, was bid off by William McKee."

Cross-examined—Prior to sale he had according to the Act of Assembly appointed John Smith and W. R. Rankin to appraise the land; they had made such appraisement, and he had it on day of sale, but after searching for it could

not find it—supposed it might be in the clerk's office; Lineberger's bid was three-fourths of the appraisement. He further testified that subsequent to his tender of a deed to Lineberger at the defendant's own house he did make a deed to his father for forty-three acres, which included the strip of land in controversy, which strip did not belong to the Neagle tract but belonged to the Lattimer tract.

Jacob Lineberger in his own behalf testified that in the Spring of 1869, he was looking about for a tract of land with a good water and mill site upon it with a view of purchasing it for the benefit of a son and one Wilson, a son-in-law; that the *Democrat* newspaper, containing the advertisement of the sale of J. B. Neagle's tract, and other lands of H. W. Rumfelt, over the name of plaintiff as sheriff was received by him, and he concluded to examine them; that he did not attend the sale of the land advertised for April, but learned soon after that the sale was postponed until October 4th, 1869; he did not see or look for any written advertisement of the property, as he had a printed description of the property in the Charlotte *Democrat*, and relied upon that, and had no reason to doubt its correctness; in July, he got a neighbor, Mr. Craig, who said he was well acquainted with the Neagle tract, to go with him to the premises and show him the lands and lines; Mr. Craig took him along the river and on the northern lines and on the west, and then down the southern side to the river; but stated that he was not well acquainted with the lines on the southern boundary, joining the Lattimer lands; witness saw the mill-dam fronting the Neagle lands, and a mill-house erected as a gold mill, but saw no other water power along the river front; above the dam being eddy or pond water nearly to the head of the shoal; soon thereafter he got one Kerr, who lived close by the Neagle tract, and who had carried the chain for Mr. Rumfelt on some survey, and professed to know, to go with him and show him the lands

and lines; he did so and pointed out all the lines Craig had shown him, and also those on the south side next the Lattimer tract, and upon reaching the branch lying between the Neagle and Lattimer tract followed the same to the river; he did not point out any part on the river side above the branch as belonging to the Lattimer lands, and from his showing defendant did not doubt but the mill site and water power opposite the Neagle land was part and parcel thereof; he did not go to Messrs. Yates, Davidson or Wriston, who were referred to in the advertisement; witness was satisfied with the land and water power and mill site, and concluded to buy it if it did not command more than he thought it was worth; he attended the sale, and had an interview with the sheriff, who agreed to give him time to raise the money if he should buy; when the Neagle tract was offered he bid for the same $2,625, the three-fourths of the value as appraised by the appraisers; after the sale the sheriff required him to bring the purchase money in two weeks; on his way home his son-in-law, Wilson, told him a conversation he had with Mr. Wm. McLean in relation to the water power after the sale, and he, Wilson, informing him that Wm. McKee claimed that he had purchased the water power and mill site, and that he had better look into the matter before paying the amount of his bid; that on the day appointed he carried the money to Dallas and told plaintiff he was ready to pay, upon the making on his part a proper deed; after some examinations and conversation, sheriff said he had not sold to defendant the mill site and water power and he could not insert that in a deed, but would convey the J. B. Neagle tract, 208 acres, according to its boundaries as shown by the Register's books; witness refused to take such deed, saying that he had purchased the Neagle tract according to his advertisement, and the mill site and water power were the chief inducements to his purchase; plaintiff denied that he had put that advertise-

ment in the paper, or that he had sold under it; witness affirmed that he had bought under that advertisement, and if he did not get what he bought he would not pay; witness left and went home; some two or three weeks after the Superior Court, plaintiff came to his house with a deed, and the conversation then occurred between them as recited in plaintiff's testimony.

Wilson, in behalf of defendant, stated that he was a son-in-law of defendant, and for him the proposed purchase was in part contemplated, knowing that defendant was desirous of buying a tract of land with a water power on it; after the adjournment of the sale of the land in the Spring of 1869, he received a copy of the *Democrat* containing the advertisement, and showed it to defendant; that he accompained defendant on his two visits to the land under the guidance of Craig and Kerr; saw the dam and steam mill house fronting the Neagle land, and did not learn from either of the guides, and did not doubt but the same were a parcel of the Neagle land; he saw no other water power opposite the Neagle land, for it was all pond and eddy water above on the shoal; about one week before the sale of October 4th, he carried his sorghum cane to the mill of William McLean, who lived close by the Neagle land, and Mr. McLean said to him he was glad Mr. Lineberger intended buying the land and erecting mills which would be a great convenience to the neighborhood; and that it would not cost much, as the dam was already built; he accompanied defendant to sheriff's sale, and heard the crier announce the Neagle tract containing 208 acres, &c., but he said nothing about mill site or water power; defendant bid for the same $2,625; the sheriff next offered a forty acre tract for sale as Rumfelt's property, and in his description said nothing as to water power and mill site; those were the only lands offered for sale; after the sale was concluded, William B. McLean said to him, now is the time for you to buy the

mill site and water power, as you can get it cheap; he said Mr. Lineberger had bought it; Mr. McLean said no, Wm. McKee had bought it; witness was surprised at this information and communicated it to Mr. Lineberger on their way home and advised him to be cautious in paying over his money without getting a deed for what he supposed he had bought.

E. H. Wilson, for plaintiff, testified that he was clerk of Gaston Superior Court; that plaintiff came into his office with the *venditioni exponas* in his hand and said, "I have here some papers, I do not know what to do with them; I have never been treated so before; that Lineberger had bid off the land and asked for a little time to pay the money, he had given it, and now he would not take it at all, and wished to be advised"; witness refused to advise, but said if he made a return he would enter it on the execution docket, and if he made no return he should be bound, as his duty required, to issue an *alias venditioni exponas;* plaintiff replied he believed he would call it no return, and cross out the return and let you issue new executions, and if I sell the land over again I will sell it at Lineberger's risk, like an administrator's sale, and he did put crosses over the return he had written on the executions and handed them in in that way; other *aliases* were issued as if no return had been made; that neither sheriff or plaintiff in execution or his counsel ever ordered him to issue; that he did so because he supposed that was his duty; plaintiff was at the time sheriff of Gaston, but had gone out of office in September last; the sale was on the 4th of October, and the Court met on the 7th November, 1869.

Moses H. Hana, for defendant, testified: He had been summoned as surveyor to aid the commissioners in laying off the homestead of H. W. Rumfelt, in the Spring of 1869; the commissioners instructed him not to include any of the gold mines or water power, as they agreed to allow only

arable land, 125 acres, at $8 per acre, for the homestead; they were too valuable and would bring much more for the creditors, and if they were included they should value the homestead over again; Rumfelt desired the homestead should be laid off the Lattimer lands, which lay south of the Neagle tract; the first day he laid off the tract, parcel of the Lattimer, containing 165 acres, but did not cross the branch between the Neagle and Lattimer lands above which was the water power; neither did he take in any of the gold mines; finding that his survey included too much, the commissioners directed him to take out 40 acres wherever Rumfelt directed them; he did so and laid off the 40 acre tract as so marked in the plat; that he never cut off the strip of land and annexed it to the Neagle tract; he further stated that the branch was near the dividing line between the Lattimer and Neagle lands; that in front of the lower end of the Neagle land there was a narrow strip of land which was part of the Lattimer land and the branch crossed the lower end of this strip; that this narrow strip was only two or three poles wide and thirty-four poles up the river; it was too narrow for the erection of proper buildings, roads &c., for the proper use of the water power, which stood on this strip and just below the upper corner and line of this small piece of land; that there was a dam erected below the upper line, five or six feet high which was built obliquely across the river up to the shoal and the larger part of the dam was opposite the Neagle land; there was a small mill house below the dam, but had not been driven by water; it was a gold mill and run by steam, not connected with the water power; there was no other water power that he could see, on the river front of the Neagle land, except where this dam stood; all above was pond water nearly to the top of the shoal. The witness was asked if he was not instructed by the commissioners, when laying off the homestead, to lay off this strip to be sold with the Neagle tract, as it would become

more valuable and bring more money for the benefit of the creditors? This was objected to. Defendant's counsel stated that they expected to show and satisfy the jury that the divisions of the lands made by the commissioner and surveyor was adopted by the sheriff in his sales in all respects. Objection sustained, and testimony ruled out. The witiness further testified, that on the first day of the survey, observing the directions of the commissioners, he had crossed the branch and included this narrow strip in his bounds of the 165 acres; Hana never ran around the strip at all, but only cut off 40 acres by the inside line joining the homestead; this necessarily cut off the strip with the 40 acre tract.

H. Rumfelt, for defendant, was defendant in the executions, and owned all the lands; he had built the dam now standing on the narrow strip of land several years since; it was built of logs and rocks, and ran angling up the river; the shore end of the dam abutted against a rock on the upper end of the narrow strip, and the larger part of it was opposite to the Neagle tract; the fall was about six feet at the dam, and there was no other water power opposite the Neagle land, as it was all eddy water from the dam; it was built for a saw mill; the mill house erected below the dam was used as a gold mill, and was driven by steam power. Was asked whether on the first trial of this suit in Gaston, the plaintiffs offered any evidence, or alledged that there was any other mill site or water power fronting the land except where the dam stood. Objected to, and ruled out.

Rufus Rankin, for defendant, stated that he and John Smith were called upon by the sheriff to appraise the lands of Rumfelt, with a view to the execution sale; they valued the Neagle land, including strip and water power at $3,500, and reported same to sheriff; they did not tell him particularly that they included the strip and water power.

J. B. Kerr, for plaintiff, had assisted Mr. Rumfelt to survey

the Neagle land when he bought it; had accompained Mr. Lineberger in 1869, when he viewed it; he showed him all the lines as he supposed, but did not tell him that the strip of land did not belong to the Neagle land, for he did not know it, but showed him all the courses, including the Water oak and White oak.

Wm. B. McLean, for plaintiff, lived near the Neagle land sixty years; knows all the lines, and knows that the strip is not a part of it, and never was a part of it; it always belonged to the Lattimer tract; he put the notice in the *Democrat* newspaper; there is a good water power on the Neagle land, 160 yards above strip of land, opposite to the Rock Island wheel house, with about as much fall as at Rock Island, three or four feet high; there are other water powers and mill sites opposite to the Neagle land; the water power and mill site alluded to in the advertisement was the one 160 yards above the dam; did not think the water ponded back more than 160 yards; the part of the dam now remaining runs from the rock corner in the river diagonally to the island, and is all on the Neagle tract; he is one of the securities of Rumfelt, and his property was bound by the execution, and he put the advertisement in the *Democrat* to make the property bring as much as possible, and had paid for the advertisement himself; did have the conversation with William Wilson at his sorghum mill as recited by him, but did not tell him that the strip of land did not belong to the Neagle tract; was at the sheriff's sale.

Jasper Stowe, for plaintiff, has for many years been engaged with water powers; has known this shoal before and since this suit; the whole shoal is tolerable regular on the Gaston side where the Neagle land is, and is about 500 yards long the lower half being more steep than the upper; ascending from the present dam and about 160 yards above it, a fall of about twenty horse power may be had; 100 yards

above the dam, about twenty-five or thirty horse power, with three feet head; fifty yards above the dam is forty horse power; mill sites can be had at all these points along the shoal which have been spoken of, to run a grist and saw mill; twenty-five or thirty horse power is necessary; at the Rock Island mills on this shoal, on the Mecklenburg side, there is a fifty horse power with four and a half feet fall; two-thirds of the river is on the Neagle side in Gaston, the island in the river so dividing the current; most of the fall is from 160 yards above the dam down to the rock and dam.

On cross-examination witness stated that his views is based on the supposition that the present dam must be taken away; the present dam would destroy all the water powers above spoken of, with the dam standing as at present could not find any water above.

Plaintiff asked the Court to instruct the jury that the facts proved by Eli Withers, and the indorsements upon the executions given in evidence, do not, in law, constitute a waiver of the sale made by the plaintiff.

The defendant insisted:

1st. That this action cannot be maintained, the remedy being a motion for a rule in the original suit.

2d. That plaintiff having neither the right of property, nor possession, but simply a naked authority to sell, derived from a Court, cannot maintain this action.

3d. That plaintiff not having paid to the plaintiff in the execution the amount sought to be recovered, cannot maintain this action.

4th. The failure of the sheriff to make return of the alleged sale to the return term of the Court, and the subsequent issuing of *alias* and *pluries venditioni exponas* commanding the sale of the same property, and delivered to the present plaintiff as sheriff, was a legal waiver on the part of the plaintiff in the execution of any claim against the defendant for the purchase money.

5th. The plaintiff having agreed before the sale that the defendant should have time to pay the amount of any bid he should make, avoided the sale as contrary to the policy of the law.

6th. That if defendant made his bid under a mistaken belief, that the Neagle tract covered the strip of land lying between the Neagle tract and the river, and such mistake was induced by the representations of plaintiff, it would avoid the contract and defendant would not be required to pay his bid.

The following issues were submitted to the jury:

1. Did plaintiff falsely and knowingly mislead and deceive the defendant in the sale of the land mentioned in the pleadings?

2. Did defendant assume to pay the plaintiff the sum mentioned in the complaint as the price of the tract of land mentioned in said complaint?

3. Did the defendant bid for the property offered for sale under misapprehension on his part induced by the representation of the plaintiff, as to the extent of the land comprised in the name of the "J. B. Neagle tract?"

4. Did plaintiff, or plaintiffs, in execution under which the property was offered for sale, waive the bid made by defendant?

Defendant's counsel asked his Honor to charge the jury:

1. That this action cannot be maintained—the remedy being a motion for a rule in the original suit.

2. That plaintiff having neither the right of property, nor possesion, but simply a naked authority to sell derived from a Court, cannot maintain the action.

3. That plaintiff not having paid to the plaintiff in the execution, the amount sought to be recovered, cannot maintain the action.

4. The failure of the sheriff to make return of the alleged sale to the return term of the Court, and the subsequent

issuing of *alias* and *pluries* executions, commanding the sale of the same property, and delivered to the present plaintiff as sheriff, was a legal waiver on the part of the plaintiff in the execution of any claim against defendant for the purchase money.

5. The plaintiff having agreed before the sale that the defendant should have time to pay the amount of any bid he should make, avoided the sale as contrary to the policy of the law.

6. That if defendant made his bid under a mistaken belief that the Neagle tract covered the strip of land lying between the Neagle tract and the river, and such mistake was induced by the representations of the plaintiff, it would avoid the contract, and defendant would not be required to pay his bid.

His Honor charged the jury that the first issue is purely a matter of fact for the jury to determine from the evidence in the case. If you find that the plaintiff did *faslely* and *knowingly* mislead and deceive the defendant in the sale of the land, that puts an end to the case. If you do not so find then you must consider the second issue which is the first of defendant's.

Defendant's first issue. This is also a question of fact for you to determine and say whether the defendant did assume to pay to plaintiff the sum mentioned in the complaint—$2,625—as the price of the tract of land mentioned in said complaint.

Second issue. You are to determine this issue upon the facts, governed by the principles of law laid down by the Court applicable to the facts therein contained. The first principle of law is that if one person has a better opportunity to know a certain fact than another, and makes a representation which the other accepts, is governed by and is injured, he is entitled to relief; therefore, you are to deter-

mine what knowledge each one had, or their opportunity of ascertaining the facts.

In the second place, if two persons have the same opportunity of ascertaining the facts, although a misrepresentation may be made by one as a matter of opinion, or to enhance the price, then the other would not be entitled to relief.

In the third place, if the person complaining of a misrepresentation, or misapprehension has a better opportunity to ascertain the facts than the person complained of, of course he is not entitled to relief.

The acts of the plaintiff alleged in the instructions prayed does not amount to a waiver of plaintiff's claim in the execution.

The foregoing were given to the jury, and the following reserved: It is the opinion of the Court that there is no evidence that the plaintiffs in the execution did any act amounting to a waiver of their claim. Nor could the defendant take advantage of the "avoidance" mentioned in the fifth instruction asked by defendant's counsel. It is also the opinion of the Court that the plaintiff could maintain his action as brought.

The jury found all issues in favor of the plaintiff, judgment rendering motion and rule for new trial. Rule discharged. Appeal prayed and granted. Notice waived.

Wilson, for appellants, argued:

I. That a motion in the original cause to compel defendant to comply with his bid was the proper remedy, and not an action by plaintiff to recover the amount thereof. *Council* v. *Rivers*, 65 N. C. Rep., 54; *Mann* v. *Blount*, Ibid., 100; *Mason* v. *Miles*, 63 N. C. Rep., 564.

II. That a bidder or purchaser at a master's sale in equity subjects himself to the jurisdiction of the Court, *quod hoc*, and can be compelled to perform his agreement specifically

Rogers v. *Holt*, Phil. Eq., 108; *Harding* v. *Yarborough*, 6 Jones Eq., 215; *ex parte Yates*, Ibid., 306; *Blossom* v. *Railroad*, 1 Wallace, 615.

III. The fact that the sheriff failed to make a return upon the *venditioni exponas* and *alias* process issued to him in law was a waiver of the bid of defendant; and that his Honor erred in his charge in this respect. *Grier* v. *Yontz*, 5 Jones, 371.

IV. That the sheriff's duty required him to sell for cash, and consequently his agreement to give time for payment of the money was contrary to the policy of the law and void, for the reason that the law gave him no authority to do so. *State* v. *Johnston*, 1 Hay., 293. Whenever an officer transcends his authority, his act is void. *Jones* v. *Gibson*, Term Rep., 41. As to what constitutes public policy, see Story on Sales, sec. 489. A sheriff's deed fairly executed at any time after the sale under execution relates back to the sale, and operates to pass title from that time. *Dobson* v. *Murphy*, 1 Dev.. & Bat., 586.

V. That the Judge below erred in excluding evidence that the sheriff adopted the action of the commissionners in attaching the strip of land along the river in front of the Neagle tract to it. 1st. The sheriff has the right in his discretion to sell land by the acre. *Davis* v. *Abbot*, 3 Ired., 137. 2d. It is the duty of the sheriff to sell land in such a way as to bring the most money. *State* v. *Moon*, 7 Ired., 387.

VI. That the charge of the Judge (the second proposition) is erroneous in law, and the jury misled thereby. *Bynum* v. *Bynum*, 11 Ired., 632; *Smith* v. *Sasser*, 5 Jones, 388.

Guion, also for appellants, insisted that this action cannot be maintained—the remedy being by motion or rule in the original cause. The Judge held that the plaintiff could maintain his action as brought.

The action is one virtually for the specific performance of

a contract, the sheriff being the vendor, and the defendant the purchaser. When the hammer is down, the contract is complete, and the parties mutually bound. Such is the law as to auction sales, and judicial sales are governed by the same rules of law. *Blossom* v. *Railroad*, 1 Wallace, 655; *Ibid*, 206. The case decide that a bidder at a judicial sale becomes a party in the cause with rights which the Court will protect if necessary; and will summarily compel him to execute his part of the contract, being a party to the cause. He cannot ask relief in another suit.

As to judicial sales, a bill for specific performance will not *lie*, a motion in the cause affording the most appropriate remedy. *Patrick* v. *Carr*, 1 Winst. Eq., 89; *Mason* v. *Osgood*, 64 N. C. Rep., 468; *Mason* v. *Miles*, 63 N. C. Rep., 564; *Rogers* v. *Holt*, Phil. Eq., 108; *Mann* v. *Blount*, 65 N. C. Rep., 99; *ex parte Yates*, 3 Jones Eq., 215.

An action to recover the amount of a bond given by defendant to the clerk and master for the purchase of a tract of land sold by him, was held not the proper remedy, as a motion in the cause afforded the proper relief.

2. The plaintiff having neither the right of property nor possession, but simply a naked authority to sell, derived from a Court, cannot maintain this action, showing no order or direction from the Court to sue. *Barden* v. *McKenzie*, 4 Hawks, 277; *Hill* v. *Child*, 3 Dev. 265; *Love* v. *Gates*, 2 Ired. 14. As to lands, the sheriff has not even a special property in the lands. An auctioneer having a special property may sue. The sheriff is but an officer of the Court acting under its mandate, and must report to the Court, if any special matter shall arise; and like a receiver or other authorized agent of the Court, must receive permission or authority before he can sue. If he has a right to sue of his own will, he may disappoint the wishes of the judgment creditor, and prevent a resale if that were deemed most advisable. He may, as in the present case, go out of office before the trial,

and afterwards receive the money and release his bondsmen, or, he may die and his executors or administrators receive the money. *Quere:* Would they be officers of the Court, and subject to its summary orders?

3. Plaintiff can only maintain this action on the ground that he has either paid the money or is bound for it; or that he is liable to pay it, for that he has been guilty of some dereliction of duty which subjects him to its payment. In either case the defendant is not liable.

What amount would the plaintiff in execution recover from the sheriff under facts of this case? He may not be able to coerce the defendant to pay him the amount of his bid; and the land has been uninjured and may be worth as much or more now than on the day of sale. *State* v. *Skinner*, 5 Ired. 411.

4. The issuing of subsequent *venditioni exponas* was a waiver of the right to call upon the defendant for specific performance. The facts on this point amount to an actual rescission of the sale by both parties. It is made the special duty of all clerks of Court, under a penalty, to issue executions and *aliases* within six weeks, unless otherwise directed by the plaintiff in the judgment. Rev. Code, ch. 45, sec. 29. In this case the sheriff concluded to make no return of the sale for the express purpose of having an *alias* to issue under which to resell the land as Rumfelt's property, and hlod the defendant liable for any loss. *Grier* v. *Yontz*, 5 Ired. 371.

The present case is not the first in this State. The orderly mode of proceeding when a purchaser refuses to make good his bid, is clearly and distinctly prescribed in the decisions of this Court: 1st, to make him pay the money, or 2d, to rescind the sale *in toto;* or 3d, which is the middle course, to order a resale, with the distinct assent of the bidder that he will make good any loss that may occur by a resale. This is the course pursued upon the return made to the

Court and is upon motion of the party. *Ex parte Yates*, 6 Jones Eq. 212 and 306; *Harding* v. *Yarborough*, Ibid, in note; and *Clayton* v. *Glover*, 3 Jones, Eq. 371.

Although the course and remedy are so distinctly announced by this Court and so just to all parties, this plaintiff has chosen to pursue a strategic course of his own conception. He sues the bidder as the owner of the property, and at the same time sues out of *venditioni exponas* to sell the property as Rumfelt's. He seeks his own safety in an illegal and inadmissible alternative. Such inconsistency of claims are not to be tolerated in a Court of Equity.

5. Defendant insists that a sale upon credit given to defendant by agreement made before the sale was void. The law of execution simply speaks of sales. Rev. Code chap. 45. But that term, *vi et termini* in law implies sales for cash; not even notes or bills of exchange can be substituted, unless so specially directed in the judgment or decree. By sec. 18, all sales made contrary to the true intent and meaning of that chapter subjects the officer to a penalty.

No action will be sustained in affirmance and enforcement of an executory contract to do an immoral act, or one against the policy of the law, the due course of justice or the prohibition of a penal statute. *Sharpe* v. *Farmer*, 4 Dev. & Bat., 121; *Beusley* v. *Bignold*, 5 B. & A., 335, (7 E. C. L., 121.) It is the policy of the law that all bidders shall stand upon an even footing at judicial sales.

6. That if defendant made his bid under a mistaken belief induced by the representations of the plaintiff, it would avoid the contract, and defendant would not be required to pay his bid. The Court in substance, charged the jury that if the defendant had as good or better opportunity than plaintiff to know whether the mill site and water power were a part of the Neagle tract, in fact, the misrepresentation of plaintiff would not entitle defendant to relief. The

mill site and water power had been a part of another tract of land, lying on a small and narrow strip between the lower end of the Neagle tract and the river. It was in the sheriff's power, and it was his duty to have annexed it to the Neagle tract. He advertised that the mill site and water power were a part of the Neagle tract, and it appeared in fact to be so. No one could know better than the sheriff whether he had annexed, or intended to sell it with the Neagle land, and no reference to persons, deeds and Register's books or surveyors, could have given any one the same knowledge that the sheriff possessed. In *Flight* v. *Booth*, 1 Bing. N. C., 380, (17 E. C. L., 424,) the Court say: "In this state of discrepancy between the decided cases we think it a safe rule to adopt that where the misdescription, although not proceeding from fraud, is a material and substantial point, so far affecting the subject matter of the contract that it may reasonably be supposed that but for such misdescription, the purchaser might never have entered into the contract at all; in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts the purchase may be considered as not having purchased the thing, which was really the subject of the sale. *Stamper* v. *Hawkins*, 6 Ired. Eq., 7; *Pugh* v. *Brittain*, 2 Dev. Eq. 34; *Good* v. *Hawkins*, Ibid., 393; *Newsom* v. *Buffalow*, 1 Dev. 39., 379.

In the sale of real property at auction care should be taken that the description of it be accurate, or the purchaser will not be held to a performance of the contract. 2 Kent Com. 537. "Admitting that a purchaser might by minute examination make that discovery (of the material deficiency) he was not driven to that examination, the other party having undertaken to make a representation. *Dyer* v. *Hargrave*, 10 Vesey 509.

The sheriff having advertised the property as he did in

the newspaper for the purpose of inviting bidders to the sale of the property so advertised, should have made a correction of the description thus publicly given, and removed any false impression it had made. His real acquaintance with the property had nothing to do with the case; "whether a party misrepresenting a fact knew it to be false, or made it without knowing it were true or false is wholly immaterial," &c. 1 Story's Eq., par. 193, and cases cited.

Schenck and *Bynum*, contra:

The action is properly brought. *Tate* v. *Greenlee*, 4 Dev. Law 149, is a precedent directly in point, and it is cited and approved in *Grier* v. *Yontz*, 5 Jones 371.

The authorities cited by defendant to show that a motion in the cause was the proper remedy are all equity cases, where all the parties are before the Court and are making their own sale; but this is a sale *in invitio*, under process. See distinction taken in *Smith* v. *Brittain*, 3 Ired. Eq. 351. In *Council* v. *Rivers*, 65 N. C. Rep. 54, the Court says, "the remedy by order in the canse is a principle of equity."

The question of waiver is not raised by the pleadings, and it was error in the Court to submit to the jury. *Heileg* v. *Stokes*, 63 N. C. Rep. 612; *Rowland* v. *Thompson*, 64 N. C. Rep. 716; C. C. P., secs. 100 and 219. The error in the Court below in submitting irrevelant issues can only be taken advantage of after trial by appeal. Plaintiff may move now to strike them out. *School Committee* v. *Kesler*, 66 N. C. Rep. 323.

Credit given by sheriff does not invalidate the sale. See *Tate* v. *Greenlee*, supra. But this defense was not set up in the answer or by demurrer, and cannot be taken advantage of under sec. 99 C. C. P.; because it does not appear on the face of the complaint. The charge on the question of mis-

representation is fully sustained by *Walsh* v. *Hall*, 66 N. C. Rep. 233; *Lytle* v. *Bird*, 3 Jones 223.

The question of evidence raised is clearly untenable, because the appraisers had no right to annex the strip of land to another tract to enhance its value. Hana, the surveyor for the appraisers expressly swears that he did not attach the strip of land to the Neagle tract.

PEARSON, C. J. I. The legal effect of the fact that the *venditioni exponas* issued after the sale, on the last on which the plaintiff indorsed "the land sold under previous *venditioni exponas* action pending for the same bid." Do these facts amount to a waiver of the right of action against the defendant for the amount of his bid? and the legal effect of the fact that the sheriff agreed to give the defendant a few weeks to raise the money, does this fact vitiate the sale? are questions not presented by the case, for there are no allegations by which to put these facts in issue. There must be *allegata et probata*, and under the new system as under the old, the Court cannot take notice of any proof, unless there be a corresponding allegation. Proof without allegation is as ineffective as allegation without proof. The record either as originally framed, or as made by amendment must set out the case as well on the part of the defendant as on the part of the plaintiff.

II. Can the sheriff who sells land under an execution maintain an action in his own name against the purchaser for the amount of his bid upon tendering a deed for the land sold? This is settled, *Tate* v. *Greenlee*, 4 Dev., 149; *Grier* v. *Yontz*, 5 Jones, 371. Indeed, unless the sheriff can force payment of the bid by action it is difficult to see how he can execute the writ. At one sale the bidder fails to pay the cash, the sheriff lets him go, and after the necessary delay, makes a second sale; the bidder fails to pay the cash, a third sale, and so on *ad infinitum*. If

upon tender of the money the sheriff refuses to make title, he can be put under a rule, for he is an officer of the Court. If the bidder upon a tender of the deed refuses to pay, he cannot be put under a rule, for the Court has given a *final judgment.* The execution is a mandate to the sheriff to make the money by sale, and the Court has no privity or connection with the bidder. The relation of creditor and debtor exists between the sheriff and the bidder alone by force of the contract of sale, and the sheriff is left to enforce his rights by the usual remedy of action, unless he elects to rescind the contract of sale, and sell the land again, in which case, as in *Grier* v. *Yontz*, 5 Jones, 371, supra, he releases the bidder at the first sale.

It will be seen that a bidder at a sheriff's sale occupies a relation altogether different from a bidder at a sale made by order of a Court of Equity, either by its clerk and master or by a commissioner, for then the Court takes the matter into its own hands and makes the sale for the parties, holding the cause for further directions, taking the bidder under its protection and control, so as to relieve him from his bid if there be ground for it, or to compel him to perform his contract specifically, and managing the whole proceeding until the sale is in all things carried into effect, whereas the sheriff makes the sale by himself, without any confirmation or other act of the Court, and acts by force of a *statutory power* to sell, receive the price and make title; so the Court has no privity or control over the bidder, and the sheriff is left to his action. It will be noticed farther that this statutory power conferred on the sheriff differs "*in toto*" from a power to sell conferred by an individual; there the attorney sells in the name of his principal, receives the money and makes title in his name, whereas a sheriff sells in his own name, receives the money and makes title in his own name, and if the money is not paid he sues for it in his own name. By force of the contract of sale the title of the defendant in the

execution is divested, and the sheriff although he goes out of office, may execute the deed for title, and it relates back to the date of the sale. This is familiar learning.

III. Was it necessary for the sheriff to make a return of the sale on the execution as a condition precedent to his right of action? We can see no principle upon which this can be required; after the sale as soon as the sheriff tenders the deed, it is the duty of the bidder, by the terms of the contract, to pay the money, and his failure to do so gives a cause of action, and the judgment will be that the sheriff recover on filing in Court a proper deed. He may be put under a rule to make the return, but there is nothing in the policy of the law which forbids him from taking time (as in our case) to consult counsel.

IV. The sheriff sold the "John Neagle tract," and he tendered a deed for it; the defendant refused to accept the deed unless it was made also to include a narrow strip of land and the water power attached, which lies outside of the "John Neagle tract," and was a part of the Lattimer tract. This is the gist of the controversy.

It is proved that the sheriff offered for sale the "John Neagle tract," and that was bid off by the defendant, nothing being said about the strip of land or the water power, and afterwards the sheriff sold the strip and water power which was bought by a third person.

The defendant insists that by means of an advertisement made by the sheriff some time before, it was contemplated to make a sale which did not take place, the sale being made six months afterwards. He was under the impression that the strip of land and water power either formed a part of the John Neagle tract or was to be sold with it, and that his main purpose in bidding was to get the water power, and on this ground seeks to be relieved from his contract. To this the sheriff replies that the defendant had the same, if not better means of information than he had in regard

to the boundaries of the "John Neagle tract," which was all that he sold. The whole matter was submitted to the jury. We do not feel called upon to analyze the many generalities and abstract propositions set out by his Honor in the charge. It is sufficient to say it contains many truths and some errors taken in the abstract, but none that are applicable to the evidence which could by possibility have operated to the prejudice of the defendant, and upon the whole we are satisfied that the verdict does substantial justice, and do not feel called on to disturb it, in the absence of a distinct issue, which the defendant had it in his power to offer; that he was in fact misled, and believed the "John Neagle tract" embraced the strip of land and the water power, or that he believed he was buying it.

PER CURIAM. Judgment affirmed.

H. W. GUION and wife *v.* JAMES MELVIN *et al.*

The appointment of a trustee by a Judge of Probate, in cases where the former trustee has died, removed from the county, or become incompetent, cannot be done on an *ex parte* motion or petition. The application for such appointment is in the nature of a civil action, and all persons interested must be made parties, and have full time and opportunity to set up their respective claims.

A summons served on a defendant, commanding him to answer on a day certain, which day is less than twenty days from the time of service, is not necessarily on that account void, and the Probate Judge is not bound to dismiss it. He should have allowed the defendants the time allowed by the Code for an appearance.

CIVIL ACTION, (entitled in the record, a special proceeding,) determined by *Russell, J.*, at the Fall Term, 1872, of BLADEN Superior Court.

The plaintiffs issued their summons against the defendants, dated the 20th day of April, 1872, commanding them to

appear before the Judge of Probate on the 13th of May, 1872, and answer the complaint, &c. The summons was served on the 1st day of May, 1872.

In their complaint, filed before the Judge of Probate, the plaintiffs alleged that in 1857 the defendant, Melvin, made a deed of trust to Thos. J. Purdie, his heirs, executors and administrators for the benefit of certain creditors, among whom was the wife of the plaintiff. That the trustee was killed in 1863, after executing the trust in part, and leaving the defendant, J. W. Purdie, his administrator, and with Eliza, another defendant, his only heirs at law. That the debt due to the plaintiff's wife has never been paid, and that the defendants, though often requested, refused to sell the property conveyed and pay the debt. Plaintiffs pray that a trustee may be appointed by the Judge of Probate, who shall execute the trust, &c.

The defendants appeared before the Judge of Probate and objected that the summons was irregular, because it commanded the sheriff to summons the defendants to answer the complaint on a day certain.

That twenty-one days had not elapsed from the time when the summons was *served* on the defendants before the day set for its return.

That under the Code of Civil Procedure the defendants are entitled to twenty days, to which one day is to be added for every twenty-five miles traveled in which to answer the complaint, and the defendants cannot be required to answer in a less time. The defendants therefore moved to dismiss the proceedings.

The plaintiffs contended that if the day set for the return was twenty-one days from the day of issue of the summons that it was a compliance with the law.

The Court being of opinion that the defendants could not be required to answer the complaint in a shorter time than twenty-one days, counting from the service of the summons,

allowed the motion, and dismissed the proceedings. From this judgment the plaintiff appealed.

His Honor, Judge RUSSELL, upon consideration, was of the opinion that both plaintiffs and defendants had mistaken the nature of the jurisdiction conferred by the Act of 1871 upon the Judge of Probate, in the matter of appointing trustees. It is neither a special proceeding nor a civil action, nor in fact, any action. By the Act Probate Judges are simply authorized and empowered to appoint trustees when the trustees are dead, or out of the State or incompetent to act. This is a mere authority and duty put upon the Probate Judge so as to prevent trustees from being defeated—something in the nature of a police regulation—of the same kind of jurisdiction as the appointment of magistrates, administrators, guardians, &c.

The proper proceeding is by mere motion or petition before the Probate Court, and is to be heard *ex parte*. The appointment is a matter exclusively for the discretion of the Probate Judge.

The Probate Court will proceed to act upon the application of the plaintiffs, and the costs of the unnecessary summons will be taxed against the plaintiffs.

From this judgment the defendants appealed.

No counsel for appellants in this Court.

Battle & Son and *Sutton*, contra.

RODMAN, J. On the 20th of April, 1872, plaintiff issued a summons requiring defendants to appear before the clerk of the Superior Court of Bladen on the 13th of May, 1872, to answer, &c. The summons was executed by the sheriff of Bladen on 1st May, 1872, so that the return day fell within less than twenty days after the service.

The complaint stated that defendant, Melvin, in 1857 executed a deed to Thomas J. Purdie for land and personal

property in trust to secure sundry debts, and among others one to plaintiffs. In 1863, Thomas J. Purdie died; the other defendants, (besides Melvin) are his administrators and his heirs at law, who refuse to execute the trust. It prayed for their removal and the appointment of another trustee.

The defendants appeared and moved to dismiss the summons, because it was made returnable within less than twenty days after service. The Probate Judge allowed the motion, and plaintiff appealed to the Judge of the Superior Court. The Judge held that a proceeding to procure the removal of one trustee, or of one body of trustees, and the substitution of another, was neither an action or a special proceeding, but a motion which required no service of any summons and no notice, and the order might be made by the Probate Judge *ex parte*, and he remanded the case to the Probate Judge with directions to make the order desired.

We cannot agree with the District Judge that the removal of one trustee and the substitution of another is a thing which can be done on an *ex parte* motion. Before the Constitution of 1868, it could only be done on a bill in equity, to which the trustee and all the *cestui que trusts* were necessary parties. It is a proceeding in which each of them may have an important interest. It may be that the trustee has made advances or incurred liabilities on the faith of the trust property, or is entitled to compensation for his services as trustee. And it may be that some or most of the *cestui que trusts*, desire him to continue to act as a trustee for their interests. Important questions of title to property may be involved; it cannot be maintained that such rights can be determined on an *ex parte* application by one or several only of the *cestui que trusts*. Those who were not parties to the proceeding for the removal of the trustee, clearly could not be bound by it, and any order so made would be a source of litigation and confusion. These views are general. It

may very well be that the present is a perfectly proper case for a substitution of a trustee, that the trustees have no claims, and that no injury would result from summary and *ex parte* action. But the rules of law are necessarily of general and even of universal application. The law is no respecter of persons; both sides must be heard. If in the present case one of many *cestui que trusts* can upon an *ex parte* application remove a trustee whom all the parties have chosen to execute the trust, can take from him the possession of the property and transfer it to the mover's nominee, without giving the trustee or the other parties interested any opportunity to be heard, it must follow that one of several *cestui que trusts* may do so in every case, and the consequences are too obvious to need mention.

After the Constitution of 1868, and before the Act of 1869–'70, chap. 188, jurisdiction in such a case was exclusively in the Superior Court, and it still remains there, except in the cases to which the Act is applicable. The proceeding to obtain the relief would have been called a civil action, and governed by all the rules as respects parties and procedure applicable to such actions. All persons interested must have been parties, with full time and opportunitw to set up their respective claims.

That Act says "that where any trustee of a deed in trust has died, removed from the county where the deed was executed and the State, or in any way become incompetent to execute the said trust, that the Judge of Probate of the county wherein the said deed of trust was executed, be authorized and empowered to appoint some discreet and competent person to act as trustee," &c.

The Legislature had the right, under the Constitution, to confer this jurisdiction on the Probate Judge. Art. IV, sec. 17. But it would be unjust to the Legislature to suppose that it intended to confer so important a jurisdiction on a Probate Judge, free from the ordinary securities for just

decision, which were imposed on the Superior Courts, and which, except in exceptional cases, are ever held sacred.

It is immaterial whether the procedure in such cases may with the stricter accuracy be called a civil action or a special proceeding, probably it would most accurately be the former. But a name is merely a short way of expressing more or less precisely the idea of a thing, instead of describing it by an enumeration of its qualities. In this case all the qualities of the procedure are known from the statutes respecting it, and if we call it by the one name or the other, it is only for convenience and brevity, and not to alter or change its qualities in any respect.

Independent of the Act of 22d March, 1869, (Acts of 1868–'69, chap. 76, p. 179,) and of the subsequent acts continuing that Act in force, there is no difference in the procedure in civil actions, and special proceedings *inter partes*, except of course in a few cases where peculiar proceedings may be prescribed. This Act is confined to actions of which the Judge of the Superior Court exclusively has jurisdiction. It does not apply to any proceedings before the clerk as Probate Judge. The procedure before him remains (at least generally) as it was before that Act, and is regulated by chap. 93, Acts 1868–'69, (ratified the 27th March, 1869,) sec. 4 enacts that such actions shall be begun as is prescribed for civil actions in the Superior Courts, and section 6 enacts that the proceedings shall be as is prescribed for civil actions by C. C. P.

This reasoning shows, we think, that the Judge erred in remanding the case to the Probate Judge with instructions to proceed in it without making all the persons interested parties, and without notice to them or any of them, and *ex parte*.

We will now proceed to consider what directions the Judge should have given upon remanding the case:

1. *As to the duty of the Probate Judge upon the return of the*

summons executed less than twenty days before the return day. C. C. P., sec. 73, says: "It (the summons) shall command the officer to summon the defendant to appear, &c., within a certain number of days after the service exclusive of the day of service to answer," &c. Sec. 74, clause 3. The number of days shall in no case be less than twenty, &c.

In the present case the plaintiff made the summons returnable on a day certain, and not on a certain day after service. We do not say that this deviation from the statute form is such an irregularity as will make the summons void, although it is always best and safest to follow the form prescribed by the Code. But clearly the defendant cannot be abridged of any right by such an irregularity; he is not obliged to appear until the twentieth day after service, exclusive of the day of service, and any proceeding had before that day is null and void. We think the Probate Judge was not bound to dismiss the proceeding for the irregularity, but that he should have allowed the defendants the time allowed by the Code for an appearance. As that time has long since expired, when the case is remanded to him it will be his duty to allow them a reasonable time (which will be generally twenty days,) after notice of the remanding within which to appear and answer. He will then proceed as required by law.

2. *As to the parties.* Of course no one can suppose that by the death of a trustee there ceases to be a trustee. The real property descends to his heirs, and the personalty goes to his administrator, clothed with trusts. The plaintiff properly made the heirs and administrator parties defendant. The other *cestui que trusts* who have an interest in the question ought either to be made parties, or the summons should be on behalf of the plaintiff and all others in like situation who choose to come in, and they should receive pendency of the action. The plaintiff of course will be allowed to amend in these respects.

PER CURIAM. Judgment reversed, and the case is remanded to the Superior Court to be proceeded in in conformity to this opinion. Inasmuch as the plaintiff, by making the summons returnable on a day certain, which as it turned out, was less than twenty days after service, gave occasion to the error of the defendants in moving to dismiss, instead of moving (if they chose to move when there was no necessity for motion) for time to appear on the proper return day, viz: the twentieth day after service, we consider that both parties erred, consequently each must pay his own costs in this Court.

DUNCAN M. KENNEDY *v.* JOHN JOHNSON *et al.*

A B and C, tenants in common, sells a tract of land to D, reserving "to themselves the right to live in the dwelling house upon said land, and to use all necessary outhouses, and to cultivate so much of said land as they may need during their natural lives." A and B die, and the survivor, C, sells the land to E. who takes possession of all of the tract not used by C. In a suit by D. against E, to recover possession of the land and for damages: *Held* that C, the life tenant, was properly admitted to defend the action; and that the said action for the recovery of the land being commenced during the lifetime of C was premature, and could no be sustained.

The relief sought in the complaint of a plaintiff must be sought in the Court below, and must not be sprung in the Appellate Court for the first time.

CIVIL ACTION for title and possession of a tract of land, tried before *Buxton, J.*, at the Spring Term, 1873, of the Superior Court of RICHMOND county.

One of the defendants, Archibald McLaurin, having left the premises sued for before the trial, the suit as to him was discontinued. The other defendant, Margaret Sinclair, claiming an interest in the land, was admitted as defendant upon filing the proper affidavit.

In his complaint the plaintiff claimed three hundred acres of land under a deed from Daniel Sinclair, Isabella

Sinclair and the defendant, Margaret Sinclair, of date 22d January, 1866. For the consideration of five hundred dollars, and the further consideration of six bushels of corn, six ditto of wheat, and thirty-three and one-quarter pounds of pork to be paid by plaintiff yearly, the parties conveyed to him the land in controversy, "*retaining to themselves the right to live in the dwelling house upon said land, and to use all neccssary outhouses, and to cultivate so much of said land as they may need during their natural lives.*"

The plaintiff alleged that the defendants, Johnson and McLaurin, were in possession of said land, and demanded judgment for the same and for five hundred dollars damages.

The answers of the defendants alleged that the deed to the plaintiff was procured from the parties, who were old, ignorant and in feeble heath, and who had been stripped by Sherman's army of everything they had by misrepresentation and fraud, and that the consideration mentioned in it had never been paid.

Daniel and Isabella Sinclar died before the commencement of the suit. Margaret Sinclar was living in the dwelling house on the land. The other defendant, Johnson, who had in October, 1870, purchased the land from Margaret was in possession of the remaining portion thereof.

The defendant submitted upon the plaintiff's own showing that this action was premature, as upon a proper construction of his deed his right to the possession of the property was not complete with the death of Margaret Sinclair.

The plaintiff contended that so far as Margaret Sinclair was concerned, she had admitted in her answer that she had disposed of her interest in the land by deed to her co-defendant, and therefore had no right to make herself a party to the suit, and moved that her name be stricken from the record. His Honor refused the motion, and the plaintiff excepted. The plaintiff further contended that as to the

defendant, Johnson, he was entitled to a recovery against him.

His Honor, upon consideration, was of opinion that it appeared from the answers that the relation between the defendants, Johnson and Margaret Sinclair was congeable; and further, that this action brought in the lifetime of Margaret Sinclair, the survivor of the life tenants, was premature; and so intimating that the plaintiff was not entitled to recover in deference to such opinion, the plaintiff submitted to a non-suit. Judgment of non-suit, and appeal.

N. McKay and *Hinsdale*, for appellant.
W. McL. McKay, contra.

Reade, J. By a proper construction of the deed of 22d January, 1866, from the three Sinclairs to the plaintiffs, the dwelling and other houses and so much of the land as they might need, was retained by the grantors during their lives and the life of the survivor. So that the plaintiff has no control whatever over it, nor entitled to the possession. If this were not so, if there was no reservation in the deed in so many words, still the stipulations in the deed would in equity be construed an agreement on the part of the plaintiff that the grantors should possess and enjoy the houses and so much of the land as they need. And equity would compel the plaintiff to perform the agreement.

Conceding this to be so, then the plaintiff says that on the death of two of the grantors he immediately succeeded to their interests and thereby became tenant in common with the survivor, and is entitled to be let into the joint possession. We do not think so. We have already said that the reservation is for the longest life of the grantors, and that during that period the plaintiff has no rights. And treating it as a covenant on the part of the plaintiff, the circumstances are to be looked to to ascertain the meaning.

Here were a brother and two sisters, very old and infirm, living together, and selling their home, which was all they had in the world, and reserving the use of it during their lives. It is not to be supposed that they meant to give it up as soon as one should die or that a stranger should be let into the house with the survivors or survivor.

Furthermore, the plaintiff does not ask in the pleadings to be let in as tenant in common, but he asks for the exclusive possession. To meet this difficulty his counsel suggested that if not entitled to the precise relief asked for, yet if entitled to any other it should be afforded him. It is true that such is the literal provision of the Code. But it must be understood with the qualification, that whatever relief is sought must be sought below, and must not be sprung in the Appellate Court for the first time.

The right of the plaintiff would seem to be, not to turn the defendant out and take exclusive possession, nor yet to be let into possession with her, but to have an inquiry as to how much of the land the defendant "needs," and then the plaintiff would be entitled to the exclusive possession of all that she does not need. But this relief was not sought in the Court below, nor indeed was it sought here.

The plaintiff also asks to have the cloud removed from his title caused by the fact that the only surviving grantor, the female defendant, had conveyed the land in fee simple to the defendant. And we suppose that upon general principles he would be entitled to that relief. But the defendant alleges that the aforesaid deed was obtained from her by the fraud and circumvention of the plaintiff; and there is so much in the circumstances of the case tending to make the allegation probable that we would leave the plaintiff to his strict legal rights. When the plaintiff shall institute proper proceedings to be let into so much of the land as the defendant does not need, and therefore did not reserve, the

alleged fraud can be set up by the defendant and the question can be tried.

There is no error.

PER CURIAM. Judgment affirmed.

ROBERT H. WINBORNE and wife, ANNA F., *v.* CALEB WHITE, Adm'r of JONATHAN WHITE and others.

The guardian of A sells the land of his ward under an order of our late Court of Equity, which is purchased by B, the mother of A. B intermarries with C, and with her husband, conveys the land in trust to secure the payment of the purchase money. C afterwards becomes guardian of A, and directs the trustee to sell the land and to pay the purchase money, which is done, and C buys it. A brings suit for the land or for its value and for the rents, &c.: *Held*, that the only interest that A had in the land was as a security for her debt, and that the action could not be maintained.

CIVIL ACTION tried before *Watts, J.*, at the Spring Term, 1873, of the Superior Court of PERQUIMANS county.

I. The complaint alleges that in 1839 one Peter Parker died seized of a tract of land in Perquimans county containing about 325 acres, and leaving a widow, Elizabeth B., and one child, the *feme* plaintiff, Anna F.

II. The widow was allotted dower in the said land, and the remainder was sold under a decree of the Court of Equity of Perquimans county, upon proper proceedings had for that purpose, as the estate of the said Anna F.; at the sale the widow became the purchaser at the price of $2,105.35. The sale was confirmed, title made, and she executed her bonds for the purchase money to one William R. Skinner as guardian of said Anna F.

III. After her purchase the widow entered into a contract with one Small for the lease and cultivation of said land for five years. The net proceeds to be equally divided between herself and Small.

IV. Thereafter, about July, 1846, said Elizabeth intermarried with Jonathan White, the intestate of the defendant, Caleb, and upon the 11th of August of that year, she and her said husband duly executed to Nathan Winslow a conveyance of said land in trust, to apply all rents and profits accruing from said contract with Small to the payment of the interest first, and then principal of the bond given by the said Elizabeth B., as aforesaid; and in case such rents and profits should prove insufficient, and payment of said bond should be required by suit or otherwise to sell said land, or so much as may be necessary, and with the proceeds pay off said bond.

V. N. R. Skinner, former guardian of the plaintiff Anna F. having surrendered his guardianship, the said Jonathan White was appointed guardian of the said Anna F. in his stead, and qualified as such at November Term, 1846, of Perquimans County Court.

VI. That during the continuance of the lease of Small large profits accrued, sufficient, as plaintiffs allege, to pay the annual interest on said bond, and greatly reduce, if not pay principal, which profits passed into the hands of said Jonathan, but were not applied by him to the purposes of the trust.

VII. That with intent to acquire to himself the title in in said land, and while the said bond was amply secured and no necessity of its collection existed, the said Jonathan by virtue of his powers as guardian, as aforesaid, caused the said trustee to sell the whole of said land for the payment of said bond; and at the sale, he, the said Jonathan, became the purchaser at the price of $3,150, and in payment thereof, surrendered and cancelled said bond, then amounting to $2,600, and executed his notes for the residue.

That at the time of said sale, the plaintiff, Anna F., was living with her friends at little or no expense, and there was no necessity of selling, and that no advantage accrued to her

estate from said sale; but it was made at the instance of said Jonathan and for his own benefit.

IX. That the said notes given by said Jonathan for the excess of said price over the said bond have not been paid.

X. That plaintiffs are advised that the said land is still at the election of said Anna F., her property subject only to the payment of the said notes, and that she now elects to take the said land.

XI. That after the said sale the said Jonathan during his life, and the defendants, after his death, have possessed and made large profits from said lands, which should be accounted for to plaintiffs.

XII. That said Jonathan died intestate in 1860; that the defendant, Caleb, one of his sons, administered on his estate, and he and the other defendants are his only heirs-at-law.

XIII. That plaintiffs intermarried 10th April, 1860.

XIV. That the plaintiffs having no notice of the purchase of the said lands by the said Jonathan under the circumstances aforesaid, which they have only lately discovered after much labor and difficulty, and in ignorance of the right of the *feme* plaintiff, the said Anna F., to make her said election, brought their action against the said Caleb, as administrator of the said Jonathan, and against the sureties to his guardian bond, at —— Term, 18—, of Perquimans Superior Court, and obtained judgment for $, thereon, some part of which said judgment still remains unpaid.

XV. That said Elizabeth died in 18—, leaving as her heirs-at-law, plaintiff Anna F., and defendant Jonathan.

The plaintiffs insist they are not concluded by their said judgment, and now demand judgment,

1. For an account of rents and profits which were received or ought to have been received from the said Small contract.

2. For an account of the purchase money and interest included in said judgment.

3. For an account of notes and profits made by the intestate Jonathan during his life, and by his heirs since.

4. That if the first account shows a sum sufficient to have discharged said bond, that said sale be declared void, and that the defendants convey said land to the heirs at law of said Elizabeth B.

5. That the defendants be required to convey the said land to plaintiffs.

The defendants admitting to be substantially true all the allegations of the complaint, except as they are controverted by the answer, allege—

I. That the intestate became guardian to the plaintiff, Anna F., at the request of the said Elizabeth B., and upon the insolvency of the former guardian, William A. Skinner.

II. That under the deed of trust to Winslow only the sum of $379.78 was received from the lessee, Small, and that this sum was accounted for by the defendant, Caleb, as administrator, and constituted a part of the plaintiff's judgment recovered on the guardian bond of the intestate, Jonathan.

III- That upon the expiration of said lease in 1848, the intestate, Jonathan, as guardian of the *feme* plaintiff, gave notice to the trustee, Winslow, to close said trust; and at the sale, at the request of, and to gratify the said Elizabeth B., became the purchaser. That to pay the price, he sold his own plantation, and of the proceedings invested a sum sufficient to pay off the bond of the plaintiff, Anna F., for her benefit. That the sale was made openly, and the price was universally admitted to be fair and just; and that the share of the plaintiff, Anna F., as one of the heirs at law of the said Elizabeth B., has been accounted for, and constitutes a part of the plaintiff's said judgment.

IV. That the amount of the judgment received by the plaintiff in the guardian bond aforesaid is $3,981.84, all of which has been paid except $1,044.39, and this sum has been tendered to plaintiff's and refused by them.

The case coming on to be heard, upon the complaint and answer, and the admissions of the parties, his Honor was of opinion, that the plaintiffs could not now elect to claim the land, inasmuch as upon their own suit they had recovered judgment upon the guardian bond and had received payment of the greater part of their judgment. His Honor also ruled that the guardian had the right to buy at the trustee's sale made for the purpose of paying a debt due his ward, and that registration of the trustee's deed affected the plaintiffs with notice, who after nine years' acquiescence had elected to sue on the bond.

The Court ordered a reference to the clerk of the Court to report whether the rents due under the Small contract, after the execution of the deed in trust had been applied to the payment of the note due the ward by the said Elizabeth B.; and if not, the proportion of such rents, with interest due to the *feme* plaintiff.

The plaintiffs excepted to the ruling of the Court, for that:

1. Evidence was not allowed to be heard to explain the circumstances attending the beginning and prosecution of the suit on the guardian bond, as set out in the complaint.

2. The Court held the plaintiff concluded by their act in bringing their said action, and not at liberty to assert any claim to the land in consequence thereof.

3. The Court held that registration of a deed was notice to plaintiffs, and that an acquiescence thereafter barred any claim to the land, and no evidence was admissible to account therefor.

From the judgment the plaintiffs appealed.

Gilliam & Pruden, for appellants:

The guardian, White, upon his intermarriage with his wife, became thereby personally responsible for the debt, which security was added to the conveyance of the land itself. And the land, as the sale shows, was ample security for the debt. There was no necessity for enforcing payment, and the trust fund was used by the guardian in the purchase of the property for himself, and the most of the purchase money paid thereby. His was a breach of official duty and a misapplication of the trust funds, which could be afterwards sanctioned by the ward, and the property thus acquired with her money claimed, or waiving this right, she could charge his bond with the moneys thus converted. Her equity to follow the investment and claim the property her money had been used to pay for, is thus clear and unquestionable. Lewin on Trusts Marg. p. 290. Has this right been forfeited and the election determined? So ruled the Court.

An election to be effectual must be made with a knowledge of one's rights and with an intention to elect. 1. Leading cases in equity in *Streatfield* v. *Streatfield*, p. 321; notes, p. 249. What will be conceded election? A receipt of a legacy for three years does not preclude an election made in ignorance of one's rights. *Wake* v. *Wake*, 1 Ves. Jr. 335; same for five years. *Reynard* v. *Spence*, 4 Beav. 103.

Infants may elect at majority. Married women after enquiry by the master. 1. Leading cases in equity, p. 303; *McQueen* v. *McQueen*, 2 Jones Eq. 16; 2 Story's Eq., sec. 793 and sec. 1,097. Story says (last cited section): Before any presumption of an election can arise, it is necessary to show that the party acting or acquiescing was cognizant of his rights. When this is ascertained affirmatively it may be further necessary to consider whether the party intended an election; whether the party was competent to make an

election; for a *feme covert* an infant or a lunatic will not be bound by an election, &c. *West* v. *Sloan*, 3 Jones Eq. 102; *Young* v. *McBride*, 68 N. C. Rep. 532.

RUFFIN, J.: This case is "not at all like the cases of dealing with trust funds by trustees, executors, guardians, factors and the like, in which the owners of the fund may elect to take either the money or that in which it was invested." *Campbell* v. *Drake*, 4 Jones Eq. 96.

Moore & Gatling, contra.

I. This case bears no resemblance to that class of cases in which a trustee undertakes to buy the trust property for his own benefit as in *West* v. *Sloan*, 3 Jones Eq. 103; because the land in question had ceased to be the property of the *feme* plaintiff, having been sold by order of the Court of Equity, and bought by Mrs. Elizabeth B. Parker, a stranger to the proceeding and to the guardianship long prior to the guardianship of the intestate, Jonathan. The validity of her purchase is not impeached.

View our case as if a debt secured by deed in trust of land belonging to the debtor who is some third party, had come into the guardian's hands as the estate of his ward, and upon failure of the debtor to pay the interest promptly, or for other good cause, the guardian had required the trustee to make sale, and upon such sale had purchased the land openly and at a fair price, paying therefor with his own money, and in his final accounting fully satisfying his ward for her debt and all accrued interest. For such a view is warranted by the complaint alone without reference to the explanation contained in the answer, there being no allegation that the guardian paid for the land with the ward's money, or that there was collusion between the trustee, Nathan Winslow, and the guardian. Upon the principles

announced in *Simmons* v. *Hassell*, 68 N. C. Rep. 213, it is plain that the plaintiff has no election.

II. The only charges brought against the guardian in the complaint are,

1st. An intention to buy the land for himself.

2d. That there was no necessity to change the investment.

If we admit the first charge, does it sustain the plaintiff's views of the case? We take it, "the intention to buy for himself" is very plainly evidenced by the fact that he did buy for himself. He intended to buy. He did buy. He had a right to buy. He stands upon higher ground than that claimed for him in the view just before presented. His wife owns the equity of redemption in the land conveyed to Winslow, and he himself is individually liable for the debt. Has not the guardian a right to have the debt paid before his wife's land is entirely consumed by the debt? and if his wife does not object to the sale and purchase by him, can the plaintiff, whose debt has been fully paid, object?

The defendants insist that the propriety of collecting the debt should be left to the sound judgment of the guardian in all cases where it is not alleged that injury has resulted to the ward from such collection. Such seems to be the rule established in *Gary* v. *Cannon*, 3 Ired. Eq. on page 69.

III. The real complaint seems to be at last, that the guardian did not permit the debt to stand on interest until it had eaten up his wife's land, and then buy in the land for his ward. There are three excellent reasons why he did not choose to adopt this cause, to-wit:

1st. While the law exacts of the guardian that he shall display both good faith and ordinary prudence in the management of his ward's estate, it does not require him to sacrifice his own interests, or those of his wife for the benefit of the ward, especially when that benefit is purely a matter of speculation.

2d. To have bought the land for his ward, instead of sell-

ing the land and having the ward's debt paid, would have been such a change of investment, such a speculation, as would have rendered him liable to his ward, in case, from any reason, the speculation had proved less valuable than the debt and interest. *Whashington* v. *Emeny*, 4 Jones Eq., page 36.

3d. The debt due his ward was the debt of his wife for which his marriage made him responsible. If he had deferreed the collection with the debt constantly increasing, and the land in the hands of a trustee, it might have soon happened, and no doubt would have happened, that by reason of the increase of the debt, and the deterioration of the land, it would have failed to sell for enough to pay the debt, and the guardian would have been personally liable for the deficit. As it was, the security did not seem to have been very ample for the price, which is no where alleged to be less than the value, was $3,100, and the debt $2,600.

If, under such circumstances, the guardian collects a debt secured by his wife's land, and for which he is personally responsible, and accounts for every cent so collected, will the Court lightly declare that he acted in bad faith?

IV. To put the plaintiff's case in its strongest light, let us admit (for argument sake) that the guardian paid for the land only by surrendering his ward's bond, and that the plaintiff had the right to elect to take the land. Then this election must be made in reasonable time, and after "the closing of the trust," a short time will be reasonable time; for this right of election is not "an estate in equity, but a mere right," and the statute of presumption applies. *Davis* v. *Cotton*, 2 Jones Eq., 435; *Haskins* v. *Wilson*, 4 Dev. & Bat., 243; *Simmons* v. *Hassell*, 68 N. C. Rep., 213.

V. But even before the closing of the trust by the judgment against the guardian and its satisfaction, the plaintiff, Anna F., had no such right of election. Ours is totally unlike any case in which such a right has been held to exist.

It was not a sale by a guardian to himself. It was not a purchase of the wards property by the guardian. It is not a purchase by the guardian of property for which he paid his ward's money. But is only a purchase by him with his own money of his wife's property, which had been conveyed to a trustee to secure a debt due his ward, for which he was personally responsible, and for which he has already fully assented.

VI. There is no error in his Honor's ruling that the registration of the deed from the trustee affected the plaintiff's with notice. In *Davis* v. *Cotton*, 2 Jones Eq., 435, "possession of the property" was said to be sufficient to require inquiry. Is not possession under a registered deed equally so? The *feme* plaintiff attained her majority before marriage. The subsequent coverture is not a disability.

RODMAN, J. The principle is admitted, that if a guardian use the money of his ward to purchase land for himself, she has an election when she comes of age to take the money or the land. It is founded on public policy, and is intended to prevent guardian from speculating with the trust fund, by assuring them that though they may lose, they can never profit by the speculation. But that principle has no application to the present case. The material facts are these:

The land belonged to Peter Parker, and upon his death it descended, subject to the donor of his widow, Elizabeth, to his only heir, the plaintiff, Anna. Upon the petition of her guardian, Skinner, the land was sold under a decree of the Superior Court, and purchased by the widow, who gave her note for the price. She afterwards married Jonathan White, who thus became bound for the debt. White and wife then duly conveyed the land to Winslow, in trust to secure the debt. Afterwards White became guardian to Anna, and at his request, Winslow sold the land and he purchased, for a price somewhat greater than the debt to

his ward, and thereupon his wife's bond to Skinner, as guardian, was cancelled.

It is clear that White could at any time have paid off his wife's debt to his ward, as well after as before it was made a lien on the land. What else did the sale, through the trustee and the purchase by him amount to so far as the ward is concerned except that? It is true, it also extinguished his wife's estate, but that was done by her consent lawfully signified by the execution of the deed in trust. Probably the whole purpose of the deed in trust was to relieve him from liability for her debt and compel its payment out of her land for the purchase of which it was contracted. And this purpose was a legitimate one. It may be assumed that White, immediately on cancelling his wife's note to his ward, substitutes some other security for it, because it was his duty to do so, and the contrary is not alleged. The ward never had any interest in the land, except as a security for her debt, and she cannot complain that the debtor extinguished that security by paying the debt to the guardian, who safely re-invested the money. That the debtor and the guardian were one person can make no real difference. His being guardian did not deprive him of the right to pay his wife's debt. If no sale had taken place, and the guardian had annually expended the interest of the debt for the support of the ward, or had invested it for her, the principal of the debt would still be a lien on the land; but could the ward, *as such*, and without reference to what would have been her rights as heir to her mother, have claimed anything beyond the debt? Clearly not, and she can claim no more now, notwithstanding her expectancy as heir to her mother was cut off by her mother's sale of her estate.

In our opinion, there is no case for election, as the plaintiff never had any right to anything but the money. It is

admitted that she has recovered a judgment for that, and that it has been paid or tendered to her.

In any view of the case, it is difficult to see what claim the plaintiff, Anna, has to the rents of the land paid to her mother before her marriage with White, but after her purchase of the land. The land and its profits were exclusively the property of the mother; the daughter's right was to the note and interest.

The judgment below is reversed, and the action is dismissed.

PER CURIAM. Judgment reversed.

STATE v. BUCK HARRISON.

The charge, given at the request of the prisoner's counsel on the trial below, "that the case of the *State* v. *Ingold*, relied upon by the defence, was law in North Carolina, *but it was on the extreme verge of the law*," is no ground for a new trial.

INDICTMENT for manslaughter, tried before *Tourgee, J.*, at the Spring Term, 1873, of CASWELL Superior Court.

The evidenee was that the prisoner and the deceased, both colored, were at a social gathering on the evening of —— day of ——, 187–, where there was music and dancing. The prisoner offered, or was invited by some one to assist in making music for the dance, and the deceased objected to his doing so, assigning as the reason for his so objecting, that the prisoner had been invited by him, (the deceased,) in the course of the afternoon, immediately preceding the gathering, at which they were then present, to attend said gathering and make music for them, and that the prisoner refused to do so. On the objection of the deceased being

made, the prisoner with angry epithets, denounced the company there assembled, and said he did not care for them; whereupon the deceased laid his hand upon the prisoner and had hold of him near his throat. The prisoner got himself loose from the grasp of the deceased and partially retreated and made towards the door. That deceased followed him up and seized him a second time, the prisoner endeavoring to get away from him; and while he, the deceased, so held him, the prisoner, with a knife, stabbed and killed him.

There was some evidence tending to show that the prisoner had the knife, with which he gave the fatal stab, concealed in his sleeve, before the deceased laid hold of him the first time.

The counsel for the prisoner, in his defense, relied upon *Ingold's* case, 4 Jones 216; and asked his Honor to charge the jury, that, though a person may enter into a fight willingly, yet if in the progress, he be sorely pressed, that is, put to the wall, so that he must be killed, or suffer great bodily harm unless he kill his adversary, and under such circumstances he does kill him, it is but excusable homicide.

In response to this request, his Honor charged the jury, that the case of the *State* v. *Ingold*, relied upon by the defense, was law in North Carolina, but it was on the extreme verge of the law. Prisoner's counsel excepted.

Verdict of guilty. Motion for a *venire de novo;* motion refused. Judgment and appeal.

No counsel for prisoner in this Court.

Attorney General Hargrove, for the State.

BOYDEN, J. The only question raised by the record is as to the response of his Honor in reply to the prayer of the defendant for specific instructions to the jury.

His Honor committed no error in his response, for two reasons.

First, because there was no evidence in the cause that the prisoner was sorely pressed, so that he must be killed or suffer great bodily harm, unless he killed his adversary, so that his Honor might and ought to have declined to charge as requested.

Secondly. His Honor committed no error for the reason that his Honor charged that the law was, as stated by defendants counsel. But after charging the law as requested, his Honor remarked, yet it was on the extreme verge of the law. We suppose it was the last expression of his Honor to which the defendant's counsel excepted; but that surely could form no ground of error, even if there had been evidence in the cause to have entitled the defendant to the instruction requested, for his Honor having informed the jury that in North Carolina the law was as stated by defendant's counsel, it could make no difference how near the verge of the law it was or how little would be necessary to pass the verge and change the law.

There is no error. This will be certified that the Court may proceed to judgment.

PER CURIAM. Judgment affirmed.

STATE *v.* CHAS. MOORE and MARY MOORE.

The question of "cooling time," is a question of law to be decided by the Court, and not a question for the jury.

If such a question be left to the jury, and they decided it as the Court should have decided it, this error is no cause for a new trial.

The separation of two persons engaged in fist-fight, which eventually terminates in a homocide, to jusiify a verdict of murder, must be for a time sufficient for the passions excited by the fight to have subsided, and reason to have resumed its sway. *Hence*, Where one witness testified that the prisoner was "absent no time," and another, that after the first fight he started to go home, and looking back the parties were again fighting: *Held*, There was not such sufficient cooling time as to justify a verdict of murder.

INDICTMENT for murder, tried before *Logan, J.*, at Spring Term, 1873, of the Superior Court of MECKLENBURG county.

Prisoners were indicted for the murder of one Robert Smith, and having severed in their trial, Charles Moore was tried and convicted.

It was contended for the prisoner that the crime committed was manslaughter. The evidence for the State was substantially as follows:

Sarah Ann Davidson testified, that she lived a short distance from the prisoner on the same side of the alley; the prisoner lived on the opposite side of the alley, and opposite the house of the witness. When the fight took place witness was opposite prisoner's house, and the deceased was going along the street towards the house, and when opposite the gate the prisoner said, "Who is that?" Deceased answered, "It is me." Prisoner said, "What do you want?" Deceased replied, "I dont't want you, but want to see Mary (living with prisoner as his wife). Prisoner then said, "You were listening to my conversation." Deceased replied, "That he was doing no such thing." Prisoner replied, "You are a damn'd liar;" to which deceased said, "You are an infernal liar." Curses followed. Deceased was in the street, and said to prisoner, "If you come out

and curse me I will hit you." Prisoner went out, he and deceased continued to quarrel, prisoner alleging that the deceased was eaves-dropping, and deceased denying it all the while; then they both went together fighting; were not long engaged in a fight when they stopped; prisoner's so-called wife called him into the house; he went in, but remained (in the language of the witness), "absent but no time." Deceased was still in the street; witness walked off; heard deceased say that prisoner had killed him; the parties were still close together; deceased then went home; he was stabbed in the left side; it was about 8 o'clock, P. M., and cloudy; witness saw no knife; deceased and prisoner were not friendly; they did not visit.

On her cross-examination the witness testified: At first the parties did not appear mad; witness heard all the talk; they made considerable fuss; heard prisoner say to deceased, "I will report you to the Mayor."

Jane Smith, a daughter of deceased, testified that when she went out they were fighting, she tried to get deceased home; went between them and tried to separate them; deceased walked off; prisoner said, "If you hit me again I will sicken you;" Mary Moore, prisoner's wife, said, "Let them fight," and pushed the prisoner to deceased and they went together fighting; deceased jumped away, and said, "Charley has killed me;" deceased went home and fell in the door; he was stabbed in the left side and lived an hour and a half.

Other witnesses were examined for the prosecution, but no new facts were elicited. The prisoner offered no evidence, but through his counsel asked his Honor to charge the jury:

That if the jury are satisfied that the parties upon a sudden quarrel got into a fist-fight, and the prisoner before separation gave the fatal stab, it would be manslaughter.

That a mutual combat with fists is a legal provocation,

and reduces a slaying by a deadly weapon (not shown to be unusual), to manslaughter.

That the evidence discloses that there was not sufficient "*cooling time*," between the fights.

Other instructions were asked, but as the case in this Court turned upon the last, they are not necessary to an understanding of the decision.

In answer to the last instructions his Honor charged the jury that if parties engage in any affray, or there is other legal provocation, and they become separated, then if there is sufficient "cooling time," it will be murder; that if one of two parties, after separation, goes off and then returns and again engages in an affray, then if there was sufficient time for the passions to cool, it would be murder.

That it was the duty of the jury to apply these principles to the evidence, and if they were satisfied that the prisoner was guilty of murder, they should so find; otherwise to find him guilty of manslaughter.

Verdict, guilty of murder. Rule for a new trial; rule discharged. Judgment and appeal.

Purnell, for the prisoner.

1. His Honor erred in refusing the fifth instruction asked for by defendant's counsel. *State* v. *Jacob Johnson*, 2 Jones; *Commissioners of Newbern* v. *Dawson*, 10 Ired., 436; *State* v. *Moses*, 2 Dev., 452; *Bailey* v. *Pool*, 13 Ired., 404; *State* v. *Chxistmas*, 4 Jones, 471. Revise Code, page 185.

2. We submit that his Honor erred in submitting to the jury the question of "cooling time." It is firmly settled that this is a question of law for the Court. *State* v. *Sizemore*, 7 Jones, 206.

Nor is the error covered by the jury as the only evidence as to time was that it was "no time," which must of necessity mean the shortest space of time, and besides, his Honor

was especially requested to instruct the jury by the sixth instruction, prayed that there was not sufficient cooling time.

Attorney General Hargrove, for the State, cited *State* v. *Johnson*, 1 Ired., 352; *State* v. *Curry*, 1 Jones, 280.

BOYDEN, J. We think his Honor erred in refusing the sixth prayer for specific instructions, to-wit: That the evidence discloses that there was not sufficient cooling time between the fights.

The whole testimony shows that there was a sudden quarrel resulting in blows with the fists; that at length the combatants separated, and the evidence as to the length of time they were separated is first by the witness, Sarah Ann Davidson, witness for State, who says that "the prisoner was absent but no time." William Smith, another witness for the State, testified that he saw the parties fighting; deceased told witness to go home, and witness started back; prisoner and deceased had separated; witness looked back and saw they were fighting again, then heard the deceased say that the prisoner had killed him.

It is well settled in our State that the question of cooling time is a question of law to be decided by the Court, and not a question for the jury. It is also settled that if such a question is left to the jury, and they decided the question as the Court should have decided it, this error forms no cause for a new trial. So the question is distinctly raised, does the evidence show that in law there was sufficient cooling time? The Court here are of opinion there was not sufficient cooling time. The two witnesses for the State and the only ones that testified upon this question state the fact that the prisoner was absent no time, in other words, the separation was so short that she could not compute the time, and the other witness says the prisoner and the deceased were separated and deceased desired witness to go home,

that he started, that he looked back and they were again engaged in the fight. It seems to the Court that this testimony does not show that there was a sufficient time during the separation for the passions excited by the fight to have subsided, and reason to have resumed its sway, and on this ground there must be a *venire de novo.*

This renders it unnecessary to notice the other questions made in the case.

PER CURIAM. *Venire de novo.*

MARY E. DAVIS and another v. JOSHUA PARKER and others.

Testatrix, after providing for the payment of her debts and funeral expenses, says: "The balance of my property of all kind, I give to my grandson, John Thomas Hollowell, to him and to his heirs; and if he should die and leave no lawful heirs of his body, then and in that case, I give," &c.: *Held*, that the estate of John Thomas an absolute one at the death of the testatrix, and went upon his death to his representatives.

Hilliard v. *Kearney*, Busb. Eq. 221, cited and approved.

CONTROVERSY, which might be the subject of a civil action, submitted without action to *Clarke, J.*, at WAYNE Superior Court, 11th day of February, 1873, upon the following CASE AGREED:

In the year 1869, one Sarah Davis, of Wayne county, died, leaving a last will and testament, as follows:

"STATE OF NORTH CAROLINA,
WAYNE COUNTY.

"I, Sarah Davis, of said county, do, this 11th day of December, 1868, make and declare this to be my last will and testament, in manner and form following, viz.:

"It is my will and desire after my decease for my burial

expenses to be paid and all my just debts. The balance of my property of all kind, I give to my grandson, John Thomas Hollowell, to him and to his heirs; and if he should die and leave no lawful heirs of his body, then in that case, I give Celia Mayo the sum of two thousand dollars, to her and to her heirs, and all the balance of my property I give to my nearest relations, all except Joshua Davis and the children of his brother, John Davis, deceased. To Joshua Davis I give ten cents, and to each one of Joshua Davis' children ten cents—and the balance of my property to be equally divided among the balance of my nearest relatives.

"Lastly, I nominate my grandson, John Thomas Hollowell, my executor to this my last will and testament, to all intents and purposes.

"Given under my hand and seal, the day and date above mentioned."

Signed, &c.

This will was duly probated before the Judge of Probate of Wayne county, and recorded, and Jessee Hollowell was appointed and qualified as administrator, *durante minore ætate cum testamento annexo*, the said John Thomas Hollowell, being at the execution of said will an infant of 19 years of age.

At the date of said will the nearest relations of said testatrix were Matthew Davis, Joshua Davis, referred to in said will and Joshua Parker, who were her nephews.

Said Matthew Davis died after said testatrix and before John Thomas Hollowell, leaving Mary E. Davis, the plaintiff, his heir at law and distributee. Indiana Parker, another plaintiff, is a grand neice of said Sarah Davis, whose father, a nephew of said Sarah, had died in the lifetime of said Sarah, and before said will was executed.

There was devised by said will and included in the residuary clause thereof, a tract of land in said county. Per-

sonal property, which has been converted into money by said administrator was bequeathed in said will and said residuary clause, to the amount of $500.

John Thomas Hollowell died intestate in said county in the year 1871, without issue, and the said Jesse Hollowell was only qualified as the administrator of the estate. Jesse is the heir at law and distributee of John Thomas.

The debts due from the estate of the said Sarah Davis and the said John Thomas Hollowell are paid.

The plaintiffs demand judgment against the defendants that they be declared entitled to share in the lands and money devised and bequeathed by said will and said residuary clause equally with said defendant, Joshua Parker.

Said defendant, Joshua, denies the right of said plaintiffs, or either of them, to share in said property, claiming the whole as the "nearest relative" of said Sarah Davis. And the said Jesse Hollowell denies the right of either said plaintiffs or said defendant, Joshua, to share in said property, claiming the whole as the heir at law and distributee of said John Thomas, and demands judgment for his costs.

And the parties submit all their rights upon the above state of facts to the judgment of the said Court.

His Honor, upon full consideration of the case, adjudged:

1. That the plaintiff, Indiana Parker, and the defendant, Jesse Hollowell, are entitled to no part of the property devised and bequeathed by Sarah Davis' will.

2. That the plaintiff, Mary E. Davis, and the defendant, Joshua Parker, are entitled to the whole of said property in equal proportions; and that said Mary E., recover of said Jesse the sum of $250, being the whole amount of money in said Jesse's hands as administrator under said Sarah Davis' will; and that they recover possession of the tract or parcel of land mentioned in the "case agreed," as tenants in common.

And it is further adjudged that the costs be paid out of said fund.

From which said judgment the defendants and the plaintiff, Indiana Parker, appealed.

Smith & Strong, for defendant, Hollowell, submitted:

The defendant, Jesse Hollowell, excepts to the ruling of his Honor that the property devised and bequeathed by the will of Sarah Davis to John Thomas Hollowell, upon his death vested to her nearest relations, and did not descend to or vest in the said Jesse as heir at law and personal representative of the said John Thomas.

The facts as shown by the case agreed are, that the whole of her property, after payment of debts, was given by the said will to the said John Thomas, and his heirs, and if he should die and leave no lawful heir of his body, then all of her property remaining after a legacy of $200 was given to her nearest relatives; that the said Sarah Davis died in the year 1869, and that the said John Thomas died intestate and without issue, in the year 1871. *Hilliard* v. *Kearney*, Busb. Eq. 221. See at page 229, near the bottom, the very able opinion of Chief Justice PEARSON, where the authorities are cited and the reasoning elaborately gone into.

Morrisey, for plaintiff, Indiana Parker:

The plaintiff, Indiana Parker, excepts, because his Honor ruled that she was entitled to no part of the property devised and bequeathed by the will of Sarah Davis, but that the plaintiff, Mary E. Davis, and the defendant, Joshua Parker, were entitled to the whole thereof.

The facts as shown by the case agreed are, that the testatrix upon the death of John Thomas Hollowell, devisee and legatee, without heir of his body, devised and be-

queathed the whole of her property, excepting a legacy of $200, to her nearest relations, all except Joshua Davis, who was a nephew of the said testatrix, and the children of said Joshua's brother, John Davis, deceased, to each of whom she gave ten cents, and provided further that all the balance of her property should be divided amongst the balance of her nearest relations; that the said Indiana was a grand neice of said testatrix at the date of said will, whose father, a nephew of said testatrix, was then dead; that Matthew Davis, a nephew of said testatrix, was living at the date of said will, but died after the death of said testatrix, leaving the plaintiff, Mary E. Davis, his only issue; that the defendant, Joshua Parker, was a nephew of said testatrix, living at the date of said will, and that there were no nearer relatives, of the said testatrix at the date of said will, nor at her death, than said Matthew Davis, Mary E. Davis, Joshua Parker and Indiana Parker, the plaintiff.

The plaintiff insists that the exception from the general words of the gift of the children of her nephew, John Davis, shows the meaning in which the testatrix used the words, and that she supposed, that but for that exception said children would have been embraced within theirs.

In cases like this the ordinary grammatical sense has been adopted as the rule of construction "unless it shall appear from the other part of the instrument that a different meaning was intended." *Harrison* v. *Ward*, 5 Jones Eq. 240; *Simons* v. *Gooding*, 5 Ired Eq. 382.

Here it is clear that a different meaning was intended. That Matthew Davis, father of defendant, Mary E., was entitled at the death of testatrix. See *Jones* v. *Oliver*, 3 Ired Eq. 369.

RODMAN, J. This case is governed by *Hilliard* v. *Kearney*, Busb. Eq. 221, where the rule is thus stated: "When the estate is defeasible, and no time is fixed on at which it is to

become absolute, and the property itself is given and not the mere use of it, if there by any period intermediate between the death of the testator and the death of the legatee, at which the estate may fairly be considered absolute, that time will be adopted."

"If there be no intermediate period, and the alternative is either to adopt the time of the testator's death, or the death of the legatee generally. * * * As the period at which the estate is to become absolute, the former will be adopted unless there be words to forbid it, or some consideration to turn the scale in favor of the latter."

Here the testatrix after providing for the payment of her debts and funeral expenses, says, "the balance of my property of all kind I give to my grandson, Thomas Hollowell, to him and his heirs, and if he should die and leave no lawful heirs of his body, then and in that case I give Celia Mayo the sum of $200, to her and her heirs, and all the balance of my property I give to my nearest relations, &c."

The estate of John Thomas was an absolute one at the death of the testatrix, and went upon his death to his representatives.

A judgment may be drawn in conformity with this opinion. Judgment below reversed.

PER CURIAM. Judgment reversed, and decree accordingly.

DANIEL G. A. WARD *et al. v.* W. T. DORTCH *et al.*

The removal of a trustee at the request of the *cestui que trust*, and the appointment of some other person to sell the lands conveyed in the deed, in which such trustee is appointed, is purely a matter of discretion for the Court below, and one which the Court should not do without good cause.

(*Stone* v. *Latham*, 68 N. C. Rep. 44, cited and approved.)

CIVIL ACTION, tried before *Clarke, J.*, at Spring Term, 1873, of the Superior Court of WAYNE county, upon the following facts, constituting the "case stated" and sent to this Court.

This action is brought by the plaintiffs, who are *cestui que trusts* against the defendant, Dortch, the trustee in a certain deed of trust made by the other defendant, Geo. W. Collier, to said Dortch on the 1st day of February, 1867, for the purpose of compelling him, the trustee, to sell the land conveyed in said deed for plaintiff's benefit.

At the Special January Term, 1873, his Honor, Judge TOURGEE, by consent of parties, made an order to sell the land conveyed as aforesaid, and appointed the trustee as commissioner to make the sale. The sale was advertised, and on the day the land was offered for sale at public auction, when $18,000 was all that was bid for the same, and the commissioner considering that sum insufficient and under its value, withdrew it from sale and reported to the next term of the Court that there was no sale, and introduced affidavits tending to show that the land would by being sold in December next, bring at least $30,000.

It was then moved on the part of the plaintiffs that the defendant, Dortch, be removed from the trusteeship, and some one else appointed to sell the lands in his stead, which motion was refused on the ground that Dortch had no notice of such motion.

Plaintiffs then moved that the commissioner heretofore appointed be ordered to sell the lands on the terms expressed

in the former order, and that he report the sale at the next term of the Court. Motion likewise refused.

His Honor, then on motion of defendants, ordered that Wm. T. Dortch (the defendant) sell the lands mentioned in the pleadings on the 1st Monday in December next, on the terms set forth in the decree heretofore made in this cause.

From which order, plaintiffs appealed.

Isler, for appellants :

1. The Court has the power to remove a trustee without any formal notice. *Stilley and wife* v. *Rice,* 67 N. C. Rep. 175.

2. The postponing the time of sale to some other, different from that expressed in the mortgage, is impairing the obligation of the contract. *Branson* v. *Kinzie,* 1 How. U. S. 311; *Melraken* v. *Hayward,* 2 How. U. S. 608.

Smith & Strong, contra :

Dortch was trustee and was directed as such to make the sale.

The Court had the right to prescribe the time of a sale made under its order, though disregarding the particulars of the deed, if the interests of outside parties entitled to the surplus require a donation in order to insure a sale for value. *Bryant & Reed* v. *Scott.*

The order to sell was made at a previous term and acquiesced in. No complaint can now be made nor appeal taken thereupon. The decree was by consent, and as to the point of ruling complained of the plaintiff, proposed a decree containing same terms.

SETTLE, J. In refusing the plaintiff's motion to remove Dortch from the trusteeship, and to appoint some one else

to sell the lands in his stead, we cannot see that his Honor committed any error for which he can be reviewed.

No facts are set forth, which of themselves, entitle the plaintiffs to have Dortch removed from the trusteeship created by the deceased, and as to his appointment by the Court as commissioner to sell the lands, it was purely a matter of discretion in the Court either to continue or remove him.

In *Stone* v. *Latham*, 68 N. C. Rep. 421, it is said that a commissioner appointed by a Court to sell land, is but the finger of the Court, and may be appointed, controled and removed by the Court in its discretion.

But the plaintiff says that the Court has no power to extend the time of sale beyond the terms limited in the deed of trust.

This question does not arise, for upon inspection of the deed it will be seen to no express and definite terms are fixed as to the time of sale, but the power of sale is conferred upon Dortch alone in certain events, &c.

His report giving his reasons for not selling the land at the time appointed seems to have been satisfactory to the Court there, and we may add that he appears to us to have acted with good judgment.

Undoubtedly, if a trustee or commissioner refuses or neglects to sell land when it is his duty to sell, a Court will remove him, but it should not do so without good cause. Should there be delay beyond that granted by his Honor it would look in the absence of the most cogent reasons, as if there was good ground for the plaintiff's motion.

Let it be certified that there is no error.

PER CURIAM. Order affirmed.

J. A. TEAGUE and wife, MARGARET, v. W. W. DOWNS.

Since the Act of 1848, a husband has the right to surrender his estate as tenant by the curtesy initiate, and let it merge in the reversion of his wife, who, with the assent of her husband, may sell the same and receive the whole of the purchase money.

And an agreement that the wife shall receive such price in personal property and hold the same to her separate use, to enable her to lay it out in the purchase of another tract of land, is valid, such price not vesting in the husband, *jure mariti*, so as to subject the same to the claims of his creditors.

(*Sutton* v. *Askew*, 66 N. C. Rep. 172, cited and approved.)

CIVIL ACTION, tried before *Mitchell, J.*, at the Spring Term, 1873, of the Superior Court for CALDWELL county.

On the trial below it was in evidence that the plaintiffs were married about the year 1852, and had now children nearly twenty-one years old; that the *feme* plaintiff was one of the heirs at law of one Aquilla Payne, who died in the year ——, before 1868, and as such became possessed of a certain tract of land, which in the year 1868, she and her husband conveyed by deed to one Walter Payne, her brother, with a verbal understanding between the three that the proceeds of the said sale was to be to the sole and separate use of said Margaret, and was to be paid to her for the purpose of enabling her to purchase another tract of land for a home for herself and family; that in accordance therewith the money was paid to her, and kept by her solely and exclusively for the purpose above set forth.

That the said Walter paid the *feme* plaintiff four hundred and fifty dollars, to-wit: $200 in money and a mule and wagon valued at $250. This mule, with the consent and under the direction of the *feme* plaintiff, was taken to another county and exchangsd for another mule, and that also for another.

It was also in evidence that by the consent and under the direction of the said Margaret, the *feme* plaintiff, Walter Payne, as her agent, entered into a verbal contract with the

defendant, Downs, thereby purchasing the tract of land mentioned secondly in the complaint for $300, and in payment thereof, delivered to Downs the mule and wagon and paid him $60 in money. This contract with Downs had never been rescinded nor modified, nor had any of the price paid for the land ever been paid back, though the plaintiff, Teague, swore that he had afterwards purchased back the mule from Downs; that the defendant at the time of the trade with him was informed that it was made on behalf of the *feme* plaintiff alone, and the land paid for her out of her separate property, and that he then agreed to make the deed to her alone; that defendant had been called upon to make the deed and had refused to do so, and had sold the land to another. The foregoing facts were disposed to by the plaintiffs and by said Walter Payne.

Defendant, as a witness, testified that the trade was made with Teague, and not his wife; that by the payment of the money and delivery of the mule and wagon, the purchase money was paid up, and he was ready to convey; but that he discovered that the mule was old and unsound, and that Teague agreed to take the mule back, paying his value in money. That he, Teague, did take the mule back at the same price he, the defendant, had paid, to-wit: $120, and had paid $45 thereof, and afterwards agreed with defendant to rescind the verbal contract concerning the land; that it was so rescinded and defendant was to repay to Teague the sum paid for the land; that before he, the defendant, had repaid Teague, judgment was rendered against the defendant in certain proceeding supplemental to execution, instituted by one Roberts against Teague for $123.50 and costs, which the defendant as debtor to Teague had to pay. The record of this judgment was also in evidence.

The defendant insisted:

1. That any verbal evidence of the contract between plaintiffs and Walter Payne, at the time the trade was made

with him for the land of the *feme* plaintiff was inadmissible under Statute of Frauds.

2. That as Teague was tenant by the curtesy of his wife's land, he was entitled to the same in the fund arising from its sale.

3. That personal property accruing during the coveture, under the circumstances alleged belonged to the husband.

4. That the suit was the wife's and the husband ought to be defendant.

5. That as the husband was tenant by the curtesy before the adoption of the present Constitution of the State, it could not divest his rights.

His Honor charged the jury that if the contract between plaintiffs and Payne for the wife's land, and the contract between the *feme* plaintiff and defendant were made as alleged and deposed to, and the defendant had received the price agreed on, and had refused to make title, the plaintiffs would be entitled to recover. To this defendant excepted.

Several issues were submitted to the jury involving the facts alleged in the complaint, which were found in favor of the plaintiffs, and in accordance with the verdict, the Court on motion gave judgment in their favor for $300 and costs.

From this judgment defendant appealed.

Folk, for appellant:

The action is to recover the money paid, and property delivered to defendant on the ground that the contract was void, and the question is, whose money and property is it?

1st. Husband was tenant by the curtesy initiate of the land sold to Payne, consequently he had the same interest in the proceeds of the land, which he had in the land. *Wil-*

liams v. *Lanier*, Busb. Law, p. 30. *Smith* v. *Smith*, Winston Law and Equity, p. 31. *Forbes* v. *Smith*, 5 Ired., p. 369.

2nd. But the entire proceeds of the land belonged to the male plaintiff. For money accruing from the sale of the wife's land by a proper conveyance from husband and wife, loses the character of real estate and belongs to the husband *jure mariti*. *Rouse* v. *Lee*, 6 Jones Equity 352. *Temple* v. *Williams*, 4 Ired. Equity 522, and no agreement or transaction between husband and wife, can be proved by parol to support a settlement made after marriage in obstruction of husband's creditors. Revised Code, ch. 37, sec. 26, *Sanders* v. *Ferrell*, 1 Ired. 97. It is submitted there is nothing in the State Constitution which can effect this question.

1st. The husband had a vested right in the land, the same in its proceeds, of this the Constitution cannot deprive him. Cooley's Con. Lim., 2 Ed. 360 and 361.

2nd. The marriage was a contract, solemnized before the adoption of the Constitution, and cannot be affected by that instrument, so far as that contract confers rights of property. *Sutton* v. *Askew*, 66 N. C. Rep., p. 172.

If secret agreements between husband and wife, may alter marital rights throughout a series of conversions of property, the effect on creditors and purchasers would be startling.

Armfield, contra:

The Constitution provides in art. 10, sec. 6, that "the real and personal property of any female in this State, acquired before marriage, and all property, real and personal, to which she may, after her marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable to any debts, obligations or engagements of her husband * *

* * and may be, with the written assent of her husband, conveyed by her," &c.

In this case the land of the wife was conveyed by her, her husband guaranteeing to pass the title, to her brother, Walter Payne, in the Fall of 1868, after the adoption of the present Constitution of the State, and then became "personal property to which she became entitled" at that time, and therefore, "her sole and separate estate," and "not liable to any debts, &c., of her husband."

The above clause of the Constitution is unrestricted in its operation as to marriages prior, or subsequent, and applies by its terms to one as well as the other, and the Court will not restrict or limit it unless it be necessary to do so to prevent a conflict with some higher law; but there is no higher law, unless it is the written Constitution of the United States, and it cannot be supposed to conflict with anything in that instrument, unless it be the prohibition in art. 1, sec. 10, on every State from passing any law impairing the obligation of contracts; or unless it conflicts with some other provision contained in itself, and there is none that it can be supposed to conflict with unless it be sec. 17, of the Declaration of Rights, which provides that "no person shall be deprived of his property but by the laws of the land."

As to the first objection: The husband was not tenant by the curtesy initiate by contract. See *Norwood* v. *Marrow*, 4 Dev. and Bat. 442; and if he was he expressly waived that contract by joining in the conveyance to Payne, and the agreement that the proceeds should belong to his wife. The same answer may be given to the second objection for "*Injuria volente non fit.*"

If the husband had an interest in the land sold to Payne, as "tenant by the curtesy initiate," it was an incobate interest. See *Sutton* v. *Askew*, 66 N. C. Rep. 172, and it was not subject to his debts, nor could it be conveyed or leased by him for his life or for a term of years. See Revised Code,

chap. 56, sec. 21, p. 328, (passed Session 1848, chap. 41.) And it would follow that when it was converted into personalty in the Fall of 1868, and the husband assented thereto, and that said personal estate should be her separate property, he did nothing of which his creditors could complain, but it does not appear that he had any creditors when he did this, therefore it was no fraud under 13th Elizabeth.

PEARSON, C. J. At the common law a husband by the marriage acquired all of the wife's personal things in possession" absolutely, and he acquired an estate during the coveture in her things real in possession, and was seized in her right of the fee simple; on the birth of a child born alive he became entitled as "tenant by the curtesy initiate" to an estate for his life in his own right, and was seized of the reversion in right of the wife. This life estate he could sell, charge with a term for years and by force of the statute, Rev. Code, ch. 45, sec. 1, it could be sold under execution for any "just debt, duty or liability."

In this state of the law it is clear that the husband being in debt or subject to a duty or liability could not have surrendered his life estate as tenant by the curtesy initiate to his wife, so that it might merge in her reversion without a violation of 13th Elizabeth as a voluntary conveyance in fraud of creditors.

By Rev. Code, chap. 56, sec. 1, (Act 1848,) it is provided, "no real estate acquired on or since the first day of March, 1849, by *feme coverts*, who were such on the third Monday of November, 1848, shall be subject to be sold or leased by the husband for the term of his own life or any less term of years, except by the consent of the wife, and no interest of the husband whatever in such real estate shall be subject to sale to satisfy any execution against them."

As the marriage in this case was solemnized after the year 1848, no question can be made as to the application of

the statute, it follows that as the creditors of the husband had no right to subject this estate to the satisfaction of debts, he was at liberty, if so minded, to surrender his estate, and let it merge in the reversion of the wife, and consequently when she sold the land to Walter Teague, the whole estate passed from her, and she with the assent of the husband, was entitled to receive the whole of the price.

Assuming this to be so, it was urged for the defendant, that although the wife could take she could not hold, for as soon as the mule, wagon and money (the price of the land) was received by her, the title vested in the husband *jure mariti*, and hence it was inferred that the defendant was under no obligation when he elected to avoid the contract of sale for the tract of land that Mrs. Teague wished to acquire to repay to her the articles and money which he had received of her agent, and was protected by the judgment to which he had submitted on the supplemental proceedings against the husband.

Had the wife sold her land and received in payment the mule, wagon and money, without any understanding in regard to it, the *jus mariti* would have vested the title in the husband, and the inference contended for by the defendant would have followed, but there was "an understanding in regard to it," and it was expressly agreed that as the purpose was to convert the land inherited by the wife from her father into another tract of land that would suit her better, the husband relinguished all claim to the price she was to get for her land, to-wit: the mule, wagon and money, and allowed it to be her separate property to be invested in the purchase of another tract of land. To this, it is objected, husband and wife are in law one person and no understanding or agreement between them has any legal effect against creditors except marriage settlements, and marriage contracts in writing and registered. Rev. Code, chap. 37, sec. 24. The facts do not make a case of a *marriage settlement* or

marriage contract within the meaning of this statute, for we have simply an understanding, agreement or contract (call it as you please) by which the husband consents that the wife may convert one tract of land, *which is in no wise subject to the claims of his creditors*, into another tract of land; and in order to enable her to make the conversion he stipulates to allow her to hold as her separate property the price of her land until it can be reinvested in another tract of land.

This is all "plain sailing," and it is only disturbed by the fact that the defendant (when he elected to repudiate his verbal contract of sale instead of repaying to Mrs. Teague the price which he had received from her through her agent, Walter Teague,) confessed (contrary to the fact according to the issue found by the jury) that he held the money and wagon as the property of the husband, and allowed the creditor, Roberts, to take judgment against the property in his hands without suggesting the fact that the fund was claimed by the wife as her separate property, of which he had full notice. This was his folly, or an attempt on his part to commit a fraud, and the consequences must fall on him.

Let it be admitted that should a husband, married in 1852, his marital rights being fixed by the law as it then stood, *Sutton* v. *Askew*, 66 N. C. Rep. 172, in anticipation of the death of his wife's father, agree to let the wife have her distributive share for her separate use, such agreement must be in writing duly registered and that as against creditors it must also be proved that the husband's estate was competent to pay his debts. Revised Code, chap. 37, sec. 25. Ours is not that case, for here the wife had the one tract not subject to the creditors of her husband and the amount of the agreement was that the husband consented to allow the one tract to be converted into another and to this end, that

she might hold the price of the first tract as her separate property until it could be reinvested.

This agreement did not at all affect or concern the rights of creditors, and putting creditors out of the case, there is no farther difficulty, for in respect to the dogma, that husband and wife are one person, and the wife cannot hold personal property as her separate estate without the intervention of a trustee, the Constitution of 1668, art. 10, sec. 6, makes a radical change and allows married women to take and hold property as well in respect to marriages before as after that date—except where, as in *Sutton* v. *Askew*, sup., the husband's right to sell his own land is to be clogged by the necessity of getting his wife's consent, in other words paying a fine for the privilege of alienation, or where the rights of existing creditors are injuriously effected.

The objection that Teague, the husband, should have been made defendant instead of the plaintiff, as his interests are adverse to that of the wife, was fully met by the position of Mr. Armfield, that under C. C. P. it makes no material difference whether a party is plaintiff or defendant, as the Court can give affirmative relief and the judgment is a final determination of the rights of all of the parties.

There is no error.

PER CURIAM. Judgment affirmed.

JAMES M. MAYHO and JAMES H. PARKER v. B. W. COTTON.

Before the Act of 1868, the owner of land was not restricted by the Constitution in the choice of his homestead to the tract upon which he resided, nor to contiguous tracts, but the same might have been assigned from any land of the required value.

CIVIL ACTION for the recovery of 900 acres of land, tried at the January (Special) Term, 1873, of HALIFAX Superior Court, before his Honor, *Cloud, J.*, upon the facts contained in the following CASE AGREED:

"The sheriff of Halifax, under executions duly issued on sundry judgments against the defendant, B. W. Cotton, on the 6th March, A. D., 1869, after due levy and advertisement, (levy made subsequent to the adoption of the Constitution,) proceeded to sell at the Court House door in said county, the lands claimed in this action. At the said sale, the plaintiff, Parker, became the purchaser at the last and highest bid, and before the settlement with sheriff, transferred half interest in said land to the plaintiff, Mayho, and the sheriff's deed was, at the request of plaintiffs, made jointly to them, they paying the purchase money in full. The defendant, B. W. Cotton, who was defendant in said executions, was in the possession of the land when sold by the sheriff, and has been in possession ever since. On the day of sale, and before the sale was made, the plaintiff, Parker, and the defendant, Cotton, had a conversation just about the time of sale, in which Cotton said, that no one was bidding for the land in any way for his benefit or advantage and that he claimed nothing in this place; that he wished to save his other place, and proposed to borrow of Parker a small sum of money to aid in accomplishing that object; which, however, Parker did not loan him. This place, known as the "Swamp Place," was levied on at that time and advertised for sale, and was sold on the same day, and before the sale of the place mentioned in these proceed-

ings. At the sale of the said "Swamp Place," the defendant claimed to have the homestead laid off out of that place, and when the place now in controversy was sold by the sheriff, no such claim was made. The defendant had also proceeded by applications before one Wm. Fenner, a Justice of the Peace for said county, on the 2d day of March, 1869, to have his homestead laid off, and it was done on "Swamp Place," and return thereof was made to the office of the clerk of the Superior Court, and duly recorded in the Register's office of said county, on the —— day of ——, 186–, the said return being dated 4th March, 1869. The plaintiff was induced to bid at the sale by the said Cotton's saying to him that he claimed nothing in the place mentioned in this action, and by his claim of homestead in the "Swamp Place."

The sheriff made a deed to the purchaser of the "Swamp Place" in fee, without reservation of homestead. The purchaser of said "Swamp Place" brought an action against the defendant, Cotton, to recover possession of said place. Cotton appeared and defended the action, and claimed that it was sold subject to his right of homestead in that tract. The suit was compromised between the said parties to that action by the parties thereto, on the payment by the defendant, Cotton, of a sum agreed on between said parties, as the consideration for the conveyance of said land to the defendant by the plaintiffs.

The defendant, Cotton, owned the said two tracts of land, which were four miles apart. His "Mansion House" and residence was at the time of said sale and for many years previous, and has been ever since, on the place claimed in this action. Defendant, Cotton, has a wife and several minor children living.

The defendant, Cotton, only claims a homestead in this tract, and offers to surrender the excess if any. The land mentioned in this action was purchased by said Parker for

$2,060. He offered to sell the same to the defendant a few days after purchasing it, for $4000, which the defendant declined to give. A fair rent for the land in dispute is $125 *per annum.*"

Upon the foregoing facts, the Court being of opinion that the plaintiff was entitled to recover, gave judgment accordingly, and a further judgment against the defendant and his surety for the sum of $530 damages and for costs.

From this judgment, defendant appealed.

Clarke & Mullen, for appellant:

1. Homestead means dwelling-place, and every homestead must embrace the capital-mansion.

2. The husband cannot waive homestead except by deed in which wife joins. Mere words of judgment debtor on day of sale cannot have a force which would be denied his deed (without his wife's signature), supported by ample consideration.

3. Even admitting that the head of a family has a right to elect as a homestead a "swamp" or other place which is not his homestead, the case agreed shows he has not done so here, for he had resided before, at day of sale, and ever since, at this place. Furthermore the sheriff had refused in deed of Swamp Place to exempt homestead for debtor.

4. Decision in *Watts* v. *Leggett,* 66 N. C. Rep. 197, admits power of Legislature to *extend* homestead by allowing two tracts not contiguous to be embraced when a homestead of contiguous lands cannot be had, but even then one of them must contain capital-mansion. Besides this act of extension was passed subsequently to this sale.

5. This view of homestead is supported by decisions in all the other States.

6. Case shows property is worth at least $4,000. Take

out $1,000 as homestead, and enough is still left to pay plaintiff his bid, $2,000, and interest.

7. Wife should be a party to any proceeding to eject her from homestead, especially since she cannot now claim dower. *Bunting* v. *Foy*, 66 N. C. Rep. 193.

Coningland, and *Batchelor, Edwards & Batchelor*, contra.

RODMAN, J. The defendant, Cotton, owned two pieces of land four miles apart, the one called the Mansion, on which he resided, and which is claimed in this action, and the other called the Swamp Place. Both were sold under execution on 6th March, 1869. The plaintiffs purchased the Mansion. The defendant claims a homestead in it.

On the 2d March, 1869, defendant proceeding under the Act of 22d August, 1868, then in force, (Acts 1868, ch. 43,) applied to a Justice to have his homestead laid off in the Swamp Place, which was done, the return of the freeholders being dated 4th March. It does not appear when the return was registered.

The grounds on which the defendant now claims a homestead in the Mansion, as we understand them, are:

1. That as the law then stood under the Constitution and Act of 1868, he was obliged to take his homestead in the land on which he resided, and any proceeding to have it laid off elsewhere was void, at least unless his wife joined in the application.

2. That as the sheriff conveyed by his deed to the purchaser of the Swamp Place the whole estate of the defendant without an express exception of the homestead, the defendant was not allowed a homestead in that place.

It may be inferred from the language of the Constitution that its framers supposed that the debtor would take his homestead in the dwelling which he inhabited and the surrounding lands. But his choice is not positively restricted

to that, nor to contiguous lands. It might frequently happen that if so restricted, a debtor might not be able to get a homestead of the permitted value, when by taking lands not contiguous to his dwelling he could do so. Was a debtor to be restrained and maimed in his homestead, and the intention of the Constitution defeated by an accident of that sort? The lands although not contiguous might be very near, and the clear intention of the Constitution was to exempt a certain *value*. What difference could it make to a creditor whether the assignment were in one place or another, so that the *value* of the exemption was not increased? The Legislature following out the Constitutional intent, and regarding the value of the exemption as the only thing material, soon removed all doubt by enacting that a homestead might be assigned in tracts not contiguous. As soon as it was established that a man owning a dwelling worth $500 could take take that, and also land elsewhere worth $500 for his homestead, it became evident that no reason of justice or convenience prohibited him from taking his homestead to its full value in the latter place and giving up the former to his creditors if he so selected. It is true the homestead in this case was assigned before this power was expressly established by legislation; but it existed under the Constitution and the Act of 1868, at least to the effect that the assignment of a homestead in a place other than the residence, at the request of the debtor was not void as to him. In this case the defendant received his homestead in the Swamp Place; that the sheriff did not refer to it and exclude it from his deed, was not material. A sheriff's deed passes only what he may lawfully sell. If, upon the compromise with the purchaser afterwards, the defendant did not obtain the full value of his homestead right it was his own folly. It is to be presumed that he did. By so receiving it and by his representations to the plaintiff when he purchased the land now sued for, the de-

fendant is estopped from claiming a homestead in this land. If taking a homestead in the Swamp Place was illegal in the sense of being unauthorized, the defendant cannot avail himself of his own illegal act to obtain two homesteads, as in effect he would if he could defeat the plaintiff's action. Neither is it material that the wife of defendant did not by deed assent to his receiving a homestead in the Swamp Place. Sec. 8, art. 10 of Constitution applies only to a conveyance of the homestead after it has been laid off.

PER CURIAM. Judgment affirmed.

BEADY A. GREEN and J. B. GREEN *v.* GEORGE J. GREEN.

The misjoinder of unnecessary parties, either as plaintiffs or defendants, is mere surplusage, and under the liberal system of pleading introduced by our Code of Civil Procedure, is not a fatal objection.

A reference made by the Court to take an account to be used in an action pending before it, is not such a reference as can be ended at the election of either party, upon the notice prescribed in the Code of Civil Procedure, sec. 247.

(*Maxwell* v. *Maxwell*, 67 N. C. Rep. 383, cited and approved.)

CIVIL ACTION for the recovery of real property, tried before *Buxton, J.*, at Spring Term, 1873, of UNION Superior Court.

The action was originally brought by one Tilmon Green, to Fall Term, 1869. He having died, the present plaintiffs, B. A. and J. B. Green, devisees under his will, come into Court, and make themselves parties plaintiff.

One of the defenses set up in the answer being of an equitable character, in order to ascertain the amount for which the land was bound, at Fall Term, 1870, a reference was ordered by the Court to the Clerk and S. H. Walkup, Esq., to take an account in the cause. This was done and a report made, which at Spring Term, 1871, was re-referred

The parties were notified to attend on the 13th of August, 1872, before the referees for the purpose of taking the account, but the defendant not appearing, (having been notified by the wrong name) a postponement was had until the 10th of September, 1872, and the parties were again notified. On the 2nd of September, the following written notice was served by the defendant on the plaintiffs. After stating the case, "the referees, S. H. Walkup and G. W. Flow, heretofore appointed in said action, having failed to make their report within the time prescribed by law, you are hereby notified, that I, elect to end said reference, and desire to proceed as though no reference had been ordered.

August 31st, 1872. (Signed) G. J. GREEN."

The parties being present before the referees on the 10th of September, 1872, the counsel for the defendant produced before the referees the foregoing notice duly served upon the plaintiffs, and objected to any further proceeding under the reference, on the ground that the reference was terminated by service of the notice in accordance with C. C. P., sec. 247, chap. 5, title 10, the referees having failed to make their report within sixty days.

The objection was overruled, and the referees proceed to take the account. Defendants excepted, and entered their protest in the proceedings.

The referees reported to Fall Term, 1872, at which term the defendants was allowed until the 1st of Febuary, 1873, to file exceptions. At Spring Term, 1873, no exceptions being filed, and the Court refusing to grant further time for that purpose, the plaintiffs moved for a confirmation of the report; whereupon, the defendant renewed the motion made before the referees to set aside the report for the reason apparent on its face, to-wit: the reference had ended upon the receipt of the notice alluded to. His Honor being of opinion, that the provision of sec. 247, C. C. P., were not applicable to a reference to state an account, declined to set

aside the report, but allowed the motion of the plaintiffs to confirm the same. From which judgment the defendant appealed.

Upon the argument, a misjoinder of parties plaintiff was relied to defeat the action. His Honor below was against the defendant on this point.

Bailey, for appellant, submitted:

When the case was first constituted in Court, Tilmon Green being plaintiff, the defendant's answer and the reply raised an issue on the *defendant's title;* but when Tilmon Greene died and the present plaintiffs came into Court as such, the defendant filed a supplemental answer denying *their title.* This, I submit, had the effect to shift the issue from the defendant's title to that of the *present* plaintiffs.

This being so, a reference was erroneous, and the transcript shows a re-reference after the present plaintiffs became such of record.

This was not a reference by consent, such a reference must be only upon the *written* consent of the parties; nor is the present issue made by the substituted supplemental answer the subject of reference under the Code, sec. 245. The defendant's notice to elect to end the reference was brought to the attention of the Court, but while that may not have been the proper remedy, and it is not insisted that it was, it appears from the case that the defendant moved to set aside the report—such is the motion, and if a proper one should be allowed, though based on a wrong reason.

If the Court had no power, as it is submitted it had not to refer the case after B. A. and J. B. Green became plaintiffs, then it ought at the earliest moment to have arrested its steps and granted the motion to set aside the report. For though, *coram non*, yet it is error to confuse a litigation in this way, according to the reasoning deducible from *Dulin*

v. *Howard*, 66 N. C. Rep. 433. How far the rights of litigants may become confused and entangled by encumbering the record with reports and confirmations thereof which the Court had no right to receive or make, it is impossible to conjecture.

But it is the expressed policy of the law as shown by the adoption of the Code system to simplify procedure and disembarrass litigation from all entangling matter.

By the supplemental answer the title of the present plaintiffs is denied—it being alleged that they are only remaindermen—devisees in remainder. No issue is formally framed, but being an affirmation of title on one side in *them*, and denied on the other; it is like confession of lease entry and ouster, and plea of not guilty in the old action of ejectment. No account was or could be in legal contemplation needed, the ordering it was error, the reception of the report and its confirmation error also; the record does not show, but it is inferrible fairly that the report was in favor of the plaintiffs.

As *the point* made is the same according to the view taken below or in this Court, we submit that the appellant should have any benefit legally derivable therefrom.

Wilson, contra.

PEARSON, C. J. We can see no error upon the point in respect to the misjoinder of parties plaintiffs urged in the argument, for the facts are not found, and the defendant must be taken to have waived by asking for time to except, &c.; this was the view which his Honor took it, and in this we concur.

By the argument before us this question was suggested for consideration. Under the C. C. P., is a misjoinder, (that is making too many parties plaintiffs,) a fatal objection? We are inclined to the opinion that under the very liberal

system of pleading introduced by C. C. P., the fact of unnecessary parties, either plaintiffs or defendants, is not a fatal objection.

As to the unnecessary parties made *plaintiffs*, it is their own concern, to be made liable for costs; as to the unnecessary parties made defendants, they are allowed to disclaim and have judgment for costs. By unnecessary parties, defendant is meant parties against whom the plaintiff is not by his own showing entitled to any decree, judgment or order. For illustration, take our case, (as we conjecture the fact to be,) an action for the recovery of land by *Tilmon Green* v. *George Green*. The defendant relies upon an equitable defense, to-wit: that he is entitled to the land on paying certain amounts paid by one Long, under whom the plaintiff derives title with notice of the defendant's equity, which is admitted and a reference ordered by the Court to fix the amount remaining unsatisfied; pending the proceeding Tilmon Green dies, and B. A. Green and G. B. Green are made party plaintiffs and carry on the action. Now what difference can it make, that instead of B. A. Green and J. B. Green being entitled to the land as devisees, taking the land as tenants in common, the former is tenant for life and the latter is entitled to the remainder in fee? There is no harm done by joining the remainderman as plaintiff, like the case where the seller and the purchaser of a note, there being no endorsement, are both plaintiffs—the joinder is unnecessary, but what harm can it do? So in regard to unnecessary parties defendant, for under the C. C. P., the complaint and answer set out all of the facts, and under a special plea, "former judgment for the same cause of action between the same parties," all of the facts appear by the pleadings, and the joinder of unnecessary parties will be surplusage.

C. C. P., sec. 95: "A *defect* of parties plaintiff or defendant is ground of demurrer," but too many parties

is surplusage only, cured as above indicated by judgment for costs or disclaimer. A misjoinder of one who is a necessary party is fatal, for he will not be bound by the judgment, this effects the merits; a misjoinder of one who is not a necessary party is surplusage.

Upon the point as to the right of the defendant to put an end to the order of reference, we concur with his Honor. On the facts set out in the replication it only remained to ascertain by an account how the balance stood, and the reference was ordered by the Court to settle the details, and was in no sense a reference of the case by consent of parties. See *Maxwell* v. *Maxwell*, 67 N. C. Rep. 383.

Affirmed.

After this case was argued and decided and an opinion written, Mr. Bailey obtained leave to file a brief as attorney for defendant.

This Court is willing at all times before the opinion is filed, to avail itself of the aid of the members of the bar in "the search after truth," by briefs filed presenting a new view based on the facts of the case, or a reference to additional authorities, directly in point.

Upon a re-perusal of the record, we find that the ingenious argument of Mr. Bailey has no foundation of fact to rest on. He says, by the supplemental answer, it is alleged that "the plaintiffs are only remainder men, devisees in remainder." The record shows the fact to be that the supplemental answer says that there is a misjoinder of parties plaintiff, "that John B. Green who has been made a party plaintiff, with Beady B. Green, has only a claim in remainder, and is not entitled to the present possession according to the rights set up by the plaintiffs;" here is an admission that Beady B. Green is entitled to a present estate according to to the rights set up by the plaintiffs, and the objection is that the remainder man, John B. Green, ought not to have been made a party which has been already disposed of.

We take this notice of the brief of Mr. Bailey out of respect for the learned counsel and with the hope that it will be an admonition to counsel, not to allow their professional zeal to result in overlooking the facts of the case in order to present "a nice point of law."

PER CURIAM. Judgment affirmed.

E. J. LILLY v. THE BOARD OF COMMISSIONERS OF CUMBERLAND COUNTY.

Money deposited in banks loses its distinct character as money, and becomes a debt due to the depositor from the bank, and as such, is a proper subject for taxation.

Solvent credits are property, and like other property are liable to taxation under our Revenue law. Nor does it make any difference if such credits were derived from the trade of a merchant in the usual course of a business, also taxed.

ARGUENDO: The State, until forbidden by Congress, has the power to tax National Bank bills.

PETITION to the Board of Commissioners of CUMBERLAND county to reform the tax lists, heard by *Burton, J.*, at Chambers, June, 1873, in the town of Fayetteville, upon the following CASE AGREED:

I. On the —— day of April, 1873, the plaintiff in giving in his list of taxables to the list-takers for Cross Creek Township, in said county, was required by them to list his money on hand the 1st day of April, 1873, and also his solvent credits, being debts due and owing to the plaintiff.

II. The tax lists, as made out by the list-takers for Cross Creek Township, was returned to the defendants, the Board of Commissioners of Cumberland county, who by their advertisement, appointed the 21st day of May, 1873, for the hearing before them of complaints of the action of the list-

takers; at which time the plaintiff appeared and complained that he had been charged with a tax upon his money on hand and on his solvent credits, and prayed the defendants to correct the said list by striking therefrom the tax upon these subjects. This the defendants refused, and the plaintiff appealed to the Superior Court.

III. The money on hand listed by the plaintiff, is money deposited in bank, consisting of National Bank notes, and United States Treasury notes, which were received by him in the usual course of his business, and the solvent credits listed are notes and accounts owing to him by his customers—the defendant being a wholesale and retail merchant doing business in Fayetteville.

IV. That the business of the defendant is taxed by the laws of North Carolina, and the said money and notes are the direct proceeds of such taxed business.

The parties claim as follows:

I. The plaintiff insists that his money on hand and solvent credits are not subject to taxation under the Constitution and Laws of North Carolina, and the Constitution and Laws of the United States.

II. The defendants claim that these subjects of taxation are especially enumerated and defined in the Constitution and Laws of North Carolina, and that they are bound to impose the tax provided by law on these subjects.

The parties, plaintiffs and defendants, agree upon the foregoing case and submit the same to the Hon. R. P. BUXTON, Judge, &c., to determine the following questions:

1. Whether money on hand and solvent credits are subject to taxation by the Constitution and Laws of North Carolina and the Constitution and Laws of the United States.

2. Whether money on hand and solvent credits, which are the proceeds of a business taxed by the laws of the State of North Carolina, are proper subjects of taxation un-

der the laws of North Carolina and the Constitution and Laws of the United States.

It was admitted that the money before designated was a general deposit in bank.

After argument, his Honor delivered his opinion as follows:

"I think it may be considered settled by the Supreme Court of the United States, in the case cited for the plaintiff, *Bank* v. *Supervisors*, 7 Wallace 26, and *Veazie Bank* v. *Fennel*, 8 Wallace 533, that United States Treasury notes and National Bank notes are exempt from State taxation, upon grounds of public policy, appertaining to the general government. So far as the case in hand is concerned, there seems to arise two questions necessary to be determined before it can be satisfactorily decided.

1. Do United States Treasury notes and National Bank notes after they are deposited by the owner to his credit in a bank continue to be the money of the depositor or the bank? If they continue to be the money of the depositor, then they continne to be the evidence of debt due from the Government to the depositor, and according to the above recited case he is not to be taken on their account. If, however, they become the money of the bank then the Government no longer owes the depositor, but owes the bank, and the bank owes the depositor. In other words the depositor becomes the holder of a "solvent credit," not upon the government, but upon the bank. The question of Government policy becomes eliminated from the case as a difficulty in the way of the taxing power of the State, and the remaining question would be,

2. Are solvent credits between citizens taxable by the State?

The first question relating to the nature and character of deposits in bank is incidentally touched upon in the case of *Planters Bank of Tennessee* v. *Union Bank of Louisiana*,

decided at the last term of the Supreme Court of the United States, in which case the following language occurs: (I quote from the case as reported in the Raleigh *News*, 3d June, 1873.) Generally a bank becomes a debtor to its depositor by its receipt of money deposited by him, and money paid into bank ceases to be the money of the depositor and becomes the money of the bank, which it may use by returning an equivalent when demanded, by paying a similar sum to that deposited. A collecting bank is the debtor of the depositor, and is under obligation to pay on demand, not the identical money received, but some equal in legal value. But this is the rule where money has been deposited and where there has been no contract or understanding that a different rule shall prevail.

This passage I consider decisive of the question relating to the nature and character of deposits in bank, so far as deposits of a general nature as distinguished from special deposits are concerned. In the absence of a statement to the contrary, I consider the deposits referred to in the "case agreed," to be general deposits subject to check. We have the case of an individual owning "solvent credits" on a bank. This brings me to the consideration of the second question:

2. Can the State of North Carolina tax solvent credits between individuals?

In the case of the *State* v. *Bell*, Phill. 76, and the cases therein cited, the general subject of State taxation, its nature, and the extent of its power, is discussed. "The taxing power is one of the highest and most important attributes of sovereignty. It is essential to the establishment and continued existence of the government." To the same effect speak the Supreme Court of the United States in *Nathan* v. *The State of Louisiana*, How. 73: "The taxing power of a State is one of its attributes of sovereignity, and when there has been no compact with the Federal Government, or ces-

sion of jurisdiction for the purposes specified in the Constitution, this power reaches all the property and business within the State, which are not properly the means of the general government, and as laid down by this Court, it may be exercised at the discretion of the State." It is suggested that this general power of taxation on the part of the State, is further limited by a clause of the Federal Constitution, Art. 1, sec. 10: "No State shall pass any law impairing the obligation of contracts;" and it is urged that the taxation by a State of a "credit," has the effect of impairing the obligation of a contract, and has been so decided recently by the United States Supreme Court. The case alluded to is probably *Walker* v. *Whitehead*, not yet reported. I have not seen the case referred to, only a very brief, and I must think a very inaccurate newspaper abstract of it.

The abstract is as follows: "No. 123, *Walker* v. *Whitehead*, Error—to the Supreme Court of Georgia. This was an action on a promissory note, and it was dismissed because it did not appear that certain taxes (chargeable on all debts) had not been paid on the debt. This Court reversed the judgment, holding that the act imposing taxes on debts by the State is unconstitutional, as impairing the obligation of contracts. Mr. Justice Swayne delivered the opinion," &c. A distinguished legal friend, Chairman of the Judiciary Committee, who is well up with the current literature of the profession, whom I have consulted about this matter, has kindly furnished me with his views. He says: "The Legislature of Georgia in 1868, with the view of embarrassing the collection of *ante bellum*, or old debts (so called,) passed a law imposing a tax on all such debts, and required the holders of all such claims, before they could sustain an action thereon, to exhibit in Court the receipt of the proper fiscal officer for the amount of the tax. This legislation was of a piece with the Stay laws of that State, and *in pari materia* with their homestead recently rent in twain by the

Supreme Court of the United States. A case was taken to the United States Court involving the right of the State to tax credits in this way. Shall the rights of parties be defeated by such discrimination? The Supreme Court held that such legislation was unconstitutional; not as I understand, because the State taxes solvent credits, but because of the discrimination and the obvious purpose to defeat the holders of such obligations. You remember our Legislature, about 1869, did the same thing, and you ruled against it without hesitation and without supposing that you thus exhausted the power to tax solvent credits.

In the absence of the case of *Walker* v. *Whitehead*, above referred to, I accept my learned friend's statement as a satisfactory explanation of the grounds upon which that case rests; and I am of opinion that it does not militate against the right of a State to tax solvent credits in a legitimate way.

According to the case agreed, the plaintiff, under my construction, had no money on hand, being all deposited to his credit in bank. It constituted a "solvent credit," and I hold and so decide that it was taxable, and that the Commissioners of Cumberland county did right to reject the application.

The further ground stated in the case agreed, why the money on hand and solvent credits should not be taxed because derived from a business already taxed was not argued before me, and as I suppose was thrown in as makeweight. The proceeds of the plaintiff's business were converted into a new form, and I think were as much taxable under the form of solvent credits as they would have been had they been converted into a house and lot.

It is adjudged by the Court that the proceedings be dismissed at the costs of the plaintiff.

From this judgment the plaintiffs appealed.

Fuller & Ashe and *B. Fuller*, for appellant.

James C. McRae, contra, submitted :

I. Art. 5, sec. 3, Constitution of North Carolina, directs that laws be passed taxing by uniform rule all moneys, *credits*, &c. If we admit that United States securities, National Bank bills and national currency are non-taxable, then by this case it appears that plaintiff had none, but in lieu thereof had money deposited in bank. This was a debt due plaintiff from the bank and was a solvent credit which is taxable. *Planters' National Bank of Tennessee* v. *Union Bank of Louisiana*, decided at last term of Supreme Court of United States.

II. If the taxation of solvent credits impairs the obligation of contracts, which we deny, then it is not suggested in the case that this deposit was made before the adoption of our present Constitution, and certainly this taxation would not impair the obligation of any contract entered into since the adoption of the present Constitution of North Carolina.

III. Indeed since the laws of 1848-9, title Revenue, laws have always been in existence in effect taxing solvent credits.

IV. As to the money being the proceeds of a taxed business. There is nothing in the law or in the Constitution to prevent the taxation of a solvent credit arising from a taxed business. Suppose it had been invested in other personal or real property? This is not an income tax.

READE, J. The points intended to be presented in this case are:

1. As to the power of the State to tax United States Treasury notes and National Bank bills.

2. As to the power of the State to tax solvent credits.

3. As to the liability to taxation under the present State Revenue Law of solvent credits; the consideration for which

were sales of goods by a merchant whose business is taxed.

This last point though presented by the record, his Honor says was not argued before him, and he considered it as free from doubt that such credits are liable to taxation, and we agree with him.

The second point as to the power of the State to tax solvent credits, we have no doubt. A credit is *property;* and as such, liable to taxation like other property. We are unable to appreciate the argument that a tax of credits "impairs the obligations of contracts." The obligation of a contract is the duty of its performance by the debtor; and a tax upon the creditor does not enable the debtor to avoid or disable him from performing it. It is true it makes a credit less valuable to tax it; but the same is true of any other property.

The first was treated as the main point in the case. And it is the same point as in the case *Ruffin* v. *Commissioners of Orange,* at this term; where we consider it more at large.

We agree with his Honor in the conclusion at which he arrived; and we agree with him in his reasons for his conclusion, except that we are inclined to think that the State may tax National Bank bills until Congress forbids them to be taxed. His Honor's views are very well stated in the record, and we adopt them as our own, with the qualification stated.

There is no error.

PER CURIAM. Judgment affirmed.

ALFRED DOCKERY *v.* R. S. FRENCH, Trustee, JOSEPH THOMPSON, T. J. MORRISEY and others.

An order restraining the sale of certain premises, to which the plaintiff claims title, will be continued to the final hearing, and the plaintiff's right protected, if the complaint and affidavits disclose merits on his part.

CIVIL ACTION and motion for an injunction, heard before *Russell, J.*, at the Spring Term, 1873, of the Superior Court of ROBESON county.

On the 16th January, 1873, the plaintiff issued summons to the defendants, French, Thompson and Morrisey, at the same time filing his complaint, in which he alleged that in March, 1859, the defendant, Morrisey, executed to the defendant, French, a deed of trust, conveying certain lands and slaves for the purpose of securing a debt due Thompson as guardian, and of securing him on account of his suretyship for Morrisey on a note due the Bank of Fayetteville.

That Morrisey was permitted to remain in possession of the land until he sold it to the plaintiff, and of the slaves until they were emancipated.

That Morrisey in February, 1864, paid off and discharged in full the debts secured by said deed of trust, and that the defendant, Thompson, surrendered to him the notes, the evidences of the debts, receipting in full on the deed for all claims secured in it, and declaring the deed to be satisfied so far as he was concerned.

That in November, 1870, the defendant, Morrisey, being in full possession of the land, sold the same to the plaintiff for a valuable consideration.

That the trustee refuses to convey the legal estate, and has advertised to sell the land.

Plaintiff prays that the trustee may be compelled to convey to him the legal title, and that he be restrained from selling, &c.

At the Special (January) Term, 1873, of Robeson Superior Court, his Honor, Judge BUXTON, made an order in the cause restraining the trustee from selling, and commanding him to appear and answer at the term of the Court beginning in February.

The defendant, Thompson, in his answer denies the payment of the debts secured in the trust, alleging that in 1864 Morrisey came to his house and paid him Confederate money to the amount of about $6,000, and having no legal advice he received the same.

French, the trustee, in his answer sets forth the facts as to the trust, contending that the money belonged to the wards of Thompson, to-wit: the minor children of Wm. Blount, and that he had no right to receive Confederate money in payment of a debt due them, and insisting that the plaintiff be held to strict proof in regard to the purchase of the land from Morrisey. This defendant also charged that at the time of the sale to the plaintiff a suit against Thompson was pending, brought by his wards, the Blount heirs, for the recovery of the identical money loaned Morrisey.

The plaintiff filed an affidavit, in which is fully set out the consideration given for the land.

The heirs of Wm. Blount, claiming an interest in the controversy, were made party defendants, and answered substantially setting up the same defense as their co-defendants.

His Honor, Judge Russell, upon hearing the cause upon the complaint and answers, ordered the injunction or restraining order to be continued until final hearing.

From this judgment the defendants appealed.

McLean, with whom were *Strange* and *W. McL. McKay*, for the appellants, filed the following brief:

1. When trust property has been improperly disposed of,

and is capable of being followed in specie, the party in possession with notice, may be compelled to reconvey it. If it cannot be followed, or the person in possession cannot be made liable to the trust, the trustee will be decreed to compensate the *cestui que trust* by payment of the value of the property so lost, &c. *Freeman* v. *Cook*, 6 Ired. Eq. 373.

2. Accepting in payment of a *well secured debt* of $6,000 Confederate money in 1864, worth only $300, is an improper disposition of trust funds, and the security, to-wit: the land conveyed in the deed of trust can be followed.

3. None of the wards having given their assent to their guardian to receive in payment Confederate money in February, 1864, worth at the time only $300 for $6,000, the amount of their debt, then the debt remains unpaid for the whole amount except $300. And according to the terms of the trust, the debt remaining unpaid and unsatisfied, it is the duty of the trustee to sell the land to satisfy the debt secured by the trust. *Baird* v. *Hall*, 67 N. C. Rep. 233; *Emerson* v. *Mallett*, Phil. Eq. 234.

4. The Courts of the State will see that a guardian who has his wards' debt secured by land cannot relinquish his security to the prejudice of his wards. *Singletary* v. *Whitaker*, Phil. Eq. 79.

Fuller & Ashe and *B. Fuller*, contra, submitted:

1. The injunction is granted to restrain *an act* which tends to the injury of a party pending the litigation. C. C. P., sec. 189.

2. And it will be granted when the Court sees that it is necessary to protect the party during the litigation without reference to the ultimate issue of the trial, or the merits of the cause, if there be merits or cause of action. That is, if there be a controversy between the parties to the action, and it appears from the affidavit that it is reasonably necessary

for the protection of the rights involved, an injunction will be granted. *Jarman* v. *Saunders*, 64 N. C. Rep. 369. And questions of title will not be tried on affidavits; nor will the merits of the case he heard. If it appears that there is something real, substantial in plaintiff's case, "*not mere sham*," but "something fit to be considered of," the Court will not "put an end to the matter" on affidavits, but grant an injunction. *Hones* v. *Mauney*, 67 N. C. Rep. 218, at end of case.

Here the plaintiff bought Morrisey's interest. He is entitled to have all he got protected until it is decided how much he got by his purchase, and this is a matter of proof under all the circumstances surrounding the payment. There is no case which decides that a payment of Confederate money, apart from the circumstances is *ipso facto*, a discharge only for its value. *Baird* v. *Hall*, 67 N. C. Rep. 233. And even if it was a payment *pro tanto* only, the value must be ascertained at the hearing, and in the meantime the plaintiff's right will be protected.

3. But not only so; the plaintiff is entitled against the trustee to a conveyance of the legal estate upon the payment of the balance of the debt and interest, even if the payment relied on was only for its value. And this right would be lost by a sale. The Court in its decree will give him a reasonable time to pay the debt before a sale will be ordered, and the decree cannot be made until the hearing. It will not be heard on affidavits. *Ward* v. *Brandt*, Phil. Eq. 71, is authority for the position that a resulting trust, as in that case, and in ours, will be protected by the decree. And if a sale should be allowed now, the resulting trust to Morrisey, which, *at least* the plaintiff has, would be greatly lessened in value, if not rendered entirely worthless.

RODMAN, J. 1st. In this case the plaintiff alleges that he has paid the trustee the full amount of the trust debt, and

that he has purchased the equity of redemption of the bargainor, and that he is entitled to have a conveyance of the trust estate.

2d. The plaintiff further alleges that if he has not paid the whole of the trust debt, that he at least has paid a portion thereof, to-wit: the value of the Confederate money at the time of its payment.

The plaintiff further alleges that the *cestui que trusts* have required the trustee to proceed to make sale of the property, and that he fears the trustee will make the sale, unless restrained by injunction. The defendants deny the payment in full, but admit that the plaintiff is entitled to a credit for the value of the Confederate money at the time of its payment, and that he is entitled to a conveyance of the land upon the payment of the balance of the debt secured in the deed of trust.

Upon filing the complaint, the Court granted a restraining order; and upon a hearing after notice to the defendant, continued the injunction or restraining order until the final hearing of the case, and the defendant appealed.

We think his Honor is fully sustained in his ruling by the authorities cited by the learned counsel for the plaintiff.

No harm can result by continuing the order until the final hearing of the case; whereas, by permitting a sale great mischief might arise to one of the parties should they adhere to their present views, and the trust property be purchased by a stranger.

There is no error. This will be certified.

PER CURIAM. Judgment affirmed.

STATE *v.* BENJAMIN S. DAVIS.

In an indictment for forgery, if it appears that the instrument is kept out of the possession and knowledge of the jury by the action of the prisoner himself, the act is equivalent to the destruction of the instrument. And such destruction is sufficiently alleged, under the circumstances, when it is charged in the indictment that the prisoner has "disposed of" the instrument.

Indictment for forging a bond or other instrument, is sustained by proof of the forgery of the name of one of the obligors in the bond.

After declaring himself ready for trial, a prisoner cannot object for want of time in which to produce a paper alleged to be in his possession, having had two days notice to produce it.

(*State* v. *Garret*, 1 Ired. 27, cited and approved.)

INDICTMENT for forgery tried before *Watts, J.*, at the Spring Term, 1873, of NORTHAMPTON Superior Court.

The prisoner was charged in the idictment with forging "a certain bond and writing obligatory, the words and figures of which said forged bond are to the jurors aforesaid unknown, the same having been in the possession of the said Benjamin S. Davis," (the prisoner,) "long before the taking of this inquisition, and the same having long before the taking of this inquisition, been in some way, to the jurors unknown, disposed of by the said Benjamin S. Davis, which said forged bond and writing obligatory was dated at some date, to the jurors unknown, in the year A. D. 1866, promised to pay to Andrew J. Britton the sum of one hundred dollars, and purported to be signed and sealed by Benjamin S. Davis, E. C. Davis and J. M. S. Rogers, (and the same cannot be more fully described for the reason hereinbefore stated,) with intent to defraud the said Andrew J. Britton." Prisoner pleaded "not guilty."

At the same term the prisoner was tried, and two days before the trial notice to produce the forged instrument was served on the prisoner in jail. On the trial the prisoner's counsel insisted that it was necessary to set forth in the indictment a copy of the instrument alleged to be forged, *in totidem verbis*. The Court overruled the objection and

the defendant excepted. The counsel for the prisoner asked his Honor to charge the jury: 1st. That the jury cannot convict the prisoner, because the State has failed to prove that J. M. S. Rogers, whose name it is alleged, was forged, is identical with the J. M. S. Rogers who is produced in evidence.

2d. That the jury cannot convict, because the instrument alleged to be forged has not been produced in evidence.

3d. The bill having charged as a part of the description of the instrument alleged to have been forged, that it was signed by Benjamin S. Davis, E. C. Davis and J. M. S. Rogers, if the jury are satisfied from the evidence that the instrument was signed B. S. Davis, and not Benjamin S. Davis, it is fatally defective.

As to the first instruction prayed, his Honor left it as a matter of fact to the jury whether or not the J. M. S. Rogers, whose name it was alleged was forged, was identical with the J. M. S. Rogers who was examined as a witness for the State.

The second instruction was refused upon the ground that if the jury believed the evidence the State had accounted for the non-production of the instrument of which the forgery was alleged to have been committed.

As to the third instruction, his Honor charged that if the jury believed that the note purported to be signed by Benjamin S. Davis, the prisoner is not a fatal variance, if the evidence left it in doubt, whether the form of his signature was Benjamin S. Davis or B. S. Davis.

The prisoner was convicted; whereupon his counsel moved for a new trial, which motion was refused. They then moved in arrest of judgment, for the reason that the indictment should have stated in what respects the instrument was a forgery, whether it consisted in an alteration of

the face, or the falsely forging a signature. Motion refused. Judgment, and appeal by prisoner.

W. W. Peebles, with whom was *Barnes* and *Batchelor, Edwards & Batchelor*, for the prisoner, submitted:

It is necessary that the indictment should set forth the bond in words and figures. 2 Russell, 359 marginal; *United States* v. *Britton*, 2 Mason, 468; Wharton American Crim. Law 1470; *State* v. *Twitty*, 2 Hawks, 248.

The exceptions to this rule are where the forged instrument has been destroyed *by the prisoner*, or has remained *in his possession;* and it must appear in the indictment what is the cause of the non-description; 8 Mass. R. 110.

It not appearing from the face of the bond to be a thing prohibited to be forged, the purport must be expressly averred: 2 Russell, 362 marginal.

If the forged bond be in possession of the prisoner, the prosecutor cannot give secondary evidence of its contents without notice to produce it *a reasonable time before the commencement* of the term of trial. *Rex* v. *Hayworth*, 19 Eng. Com. L. Rep., p. 370, (4 Car. & Payne 254.) In *Rex* v. *Hunter*, 14 Eng. Com. L. Rep. 469, notice to produce the deed was given *previously* to the commencement of the assizes. In *Rex* v. *Hayworth* above, it is held to be necessary to be *before* the commencement of the term.

Attorney General Hargrove and *Cox*, and *Busbee & Busbee*, for the State.

It is essentially necessary to a complaint for forgery that the instrument should be set forth in words and figures, if in the possession of the magistrate or prosecutor. But if the instrument has been secreted, detained or destroyed by the party charged, it will be sufficient to allege that the

instrument was so detained, secreted or destroyed, and therefore the tenor and the substance of it cannot be set forth in the complaint. Davis, Justice, bottom 238 page.

In an indictment for murder, though it is required to set forth the instrument with which the slaying took place when known, yet if unknown and the Grand Jury are precluded from ascertaining with greater certainty how it was done, may state by means unknown. *State* v. *Webster*, 5 Curting, 295; *State* v. *Williams*, 7 Jones, 446.

So in forgery this particularity may be dispensed with if the instrument is destroyed or in the hands of the prisoner, upon the fact appearing in the indictment; and then substance need only be given. 1 Bishop Crim. Precedent, 303, and cases then cited, and 2 Bishop Crim. Precedent practice, 387 and 388. For form of indictment see Wharton's Crim. Precedents, 291, and *People* v. *Badgely*, 16 Wendell, 53.

Exceptions to the rule requiring instruments to set forth in the indictment is when instrument in hands of prisoner. Per. J. Sedgwick, 8 Mass. 110. *Peddleton* v. *Corn*, 1 Leigh 694.

If any part of a true instrument be altered, may lay it as a forgery of the whole instrument. 2 Russ on Crim, p. 388; 2 Easts P. C., p. 978, 986, 988.

An indictment for forging a bond against one of the obligors therein may allege the forgery of the whole instrument by him. *State* v. *Gardner*, 1 Ired. 26. Forgery may be generally or specially alleged. *State* v. *Weaver*, 13 Ired. 491.

RODMAN, J. The defendant moves in arrest of judgment, because the instrument alleged to be forged is not set forth according to its tenor, and no sufficient reason is given for the omission.

The indictment charges that the defendant forged "a certain bond and writing obligatory, the words and figures of

which said forged bond are to the jurors aforesaid unknown, the same having been in the possession of the said Benjamin S. Davis long before the taking of this inquisition, and the same long before the taking of this inquisition, been, in some way to the jurors unknown, *disposed of* by said B. S. Davis, which said forged bond and writing obligatory, was dated at some date, to the jurors unknown, in the year A. D. 1866, promised to pay to A. J. B., the sum of $100, and purported to be signed and sealed by Benjamin S. Davis, E. C. Davis and J. M. S. Rogers (*and the same cannot be more fully described for the reason hereinbefore stated,*) with intent to defraud the said A. J. B.," &c.

The law clearly is that the forged instrument must be described according to its tenor, or else it must be shown that it has been destroyed by the prisoner, or is in his possession and withheld from the jury, so that the tenor cannot be set forth. We think that it is sufficiently averred in this case. The words "disposed of" would be ambiguous; but when the indictment proceeds to aver that by reason of its having been "disposed of" the same cannot be more fully described, it sufficiently avers such a disposition as amounts to a destruction within the reason of the rule. If, by the action of the prisoner, the instrument is kept out of the possession and knowledge of the jury, that act is equivalent to its destruction.

2. The prisoner moves for a new trial, because the indictment charges a forgery of the whole instrument, whereas the evidence shows a forgery of the name of Rogers alone, while the prisoner's own signature is of course genuine. This objection is answered by the case of *State* v. *Gardner*, 1 Ired. 27, which is in point.

3. He moves for a new trial on the further ground that secondary evidence of the contents of the forged writing was admitted, although it was not charged and proved that the same was in his possession, and he had received no suffi-

cient notice to produce it. The notice to produce was served on the prisoner after the term at which the trial was had began, when the prisoner was in prison, and some few (say two) days before the trial. The learned counsel cited several English cases, in which it is held that such a notice is insufficient. Decisions of other States or countries on mere matters of practice can have but little weight, unless they can be shown to be founded on some general principle of justice or convenience. There may be differences in the circumstances not apparent to us. There can be no doubt that if the prisoner had requested the aid of the Court in sending for the paper, it would have been given to him if circumstances did not make it inconvenient or unreasonable. And if, when called on for trial he had declared that the production of the paper was material to his defense, and his ability and readiness to produce it within a reasonable time, the Court would have postponed the trial. But after he declares himself ready for trial, no injustice is done him by allowing secondary evidence of a paper which he has either destroyed, or having under his control, refuses to produce. To adopt what seems to be the English practice would, under our system of Courts, be extremely inconvenient.

There is no error. Judgment affirmed. Let this opinion be certified.

PER CURIAM. Judgment affirmed.

OLLY SPARKS *v.* SAMUEL B. SPARKS.

In a petition for divorce, and for alimony *pendente lite*, it is error in the Court below to decide, at the return term, upon matter alleged as a bar to the petitioner's right to a decree. And upon the petitioner's making out a *prima facie* case, she is entitled under the Act of Assembly to alimony *pendente lite*.

Defendant, in answer to a petition for divorce, relies upon a record of a former suit between the petitioner and himself, his answer in which suit alleged adultery on the part of the petitioner, and in which the jury found that the petitioner had been guilty of adultery with J. M., or with "some one else:" *Held*, that such allegation was so indefinite and so vague as to be void and of no legal effect.

PETITION for divorce and alimony *pendente lite*, heard before *Henry, J.*, at Spring Term, 1873, of the Superior Court of YANCEY county.

The following facts are agreed, and are all that are pertinent to the point decided at this term:

The plaintiff filed her complaint, alleging adultery, &c., and praying a divorce *a vinculo matrimonii*, and for alimony during the pendency of the suit. At the appearance term, the defendant having been served with process, the plaintiff moved the Court to allow her alimony *pendente lite*. Thereupon the defendant files an affidavit in which he swears that the issues now made in this case have been adjudicated and decided in a suit tried in McDowell county, in which the jury find a verdict in favor of defendant, and offers in evidence the transcript of the record of that suit. To this evidence plaintiff objected. Objection overruled and evidence admitted.

His Honor refused to order alimony *pendente lite*, and the plaintiff appealed.

Malone, for appellant, submitted:

1. This case raises the question as to the power and duty of the Court in granting alimony *pendente lite*.

2. The complaint and affidavit being sufficent upon their

face the Court should have granted alimony *pendente lite* at the appearance term, and it is error to consider the merits of the defense at the appearance term, and to refuse the allowance. *Taylor* v. *Taylor*, 1 Jones 538; Revised Code chap. 39, sec. 15, Acts of 1871–'2 page 339 and 340 and 341.

3. The former verdict of the jury finding most of the material issues against the plaintiff is no bar for the following reasons: first, the complaint alledges acts of adultery and general acts of prostitution *subsequent* to the finding of the jury; second, if it should be a bar to a divorce from the bonds of matrimony, still the Court should have entertained the application for the purposes of alimony, and for such other decrees as the equity of the case might warrant. Revised Code chap. 39; third, the issues were not specific in their statements, and therefore void, and have no binding validity. *Wood* v. *Wood*, 5 Ired. 674; fourth, the verdict of the jury is not binding on the power; it only presents facts for his adjudication.

4. A judgment is *void* when rendered contrary to the course of the Court. *White* v. *Albertson*, 3 Dev. 341; and hence in this case the jury not having found a state of facts "according to the course of the Court" a judgment thereon is void, and may be disregarded by the parties.

5. The application for *alimony* is not necessarily a part of the action for divorce. *Cox* v. *Cox*, 19 Ohio, 546.

6. The statement of the relation of husband and wife—the abandonment of def't—the condition and title to the property, and the support of the child constitute a case for alimony. Acts 1871–'72, (Title Marriage.)

No counsel *contra* in this Court.

PEARSON, C. J. Assuming that in any case a plea in bar of an action for divorce, to wit: "former judgment against the petition" put in on affidavit, at the appearance term,

can be allowed the effect to defeat the petitioner's application for alimony, pending the action, which we are not prepared to admit; it cannot be allowed that effect in the present case. The issues in the former case were tried Spring Term, 1872, and the petitioner *now* avers, as *new matter*, that "the defendant is *now* and has been living with Nancy Reston in his house, in open adultery, and they live together as man and wife." This in despite of "the finding," makes a *prima facie* case for divorce, and the petitioner was entitled to alimony, until she has opportunity to make good her allegation of *new matter*.

In respect to the issue upon the matter in bar, set out in the record of the former proceeding, to wit: the adultery of the petitioner, it will be noted that the allegation of this matter, which is afterwards converted into a bar of the right to divorce, is vague and indefinite, and seems to have been made *alierndo*.

"This defendant denies the allegation that Mary J., aged six years, is the issue of the marriage, but avers that the said Mary J. is a bastard; that he is not her father, she being born when he had not had intercourse with plaintiff for eleven months.

It will also be noted that the issue submitted to the jury as growing out of this allegation is likewise too vague and indefinite to be acted on by a Court, or to be allowed the effect of an estoppel of record, and a perpetual bar to any relief that the petitioner may ask for. The issue is in these words: "4th. Has the plaintiff been guilty of adultery with Josiah Moody, or "*any one else?*" to which the jury respond in the affirmative. Who can say whether the jury meant to find adultery with this Josiah Moody, who is for the first time mentioned, or with *some one else*—thus leaving the matter at large, and imposed upon the petitioner the burden of explaining every incident of her life from the time of the marriage, which was considerable and against the course of

the Court, settled by the authorities in divorce cases, cited by Mr. Malone in his well considered brief.

We are of opinion that his Honor erred in deciding upon this matter in bar, at the return term, and as the petitioner made a *prima facie* case, she ought to have allowed alimony *pendente lite.*

We are also of opinion that the allegation of adultery on the part of the petitioner set up in the answer in the first proceeding and the issue found thereon, are both so indefinite and vague as to be void and of no legal effect by way of estoppel.

There is error; order refusing alimony reversed. This will be certified.

PER CURIAM. Order reversed, and alimony *pendente lite* allowed.

JAMES JONES *v.* MILLY M. FORTUNE and another.

In an action for the recovery of possession of land, where the defendants filed their affidavit alleging they were unable to give the bond required in ch. 193, sec. 11, Acts of 1869-'70, and counsel certified that the plaintiff was not entitled to recover: *Held*, to be error in the Judge below to require the defendants to give bond before they would be permitted to defend said action.

(*Deal* v. *Palmer*, 68 N. C. Rep. 215, cited and approved.)

CIVIL ACTION tried before *Henry, J.*, at Spring Term, 1873, of HENDERSON Superior Court.

The plaintiff claims a tract of land upon which defendants reside and also claim to hold as trustee for certain children. On the trial below, the defendants filed an affidavit, in which they severally swore that they were unable to give the bond required by law, before they would be allowed to defend the suit.

J. D. Hyman, Esq., an attorney of the Court, also certified that in his opinion the plaintiff was not entitled to recover, and moved that the defendants be allowed to plead without giving bond. Motion refused, his Honor ordering that defendants be allowed to file a bond within thirty days.

From this order defendants appealed.

L. W. Barringer, for appellants, submitted:

1. His Honor was in error in refusing the motion of the defendant to be allowed to defend *in ejectment in forma pauperis* without bond. His ruling is contrary to the statute provided for such cases. Acts 1869–'70, ch. 193, proviso of sec. 4; *Deal* v. *Palmer*, 68 N. C. Rep. 215.

2. The requirement of the statute have been strictly complied with. The certificate of counsel and the affidavit of the defendants were duly made.

3. His Honor made an "order involving a matter of law" contrary to the statute above cited, hence an appeal lies.

It is not a matter of descretion. C. C. P. sec. 299.

Fuller & Ashe, contra.

READE, J. The Act 1869–'70, ch. 193 requires defendant in "suits for the recovery of real property or the possession thereof," to give bond for $200 with surety to answer for costs and damages, &c., before he shall be permitted to plead, answer or demur. But there is a proviso in sec. 4 of said Act that if an attorney will certify that plaintiff is not entitled to recover, and the defendant will swear that he is unable to give security, then the defendant may plead, &c., without bond.

In this case there was the necessary certificate of counsel and affidavit of defendant, but still his Honor refused to allow the defendant to plead, &c., without bond. In this we

think there was error. When the necessary certificate and oath are made, the language of the Act is "no defendant shall be required to give said bond," &c. *Deal* v. *Palmer*, 68 N. C. Rep. 215.

Error.

PER CURIAM. Order reversed.

S. P. C. SHELTON *v.* D. D. DAVIS.

That there may be some certainty in judicial proceedings, the Supreme Court will not for a moment entertain the consideration of a judgment in favor of a plaintiff given upon a state of facts not alleged in the complaint, and inconsistent therewith.

(C. C. P., Secs. 128, 129 and 130.)

CIVIL ACTION, commenced in Jackson county and removed to Haywood county, upon affidavit, where it was tried by *Cannon, J.*, at Fall Term, 1872.

His Honor states, that the counsel in the case being unable to agree upon the facts evolved, he adopts the following and transmits it as the "case stated:"

"The action is in the nature of the old action of *assumpsit;* the allegations of the complaint are denied by the answer, which also contains allegations of new matter. A reply was filed by the plaintiff denying the allegations of new matter set up in the answer. The defendant's counsel ask the Court to charge the jury that if they found from the testimony that the defendant did not sell the lands as agent for the plaintiff, and that he had renounced his agency, and afterwards purchased the lands for the use of himself and the other vendees named in the deed, that unless there was some note or memorandum in writing signed by the defen-

dant showing some part of the purchase money to be due, the plaintiff could not recover, it being contrary to the provisions of the Statute of Frauds, although the defendant might have verbally promised to pay the same.

His Honor declined so to charge the jury, and added that he did not think the pleadings raised that question, as it seemed the plaintiff had brought suit for money alleged to have been received by the defendant to plaintiff's use. Defendant excepted.

After the case had been given to the jury and they had retired to make up their verdict, they returned into Court, and stated they desired to ask a question of one of the witnesses. The Court remarked that the jury might ask the witness anything with regard to what he had stated on his examination before. The jury said that the question they desired to ask would bring out new matter. The Court, upon reflection, allowed the jury to ask the question notwithstanding. The question was accordingly asked, which brought out new matter, not before spoken of by the witness. The defendant objected, and insisted that the jury had no right to ask any question of the witness calling out a fact not already deposed to, unless by consent of parties. After the question had been answered by the witness, the Court, upon consideration, excluded the answer to the question from the jury, and stated to the jurors that in making up their verdict not to consider the answer as part of the evidence. Verdict for the plaintiff. Rule for a new trial. Rule discharged. Appeal by defendant.

Merrimon, Fuller & Ashe, for appellant.
Battle & Son, contra.

1. There appears on the record an objection to the verdict as it was at first found, and then to its being amended. We think there is no doubt of the power of the Court to have

the verdict amended, particularly as it does not appear that amendments was made in the absence of the jury. The amendment consisted in nothing but the dividing of 650, the number of the acres of land by 4, and getting the result $162.50 with interest from a certain time which was mentioned in the verdict.

2. But if the verdict had remained unamended it would have supported the judgment. See *Merrimon* v. *Norton*, 67 N. C. Rep. 115.

3. Neither of the objections appearing on the bill of exceptions amount to any thing after the land had been sold; the obligation of the agent to pay the price which he had got for it to his principal certainly did not require the aid of the Statute of Frauds to enforce it. No authority need be cited for this. The cases cited for the defendant do not apply.

4. It was discretionary with the Judge to permit the jury to ask the question which they did, and the exercise of that discretion cannot be reviewed in this Court. *Parish* v. *Fite*, 2 Mass. 256 S. C.; 1 Car. Law Rep. 238; *Kelly* v. *Goodbread*, N. C. T. R. 28; *State* v. *Rush*, 12 Ired. 38. But if the Judge committed a mistake he immediately corrected it.

PEARSON, C. J. No one can read the record in this case without being painfully impressed with the connection that if it becomes a precedent, there will be an end to all certainty in judicial proceedings. *The complaint* alleges that the defendant, as the agent of plaintiff, sold a tract of land to A, B and C, and to the defendant, he taking one-fourth for the price of $800, which he received and failed to pay over, and demands judgment for $800, minus $325 paid.

The answer admits that defendant at one time held a power of attorney to sell the land, but avers it was surrendered, and afterwards, the plaintiff sold the land to A, B and C, and the defendant, and executed a deed therefor, reciting a

consideration of $800, the receipt of which sum is acknowledged in the deed, and goes into an explanation to the effect that defendant by joining with A, B and C, effected a sale to them and himself at the rate of $1 per acre, received of them $327, which he paid to plaintiff, and thereupon plaintiff executed a deed to A, B and C and the defendant, setting out $800 as the consideration, which was done to enable A, B and C to resell at an advantage. The answer then avers by way of further explanation than when the deed was executed the plaintiff and the defendant had a private understanding that defendant was to pay nothing, but was to reconvey to the plaintiff one-fourth of the land, and was to be paid commissions for having effected a sale to A, B and C of the other three-fourths.

The jury on the ruling of his Honor that the alleged agreement that defendant was to pay nothing, but was to reconvey one-fourth of the land was void under the Statute of Frauds, (not being in writing) find that the defendant owes the plaintiff twenty-five cents an acre for the land conveyed, amounting to $162.40, treating him as a purchaser with A, B and C at the rate of one dollar per acre.

So we have a case when the complaint is passed over as amounting to nothing, and the plaintiff has judgment on a part of the answer, the other part being held void on the Statute of Frauds.

Without this explanation taken from the statement of the case, no one could understand how it happened that a plaintiff on a demand of judgment against the defendant as agent for $800 *received by him* should have a judgment for one-fourth of the value of the land at one dollar per acre. Very certainly should the plaintiff bring another action for the $800 received by the defendant as his agent; the plea of "former judgment for the same cause of action" would be of no avail without a vast deal of explanatory matter.

The very interesting questions agreed at the bar are not

presented by the case, for we have not a vendor who *has executed a deed*, calling upon the vendee for the price, but we have a supposed vendee, alleging a private verbal agreement by which he was to reconvey his part and pay nothing.

We will not decide whether this case comes under the Statute of Frauds, or whether the defendant is not concluded by the rule, "a man must come into Court with clean hands," for the idea of giving the plaintiff judgment upon a state of facts not alleged in the complaint and entirely inconsistent with it, whatever may be said in regard to the progress of the age, and the liberal and enlarged views of C. C. P., is a proposition which no member of this Court can for a moment entertain.

The plaintiff before or during the progress of the trial ought to have made "issues of fact," or requested the Judge to direct the jury to make a special finding, so as to enable him to move to amend the pleading to make it conform to the facts found.

Under C. C. P., secs. 128, 129, 132, a plaintiff may sue for a horse and recover a cow (which Blackstone treats as an absurdity); but in order to this when the variance appears, the plaintiff must obtain leave to amend by striking out "horse" and inserting "cow," or else the jury must find the facts specially, or the case must be submitted to the jury "on issues," so that the pleading may be amended and be made to conform to the facts proved on such terms as the Judge may deem proper "unless the amendment effects the merits and substantially changes the claim or defense."

Should his Honor think it proper to allow the necessary amendments so as to let the complaint be for one-fourth of the price of the land at one dollar per acre and judgment accordingly for $162.40, the case will then be in a condition to be brought up to this Court by appeal for a review of the ruling as to the Statute of Frauds, otherwise judgment must be arrested, and the plaintiff left to bring another

action if so advised. The question will then be, can the plaintiff have judgment on a part of a verbal agreement, and exclude the other part of it?

Error.

PER CURIAM. Judgment reversed.

N. C. LAND COMPANY v. M. O. BEATTY and C. S. BENNETT.

A plaintiff cannot join in the same complaint, a count (or cause of action) in contract, against one of two defendants, with a count (or cause of action) on the fraud of both.

Any number of causes of action belonging to any one of the classes enumerated in sec. 126 of the Code of Civil Procedure, may be united, provided they all affect the parties, but no two belonging to different classes.

(*Chamberlain* v. *Robertson*, 7 Jones 12; *Bedsole* v. *Monroe*, 5 Ired. Eq. 313, cited and approved.)

CIVIL ACTION, tried before *Albertson, J.*, at Spring Term, 1873, of WAKE Superior Court.

In the complaint it is alleged,

1. That the plaintiff is a corporation, by virtue of an Act of our General Assembly, with its principal office in Raleigh, and its business is to buy and sell land, and to sell land for others upon commission.

2. That defendants came to their office in July, 1871, to get the aid of the Company to sell a half interest in certain valuable lands in Chatham county, known as the Ore Hill Mineral property.

3. That defendants represented that they had severally purchased from one S. H. Wiley one half each of the said lands, but that the defendant, Beatty, had bought Bennett's share, and now owned the whole; that Beatty agreed to pay plaintiff a commission at the rate of ten per cent. of the

price for which a half should be sold, in case a purchaser or purchasers should be found by the aid of the plaintiff or its agents, and that Bennett knew of and consented to the said contract.

4. That plaintiff at much trouble and expense endeavored to sell the property as authorized, and that certain persons from Canada were induced through the efforts of the Company to visit the lands, and finally purchased the half interest offered for sale, being introduced to defendants in the office of the plaintiff.

5. That such sale was made in August, 1871, at the price of $150,000.

6. That plaintiff under the said contract and in consequence of the sale, became entitled to the ten per cent. of said price, but plaintiff subsequently offered, and is now willing to accept $7,500 as full compensation for its services under said contract, 5 per cent. being the usual commissions upon such sales.

6. That after the sale, when plaintiff demanded payment for its services, the defendants alleged that the interest so sold as above stated, belonged to Bennett and not to Beatty, which the plaintiff has been informed is true, and now Bennett pretends that he is not liable to the plaintiff for any amount on account of such services, and both defendants refuse to pay for the same.

That in making representations to the sheriffs as to the ownership of the said lands, and in procuring the aid of the plaintiff in effecting the sale as aforesaid, the defendants were guilty of fraud upon the plaintiff, and the plaintiff believes they are jointly and severally liable to the plaintiff to the amount of the commission charged by virtue of the said contract, or as damages for the fraud.

Wherefore the plaintiff demands judgment against the defendant for $7,500, and interest from the 1st of August, 1871.

At Spring Term, 1872, the defendant, Beatty, answered, and denied the material allegations in the plaintiffs complaint; and alleging that no part of his (Beatty's) interest was sold, but the part sold belonged to Bennett. And further, that he, Beatty, is informed that the contract of sale made by Bennett has been abandoned.

And Bennett at the same term demurs to the complaint on the ground:

1. That several causes of action have been improperly united, one being a money demand on a contract stated in the complaint between the plaintiff and the defendant, Beatty, to which the defendant, Bennett, was no party as appears on the face of the complaint, and a second cause of action, a claim to recover damages for a fraud alleged to have been committed against the plaintiff by the defendants.

For a second cause of demurerr:

That it appears on the face of the complaint that this defendant, Bennett, was not a party to the contract alleged in plaintiff's complaint, and that the interest in the property which it is alleged the defendant, Beatty, contracted with plaintiff to sell to him, was not sold by plaintiff or otherwise.

His Honor, Judge ALBERTSON, at Spring Term, 1873, after argument, overruled the demurrer, and ordered Bennett to answer before the next term of the Court.

From this order the defendant, Bennett, appealed.

Batchelor & Son, for appellant.
Battle & Son, contra.

RODMAN, J. The Code of Civil Procedure (sec. 93) requires every complaint to contain a statement of a cause of action, and each material allegation going to constitute the same shall be distinctly numbered. Several causes of action may be united in the same complaint. (Sec. 126.) (What

causes of action may be united we will presently consider.) But each cause of action must be stated as such, and thus separated from every other. (Sec. 126.) If several causes of action are improperly united the defendant may demur. (Sec. 95.) The defendant demurs upon that ground in this case.

On examining the complaint we find that it does not profess to state more than one cause of action. If in fact it states two it would be demurable, because it compounds and does not state them separately. But this would go to the form only, that is, it would be ground for special demurrer only, and as it is not set forth the defendant can have no benefit from it.

The first five articles in the complaint allege in substance that defendant, Beatty, being (or representing himself to be) the owner of certain lands, employed plaintiff to find a purchaser for one-half thereof, and in consideration that plaintiff would endeavor to do so, agreed to pay plaintiff ten per cent. on what he should sell one-half for, and that by means of the labors of plaintiff the defendant, Beatty, did afterwards sell one-half of said lands for $150,000.

The 6th article says "that the plaintiff *under said contract* and in consequence of said sale, became entitled to a commission," &c.

It is true that plaintiff says that Bennett was present and assented to the representations of Beatty, but he nowhere says that Bennett promised.

These articles evidently allege a cause of action in the contract made by Beatty. Whether article 6th means to allege that plaintiff became entitled to a commission from Beatty alone, or from Beatty and Bennett jointly, is left vague, and consequently must be taken most strongly against the pleader if it will make any difference. These six articles contain a complete statement of a cause of action on contract: 1. The contract; 2. The performance of

plaintiff's part; 3. The breach; 4. The claim of damages. All that follows is superfluous to that cause of action.

Article 7th, taken in connection with the previous allegations, states a cause of action in the false and fraudulent representations of both the defendants, and says "that in making representations to the plaintiff as to the ownership of said property as aforesaid, and in procuring the aid of the plaintiff in effecting the sale of said half interest, the defendants were *guilty of a fraud* upon the plaintiff, and the plaintiff believes they are jointly and severally liable," &c.

Whether either of these two causes of action as set forth would be sufficient in form or substance to entitle the plaintiff to a judgment, we are not called on to express any opinion and we do not.

The question before us is, can the plaintiff join in the same complaint a count (or cause of action) in contract against one of the defendants, with a count (or cause of action) on the fraud of both?

Prior to the C. C. P. it is clear that at law such a misjoinder was demurrable. 1 Chit. Pl. 331; *Chamberlain* v. *Robertson*, 7 Jones 12. In equity multifariousness was not allowed in a bill. 1 Dan. Ch. Pr. 384; *Boyd* v. *Hoyt*, S. Paige 65. Multifariousness is well defined in Story Eq. Pl., sec. 271, and in *Bedsole* v. *Monroe*, 5 Ired. Eq. 313. By either definition this action would be multifarious.

But it is contended that the joinder is allowed by sec. 126, C. C. P. This says "The plaintiff may unite in the same complaint several causes of action whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of,

1. The same transaction, or transactions connected with the same subject of action.

2. Contracts express or implied; or

3. Injuries with or without force, &c.

But the causes of action so united must all belong to one

of these classes, and * * * must affect all the parties to the action, * * * and must be separately stated."

The argument of the plaintiff must be that under the first clause he could unite any number of causes of action belonging to all of the after enumerated classes, provided only they all arose out of the same transaction, or out of distinct transactions concerning the same subject of action.

It is easy to see that this construction would produce all the inconvenience and confusion which it was the object of all the rules regulating the joinder of action to prevent.

Take an example: A lends a horse to B who sells him to C. The sale is one transaction, but it may give rise to several causes of action of different kinds, and between different parties. A may have an action of trover against B or C. B may have an action for the price. C may have an action for deceit; and if the sale were to C in trust for D, he might have an action. If we suppose two transactions about the same horse the number of possible actions about the same subject becomes much greater.

It cannot be possible that all these numerous actions between different parties, and having no common bearing or connection except that the subject of all is the same horse, can be united.

It is difficult to give any exact meaning to that clause. Perhaps it was not intended to make a distinct class; for it is not united, as all the following clauses are, by the conjunction "or." Or, perhaps it is an imperfect attempt to condense the rule of equity by which all persons having rights or estates in the same subject matter, (as for example devisees, heirs at law, creditors, and a widow, in the estate of descendent) may by one proceeding obtain an adjustment of all their respective claims. However this may be, the cause has no bearing on the present question. These remain the classes of contract, injury, &c. Any number of causes of action belonging to any one of these may be united, pro-

vided they all affect the parties, but no two belonging to different classes.

Judgment below reversed and demurrer sustained. Action remanded to be proceeded in, &c.

Let this opinion be certified.

PER CURIAM. Judgment reversed.

JOHN A. GILMER, Exec'r of J. A. GILMER *v.* NANCY MCNAIRY.

In a suit on a bond, alleged to be due the plaintiff's testator, who died in 1863, which bond was given in 1858, and was executed at the request of the testator, in renewal of an older bond of date some ten years previous, both of which bonds, it was claimed by defendant, were given as vouchers or receipts for money due her from the estate of her husband, of which the plaintiff's testator was executor: *It was held*, that although the defendant could not testify directly as to any conversation or understanding she had with the plaintiff's testator at the time of the execution of the first bond, concerning its use, it was competent for her to relate that conversation in her evidence as to what was said and what took place between herself and the agent of said testator at the time of the execution of the other, or second bond—the one in suit.

Direct evidence of a conversation and understanding with the plaintiff's testator is, under section 343, Code of Civil Procedure, incompetent; a rehearsal of that conversation, however, in a conversation with an agent of such testator is competent, as a part of the *resgestæ*.

CIVIL ACTION, tried at Spring Term, 1873, of the Superior Court of GUILFORD county, before his Honor, *Tourgee, J.*

Plaintiff declared on a bond for $998.98, given by defendant to plaintiff's testator, on 25th January, 1858, due 1st March, 1858.

The defendant in her answer alleged as a defense to the action, that the testator of the plaintiff and one Hunt were executors of the will of James McNairy, deceased, her late husband, whose estate she averred was large, and of which she was entitled as one of the distributees. That the bond

sued on was given for the aggregate of the principal and interest of a bond given by her to the testator of the plaintiff, some ten years before that, for money paid her by Mr. Gilmer, the said testator, in part of her distributive share in the estate, and was intended only as a receipt or voucher on the final settlement.

It was admitted on the trial that James McNairy died in Guilford county, in 1840, leaving a last will and testament, which was duly admitted to probate, and ihat the said Gilmer and said Hunt qualified as executors thereof. It was also admitted that the defendant, the widow of said James McNairy, dissented from the said will, and that such dissent duly appeared of record. The inventory and account of sales returned by McNairy's executors were also in evidence, by which it appeared that the estate coming into the hands of the executors in Guilford county, amounted to upwards of $8000, and further showing that the widow, the defendant, had purchased at the sale had by said executors, articles to the amount of $490.

The defendant was herself examined, and proved that the bond sued on was given for the aggregate of principal and interest of another bond, surrendered to her at the time of the execution of the bond in suit, and that this transaction of the calculation of the interest on the old bond and the execution of the one in suit was had with Charles E. Shober, who was the agent of the plaintiff's testator for that purpose.

She further stated, the same being objected to by the plaintiff, that she had received a letter from Mr. Gilmer while he was in Congress, which letter she had lost, directing her to go to Shober and renew her bond, and she accordingly did so as above stated.

When she went to Mr. Shober, who had lost his wife only a few days before, and who was very much distressed thereby, he produced the old bond and began to calculate the interest; then she objected to paying the interest on the

same for the reason, as stated to him, that the first or old bond was taken as a voucher for a portion of her distributive share paid her by Mr. Gilmer, and that said bond was held by Mr. Gilmer to be used as a receipt or voucher for so much of her distributive share in her husband's estate on a final settlement, and was not a debt to Mr. Gilmer. That she told Shober that the money she received on the old bond was received as a portion of her interest in her husband's estate, and that it was so understood and intended by Mr. Gilmer, and that there was still other moneys due her from said estate in the hands of Mr. Gilmer. The plaintiff's objection to this testimony was overruled by the Court. It was allowed, and the plaintiff excepted.

The defendant further testified that Shober admitted that there was more money due her, and told her that suit was pending in Tennessee to recover for the estate other moneys still, and that Gov. Brown was counsel for the executors in Tennessee, and requested her to execute the bond with the interest included, as her money, he stated, was drawing interest, and it would all be the same to her. That she could use this bond—the bond in suit—as a voucher or receipt on the final settlement; that it was upon this understanding and assurance that she executed the bond now in suit, and that she stated to Shober, in the course of the conversation in regard to the execution of the bond, that the amount expressed in the old bond, which was about $600, was all she had ever received from the estate of her late husband. She further stated that she never had received any money from the other executor, Hunt.

The plaintiff objected to the witness giving the conversation between herself and Shober at the time of the execution of the bond sued on upon, the same principle which would exclude evidence of any transaction or communication between the witness and Mr. Gilmer, the plaintiff's

testator. The objection was overruled and the plaintiff excepted.

On her cross-examination the defendant proved that the testator of the plaintiff and the said Hunt qualified as executors to the will of her husband in 1840, and that before the bond sued on in this action was executed all the other distributees, nine in number, had received their respective shares of the estate, and had removed; that Hunt the co-executor had also removed from the State and that he is still alive; that she had always resided in Guilford county, in which county the plaintiff's testator resided; that she had never sued for her distributive share, and had not demanded any account or settlement with Mr. Gilmer after the date of the bond sued upon, up to Mr. G's death, which took place in 1868.

The defendant also proved by Milton Hunt, co-executor of her said husband with plaintiff's testator, that the said testator, Mr. Gilmer, had received some $18,000 from Tennessee belonging to the estate of her said husband, at different times, from 1841 to 1848; that Mr. Gilmer had told him (the witness) so, himself; that he (Hunt) had removed from this State in the Spring of 1848, and has no knowledge as to how the estate of their testator was administered by his co-executor. This witness in his deposition, in answer to questions as to how the estate was distributed and by whom, further testified that he did not recollect how the distribution was made, but that it was made by Mr. Gilmer; he does not know that the defendant ever received any part of her distributive share of the estate from Mr. Gilmer; that he, himself, never paid her anything to his recollection, having no receipts or vouchers showing such payment; that there were ten distributees, including the defendant, and he does not know the amount received by any of them, there never being any final settlement of the estate to his knowledge.

On cross-examination by plaintiff, this witness (Hunt)

testified that some time between 1850 and 1860, Mr. Gilmer, his co-executor, caused a suit to be brought in the State of Tennessee against the estate of the late Judge McNairy, which brought about a settlement in that State from which B. Y. McNairy, P. J. McNairy, J. C. McNairy, William McNairy and the witness' wife, Mary J. Hunt, who were distributees of the said James McNairy, received $400 apiece.

In answer the plaintiff introduced Charles E. Shober, who testified that he was an agent of Mr. Gilmer, plaintiff's testator, at the time he took the bond, the subject of the suit, and that he took said bond as such agent. That the defendant came to his house in Greensboro, and that the bond was taken at his house; that as to the particulars of the transaction he has no distinct recollection. That the bond in suit is the aggregate amount of another bond (principal and interest) surrendered to the defendant on the day of the date thereof, that he did not know what the first bond was for, nor with what intent executed, and does not remember the particulars of the conversation of the defendant and himself at the time the bond was executed.

The plaintiff asked his Honor to charge the jury that the lapse of time under the circumstances in this case deposed to would prevent or defeat a bill in equity for an account, and the claim of the defendant as set up in this action; the lapse of time affords the presumption of satisfaction or abandonment and equally defeats the ascertainment and set off of her distribution share. The Court declined so to charge, but charged the jury that if they should find that the bond sued upon was executed in part of the defendant's distributive share, and intended to be used as a voucher or receipt on final settlements, they should find for the defendant; otherwise for the plaintiff.

There was a verdict and judgment for defendant.

Plaintiff moved for a new trial, for

1st. Because of the admission of the declaration of the

defendant to Shober, as deposed to by her, as showing for what purpose and to what intent the original bond was given.

2d. Because the Court did not charge as requested as to the lapse of time.

3d. Because of the charge as given.

Motion overruled, and appeal by plaintiff.

Dilliard and *Battle & Son*, for appellant:

1. Gilmer being dead, defendant was not competent witness to prove under sec. 343 C. C. P., "the transactions" between her and Gilmer in relation to execution of the bonds—what they were for and how to be used. *Whitesides* v. *Green's* Administrator, 64 N. C. Rep. 307; *Peoples* v. *Maxwell*, Ibid, 313.

2. Shober's agency to take the bond sued on (Gilmer being absent) does not help the matter; because it is to be inferred, and his testimony is, that he knew nothing about the transaction attending the execution of the bond for which this was a revival; and those transactions are the grounds of defense.

3. By letting her testify as to what she said to Shober about the understanding with which the old bond was given, she is permitted to prove by her own declarations, transactions with the deceased, of which Shober knew nothing. This is against the intent of sec. 343 C. C. P.; *Peoples* v. *Maxwell*, supra.

4. McNairy, husband of defendant and testator of Gilmer, deceased, died in 1840. Other nine distributees after having received their shares of the estate, moved away in 1848, the year in which the old bond was given. Though statutes of limitation and presumption of payment do not ordinarily apply to claims for distributive shares, being matter of equitable cognizanee, yet equity adopts the analogies of the the law in such cases as this, and presumes payment, satis-

faction or abandonment of distributive share. *Falls* v. ———, 4 Hawks 421; *Ivey et ux.* v. *Rogers*, 1 Dev. Eq. 58. That the bond of 1848 affords presumption of settlement or satisfaction of matter between the parties. See *Petty* v. ———, 1 Dev. Eq. 191.

If Gilmer had given defendant his bond for her share of the estate in 1848 its payment would have been presumed by lapse of ten years. The facts of this case and great lapse of time make a state of things on which equity would not entertain a bill by defendant for injunction to set off distributive share, or for an account. See authorities above cited.

5. If satisfaction or abandonment would be presumed, then defendant would not be allowed, as in *Albright* v. *Albright*, 67 N. C. Rep., to rebut that presumption by her own oath, as against Gilmer, deceased. If she cannot testify to transactions with him, she cannot say there was no transaction when the law presumes one, and he is not here to deny what she says. The principle of sec. 343 C. C. P. is mutuality.

6. If, as we insist, the defendant's testimony was incompetent on the points noticed, it was error in the Judge to charge that "if the bond sued on was in part of distributive share of defendant, and intended to be used as a receipt or voucher, they should find for defendant, because, 1st. There was no other evidence as to the purpose of the bond. &c. 2d. If the evidence was competent, it should have been referred for an account, to ascertain what defendant's share was. 3d. Her share could not be ascertained without Milton Hunt, Gilmer's executor of McNairy being a party. *State* v. *Johnston*, 1 Ired. 381; *State* v. *Britton*, 11 Ired. 110; *State* v. *Moore*, Ibid. 160.

7. To prevent multiplicity of action, an account should have been taken in this case; because if an account in an action for settlement should now be ordered, and it should

turn out that defendant's share was less than the amount of the bond, plaintiff under judgment here would lose the excess.

8. *Hence* the judgment here "on the merits," going beyond the verdict, improperly and erroneously precludes plaintiff from ever recovering such excess.

9. It was error to leave it to the jury to find, without an account, that there was a distributive share large enough to pay the bond. *McLean* v. *Leach*, 68 N. C. Rep. 95.

Scott, contra, submitted:

1. The contents of the letter from Mr. Gilmer may be proved by Mrs. McNairy, the defendant, under section 343 C. C. P., *Williston* v. *Williston*, 41 Barb. 635. "This section," (New York Code, sec. 399) "was not intended to apply to testimony resting in papers or documents. It is only applicable to personal intercourse, conversations and communications had personally with the deceased."

2. Mrs. McNairy, the defendant and witness, stated as *a fact* that the first or old bond was taken as a voucher for a portion of her distributive share paid to her by Mr. Gilmer, to be used as a receipt or voucher for so much of her distributive share in her husband's estate on a final settlement, and was not a debt due Mr. Gilmer.

3. Shober was Gilmer's agent for the express purpose of taking the bond now in suit, and from what appears from the evidence, had at that time knowledge of the business, but no objection was made on the ground of want of knowledge in Shober, but only upon the ground before stated. The defendant further testified that Shober admitted that there was more money then due her, and told her that suit was pending in Tennessee to recover for the estate other moneys still, and that Gov. Brown was counsel, &c.; that Shober requested her to execute the bond with interest in-

cluded, as her money, according to his statement, was drawing interest, &c.; that she could use this bond, the one in suit, as a voucher or receipt on the final settlement; that it was upon this understanding and agreement that she executed the bond now in suit.

4. Defendant further testified that the amount expressed in the old bond, which was about $600, was all she had ever received from her husband's estate. She does not say that the other distributees had been paid off, but that she had not.

As to the second exception, refusal of the Court to charge as requested, in regard to lapse of time:

1. The bond now in suit was given in 1858. The estate was not then fully settled. Suit in Tenn. in 1860, and estate not then settled. Mr. Gilmer died in 1868. There has never been any final settlement. All statutes of limitations and presumptions, &c., suspended from May, 1861, until January, 1870. Acts 1862-'63, chap. 34; also 1866, chap. 50; *Platte* v. *W. N. C. R. R. Co.*, 65 N. C. Rep. 74; Act 1867, chap. 17, sec. 8. Laches no greater on defendant's part than on the part of Mr. Gilmer.

As to third exception:

1. Plaintiff offers no proof and produces no receipt or vouchers from defendant showing any payment to her of her share of the estate, or any part thereof.

2. Hunt, Gilmer's co-executor, does not know of any payment to defendant. He himself never paid her anything.

3. The suit in Tennessee was brought by the executors in their own names, and not by the distributees or next of kin, as Judge McNairy died before James McNairy.

Exclusive of the statements made by defendant to Shober, there is still enough in the case—*facts* proved by defendant and the admissions of Shober—to warrant the verdict and judgment given.

PEARSON, C. J. The case turns upon questions of evidence.

For if the evidence objected to was competent, there is manifestly no error in the charge; and if the evidence ought not to have been received, the plaintiff was entitled to the instruction asked for, so that was simply presenting the same points in a different way, and his Honor committed no error in putting the case to the jury upon the evidence which he had ruled to be competent.

1. Mrs. McNairy's statement that she called upon Colonel Shober "in consequence of a letter received from Mr. Gilmer while in Congress, directing her to do so, and to renew her bond" was immaterial, and if anything was in favor of the plaintiff; so he has no right to complain. That fact was calculated to impress the jury in favor of the plaintiff, for if the bond was to be treated merely as a *voucher*, why have it renewed? This question can only be explained by the fact that on the part of the plaintiff there was no evidence that the estate had been settled, no vouchers, &c., which in the management of a large estate was certainly a very loose way of doing business; and to allow one side to rely upon *a bond*, and cut off the other side by a presumption from lapse of time so as to exclude an account, would seem to violate the maxim, "no one shall take advantage of his own wrong."

2. The objection that Mrs. McNairy ought not to have been allowed to testify as to what she told Colonel Shober at the time she renewed the bond in reference to the understanding between her and Mr. Gilmer in regard to the first bond, is a question of much more difficulty.

Mr. Gilmer being dead, Mrs. McNairy could not have testified directly as to the conversation and understanding between Mr. Gilmer and herself. Sec. 343 C. C. P.

But after some hesitation, we are of opinion that it was competent for her to testify as to what she said to Colonel Shober at the time she executed the bond sued on.

1. It was a part of "the *res gestæ*."

2. Colonel Shober is living, and could have contradicted her, which he failed to do, although called as a witness.

Assume it to be a fact that Mrs. McNairy, when she executed the bond, told Colonel Shober that there was the understanding between Mr. Gilmer and herself above set out. The legal effect of this assertion, to the agent of Mr. Gilmer, presented a question about which no instruction was asked, and which would have been difficult of solution. Direct evidence of Mrs. McNairy as to the conversation with Mr. Gilmer is incompetent—but her rehearsal of that conversation to Colonel Shober is competent. This is one of the novelties resulting from the recent changes of the law of evidence. Her telling Colonel Shober that she had held a certain conversation with Mr. Gilmer is *per se* no evidence of the fact, for we only have her word for it. But taken in connection with the other evidence and the circumstances of the case, we are inclined to the opinion that there was evidence fit to be left to a jury as to the allegation that this bond was to be subject to a credit or set off by reason of the amount, she was entitled to for her distributive share on final settlement of the estate of her husband.

Mrs. McNairy's rehearsal to Colonel Shober when she executed the bond sued on, of the conversation with Mr. Gilmer when she executed the first bond *per se*, amounts to nothing—it is bare assertion; but connect it with the fact that Colonel Shober was the agent of Mr. Gilmer in procuring the execution of the bond. Notice to an agent is notice to the principal. So Mr. Gilmer had notice that this good lady did not consider the bond in any other light than as a receipt or voucher to be used as a credit or set off on final settlement—connect it with the fact that notwithstanding such notice, Mr. Gilmer allows the note to stand over until after his death, and connect it with the further fact that there never has been a *final* settlement of the estate of the defendant's husband. This tends to account for the fact that

the note was permitted to lie over, and we see no error in the ruling of his Honor, and believe the verdict meets the merits of the case.

Had the plaintiff allowed the counter claim and asked a reference to fix the amount, justice probably would have been better administered, but he chose to stand on the law, and having taken his chances before a jury, must abide by the result.

No error. Affirmed.

PER CURIAM. Judgment affirmed.

W. W. GRIER and others *v.* MOSES H. RHYNE.

A contract to convey "a certain piece of land in the county aforesaid adjoining the lands of" A and B "and others, being a part of the Alexander tract, supposed to contain 30 or 35 acres," is so vague and indefinite that a Court cannot enforce it specifically.

CIVIL ACTION to recover a tract of seventy acres of land and damages, tried before *Logan J.*, at Spring Term, 1873, of GASTON Superior Court.

The following is the case "settled" and transmitted to this Court:

Plaintiffs claimed the land as purchasers under the proceedings in an attachment which was in evidence against one G. C. Rhyne, under whom defendant also claimed.

The attachment was issued 10th June, 1869, levied on the land on the 12th, and on the 24th July judgment was rendered in favor of plaintiffs for $178.05; the same was docketed on the 6th August, an execution issued, and at the sheriff's sale, plaintiffs became the purchasers, bidding $180, to whom the sheriff made, on the 7th November, 1870, a deed for the whole 70 acres.

Defendant admitted himself in possession, and offered in evidence a bond from the said J. C. Rhyne, in the penal sum of $1,000 of date, 9th April, 1869, and conditioned as follows:

"The condition of this obligation is such that whereas the above bounden J. C. Rhyne, hath contracted and agreed to sell and convey to the said M. H. Rhyne and his heirs, a certain piece of land in the county and State aforesaid, adjoining the lands of S. J. Suggs and M. H. Rhyne and others, being a part of the "Alexander" tract of land, supposed to contain 30 or 35 acres, on receiving the sum of $14 per acre, being the price agreed on between the parties.

"Now, therefore, if the said Rhyne, on receiving the said purchase money, together with the lawful interest that may accrue on the same, shall well and truly at his own proper costs and charges, make and execute to the said M. H. Rhyne and his heirs, a good and sufficient deed of conveyance with general warranty and full covenants to convey and assure him, the said M. H. Rhyne, and his heirs, a good and indefeasible estate of inheritance in fee-simple, in and to the aforesaid tract of land, with the privileges and appurtenances thereto belonging or in anywise appurtaining, free and discharged of any and all incumbrance whatever, then the above obligation to be void," &c.

Defendant then offered in evidence the deed of the said J. C. Rhyne and wife, dated 10th of August, 1869, conveying the whole of the "Alexander" tract, containing 70 acres to defendant, reciting as the consideration therefor, the sum of $800, in hand paid, under the following boundaries and description, viz: (Here follows the boundary.)

One Shipp, a witness for defendant, testified that he wrote the foregoing bond, and the day J. C. Rhyne signed it, he left the county; that said Rhyne was indebted to him, as executor, the sum of $590, specie; that in a few days after the bond was signed the defendant paid $200 on the note,

and one A. P. Rhyne gave him his due bill for $300, which was soon paid off, and which discharged his debt, one Lineberger having before made a payment on it.

Defendant asked this witness if the parties (to the bond) went around the land and marked off what was intended to be embraced in the bond? The question was objected to by plaintiff but received by the Court. Witness answered and stated that he was present and stepped off the ground meant to be included in the bond, and the same was selected from that part of the "Alexander" or 70 acre tract, next to and adjoining the defendant's land, and from their stepping off the same, it was estimated that it would amount to 30 or 35 acres; that it would yield 15 or 20 bushels of corn and 500 lbs. of cotton per acre. In the Summer witness wrote to J. C. Rhyne concerning the attachment, advising him to return, which he did, and made the deed to the defendant for the whole 70 acres.

J. C. Rhyne, himself, called by plaintiffs, testified that he truly owed the amount recovered by plaintiffs in their attachment; that he also owed the witness (Shipp) as before stated, and A. P. Rhyne. That after his return from Mitchell county, where he had been, he made the deed to M. H. Rhyne; that no money passed, but out of it was to be paid what was due to Shipp, and the balance to A. P. Rhyne.

On this evidence the plaintiff insisted:

1. That they were entitled to the whole 70 acres of land.

2. That the bond for title was invalid for uncertainty as to land intended to be conveyed.

3. That the delivering up of the bond for 30 or 35 acres, and taking a deed for 70 acres was a voluntary rescision and cancellation of the bond, and the covenants and rights existing under it, and having taken place after the levy, the deed made in pursuance of the new contract was void as to creditors and purchases under the *venditioni exponas.*

4. That if the deed, absolute on its face, was executed with

parol trusts in favor of third parties, it was void as to creditors.

5. That if M. H. Rhyne had paid only $200 of the purchase money and not otherwise bound himself for the residue of the purchase money, the deed is void—M. H. Rhyne not being a *bona fide* purchaser.

As to the second of the above points, and the only one considered in this Court, his Honor charged the jury that in his opinion the bond for the 30 or 35 acres of land was not too vague and uncertain to render it void.

The jury, upon the issues submitted to them, some of which are not material to the point decided, among other things, found that there was no fraud in reference to the bond between G. C. and M. H. Rhyne; that the defendant is entitled to the number of acres contained within the boundaries contracted in the bond; that the plaintiffs are entitled to $20 damages and the remaining portion of the 70 acres.

Judgment in accordrnce with the verdict, from which plaintiffs appealed.

Guion, for appellants.

It is one of the first principles of the doctrine of specific performance that the contract sought to be performed must be *certain and clear in all its material terms. Mallory* v. *Mallory*, Busb. Eq. 83; *Plummer* v. *Owens*, Ibid. 255; the paper produced, too vague and uncertain. *Murdock* v. *Anderson*, 4 Jones Eq. 78.

In *Richardson* v. *Godwin*, 6 Jones Eq. 230, "It is settled that where an insufficient description is given parol evidence is not admissible to show what the parties meant, or to identify the particular parcel of land which was the subject matter of the written contract. This must be done by the terms of the contract, and an insufficient discription

cannot be added to or helped out by parol proof of what was said before at the time or after the written contract was executed. *President & Directors Deaf & Dumb Institution* v. *Norwood,* Busb. Eq. 65.

Every deed must set forth a subject matter, either certain in itself, or capable of being reduced to a certainty by reference to something extrinsic to which the deed refers. *Massey* v. *Belisle,* 2 Ired. 170; *Munn* v. *Taylor,* 4 Jones 272.

Same point also held that parol evidence is inadmissible to *aid* or *add* to the description of land or other instrument. *Archibald* v. *Davis* 5 Jones 324, 325.

As to cancellation. *Reed* v. *Deere,* 12 E. C. L. 291.

The verdict is as uncertain as defendant's bond. The verdict and judgment should specify the particular parcel or tenement to which plaintiff is entitled in manner and form stated in complaint. See Tidd's Practical Forms 156; *Johnson* v. *Newill,* 65 N. C. Rep. 678: C. C. P. 261, sub. sec. 4.

Wilson and *Schenck,* contra.

READE, J. The plaintiffs are entitled to recover the land demanded, unless the defendant's defense will avail him.

The plaintiffs claim under a purchase at execution sale against one G. C. Rhyne. The defendant claims under a contract of purchase and a bond for title from the same G. C. Rhyne prior to the lien of the execution under which the plaintiffs claim.

The plaintiffs claim the whole tract of seventy acres. The defendant claims a part of the same tract under a bond for title as follows: "The condition of this obligation is such that whereas the above bounden G. C. Rhyne hath contracted and agreed to sell and convey to the said M. H. Rhyne and his heirs a certain piece of land in the county aforesaid adjoining the lands of S. J. Suggs and M. H. Rhyne and others, being a part of the Alexander tract, sup-

posed to contain thirty or thirty-five acres, on receiving the sum of $14 per acre," &c.

This thirty or thirty-five acres it appears was to be a part of the tract of seventy acres, which the plaintiffs claim. And as the plaintiffs bought with notice of the defendant's equitable claim, they would be bound by it. And they would be declared to hold so much of the land as trustees for the defendant, and would be compelled to convey to him.

But the difficulty in the defendants way is, that his contract of purchase of thirty or thirty-five acres, to be taken off a tract of seventy acres, without saying where it is to be taken off is so vague and indefinite that we cannot enforce it specifically. It is uncertain in quantity and uncertain in boundary, and there is no reference to anything by which the quantity or the place can be made certain. The plaintiffs must therefore recover the whole tract of land.

But still the defendant has an equity against the plaintiffs which must be protected, in this: the defendant had contracted for an interest in the land, and had paid a part of the purchase money. And upon a failure to get title he is entitled to recover his money back and to have the land charged with it. The plaintiffs having bought with notice are affected by his equity and the same is a charge upon the land in their hands. Upon another trial there should be an enquiry as to the amount paid by the defendant, and upon the payment of that sum with interest to the defendant by the plaintiffs they will be entitled to recover the land.

Otherwise the land should be sold and the rights of the parties adjusted in accordance with this opinion. Legal and equitable rights are now administered in the same action.

There is error.

PER CURIAM. *Venire de novo.*

STATE *ex rel.* LOUISA STOCKS, Adm'x *de bonis non*, *v.* W. H. SMITH, Adm'r, &c., *et al.*

A judgment rendered during the war is subject to the legislative scale in regard to Confederate notes to be applied at the date of the contract, or the time of the breach complained of.

Verdict that the "plaintiff is entitled to the amount of the judgment taken at February Term, 1865, subject to the legislative scale," and his Honor had charged the jury that the sale was to be applied at the date of demand, August, 1863: *Held*, that the judgment was to be scaled as of August, 1863, and his Honor ought to have directed the clerk to aid the jury in the calculation necessary for the application of the sale, so as to fix the amount, for which the judgment should be rendered.

(*Alexander* v. *Rentals*, 64 N. C, Rep. 634, cited and approved.)

CIVIL ACTION on an Administrator's bond, tried at the January (Special) Term, 1873, of PITT Superior Court by his Honor, *Clarke, J.*

The defendant, Smith, was the administrator of one Asa Stocks, and the other defendants were sureties on his official bond. At the August Term, 1863, of the Court of Pleas and Quarter Sessions of Pitt county, he surrendered his letters of administration, and the plaintiff was appointed administratrix *de bonis non* of the estate of the said Stocks, and at once demanded the payment to her of whatever the defendant had in his hands belonging to said estate. This defendant did not do, and the plaintiff filed a petition against him for a settlement, and at February Term, 1865, obtained a judgment against defendant, Smith, as administrator, for the sum of $504.05, with interest from 1st of January, 1865. Upon this judgmeut, she brings the present suit, and offers in evidence, the administrator's bond, the record of his appointment, surrender and her own appointment and of the judgment just alluded to.

The defendant, in answer, testified that he sold the personalty of the estate of his intestate on a credit of six months; that the sale took place the —— day of ——, 1862, and he collected the proceeds as soon as the notes were due in Confederate money, except some fifty or sixty dollars in bank

bills, with which (Confederate money and bank bills) he took up the claims against the estate so far as he could. That he did not pay over to the plaintiff the funds belonging to the estate when requested because he wanted the clerk to state his account before going into a settlement; that the clerk had sent off the records, &c., of the Court for safe keeking, and could not state his account when he desired it. That he, the defendant, requested the clerk to inform him when the account was stated, which he did, the same being done at February Court, 1865, and that soon thereafter, the last of February or the 1st of March, he tendered to the plaintiff the amount of the judgment obtained by her in Confederate currency and she refused to accept it. The defendant further stated that he received fifty or sixty dollars in bank money as part of the proceeds of sale; that he did not know what he did with this money and could not say that he paid it out for debts; that plaintiff wanted to setttle with him, as she could not settle the estate unless he first settled with her; that the money he tendered the plaintiff after his account was stated was not the identical bills he received for the property sold; it was not the same money but the same currency. At the sale some of the property sold was paid for in cash, how much he could not say, though not so much as half. Defendant further stated that the money he tendered the plaintiff in 1865 he afterwards deposited with Calvin Cox, the clerk, and who also became clerk of the Superior Court in 1868.

Plaintiff objected to the introduction of this testimony. The Court received it and plaintiff excepted.

The plaintiff, in answer, testified that after her appointment as administratrix she called on defendant at the Courthouse and requested a settlement. She wanted to settle to enable her to do so; that defendant refused to settle and stated he would not until his accounts were stated; that he never paid her over anything nor ever offered to pay until

a short time after the last battle of Kinston, in 1865; that he then offered her Confederate money which she refused to accept.

Plaintiff further testified that during the war she paid to defendant a debt he held against the estate of some $60 in Confederate money, out of her own funds, and that since the war she had paid other debts in "greenbacks"—some $29.50—out of her own money. She could not say the exact amount of debts against the estate she had paid, but they would amount to $200.

Other witnesses were examined on both sides, but as their testimony only coroborrated what before had been stated, it is needless to repeat their evidence. Plaintiff offered to prove the value of the property sold. Rejected by the Court. Plaintiff again excepted.

His Honor charged the jury that defendant on relinquishing the administration, or at the end of two years after taking out letters of administration became liable for any balance in his hands in such funds as he had received or their equivalent. Much more is that the case if the evidence satisfies the jury that a demand was made upon him and he failed to settle. If he tendered Confederate money, it being the currency of the country at the time, no interest on the amount really and justly due can be allowed from that time to the date of the suit. The jury then will consider and determine what amount if any was due at the time the administratrix demanded settlement, applying the Legislative scale. If the defendant tendered the identical money he received, or deposited with the clerk the very same, you will find for the defendant, but otherwise for the plaintiff, for the amount reduced by the scale in money of the present day.

There was a verdict for the plaintiff, and the jury say plaintiff is entitled to the judgment taken February Term, 1865, subject to the legislative scale.

Plaintiff moved for a new trial on the ground that the

verdict was contrary to the evidence and the charge of the Judge, and the Court having intimated a readiness to grant, the same defendant's counsel proposed the following: "that judgment be entered for $—, the balance due on the 8th August, 1853, with interest from that time, subject to a deduction of the amount of the value of Confederate money at that time, according to the legislative scale, as to which there will be a reference to the clerk of this Court."

This was declined by plaintiff on the ground that he had failed to show whether he paid out for the purposes of the estate some $60 or $70, by him received in old bank bills, or had used it for his own purposes. The Court being of opinion that the verdict as reformed would be just and that the objection of the plaintiff was frivolous, refused the motion for a new trial. Plaintiff appealed.

Battle & Son, for appellant.

1. The judgment obtained by the plaintiff against the defendant at the February Term, 1865, of the County Court of Pitt, being in all respects regular, cannot be questioned, except upon a motion to set it aside or to have it amended and modified. It makes no difference that it was given during the war, and its merits, &c., cannot now be questioned. *Jacobs* v. *Burgwyne*, 63 N. C. Rep., 193; *McElmoyle* v. *Cohen*, 13 Peters 312.

2. If it were admissible to show that the judgment was solvable in Confederate money, then the value of the property sold, and not the amount scaled, ought to have been taken as the true sum to which the plaintiff was entitled. *Maxwell* v. *Hipp*, 64 N. C. Rep. 98; *Laws* v *Rycroft*, Ibid 100.

3. The offer to pay in Confederate money, even if it had been in time, was of no effect because it was not the same identical money which the defendant had received. *Cummings* v. *Mebane*, 63 N. C. R., 315; *Shipp* v. *Hetrick*, Ibid 329.

4. As the defendant could not tell what he had done with the bank bills the plaintiff was entitled to the value of them.

5. As to the verdict, see *Meredith* v. *Crews*, 64 N. C. Rep. 536; *Merrimon* v. *Norton*, 115.

6. After the Court had decided that plaintiff was entitled to a new trial he had no right to punish her for refusing to accept the terms proposed by the defendant.

No counsel in this Court, contra.

PEARSON, C. J. A judgment rendered during the war is subject to the legislative scale in regard to Confederate notes, to be applied at the date of the contract or the time of the breach complained of. *Alexander* v. *Rentels*, 64 N. C. Rep. 634.

The learned counsel for the plaintiff in this Court admitted his misapprehension of the law in regard to this point, and thus the case is relieved from all embarrassment. The jury find that the plaintiff is entitled to (the amount) the judgment taken February Term, 1865, subject to the legislative scale. His Honor had charged that the scale was to be applied at the date of the demand, August, 1863. So upon the return of the verdict his Honor ought to have directed the clerk to aid the jury in the calculation necessary for the application of the scale, so as to fix the amount for which judgment should be rendered.

Instead of taking this course his Honor heard certain propositions for a compromise, and leaves the matter at large, and *thereupon the plaintiff appeals.*

There is error. This will be certified to the end that in the Court below the legislative scale, may, upon a calculation to be made by the clerk on the basis that the scale of August, 1863, is applicable, be applied to the case, and judgment be entered in conformity thereto.

It is set out in the record that the verdict was taken by consent in the absence of the Judge, and in such cases, and in fact in all cases, the entry of the verdict made by the clerk should be construed in reference to the charge of the Judge, and it should never be intended that the jury mean to find contrary to the charge of the Judge. In this case he told the jury, in so many words, that the legislative scale was to be applied at the time the plaintiff made the demand, August, 1863, and the entry of the verdict must be construed in reference to his charge. There will be judgment for defendant as to the costs of the appeal. It is the fault of the plaintiff that the verdict was not made to conform to the ruling of his Honor.

PER CURIAM. Judgment accordingly.

GEORGE W. THOMPSON, Adm'r *v.* B. Y. ROGERS.

A, as surviving partner of A and B, sold in 1863, certain cotton belonging to the firm, on a credit of six months, the purchase money to be paid when due in funds current at that time. C, also a partner of A in another business bought the cotton, giving A, the surviving partner, a note for the amount, to-wit: $5,681.20, which amount was paid to A when the note became due, whereupon A tendered to D the administrator of B, the deceased partner, one-half of the cotton money, to-wit: $2,840.60, which D refused to receive, and A funded the amount in Confederate 4 per cent. bonds, holding the bonds for D's benefit. In a suit by D against A for a settlement of the copartnership, and in which D seeks to charge A with the whole amount of cotton sale: *It was held*, that in a settlement of the copartnership, A should be allowed as a credit the amount funded in Confederate securities, which was lost, and that he should be charged by the firm with the one-half of the sale, $2,840.60, which he retained to his own use.

Held further, That A, the surviving partner had acted in good faith in a fiduciary character; the scale as applied to contracts generally does not apply in this case, A being responsible only for the value of of the Confederate money at the time he received it.

EXCEPTION to the report of a commissioner, stating an account, heard and determined by *Albertson, J.*, at the Spring Term, 1873, of WAKE Superior Court.

The plaintiff as administrator of one Peleg Rogers, at Spring Term, 1868, of the Court of Equity for Wake county filed a bill against the defendant for an account and settlement of a copartnership theretofore existing between the plaintiff's intestate and the defendant.

The defendant answered at the same term, and the suit was removed to the docket of the present Superior Court as provided in the Code of Civil Procedure.

It appears from the pleadings that the plaintiff's intestate and the defendant entered into a copartnership in 1858, for the purpose of carrying on a general mercantile business, each party furnishing an equal amount of the capital employed, and sharing equally the expenses and dividing the profits. This copartnership continued until Feburary, 1863, when it was terminated by the death of the plaintiff's intestate, leaving the defendant surviving partner, and in posession of the effects of the concern.

At Spring Term, 1869, it was referred to C. M. Busbee, Esq., commissioner, to state and report an account of the partnership dealings, which report was made to Fall Term, 1871.

The plaintiff excepted to the report of the commissioner, for allowing the defendant credit for certain cotton sold, the facts concerning which as reported by the commissioner and not denied, are

In April, 1863, the defendant, as surviving partner, sold a lot of cotton belonging to the partnership, at public auction; that the plaintiff as administrator of the deceased partner, gave his assent to the sale, was present and concurred in the terms, publicly announced before the sale commenced. The cotton was sold on six months' credit, the purchaser giving bond and security, with the understanding that when the

note fell due, such currency as was at that time in circulation would be received in payment of the same. The cotton was purchased by Calvin J. Rogers, on account of himself and partner, who was the defendant herein, and they executed the required note with Thomas R. Rogers, as surety. The note became due October 20, 1863, and was immediately discharged, amounting to $5,681.50, by payment to B. Y. Rogers, as surviving partner, the defendant to whom it was made payable when it was executed. The defendant then consulted counsel, and acting under their advice, on the 19th March, 1864, as surviving partner, funded the share of P. Rogers, deceased, the plaintiff's intestate, together with some other money due his estate from the partnership, amounting to some $3,000 and obtained a certificate for 4 per cent. registered bonds of the Confederate States for $3,000, and which certificate is filed with the report.

The commissioner allowed the claim to defendant.

At Spring Term, 1872, the plaintiff excepted to the report of the commissioner.

I. For that the commissioner has not charged the defendant with *the value* of the cotton belonging to the partnership sold in April, 1863, and purchased by another partnership of which the defendant was a member, or with the amount for which the said cotton sold, scaled as of April, 1863.

II. For that the defendant is credited with $2,840.75, scaled as of October, 1863, and interest, and that amount is deducted from the balance stated as due the plaintiff when in any event he should be credited with only half that sum. In other words, that credit if allowed at all, should be allowed as against the partnership, and not as against the estate of the plaintiff's intestate.

III. For that the defendant should not be credited with the said $2,840.75 at all or any part thereof.

At Spring Term, 1873, upon the hearing of the cause, his Honor held:

I. That the first exception of plaintiff to the report above set out, be and the same is sustained, and the defendant is to be charged with the value of the cotton sold, and interest as of the day of sale, the value to be ascertained according to the scale.

II. The third exception is sustained, as there has been no payment on account of the cotton sold by defendant to the plaintiff. The plaintiff has received nothing from the sale of the cotton.

III. The defendant is to be charged with the value of the cotton and interest thereon according to the scale, and upon the payment of the debts of the partnership of P. & B. Y. Rogers, defendant is to pay to plaintiff the proportion of the residue due to plaintiff by the terms of the partnership, the payment to be made in currency. The plaintiff is to recover costs.

From which judgment the defendant appealed.

Fowle and *Batchelor, Edwards & Batchelor*, for appellant.
Battle & Son, contra, submitted:

1. A surviving partner is held strictly as a trustee. Col. on Part. sec. 130. Like other trustees he cannot sell partnership property and buy it himself. Pars. on Part. (442).

2. When a trustee buys at his own sale even at a fair price, *cestui que trust* can treat the sale as a nullity; not because there is, but because there may be fraud. *Patton* v. *Thompson*, 1 Jones Eq. 285; *Elliott* v. *Pool*, 3 Jones Eq. 17.

3. No circumstances can justify a departure from the rule that a trustee must not be a purchaser at his own sale. *Gordon* v. *Finlay*, 3 Hawks 239. This doctrine was afterwards qualified to this extent: A trustee may buy and charge himself with his bid, and the *cestui que trust* may at

their election hold him bound by it or may repudiate the sale, and treat the property as still belonging to the trust fund. *Pitt* v. *Petway*, 12 Ired. 69.

4. In this case the administrator of the deceased partner assented to public sale and that current funds should be taken; but he did not assent to a sale to Calvin J. Rogers for the firm of C. J. and B. Y. Rogers, of which the defendant was a member. He assents now to the purchase by C. J. and B. Y. Rogers, so far only as to hold them responsible for the value of the cotton, ascertained by their bid in Confederate money, scaled as of the day of sale.

In any other view the estate of the deceased partner gets nothing from the sale, while the surviving partner (for himself and Calvin J. Rogers as partners,) has the value of cotton. This cannot be equity.

5. If, in fact the plaintiff assented to sale to Calvin J. and B. Y. Rogers, he must have done so with the understanding that the defendant was responsible for value of the cotton as ascertained that day by the bids. His silence could be interpreted as meaning only that the surviving partner should take the property, and be accountable to the partnership for its value. His refusal to take Confederate money when the note became due shows that his assent, if he did assent, meant nothing more.

The tender here was not of all the money, Confederate and other, which B. Y. Rogers, surviving partner owed, but only of that he owed on the cotton transaction. The administrator of deceased partner could upon no principle be required to have partial settlements. So the funding here was of only part of the Confederate money he owed the partnership.

SETTLE, J. The defendant and one Peleg Rogers entered intered into a mercantile partnership in 1858, by which they agreed to share equally the losses and profits of the

concern. In February, 1863, Peleg Rogers died, and during the month the plaintiff became his administrator.

At Spring Term, 1868, the plaintiff filed a bill for a settlement of the partnership, and at Spring Term, 1869, a commissioner was appointed to state the account of the defendant as surviving partner of the firm of P. & B. Y. Rogers. The case is now before us by appeal from the ruling of his Honor overruling the report of the commissioner. We do not concur either with the commmissioner or with his Honor.

The plaintiff seeks to charge the defendant with one-half of the value of a certain lot of cotton belonging to the firm at the death of the plaintiff's intestate. The facts necessary to a full understanding of the controversy are that the defendant in April, 1863, as surviving partner, sold a lot of cotton belonging to the partnership at public auction; that the plaintiff, administrator of Peleg Rogers, gave his consent and approbation to said sale as administrator, and was present at the same; that the terms announced publicly on the day of sale and concurred in by the administrator were a credit of six months, purchaser to give note, and such currency as should be in circulation when the note fell due would be received in payment of the same.

The cotton was purchased by one Calvin J. Rogers on account of himself and his partner, B. Y. Rogers, and they executed a note with security for the payment of amount bid. The note became due October 20, 1863, and was immediately discharged, amounting to $5,681.50, by payment to B. Y. Rogers as surviving partner, to whom it was made payable when executed.

The defendant immediately tendered one-half of said amount to the plaintiff, who refused to receive it. The defendant then consulted counsel, and acting under their advice, funded, as surviving partner, the share of P. Rogers, deceased, and obtained a certificate for four per cent. regis-

tered bonds of the Confederate States, which certificate he has filed with the papers in the suit.

The commissioner failed to charge the defendant with anything on account of the cotton, but his Honor held that he should be charged with the value of the cotton and interest from the day of sale; the value to be ascertained by applying the scale to the amount bid for the cotton.

The defendant received $5,681.50, the the full price of the cotton, for and on behalf of the partnership.

He seems to have acted in good faith, and in his settlement with the partnership he should be allowed, as a credit, the certificate for registered bonds of the Confederate States, but as he retained $2,840.75 of the cotton money he is clearly liable to account therefor to the partnership. In other words, he held the whole amount for the firm, and the firm lost that which was funded in Confederate bonds, and the firm is entitled to divide that which was not lost. But the scale as applied to contracts generally does not apply in this case. The defendant was acting in good faith in a fiduciary character, and is liable only for the value of the Confederate money at the time when it came into his hands.

There was error to the extent indicated.

Let this be certified.

PER CURIAM. Decree accordingly.

STATE v. DAVID B. JONES.

It is no ground for arresting a judgment because the jury did not find on which count in an indictment for arson, the defendant was guilty; the first count being the only one charging the defendant, the second charging others as aiders and abetters.

The Act of 1870-'71, chap. 267, applies only to offences committed after its passage; and does not repeal the Act of 1868-'69, chap. 20, as to any offense committed before.

INDICTMENT, arson, tried before *Clarke, J.*, at the Spring Term, 1863, of the Superior Court of WAYNE county.

The defendant, with two others not taken, was charged with the burning of the dwelling house of one Mirand Wise on the night of the 11th of February, 1871. The indictment, under the Act of the 10th of April, 1869, contained two counts: the first, charging the prisoner with one Howard and Underwood with burning the house; and the second, charging that Howard and Underwood were present with the prisoner, aiding and abetting the commission of the offense.

On the trial below, after the charge of his Honor, the defendant's counsel ask one for instruction, which was given.

There was a verdict of guilty. Motion for a new trial; motion refused. The defendant's counsel moved to arrest the judgment on the ground that the jury in their verdict failed to say on which of the two counts in the indictment they find the defendant guilty. Motion refused. Judgment and appeal.

No counsel for the prisoner in this Court.
Attorney General Hargrove, for the State.

RODMAN, J. The defendant moves in arrest of judgment, because,

1. The jury did not find on which count he was guilty.

An answer to this is that the first count was the only one which charged the defendant, consequently the verdict could apply to that only. The second count was against two other persons as aiders, &c., who were not on trial.

2. That the Act of 1868–'69, upon which the indictment was framed, had been repealed before the trial by the Act of 1870–'71, chap. 222.

But this last Act applies only to offenses committed after its passage, and does not profess to repeal the prior act as to any offenses committed before. The offense is charged to have been committed before the passage of the Act of 1870–'71.

There is no error.

Let this opinion be certified.

PER CURIAM. Judgment affirmed.

SAMUEL P. CALDWELL, Ex'r. *v.* R. J. BEATTY.

A writ of *recordari* is sometimes used as a writ of *false judgment* to bring up a case in order to review an alleged error in law, and it is sometimes used as a substitute for an appeal, in which case the whole matter is tried *de novo* in the higher Court.

Arguendo. Where the error alleged is a defect of jurisdiction such error may be corrected upon a writ of *recordari*, used as a writ of false judgment, although the party may have neglected to avail himself of the right of appeal.

A party has a right to "split up" his account so as to include a certain number of items under one warrant and a certain number under another, and so on, so as to bring the several warrants under the jurisdiction of a Justice of the Peace.

The question whether a certain account is over the jurisdiction of a Justice of the Peace is a question of law to be decided by the Court, the amount of the account being a question of fact for the jury to decide.

The alleged fraudulent conduct of a defendant and an attorney employed by the plaintiff cannot be inquired into upon a writ of false judgment.

(*Israil* v. *Ivy*, Phil. 551; *Waldo* v. *Jolly*, 4 Jones, 173; *Green* v. *Calddeugh*, 1 Dev. & Bat. 320; *Pearson* v. *State Bank*, 4 Hawks, 294; *Smith* v. *Bowe*, N. C. Term, Rep. 200; *Buie* v. *Kelly*, 7 Jones, 266, cited and approved.)

PETITION for a *recordari* heard at the Spring Term, 1873, of GASTON Superior Court, before *Logan, J.*

In his petition the plaintiff, as executor of S. L. Caldwell, deceased, states that the defendant in May, 1870, instituted before a Justice of the Peace five actions against him, based upon one account running through the years 1861–'62–'63–'64 and '65, amounting in the aggregate to $498, upon which he obtained judgment for $429; that the judgments therein rendered were based upon one continuous account purposely divided to confer jurisdiction on the Justice of the Peace. It is further stated by plaintiff that no service of summons was made on him nor was such service acknowledged by him, or by any one having authority to do so, and that his interest was not represented; that one C. E. Grier had been some time before authorized by him in writing to represent him in the prosecution and defense of all civil actions which might arise in the ordinary discharge of his said trust, but with no power or authority either to accept service of legal process or to confess judgment thereon; that Grier was present at the trial of defendant's warrants and made no defense by answer, demurrer or plea, but allowed judgment to be entered up absolutely against the plaintiff, although he (Grier) at the time had in his possession a counter claim against the defendant in favor of plaintiff's testator for $272.50, besides being aware of the fact that the assets of the estate had been exhausted and that there were outstanding debts of higher dignity. Plaintiff further stated that he had been informed that Grier was counsel for defendant which information he believes to be correct.

On the 15th November, 1872, Judge LOGAN ordered writs of *recordari* and *supersedias* to issue, and upon the return of the writ, the defendant answered, denying the main allegations in the petition, and alleging that the plaintiff at the trial alluded to was fully represented by Grier, who had full authority in the premises, and that the proceedings were

regular and legal. That Grier intentionally permitted defendant to obtain judgments for the purpose of giving him preference over a certain claim, known as the "Gingle debt," that this was done with the full knowledge and authority of the plaintiff himself. The petition and answer were each supported by affidavits, which, not being pertinent to the point decided, and upon which judgment below was rendered, need not be set out.

His Honor held that the account of defendant againt the plaintiff's testator, exceeded the sum of which a Justice of the Peace had jurisdiction, therefore, the Justice had no right to render the judgments against the plaintiff. On motion of plaintiff's counsel, the Court declared the said judgmets null and void, and that the same be vacated, and further ordered a *superdeas* to issue, &c.

From this judgment defendant appealed.

Schenck, for appellant, submitted.

His Honor, Judge LOGAN, treated the *recordari* in this case as a writ of false judgment simply, and the various allegations of fraud are not now before the Court, as the Judge did not pass on them in rendering his judgment. *Collins* v. *Gilbert*, 65 N. C. Rep. 135.

The defendant insists that a writ in the nature of false judgment simply does not lie where the right of appeal is given. That the appeal is given by statute as a substitute for these remedial writs of *recordari* and *certiorari*, which are governed by the sames rules. At common law all cases were carried to a higher Court by one or the other of these writs, and they are only used now when there is no appeal given, or where it has been lost by the fraud of the other party, or by accident. *State* v. *Bailey*, 65 N. C. Rep. 426.

The following authorities are relied on: *Webb* v. *Durham*, 7 Ired. 130; RUFFIN, C. J. calls attention, page 133, to the fact "no appeal is allowed in the case," being under the statute of Forcible Trespass, and says *Parker* v. *Galnette* was

sustained because garnishee could not have a new trial by appeal. *Satchwell* v. *Respass*, 10 Ired. 365; NASH, J., says the writ lies "where proceedings are not according to the course of common law and *no appeal* is given." *Baker* v. *Halstead*, Busb. 41, NASH, C. J., "when *the right of appeal* is not given the writ is used to correct errors of law." *Elliott* v. *Jordan*, Ibid. 299, where it is cited and approved. *State* v. *Bill*, 13 Ired. 375, "where the right of appeal is not allowed, defendant is entitled to have it revised on points of law." *Brooks* v. *Morgan*, 5 Ired. 481. We are aware that there are conflicting opinions in *Hartsfield* v. *Jones*, 4 Jones 311, and perhaps other cases, but "the reason of the thing" is against the right to use a *recordari* as a writ of false judgment, where the statutes gives a full and adequate remedy by appeal. So far as the case shows the appeal was not lost by fraud or accident, and plaintiff has only insisted on the writ to correct an error of law, when he did not see proper to appeal.

The question is presented thus: Judgment is given against plaintiff before a magistrate; no appeal is prayed; two years after, when other creditors press him to get preference he sues out this writ to correct an error of law, and to have the judgment declared void, which was done—can he thus trifle with even a magistrate's judgment? *Baker* v. *Halstead*, Busb. 41.

2. If the Court is of the opinion that the writ lies in the nature of a writ of false judgment, we say that the Justice's judgment is fully sustained by the case of *Waldo* v. *Jolly*, 4 Jones, 173, where the Court says the plaintiff may divide his account, and the only disadvantage for him is that the statute may run sooner against him than if he sued on all the account.

It was the duty of the petitioner to assign his errors, and the Court had no right to treat the petition as in the nature of a writ of false judgment.

Bynum and *Guion*, contra:

1. As to jurisdiction, see Constitution, art. 4, sec. 33; *Moore* v. *Thompson*, Busb. 221; *Ramseur* v. *Barrett*, 5 Jones 409; *Waldo* v. *Jolly*, 4 Jones 173, 174; *Beatty* v. *Caldwell*, 67 N. C. Rep. 42. Jurisdiction cannot be conferred by consent. *Leach* v. *W. N. C. R. R. Co.*, Ibid. 486.

2. When *recordari* will be granted; *Critcher* v. *McCadden*, 64 N. C. Rep. 262. Practice therein; *Collins* v. *Gilbert*, 65 N. C. Rep. 135; *Swain* v. *Smith*, Ibid. 211, 338. When there is a defect of jurisdiction, no matter how it appears, the Court will stay proceedings in the cause. *Israel* v. *Ivy*, Phil. L. 551, 552.

3. The fiduciary relations of *attorney and client*, guardian and ward, &c., are sufficient under our present judiciary system to raise a presumption of fraud as *a matter of law*, &c., unless rebutted. *Lee et al.* v. *Pearce and wife*, 68 N. C. Rep. 76. There held that the Court, as a Court of Equity as well as law, will give relief as such.

4. The proofs raise several issues, but only one is found by the Judge, and he thereupon vacates the judgment.

If enough appears in the case to justify the vacating order, it is immaterial whether the Judge granted it upon the right or wrong finding.

Sec. 118, C. C. P.: What is meant by an account? All *the items* to be furnished.

Sec. 499. Where the sum demanded exceeds $200, the Justice shall dismiss the action, &c., unless the plaintiff shall remit the excess above $200, and shall at the time of filing his complaint direct the Justice to make this entry. "The plaintiff in this action forgives and remits to the defendant all interest, and so much of the principal of this claim as is in excess of the two hundred dollars."

In *Marshall* v. *Fisher*, 1 Jones 117. Jury found question

of law correctly. If so, same as if the Court had found it so, and no ground for *venire de novo*.

Hobbs v. *Outlaw*, 6 Jones 177. Evidence admitted correctly, but upon improper ground, new trial refused.

Mordecai v. *Parker*, 3 Dev. 427. "For though, the Court erred as to the rule of damages—a verdict for the defendant would have stood, because the record shows that upon another trial, the defendant must have a verdict. This action cannot be maintained for any purpose."

PEARSON, C. J. A writ of *recordari* is sometimes used as a writ of false judgment to bring up a case in order to review an alleged error in law, and it is sometimes used as a substitute for an appeal in which case the whole matter is tried *de novo* in the higher Court.

Whether a writ of *recordari* as a writ of false judgment can be resorted to in cases where by law an appeal is given, and the party has failed to appeal, is a question which it is not necessary to decide, but we are inclined to the opinion, that when that error alleged is a defect of juristiction, such error may be corrected upon writ of *recordari* used as a writ of false judgment, although the party may have neglected to avail himself of the right to appeal. *Israel* v. *Ivey*, Phillips 551.

We are of opinion that there was no defect of jurisdiction, and that Beatty was well entitled to "split up" his account in the words of the case, so as to include a certain number of items under one warrant, and a certain number of items under another warrant and so on, so as to bring the several warrants within the jurisdiction of a Justice of the Peace. This is called a "running account," from the manner in which the items are set out in the book of Beatty, each item is entered and was in fact a distinct dealing, so that Beatty might, if so inclined have warranted Caldwell for the amount of each item the day after the article was sold and

delivered; in other words the legal effect was the same as if Caldwell had given his due bill to Beatty for each item at the delivery of the article. *Waldo* v. *Jolly*, 4 Jones 173. After some hesitation it was held that when one has two promissory notes, both under the jurisdiction of the Court, and within the jurisdicton of a single justice, he might bring the case within the jurisdiction of the Court by issuing a writ and declaring for the *joint* amount of the two notes. *McCastin* v. *Irwin*, 4 Dev. 43. It is beyond question that he might have had a warrant upon each note before a Justice of the Peace, so if there be ten notes or one hundred notes, or as in our case two hundred distinct dealings, each constituting a distinct cause of action for the sale and delivery of goods. It was said on the argument, this would be extremely inconvenient to the defendant, and impose on him great hardship by an unecessary accumulation of costs. True, it would be very inconvenient not only to the debtor, but to the creditor, and for this reason there are but few cases in which such a course has been taken still, such is the law, and to avoid the hardship, the creditor is permitted to join several items in one warrant, but he cannot thereby escape the statute of limitations, which is applied to each item as if sued on by itself. *Green* v. *Caldcleugh*, 1 Dev. & Bat. 320, and to discourage a multiplicity of action, the Court will under certain circumstances direct a consolidation. When a plaintiff sued out twenty-one warrants on as many bank notes, amounting in all to one hundred and four dollars, he was compelled to consolidate. *Pierson* v. *State Bank*, 4 Hawks 295; see also, *Smith* v. *Bowe*, N. C. Term Rep. 200; *Buie* v. *Kelly*, 7 Jones 266.

It is nowhere intimated that the principle stated in *Waldo* v. *Jolly* supra, is not sound. The right to maintain separate actions on each item or any number of the items is conceded and, the Court interferes and orders consolidation simply to prevent *useless* vexation; but here there is no idea

of vexation, and it is apparent that the sole motive for having five warrants is to keep within the jurisdiction of the Justice of the Peace; had he sued out two hundred warrants (one on each item) there would have been no defect of jurisdiction; he elects to include all under five warrants to avoid a rule for consolidation. We can see no ground upon which it can be seriously urged that he was obliged to treat the whole as one debt and sue in the Superior Court. So the main ground on which the application for the writ of *recordari* was made is untenable. His Honor was under a misapprehension, in supposing that whether Beatty's account was over the jurisdictlon of a Justice of the Peace or not, is a question of *fact* and not a question of law; the question of fact was as to the amount of the account and of how many items it was composed; as to that there was no controversy. His Honor erred in regard to the question of law and his decision is of course subject to review, although it is treated by him as a matter of fact.

In regard to the alleged fraudulent conduct of Beatty and Grier, attorney of Caldwell, we are at a loss to see how that can be reached by a writ of *recordari*, used as a writ of false judgment. What error in law did the Justice of the Peace commit? Here was a warrant within his jurisdiction as we have seen above, the attorney of the defendant was present and did not dispute the items, but on the contrary, after entering a credit admitted the several amounts claimed to to be due; what could the Justice of the Peace do, save to enter judgment for plaintiff? and what can be brought up for review by this mode of proceeding?

Under the old system this would have been a case for a bill in equity, to have the judgments set aside and a new trial by consent of the plaintiff on the ground of fraud; or possibly it may have been reached by a writ of error for matter of law, in which case the application would be made to the Justice to vacate the judgments on the ground that they

had been obtained by fraud. But a writ of false judgment only lies when the Justice himself has committed an error of law.

Whether the remedy under the new system is by action in the Superior Court to compel the party to consent to have his judgments vacated and a new trial had, as formerly under a bill in equity or by an application to the Justice of the Peace, are questions about which we express no opinion; for really we have not formed one, but we are all clearly of opinion that the alleged fraudulent conduct of Beatty, and Grier, the attorney of Caldwell, cannot be inquired into upon a writ of false judgment.

There is error. Judgment below reversed.

This will be certified.

PER CURIAM. Judgment reversed.

DAVID ISRAEL, Ex'r of JOHN ISRAEL, dec'd *v.* NANCY KING, Ex'x *de son tort* of CHARLES IVEY.

Evidence to charge one as *executor de son tort*, need not be sufficient to warrant a conviction of felony.

In seeking to charge a widow as *executrix de son tort*, the value of her year's provision should be deducted from the assets found to be on hand.

The personal representative of a deceased administrator is a necessary party to a suit against his widow, seeking to charge her as *executrix de son tort*.

CIVIL ACTION, to charge defendant as executrix *de son tort*, tried before *Buxton, J.*, at the January (Special) Term, 1873, of the Superior Court of ROBESON county.

The following is the case settled by his Honor, Judge BUXTON, and sent to this Court as a part of the transcript of the record.

"The defendant, Nancy King, was first the widow of

Charles Ivey, who died 27th January, 1866. With her consent, letters of administration on the estate of Charles Ivey, was granted to Reuben King at the February Sessions 1866, of the County Court of Robeson county. In 1867, May 31st, the defendant, Nancy, intermarried with the said King, who died before the commencement of this suit, August, 1869, leaving a will and a large estate.

This present action was instituted by plaintiff to recover from the defendant as *executrix de son tort* of her former husband, Charles Ivey, the payment of certain notes, set out in detail in his complaint, alleged to be due the plaintiff's testator from said Ivey on the ground that the defendant had misapplied to her own use a quantity of cotton and bacon belonging to the estate of Charles Ivey, her late husband.

Upon the trial the defendant objected to the sufficiency of the complaint, because it did not specify the quantity of cotton and bacon alleged to have been converted. The Court sustained the objection, but permitted the plaintiff to amend his complaint by inserting: "Eighteen four hundred lbs. bales of cotton and 2,000 lbs. of bacon;" the complaint as originally drawn was verified by affidavit, but was not re-sworn to after the amendment. Defendant excepted.

This amendment to the complaint having been made, the plaintiff took the ground that the answer ought to be responsive to the amended portion of the complaint, or else that the allegation should be taken to be true. The Court concurred in the position, whereupon defendant asked and obtained leave to amend her answer, which was done by inserting the statement in reference to 16 bales of cotton and 1500 lbs. bacon.

On the part of the plaintiff, it was in evidence that all the notes mentioned in the complaint, except one for $80, (which was subsequently withdrawn by plaintiff) were due and owing by the estate of Charles Ivey to the testator of

the plaintiff. It was further proved that at the time of his death Ivey was in possession of 16 bales of cotton, a large quantity of bacon, a large number of hogs and other personal property.

The plaintiff further proved by one Branch, the former overseer of Ivey, that some three weeks after Ivey's death, the witness took possession secretly of 12 bales of cotton and 42 large sides of bacon, which were disposed of under her directions—the cotton being carried off by night to market and sold, partly at Fayetteville and partly at Riverside; that in the trip to Fayetteville he was accompanied by Dr. Norment, under whose instruction the defendant directed him to act. This witness also testified that by direction of the defendant, after her husband's death, he secreted in the woods a mile from the house, a lot of 40 hogs belonging to the estate, to prevent them from being sold for the benefit of the estate, and that they were not sold, but were killed for defendant; that he was also directed to secure all the valuable tools and not have them sold. This, he, the witness did, and the tools were not sold. For the plaintiff it was also proved by Mrs. Branch, wife of the preceding witness, that shortly after the sale of the cotton in Fayetteville, the defendant exhibited to her a bag which she, the defendant, told her contained the cotton money.

Mrs. Branch also testified that the defendant had corn, lard, pork and crockery conveyed off and secreted, to prevent these articles from being sold for the benefit of the estate of her husband, Charles Ivey; this was after his, Ivey's death. It was also in evidence, that at the time of the sales spoken of, cotton was worth 20 cents per lb. in silver, and bacon 20 cents in greenbacks.

In answer, the defendant proved by Dr. Norment that her husband, Charles Ivey, and John Ivey, his son, both died of small-pox in January, 1866, on the plantation, within a few days of each other; that the witness was the attending

physician, and that it was difficult to provide nurses or other attendants or medical care at the time; that his whole time for 30 days was occupied by these two cases of small-pox, and that the county was in a greatly unsettled and disturbed condition owing to the prevalence of the disease. The witness further testified that fearing to lose his bill, amounting to $1500, and as the only means of securing it after the death of the Iveys, he went to the house of the defendant in the night time, and without her knowledge or consent, expressed or implied, and with the aid of the overseer, he took 8 bales belonging to the estate, and 4 bales pointed out to him by the overseer as belonging to the estate of John Ivey upon whose effects he, the witness, afterwards became administrator and sold them and applied the proceeds to the payment of his medical bill, which was larger than the amount of sales; that afterwards, upon its becoming known to him that Mrs. Ivey was in need he loaned her $150 of the money arising from the sale of John Ivey's cotton, she promising to return it when called for; that the money he let her have was silver, and that she never got a cent of the proceeds of the eight bales of her husband's cotton, and that at the sale made by Reuben King, administrator of Charles Ivey, he, the witness, bought four other bales of cotton, for which he gave his note.

For the defendant, was further read in evidence the record of proceedings in the County Court of Robeson, instituted by defendant as widow of Charles Ivey to obtain a year's allowance, whereby it appeared that at November Term, 1866, the report of the commissioners were confimed. By this report there were set apart for her use certain articles, which not being on hand the deficiency was assessed in money as prescribed by law, and which amounted to $146.50. The account of sales of Reuben King as administrator of Charles Ivey was also read in evidence, by which it appeared that 23 hogs, a number of pigs and a quantity of

corn were there, March 1866, sold, of which the widow purchased 8 of the hogs, a lot of the pigs and 20 bushels of corn.

The evidence being closed, one of the defendant's counsel in his address to the jury called attention to the 118 chap., sec. 17 Revised Code, which allows the widow of an intestate to use so much of the crop, stock and provisions on hand, as may be absolutely necessary for the support of herself and family, until grant of letters of administration, and he, the counsel insisted that the complaint made no reference to this right of the widow, and contained no averment, that she had transcended this right. In reply the plaintiff's counsel insisted that the complaint did in effect make that averment, as it charged that the widow had appropriated to her own use eighteen four hundred pound bales of cotton, and 2000 lbs. of bacon that should have been sold by his administrator and held as assets for the payment of his honest debts. In the view presented by the counsel of the defendant, his Honor concurred, and held that the complaint shold state explicitly that the defendant had appropriated to her own use over and above what was necessary for the support of herself and family until grant of administration, and directed the complaint to be amended by inserting the required averment. Complaint thus amended was not re-sworn to. Defendant excepted. Defendant's counsel then asked in writing this special instruction. "That the testimoney to charge the defendant as *executrix de son tort*, must be sufficient to warrant a conviction of felony, viz: taking, stealing and carrying away the personal property of the deceased, had it been done by any other person not under her direction." Deeming it erroneous, his Honor omitted to notice the instruction in his charge to the jury. He instructed the jury that in order to charge the defendant as executrix *de son tort*, of Charles Ivey, the appropriation by her of cotton and bacon belonging to his estate, must

have been of more than was necessary for the support of herself and family from the time of his death until administration was granted on his estate, and such appropriation must have been fraudulent, done with the intent to defraud the creditors of Ivey. Defendant excepted.

His Honor handed the jury three issues in writing to which they were to respond, to-wit:

1. Are the notes read in evidence due the plaintiff?

2. Did the defendant, with intent of defrauding the creditors of Charles Ivey, fraudulently appropriate to her own use, 18 bales of cotton and 2,000 lbs. bacon, or any part thereof, being cotton and bacon more than was necessary for the support of herself and family from the time of his death, 27th January, 1866, until administration was granted on his estate at February Term, 1866, (4th Monday in February, 1866)?

3. If so, what was the quantity and value of the cotton and bacon, thus fraudulently appropriated?

In regard to these issues the Court instructed the jury that if they found the first or second against the plaintiff, they need enquire no further, but if they found them both in favor of the plaintff, they should then proceed to respond to the third interrogatory.

In rendering their verdict, the jury returned a written answer to the first and third issues; to the first, they found that the "notes were just;" to the third, they answered;" 12 bales of cotton, 4860 lbs. @ 20 cents gold, $680; 47 sides of bacon, 840 lbs. @ 20 cents currency, $168.

To the second issue, no answed was appended. his Honor inquired of the jury "how they found the second issue? The jury answered "in favor of the plaintiff." Thereupon his Honer directed their answer to the second interrogatory to be entered in the affirmative. Defendant excepted."

Upon the foregoing finding of the jury, the Court di-

rected a reference to the clerk to state the amount due upon the notes, allowing the legislative scale of depreciation, and for the amount, to enter judgment in favor of plaintiff and for costs.

From this judgment, defendant appealed.

Leitch, N. A. McLean and Cantwell, for appellant.
Strange and W. McL. McKay, contra:

The acts complained of were committed by the defendant *before* letters of administration were granted. Subsequently King qualified as administrator; about twelve months thereafter King, the administrator, married the defendant; after King's death the action was commenced against defendant to charge her as executor *de son tort* of Ivey.

The distinction made by the case seems to be this: that when the acts relied on to charge one as executor *de son tort* were committed before the appointment of administrator or qualification of an executor, then the creditor may maintain his action, though there be at the time of commencement of action a rightful administrator or executor; but if the acts are committed after appointment of administrator or qualification of executor an action will not lie by creditor. *McMonie* v. *Strong,* Dev. & Bat., 87; 2 Wheaton Selwyn, 787.

Executor *de son tort* may give in evidence that he has delivered assets to rightful executor *before* suit brought—no defence if delivered after suit brought. 1 Wms. Executor, 232; 1 Salk. 313; *Padget* v. *Priest,* 2 Term Rep., 100; *Curtis* v. *Vernon,* 3 Term Rep., 590; 2 H. Blackstone, 18.

How could this defense arise unless suit could be maintained after the appointment of administrator?

May join executor *de son tort* with rightful executor. 1 Wms. Executor, 232.

2. But after acts committed and before suit brought the

defendant married administrator, and King, therefore, became liable for her debts.

But the suit was not brought until after the death of King, and though the effect of the marriage was to make King liable, it did not relieve her, and upon his death the suit may be maintained against Nancy King, the defendant. McQueen on Husband and Wife, 59 vol. Law Lib. marginal pages 39 and 40, and page 193.

3. It is insisted that by the marriage the assets of the estate of Ivey which had been appropriated by defendant, passed by operation of law, into the possession of the rightful administrator and therefore defendant is discharged from liability.

It is true that the delivery of assets *before* suit was brought by executor *de son tort* to rightful administrator, is a defense to the action; but this cannot be presumed; the burden of proof is upon the defendant.

The evidence shows that these goods—corn and bacon—were taken off in the night time and sold. Is there any evidence that the proceeds of sale were in the hands of defendant at the time of marriage?

The evidence is the other way. Dr. Norment, witness for defendant proves that the widow was in such a destitute condition before marriage with King that he loaned her $150.

RODMAN, J. We think it unnecessary to notice the first and second exceptions which relate only to the sufficiency of the pleadings. His Honor had the right to allow or require the amendments, whether they were necessary or not, and after they were made at last, the pleadings sufficiently made the issues which were submitted to the jury.

3*d Exception.* The defendant's counsel requested the Judge to charge the jury "that the testimony to charge the defendant as exector *de son tort* must be sufficient to warrant a

conviction of felony, viz: taking, stealing and conveying away the personal property of the deceased, had it been done by any other person not under her direction."

The judge properly declined this, but told the jury that it must be proved that she took more of her husband's goods than was necessary for the support of herself and family up to the grant of administration, that it must have been done fraudulently and with the intent to defraud his creditors. We think if there is any error in this it is one of which the defendant cannot complain.

His Honor submitted three issues to the jury:

1. As to the notes declared on.

2. Did defendant fraudulently appropriate the cotton and bacon mentioned, and

3. What was their value;

And upon the jury finding the two first issues for the plaintiff directed a judgment to be entered for the value of the notes, not to exceed the value of the goods appropriated, as found by the jury.

It is now suggested that the pleadings and evidence disclose two defenses which (if found as facts by the jury or upon a reference) the defendant should have the benefit of:

1. That the value of the year's provision assessed to her should be dedueted from the assets found to have been received.

We think this should be, unless it shall appear that the years' provision was paid from some other source. Such an allowance has priority to all debts. It is not a debt owing by the deceased, and consequently does not come within the rule that an *executor de son tort*, cannot retain for a debt to himself. It is a provision which the law makes for the support of the family during the first year after widowhood. Moreover, a retainer may be justified by obtaining administration, and the marriage with the administrator was equivalent to that for this purpose.

2. The other defence goes to the whole demand, viz: that the defendant before suit brought by the plaintiff married the rightful administrator, whereby she transferred and paid over to him all the assets of the estate, and became released from all further liability by reason of the same.

The fact of the marriage appears to be admitted by the pleadings. Recent legislation has so changed the law respecting the effects of marriage on the contracts and property of the parties to it that any laborious discussion of what they were would be unprofitable. Moreover as in the view we take of the case the personal representative of the administrator should be a party, and as the questions which are now suggested do not appear to have been considered below, and were not fully argued in this Court, we prefer to express no opinion on any question further than may be necessary to confine our inquiry within certain limits.

We suppose it to be clear that if one who has made himself an *executor de son tort* by taking possession of the property of a deceased, accounts with and pays over to the rightful administrator before suit brought by a creditor, such payment is a defence to the action of the creditor. 1 Williams on Ex'r 235. *Padget* v. *Priest*, 2 Y. R. 97; *Curtis* v. *Vernon*, 3 Y. R. 587.

If a man being a creditor in his own right marries his *feme* debtor his debt is realeased forever. 8 Co. 136; 1 Thomas Coke 435, note D; Dyer 140.

If however the debt be to the husband as a trustee, it cannot be that as between the debtor and the *cestui que trusts*, the debt is extinguished. Bacon Abrid. 9, Release B. Cro Eliz. 114; Moore 236, pl. 368; Leon 320. *Dorchester* v. *Webb*, Cro. Car. 372; *Cotton* v. *Cotton*, 2 Vern. 290.

How far it would cast any liability upon the husband after the termination of the marriage by his death, and whether that liability would be primary or secondary as between his representative and the *feme*, we have not found

determined. It may be that it would depend upon whether he actually received from his wife the very assets of his intestate which she had appropriated, or other property into which they had been converted; or it may be affected by the fact that he obtained by her other property sufficient to pay the debt. *Carmichael* v. *Carmichael*, 2 Phil. C. C. (Eng. ch. Rep.) 101; *Cotton* v. *Cotton*, ub. 2 Tern. 270; *Powell* v. *Bell*, Pre. chap. 255.

These questions are left open.

This case therefore is remanded in order that the personal representative of King may be made a party, and that it may be ascertained what property King acquired by his marriage with the defendant, and if necessary that accounts may be taken of the administration of the deceased Ivey, both by the defendant, and by King, and that such further proceedings be had, &c.

The findings on the issues will stand in the mean while.

PER CURIAM. Case remanded and order accordingly.

STATE v. MATHEW DAVIS.

In an indictment for perjury, where the defendant is charged with having been sworn "on the Holy Gospels of God," and it appeared that he was not sworn as charged, such variance is fatal and will entitle the defendant to a new trial.

INDICTMENT for perjury tried before *Tourgee, J.*, at the Spring Term, 1873, of the Superior Court of RANDOLPH county.

Defendant was charged with having, in a suit between Hood, Bonbright & Co., plaintiffs, and Welborne Lassiter, defendant, tried in the Superior Court of Randolph county before his Honor, Judge TOURGEE, at Fall Term, 1871,

"*being then and there duly sworn upon the Holy Gospel of God to speak the truth,*" &c., falsely, wickedly, wilfully and corruptly committed perjury, in swearing as to the attestation of a certain deed, which was a material point on the trial of the issue then joined.

On the trial much evidence was introduced both for the State and for the defendant, to the introduction of some of which the defendant objected. It is unnecessary, however, to a proper understanding of the opinion delivered, to notice the exceptions of the defendant to the evidence as the case was decided in this Court upon one point: the alleged error in his Honor in charging the jury "that it was not necessary for the State to prove that the defendant was sworn upon the Holy Gospel of God as charged in the bill of indictment; that if they were satisfied that he was sworn in any manner known to the law it was sufficient." To this charge the defendant excepted.

The jury returned a verdict of guilty. Motion by defendant to arrest the judgment for error in allowing certain evidence to be given to the jury, and also for error in the charge of his Honor as to the above, and other points needless to mention. Motion refused. Judgment and appeal.

No counsel for defendant in this Court.

Attorney General Hargrove and *L. M. Scott* for the State:

1. The transcript discloses that "the defendant was sworn and examined as a witness," &c. The form and manner of the oath was not shown.

It is admitted that if it had appeared in evidence that he was sworn with "up-lifted hands," or was a Quaker, it having been charged that he was sworn on the "Holy Gospels," the variance would have been fatal.

But, in *Rex* v. *Rowley*, Ky. and Mood. N. P. C. 302, (found also in 24 Eng. Com. Law,) it is held, "that proofs that the

defendant was *sworn and examined* as a witness, supports an averment, that he was sworn on the holy gospels, that being the ordinary mode of swearing in England." See also *Rex* v. *McCarther*, Peake's C. 155.

II. The ordinary mode of swearing in this State is upon the holy gospels. Rev. Code, chap. 76, sec. 1. It was sufficient for the State to show that the defendant was "sworn and examined." If sworn in the exceptional form, it was proper matter of defense.

READE, J. Our statute declares that "lawful oaths for the discovery of truth and establishing right are necessary and highly conducive to good government, and being most solemn appeals to Almighty God. * * * * Such oaths ought to be taken and administered with the utmost solemnity." This "solemnity" applies not only to the substance of the oath, but to the form and manner of *taking* it, and of *administering* it. And therefore the statute further provides that the Judge, or either person administering it, "shall require the party sworn to lay his hand upon the holy evangelists of Alminghty God, * * * * and after repeating the words, *so help me God*, shall kiss the holy gospels as a seal of confirmation to the said engagements." Rev. C. Oaths. After this manner every witness in North Carolina must be sworn. And a wilful violation of such an oath in a material matter is perjury, and no other is. This is the general rule. The only exception is "when the person to be sworn shall be conscientiously scrupulous of taking a book oath in manner aforesaid, he shall be excused from laying his hands upon or touching the holy gospels * * * and he shall stand with his right hand lifted up towards heaven," &c. And Quakers and some others who have conscientious scruples about *swearing* at all, are permitted to "affirm."

If the usual form of oaths upon the holy evangelists is

dispensed with, and an "appeal" or "affirmation" is substituted, it must appear that the person sworn had conscientious scruples; else the "appeal" or "affirmation" is invalid.

This much has been said because of the general and solemn importance of the subject, and because his Honor seemed to be of the opinion that an oath valid for any one person was valid for every other person.

The indictment charged that the defendant was sworn "upon the holy gospels." His Honor charged the jury that they might convict him "if he was sworn in any manner known to the law." We are to take it that this meant that they might convict him if it appeared that he was not sworn upon the holy gospels as the indictment charged, but was affirmed as a Quaker. And this is clearly in violation of the rule that the *probata and allegata* must agree. We suppose that his Honor's idea was that as falsehood was the *substance* of the offense, the *form* of the oath was immaterial. But experience, precedents and practice all teach the value of certainty and precision in legal and especially in criminal proceedings. If one is charged with killing another with poison it will not be sufficient to prove that he killed him with a sword.

The following is a quotation from 2 Chit. Cr. L. p. 309: "And if he were sworn twice, first in the usual form, and afterwards after his own method, to state that he was sworn on the holy gospels of God will suffice, though had he been sworn only in the latter way the variance would have been fatal."

So in our case he is charged with having been sworn upon the holy gospels, and as we are to take it from the charge it appeared that he was not sworn as charged, but in some other way. The variance is fatal.

There are several other points in the case, but as this

entitles the defendant to another trial, it is not necessary to notice them.

There is error.

PER CURIAM. *Venire de novo.*

GEO. W. SWEPSON *v.* JOHN C. HARVEY and others.

A suit in our former Courts of Equity by A, the equitable assignee of a bond against B, the assignor, to compel B to allow the use of his name in a suit at law against D, the obligor in the bond, which suit was dismissed, is no bar to a suit by A, the party in interest, under the new system against D.

Nor does the fact that after the equity suit was dismissed, D having notice of the equitable assignment, paid off the bond to B, affect A's right to recover.

The record of a suit between A and B, in which a certain assignment was adjudged valid, is no evidence of the validity of such assignment in a suit between A and D, D being no party to the former suit.

CIVIL ACTION, tried before *Tourgee, J.*, at Spring Term, 1873, of the Superior Court of ALAMANCE county.

The facts pertinent to the points decided in this case, with the exceptions and objections taken upon the trial in the Court below, are fully set out in the opinion of this Court.

Upon the issues submitted to them, the jury found a verdict for the plaintiff. From the judgment rendered in accordance with the verdict, the defendants appealed.

Wm. A. Graham, for appellants.
Dillard, Scott & Smith, contra.

READE, J. It appears that the defendants were indebted by bond to one Palmer, and that Palmer made an equitable assignment of the bond before due to one Ireland, and that Ireland made an equitable assignment of the bond before due

to the plaintiff. Of all which the defendant had notice, so that the defendants became the debtors of the plaintiff. This was prior to the adoption of the present Constitution, abolishing the distinction between courts of law and courts of equity. And in suing the defendants in a court of law, as the plaintiff did, he was obliged to sue in the name of Palmer, the payee of the bond. And Palmer moved to dismiss the suit, which compelled the plaintiff to file a bill in equity to enjoin Palmer from dismissing, and to compel him to allow the use of his name in prosecuting the suit. Upon the coming in of Palmer's answer denying the plaintiff's equity the injunction was dissolved; and then Palmer dismissed the suit at law which the plaintiff had instituted in his name against the defendants. And the plaintiff's equity suit against Palmer was dismissed also. This was in the Fall, 1867. In 1868 the new Constitution was adopted uniting the courts of law and courts of equity; and soon afterwards the Code was adopted enabling the real party in interest to sue, and subsequently the plaintiff brought this suit.

1. The defendant's first objection to the plaintiff's right to recover is, that the equity suit against Palmer, whether pending or dismissed, is a bar to this action. We do not think so. The object of that equity suit was not the recovery of the debt, but to compel Palmer to allow the plaintiff the use of his name in a suit at law upon the bond against the defendants. And his failure to secure the right to sue in Palmer's name, is certainly no bar to suing in his own name as soon as that remedy was provided by law.

2. The defendant's second objection is, that after Palmer dismissed the action at law which the plaintiff had instituted in his name against the defendants, they paid off the debt to Palmer. This is their loss, and if done in good faith, it is their misfortune. But still it cannot affect the plaintiff's rights.

3. The defendant's third objection is that it became necessary in this suit that the plaintiff should show the assignment from Palmer to Ireland and from Ireland to plaintiff. And in order to show the assignment from Palmer to Ireland, he offered in evidence the record of a suit which Palmer brought against Ireland to try the validity of the assignment—Palmer alleging that the assignment was obtained by fraud and duress—which suit was terminated in favor of Ireland, and in favor of the validity of the assignment to Ireland. To that suit the defendants were not parties, and they object that the record was not evidence. The record was admitted as evidence, and in that we think there was error. And for this error there must be a new trial. It was competent for the plaintiff to prove the assignment to Ireland by Palmer, the very transaction by any competent evidence; but neither the verdict of a jury, nor the judgment of a Court is evidence of the fact against any one who has an interest to deny it, and who was not a party to the suit.

It is not a judgment *in rem*, but *inter partes*, and as against the defendants, is *res inter alias acta*.

There is error.

PER CURIAM. *Venire de novo.*

STATE *v.* JOHN DIVINE and WILLIAM BROOKS.

To enable insolvent defendants, convicted in criminal actions to appeal from judgments of the Court below, it must appear by affidavit that they are wholly unable to give security for the costs, and that they are advised by counsel that they have reasonable cause for the appeal prayed for, and that the application is in good faith.

Act of 1869–'70, chap. 196.

INDICTMENT for keeping a disorderly house, tried before *Russell, J.*, at the January Term, 1873, of NEW HANOVER Superior Court.

The defendants were charged with keeping a disorderly house by indictment, drawn in accordance with precedents in Chitty's Crim. Law, and in the Court below were found guilty. The record states: "From the above judgment the said John Divine and William Brooks pray an appeal to the Supreme Court, and it appearing to the satisfaction of the Court here, that the said John Divine and William Brooks are insolvent, the said John Divine and William Brooks are allowed to appeal without security.

No counsel in this Court for appellants.
Hargrove, Attorney General, contra.

SETTLE, J. There is no case before us. The Act of 1869–'70, chap. 196, entitled, "An act to enable poor persons to appeal to the Supreme Court in State cases," give the right of appeal to insolvent defendants upon their complying with certain requisites specified in the Act. The record sent up states that "it appearing to the satisfaction of the Court here, that the said John Divine and William Brooks are insolvent, they are allowed to appeal without security."

The insolvency of the party is not alone sufficient to entitle him to the benefits of this act; it must also appear by the affidavit, which must be filed before the Judge can grant

the appeal, that the defendant is advised by counsel that he has reasonable cause for the appeal prayed for, and that the application is in good faith. Both of these essential requisites are wanting in the record before us. We think that the affidavit should set forth the name of the counsel who advises that there is reasonable cause of the appeal. Otherwise, it would be in the power of a defendant to commit a fraud upon the Court, for it does not follow that the counsel upon whom he relies is an attorney of the Court or any one learned in the law.

This construction is reasonable and can work no hardship upon insolvent defendants whose cases have merits.

We might stop here, but as this is the first case in which we have announced our construction of this act, it may save the defendants further trouble and expense to say that we have examined the whole record and find no error. The indictment seems to have been copied from Chitty's Crim. Law, and we see no good ground of complaint either to the rulings of his Honor or the finding of the jury.

PER CURIAM. Appeal dismissed.

W. F. LEWIS, Ex'r of K. H. LEWIS v. G. W. JOHNSTON, Adm'r of JAS. L. CLARK.

A defendant who is an administrator, is entitled to costs in an action wherein the plea of "fully administered" has been found for him, and a judgment *quando* rendered. See 67 N. C. Rep. 38.

(The cases of *Wellborn* v. *Gordon*, 1 Mur. 502; *Battle* v. *Rourke*, 1 Dev. 228; *Leigh* v. *Lockwood*, 4 Dev. 577; *King* v. *Howard*, 4 Dev. 581; *Griffith* v. *Byrd*, 2 Ired. 72; *Terry* v. *Vest*, 11 Ired. 65, cited, commented on and distinguished from this.)

PETITION filed by plaintiff at January Term, 1873, to rehear a judgment rendered in this Court at the June Term previous. Case reported in 67 N. C. Rep., page 38.

The plaintiff stating the facts as they are reported in the case at June Term, 1872, and in the opinion now delivered, prays that the Court will correct the error, by which the defendant recovered costs against the plaintiff.

Battle & Son, for petitioner, submitted:

The question is whether if an executor or administrator plead to an action against him the general issue and fully administered, and the plaintiff confesses the latter and joins issue only on the former, and upon the trial of which he obtains a verdict and judgment, he ought to pay the whole costs of the suit. We contend that he ought not, and rely upon the following authorities as directly in point in our favor. *Hinsley* v. *Russell*, 12 East 232; 2 Williams on Ex'rs 1,691; *McDowell* v. *Asburg*, 66 N. C. Rep. 446. This case was decided at June Term, 1872, (67 N. C. Rep. 38,) upon the supposition that the case was tried in the Court below upon both the issues of the general issue and *plene administravit*, whereas the record proper shows that it was tried only upon the general issue, the other having been admitted as soon as it was put in. All the cases cited, *Well-*

born v. *Gordon*, 1 Mur. 502; *Battle* v. *Rourke*, 1 Dev. 228, and *Terry* v. *Vest*, 11 Ired. 65, were cases in which the trial was upon the plea of *plene administravit*, as well as upon the other pleas.

Smith & Strong, contra.

RODMAN, J. This is a petition to rehear a judgment of this Court at June Term, 1872, (67 N. C. 38.) The question now presented is this: An action is brought against an administrator upon a note of his intestate. The administrator pleads *non est factum* and fully administered. The plaintiff at the term at which the pleas are made admits the plea of fully administered, and at the same term the issue on the plea of *non est factum* is submitted to a jury and found for the plaintiff, who thereupon takes a judgment *quando*. Does the plaintiff recover the costs of the action against the administrator, or does the administrator recover them against the plaintiff?

It will be seen that the question now presented is substantially different from that which was decided when the case was last before us. Then it appeared that the plaintiff took issue on both the pleas. Now it appears that he admitted the plea of fully administered at the same term at which it was pleaded, and that the trial of the issue on the making of the note took place at the same term. The counsel for the plaintiff contends that the difference is material, and that as the case is presented on the present record, he ought to recover costs.

We may concede that by the English law, at least as it stood in 1829, the plaintiff would recover costs in a case like this. The authorities for this are 2 Williams Exec'rs 1,793, and the decision of the Court of K. B. in *Marshall* v. *Wilder*, 9 B. & C. 655 (17 E. C. L. R.)

Strange as it may seem, there is not an authority in this

State bearing with any directness on the question. We have examined all that might be supposed to do so. The first is *Wellborn* v. *Gordon*, 1 Mur. 502, (1810.) In that case the admistrator pleaded *non assumpsit* and fully administered, and the plaintiff took issue on *both* pleas. On the trial the first issue was found for the plaintiff, and the second for the defendant, who was held entitled to recover costs. It will be seen that this case is not in point, as the plaintiff, instead of admitting the plea of fully administered, took issue and went to trial upon it, when it was found against him. The decision is in conformity to the English law in a like case as stated in the case of *Marshall* v. *Wilder*, ante, and in *Edwards* v. *Bethel*, 1 B. & A. 234, and fully sustains the decision in 67 N. C. Rep. upon the record then presented.

In *Battle* v. *Rourke*, 1 Dev. 228 (1827), the defendant pleaded pleas denying the debt and also fully administered, upon all of which the plaintiff took issue, and the jury found the first pleas for the plaintiff and the last for the defendant. Thereupon the plaintiff took judgment *quando*. This case is but a repetition of *Wellborn* v. *Gordon*, and therefore not in point. In *Leigh* v. *Lockwood*, 4 Dev. 577, the question was whether an administrator against whom a judgment had been recovered for selling corn of the plaintiff, which he believed to be the property of his intestate, was entitled upon a settlement of his administration account, to be allowed for the costs paid by him under the judgment in that action. Obviously that case has no bearing on the present.

In *King* v. *Howard*, 4 Dev. 581 (1834), the administrator had pleaded performance, fully administered, former judgments and no assets *ultra*, all of which were found against him. He was held liable for the costs *de bonis propriis*. This case has no bearing.

Griffith v. *Byrd*, 2 Ired. 72, was a petition for a distributive share in the nature of a suit in equity, and has no bearing.

Terry v. *Vest*, 11 Ired. 65, relates entirely to a case where an administrator establishes his plea of fully administered before a jury, and hence is not in point.

The first and only authority we have found bearing on the question before us is the *dictum* of DICK, J., in delivering the opinion of the Court in *McDowell* v. *Ashbury*, 66 N. C. Rep.. 456, which is certainly an authority that the law had once been as the defendants contend it now is, but it was not necessary for the decision of the case, which is that C. C. P. abolishes the writ of *scire facias* only as original process, and that it, or something equivalent to it, may still be used as mesne process.

But notwithstanding the English authorities, and the entire want of reported decisions in this State, bearing directly on the precise question, it must be admitted that for many years past the practice has been in cases similar to the one before us, to give the administrator his costs. It was probably an inference from the decisions cited, and is not opposed by any of them. In the absence of any opposing decision, we consider ourselves bound by this long, general and well known practice which seems not unreasonable or unjust. It is a maxim, "*optimus interpres usus.*

For this reason we think the former decision in this case right, notwithstanding the change in the facts, which we consider an immaterial one.

We are the less disposed to depart from what may be called a settled practice as far as any can be, not resting on reported decisions, because since this action was begun the Code of Procedure has gone into effect, which somewhat changes the former practice. C. C. P. sec. 287, gives to a Court before which an action against an executor is tried, power to impose costs on him personally, only for mismanagement or bad faith.

PER CURIAM. Rehearing denied.

JOHN H. GARRETT v. JAS. O. CHESIRE.

The homestead laws of North Carolina do not impair the obligation of contracts, and are not unconstitutional.

(*Hill* v. *Kessler*, 63 N. C. Rep., 437; *McKeithan* v. *Terry* 64 N. C. Rep. 25, cited and approved.)

CIVIL ACTION for the delivery of personal property, tried before *Watts, J.*, at the Spring Term, 1863, of CHOWAN Superior Court.

On the 10th May, 1871, certain executions issued against the plaintiff from Chowan Superior Court, on debts contracted since the adoption of the Constitution in 1868. The property in controversy with other property, including a horse, was claimed and allotted to the plaintiff as his "personal property exemption," under the 10th article of the Constitution, and the Acts of the General Assembly relating thereto, and the said executions were returned endorsed, "nothing to be found." On the 20th May, 1871, the same property was sold under an execution from the United States Circuit Court, at Raleigh, for a debt contracted in 1867, at which sale defendant purchased the property and was placed in possession thereof by the Marshal.

On the 21st of May, 1871, plaintiff served the defendant with the affidavit and bond in this cause, and the property was taken by the sheriff from defendant and delivered to plaintiff. About two hours after that a copy of the summons was served on the defendant, the original having been filed with the Clerk.

Defendant appeared and moved to dismiss the action because it was not properly instituted. Motion refused, and defendant excepted.

Upon the trial, the defendant asked the Court to charge that the property in controversy was liable to the execution from the United States Court, and the seizure and sale by

the Marshal, under which defendant claimed, was valid. His Honor decline to charge as prayed, whereupon defendant again excepted.

Verdict and judgment for the plaintiff, from which defendant, after an ineffectual motion for a new trial, appealed.

A. M. & J. A. Moore, for appellant.
Gilliam & Pruden, contra.

READE, J. The complaint alleges that on the 3rd of June, 1871, the plaintiff "was the owner and in possession of one bay horse and one black mule, of the value of $300; that on that day the defendant unlawfully took the same from his posession and converted them to his own use." There is nothing else alleged in the complaint.

The answer, after objecting to the want of a summons, "denies all the allegations in the complaint." There is nothing else in the answer.

The *case* states that the property in controversy had been allotted to the plaintiff, as his personal property exemption as against certain executions which were issued against him from Chowan Superior Court on debts contracted since the ratification of the Constitution; and thereupon the executions were returned to court, endorsed, "nothing to be found." This is of no importance in the case, and we suppose it was stated only to explain why the allotment had been made.

It is further stated as follows: "On the 20th of May, 1871, the same property was sold under an execution from United States Circuit Court at Raleigh, for a debt contracted and due in 1867, at which sale the defendant purchased and was placed in possession by the Marshal."

It is further stated that, "upon the trial the defendant asked the Court to charge that the property in controversy

was liable to the execution from the United States Circuit Court, and the seizure and sale by the Marshal under which he claimed were valid."

The Court refused so to charge. The Jury found the issues for the plaintiff, and the defendant appealed.

Having only appellate jurisdiction, it is plain that we are confined to the record; and that we can know no fact which is not stated, and can *decide* no point which is not raised, and must sustain his Honor unless error is shown. The only error alleged is the refusal of his Honor to charge that the property in controversy was liable to the execution from the United States Court, and that the sale by the Marshal was valid. His Honor must be sustained unless we can see that the execution and sale were regular and valid. Now, if there can be such a thing as an invalid execution, we are to take it that this was invalid. It is true that it is stated that it issued upon a debt due in 1867, and if we assume what is not stated, that it was a debt due from the plaintiff, still it is not stated that there ever was any judgment upon the debt, in any court, at any time. And if there was a judgment, it is not stated whether it was alive or dormant, or whether it was against the plaintiff or some other person, or whether it was issued to the Marshal, or what was its form or substance, or whether the levy and sale were regular. Surely we cannot say upon such a skilfully observed state of facts, that the defendant was entitled to the charges asked for.

And his Honor could not assume that there was a regular judgment and execution, without assuming what ought to be improbable, that an inferior United States Court sitting in North Carolina, would subject the property of its citizens to sale, when the highest Court in the State had repeatedly decided it was not subject to sale.

It was stated at the bar by the counsel on both sides that a recent decision of the Supreme Court, (*Gunn* v. *Barry*)

which went up from Georgia, was supposed to be in conflict with *Hill* v. *Kessler*, 63 N. C. Rep., and several subsequent cases in this Court in regard to our homestead laws; and that it is of great importance to the public, as well as to those parties, that this Court should reconsider Hill and Kessler. If it were true that the United States Supreme Court had decided the principles laid down in *Hill* v. *Kessler* contrary-wise thereto, we should make haste to conform our decisions to the decisions of the United States Supreme Court, because in all cases within its jurisdiction that is the highest Court, and the proper administration of justice and the true principles of our government, and the good order of society and the comity of courts, require subordination. We have not been furnished with an authenticated copy of the opinion in the case of Gunn and Barry and have seen only the newspaper report, which we presume to be correct. I have considered it carefully, and I do not think it is in conflict with Hill and Kessler, or with any other decision of this Court. On the contrary, it is in exact conformity with our decisions. If there is anything seemingly in conflict it is only a *dictum* which bind neither that Court nor us. The facts in Gunn and Barry were, that at the time when the Georgia homestead laws were passed Gunn not only had a debt against this debtor, but had sued him, and obtained a judgment against him, which judgment was a *lien* upon the debtor's land and thereby Gunn had a *vested right* in the land, which the homestead laws could not divest. And therefore the United States Supreme Court, in its opinion well says: "The effect of the Act in question, (the Georgia homestead Act) under the circumstances of the judgment, does indeed not merely impair, it annihilates the remedy. There is none left. But the Act goes still further. It withdraws the land from the lien of the judgment, and thus destroys a vested right of property, which the creditor had acquired in the pursuit of the remedy to which he was entitled by the law as it stood

when the judgment was recovered. It is in effect, taking one person's property and giving it to another without compensation." This principle was expressly conceded by us in *Hill* v. *Kessler*; and was expressly decided by us in *McKeitham* v. *Terry*, 64 N. C. Rep., p. 25, and was the only point in that case. And subsequently we decided that where there was the lien of a trust deed the homestead law did not operate.

It is true that it is not only *decided* in *Gunn* v. *Barry* that vested rights were effected in that case, but it is also said that the Georgia homestead laws impair the obligation of contracts, and are therefore void. It is also conceded in *Hill* v. *Kessler*, and in all cases in our Court, that if our homestead laws impair the obligations of contracts, they are void, but our cases are all put upon the ground that our homestead laws do not impair the obligations of contracts. And it may very well be that the Georgia homestead laws do impair contracts, while North Carolina homestead laws do not. They are not at all alike. In order to show that the Georgia homestead laws do impair the obligation of contracts, the learned Judge in his opinion copies the Georgia exemption laws prior to the present homestead laws to show that they were very small—land not exceeding $200 in value, and personal property of small amount, and then he copies the homestead exemptions to show that they are very large, $2,000 land in fee simple, with all subsequent improvements in addition, and $1,000 personal property. And then the learned Judge says, "No one can cast his eyes over the former and later exemptions without being struck by the greatly increased magnitude of the latter." And thence the inference is, that the object of the later exemptions was not the securing of necessaries to men and their families, but to defeat debts.

Now compare our former exemption laws and our present homestead laws with those of Georgia. Our Act of 1856,

Rev. Code, exempt personal property, articles by name, which may be of the value of several hundred dollars, more or less, according to the circumstances of the debtor's family. And in 1866–'67, prior to the existence of the debt in the case before us, an Act was passed exempting "all necessary farming and mechanical tools, one work-horse, one yoke of oxen, one cart or wagon, one milch cow and calf, fifteen head of hogs, 500 lbs. of pork or bacon, 50 bushels of corn, 20 bushels of wheat, household and kitchen furniture not exceeding $200 in value; the libraries of attorneys at law, practicing physicians and ministers of the gospel, and the instruments of surgeons and dentists, used in their profession. Acts of 1866–'67, chap. 61.

It is apparent that an allotment of those articles approximate $1,000, and in many cases would exceed that sum in value. And the same Act allows a homestead of 100 acres, without restriction as to value, which in many cases would be worth, with the improvements, many thousands.

In 1868 our Constitution was adopted, and in that our present homestead law is limited to $1,000 realty, not in fee simple, but for a limited time, and personalty to the value of $500. Can it be said of our homestead law, as the learned Judge said of the Georgia law, that any one in casting his eye over them, as compared with former exemptions, would be struck by the magnitude of the increase? Our homestead law is not an *increase*, but a *restriction* upon former exemptions, and they were not made to *defeat debts*, but to *secure necessaries and comforts* to our citizens.

From this explanation it will be seen that the decision of the Supreme Court of the Uuited States in the Georgia case conflicts in nothing with our own decisions, but they are in exact conformity. The Georgia case decides two points: first, that in that particular case, the plaintiff had obtained a judgment on his debt, before the homestead laws were passed, and that in Georgia that judgment was a *lien* upon

the debtor's property, which he had at its rendition; and that thereby the plaintiff had a *vested right*, a *property*, which could not be destroyed or taken from one person and given to another. We distinctly conceded this principle in *Hill* v. *Kessler*, and we expressly decided it in *McKeathen* v. *Terry*. There is then no conflict on this point. There is, however, this difference between the law of Georgia as stated in the Georgia case and the law in North Carolina: a judgment in North Carolina prior to the Code has never been held to be such a lien upon property as to create a *vested right* or *property* in the plaintiff, or to divest the property out of the defendant, or to invest it in the officer. The only force of the lien has been to prevent the debtor from selling it. It requires not only a judgment, but a *levy* to change the *property*. *Ladd* v. *Adams*, 66 N. C. Rep., 164; *Norton* v. *McCall*, Ibid. 159.

The second point decided in *Gunn* v. *Barry* is that the Georgia homstead laws impair the obligations of contracts. We conceded, in *Hill* v. *Kessler*, that any law which had that effect was void. We said: "We concede that if this exemption impairs the obligation of contracts, either expressly or by implication, it is against the Constitution of the United States, and therefore void. * * * We concede also that a contract must be understood with reference to existing laws for its enforcement." And we said, also, that the State cannot abolish or injuriously change the remedy. It is not the decision of the United States Supreme Court, and our decisions, that are in conflict, but it is the Georgia homestead laws and North Carolina homestead laws that are unlike, as has been already shown.

I know that we cannot always look to the hardship of cases to guide our decisions—they are the quicksands of the law—but still it is proper to look to the effect of our decisions to enable us to see whether we are carrying out the purposes of legislation. What is the purpose of exemption

legislation? Is it to defeat debts? We have repeatedly said that this was not the object of our exemption laws, but that the purpose was to secure necessaries and comforts for our citizens. This is not left to inference, but our laws have themselves declared this to be the purpose. Rev. C., chap. 45, sec. 8. And this is paramount to all debts.

The Supreme Court of the United States in a late case, *Vann Hoffman* v. *The City of Quincy*, 4 Wal., 535, in speaking of exemptions which the State may make, says: "They may also exempt from sale under execution the necessary implements of agriculture, the tools of a mechanic and articles of necessity in household furniture. It is said regulations of this description have always been considered in every civilized community as properly belonging to the remedy, to be exercised by every sovereignty according to its own views of policy and humanity." And in a former case, *Bronson* v. *Kinzee*, 1 How. 311, TANEY, C. J., said the same thing, adding that "It must reside in every State to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well being of every community." And in *Planter's Bank* v. *Sharpe*, 6 How. 301., Mr. Justice WOODBURY, in delivering the opinion of the United States Supreme Court, enumerated exemption laws among the examples of legislation which might be constitutionally applied to existing contracts. The purpose of our legislation being to secure its citizens the "necessaries and comforts" of life, and this having been decided to be a legitimate purpose, and paramount to all debts, let us see in what condition our people would be if our homestead laws are declared to be void. Our homestead and personal property exemption Act repeals all other laws upon the subject. Therefore our debtor class are to be left without any exemption whatever. Not even a bed or a crust. Nor is there any relief in bankruptcy, because a large portion of the

debtors have not the means to pay the expenses, nor are their debts large enough to bring them under the bankrupt law.

And furthermore, the late amendment to the bankrupt law allows such exemptions in each State as the State law makes, and North Carolina exempts nothing.

And then we have it that exemption laws, which repeal former and larger exemption laws, and which are therefore better for the creditor, are declared void because they are too large and impair contracts. And here it is to be considered, if necessary exemptions are constitutional and unnecessary ones are unconstitutional, who is to judge of what is necessary? It would seem that the Legislature is the proper body. Legislatures have heretofore done it, and the Legislature of every State in the Union has done it. And in no single case has a Court ever done it. The nearest a Court has ever come to it is in the Georgia case, in which the Court says, that where there was an exemption of $200 worth of land, and it was increased to $2,000, the "magnitude of the increase" was palpable, and made it void. Suppose this case: A widow is allowed a year's support, say $100, and the Legislature alters the law from $100 to $200, would the courts undertake to say that it was unreasonable or unnecessary, and therefore void? If from $100 to $1,000 it would be palpable. Or suppose the same as to a debtor. I suppose the increase would have to be *striking*, and the want of necessity *palpable*. It would be verging on the ridiculous to say that the Supreme Court of the United States, or any other court, better knows the details of what is necessary for the "comfort and support" of the citizens of North Carolina than the Legislature of the State, or that it is a question of law, unless in palpable cases. And it would be inhumanity to say, that because the Legislature repealed one exemption law and substituted another and a lesser one, therefore the debtor should not have any exemp-

tion at all. And this, too, at a time when, owing to peculiar circumstances, probably one-half of the debtor class are owing more *old* debts than they can pay. Nor is this view irrelevant, because, as I have already shown in the quotations from the United States Supreme Court decisions, exemption laws are based upon "policy and humanity;" and they do not impair, but are paramount to debts. If under our circumstances our people are to be left without any exemptions, the policy of christian civilization is lost sight of, an we might almost as well return to the inhumanity of the Twelve Tables of the Roman law: "If the debtor be insolvent to several creditors, let his body be cut in pieces on the third market day. It may be cut into more or fewer pieces with impunity; or, if his creditors consent to it, let him be sold to foreigners beyond the Tiber." Cooper's Justinian, 655, App.

This, at least, might not involve his wife and children in his suffering; and besides, as long as the creditor chose to keep him in custody under the Roman law, he was obliged to allow him a "pound of meal a day." But, if our exemptions are declared void, then both the debtor and his family go without even his "pound of meal."

The opinion in *Hill* and *Kessler*, the leading case in our Court, was prepared with care, after much reflection and investigation; the conclusion arrived at was against my former impressions and prejudices, and against my pecuniary interest, but I was satisfied then, as I am now, that the decision was right. And it will be upheld as the law in North Carolina, unless and until the Supreme Court of the United States shall decide that the homestead laws of *North Carolina* are void.

There is no error.

PER CURIAM. Judgment affirmed.

A. C. COWLES, Adm'r *v.* P. HAYES and T. N. COOPER.

An irregular judgment may be set aside at any time, and an injured party is not confined to a year after he has notice of it. A motion to vacate such judgment is the proper course to pursue, giving the opposing party notice of such motion.

(*Keaton* v. *Banks*, 10 Ired. 381, cited and approved.

MOTION to set aside a judgment, heard before *Mitchell, J.*, at the Spring Term, 1873, of IREDELL Superior Court.

The plaintiff on the 27th day of January, 1873, gave the the defendants notice that he should move at the next term to set aside a judgment theretofore rendered against him, and re-instate the suit on the docket.

The facts as found by his Honor are: The plaintiff, as administrator of one James Howard, caused a summons to be issued and returned before a Justice of the Peace on the 12th day of February, 1870, against the defendants, to recover $156.65, alleged to be due by a note given by defendants at a sale of the intestate's property in the Spring of 1865, and before the close of the war. The plaintiff contended that the note was not liable to scale, but on the return day of the writ, the 12th of February, 1870, the Justice in the absence of the plaintiff, gave judgment for him against the defendants according to the scale, for $4.06 and for costs. From this judgment the plaintiff appealed, and the Justice sent up the papers to the Judge (without evidence), under section 539, C. C. P., and on the 20th day of August, 1870, the Judge at Chambers, (plaintiff being absent,) affirmed the judgment of the Justice, and from which judgment of affirmation the plaintiff did not appeal; but on the 20th of September, 1870, the plaintiff filed his petition for a *recordari*, alleging the facts as stated, and alleging that he arrived at the place of trial before the Justice, before 11 o'clock on the day of trial, (which his Honor found to be true,) with witnesses to prove the value of the property for which the

note was given, but that the Justice had already given judgment according to the scale, and refused to open the case or grant a new trial, and that the case had never been heard upon its merits. His Honor thereupon ordered the writ of *recordari* to issue, which issued 17th September, 1870, and at Spring Term, 1872, on motion, ordered the case to be put upon the civil issue docket for trial. The defendant appealed to the Supreme Court, and at Fall Term, 1872, the certificate of that Court in said case being filed in the Superior Court of Iredell county, the *recordari* was dismissed.

The plaintiff having previously given the defendants notice at Spring Term, 1873, (having made the same motion at Fall Term, 1872, which was referred for want of previous notice to defendants,) moved to vacate the judgment rendered by his Honor at Chambers, on the 20th of August, 1870, as being irregular and contrary to the course of the Court, and to cause the said appeal from the Justice to be placed on the civil issue docket of said Court for trial. His Honor vacated and set aside the judgment, and ordered the cause to be placed on the civil issue docket for trial at the next term.

From this judgment, defendants appealed.

Bailey, for appellants, submitted the following brief:

1. The notice is insufficent for vagueness.

2. Irregularity waived by want of promptness in making the motion. *McEvers* v. *Markler*, 1 John Cases 248; *Nichols* v. *Nichols*, 10 Wend. 560. This principle has always been applied to the analogies of *certiorari* and *recordari*, and ignorance of the practice is no excuse. *Moreland* v. *Sanford*, 1 Denio 660.

3. Sec. 133, C. C. P., is a substitute for the former practice touching the vacating of judgments, and is exclusive. The relief moved for is not obtainable under this section, as the

application is not made within one year after notice (the petition for *recordari*, which avers notice having been filed 20th September, 1870).

4. The ground of an appeal was an error in law. Such an error was either patent or latent, and might be manifested to the Judge in two ways: (1.) Where it appears on the face of the proceedings. (2.) By affidavit. This was admissible under the old practice in certain cases, *Ferrell* v. *Underwood*, 2 Dev. 111; *Carr* v. *Woodliff*, 6 Jones 400, because not records, and this Court has decided that Justice's proceedings under the new system are not records. Had the supposed error in law been manifest, his Honor, it is submitted, should have taken one of two courses: (1.) Held that there was no error, and affirmed the judgment, or, (2. That there was error, and reversed the judgment and ordered a *procedendo*. Why put it on the civil issue docket? If a plaintiff, merely because it is his appeal, has the absolute right to have it put on the civil issue docket, without regard to the character of the issue, it is submitted the constitutional jurisdiction conferred on Justice's courts is swept away; for then all a plaintiff has to do is to fail to appear at the trial, (as in our case,) or to fail to bring forward (of purpose) evidence to sustain his claim, and on being defeated, appeal; and thus by an obvious artifice, the policy of the Constitution, the current legislation approved by this Court (*Hedgecock* v. *Davis*, 64 N. C.) in confining trivial litigation to Justice's courts will be defeated! It is submitted that so far from encouraging such a practice, the Courts should be astute to nip it in the bud.

5. The plaintiff by failing to appear at the trial according to the express provision of the Code, waived a jury trial. C. C. P., sec. 520. So that the appeal stood like an appeal under the old system, where on appeal the defendant failed to plead, which authorized the Judge to try with or without a jury according to *Ramseur* v. *Harshaw*, 8 Ired. 480.

6. Our case is distinguishable from *Commissioners* v. *Addington*, and *Wells* v. *Sluder*, 68 N. C. Rep. In both, judgments were rendered *against* the plaintiffs, and in each more than twenty-five dollars was demanded, but in the principal case, although nominally $156.65 was claimed, it was on a note executed during the war, to-wit: 3d of March, 1865, (see copy of note on page 9, transcript.) According then to his own showing, the plaintiff claims substantially the amount reduced by the scale, and thus the conclusion that he was suing for more "is excluded." It is the same as if the plaintiff had only claimed in terms, $4.06.

7. The judgment was held to be a regular judgment by this Court when the case was here before. *Cowles* v. *Hayes*, 67 N. C. Rep. 128; *White* v. *Albertson*, 3 Dev. 341; *Bender* v. *Askew*, 2 Dev. 150, for definition of irregular judgment.

8. But supposing it to be irregular—the plaintiff has been guilty of gross laches at every step.

(1.) In failing to appear at the trial.

(2.) In failing on the appeal by affidavit or otherwise, to bring to his Honor's notice the latent error in law.

(3.) By failing to move to set aside the judgment within one year after notice.

Judgment rendered August, 1870. Notice issued 27th January, 1873.

Even after the judgment of this Court at June Term, 1872, the plaintiff allows a term to pass, and over six months to elapse before he notifies.

And this Court has held that even in applications to set aside judgments taken contrary to the course of the Court, the motion will only be granted, "provided the application for that purpose be made in proper time." *Winslow* v. *Anderson*, 3 Dev. & Bat. 9.

Armfield, contra:

When this case was before the Court at June Term, 1872, see 67 N. C. Rep. 128, the Court decided that as the paintiff appealed upon a claim for more than twenty-five dollars, the appeal ought to have been returned to the Court in term time, and not to the Judge at Chambers. Therefore the appeal being returned to Chambers was *coram non judice*, and the judgment was a nullity, and it was the duty of the Judge to treat the judgment as void, and order the case to be placed on the docket of the Superior Court for trial, as he has done.

RODMAN, J. It is clear from what was said in this case in 67 N. C. Rep. 128, that the Judge erred in undertaking to decide the appeal from the Justice on the papers merely, and out of term time. It was held also that the plaintiff was mistaken in his remedy when he applied for a *recordari* to the Justice, because having appealed, the case was no longer before the Justice, but in the Superior Court. His only remedy possible was by applying to the Judge to vacate the judgment, which he made at Chambers. That is the course which he is now taking. The motion is not made under sec. 133, C. C. P., the plaintiff does not ground his claim to relief on his own mistake, inadvertence, surprise, &c., but he puts it on the ground that the judgment of which he complains was irregular, and against the course and practice of the Court. An irregular judgment may be set aside at any time, and a party injured is not confined to a year after he has notice of it. *Keaton* v. *Banks*, 10 Ired. 381. By which is meant within any reasonable time, having regard to the rights of third persons as well as to those of the parties. The judgment was irregular, because the Judge undertook to decide the case himself, when, as the papers showed, the plaintiff was entitled to a trial upon the facts by a jury. We think the application to set it aside was made in a reasonable time.

The judgment below is affirmed and the case remanded to be proceeded in, &c.

Let this opinion be certified.

PER CURIAM. Judgment affirmed.

STATE and MARY HARGETT *v.* JESSE W. BROADWAY.

On the trial of issue of bastardy, the impotency of the putative father, if true and proven, would be a complete and satisfactory defence; it is therefore error in the Judge below to reject any competent evidence, introduced for the purpose of proving that the putative father was impotent at the time the child is alleged to have been begotten.

BASTARDY, tried upon issues, at Fall Term, 1872, of LENOIR Superior Court, before *Clarke, J.*

The case, as settled by counsel, states that in his charge to the jury, "his Honor went on to say that they need not inquire whether the defendant, Broadway, was able to get a child or not, for the son of the defendant was a witness and present in Court, by acknowledging whom, as his own, defendant admitted his ability to get a child, to which defendant excepted.

There was a verdict against the defendant, whereupon the defendant appealed to the Supreme Court."

Smith & Strong, for defendant.
Attorney General Hargrove, for the State.

SETTLE, J. The case settled by counsel is so imperfectly stated as to leave us somewhat in doubt as to the facts upon which his Honor gave the charge complained of.

But we take it that upon the trial of an issue of bastardy the defendant offered to prove that he was impotent at the

time the child was begotten, and that his Honor rejected the evidence, and in his charge to the jury said that "they need not inquire whether the defendant was able to get a child or not, for the son of the defendant was a witness and present in Court, by acknowledging whom, as his son, defendant admitted his ability to get a child."

The impotency of the defendant, if true and proven, would have been a complete and satisfactory defence to the charge, and it was no answer to that defence to say that he had been the father of another child at an earlier period of his life.

The age of the son, whom he acknowledged, is not stated, but as he was a witness in Court, we are to infer that several years had elapsed between his birth and the 20th of September, 1869, when Mary Hargett charged the defendant with the paternity of her child, then not born.

It will not do to infer that the vigor and manhood of youth is always an attendant upon more advanced years.

There was error.

PER CURIAM. *Venire de novo.*

T. J. JONES *v.* THE BOARD OF COMMISSIONERS OF BLADEN COUNTY.

Suits against the board of county commissioners ought to be brought in the county of which they are commissioners. (C. C. P., sec. 67.)

RODMAN, J., dissenting.

(*Johnson* v. *Commissioners of Cleaveland*, 67 N. C. Rep. 101: *Alexander* v. *Commissioners of McDowell*, Ibid. 330, cited and approved.)

CIVIL ACTION, tried by *Buxton, J.*, at Spring Term, 1873, of the Superior Court for CUMBERLAND county.

The suit was brought to the Spring Term, 1873, of the Court of Cumberland county, at which term the plaintiff, a

resident of that county, filed his complaint, seeking the recovery of a bond given by the chairman of the late Court of Pleas and Quarter Sessions of Bladen county, in December, 1864, for $16,000.

Defendants appeared by counsel and moved to dimiss the suit for want of jurisdiction, contending that the same should have been brought to the Superior Court of Bladen. His Honor being of that opinion, allowed the motion and dismissed the suit.

The plaintiff excepted to this ruling of the Court, because, 1st, the action being for a debt only, plaintiff can sue in the county where he resides; and 2d, because his Honor erred in dimissing the action. If the county of Cumberland is not the proper county, he ought only to have ordered a change of venue to Bladen county, and from the judgment of his Honor, plaintiff appealed.

B. and *T. C. Fuller* for appellant:

1. The action is well brought to the county where plaintiff resides, for

a. It is a transitory action, being for the debt only.

b. The venue in the action is not by any statute excepted out of the general rule.

Section 67, C. C. P., does not apply, because the action is not against public officers on account of anything they have done, but is against the municipal corporation for a debt owing to plaintiff.

Section 67 applies to penalties and forfeitures and suits in the nature of such, as is evident from the text and context. Clause 1 is for a penalty or forfeiture *eo nomine.* Clause 2 is virtually such by reason of its connection with the preceding—*noscitur a sociis*—and for the further reason that the action contemplated by that clause is not confined to public officers, but is extended also to the servants, or

agents, or assistants of the officer, clearly implying that the action must be for other acts than those which make a corporation only responsible for a debt.

In our case, the clerk (Blue) witnesses and seals the bond. Would an action lie against him for this act under section 67? The present commissioners are the successors of those who made the obligation. A suit for the *act* done would never lie against them, but must be brought against the parties doing the act.

2. It is admitted that if this action was for a *mandamus*, it ought to be brought in the county of Bladen, for 1st, it would then be for an act done by the defendants as public officers, viz: refusing to pay, or to levy a tax to pay the plaintiff's debt; 2d, it would be in the nature of a penal action, and the defendants would be subject to a penalty *as individuals* for their disobedience.

And upon this last point the Supreme Court started the doubt expressed in *Johnson* v. *Commisioners of Cleaveland*, 67 N. C. Rep., 101. This is put in a more positive form, and the point may be considered as settled in *Alexander* v. *Commissioners of McDowell*, Ibid, 330, as to action of *mandamus*. But it is submitted that the authority goes no further than to this and similar actions.

3. No particular stress is laid upon the way in which the objection is brought forward; and it may be that, in a proper case, when the matter urged appears on the face of the complaint, a motion to dismiss may be entertained. See *Kingsbury* v. *Chatham Railroad Company*, 66 N. C. Rep. 284.

But the Court below ought not to have dismissed the action. The most it should have done was to make an order to remove the trial to Bladen county. This certainly would have met all objections, and would have saved what has been done by way of amendment, which the Court

ought always to make. And this is the cause specially provided by sec. 60, C. C. P.

But the Court will not do even this *mero motu*, nor on motion, but only on the demand of the defendant in writing, before the time of answering expires. Section 69, *supra*. And it is to be noted that chap. 6, C. C. P., is a provision for the place of trial, differing from Rev. Code, chap. 37, which provides when actions shall be commenced.

Strange, N. McKay and *Sutton*, contra.

READE, J. C. C. P., sec. 67, provides that actions against public officers shall be brought in the county where the cause of action arose. And we have already said in two cases *Johnson* v. *Commissioners of Cleaveland*, 67 N. C. Rep. 101, and *Alexander* v. *Commissioners of McDowell*, Ibid. 330, that suits against county commissioners ought to be brought in the county of which they are commissioners.

That is the only point in this case.

There is no error.

RODMAN, J. *dissentinte*. I regret that I cannot agree with my learned associates, and as the question is of some importance, I will briefly give my reason, C. C. P., sec. 67 requires the action to be brought where the cause of action arose. The question is, where did it arise? The contract was made in Bladen; it was to pay money, not at any particular place, but generally, and on a certain day. In such a case I think the principle is settled, that the debtor is bound to seek the creditor if he lives within the State, and pay him where he may be. The failure to pay is the cause of action. It is true that in one sense the making of the note is the cause of action, as without it no cause of action could ever have arisen. But it is equally true that if General McKay had never made the bequest which caused the county to need to

borrow the money, the note sued on would never have been given. The law looks only to the proximate cause, for if it regards any beyond that, it undertakes to follow out an endless chain with innumerable branches.

The proximate, and in a legal sense, *the* cause of action was *the breach* of the contract, which occurred in Cumberland where the creditor lived, and where it was the duty of the debtor to make the payment. I know of no reason of public convenience or policy which puts municipal corporations upon a different footing from individual debtors, in respect to the duty of seeking the creditor. If they choose, they can make their notes payable at their own county town. But when the contract is to pay generally, it must be governed by the ordinary law.

We have no right to insert a stipulation which the parties did not.

PER CURIAM. Judgment affirmed.

W. H. HARRIS and wife, SUSAN A. *v.* WILLIAM CARSTARPHEN.

When a guardian has a settlement with his ward, shortly after the ward's maturity, in the absence of her advisers and friends, the law, founded in public policy, presumes fraud, and throws the burden of rebutting that presumption upon the guardian.

(*Williams* v. *Powell*, 1 Ired. Eq. 460; *Lee* v. *Pearce*, 68 N. C. Rep. 76, cited and approved.)

ORIGINAL BILL, under the old practice, transfered to the Superior Court of NORTHAMPTON county, and heard by his Honor, *Cloud, J.*, at January (Special) Term, 1873.

The plaintiff at Spring Term, 1867, filed in the Court of Equity of Northampton county, their bill against the defendant, who had been guardian of the *feme* plaintiff, praying

for an account and settlement under an order of the Court, &c.

It was charged in the bill that there was a large amount due the *feme* plaintiff; that on the 1st of October, 1865, the defendant, as guardian, settled with her, his ward, and transfered to her many claims which were at the time insolvent, and which had been obtained by defendant in some other manner than as guardian. That at the time of such settlement, the *feme* plaintiff, then *sole*, had just attained the age of twenty-one; and that she had been a ward of defendant, who had before married her mother, and was easily imposed upon and deceived by a person standing in such a fiduciary relation, and that she was deceived and imposed upon in the premises by the defendant, the said guardian and step-father; and that she was induced to sign a receipt in full of a settlement which is false, fraudulent, deceptive and incorrect.

It is further alleged in the bill that the defendant justly owed the plaintiffs some $8,000, whereas he paid over all in credits, many of them insolvent, only $4,865. That soon after the said pretented settlement, she intermarried with the plaintiff, Harris, which marriage was posponed by her guardian until after her arrival at twenty-one years of age, for the purpose of obtaining the receipt before alluded to from her.

At Fall Term, 1867, the defendant filed his answer to the said bill, in which was denied the material allegations therein contained, and alleging that he had administered his ward's estate with honest care and fidelity; especially denying that the receipt given by her was obtained by undue and fraudulent means, or that any unfair and improper influence was exerted to obtain it.

At Spring Term, 1861, it was referred to the clerk to state an account of all the property and estate of every kind that came into the hands of the defendant as guardian of the

feme plaintiff, together with all the money, rents, hires of negroes, interest and profits of all sorts, and also an account of the defendant's disbursements and expenditures as said guardian during the whole term of the guardianship.

At Spring Term, 1872, the defendant filed a petition in the cause, praying that the order of reference should be reheard, and be annulled and vacated.

The clerk to whom it was referred to state the account at Fall Term, 1872, made a report, to which both plaintiffs and defendants excepted. The exceptions at the present stage of the case are immaterial, as the decission of this Court is upon another and an entirely distinct point.

Upon the hearing at the January (Special) Term, 1873, the Court adjudged and decreed that the release set up by the defendant be set aside, and the account re-opened. From this judgment, the defendant appealed.

Smith & Strong, for appellant.
Barnes, and *Peebles & Peebles*, contra.

SETTLE, J. The defendant occupied the double confidential relation to the *feme* plaintiff of guardian and father-in-law, having married her mother.

On the eighth day after the ward's arrival at the age of twenty-one, he procured from her a receipt in full settlement of his guardian accounts.

She now alleges that the defendant, taking advantage of her ignorance and confidence, has greatly imposed upon her, and demands an account of his guardianship.

He sets up his receipt, or rather release in bar of all right of action. When a guardian has a settlement with his ward, shortly after the wards maturity, in the absence of her advisers and friends, the law, founded in public policy, presumes fraud, and throws the burden of rebutting that presumption upon the guardian.

The policy is "to prevent fraud, and not merely to redress it." Here the ward was invited to a settlement by the guardian, very soon after her maturity, and it was made in the presence of a single person to whom the ward was introduced for the first time when she entered the room to make the settlement.

We have no hesitation in putting this release out of the way, and giving the ward an opportunity to surcharge and falsify the accounts of the guardian; on the other hand, if the defendant has acted with the good faith and prudence demanded of a guardian, he will also have an opportunity of establishing it before the tribunals of the country. *Williams* v. *Powell*, 1 Ired. Eq. 460; *Lee* v. *Pearce*, 68 N. C. Rep. 76.

Let it be certified that there is no error.

PER CURIAM. Judgment affirmed.

STATE *v.* BENJAMIN KING.

The Constitution does not repeal section 2, chapter 34, of the Revised Code; it repeals only so much of it as imposes death as a punishment: *Hence*, one can be now indicted, convicted and punished for burning a mill-house in 1868.

INDICTMENT, for burning a grist mill, tried at Spring Term, 1873, of WAKE Superior Court, before *Albertson, J.*

The defendant was arraigned upon the following indictment, to wit:

"STATE OF NORTH CAROLINA,
"WAKE COUNTY,

"*In the Superior Court—Fall Term*, 1872.

"The jurors for the State, upon their oath, present that

Benjamin King, late of the county of Wake, on the first day of May, in the year of our Lord one thousand eight hundred and sixty-three, with force and arms at and in the county aforesaid, a certain grist mill-house there situated, the property of William Lynn, wilfully, felloniously and unlawfully did set fire to and burn, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of State.

COX, *Solicitor.*"

Defendant's counsel moved to quash the indictment, which motion being allowed by the Court, the same was quashed. From this judgment, the State appealed.

Attorney General Hargrove, for the State.
Battle & Son, for defendant.

RODMAN, J. The indictment found at Fall Term, 1872, charges that on 1st May, 1863, the defendant burned a grist mill wilfully and feloniously against the form of the statute. The Judge quashed the bill and the State appealed.

In 1863, the law punished the offense with death. R. C., chap. 34, sec. 2. In 1868, the Constitution (Article XI) enacted:

"Sec. 1. The following punishment only shall be known to the laws of this State, viz: death, imprisonment with or without hard labor, fines, removal from office," &c.

"Sec. 2. Murder, arson, burglary and rape, and these only may be punishable with death if the General Assembly shall so enact."

On 10th April, 1869, (Act 1868–'69, chap. 167, sec. 6,) the General Assembly enacted: "Every person convicted of any crime whereof the punishment has hitherto been death by the laws of North Carolina, existing at the time the present Constitution went into effect, other than the crimes

before specified (among which is not included the one here charged) shall suffer imprisonment in the State's prison for not less than five, nor more than sixty years."

The counsel for the defendant contends that he cannot be punished by the Revised Code, for that has been repealed by the Constitution, or by that in connection with the Act of 1869. Nor by that Act, because it is not retrospective. Nor by the common law, because by that the offense was only a misdemeanor, and the prosecution of a misdemeanor is barred after two years.

The learned counsel refers us to Dwar. Stat. 677, which cites *Rex* v. *McKenzie,* Rup. & Ry. C. C. 429.

That case was this: The defendant was indicted for private stealing in a shop on 11th July, 1820. The statute of 10 and 11, W. 3 C. 23, which was then in force, deprived persons convicted of such an offense of the benefit of clergy. The statute, 1 Geo. IV, ch. 117, was passed 25th July, 1820, and in terms repealed the Act of W. 3, and enacted that from and after the passing of the Act every person convicted, &c., should be transported for life. The Judges held that neither statute was applicable to the offense, but the prisoner must be punished for a common larceny.

We think the counsel takes a mistaken view of the intent and effect of the Constitution.

The effect of his interpretation of secs. 1 and 2, of art. 11, would be that immediately upon the adoption of the Constitution, all offenses which were punishable otherwise than by fine and imprisonment, (including murder, arson, burglary and rape) would cease to be punishable at all, until a punishment should be anew prescribed by the Legislature. We say, including murder, &c., for it was evidently the intention of section 2, that these offenses should cease to be punishable with death, unless the Legislature should so enact. It is true the counsel does not push his proposition quite so far; he admits that the common law punishment

could be imposed, provided the offense was not out of date. But it cannot have been the intention of the Constitution to restore, for the interval which must have been foreseen between its adoption and the action of the Legislature, the common law punishments, for among these were whipping and the pillory, the very punishments which it was most anxious to prohibit.

To interpret these two sections we must look at section 24, article 4, which says that the laws not repugnant to the Constitution shall be in force until lawfully altered, and section 1, of article 14, which says that indictments that have been found, or may hereafter be found, for any crime or offense committed before the Constitution takes effect, may be *proceeded upon in the proper Courts*, but no punishment shall be inflicted which is forbidden by this Constitution.

"Proceeded upon," &c., of course, means proceeded upon to judgment, which includes the condemnation to some punishment. The punishment shall not be death, for that is forbidden for this offense, but it may be any not forbidden, (including imprisonment with hard labor) which it shall be, remains necessarily in the discretion of the Court, at least until the Legislature shall control its discretion by a law.

The Constitution does not repeal section 2, of chapter 34, of Revised Code; it repeals only so much of it as imposes death as a punishment for this offense; the act remains a crime subject to any lawful punishment. The distinction between a statute which wholly repeals a former one creating or punishing a crime, and one which only takes away or alters the punishment is a plain one. If the second statute takes away the punishment, and the offense was not one at common law, the first statute is in effect repealed. If, however, there was a punishment at common law, that

punishment is restored. That was the case of *Rex* v. *McKenzie.*

We think there is an existing punishment beyond fine and mere imprisonment, which is applicable to the offense, and that the indictment should not have been quashed.

The remaining question whether the Act of 1869 applies to the offense, is of small importance, as it only controls the discretion of the Court as to the minimum of punishment. The language is broad enough to cover a prior offense, and we are inclined to think it was so intended. As it lessens the punishment applicable when the offense was committed, the Act is not *expost facto* in the legal sense.

PER CURIAM. Judgment reversed and case remanded.

J. C. BRYAN *v.* O. HUBBS.

A sheriff is bound to return every process which come to his hands, not void, with a statement of his action under it; and if he has not completely obeyed it, with a lawful reason for his omission.

The Act of Assembly, 1870-'71, chapter 42, by which executions issued on judgments in civil actions, are required to be tested as of the term next before the day on which they are issued, is merely directory, and its omission does not vitiate the process.

Until the entry on the judgment docket by the clerk, no appeal from a judgment rendered in term time is effectual, and such entry must be within ten days after the judgment is so rendered. Notice of such appeal may be given in a reasonable time afterwards.

The undertakings necessary to perfect an appeal may be given within a reasonable time after notice of the appeal has been given. And after such appeal has bsen perfected, it is the duty of the clerk to give notice thereof to the sheriff, in order that any excution which may have issued may be superseded.

Until the sheriff receives notice that the execution has been superseded, he is to obey it according to its tenor. On receiving such notice, it is his duty to stop proceeding, and to return the writ with a statement of his action under it, and the reason for his ceasing to act.

MOTION for judgment *nisi*, heard by *Clarke, J.*, at the Spring Term, 1873, of CRAVEN Superior Court.

Defendant was sheriff of Craven county, and received on the 4th day of March, 1873, an execution in favor of the plaintiff, against one William Foy, returnable to the Spring Term, 1873, of the Superior Court, which commenced on the 24th day of March, 1873.

This motion is for a judgment *nisi* against the sheriff, the defendant, Hubbs, for failing to make a "due return."

The return made on the execution is in the following words: "The within execution stayed by order of J. Edwin West, clerk of the Superior Court of Craven county," March 12th, 1873.

The defendant objected to the motion, upon the ground that the execution was void in two particulars: 1st. That it commanded land to be sold, whereas it had only twenty days to run. 2nd. That it was not tested of the term next before the day upon which it is issued, and in fact bore no test.

The stay was ordered by the clerk according to the papers filed, to-wit: His order staying the execution was based on the undertaking, a copy of which is sent up.

His Honor, being of opinion that the execution was void for want of a test, refused the motion for a judgment *nisi*, whereupon the plaintiff appealed.

Battle & Son, for appellant:

1. The execution here not void, because not tested of preceding term.

It conforms to rule 21, of this Court, adopted June Term, 1869, which was subsequent to Act of March, 1869, chapter 76, section 10, directing executions to be tested of preceding term, and the Acts of January, 1871, chap. 42, sec. 10, and

December, 1872, chap. 14, but extends the Act. This shows that the Court concedes that provision to be directory.

Certainly, process conforming to a rule of this Court cannot be void under such circumstances.

A sheriff, being a ministerial officer, cannot be bound to examine into the legality of writs, but must execute them according to the exigency. Watson on Sheriffs, 54; *Cody* v. *Quin*, 6 Ired. 191; 3 Bac. Abrid. 687.

What end is attained by testing executions of preceding term, under our new practice? Docketing judgments constitutes a lien on land, C. C. P. 254. No lien is required on personalty until levy; *cessatio ratione, &c.* Executions upon judgment of Justices, docketed in Superior Court, can be tested of no term, with any good reason; nor can such as issue upon judgments in special proceedings. Under the old practice, the priorities of executions depended upon the *teste;* now, the *teste* has no effect except as showing on the face of the execution the time of docketing judgments, as constituting a lien on land of judgment debtor; and in *alias* executions it does not have that effect.

The clerk, having issued the execution, was *functus officio.* He has no power to stay or enjoin executions. Such power is in the Judge. *Hunt* v. *Snead*, 64 N. C. Rep. 176. *McAdoo* v. *Benbow*, 63 N. C. Rep. Const. N. C., art 4, sec. 17.

To prevent executions from issuing upon a judgment for money, an undertaking with *two sureties* must be given within ten days. C. C. P., sections 304, 309, 310. One surety is sufficient on bond for costs, Act 1871, amending C. C. P., sec. 303; but this does not stay execution for the debt.

Here appeal was taken in open Court with notice to plaintiff; second security did not sign the undertaking and justify until March 14th, after execution issued.

It was the duty of the sheriff to execute the process, it having gone into his hands twenty days before Court (return day). He might have levied upon and sold person-

alty, and if none, he could have levied upon real property. At any rate, he should have made *due return*. What is *due return*, as to substance and form, is a question of law. *Waugh* v. *Brittain*, 4 Jones 470.

Sheriff here returns execution stayed, March 12th, when second surety signed and justified only on the 14th.

Haughton, contra:

1. The execution should have been *tested* of the preceding term. Act of 1870–'71, chap. 42, sec. 7, page 94. Otherwise it is so far void as to excuse the sheriff. Arch. Plead. 258; Comyn's Dig. 2; 2 Lord Raymond 775; 1 Sellon's Practice 520.

2. Defendant gave good security for the debt; *ergo*, *fi. fa.* issued according to law.

See sec. 300, C. C. P. Execution shall not be suspended until the giving the undertaking, 302, 306 and 308. Whenever an appeal is perfected it stays all further proceedings in the Court below upon the judgment appealed from. 310. Exception to sufficiency of sureties must be within ten days after notice of appeal. 312. These provisions shall apply to appeals to Supreme Court, and also as to stay of execution. Rules of Practice of this Court. 63 N. C. Rep. 667. Rule 11 uses the words "sufficient surety," and in a "sufficient sum." This is either a construction of the C. C. P., on this subject or an alteration, as allowed by sec. 394, C. C. P.

The object of the law and the purpose of this Court is, that the appellee shall be properly secured; that is all that he can ask, and all that the law requires. This statute is directory. *Bloom* v. *Benedick*, 1 Hill, 130; *People* v. *Cook*, 14 Barb. 290.

If the Act is performed, but not in the time, or in the *precise* mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the

statute. Cooley 78, and note cited on same page. *Marsh* v. *Cohen*, 68 N. C. Rep. 286.

RODMAN, J. The defendant contends that the execution was void, and imposed no duty on him to make a return.

I. Because there was only twenty days, or less, from the issue to the return day.

Answer. A sheriff is bound to obey every process (not void) which comes to his hands, as far as he lawfully can. He is therefore bound to return every such process with a statement of his action under it, and if he has not completely obeyed it, with a lawful reason for his omission. It is true that in this case the defendant could not have sold the lands of the defendant, because an advertisement of thirty days was necessary. It is also true that he was not required to levy on the lands of defendant. Since the law gives to a docketed judgment a lien on all the real property of the defendant, a levy has no use. But he might have levied on the goods of the defendants, if he had any, which he should have returned, or he should have returned that he had none, or other lawful excuse for the omission. The fact that the execution was stayed on the eighth day after it was issued, (assuming that the stay was lawful, and would have excused inaction after that day,) will not of itself excuse an omission to execute the process by levying on the goods of the defendant prior to that day, unless the return shows some reason for the failure. The return therefore was not a due one, unless the execution was void for some other reason alleged.

II. It is contended that the execution was void for want of a clause saying that it was issued at the last term of the Superior Court, which clause is called a *teste*. It is conceded that this clause was not required by C. C. P. (1868), but it is contended that it was made indispensable by the Act of 1870-71, chap. 42, sec. 7. (See also Acts 1868-'69, chap 76,

sec. 11.) This says: "All executions issued on judgments in civil actions shall be tested as of the term next before the day on which they issued, and shall be returnable to term of the Court next after that from which they bear test, &c. Before C. C. P. (1868), this formality had an effect. The lien of the execution ran from the *teste*. But as the law stood in 1872, and as it now stands, if observed, it is absolutely without any reason, aim or effect; the lien on land being from the docketing of the judgment, and that on personalty from the levy. The will of the Legislature ought to be obeyed even in small and useless forms. But we cannot suppose that the Legislature intended to make such an idle form so indispensable a part of an execution, as without it, the writ should be void.

Besides, the enactment cannot in all cases be obeyed. If a judgment be taken at a regular term and execution immediately issue therefrom, it will be made returnable to the next regular term; but if a special term be called in the meanwhile, the execution would cease to be returnable to the next term. And if it should be known to a plaintiff that a special term will occur, and he issues his execution returnable to that, then the defendant will not have from one regular term to another, for the payment of the judgment, but possibly a very much shorter time; a result which is opposed to the whole spirit of the Act, and probably never occurred to the draughtsman. And so, as is said by the plaintiff's counsel, in an execution upon a justice's judgment docketed, a *teste* would be false and repugnant.

We think the Act in question in this respect is merely directory, and the omission of the form was only an irregularity which might have been amended at any time, and did not vitiate the execution.

III. We now come to the more important question; was the return insufficient, either in that the certificate of the clerk of 12th March, was not a lawful excuse for omitting

to proceed further upon the execution after its receipt or from any other defect?

This involves these questions:

1. Within what time must the undertakings to appeal be given?

2. Has the clerk power, upon the proper undertaking being given, to stay the further action of the sheriff upon an execution previously issued?

3. What is the sheriff's duty in such a case?

Some uncertainty seems to exist among the profession on the matters covered by these questions, and to answer them will require us to consider the whole subject of the practice on taking and perfecting appeals.

1st. C. C. P., sec. 300. An appeal must be taken within ten days after the rendition of a judgment in term time. Sec. 301. "Within the time prescribed in the preceding section, the appellant shall cause his appeal to be entered by the clerk on the judgment docket, *and notice thereof to be given to the adverse party.*" The rest of the section prescribes how the case is to be settled, and is not material. On this clause it is to be noted that the appeal is taken by causing it to be entered on the judgment docket. It is the clerk's duty to enter it, if requested, within the ten days. Until such entry, no appeal is taken; without that as a foundation all subsequent proceedings are irregular. No doubt, in *a proper case,* the record could be amended after the ten days, or at any time, to speak the truth. Nothing need be said on that subject. The more pertinent question however, is, whether notice of the appeal must be given within the ten days. It is clear that the appeal must be entered within the ten days. It is also clear that notice of the appeal must be given. *But must it be given within the ten days?* We think it need not be, and for this plain reason, that as the party has until the last minute of the time to take his appeal in, the notice of it, which must (unless where the mere entry

of the appeal is notice, as in practice in most cases it would be under sec. 80, C. C. P.,) take some time, and may possibly take more than ten days, may, from the necessity of the case, be given after that time. Where two things are required to be done in succession, and a certain time is allowed for doing the first, the second must be permitted to be done after that time. Consequently we think the notice of appeal (where not given merely by the entry, as it may be under sec. 80), may be given in a reasonable time afterwards.

What is a reasonable time, is to be determined by the purpose (which here is the settling the case), and the circumstances. In general, it may be said that any time will be reasonable, which allows ample time afterwards for the proceedings for settling the case, and for sending up the appeal in due time. It may be observed here that this construction is supported by the consideration that nothing is effected by merely giving notice of appeal. If the appellant does not proceed to have his case settled, his appeal and notice are vain; and so if he fails to give the undertakings required. There can be no reason therefore for requiring notice of appeal, or the submitting of a case, or the giving an undertaking for costs, all of which are necessary before the appeal can be sent up to be done in any fixed certain time. The reason of the thing would seem to be satisfied by requiring these things to be done in a reasonable time, so that the purpose may be accomplished without inconvenience or injury to any party. The successful party loses nothing by any delay, his excution is not suspended. Provided the appeal is perfected so that it may be heard in due time and course, every object is attained without inconvenience to any one. It may here be said too that when the appellant presents his case to the respondent under sec. 701, that is necessarily notice of the appeal, and there is no obligation to give it earlier, and no reason for doing so if the purpose

be only to send up the case. Before the appeal is perfected even for the sending up of the case, an undertaking for costs, &c., must be given under sec. 303. A copy of this, with the residences of the sureties, must be served as provided in sec. 80, and the appeal may then be sent up. It would seem that where the amount to be secured was so small (rarely if ever exceeding $50) it might safely be left with the clerk to pass on the sufficiency of the surety. But until the law shall be altered it should be followed. We do not say that in all cases the giving of the residences is essential, but the service of a copy certainly is.

We now come to the proceedings having for their object to suspend execution.

The undertakings required by sections 304, 305, 306, 307, must be given and they cannot be considered as effectually given until notice is given as required by sections 309 and 310. But the mode of giving notice is governed in this as in other cases by section 80. No certain time is prescribed, at least, none is directly prescribed, within which these undertakings shall be given. It is contended that it must be implied from sections 309 and 310, that these undertakings must be given within ten days after taking the appeal when that of itself is notice, or at least within ten days after any subsequent notice of the appeal whenever that may have been given, *because* the respondent is allowed ten days "after notice of the appeal," within which to object to the surety. We think this is a misconstruction, because it would be very inconvenient and opposed to the general spirit of the Act, without any reason. The spirit and reason of the act is, 1st, That the appellant may have his case reheard in the appellate Court in every case where it can be done without prejudice to the successful party, whose claim by the judgment in his favor, is *prima facie*, a rightful one; 2d, That the successful and *prima facie* rightful party shall not be deprived of the security which his judgment and execu-

tion give him until other adequate security is substituted. What difference can it make in reason, and looking at these purposes, at what time the adequate security is substituted, provided it be done in a reasonable time, that is to say, within a time which answers every purpose of the Act, without inconvenience to any party. The construction contended for, by confining the power to perfect an appeal to ten days after judgment, would restore almost the inconvenience and absurdity of the old practice, by which a party was compelled to appeal during the term from a judgment which might happen not to be given until the last instant of the term. Moreover, where the object is to allow the respondent ten days within which to object to the sureties, the expression seems strange which directs the time to begin to run from notice of the imperfect and intended appeal, and not as one would naturally expect from notice of the *appeal perfected* by giving the required undertakings. The words, "notice of the appeal," are equivocal; they may mean notice of the intended appeal, or notice of the appeal perfected by the notice. We conceive this last to be the true meaning of section 310, and that the time allowed the respondent is ten days from notice of the perfected appeal, which is given by a copy of the undertaking with the residences of the sureties without which the undertaking is ineffectual. With this construction this section affords no reason for saying that the undertakings shall be given within any certain time. They may be given within a reasonable time, and what that is has been already stated. It is that which will give the respondent the full benefit of his judgment if it be affirmed, and no reason is now seen why it may not extend up to the giving of judgment in the appellate Court.

2. Then the question arises, if the clerk had issued execution before the perfecting of the appeal, what is his duty when the appeal is perfected?

The effect of it is, to stay all proceedings. Secs. 308, 311,

The only way in which the apellant can get the benefit of these sections is by giving notice of his perfected appeal to the clerk and sheriff. It is true that the clerk has notice that the undertaking has been given, but he *may* not have notice that notice of it has been given to the respondent, sec. 80. When he has notice of the perfected appeal (by the performance of both Acts), no reason can be seen why he should not give notice of the perfected appeal to the sheriff. There can be no propriety in applying to the Judge for an injunction. The case does not constitute one in which, by C. C. P., sec. 189, an injunction is allowed. The giving the undertaking and notice is, by the statute, a suspension of further proceeding. We think, therefore, it is the clerk's duty to give notice to the sheriff that the appeal has been perfected, by which execution is superseded.

3. *What is the sheriff's duty before and after receiving notice that appeal has been perfected so as to supersede execution?* His duty while the execution is in his hands is to obey it according to its tenor. On receiving official information that the execution has been superseded, it is equally his duty to stop proceedings (as required by sections 308, 311) and to return the writ with a statement of his action under it, and the reason for his ceasing to act.

To apply these views to the present case. The return of the sheriff is insufficient: 1. Because it does not show a levy on the goods of the defendant, or any excuse for the failure. 2. Because the certificate of the clerk does not state that the defendant, in the execution, had perfected an appeal, but only that he had taken an appeal and undertaking *approved* by the clerk.

The judgment below is reversed, and being interlocutory, the case is remanded to be proceeded in, &c.

The plaintiff will recover costs in this Court.

PER CURIAM. Judgment reversed.

HENRY CAUBLE v. JOHN A. BOYDEN.

The finding of certain facts by a Justice of the Peace, on the trial of an action in which the recovery is for less than $25, is final, and not the subject of review by the Judge or the Superior Court.

CIVIL ACTION, tried by his Honor, *Cloud, J.*, at Chambers, November 20th, 1872, at the Superior Court of ROWAN county.

Plaintiff brought his action in a Justice's Court, for the recovery of $35, due for work and labor done.

The defense was, that there was a written contract concerning the work, the terms of which had been complied with by defendant, he insisting that such fact excluded the introduction of parol evidence. The Justice found as a fact, that after the completion of the terms of the written contract, a parol contract was made, and allowed the plaintiff to prove it, after objection by defendant.

Judgment was rendered in favor of the plaintiff for $23.75, from which defendant appealed. Judge CLOUD affirmed the judgment, and defendant again appealed.

Bailey, for appellant.
Jones & Jones, contra.

RODMAN, J. The plaintiff brought an action before a Justice in the nature of a *quantum meruit*, for work and labor done. The defendant alleged that it was done under a written contract, which had been paid in full, and offered the contract and receipt of the plaintiff in evidence. The Justice excluded it. This exclusion must have been because the Justice found as a fact that the work claimed for, was independent of the contract, and that the contract did not touch plaintiff's claim. His judgment on this point (being on a matter of fact) was final, the sum found due being less

than $25, and was not subject to review by the Superior Court or the Judge.

We do not understand the record to say that the Judge undertook to review it. He states, as we understand him, that he found that the Justice had found the fact that the plaintiff's claim was outside of the written contract, and that notwithstanding the contract, plaintiff was entitled to recover $23.75. He therefore affirmed the judgment of the Justice. There was no error in this.

Judgment affirmed, and judgment here accordingly.

PER CURIAM. Judgment affirmed.

M. L. DAVIS, Administrator of J. H. DAVIS *v.* C. J. FOX, Administrator of A. C. WILLIAMSON, and others.

The administrator of a deceased guardian cannot maintain an action on the bond of a clerk and master for a fund alleged to be due to the ward.

CIVIL ACTION, tried before *Logan, J.*, at the Spring Term, 1873, of the Superior Court of MECKLENBURG county.

Plaintiff's intestate, J. H. Davis, was guardian of one N. J. Lee, and during the minority of his said ward certain lands were sold by order of the Court of Equity of Mecklenburg county, and the proceeds of sale was paid into the office of the clerk and master of that Court. A. C. Williamson, the intestate of the defendant, Fox, was the clerk and master at the time, and never paid over the money belonging to the ward, either to the guardian or to any one else, for said ward. The other defendants were the sureties of the clerk and master, or the representatives of such sureties.

On the return of the summons the defendants demurred to the complaint of the plaintiff, assigning as grounds for

the demurrer that the plaintiff, as administrator, had no such right to the funds of the ward of his intestate as will authorize him to bring a suit for the recovery of those funds.

His Honor overruled the demurrer, and gave judgment for the amount due the ward and interest. From this judgment the defendant appealed.

Jones and *Johnston*, with whom was *Bailey*, for plaintiff:

There is a defect of parties plaintiff:

1st. The summons shows that the action is brought in the name of M. L. Davis, administrator, and not in the State's name to his use. The State "was the trustee of the express trust," "the contract of defendants was made with the State for the benefit" of those injured by its breach, C. C. P., sec. 57, and therefore the State should have been a party plaintiff. *Mebane* v. *Mebane*, 66 N. C. Rep., p. 334.

2d. If the Court be of the opinion that under C. C. P., sec. 55, that the "real party in interest" is the proper party plaintiff, then on that view, defendant says that the ward, who was of age when the suit began, is the "real party in interest," and was entitled to receive this money and release the defendants.

3d. That this money being the proceeds of the sale of the ward's interest in his fathers lands, was still considered *real estate*. *March* v. *Berrier*, 6 Ired. Eq., p. 524, and the administrator of the guardian was not entitled to it. *Bateman* v. *Latham*, 3 Jones Eq. 35.

The administrator only takes those things in which his testator or intestate had a beneficial or absolute interest in, and which he would be bound to apply as personal estate. Ired. Ex'rs, p. 483, 474, 570, 579, and notes; Williams on Ex'rs, p. 1,514, 1,515; *Williams* v. *Maclain*, 1 Ired. Eq. 92.

4th. The judgment of the Court was *quod recuperet*, when

it should have been *respondeat ouster*. It is submitted that the Act of 1871-'72, chap. 173, amending, sec. 131, C. C. P., restores the rules of equity pleading, and alters the construction given to sec. 131, in the case of *Ransom* v. *McLeese*, 64 N. C. Rep., p. 17.

Dowd, contra :

1. A demurrer for want of title in plaintiff, or of "legal right to sue," will not be sustained unless the want of such title, or "legal right to sue," appear on the face of the complaint. See *Bank of Charlotte* v. *Britton*, 66 N. C. Rep. 365, *non constat*, but that plaintiff's intestate may have settled with his ward, and thus become the real and only party in interest; and this he may show on the trial.

2. But the action is properly brought, even if it appeared affirmatively that plaintiff's intestate was only interested as guardian, entitled to commissions, or liable for negligence. *Biggs* v. *Williams*, 66 N. C. Rep. 427; *Mebane* v. *Mebane*, Ibid. 334; *Davidson* v. *Elms*, 67 N. C. Rep. 427; C C. P., sec. 57.

3. The demurrer being over-ruled on its merits, it was discretionary with the presiding Judge to allow the defendant to answer, notwithstanding Acts 1870-'71, chap. 173. That Act substitutes *shall* for *may*, but does not erase the word *discretion*; the act as amended reads *shall in his discretion*: which still leaves it very properly in the breast of the Judge to say whether the defendant may plead according to the circumstances of the case, as for instance whether defendant's attorney will state upon honor that he has a substantial defence, &c.

4. The defendant cannot have costs in this Court if he was, or yet is entitled to answer, because he did not ask to be allowed to answer. It was not error to render judgment if the defendant did not ask leave to answer. *Mebane* v. *Mebane, supra.*

PEARSON, C. J. We are of opinion that the first exception of the defendant to the ruling below, is well taken, to-wit: The plaintiff as administrator of the deceased guardian, cannot maintain an action on the bond of the clerk and master for a fund alleged to be due to the ward. The action should be brought by the ward if she be now of age, or in her name by a second guardian, if she is still a minor. The administrator of the deceased guardian has no interest or concern with the fund, for which the clerk and master in equity and his sureties may be liable. The matter which concerns him, is to have a settlement in regard to the money received by his intestate as guardian, in which settlement will, of course, be included commissions, vouchers, &c. The administrator cannot maintain an action for a fund that his intestate ought to have collected. On payment of the amount he will have an equity, to be allowed to sue in the name of the ward, in order to have indemnity out of the bond of the clerk and master, but until such payment, he has no *status* in a Court of law or equity, except as the representative of a guardian who was in default.

Error; this will be certified.

The other exceptions are not noticed, as they may be cured by amendment.

PER CURIAM. Judgment reversed.

WILLIS P. BARNES and others *v.* W. J. BROWN, and wife and others.

Where, by the finding of a jury, it is left an open question, whether a certain debt secured by a mortgage, has not been in part paid, the mortgagor, or those representing him, have the right to have the fact of such payment and its proper application at the time made, found by the jury; and for that purpose, the case will be remanded from this Court, and the issue made up and responded to by a jury in the Court below.

CIVIL ACTION tried at the January (special) Term of the Superior Court of the county of ROBESON, before his Honor, *Buxton, J.*

The plaintiffs, who are children and heirs-at-law of Hardy Barnes, deceased, brought this action against the defendants, the children and heirs-at-law of Reuben King, deceased, to Fall Term, 1871, to compel the said defendants to convey to them the legal title to two lots, Nos. 95 and 96, in the town of Lumberton, of which the plaintiffs alleged they owned the equity of redemption. The plaintiffs likewise sought to recover rents and profits.

The fact as disclosed by the record are, Hardy Brown, the ancestor of plaintiffs, and owner of the lots, the 13th December, 1853, conveyed the same to Reuben King, the ancestor of the defendants, by mortgage, to recover the sum of $850, which he owed King. Brown being further indebted to others, on the 27th of December, 1853, a few days after the mortgage, executed a deed in trust to the Hon. R. S. French, trustee, for the purpose of securing the payment of certain debts therein described, and which conveyed to the trustee for that purpose, the two lots, Nos. 95 and 96, before spoken of, and 350 acres of land besides. In this deed of trust, the trustee was directed to sell the property conveyed, if the debts secured thereby was not paid before the 1st June, 1854. The debts not being paid by the the time limited, the trustee, as directed, on the 13th September, 1854, sold the property, and King, before mentioned,

became the purchaser of all of it, to-wit: the lots, Nos. 95 and 96, at $1,000, and the 350 acres of land at $995, making the aggregate of $1,995, which sum King paid to the trustee, who applied it in payment of the debts directed by the trust. French, the trustee, on the 13th September, 1854, executed to King, the purchaser, a deed in *fee simple* for the said lots and lands. This deed was not proved nor registered until 8th May, 1869, sometime after the death of King.

On the 28th January, 1869, King and wife made a need in *fee simple* to W. H. Barnes, a son of Hardy, and one of the plaintiffs for the 350 acres of land, in consideration of $400, of which sum, at the date of the deed, $200 was due. And during his last illness, King made a will, in which he devised the lots to his married daughter, Amanda, wife of J. W. Brown, both defendants.

The plaintiffs allege, that while the deed from the trustee, French, to King, was absolute on its face, yet there was an understanding and parol agreement between Barnes and King, whereby, as soon as Barnes should pay the mortgage debt of $800, and the $1,995, paid to the trustee, King would reconvey all the property, lots and land to him. That those sums were paid to King in the lifetime of Barnes. The plaintiffs insist that inasmuch as King retained the title to the lots, Nos. 94 and 96, up to the time of his death, that they, as heirs-at-law of Barnes, are now entitled to a reconveyance from the heirs-at-law of King, or from his devisees, the defendants, W. J. Brown and wife, Amanda, and also to an account for rents and profits for use, &c.

In support of the allegation of their complaint, the plaintiffs called Mary, the widow of Hardy Brown, their ancestor, and also one of the plaintiffs of record, as guardian of D. W. Barnes, a minor child of the said Hardy. She testified that between the years 1856 and 1858, she made two payments to King for her husband, one of $300 and another of $600.

She expected the payments were made on the mortgage debt. It was then proposed on the part of the plaintiffs to prove by her the declarations of King in regard to the matter. Objected to by defendant, because, being a party and having a right of dower, King being dead, the testimony was excluded by section 343, C. C. P., page 129. His Honor sustained the objection, holding that the witness could speak of the payments and of what occurred at the time they were made, as a part of the *res gestæ*, but of no other conversation with King. Plaintiff showed a release from the witness of all her right of dower, and any and all her interest in the recovery. His Honor still held the testimony, incompetent and the plaintiffs again excepted.

The defendants denied the allegations in the plaintiffs' complaint, and insisted that the lots, Nos. 95 and 96 were the absolute property of W. J. Brown and wife, as devisees of King, and introduced testimony to support the defenses set up in their answer.

After the close of the evidence, the plaintiffs asked his Honor to charge:

1. That upon the execution of the mortgage by Barnes to King, 13th December, 1853, King became the legal, and Barnes the equitable owner of the land in controversy; and that that relation could not be changed, but remains the same until the mortgage is redeemed or foreclosed.

2. That when King purchased of French, the trustee, the mortgaged premises, he is considered in law as having purchased for the benefit of the mortgagee, not the equity of redemption, but a mere incumbrance on the land, and that a verbal contract to purchase and hold until Barnes could redeem, does not come within the statute of frauds, but may be enforced.

By the defendants, his Honor was asked to charge the jury:

1. That a verbal agreement, even if proved, between King

and Barnes, that King would reconvey to Barnes the title he got from French, the trustee, would be null and void by reason of the statute of frauds, and could not be enforced.

2. While denying there was such agreement, yet if there was, it was void for want of a consideration, King having paid his own money for the property.

His Honor, after stating the testimony, remarked that he would reserve his opinion on the questions of law raised by the counsel, and submitted to the jury, to respond to the following issues:

1. Was there a verbal agreement between King and Barnes that so soon as Barnes should pay King the amount secured by the mortgage of the 13th December, 1853, to wit: $800, together with the $1,995, the purchase money paid by King to French, and the interest accruing thereon, that King would reconvey by deed in fee to Barnes and his heirs the lots, Nos. 95 and 96?

2. Has the money been repaid to King in full?

The jury found the negative of the issues submitted, and against the plaintiffs, who submitted to the Court that they were entitled to an account *non obstante veredictu.*

His Honor being of opinion that the incidental relief shared the fate of the principal relief prayed for in the complaint, and was rendered unattainable by the findings of the jury on the issues submitted to them, refused the motion for an account and gave judgment against the plaintiff for costs.

Rule for a new trial; rule discharged; judgment and appeal.

At the request of the appellants, the whole of the evidence taken in the case was appended to the statement made for this Court. This evidence being unnecessay to an understanding of the Chief Justice's opinion is omitted.

N. McLean and *W. McL. McKay*, for appellants.
Strange, Leitch and *N. A. McLean*, contra.

PEARSON, C. J. In response to the second issue, the jury find "that the money has not been repaid to R. King *in full.*" This leaves the question open whether the money has not been repaid to R. King "*in part.*" There were two amounts, $800 secured by mortgage to King, and $1,995 paid by King to French as the price of the equity of redemption, and of a tract of 350 acres, not embraced in the mortgage.

Assume, as we must do from the finding of the jury, that the two amounts have not been paid in full, how does it appear that the $800, or the greater part of it, was not paid to R. King after he bought the equity of redemption, which was in 1854. Mary A. Barnes testified: "Between the years 1656 and 1858 I made two payments for my husband to Reuben King, one for $300, and the other for $600. I paid the money I expect on the mortgage debt."

If this be true, it gives a very different aspect to the case from the one upon which his Honor based his decision, where King paid $1,995 for the equity of redemption, and the 350 acre tract, it was assumed that that the property was worth the price given for the equity of redemption over and above the mortgage debt. So if the transaction was a naked purchase of the equity of redemption, King having the legal title before, and acquiring by his purchase the equitable title, became the absolute owner as well in equity as at law. The $800 and interest was the price of the legal estate, and the amount paid for the equity of redemption was the price of the equitable estate.

Taking this to be so, as the defendants insist, upon what ground did King afterwards receive the $300 and the $600? He could only have received the money on the idea that his was not a naked purchase of the equity of redemption,

but was connected with a trust that Barnes was to have back the land on repayment in full; at all events it would give the plaintiff a right to have the money refunded.

Under the rules, without sending the case back, the Court directs this further issue.

"Did Reuben King, between the years 1856 and 1858, receive of Hardy Barnes by the hands of Mary A. Barnes, his wife, the sum of $300, and also the sum of $600, or any other amounts, to be applied in satisfaction of the mortgage debt, or of any other debt in in reference to the land.

This will be certified, and the case retained for the finding of the issue.

PER CURIAM. Decree accordingly.

STATE *ex rel.* D. BRYANT & BRO. *v.* LEMUEL H. MORRIS.

In action against a surety on a constable's bond, alleging certain breaches of the condition of the bond by the constable, now dead, the plaintiff is not a competent witness to prove any transaction or conversation between himself and such deceased constable, in regard to the matters in controversy.

(*Halliburton* v. *Dobson*, 65 N. C. Rep. 88; *Isenhour* v. *Isenhour*, 64 N. C. Rep. 640, cited and approved.)

CIVIL ACTION, on a constable's bond, tried at the July (special) Term, 1872, of HALIFAX Superior Court, before *Moore, J.*

The action is brought upon the bond of one Junius H. Morris, constable, against the defendant, one of the sureties thereto, (the said constable being dead). In his complaint, the relators alleged two breaches of the condition of the said bond, to-wit: "1. That the said constable had collected certain claims put into his hands for collection as constable, and had not paid over the money to the relators, to whom

it was due. 2. That said constable had negligently failed to collect certain other claims placed in his hands for collection, when the debtors were solvent and able to pay; and that the debtors afterwards became insolvent and unable to pay the debts, whereby the claims were totally lost to the relators.

On the trial, the execution of the bond, dated 17th February, 1867, by defendant as surety, and by the constable, was admitted, and also that the said constable signed the receipt, in which were set out the claims to be collected.

It was proved that Junius H. Morris, the constable, was dead. His personal representative was not a party to this suit.

The relators offered to prove by one of themselves, to-wit: D. Bryant, that he placed in the hands of the said constable for collection certain accounts amounting to $ —, for which he took the constable's receipt. This evidence was objected to on the part of the defendant, on the ground that the constable being dead, the relator was not a competent witness to prove these facts; and for the further reason that the evidence, if admitted, tended to vary the contract between the parties, which was contained in the receipt, and was therefore inadmissible, as the receipt was not signed by him *as constable*. The objection was overruled, and the evidence admitted. Defendant excepted.

Bryant, the relator, then proved that he placed in the hands of the constable the following accounts, against the parties therein named, (unnecessary to be detailed) and that the receipt before alluded to was given for them. Defendant objected to the evidence, which being allowed, he excepted.

The relator, Bryant, also testified, after objection by defendant, that he had several conversations with Morris, the constable, who told him that he had collected a large number of the claims, naming several of them. Defendant again excepted to the introduction of this testimony. In

the course of the examination of this relator, the Court after objection, permitted plaintiff's counsel to ask leading questions as to each of the accounts, as for example: Sandy Merrit's account. "Do you know if, whether the constable collected any portion of said claim, if so, how much?" And so on.

Bryant, the relator, also proved that he ordered the said constable to attach the cotton of one of the debtors, one Stallings, which was then at Enfield, but he, the constable, did not do it. This evidence also objected to; received, and exception by defendant.

One Partin was then called for relators, who had been their clerk, who proved that the statement of the accounts as contained in a book then exhibited, was in his handwriting, and that the accounts were all due to the relators, and were placed in the hands of Morris, the said constable, for collection. One of the debtors mentioned in plaintiff's receipt, also proved that he had paid his account to the constable.

It further appeared that several of the said debtors were, in 1867, solvent, and continued so for 12 months, and that Morris was acting as constable in the year 1867.

The defendant's counsel insisted before the jury that the evidence of one of the relators, as to facts occurring in 1867, was not sufficient to warrant a verdict in favor of relators; that there was other evidence, proven to be accessible to relators, to prove their case, and the non-introduction of this testimony, was a matter for the jury to consider, and they must be satisfied by relators before they, the jury, could find a verdict in their favor.

His Honor charged the jury that the relators were not bound to introduce any other evidence than their oaths; and if the jury were satisfied with the evidence as given in, they would find a verdict in their favor. That in cases of the utmost importance, the jury were justified in finding a

verdict on the testimony of one witness, and such witness interested, and it was for them to say how they would find on the evidence introduced before them. Defendant excepted to this charge. No special instructions were asked by either party.

The following are the issues submitted to the jury, with their response to each.

1. Did the said constable fail through negligence to collect any of said claims, if so, to what amount?

The jury find this issue in favor of defendant.

2. Did the plaintiffs, before the commencement of this action, make a demand upon said constable, if so, at what time?

The jury find this issue in favor of the plaintiffs.

3. Did the parties mentioned in the complaint, as debtors to Bryant & Bro., owe the amounts charged against them?

The jury find this issue in favor of plaintiffs.

4. Were the claims placed in the hands of Morris, to collect as constable?

This issue also found for plaintiffs.

5. Did the said constable collect any portion of said debts, and has he failed to pay over the amount collected?

The jury find this issue in favor of plaintiffs, as to claims amounting to $607.21, with interest on $454.28 from this time.

Judgment in accordance with the verdict, and for costs. Defendant appealed.

Conigland, and *Batchelor, Edwards & Batchelor*, for appellant.

Devereux, contra:

The testimony of the relator, Bryant, was properly admitted. For the bondsmen of Morris stand in none of the relations to the deceased that are enumerated in the *proviso*

to sec. 343, C. C. P. *Whiteside* v. *Green*, Administrator, 64 N. C. Rep. 310, 311.

READE, J. If the plaintiff had sued the administrator of the dead constable, he could not have testified as to any transaction between him and the deceased so as to affect his estate. C. C. P. S. 343.

But the defendant is not sued as administrator, but as surety of the dead constable, and the question is whether the plaintiff can testify as to transactions between himself and the deceased, which affect the defendant as his surety. It is said that he ought not to be allowed to do this, because whatever he recovers of the defendant as surety, the defendant can recover of the estate of the deceased constable.

This would seem to be so; and therefore to allow the evidence against the surety is to allow it indirectly against the principal, which is the evil meant to be guarded against by the exception in the statute. So that while the objection to the evidence is not within the *letter*, it is within the *spirit* of the statute.

Halliburton v. *Dobson*, 65 N. C. Rep. 88; *Isenhour* v *Isenhour*, 64 N. C. Rep. 640.

There is error.

PER CURIAM. *Venire de novo.*

SALLY C. WHITEHURST and others *v.* A. W. GASKILL and JOHN G. ROBERTS.

The mortgagee, being the legal owner of the land mortgaged, is the person to whom notice must be given by the sheriff of a levy and sale of such land for unpaid taxes.

CIVIL ACTION, tried before *Clarke, J.*, at June Term, 1873, of the Superior Court of CARTERET county, upon the facts contained in the following CASE AGREED :

On the 2d February, 1858, the defendant, A. W. Gaskill, being indebted to one David W. Whitehurst in the sum of $350, executed a mortgage of certain land to secure the payment of said debt, five years after date, at which time the mortgage was to become absolute.

The mortgage was registered the 19th of February, 1859. Gaskill, the defendant and mortgagor, remained in possession, (though there was no express stipulation in the deed that he should do so,) and listed the lands therein conveyed for taxes for the year 1870. The taxes not being paid, the sheriff levied on it, and returning his levy according to law, the land was ordered to be sold.

The levy was duly made, the sheriff complying with all the requirements of the law. He gave the required notice of the levy and sale to Gaskill; and on the 7th day of January, 1871, he sold the land for the said taxes, when the defendant, Roberts, became the purchaser, taking a receipt for amount of taxes and costs, describing the land, &c., which receipt was registered. The owner having failed to redeem, the sheriff on the 5th of February, 1872, executed a deed for said land to Roberts, which was also registered the 18th of March, 1872.

The mortgagee, David W. Whitehurst, died in the year 1865, leaving a will, which was duly proved, and in which he devised all his lands to the plaintiff, Sally, for life,

remainder to the other plaintiffs, except John M. Perry, who qualified as administrator with the will annexed of the estate of said David.

No notice of the levy on the land or of the day of sale was ever served on the plaintiffs by the sheriff or any other person.

Upon the foregoing facts, his Honor gave judgment of foreclosure in favor of plaintiffs; and directed that unless the defendants should pay the said sum of $350, with interest thereon from the 2d of February, 1858, within twenty days from the 2d day of June, 1873, the clerk should, after advertising thirty days, expose the said lands at public sale at the court-house in Beaufort.

From this judgment, defendants appealed.

Hubbard, for appellants:

Insisted that no notice to the plaintiffs was necessary. The Act rrquiring notice to be given is merely directory; and a purchaser at a sheriff's sale acquires a title to the land sold, even though the sheriff did not advertise. 1 Murph. 311.

Haughton, contra:

Relied on *Taylor* v. *Allen*, 69 N. C. Rep. 346; *Potts* v. *Blackwell*, 4 Jones Eq.; *Avery* v. *Rose*, 4 Dev. 549; *Register* v. *Bryan*, 2 Hawkes, 17. Cooly on Const. Lim. 521, and notes.

READE, J. The question is whether the plaintiff, who represents the mortgagee was, entitled to notice of the sale of the land for taxes. The statute is express, that notice shall be given, and the only question is who is the proper person to be notified.

The mortgagee is the legal owner of the land, and has a

substantial interest in it, and is the person entitled to the notice. The sale in this case was therefore void, and the plaintiff was entitled to the order of foreclosure and sale made below.

The taxes were, however, a charge upon the land, and as the defendant, Roberts, paid off the taxes, he has a lien upon the land for the amount so paid. With this modification, the order below is affirmed.

This will be certified that further proceedings may be had according to law, and the rights of the parties administered according to this opinion.

Neither party will recover cost in this Court, but each party will pay his own costs.

PER CURIAM. Judgment accordingly.

WILLIAM R. BRIDGERS v. LEMUEL T. BRIDGERS.

The jurisdiction of a Justice of the Peace when necessary to be proven, being a question of law, cannot be proved by witnesses (if properly objected to), but must be determined by the Court.

A party objecting to the introduction of evidence must state with certainty the points excepted to; and if the ground stated for such objection be untenable, it is error to reject the evidence, though inadmissible if properly objected to.

(*Stout* v. *Woody*, 63 N. C. Rep. 37, cited and approved.)

CIVIL ACTION, tried before *Cloud, J.*, at the January (special) Term, 1873, of NORTHAMPTON Superior Court.

Plaintiff brought this suit to recover damages for slanderous words spoken by defendant of and concerning the plaintiff, charging him with having sworn to a lie in a certain trial before a Justice of the Peace.

On the part of the plaintiff one Bridgers Odom was introduced as a witness, who proved that he was present at the

trial of a warrant had before one Jesse Flythe, a Justice of the Peace, in which the defendant was a party, and the plaintiff here was sworn as a witness, and in speaking of the trial and examination, the slanderous words complained of were uttered by defendant. This evidence was given without objection.

The plaintiff then introduced Jesse Flythe, the Justice of the Peace, who stated that a warrant was tried before him as a Justice of the Peace, between one Daniel E. Bridgers and the defendant. He was then asked by plaintiff's counsel if the subject matter of the said warrant was within his jurisdiction?

This evidence was objected to by the defendant upon the ground that it was secondary evidence, and that the warrant and proceedings must be produced, and parol evidence could not be given, unless it appeared that diligent search had been made, and they could not be found. This objection was sustained and the evidence rejected.

There was a verdict for the defendant and judgment accordingly. Appeal by plaintiff.

Barnes, for appellant:

The evidence offered and excluded by the Court, was *primary* and not *secondary*. The proposition was not to prove the *contents* of the warrant, for a warrant does not state upon its face that the Justice has jurisdiction, but it was to prove that the subject of investigation or trial was within his jurisdiction, and this might appear only upon investigation of the testimony. For instance, a warrant upon its face might claim the payment of a debt of $200, and upon the production of the note it might be for $300, and thus, upon the examination of the testimony only, would it appear that a Justice had no jurisdiction of the case. "Evidence that carries on its face no indication that

better remains behind, is not secondary but primary, and though all information must be traced to its source if possible, yet if there be several distinct sources of information of the same fact, it is not ordinarily necessary to show that they all have been exhausted before secondary evidence can be resorted to." Gren. on Ev., sec. 84.

Whether a Court has jurisdiction of a particular matter is a question of law arising upon a particular state of facts. Now, cannot the Judge of a Court who hears the evidence and decides the question of his jurisdiction as a matter of law, prove in some other proceeding had between the parties the fact that he had such jurisdiction? Can this fact be proved only by the record? It would seem that the other source of information, to wit: the evidence of the presiding Judge, would be equally conclusive, and that both kinds of evidence were primary.

There are three classes of cases in which oral cannot be substituted for written evidence:

1. Oral evidence cannot be substituted for any instrument which the law requires to be in writing.

2. Oral proof cannot be substituted for the written evidence of any contract which the parties have put in writing.

3. Oral evidence cannot be substituted for any writing, the execution of which is disputed and which is material to the issue between the parties, and is not merely the memorandum of some other fact. Green on Ev., sections 86, 87 and 88. When the writing does not fall within either of these classes, there is no ground for excluding oral evidence. Ibid. sec. 90, and the cases there cited.

If the proposition had been to prove the contents of the warrant by parol testimony, it would have been admissible, for that in this trial was a collateral question. When the contents of a paper comes collaterally in question such writing need not be produced, but parol evidence of its contents

will be received. *Pollock* v. *Wilcox*, 68 N. C. Rep. 46: Ibid. 412; *Reinhardt* v. *Potts*, 7 Ired. 403.

In an action for slander, charging the plaintiff with perjury in a particular suit, he is not bound to produce the record of that suit. *McDowell* v. *Murchison*, 1 Dev. 7. Not bound to prove that the Justice was commissioned and yet that matter is contained in a writing. *Pugh* v. *Neal*, 4 Jones 369.

Peebles & Peebles, contra.

READE, J. This was an action for slanderous words. The defendant had charged the plaintiff with "swearing to a lie" in a trial before a Justice of the Peace, in which plaintiff had been examined as a witness.

In order to prove that the Justice had jurisdiction, the plaintiff introduced the Justice and asked him the question: "Did you have jurisdiction of the subject matter which you were trying?"

This was objected to by the defendant, and ruled out by his Honor. Whether the question was proper, is the only point in the case.

The plaintiffs' counsel in his brief says: "Whether a Court has jurisdiction of a particular matter is a question of law, arising upon a particular state of facts." Take that to be so, and it is so, and it would seem to follow that the question was improper; because we do not prove what the law is by witnesses. Nor do we prove mixed questions of law and fact by witnesses. It would have been proper to ask the Justice what was the matter which he was trying? And he could have stated the *facts*, as, for instance, that he was trying a demand for $500, for work and labor done, and then a question of law would have arisen for his Honor to decide, whether the Justice had jurisdiction of that sum. But the plaintiff did not ask the Justice to state the facts,

but to state a conclusion of law from an unknown state of facts. This was clearly improper.

But still the question remains, ought his Honor to have rejected the evidence? He certainly ought not to have rejected it, if it was not objected to by the defendant. Nor ought he to have rejected it, although objected to by the defendant, unless the objection was put upon the proper ground. We have already seen that it was objectionable on the ground that the Justice was called upon to prove a qustion of law. But this objection was not taken by the defendant. He objected "upon the ground that it was secondary evidence, and that the warrant and proceedings ought to have been introduced." He did not object generally to the question, but he "*pointed*" his objection. And in this way he misled both the plaintiff and his Honor. *The ground* upon which he put his objection is untenable, and he must be held to that.

If the defendant had said, I object to this witness testifyfying as to a question of law, we may reasonably suppose that both the plaintiff and his Honor would have seen the force of the objection. And then the plaintiff could have avoided the objection by asking the witness as to the facts and leaving the law to his Honor. Or if his objection had been *general*, it might have led to the same result. But his objection was *special*, and untenable, and calculated to mislead.

In Chitty's Practice, vol. 4, p. 14, the requisites of a bill of exceptions is given: "It must state the circumstances upon which it is founded, or that a particular witness was called to prove certain facts; * * * the allegation of counsel on the admissibility or effect of the evidence, the opinion of the Judge and the exception of counsel to that opinion and the verdict." And it is further said that "where the object for which evidence is offered, but rejected, is obvious, and must have been understood by the Judge

and jury, it is not necessary that that object should be specially stated." And in Cowen & Hil'ls Notes to Phillips on Evidence, p. 778, it is said that the exception must be "so specific as to point to the precise error intended to be relied on, for the Court is not bound to do more than respond to the motion of objection made. They are under no obligations to modify the propositions of counsel so as to make them suit the case, but may dispose of them in the terms in which they are propounded." And again, it is said "the party excepting must lay his finger on those points," &c. And in *Stout* v. *Woody*, 63 N. C. Rep. 37, it is said that exceptions must "*specify* the errors complained of."

The same principle permeates all the pleadings and proceedings in the administration of justice.

There must be *certainty*. Every thing that is calculated to mislead, or is obscure, is bad.

There is error.

PER CURIAM. *Venire de novo.*

JOHN P. HAUGHTON *v.* J. P. NEWBERRY.

An action for the recovery of the possession of personal property, (in the nature of *detinue* under our old system,) will not lie against one who was not in possession of the property at the time the action was commenced.

Nor can a plaintiff in such action, under a general prayer for "other relief," recover the judgment warranted by the facts proven. For althongh the names and technical forms of actions are abolished by the Constitution, yet in the very nature of things, there must be distinctions in respect to the remedies applicable to different cases.

(*Lea* v. *Pearce*, 68 N. C. Rep. 78, cited and approved.)

CIVIL ACTION, tried before *Watts, J.*, at the Spring Term, 1873, of the Superior Court of CHOWAN county.

The facts as appears of record are: In 1863 the defendant took possession of a boat, which was claimed by the plaintiff; and during that year he, the defendant, came to the plaintiff and offered to purchase the boat, stating at the time, it was in his possession. Plaintiff refused to sell.

Plaintiff was absent from the State until the Fall of 1868. In 1870, ascertaining where the boat was, he demanded its possession of defendant, who informed him that he had since purchased the boat from the executrix of T. L. Skinner, deceased, and would not surrender it unless repaid the purchase money. Plaintiff afterwards saw and identified the same boat (his property) in the possession of one Mariner, to whom the defendant had sold it.

In December, 1871, this action was commenced.

His Honor upon calling the case at Spring Term, 1873, having intimated an opinion that the plaintiff's right to recover was barred by the statute of limitations, plaintiff excepted.

Defendant asked the Court to charge that this is an action of *trover*, and inasmuch as there was no proof that the boat was in possession of the defendant at the time of the demand by the plaintiff since the war, the plaintiff could not recover. His Honor so held, and the plaintiff excepting, submitted to a judgment of non-suit, and appealed.

A. M. Moore, for appellant.
J. A. Moore and *Gilliam & Pruden*, contra.

PEARSON, C. J. It is alleged by the complaint that the defendant was in possession of the boat at the commencement of the action, and judgment is demanded for the recovery of the possession of the boat, and damages for its detention, as in the action of *detinue* under the old system.

On the trial the fact turned out to be that the defendant was not in possession of the boat at the commencement of

the action, but had sold it and passed the possession to one Mariner. Upon this state of facts, his Honor intimated an opinion that the plaintiff could not recover, and the plaintiff submitted to a non-suit, and appealed.

We do not concur with his Honor, in either of the particular positions he assumed at the instance of the defendant's counsel. The action set out in the complaint is certainly not an action of "trover," and had it been an action of trover the plaintiff would have been entitled to recover the value of the boat by way of damages for wrongful conversion; but we do concur in his general conclusion, that as the case then stood the plaintiff could not recover, and an affirmance of the judgment may furnish an illustration of the idea, that "two negatives sometimes amount to an affirmative."

There was a fatal variance between the allegation and the proof. In face of the fact, that the defendant did not have the possession at the time of the commencement of the action, as a matter of course the plaintiff was not entitled to the judgment demanded by the complaint, to-wit: To recover the possession of the boat, for under that judgment the writ of execution would command the sheriff to deliver the boat to the plaintiff, and Mariner, who was a purchaser, upon the "*lis pendens*," would be deprived of his possession by a judgment in an action to which he was not a party; so that, as the pleading then stood, his Honor was obliged to hold that the plaintiff could not recover; upon this intimation the plaintiffs counsel should have admitted that the action was misconceived, because of his mistake as to the fact that the defendant was not (as he had supposed) in possession of the boat at the time of the commencement of the action, and that instead of demanding judgment for the recovery of the possession of the boat, he ought to have demanded judgment for the value of the boat, by way of damages, as in action of trover, and thereupon asked leave

to amend the complaint so as to conform it to the proof which would have been allowed without costs, as the defendant could not have been misled by the misprision, C. C. P., sections 128, 129, 132. But instead of this, he takes an appeal, for the supposed error, in ruling that as the pleading then stood, the plaintiff could not recover.

The position taken in the argument here, is, that although the plaintiff was not entitled to the judgment demanded in his complaint, yet if the facts proven showed that he had a cause of action, the Judge ought to have disregarded the allegations and demand of judgment set out in the complaint, and given such judgment as the facts showed that the plaintiff was entitled to, without reference to the pleadings or form of the action, in analogy to the procedure in courts of equity, by which under "the general prayer for relief" the plaintiff, although not entitled to the relief specifically prayed for, has a decree for such other relief as he may be entitled to. This innovation is put on the ground that by the new Constitution, the distinction between action at law and suits in equity, and the forms of all such actions and suits are abolished, and there shall be but one form of action. In other words, the position of the learned counsel is, that under the new order of things, a plaintiff may make any allegation he pleases, and demand any judgment that suits his fancy, and although at the trial he fails to prove his allegations and to show that he is entitled to the judgment demanded, yet if upon the evidence he has any cause of action whatever, he shall have judgment according to such cause of action. The proposition is so startling to one accustomed to certainty in judicial proceedings as to be difficult to approach; an attempt to draw an analogy from the procedure in equity is far-fetched; for, in courts of equity, the evidence is all in writing. The Chancellor tries the facts as well as the law, and can take his own time for it; whereas, in the mixed tribunal under the Constitution

of 1868, the trial of issues of fact is for a jury. The Court is to decide issues of law only, and the jury must, during the term, pass upon the issues of fact. How can the Judge under our system, consider a matter to be a fact, unless it be so found by the verdict of a jury, or be admitted by the parties? In *Lea* v. *Pearce*, 68 N. C. Rep. 78, it is said, "the provision in our present Constitution by which the distinction between actions at law and suits in equity is abolished, and the subsequent legislation effects only the mode of procedure, and leaves the principle of law and equity intact."

In this case we say, the provision in our present Constitution by which it is ordained, "The distinction between the forms of action at law and suits in equity is abolished, and *there shall be but one form of action*, and the subsequent legislation effects only the mode of procedure, and leaves the principles which form the nature of the procedure must of necessity be applied, whether in a court of law or of equity intact." For illustration, the Constitution in conferring jurisdiction upon Justices of the Peace, restricts it to civil actions *founded on contract*, thus recognizing the jurisdiction which in the nature of things must exist between actions *ex contracto* and *ex delicto*, as expressed in the old mode of procedure. So the Code of Civil Procedure, which professes to carry out this ordinance of the Constitution, of necessity recognizes the distinction that must exist as to the principles applicable to the different actions or remedies fitted for the many state of facts in the cases that are of daily occurrence; and although it is ordained by the Constitution there shall be but one form of action," it was manifest from the nature of the subject to the framers of the Constitution, that this could not be literally carried into effect. Accordingly, by an ordinance of the Convention, commissioners are appointed to prepare a code of practice and procedure. So the Code of Civil Procedure is a statute in which the Convention that framed the Constitution took

the initiative, for the reason that although the *names* and *technical forms* of action are abolished, yet in the very nature of things there must be distinction in respect to the remedies applicable to differing cases. A recognition of a difference in causes of action and the judgment appropriate to the cases respectively, was a matter of necessity; hence, the C. C. P. recognizes the distinction between actions founded on contracts and on torts; on injuries to the person or to property—on an injury to land by wrongfully withholding the possession or by breaking the close, treading down the grass, &c., or an injury to "goods and chattels," by detaining them from the owner, or by destruction or conversion, as in our case. Were it otherwise, the plea of former judgment for the same cause of action could never be maintained, without a resort to parol evidence to show upon what state of facts the judgment had been rendered; defendants never would know what complaint they would be called on to make; in fact the ills and inconveniences that would result from such loose pleading, or rather "no pleading," are innumerable.

Ample room is made for the amendment of pleading, so as to conform it to the facts as proved in every case, thus preserving certainty in pleading, and at the same time giving effect to the true intent and meaning of the Constitution, which was not to abolish "the noble science of pleading as a means necessary for the administration of justice," but simply to divest it of the forms and technicalities by which it had become disfigured.

There is no error.

PER CURIAM. Judgment affirmed.

ROBERT WOOTEN *v.* JOHN S. MAULTSBY and A. MUNROE.

A judgment is rendered on a note against the maker, B, a citizen of Cumberland, in favor of the payee A, a citizen of Lenoir; the judgment is assigned, and after assignment, C, also a citizen of Lenoir, writes his name across the back of the note. In a suit by the assignee against B and C on the judgment: *Held*, that B and C were improperly joined in the action: *Held further*, that if C's name had been stricken from the process the Justice had no jurisdiction.

CIVIL ACTION, commenced in a Jusice's Court and carried by appeal to the Superior Court of LENOIR county, where it was tried before his Honor, *Clarke, J.*, at the Spring Term, 1873, of said Court.

All the facts pertinent to the point decided, and which are necessary to an understanding of the decision, are fully stated in the opinion of the Court.

Below the jury found a verdict in favor of the plaintiff. Judgment thereon, and appeal by defendant.

Merrimon, Fuller & Ashe, for appellant.

No counsel *contra* in this Court.

RODMAN, J. This action began against Munroe and Maultsby by warrant from a Justice of the Peace in Lenoir county, in which Munroe lived. Maultsby lived in Cumberland county, and the warrant was certified to that county by the clerk of the Superior Court of Lenoir, and executed by the sheriff in Cumberland.

The cause of action was a Justice's judgment obtained against Maultsby by Clark & Woodward on the 2d of November, 1855, for $44.40 and costs, upon which several payments were afterwards made. The judgment was on a note payable to Clark & Woodward, and in 1872, long after judgment had been recovered on it, and after the judgment had been assigned to the plaintiff, Munroe wrote his name on the back of the note. The plaintiff recovered judgment

before the Justice against both the defendants. Maultsby appealed to the Superior Court, and there a *nolle prosequi* was entered as to Munroe.

The defendant Maultsby contended:

1. That he and Munroe were improperly joined as defendants, the causes of action being distinct and separate.

2. That the process against him was void or irregular, and the Justice of Lenoir had no jurisdiction.

The makers and endorsers of bills of exchange and promissory notes, or any of them, may be joined as defendants, C. C. P., sec. 63. But Munroe was not the endorser of a promissory note. The note had long before been merged in the judgment, it was no longer negotiable or capable of endorsement. If he made any contract with the plaintiff at all, it was one of guaranty, which was altogether distinct from the obligation of Maultsby, and with which he had no connection. Maultsby never promised either expressly or by implication to Munroe.

The joinder is not allowed by sec. 126, C. C. P., and was good ground for demurrer. The *nol. pros.* as to Munroe did not cure the original fault. An amendment by striking out the name of Munroe altogether, would have done so. But that would leave no color of authority for the issuing the process to the county of Cumberland under the Act of 1871–72, chap. 60, p. 100.

It certainly seems as if the joining of Munroe as a defendant, was an attempt irregularly to bring Maultsby before a Court which had no jurisdiction to try him. The Superior Court should have sustained the demurrer, and if the plaintiff amended, then set aside the process as irregular, and dismissed the action.

PER CURIAM. Judgment reversed, and action dismissed.

DANIEL COGDELL, Assignee, *v.* WILLIAM J. EXUM.

An assignee in bankruptcy may sue or be sued in the Courts of the State, on claims for or against the estate of the bankrupt, our Courts having concurrent jurisdiction with the U. S. Courts in the premises.

As a general rule, every Court has ample power to permit amendments in the process and pleadings of any suit pending before it; but the Courts have no such power, when an amendment proposed to be made, will evade or defeat the provisions of a statute.

A, a bankrupt, brings a suit in his own name against B, on the 19th day of September, 1870; on the 11th of March, 1872, A's assignee in bankruptcy, C, who was appointed the 25th of February, 1869, is made party plaintiff in the suit commenced by A: *Held*, That the right of action against B accrued to C, the assignee, at the time of his appointment, and that he was barred by the limitation contained in section — of the bankrupt act.

(*Whiteridge* v. *Taylor*, 66 N. C. Rep. 273; *Phillipse* v. *Higdon*, Busb. 380; *Christmas* v. *Mitchell*, 3 Ired. Eq. 535, cited and approved.)

CIVIL ACTION, tried before *Tourgee, J.*, at the December (Special) Term, 1872, of the Superior Court of WAYNE county.

The summons in this case was issued by Z. L. Thompson, the then plaintiff, in September, 1870, who in his complaint alleged that the defendant held and had held a tract of land in trust for him ever since May, 1868, and demanded an account for rents, &c., and also a conveyance of the land.

Defendant, 4th February, 1871, filed his answer denying the material allegations in the complaint, and charging that the plaintiff, Thompson, had been adjudicated a bankrupt.

On the 6th of December, 1872, a replication was filed admitting the bankruptcy, but denying the statements contained in the answer.

At the trial term, December, 1872, the defendant was permitted to file an amended answer, of which the following is a copy: "And the defendant, by way of amendment to his answer, alleges that the supposed cause of action of the plaintiff, Daniel Cogdell" who had at Spring Term, 1872, been made a party plaintiff) "assignee in bankruptcy of the said Zadoc L. Thompson, did not accrue to him, the

said Daniel Cogdell, within two years next before the time, at which he, the said Cogdell, was made the party plaintiff to this action, nor within two years before the bringing of the same. Wherefore defendant demanded judgment for costs," &c.

Thompson, the original plaintiff, was adjudged a bankrupt, December 19th, 1868, but has not yet been discharged. The Register's deed to the assignee, Cogdell, is dated 25th February, 1869, and registered in the Register's office of Wayne county, 20th January, 1873.

His Honor, being of opinion that the Court had no jurisdistion of this action, and the same was barred by the statute of limitations, directed the jury so to find.

Verdict for defendant. Judgment against plaintiff and his surety for costs; from which judgment, plaintiff appealed.

Faircloth, for appelant.
Smith & Strong, contra.

SETTLE, J. This action was originally instituted on the 19th of September, 1870, by one Thompson, who had been adjudged a bankrupt on the 29th of December, 1868, but has not yet received his discharge. He alleges that the defendant has held a tract of land in trust for him, ever since May, 1868, and demands an account, and payment of rents, and a conveyance of the land, etc.

The present plaintiff was appointed assignee of Thompson on the 25th of February, 1869, but was not made a party to this action until Spring Term, 1872, of Wayne Superior Court, being March the 11th, of that year.

His Honor being of opinion that the Court had no jurisdiction of this action, and that the same was barred by the statute of limitations, directed a verdict to be entered in

favor of the defendant, and gave judgment against the plaintiff for costs.

This Court has held that our State Courts have jurisdiction in such cases. *Whiteridge* v. *Taylor*, 66 N. C. Rep. 273. And in the opinion of the Circuit Court of the United States, for the District of North Carolina, reported in appendix to 65 N. C. Rep. 714, *State of North Carolina* v. *Trustees of the University, et al.*, it is said: "We agree that the only jurisdiction actually conferred by that Act is with District and Circuit Courts of the United States; 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."

But the second section of the bankrupt Act declares "that no suit at law or in equity shall, in any case, be maintainable by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any Court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued, for or against such assignee."

As has been seen, the present plaintiff had no connection with this suit until more than two years had elapsed after his appointment as assignee, when his right of action accrued. Did the amendment by which he was made a plaintiff, have the effect to relate back and make him the plaintiff *ab initio*, and thereby defeat the statute of limitations in the bankrupt act; or is that limitation a bar to his recovery?

While as a general rule, every Court has ample power to permit amendments in the process and pleadings of any suit pending before it, both reason and authority deny the power where the amendment will evade or defeat the operation of a statute. "No Court has the right to nullify a statute." *Phillipse* v. *Higdon*, Busbee 380.

In *Christmas* v. *Mitchell*, 3 Ired. Eq. 535, an amendment

was allowed which introduced new matter, or rather a new charge against the defendant, to-wit: It sought to charge him with the value of certain negroes, which had not been claimed in the original bill, and the Court says, "so far as this bill seeks relief against Mitchell on account of these slaves, it is an original charge brought against him for the first time, and he is entitled, as to the statute of limitations, to consider it an original bill."

In *Miller* v. *McIntyre*, 6 Peters 61, Mr. Justice McLEAN delivering the opinion of the Court, says: "Various reasons are assigned against the operation of the statute in this case. It is insisted that the amended bill, filed in 1815, by which the defendants were made parties to the bill has relation to the commencement of the suit in 1808, and consequently, that the statute cannot bar, as its limitation had not then run. Until the defendants were made parties to the bill, the suit cannot be considered as having been commenced against them." We concur with his Honor, who tried the case in the Superior Court, that the plaintiff is barred by the limitation in the bankrupt act.

PER CURIAM. Judgment affirmed.

JOHN HOLMES, Executor of GEORGE HOLMES, *v.* ISHAM GODWIN and BLACKMAN GODWIN.

Granting a new trial because of newly discovered evidence must necessarily always, or nearly always, be within the discretion of the presiding Judge, and his decision can very rarely in such cases, be on a naked matter of law or legal inference, so as to authorize an appeal.

In an action for claim and delivery of personal property (Replevin, Rev. Code, chap. 98), when the property cannot be redelivered by plaintiff in specie, the value thereof, in case of a judgment for defendant, should be assessed at the time of the trial, and not at the time of its seizure by the sheriff.

(*Scott* v. *Elliott*, 63 N. C. Rep. 215, cited and commented on.)

CIVIL ACTION, claim and delivery of personal property, tried at the Spring Term, 1873, of the Superior Court of CUMBERLAND county, by his Honor, *Buxton, J.*

The action was commenced by the testator of plaintiff, December, 1869, who having died, his executor, the present plaintiff, became a party, and prosecutes the same for the benefit of the estate of the testator. The property claimed is described in the plaintiff's affidavit as "a certain quantity of corn now in my crib on land rented to the defendant, Blackman Godwin, by virtue of a special property therein—the same being legally in my possession, by reason of the contract of renting made between myself and said Blackman—lien attaching to the said corn as part of the crop raised on the land rented to the said Blackman, not having been satisfied or discharged; the value of the property being $150." The clerk endorsed on the affidavit the following order to the sheriff: "The plaintiff giving bond according to law, you are required to take from the defendants the property within described and deliver it to the plaintiff," which was accordingly done. Plaintiff, in his complaint, alleges that defendants removed the corn without his consent, and demands judgment for the possession thereof, or for $150, in case such possession cannot be had, and for $50 damages.

The defendants, in their joint answer, deny the allegations of the complaint, and put in a counter claim in behalf of Blackman Godwin, on the ground that the 150 bushels of corn, worth $150, was in his possession as the property of his brother, one Elias Godwin, and was wrongfully taken by the plaintiff, wherefore he asks judgment for the value thereof, to wit: $150, and for damages, $50.

It was not disputed that the plaintiff's testator, by a verbal lease, rented the land to Blackman Godwin for the year 1869. The terms of the lease were disputed; the plaintiff contending that Godwin, the tenant, was to pay

$100 for rent, and repair the fences; and $150 if he failed to repair the fences; that without complying with the terms, he with the concurrence of the other defendant, carried from the crib upon the land, two wagon loads of corn to Isham Godwin's. For the defendants, it was contended, that Blackman Godwin, the tenant, was to pay as rent $100, and put two sills under the crib, all of which was done before any corn was removed. One Elias Godwin, a brother of the tenant, cropped the land with him, and claimed the corn carried to Isham Godwin's as part of his share of the crop. There was much conflicting evidence as to points not relevant to the decision here, the following facts being established by the jury, upon issues submitted to them: 1st. That no rent was due; 2d. That the plaintiff, under the order of the clerk, took 125 bushels of corn, worth $136.25, and allowed to defendants by way of damages, 6 *per cent.* interest on the value of the corn from 1st January, 1870.

Plaintiff obtained a rule for a new trial, assigning as the grounds therefor: 1st. For error in the Court in submitting any other issue to the jury than this: "Whether any rent was due?" 2nd. For error in this: The plaintiff in addition to the foregoing reason, moved for a new trial because of newly discovered evidence, filing an affidavit in support of the motion, wherein it was stated that since the finding of the jury, the plaintiff had discovered that he could prove that a creditor of Elias Godwin, had levied an attachment on the corn in the crib, subject to his (the plaintiff's) claim, and that under this attachment corn, to the amount of $27.12 had been sold and applied to the plaintiff's (in the attachment) claim, and that this exhausted the corn in the crib at that time. And further, that he could also prove that after the corn was delivered to the plaintiff by the sheriff, the door of the crib was broken open by Blackman Godwin and a quantity of corn hauled away by him; also that some more of the corn was hauled away by direction

of Isham Godwin. In answer, the defendant, Blackman Godwin, was permitted by the Court to file a counter affidavit denying the statements in that of the plaintiff, which permission is assigned as grounds for a new trial.

His Honor considered the plaintiff's first assignment of error, in relation to the issues submited to the jury, as untennable. As to the second, upon a suggestion from the Court, the defendants were permitted to enter a *remittiter* of $27.12, the sum stated to have been applied towards the attachment against Elias Godwin, and the rule for a new trial was thereupon discharged. Judgment in accordance with the verdict, and appeal by the plaintiff.

B. and *T. C. Fuller*, for appellant.
Guthrie, contra.

RODMAN, J. The plaintiff claimed certain corn as rent owing to him by Blackman Godwin, and alleged that Blackman and Isham Godwin had taken possession of the same; that it was of the value of $150, and demanded judgment that the possession of the corn be delivered to him, or if that could not be done, then for the value. (C. C. P., sec. 176, *et seq.*) The cause of action accrued after C. C. P.

The defendants' answer, "that no part of the complaint is true." This answer was a sham one, and might have been set aside on motion. See *Flack* v. *Dawson*, at this term. But as the parties went to trial on it without objection, and distinct issues were submitted to the jury, the irregularity may be considered waived.

The defendants also set up what they call a counterclaim, viz: that the corn belonged to Elias Godwin. But C. C. P., sec. 5, 86, provides that such a claim must by made by the third party. *In general, jus tertii* cannot be set up as a defence by the defendant, unless he can in some way connect himself with the third party.

Upon the trial the jury found:

1. That no rent was owing to the plaintiff.

2. That the plaintiff received under his proceedings 125 bushels of corn, worth $1.25 per bushel.

3. They assess the defendants damages for the taking and withholding to six *per cent.* on the value of the corn from the time of the taking. Judgment was rendered accordingly against plaintiff, and he appealed.

It is proper to notice here that the case is rendered unnecessarily complex and voluminous, by setting out the evidence upon the first issue, upon which no question arises, and by repeating the pleadings and issues after they had once appeared in the record proper.

The plaintiff moved for a new trial on the ground of newly discovered testimony, and contends that the Judge erred in law in receiving counter affidavits from the defendants, denying the truth of the evidence newly discovered, although not denying that the newly discovered witnesses would testify as plaintiff alleged, and in not granting the new trial. We are of opinion that the granting of a new trial for such a cause, must necessarily always, or nearly always, be within the discretion of the presiding Judge, and that his decision can never, or very rarely in such a case, be on a naked matter of law or of legal inference, so as to authorize an appeal. The considerations which would enter into the decision of a Judge on such an application would be: 1. Will the newly discovered witnesses testify as alleged? which may generally be assumed on the faith of the affiant. 2. Is the new evidence material? 3. Is it *probably* true? looking at all the evidence on the trial. 4. Has the party used due diligence in discovering it?

It is perhaps *possible* to imagine a case in which all these considerations might be conceded for the party, and the refusal of a Judge in *such* a case would make a question of law; but is scarcely possible to conceive of a refusal by

a Judge in exactly such a case. The present case certainly does not come within the example. The propriety of the decision evidently rested on questions of fact, upon which this Court could not review the Judge below. This exception of the plaintiff is overruled.

We now take up the main exception of the plaintiff, viz: that the jury under the instructions of the Court, assessed the value of the property at the time it was taken into possession by the plaintiff, and not at the time of the trial. We think the Judge erred in this respect.

The C. C. P., in secs. from 176 to 187, covers completely the subject matter of the Rev. Code, chap. 98; consequently it must be regarded as a repeal of that chapter.

Scott v. *Eliot*, 63 N. C. Rep. 215, was a decision founded on the Revised Code. What is said in it upon the particular words of that Act is therefore not applicable to this case. But there is no essential difference between the two statutes, and the general principles asserted in that case are equally applicable here.

Replevin, (and the action of claim and delivery, is but a longer name for the same thing,) is founded on the right of the plaintiff to the possession of the property. If the defendant also claims the possession, the main issue is on that right, and the party establishing it will have judgment to retain, or to be restored to the possession, as the case may be. To avoid confusion, we will confine ourselves to a case like the present where the plaintiff obtained the possession, but failed to establish his right to it. In such case it was the right of the defendant to have judgment for the return of the property in specie, if such return could be had, or if it could not be, then for the value of the property. And it is equally the right of the plaintiff to return the property in specie, if he can. It follows that the value must be assessed as at the time of the trial, for the value is only to stand in lieu of the property, in case it shall turn out that

it cannot be returned; and the plaintiff cannot compel the defendant to accept the assessed value if he can return the property in specie; nor can the defendant compel the plaintiff to pay the value, if he offers to return the property. This is so, notwithstanding any deterioration in the article by decay, or external injury, or fall in price, so long as it remains in specie. Probably if it appeared on the trial that the property had been destroyed, so that it could not be returned in specie, the jury would be justified in so finding, and in giving the value of the property at the time of the taking and interest thereon, as the damages for the taking and detention. But that was not the case here. But it does not follow that the owner is to accept the property (deteriorated perhaps) in satisfaction of the injury. He is entitled to full indemnity. After finding the value of the property, the jury should proceed to find the damages from the taking, and detention, an element of which is the difference in the value between the time of taking, and the time of the trial. *Rowley* v. *Gibbs*, 14 John. R. 385, (that is, provided the value be less at the latter time; if it be greater the rule would be different, but it is unnecessary to consider that case, except to exclude it from the rule.) The jury may, if they think proper, add to this, damages on the basis of interest on the value of the property during the detention, although the calculation need not always be on the basis of interest, and in many cases could not properly be.

PER CURIAM. Judgment reversed, and *venire de novo.*

ROBERT L. PURVIS, Guardian, *v.* JOHN C. JACKSON.

When one is sued individually, upon a judgment obtained against him years since as administrator, and wishes to take advantage of such variance, he should plead *nul tiel record*. By pleading to the merits, he waves the objection.

Whenever it is sought to establish an authority in a clerk, to bind a plaintiff by the receipt of depreciated currency in payment of a judgment, it must be shown, either that the receipt was expressly authorized by the plaintiff, or, that the plaintiff has done acts from which such an authority may fairly be implied.

Acts from which such an agency in the clerk beyond what the law (Rev. Code, chap. 31, sec. 127,) gives him, may be implied, must be such as under the circumstances were reasonably calculated to induce the debtor to believe that the clerk was the creditor's agent for the purpose; as, for instance, that the creditor had procured an order to collect the money; or had issued an execution without instructing the sheriff what kind of money he was to receive in payment, &c. And if, from such acts, the debtor has been reasonably led to believe that the clerk was authorized to receive payment of a judgment in Confederate money, and acting on that belief, pays the judgment in such money, it is immaterial whether the clerk was really the agent or not; the creditor being estopped from denying the agency, and the debtor protected in his judgment.

Where a plaintiff, before the war, obtained a judgment against an administrator, but issued no execution thereon and demanded no payment thereof, either before or during the war, and upon the defendant's voluntarily paying the amount of the judgment into the Clerk's office in 1863, the plaintiff as soon as he heard thereof at once repudiated such payment: *Held*, That notwithstanding prudent business men in the same community and at the time were receiving Confederate money in payment of debts, still the plaintiff might disregard such payment by the defendant altogether, and recover the whole amount of the original judgment.

(The cases of *The Governor* v. *Carter*, Hawks 328; *Atkin* v. *Mooney*, Phill. 31; *Emerson* v. *Mallett*, Phill. Eq. 234; *Greenle* v. *Sudderth*, 65 N. C. Rep. 470; *Baird* v. *Hall*, 67 N. C. Rep. 230; *Utley* v. *Young*, 68 N. C. Rep. 387, cited, commented on and distinguished from this.)

CIVIL ACTION, tried at the Spring Term, 1873, of the Superior Court of MOORE county, before his Honor, *Buxton. J.*

Summons in this case, issued 1st August, 1871.

Plaintiff, as guardian for his children, had obtained a a judgment at the October Term, 1859, of the Court of Pleas and Quarter Sessions of Moore county, against the present defendant, Jackson, as administrator of one Shields, for the sum of $318.72. Shields was the grandfather of the

wards of the plaintiff, and the judgment recovered was for the amount of their distributive shares in their grandfather's estate. The present action was brought to enforce this judgment against the defendant personally.

The defence insisted upon is, that the judgment was paid and satisfied in full before the commencement of this action. And in support of such, his defence, the defendant produced in evidence sundry vouchers for small items of account connected with the estate of the said Shields, for which he claimed that the wards were properly chargable. No objection, the plaintiff allowing defendant's claim in this respect to the full amount, to wit: $26.84. Defendant then produced as evidence a receipt of A. H. McNeill, clerk of the County Court of Moore county, when such Court existed, dated 28th February, 1863, for $325.61, balance due upon the judgment, and insisted that the whole judgment was thus shown have been paid off and satisfied. The effect of this receipt is the point raised below, and the principal one decided in this Court.

The following are the facts as proved:

After the judgment was obtained, no execution was ever ordered or issued. Some short time before the commencement of the late war, the plaintiff asked the defendant for money; defendant offered to pay a part, saying that he did not have at the time money enough to pay the whole amount; this partial payment the plaintiff declined to receive. Thus the matter stood, nothing further being done or said by the parties until the 28th February, 1863, when the defendant, in a settlement with McNeill, the clerk, having in possession Confederate money derived from the estate of Shields, his intestate, paid the same into the office of said clerk upon this judgment, obtained by the plaintiff as before stated, to the amount of $325.61, and took the clerk's, McNeill's, receipt for the same, which is here offered as evidence. This sum, $325.61, together with the amount

of the vouchers allowed, made the amount of the principal and interest of the judgment at the date of the receipt. Defendant at the same time paid the costs of said judgment.

This payment into office was made without the consent or knowledge of the plaintiff; who, when informed of it by the clerk directly thereafter, and when urged by the clerk to take the money, refused to do so, assigning as a reason "that it was too pale in the face." And afterwards, when told by the clerk that unless something was done the money would be lost, he, the plaintiff, informed the clerk that he might fund it or do what he pleased with it, that he himself never would take it. This refusal of the plaintiff to receive the money was communicated to the defendant by the clerk shortly after it occurred, and was the first intimation that the defendant had of the plaintiff's objection to receive Confederate money. Defendant had not been asked for the money after the war commenced, and being advised that the payment to the clerk was a good and an effectual payment, he declined to withdraw the money from the clerk's office. The clerk, to keep it alive as long as possible, funded the sum paid by defendant in the "new issue," which died on his hands.

The wards of the plaintiff, who are his own children, have long since arrived at full age, but on account of this unsettled matter with defendant, the plaintiff has been unable to settle with them.

It was also in evidence that in the year 1863, especially in the earlier part of that year, Confederate money was generally received in payment of debts, new and old, although some persons refused to receive it.

Defendant objected to the plaintiff's recovery in this action, because of an alleged fatal variance, to wit: The first judgment—the foundation of the present action—was rendered against the defendant as administrator of Cornelius Shields; this action is brought against him in his individual capacity.

Upon this point his Honor *held*, that the original judgment fixed the liability of the defendant to the wards of the plaintiff, as distributees, and that the present action was properly instituted to enforce it. Objection overruled, and defendant excepted.

Defendant then asked for the following special instructions:

1st. That the plaintiff was not entitled to a verdict, if the jury should find that men of ordidary prudence would have taken Confederate money at the time in payment of *ante* war debts.

2nd. Nor can the plaintiff recover, if the jury should find that the plaintiff had made the money paid into his office his own.

His Honor refused to give either of the instructions prayed; and charged the jury that as the case stood, the most the defendant was entitled to by reason of his payment of the Confederate money into the office of the clerk, would be to allow such payment to be a credit on the judgment, to the extent of the value of the money paid in good currency at the time, to-wit: 28th February, 1863; such value to be determined by the scale provided by the Act 12th March, 1866. As to the second instruction prayed by defendant, there was no evidence offered to warrant it. Defendant again excepted.

There was a verdict for the plaintiff. Rule for a new trial, and upon the argument of this motion, his Honor expressed great doubt whether the payment by the defendant of the Confederate money to the clerk was, under the circumstances, valid to any extent, and suggested an appeal on the part of the plaintiff, in order that the whole of the points involved might be presented to this Court for adjudication. The plaintiff being content with the course the case had taken, declined to appeal. Rule for a new trial discharged; judgment and appeal by defendant.

Merrimon, Fuller & Ashe, and *B. Fuller*, for appellant.
No counsel for plaintiff.

RODMAN, J. At October Term, 1859, of the County Court of Moore, plaintiff as guardian, recovered judgment against the present defendant for $318.72. This is an action to recover on that judgment.

The defendant answers that in February, 1863, he paid the full amount of the judgment to the clerk of the Court in which it was recovered, and thereby satisfied the same.

On the trial it appeared that the original judgment was obtained against the defendant as the administrator of Shields, for a sum owing to the wards of the plaintiff as distributees of the intestate, Shields; no execution had ever issued on it. The money was paid as pleaded without the knowledge or authority of the plaintiff, (except so far as such authority may follow from the official power of the clerk,) who, when informed of the payment, refused to receive the money. This refusal was immediately communicated to the defendant, who nevertheless, permitted it to remain in the office of the clerk until it became worthless. It was also in evidence that in 1863, especially in the earlier part of the year, Confederate money was generally received in payments of debts, new and old, though some persons refused to receive it.

1. The defendant objected to the effect as evidence of the record introduced to prove the judgment of 1859, declared on, because the record introduced was that of a judgment against the defendant as administrator, whereas the judgment complained on was alleged to be against him personally, and contended there was a fatal variance.

If this objection had been open to the defendant, we are inclined to think it would have been a good one. The judgment complained on is against the defendant personally, and there are material differences between such a judg-

ment, and one against a defendant as administrator. Upon the latter, even after a finding of assets, the judgment is that execution be levied "*de bonis testatoris*," and before the plaintiff can have judgment that the execution he levied *de bonis propriis* of the administrator, he must allege and prove that the assets have been wasted, which he may do by a return of "no assets of the testator to be found," or perhaps by other proof. Whether under any circumstances, an administrator who has been once fixed with assets, can exonerate himself by showing that the assets have since been lost by the act of God or other like cause, it is unnecessary to inquire.

In this case the objection is not open to the defendant, because, instead of taking issue upon the judgment by a plea of *nul tiel record*, and putting the plaintiff to proof of his judgment, he expressly admits the judgment as alleged, and waives all proof. It was not necessary for the plaintiff to introduce any proof of his judgment, consequently this exception is overruled.

2. The defendant requested the Judge to instruct the jury that the plaintiff was not entitled to recover, if men of ordinary prudence would have taken Confederate money in payment of *ante* war debts, at the time of the payment to the clerk by him, viz: in February, 1863. This his Honor declined, and told the jury that the defendant was entitled to credit for the value of the money prid, at the time of the payment, according to the scale and for that only, and was liable for the residue. Defendant excepted. This exception presents the question whether the payment to the clerk was a satisfaction of the judgment at all, and if it was, then whether it was so to the nominal amount of the money paid, or only to its value at the time of payment as evidenced by the scale.

The Rev. Code, chap. 31, sec. 127, (1856) enacts: The "defendant against whom any final judgment or decree for

the payment of money may be rendered or made, by any Court of record, may pay the whole or any part thereof to the clerk of the court in which the same may have been rendered or made, at any time thereafter, although no execution may have issued on such judgment or decree, and such payment *of money* shall be good and available to the party making the same."

For many years after the passage of this act, gold was the only legal tender in payment of debts. It was held, however, in *Governor* v. *Carter*, 3 Hawks, 328, (1824,) that it was not malfeasance in a sheriff to sell property under execution for the depreciated current bank bills. And it has some times been assumed, on the authority of this case, as erroneously stated in the digests, that it authorized any collecting officer to receive current money in payment of debts, and thereby discharge the debt. But the case will bear no such interpretation, and HENDERSON, J., expressly says, that the creditor cannot be made to receive anything but specie, except by consent. We are not aware of any other decision bearing on this question prior to the recent war.

The first which needs be noticed is *Atkin* v. *Mooney*, Phil. 31, (June Term, 1866.) The sheriff had an execution against defendant, who paid it to the sheriff in Confederate money,. Neither the date of the judgment or of the payment appear in the report. READE, J., delivering the opinion of the Court, says: "A sheriff, in the absence of instructions to the contrary, would be justified in receiving what was passing currently in payment of debts of the character which he had to collect. Yet there must be some limit to the discretion of the sheriff; for if he receive funds which are so much depreciated that it would amount to notice that the plaintiff would not receive them, he would be liable to the plaintiff in the execution."

In *Emerson* v. *Mallet*, Phil. Eq., 234, (June Term, 1867,) the above rule was affirmed, and it was said that whether

the receipt of Confederate money by an officer could be justified, would depend on the circumstances in each particular case, and no inflexible rule could be laid down. It was suggested that receipts prior to 1863, could generally be justified, but after that year they could not be, the year itself being debateable ground. If the officer received Confederate money when he ought not to have done so, it was a payment of the debt to the amount of its value only, for which the officer would be responsible, and the remainder of the debt would be unpaid. It may be noticed that in this case there was an order to collect, and the payment was made on 26th December, 1863.

Greenlee v. *Sudderth*, 65 N. C. Rep. 470, (June Term, 1871,) was an action against a clerk for money received by him on 5th April, 1862, against the instructions of the plaintiff. It was held that the clerk was liable for the value of what he received, and the defendants for the residue of the debt.

In *Baird* v. *Hall*, 67 N. C. Rep. 230, (June Term, 1872,) a clerk had been ordered to collect the price of land sold by him. Some of the owners of the fund directed him to receive Confederate money; others did not. The question of payment arose between the debtor and those who had not given authority to the clerk. He received payment for all the owners in Confederate money on 25th February, 1863. The Court says, " the defendant (the debtor for the land), is entitled to have it inquired whether on the 26th of February, 1863, when he paid the money to the clerk and master, Confederate money was generally received by prudent business men in payment of such debts as the clerk and master had to collect. If that is answered in the affirmative, then he has paid the debt and is not liable at all to anybody. If answered in the negative, then he is entitled to the inquiry, what was the value of the Confederate money which he paid, which inquiry may be answered by the legislative scale; and then treating it as a part pay-

ment for so much, he (the debtor) will be liable for the balance."

In *Utley* v. *Young*, 68 N. C. Rep. 387, (January Term, 1873,) the sheriff had an execution in favor of plaintiff against defendant upon a judgment at February Term, 1861, of Wake County Court, and on 18th May, 1863, defendant made a payment thereon to the sheriff in Confederate money. The question was whether the payment so made was to be credited at its nominal, or its actual value, or whether the plaintiff could reject it altogether.

The Court say that it cannot decide the question, because it is not found whether prudent business men received such money in payment of such debts at the time and place of the payment. If they did, the payment was authorized and the debt satisfied against the defendants. If the payment was unauthorized the plaintiff might disregard it altogether and hold the defendant bound for the whole debt, or he might (as in *Greenlee* v. *Sudderth*), ratify it to the extent of its value, and hold the defendants bound for the residue.

We have gone thus fully into the cases to show that none of them professes to cover the question in the present case. In all of them, (except *Greenlee* v. *Sudderth*, in which the plaintiff afterwards ratified the receipt) there was either an order to the clerk to collect the money, or the payment was made to a sheriff with an execution in his hands. Therein this case is materially distinguished from the others. Here the judgment was taken some four years before the payment; no execution had ever been issued on it, and none could then be, so that the payment was a purely voluntary one.

It cannot be contended that by *force of the statute only* the clerk had authority to to receive payment in anything but *money;* and money, strictly speaking, means what the law calls money, and makes a legal tender. The statute cannot be construed to authorize a payment in depreciated currency; and if it did, it would violate both that clause of the

Constitution of the United States which prohibits a State from making anything but gold and silver a legal tender, and also that which prohibits a State from impairing the obligation of contracts.

The statute was for the convenience of debtors, by providing a convenient place of payment and relieving them from the necessity of seeking the creditor, perhaps at a distance, or of waiting for execution to be issued to the sheriff. Whenever it is sought to establish an authority in a clerk to bind a plaintiff by the receipt of depreciated currency in payment of a judgment, it must be shown either that the receipt was expressly authorized by the plaintiff, or that he has done acts from which such an authority may fairly be implied. The agency for this purpose must be proved like any other agency. It is not given by statute, but must come from the party. If any authority be wanted for so plain a proposition, it may be found in *Ward* v. *Smith*, 7 Wall. 447. This is the only principle on which the cases that have held a plaintiff bound by the receipt by an officer of Confederate money can stand, and this principle will support all heretofore decided.

In the present case there is no pretence that the clerk had any express authority beyond what the statute gave him. The important question is, whether there is any evidence in this case from which such an authority beyond what the statute gives can be implied.

Acts from which an agency in the clerk beyond what the law gives him may be implied, must be such as under the circumstances, were reasonably calculated to induce the debtor to believe that the clerk was the creditor's agent for the purpose. If a debtor has been induced by the conduct of the plaintiff, reasonably calculated to have that effect, to believe that the clerk was authorized to receive payment of a judgment in Confederate money, and acts on that belief by paying the judgment in such money, it is immaterial

whether the supposed agent was really an agent or not. The creditor is estopped to deny the agency, and the debtor is protected by the payment.

If a creditor procures an order for the collection of money by a clerk, or issues an execution to a sheriff without instructions as to the money in which he is to collect, such conduct is certainly evidence that he authorizes the officer to receive such money as is current in the community in like cases, and when Confederate money is the only currency which can be procured, the inference is almost a necessary one, that he authorized the officer to collect in that. This is the doctrine of all the cases above cited, and it seems entirely reasonable.

In the present case, we are of opinion that there was no evidence from which the authority of the clerk to receive Confederate money could be implied. If we assume that prudent men did receive that money in payment of such debts at the time of the alleged payment, it could not affect the plaintiff, unless by some act, he had indicated his acquiescence in the course of dealing as applicable to his claim; as for example, by issuing an execution for its collection. It must be admitted that notwithstanding the supposed course of dealing among other persons, the plaintiff would not have been bound to receive Confederate money if it had been offered to him. But to hold that *merely* by the course of dealing among others, he made the clerk his agent to receive such money, is in effect to compel him to do through another, what he was not himself compelled to do.

There is no other evidence against the plaintiff than the course of dealing, which for the sake of the argument, we assumed to have been proved. He issued no execution; he made no attempt to revive his judgment; he never demanded payment; as soon as he was informed of the payment he repudiated it. We are of opinion, in accordance

with what is said in *Utley* v. *Young*, that the plaintiff may disregard the supposed payment altogether, and recover the whole of the original judgment.

3. We can see no ground for holding that the payment to the clerk was a valid payment to the value of the currency at the time. If the clerk was the agent of the plaintiff to receive payment in Confederate money, then the plaintiff was bound by the act of his agent, and the payment discharged the defendant. If he was not, then plaintiff was not at all bound by the act of the clerk, and the payment was wholly without effect. The Judge upon the evidence, should have told the jury that the plaintiff was entitled to recover the full amount of the original judgment, (except of course, the small sums paid to plaintiff or his wards personally, about which there was no dispute,) and that there was no evidence of a payment beyond that to any authorized agent of the plaintiff.

4. On the second instruction prayed for, we agree with his Honor. There was no evidence of a ratification.

5. We are not called on to decide any questions between the clerk and the defendant.

PER CURIAM. Judgment reversed, and *venire de novo*.

STATE *v.* EMILINE SHUFORD.

On the trial of the mother for the murder of her infant child, it is error in the Court below to permit a witness to relate a statement made by the mother of the prisoner and in her presence, that the prisoner "had a child this way before, and put it away," to which the prisoner made no reply, and the reception of such evidence entitles the prisoner to a new trial.

Evidence of a distinct, substantive offence cannot be admitted in support of another offence.

(*Homesley* v. *Hogue*, 2 Jones, 391, cited and approved.)

INDICTMENT for murder, tried at Spring Term, 1873, of CATAWBA Superior Court, before his Honor, *Mitchell, J.*

The prisoner, a colored woman, with one Geo. Haynes, (the latter not arrested,) was indicted for killing a new born infant, her child.

On Tuesday of the term, the prisoner was arraigned and pleaded "not guilty," and a special *venire* of seventy-five jurors ordered to be summoned to appear on the coming Thursday. On Wednesday, the Solicitor for the State sent a new bill to the grand jury against the same parties for the same offence, which being found "a true bill," the prisoner on that day was again arraigned and pleaded "not guilty" to the second indictment, and on which the trial proceeded, and a special *venire* of seventy-five jurors again ordered. No *nol pros.* or any other order was made in the first case.

On Thursday morning, when the case was called, the prisoner's counsel asked leave to withdraw the plea of "not guilty," to enable the prisoner to plead in abatement, the pendency of the first indictment and the arraignment thereon. The motion was refused, and the prisoner excepted.

Prisoner's counsel then moved to be allowed to enter the plea in abatement in addition to the plea of "not guilty." Motion refused, and exception by the prisoner.

On the trial and during the calling of the original panel,

one England, a juror belonging thereto, was directed by the Solicitor to stand aside, without being challenged for cause. No jury was obtained from the original panel, and the State without recalling and tendering England, proceeded to call the special *venire*, summoned on Tuesday. No other *venire* had been summoned by the sheriff under the order of Wednesday.

Prisoner's counsel then challenged the array of the special *venire*, and called attention to the order and the date of its execution, and also to the order made on Wednesday. This challenged was not allowed, and the prisoner excepted.

A juror from the special *venire* was called, and tendered by the State. After juror was sworn, prisoner's counsel asked him "if he had formed the opinion that the prisoner at the bar was guilty," without first asking if he had formed and expressed an opinion. The State objected. Objection sustained, and the defendant excepted. Another juror was called and tendered. Prisoner's counsel proposed to swear and examine him as to his "unindifferency," before challinging him for cause, and that after the juror had answered, he might then have the right to challenge. State objected, and the Court sustained the objection. Prisoner excepted.

Prisoner's counsel proposed to ask another juror whether he had paid his taxes for this year or the previous year. Question ruled out, and prisoner again excepted. The jury impanelled, the State called Betsy Seltzer, a colored midwife, who testified that she knew the prisoner; who in September last, lived in a negro village near Newton, at which time her person was very large, and as she, the witness, believed pregnant. That she was called to see prisoner, Wednesday, 4th of September, 1872; that she found her in a feeble, prostrate condition, lying on a pallet on the floor of the room in which the prisoner and her mother lived; that she examined her person and found that she had been

delivered of a child, which witness thinks was born on Tuesday night.

There was no child there, and prisoner denied having been delivered of a child. Witness called again on Thursday evening, and found the prisoner quite feeble. Prisoner asked witness "if any white folks had come to her about the matter." She was told "no," but that witness expected them, and if anything was there, they would find it. Prisoner still denied the birth of the child. After dark, witness with prisoner's mother went to a church near by, leaving prisoner in the house alone, but before going, made arrangements with Adam Hoyle, Scott Hunter and Peter Byors, colored men, to watch the prisoner's movements and see if they could find the child. On her cross-examination, the witness stated that she saw no child on Wednesday or Thursday, though she understood numbers of persons searched for it. Witness further stated that the prisoner's box or chest contained a quantity of baby clothing, as generally prepared by pregnant women.

Witness further testified that about the time preaching closed, she learned that the child had been found near the house, and she went down there; there was a crowd assembled and much talk and commotion; she could not remember much that was said; witness saw the child lying on its face near the house on the ground; it was a black child, fully developed, and had one leg cut off just above the ankle; witness did not handle it; it smelled offensively; witness knew George Haynes, the prisoner indicted; he was a black man, married and lived about Newton for over a year, and for sometime previous to September, in a house near where the prisoner lived; witness had not seen him for some time; that he suddenly disappeared after the child was found, and she had not seen him since.

Dr. Campbell examined the child on Friday for the coroner's jury. It was a fully developed black child, with

its forehead and face mashed in as from a blow by a blunt instrument; skull was broken, much contusion, but skin not cut; one of its legs was off just above the ankle, it seemed to have been cut one-third round with a knife, then the bone broken and the part torn off; that the lungs were inflated fully, swam in water and gave every indication that the child was born alive. Witness further described the appearance of the child, giving it as his opinion that it was killed.

Adam Hoyle, watched prisoner's house on Thursday night. Soon after witness and others had taken their position, they saw prisoner coming up to the house from a westerly course, about 30 or 40 feet from the door; she was in a stooping posture, and entered the door on the west side; witness, with Scott Hunter, went up to the chimney, which was low and unfinished, and peeped into the house and saw prisoner take off a black skirt and place it on the bed; they made a noise and prisoner blew out the light; witness and those that were with him, about this time, smelt something very offensive, which proved to be the child, and sent for Betsy Seltzer; she, with others, came and searched the house but found nothing; prisoner left the house at this time, when witness heard some one calling for a light, and when he got there he saw the child on the ground with its face to the earth; prisoner saw it and exclaimed, "Lord-y, what is that!" She afterwards acknowledged that it was her child, but said it was born dead; there was a number of negro men and women there, and much talking and confusion; after the crowd had partly dispersed, witness and others nailed up one of the doors of prisoner's house, so she could not get out, and then they sat down at the front door and in the house, and there remained all night to watch the prisoner; that during the night, when asked about it, prisoner said the child was hers, but was born dead. Counsel for the prisoner objected to the introduction of prisoner's declara-

tions under the circumstances. Objection overruled, and prisoner excepted. Witness also testified that he knew George Haynes, and that he suddenly left soon after the child was found.

Lorenzo Bost, testified to the finding, &c., corroborating the other witness as to the facts above set out in his evidence; witness further stated, after objection by prisoner, that the prisoner's mother, in the presence of the prisoner and others, said that night that "she (the prisoner) had a child this way before, and put it away," and the prisoner made no reply. The Court admitted the evidence, and prisoner excepted. This declaration of the mother was deposed to by other witnesses, and objected to by prisoner.

Other witnesses for the State were examined, but testified to no other material facts.

His Honor was asked by the prisoner's counsel to charge the jury:

1. If the child was killed while the prisoner was not present, the jury must acquit.

2. If there is any reasonable way to account for the death of the child, except that charged in the bill of indictment, the prisoner was entitled to the doubt.

3. If the child came to its death from the combined effects of the wound on the leg and the wound on the head, the jury must acquit.

4. That the evidence being circumstantial, it must produce an effect and conviction as clear and strong as one credible and respectable witness, to sustain a verdict of guilty.

5. That the means and manner whereby the death of the child took place being known, charged and proven by the State, that the jury could not convict on the last count.

The Court instructed the jury, in answer to the foregoing propositions:

1. To acquit the prisoner if she were not present when the child was killed.

2. That if there was any reasonable way, consistent with the evidence in the case to account for the death of the child, the prisoner was entitled to the benefit of the doubt in her favor.

3. The 3d prayer for instruction, the Court declined to give.

4. The Court charged as requested.

The jury found a verdict of guilty. Prisoner moved for a new trial, on the ground of the exceptions taken and noted, as to the introduction of evidence; and also, because the State proceeded with the special *venire* before recalling and tendering England, one of the original panel, whom the Solicitor had stood aside; and because his Honor did not state the evidence of Dr. Campbell to the jury, and because his Honor's charge was calculated to mislead the jury.

Prisoner also moved in arrest of judgment, because the child was not described with sufficient certainty in the indictment.

Motion in arrest of judgment refused. Motion for a new trial also refused. Judgment of death, and appeal by the prisoner.

Schenck, for appellant, submitted:

1. The Court erred in admitting the declarations of prisoner's mother in prisoner's presence. "That prisoner had a child before, and put it away." This was irrelevant. Ros. Cr. Ev. page 56. Whar. Crim. Law, vol. 1, sec. 647. *Homesley* v. *Hogue*, 2 Jones 392.

2. Court violated the statute, Rev. Code, ch. 31 sec. 136, by clearly intimating an opinion to the jury. *Nash* v. *Morton*, 3 Jones, page 3; *State* v. *Simmons*, 6 Jones 23; *State* v.

Ingold, 4 Jones 220; *State* v. *Cardwell*, Busb. 248. This error is irrevocable, *State* v. *Dick*, 2 Win. 45.

The evidence was not "fully stated" in the charge. *State Morris*, 3 Hawks 388; *Bailey* v. *Pool*, 13 Ired. 405; *State* v. *Jones*, 67 N. C. Rep. 285.

The whole scope of the charge was prejudicial and unjust to the prisoner. *Boykin* v. *Perry*, 4 Jones 326; *Powell* v. *R. R* 68 N. C. Rep. 397.

The Court stated the evidence incorrectly. The prisoner never admitted that the child was born alive.

The indictment is defective as it only charges the killing of an "infant child," without giving name or sex, or accounting for the omission.

All the precedents are against this form of the indictment. *Rex* v. *Sheen*, 12 E. C. L. Rep. 295; *Rex* v. *Smith*, 25 E. C. L. Rep. 327; *Biss case*, 34 E. C. L. Rep. 630; *Willis case*, 47 E. C. L. Rep. 720; Arch. Crim. Pl. 234 (Marg.) Whar. Am. Cr. Law of Homicide 258. Bish. Crim. Pro., vol. 2, 513. *Regina* v. *Waters*, Head's Leading Cr. cases, vol. 2, page 152; *State* v. *Penland*, 1 Phil. N. C. Rep. 224.

Attorney General Hargrove, for the State.

SETTLE, J. The prisoner being on trial for the murder of her child, recently born, the Court permitted three witnesses to state to the jury, that the mother of the prisoner said in her presence, just after the dead body was found, and while the prisoner was under arrest, that "she had a child this way before, and put it away," and that the prisoner made no reply, and it was argued from her silence that she had confessed the charge of putting away the first child.

Of course the purpose of this evidence was to induce the jury to conclude that if the prisoner had put away one child, she would murder another. It might be suggested

that concealing the birth of a child born dead, is a very different offence from the killing of one born alive.

But evidence of matters not alleged is only admissible when it tends to prove or disprove the fact in issue. The fact in issue here was the guilt or innocence of the prisoner on the charge of killing the child, and evidence tending to prove that she was guilty of the murder of the first child was wholly irrelevant, but well calculated to prejudice and mislead a jury.

"Evidence of a distinct substantive offence cannot be admitted in support of another offense. So, proof of a distinct murder, committed by the defendant at a different time, or of some other felony or transaction committed upon or against a different person, and at a different time, in which the defendant participated, cannot be admitted until proof has been given, establishing, or tending to establish, the offence with which he is charged, and showing some connection between the different transactions; or such facts and circumstances as will warrant a presumption that the latter grew out of, and was to some extent induced by some circumstances connected with the former." Wharton Am. Crim. Law 647.

Admitting, for the sake of argument, that the prisoner did put away her child, there is no connection between that crime and the murder of her second child. The acts did not form one transaction, nor did the latter in any manner grow out of the first.

It is true that in *Com.* v. *Wilson*, 2 Cushing 590, it was held that where a prisoner was indicted as an accessory before the fact, to the crime of killing a person who had been actively engaged in ascertaining the perpetrators of a former murder, evidence of the guilt of the accused as to the former murder was held admissible, for the purpose of showing motive as to the second murder.

But there, it will be observed, that it became necessary to

show guilty knowledge and malicious intent growing out of the first transaction; and it is admitted that such cases form exceptions to the rule already stated. In *Homesley* v. *Hogue*, 2 Jones 391, the Court in holding that it was not competent for a creditor, in order to establish the fraud in question, to show that the debtor had made a fraudulent transfer of of other property to another person, say, "Whether the plaintiff had defrauded his vendee in the sale of the land, had no more bearing upon the issue before the jury, than to prove that in the sale of the horse to another person he had committed a fraud, or to prove he was in the habit of committing fraud. That A has made an usurious contract with B, is no proof that his contract with C is usurious. Such evidence is irrelevant and mischievous, having a direct tendency to mislead the jury."

As the prisoner is clearly entitled to a *venire de novo* for the admission of this evidence, we will not further notice the many exceptions taken by the defendant's counsel, who argued the case with zeal and ability in this Court.

Perhaps, however, it is proper to notice the fact that his Honor in charging the jury, after calling their attention to the witnesses, who testified to the pregnancy of the prisoner, the finding of the body of the child in her possession, and its remaining in an unchanged condition until the coroner and physician arrived, added the words "the prisoner in the mean time detained, on the admission that the child was born alive."

What his Honor construed into an admission that the child was born alive, must have been the prisoner's silence, when her mother said in her presence, that she had a child in this way before, and put it away, for the prisoner repeatedly declared that the child was born dead, and she at no time admitted otherwise, unless her silence, when charged with another crime, be construed into such an admission.

At all events it is readily perceived how such a remark from his Honor could have unjustly prejudiced the case of the prisoner.

PER CURIAM. *Venire de novo.*

STATE v. HARVEY DAVIS.

In a criminal action for perjury, it should appear on the face of the indictment that the oath taken was material to the question depending, not by setting forth the circumstances which render it so in discribing the proceedings of a former trial, but by a general allegation that the particular question became material. *State* v. *Mumford*, 1 Dev. 519, approved.

The mis-description (if any) in describing the Court in which the false oath is alleged to have been taken as "before Joseph Z. Pratt, a Justice of the Peace, in, and for said county," instead of, as "a Court of a Justice of the Peace for township A, of Chowan county," is not a substantial variance from the true description, and is cured by Act of 1811, Rev. Code sec. 14, chap. 35. It would also be cured by sections 15 and 16, of chapter 35, of Rev. Code.

The jurisdiction of the Justice of the Peace of the complaint upon the examination whereof the alleged perjury was committed, is sufficiently averred where it is averred, as it is in this case, that the Justice had power to administer the oath.

MOTION to quash indictment for perjury, heard before *Watts, J.*, at Spring Term, 1873, of CHOWAN Superior Court.

The grounds upon which the defendant based his motion to quash are stated in the opinion of the Court. His Honor allowed the motion, and gave judgment that the indictment be quashed, and that the defendant go without day.

From this judgment, Willis Bagley, Esq., Solicitor for the State, appealed to this Court.

Hargrove, Attorney General, for the State, cited to sustain the sufficiency of the indictment. *State* v. *Mumford*, 1 Dev. 519. And 3 Archbold, 392.

John Moore, for defendant.

RODMAN, J. The counsel for the prisoner excepts to the sufficiency of the indictment in two particulars.

1. That it does not show how the alleged false testimony before the Justice was material upon the examination before him.

2. That the Court of the Justice is not described by its proper legal title.

1. In *State* v. *Mumford*, 1 Dev. 519, TAYLOR, C. J., says: "It is laid down as a rule which I find no where controverted, that it should appear on the face of the indictment, that the oath taken was material to the question depending, not by setting forth the circumstances which render it so in describing the proceedings of a former trial, but by a general allegation that the particular question became material." That general allegation is found in the present indictment, and is sufficient for the purpose.

2. The prisoner's counsel contends that under the Constitution (art. 4, sec. 4,) the proper and legal title of a Justice's Court is, "A Court of a Justice of the Peace for township A in Chowan county." In support of the conclusion that the indictment is defective by reason of such insufficient description of the Court, before which the perjury is alleged to have been committed, the counsel cites the case of *State* v. *Street*, 1 Mur. 156, decided in July, 1807. In that case the indictment charged, "that at a *certain Superior Court* begun and holden for the district of Hillsborough, &c., "before the Honorable Francis Locke, Esq., *Judge of said Court*," the prisoner falsely swore, &c.

After conviction of the prisoner this Court arrested the judgment because the Court in which the perjury was alleged, was described as above, whereas it should have been described as a "*Superior Court of Law*." We will not undertake to say that the decision in that case was not in con-

formity with the law at that date. The Act now forming sec. 14, of ch. 35 of the Rev. Code, was then confined (by its express terms at least) to indictments in the county courts. (1784, ch. 110). This Act was re-enacted in general terms, and was applicable to all Courts in 1811. Whether the variance from the legal title of the Superior Court of law was or was not a formality and refinement which would have been cured by the Act of 1811, it is needless to inquire. So it is unnecessary to inquire whether the description in the present indictment of the Court in which the false oath is alleged to have been taken as before Joseph Z. Pratt, a Justice of the Peace in and for said county," is strictly correct, or whether it should have been described as the counsel for the prisoner contends as a "a Court of a Justice of the Peace for Township A, in Chowan county."

In our opinion the misdescription (if any) is not a substantial variance from the true description, and is cured by the Act of 1811, before referred to, which enacts that every indictment shall be "sufficient in form for all intents and purposes, if it express the charge against the defendant in a plain, intelligible and explicit manner, and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the Court to proceed to judgment." We think also it would be cured by sections 15 and 16, of chap. 35, Rev. Code, which it is unnecessary to quote at length.

It was also argued in this Court that the indictment was defective, in that it did not sufficiently aver that the Justice had jurisdiction of the complaint upon the examination whereof the alleged perjury was committed. A Justice has a general jurisdiction to hear complaints of all crimes committed in his county. What he shall do with the accused, whether in case he finds the complaint to be true, he shall commit him or bind him over to appear at the Superior

Court, or shall finally determine the accusation, and acquit or convict the accused, depends on the existence of conditions prescribed by the Act of 1868–'69, chap. 178. But the absence of those conditions, though it limits his power to deal with the case, does not exclude his jurisdiction to hear it. In the present case the jurisdiction is sufficiently averred, when it is averred that the Justice has power to administer the oath.

Judgment below reversed, and case remanded for further proceedings.

PER CURIAM. Judgment reversed.

ANNE M. RUFFIN *v.* THE BOARD OF COMMISSIONERS OF ORANGE CO.

Where money is placed in a bank on deposit, in the usual course of business, it is a *general deposit*, and the depositor has no right to the particular money deposited, as he has in the case of a *special deposit*: Therefore *held* to be error in the Judge below, to charge that money so deposited, remained the *money* of the depositor.

United States Treasury notes, being one of the means used for the support and administration of the general government, cannot be taxed by a State. Nor can Congress for the same reason, tax any of the necessary means used to administer the government of any of the States.

The power of a State to tax the circulation of the National Banks, depends upon whether such circulation is for the use of the United States Government or for private profit. Congress can protect the circulation of those banks, by forbidding the States to tax it; until this is done, the States have the right to tax it.

(*Lilly* v. *The Comm'rs of Cumberland*, Ante, p. 300, cited and approved.)

PETITION by the plaintiff to the Board of Commissioners of ORANGE county, praying a revision and correction of the list of taxables given in by her, heard by his Honor, *Tourgee, J.*, at the Spring Term, 1873, of the Superior Court of said county.

His Honor being of opinion with the petitioner, directed

the tax list to be corrected. From this order the Commissioners appealed.

The facts necessary to an understanding of the points decided, are fully set out in the opinion of the Court.

Attorney General Hargrove, for appellants, submitted:

1. Assuming that the United States Treasury notes are not taxable by State governments. There is no authority that I have seen deciding that *National Bank notes* are not taxable by State governments. It is true, the *Veazie Bank* v. *Fenno*, 8 Wallace, 549, may bear that construction, but it does not seem to be clear. Dissenting opinion of Judge NELSON, charges that view on the majority of the Court.

2. But if neither United States Treasury notes nor National Bank notes are taxable, still if the owner parts with them, either to an individual or a bank corporation, and takes in lieu of them a note or certificate of indebtedness, then he, the former owner, must pay on his solvent credit.

The individual or bank which may have thus acquired them, if the notes are kept on hand, would be entitled to have them exempt from taxation, but if the notes are changed into other property or evidence of indebtedness, such property would not be entitled to exemption. *Walker* v. *Whitehead*, from Georgia, only decides that a heavy tax on old debts was illegal, &c., it does not decide that a tax on solvent credits is unconstitutional.

Then arises the question. Was this deposit of the plaintiff a solvent credit? And to ascertain the true answer, we must determine whether it was a special deposit or a general deposit? It was a deposit on which the plaintiff could, if she chose so to do, draw interest. Interest was to be paid if she permitted it to remain six months.

The Bank in which it was deposited had no option as to

paying interest; that depended solely upon the action of the plaintiff.

Nothing to the contrary appearing, when a deposit is made it will be taken to be a general deposit; here it was on deposit and the plaintiff had a right to receive interest, and so the bank was the debtor of the plaintiff. The bank was not bound, and it is not to be supposed that the bank would keep the money on hand in its vaults until the expiration of six months to see whether or not the plaintiff would call for it or not, and then at the end of six months pay interest on it.

The condition that "interest was to be paid if the deposit remained six months," meant that interest was to be paid every six months, and if called for, or checked out before the expiration of any six months, counting from the date of deposit, then no interest was to be paid for that fraction of six months which had passed at the time the money must be called for. No bank would take money on special deposit and pay interest on it. *It would be more likely to charge for keeping the "notes."*

As to nature of deposit in bank, see *Planters' Bank of Tennessee* v. *Union Bank of Louisiana*, cited by His Honor Judge BUXTON, in *Lilly* v. *Commissioners of Cumberland County*, now before the Court.

Then this was not a special, but a general deposit—a loan —a solvent credit. The plaintiff calling it "money on hand" or on deposit in her complaint, or it being so listed improperly, on the tax list, cannot alter the true character of the subject matter, for that character is shown by "the case" as sent up by his Honor.

Our State Constitution, art. 5, sec. 3, requires that laws *shall be passed* taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property according to its true value in money."

This seems to be *mandatory*, and compels the Legislature to tax all "moneys, credits," &c., by a uniform rule. United States Treasury notes and National Bank notes are money—a circulating medium—therefore a legal tender for all debts, with one or two exceptions.

There is no express constitutional provision prohibiting State governments from taxing the "instrumentalities" and "means" of the United States government; that doctrine is established by the decisions of the Courts on account of the relations between the Federal government and the States. If States could tax they could destroy the instrumentalities of Federal government, &c. But Congress may permit the States to tax the "instrumentalities" of the Federal government. It has permitted the States to tax shares in the National Banks. See Act of Congress, 3d June, 1864, 9 Wallace 469. It seems Congress has permitted North Carolina to tax "all moneys, credits, investments in bonds, stocks," &c., (see art. 5, sec. 3, State Constitution,) where Congress approved our new Constitution with that provision in it; "and it is not to be supposed that it would have been done if it had been thought to be in violation of the Constitution of the United States." See *Jacobs* v. *Smallwood*, 63 N. C. Rep. 116.

"Every presumption is to be made in its favor as having the approbation of the Convention of the State, and of the Congress of the United States." See *Bank* v. *Supervisors*, 7 Wallace 468; *Lionberger* v. *Rouse*, 9 Wallace 468.

"State supreme within its sphere, as United States government in its, and Courts reluctant to interfere with power of taxation." See Cooley on Constitutional Lim.; Sedgewick on Construction of Statutory and Constitutional Law, 1 C.

John W. Graham, for petitioner:

The plaintiff contends that the State and county have no

right to tax money on deposit, when the money so deposited consists of United States Treasury notes, and notes of National Banks of the United States on these principles, decided by the Supreme Court of the United States in *McCullock* v. *The State of Maryland*, 4 Wharton, 316.

1. "The State governments have no right to tax any of the constitutional means employed by the government of the United States to execute its constitutional powers."

2. "The States have no power by taxation or otherwise to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into effect the powers vested in the National Government."

3. The power of establishing a corporation is not a distinct sovereign power or end of government, but only the means of carrying into effect other powers which are sovereign." Mr. Webster in his argument for Mr. Cullock says: "The only question is, whether a bank in its known and ordinary operations is capable of being so connected with the finances and revenues of the government, as to be fairly within the discretion of Congress, when selecting means and instruments to execute its powers and perform its duties." Corporations are but means. The only inquiry therefore, is whether the law imposing this tax be consistent with the free operation of the law establishing the bank, and the full enjoyment of the privileges conferred by it. If it be not, then it is void; if it be, then it may be valid. "If the State may tax the bank, when shall they stop?" It is further argued that the power to tax involves the power to destroy, and the bank must depend on the State government for existence. "The government of the United States has a great pecuniary interest in this corporation." It is true, that in our case, the United States own no stock in the National Banks; but they are organized under the Act of June 3d, 1864, "to provide a national currency," and each note bears the endorsement, "this note is receivable at *par* in all parts of the United

States, and in payment of all taxes and excises, and all *other dues to the United States* except duties on imports;" and also for all salaries and all other debts, and demands owing by the United States to individuals, corporations and associations within the United States, except the interest on the public debt; and the United States provide severe penalties for counterfeiting these notes. If they are not securities of the United States, how can Congress punish the counterfeiting thereof? What is the difference between a State's requiring each of these notes to be stamped, as in the *case* of *McCullock*, and imposing, as in our case, a tax of one *per cent.* on the 1st day of April, 1872, on each note, either on hand or on deposit? Why not 10 *per cent.* as well; and would not this tax prevent the object of Congress, in providing a uniform currency for the whole country? Congress has destroyed the State banks as banks of issue, by imposing a tax of 10 *per cent.* for the very purpose of making an opening for the national bank currency, and this law has been sustained by the Supreme Court of the United States in the case of *Veazie Bank* v. *Fenno*, in an opinion delivered by Chief Justice CHASE, reported in American Law Review, vol. IV, page 392. It is said in that opinion "it cannot be doubted, that under the Constitution, the power to provide circulation of coin is given to Congress, and is settled by the uniform practice of the government, and by repeating decisions that Congress may constitutionally authorize the emissions of bills of credit."

"Congress has undertaken to supply a currency for the whole country; the methods adopted to supply this currency were briefly explained in the first part of this opinion. It now consists of coin, of United States notes, and of *notes of the National Banks.* Both descriptions of notes are properly described as bills of credit, for both are furnished by the government, both are issued on the credit of the government, and the government is responsible for the redemp-

tion of both; primarily as to the first description, and ultimately as to the second." "Having thus in the exercise of undisputed constitutional power undertaken to provide a currency for the whole country, it cannot be questioned that Congress may constitutionally secure the benefit of it to the people by appropriate legislation. To this end Congress may discourage by suitable enactments the circulation as money of any notes not issued on its own authority. Without this power indeed, its attempts to secure a sound and uniform currency for the country must be futile." It must, in candor be admitted that the Supreme Court of Indiana, at November Term, 1869, (which we understand to have, before decision of *Veazie Bank* v. *Fenno*,) decided in in *Montgomery County* v. *Elston*, reported in Am. Law Rev., vol. 4, p. 396, that notes issued by the National Banks were not exempt from State taxation, distinguishing them from Treasury notes, which they held were exempt. The position of this Court that "they (the National Bank notes) "are not obligations of the United States in any proper sense of that expression," seems to us in conflict with the opinion of Chief Justice CHASE, before quoted. The notes of the bank in case of McCullock, were not obligations of the United States; still the State of Maryland was not allowed to tax them. The Supreme Court of Indiana say: It follows that the amount of the assessment on the moity, consisting of Treasury notes, was unathorized and illegal; and that the amount rated upon that portion, consisting of the National Banks, was legal and proper." The reasoning of the Court would prohibit the United States from employing any agency, and confine the government to its own notes. This is too narrow a view. *Qui hæret in littera, hæret in cortice.*

The true rule seems to us better expressed in *State* v. *Gaston*, decided by the same Court, and reported in same number of Law Review: "The power of taxation, existing alike

in the general government and in the States, co-extensive and concurrent by virtue of the sovereignty of each, has then for each this limit: neither may tax, because neither may take away the legitimate machinery or agencies employed by the other in the exercise of its governmental powers and functions." It does seem that if the decision is correct, that the National Banks are agencies of the United States, no State can impose a tax which is calculated to prevent the notes passing at *par*, and to interfere with the scheme to provide a currency for the entire country.

Again, Mr. Webster in the argument before quoted, says: "The charter as well as the laws of the United States, makes it the duty of all collectors to receive the notes of the bank, in payment of all debts due the government." The action of the State of Maryland requiring them to be stamped, is characterized as a direct interference with the revenue. "The Legislature of Maryland might, with as much propriety, *tax Treasury notes*. This is either an attempt to expel the bank, or it is an attempt to raise a revenue for State purposes by an imposition on property and franchises holden under the national government, and created by that government for purposes connected with its administration. In either view there cannot be a clearer case of interference." The Attorney General, in his argument in same case, says: "So we contend here that the only ground on which the constitutionality of the bank is maintainable, excludes all interference with the exercise of the power by the States. * * * "If they may tax an institution of finance, they may tax the proceedings in the Court of the United States." Mr. Pinkney, in same case, says: "There is no express provision in the Constitution which exempts any of the national institutions or United States property from taxation. It is only by implication that the army, and navy, and treasury and judicature of the Union are exempt from State taxation. Yet they must be exempt or it would be in the

power of any one State to destroy their use." Again: "A power to impose a tax *ad libitum* upon the notes of the bank is a power to repeal the law by which the bank was created. The bank cannot be useful, it cannot act at all, unless it issues notes. If the present tax does not disable the bank from issuing notes another may; and it is the authority itself which is questioned as being entirely repugnant to the powers which established and preserves the bank. There must be in this case an implied exception to the general taxing power of the States, because it is a tax on the legislative faculty of Congress, upon the national property, upon the national institutions." It is immaterial if it does thus withdraw certain property from the grasp of State taxation, if Congress had authority to establish the bank, since the power of Congress must be Supreme. In the opinion of the Court in *McCullock* v. *State of Maryland*, Chief Justice MARSHALL says, in speaking of State taxation: "The attempt to use it on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give." Again: "The right never existed. If the States may tax an instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail, &c., —they may tax all the means employed by the government to an extent which would defeat all the ends of the government. This was not intended by the American people."

1. United States notes issued under the loan and currency Acts of 1862–'63, intended to circulate as money, and actually constituting with the National Bank notes, the ordinary circulating medium of the country, are moreover obligations of the national government, and exempt from State taxation.

2. United States notes are engagements to pay dollars; and the dollars intended are coined dollars of the United

States. United Stated Supreme Court, 7 Wallace, 26. The National Banks were established to provide a national currency, at a time when the State Banks furnished the entire paper circulation of the country.

In providing a system by which the States, where National Banks were located and did business, could tax their shares, it was important, as their notes came in competition with State Bank paper, that there should be no unfavorable discrimination against them. It was easy to see that an unfriendly State could legislate so as to drive them out of circulation, and this consideration induced Congress to limit the State power of taxation in two particulars. *Lionberger* v. *Rouse*, 9 Wallace, 474. National Bank Act; *Veazie Bank* v. *Fenno*, 8 Wallace, 533. Dissenting opinion of Justice NELSON; National Banks are required to keep a certain amount of deposits.

A bank cannot issue bills or notes upon the basis of special deposits. *Foster* v. *Essex Bank*, 17 Mass. Rep., 479. Certificates of deposit; substantially, they resemble promissory notes, and the Courts have always inclined to regard them as such, especially when they are made payable otherwise than immediately and upon demand. If they are payable at a future day, they are simply promissory notes, neither more or less. Morse on Banking, 53.

If the money on deposit did not belong to Mrs. Ruffin, it was an inadvertance to give it in her tax list. If it was simply a "solvent credit," the sum may have been placed on deposit to meet a debt, and the petitioner would not be required to list it, as the Revenue Law allows the taxpayer to deduct all debts which he owes, and simply give in the balance, over and above indebtedness, for taxation. But the Revenue Law does not regard a deposit of any kind as a solvent credit. They are placed in different columns. The Revenue Law does not leave the question open; it

makes the deposit the *money* of the taxpayer. The Court cannot do otherwise. *Jones* v. *Justices, &c.*, 2 Murp. 167.

If it was the petitioner's money, it was not liable to taxation as money on deposit, and was inadvertently rendered. The Court cannot see that she was compelled to give it in as a solvent credit. This case is not an application to remove tax from solvent credits. The taxpayer could not deduct debts from money; he could from credits. See Revenue Law of 1872; National currency Act of 1862, makes deposits subject to United State tax, and not State tax.

Justices of the Peace appointed to receive the list of taxable property, has no right to add to the list any article of taxable property not returned by the owner. *Jones* v. *Justices, &c.*, 2 Murp. 167. Laws of 1872, ch. 115, secs. 5, 6, 7, 8 and 9. County Commissioners cannot add; *Ibid.*, sec. 16.

READE, J. The plaintiff listed for taxation "$15,000 money on deposit," taking from the bank a certificate of the form following:

THE BANK OF MECKLENBURG,
Charlotte, N. C., ..., 187.. .

..... has deposited in this office ..... dollars, to the credit of ....., in United States currency, which will be paid to ....., or .... order, on the return of this certificate, with interest thereon, at the rate of ..... *per centum per annum*, if left on deposit not less than thirty days."

The plaintiff subsequently applied to the commissioners to correct her tax list, assigning as the reason that the deposit was made in United States Treasury notes, and National Bank bills, and that they were not subject to taxation by the State.

The amount of the tax was $162, and she asked to have

that amount stricken from the tax list; or, if United States Treasury notes are exempt, and National Bank bills are not, then that $81 shall be stricken from the list.

The commissioners refused to alter the list, and the plaintiff appealed to the Superior Court, and that Court directed the commissioners to correct the list by striking out $162. His Honor holding that neither United States Treasury notes, nor National Bank bills were subject to taxation by the State.

Whether that be so or not, seems not to be necessary to the decision of the case; because it is plain that the plaintiff had neither United States Treasury notes nor National Bank bills "on hand" or "on deposit." It is true, she had deposited $15,000 in bank; but it was not a *special* deposit, as a package to be kept for her, and returned in kind when called for; if so, the money, the very money deposited, would have remained hers. But it was a *general* deposit, entered to her "*credit*," not returnable in kind, but "*payable*" to her order, with "*interest*," &c., so it would seem that she had no money at all, and ought not to have listed any. But still, having listed it improperly as money, the question remains, must the defendant strike it out? Suppose it was wrong to list it as money, and right to list it as a "credit," and the tax is the same on each, it would seem to be a vain thing to strike it out of one column and put it into another. What the plaintiff desires, and what she asks for is, to have the item of $162 deducted from the aggregate.

If the aggregate is not to be changed, then it makes no difference with her in what columns the items stand. The plaintiff's counsel answers this view by the suggestion that if treated as a *credit*, she would be entitled to deduct from the amount any debt which she may owe. And that is true. This difficulty might have been avoided if she had alleged in her petition that she was not liable to list it as money,

for the reasons given, nor as a solvent credit, because she was indebted in such a sum. But she makes no such allegation, and therefore we suppose the fact is not so. But still as it seems not to have been considered in this light, either in the Court below, or by the commissioners, or by the plaintiff in her application, she ought to have an opportunity of showing that she does owe debts which ought to be deducted from her "credits."

We think his Honor was in error in holding that the plaintiff's deposit remained her money, either as United States Treasury notes or National Bank bills. And that he ought to have held it to be a "credit," to be listed subject to any debt which the plaintiff owed; and that he ought to have had an inquiry as to that fact. The judgment below is reversed. And if the plaintiff move, the case will be remanded, that the fact of the indebtedness of the plaintiff may be inquired into.

The point most discussed at this bar was whether United States Treasury notes, and National Bank bills were liable to taxation by the State. And, although, as we have seen, it is not necessary to the decision of the case, yet as his Honor's judgment was based upon it, and as it is a matter of general interest, it may be proper that we should express our opinion upon it. It seems to be settled by numerous cases in the United States Supreme Court, cited in plaintiff's brief beginning with *McCullock* v. *The State of Maryland*, that United States Treasury notes cannot be taxed by the State, because they are of the means used for the support and administration of the United States government. And if a State could tax them, then unfriendly States might so tax them as to destroy their usefulness; and in that way, and to that extent, destroy the United States government. And it is equally well settled, that the United States government cannot tax any of the necessary means used to administer the State government. But whether a State can tax

National Bank bills seems to be a debatable question. The case cited against the power of the State to tax is *Veazie Bank* v. *Fenno*, 8 Wal. 533. We do not think that case supports the position. It is there decided by a divided Court, that Congress may tax the circulation of banks chartered by the State; and *that*, although the tax was so heavy—about sixteen *per cent.*—as to destroy them. It is not pretended that this tax could have been imposed, if the bank had been chartered for the use of the State, and as a means of administering its government. But it is put upon the ground that they are corporations for private profit.

And the power of Congress to tax the circulation of State banks depends upon whether they are for the use of the State government, or for private profit; so the power of the State to tax the circulation of national banks depends upon whether they are for the use of the United States government or for private profit. It is true they are authorized by Congress, as a currency, convenient and useful for circulation; just as State bank bills are authorized by the State. But in neither case have they necessarily any connection with the government. The Act of Congress authorizing National Banks, imposed a tax on their circulation of two per cent. And surely that would not have been done if they had been regarded as a part of the government; as that would have been the same as for the government to tax itself. The truth is that the United States government has no interest in national banks. It authorizes them in order to provide a currency, not for the government, but for the people. And it has the power to regulate and to protect them. To this end it provides for the redemption of their notes, protects them from the imposition of counterfeits and from injurious competion of State banks, by a heavy tax on State bank bills, and no doubt might further protect them by forbidding the State to tax them. But this has not been done, and until it is done, we suppose the State has the

power to tax them. It seems that all that is to be inferred from the decision in *Veazie Bank* v. *Fenno, supra*, is not that National Bank bills are exempt, but that Congress has the power to exempt them from State taxation. See *Lilly* v. *Commissioners of Cumberland*, at this term, *ante*, p. 300.

PER CURIAM. Order of the Court below reversed.

WILLIAM FOY, Administrator of SAMUEL HILL, deceased *v.* JOHN M. MOREHEAD, *et al.* Administrators, &c.

MOTION to dismiss civil action, heard before *Watts, J.*, at Spring Term, 1873, of CRAVEN Superior Court. This motion was overruled, and the defendants through their counsel, then moved that the cause be transferred to the Superior Court of the county of Guilford. His Honor, refused to grant this motion also, and rendered judgment against the defendants for the amount of the note sued on. The action was brought by the plaintiff in the Superior Court of Craven county, upon a note of one P. G. Evans and J. M. Morehead, the intestate of the defendants. The defendants answered that they were the administrators of the said John M. Morehead, deceased; that their intestate resided in, and was a citizen of Guilford, in this State, at the time of his death, and that letters of administration on his estate were granted to the defendants by the Court of Pleas and Quarter Sessions of said county, and that they gave an administration bond according to law, in said county of Guilford, and said bond was filed in the office of the Clerk of said Court, and that the defendant, Julius A. Gray, was at the time of plaintiff's bringing his action, and at the time of answering, a resident and citizen of said county of Guilford.

The facts set forth in the answer were not denied.

From the judgment, the defendant appealed to this Court.

Hubbard, for appellant.
Haughton, contra.

READE, J. The facts in this case are substantially the same as the facts in the case of *Stanley* v. *Mason*, adm'r., at this term; and the principles governing it are the same and the decision the same, and for the same reasons.

There is error. This will be certified to the end that the case may be dismissed or removed for trial to Guilford county, as the parties may move, and as the Court below may order.

PER CURIAM. Judgment accordingly.

WILLIAM B. SURLES *v.* LEWIS PIPKIN.

A plaintiff, who has indorsed the notes of a self-constituted agent of a lunatic, to enable such agent to raise money ostensibly for the benefit of the family of such lunatic, which money was used by the agent in cultivating the farm of the lunatic, can only recover, in a suit against the lunatic upon the notes signed by the agent, so much of his debt as he can show was actually expended for the necessary support of the lunatic, and such of his family as were properly chargeable upon him.

(*Richardson* v. *Strong*, 13 Ired. 106, cited and approved.)

CIVIL ACTION, for the recovery of the amount of certain notes and interest, tried before *Buxton, J.*, at the Spring Term, 1873, of the Superior Court of HARNETT county.

Suit was commenced 27th July, 1871.

Plaintiff alleged that defendant owed him $876.61, with interest, evidenced by three notes executed by E. J. Pipkin, as agent and guardian of defendant, payable to the plaintiff,

negotiated for the benefit of the defendant and his estate, and paid by the plaintiff.

The answer was filed by E. J. Pipkin, guardian of the defendant, at Fall Term, 1872, in which he alleged that he was appointed guardian of the defendant, Lewis Pipkin, who was adjudged *non compos mentis* in February; 1872, that he was a son of the defendant, and by general consent of the family, not by any authority derived from his father, he had acted as agent of his father, and as such had executed the notes mentioned in the complaint; his father, at the dates thereof, being insane and unable to transact any business. That the plaintiff had rendered himself liable upon the notes, in consequence of being allowed to take possession of the 16 bales of cotton, weighing 8,112 pounds, the property of Lewis Pipkin, worth $1,216, and judgment for that amount is asked against the plaintiff.

The replication admits that Lewis Pipkin was declared a lunatic in February, 1872, and was so reputed, but denies the allegation in the answer in reference to the 16 bales of cotton, and reitterates that the plaintiff merely indorsed the notes for the benefit of the defendant at the instance and upon the certificate of his friends, E. J. Pipkin included; that the family of the defendant was in a necessitous condition, and by way of loan for the purpose of procuring necessaries supplied to defendant.

For the plaintiff, the following three notes were offered in evidence:

"$325. Ninety days after date, I promise to pay to W. B. Surles, three hundred and twenty-five dollars, value received, negotiable and payable at the banking house of A. W. Steele & Co., in Fayetteville, this amount being for the benefit of the family of Lewis Pipkin.

March 17, 1871.

(Signed) E. J. PIPKIN, Acting Agent.

Indorsed: W. B. SURLES."

"MARCH 21, 1871.

"$292.61. Ninety days after date, I promise to pay to the order of W. B. Surles, two hundred and ninety-two dollars and sixty-one cents, at the banking house of A. W Steele & Co., value received.

(Signed) "E. J. PIPKIN, *Agent Lewis Pipkin.*

Indorsed: "W. B. SURLES."

"FAYETTEVILLE, April 4, 1871.

"Ninety days after date, I promise to pay to William B. Surles, or order, two hundred and fifty dollars, value received, negotiable and payable at the banking house of A. W. Steel & Co., in Fayetteville, this amount being for the benefit of the family of Lewis Pipkin.

(Signed) "E. J. PIPKIN, *Agent Lewis Pipkin.*

Not indorsed.

The plaintiff testified that the above three notes were negotiated at the banking house of A. W. Steele & Co., and I paid them. I had agreed to endorse to the amount of $1,000, in consequence of statements contained in this certificate signed by three sons and two sons-in-law of Lewis Pipkin.

"STATE OF NORTH CAROLINA,
HARNETT COUNTY.

"Know all men by these presents, that we, E. J. Pipkin, agent, John W. Pipkin, Samuel D. Pipkin, John Brantley, W. H. Johnson, do certify that it is necessary for E. J. Pipkin to have for the benefit of the estate of Lewis Pipkin $1,000, and we agree to endorse his act, as agent, to that amount, and William B. Surles agrees to endorse for the above amount.

(Signed) E. J. PIPKIN,
J. W. PIPKIN,
JOHN BRANTLEY,
S. D. PIPKIN,
W. H. JOHNSON.

This March 17, 1871.

I (the plaintiff,) endorsed the note (No. 1,) for $325 on the day of the date of this certificate. I also endorsed the note (No. 2,) for $292.61, and I made myself liable for the note (No. 3,) for $250, which was negotiated upon this letter of credit, pinned to the note, and which was returned to me when I took up the note:

"LITTLE RIVER, April 3, 1871.

MR. A. W. STEELE:—

Dear Sir: Mr. Pipkin is on his way to Fayetteville to get some more of the one thousand dollars agreed on when we were down. You can make the arrangement with him for $250, and take his note as the other is taken. You will please look at the first note, and draw this one by it, and I will be down this week, and will endorse it.

Yours truly,

(Signed) W. B. SURLES."

I indorsed two of the notes, made myself liable for the third, and paid the whole.

Lewis Pipkin was lunatic in 1871.

Cross-examined: E. J. Pipkin, John W. Pipkin and John Brantley, under the firm of Brantley & Pipkin, cultivated the lands of Lewis Pipkin in 1870. They likewise cultivated the same year, land of Col. A. S. McNeill. I made advances of money to them to enable them to raise that crop, and there were, in payment of advances, 65 bales of cotton delivered to me. At the time these 65 bales were delivered to me, a portion of the crop was still ungathered, or unginned, which subsequently made 16 bales. These 16 bales were claimed to be withheld by E. J. Pipkin, as rent due Lewis Pipkin, and John W. Pipkin refused to surrender them, E. J. Pipkin, saying that as agent of his father, he contended for these 16 bales as rent of his father's land, due from Brantley & Pipkin.

Here the articles of agreement, made between W. B. Surles and Brantley & Pipkin, dated the 11th of January, 1870, were read in evidence by the plaintiff. It is therein stipulated that W. B. Surles was to furnish as called for, $3,000, to enable Brantley & Pipkin to plant and cultivate 150 acres in cotton in the year 1870. Brantley & Pipkin were to cultivate that quantity of land in cotton, and deliver the cotton to that value to W. B. Surles; he to do the ginning for the toll of one-fifteenth and the seed. In default of delivering the cotton, they were to deliver ten mules to meet the indebtedness, which was to be settled by the 1st of January, 1871. A lien was also given to the full extent of the crop. Performance on both sides was secured in a penalty of $6,000.

W. B. Surles' direct examination resumed: Under the articles of agreement, I advanced to Brantley & Pipkin, between $4,200, and $4,400; and then assigned my interest in the contract to J. A. Pemberton, who paid me for my advances, and who made further advances to the firm. W. D. Smith also made advances to the firm in fertilizers. The aggregate value of the advances made by myself, Pemberton and Smith, was between $6,800, and $7,000.

In 1871, the farm was carried on by E. J. Pipkin for the benefit of the estate of his father. John W. Pipkin was not concerned in the management that year. When they refused to surrender the sixteen bales of cotton, I went to Harnett court-house, in behalf of J. A. Pemberton, to institute legal proceedings for the recovery of the cotton. While the bond for claim and delivery was being filled up, I mentioned to John W. Pipkin, that I had offered to his brother, E. J. Pipkin, to indorse to the amount of $1,000, for the benefit of the estate, to enable them to start a crop, and that then they could get along by mortgaging the crop. He asked if I would do that still, and upon my assenting, he assured me the sixteen bales would be given up to Pemberton by E. J. Pipkin.

The sixteen bales were accordingly given up, and went like the sixty-five bales, towards paying the advances made by myself, Pemberton and Smith. The sixteen bales weighed 8,074 lbs., and brought barely thirteen cents per pound. No part of the cotton received was intended to be applied to the payment of the notes in suit. These notes I indorsed, to assist them in getting stock, provisions, &c., to cultivate the crop of 1871, as they said they had no horses or provisions. The sixteen bales have been applied to the general account of 1870.

John Brantley, witness for the plaintiff, testified: I married a daughter of Lewis Pipkin. Upon my application in 1872, he was declared a lunatic, and his son, E. J. Pipkin, was appointed his guardian.

In 1871, Lewis Pipkin had no means of support, except his land. He had no money, nor provisions, nor horses, nor mules—nothing but household furniture. He needed immediate pecuniary assistance, and some arrangement had to be made.

On the 10th of January, 1871, E. J. Pipkin put up his father's land to rent, and tried to raise means upon the notes taken to secure the rent, but failed, because the notes were not considered regular. W. B. Surles agreed to assist him, provided the papers could show that the advances were for the benefit of the family. That is why we all signed the certificate to that effect.

When Surles was about to take legal proceedings to get the sixteen bales of cotton, he entered into an arrangement, by which he agreed to indorse to the amount of $1,000, if the notes could be so drawn as to bind Lewis Pipkin's property, and John W. Pipkin agreed that E. J. Pipkin should unlock the gin house, and let me and Surles take the cotton away to pay off the debts of Pipkin & Brantley. I had come with some wagons for the cotton, but they would not let me have it, and locked it up. This arrangement was

made about the 17th of March, 1871. E. J. Pipkin got money for the Surles' notes, and bought some mules and provisions, and carried on a crop that year for the benefit of his father's family, which consisted of Lewis Pipkin and wife, two daughters, two infant orphans, and John W. Pipkin and E. J. Pipkin.

Cross examined by defendant's counsel: The firm of Brantley & Pipkin farmed on the land of Lewis Pipkin in 1870. They were to pay two and a half *per cent.* per month for the use of the advances made by W. B. Surles. We raised in all, about eighty-one bales of cotton, including some fifteen or twenty bales raised on McNeill's land. About sixty-five bales were estimated to have been raised on the land of Lewis Pipkin. It was about the close of the year 1869, that Brantley & Pipkin agreed with E. J. Pipkin to rent the land of Lewis Pipkin for the year 1870. The rent was not to be a part of the crop, but was payable in money, the amount to be estimated by three gentlemen: Messrs. McNeill, Murchison and Adams. In the first three months of 1870, Brantley & Pipkin paid before it was due, between $500 and $600. E. J. Pipkin received $110 as the first payment, and used it in repairing the house of his father. When Brantley & Pipkin rented the land, Lewis Pipkin had some fodder on hand. They plowed a mule of his. A couple of hired men lived at Lewis Pipkin's. W. B. Surles did not indorse to the full extent of $1,000, in consequence of a difficulty between him and E. J. Pipkin. Three or four teams were used in hauling off the sixteen bales.

Direct examination resumed by plaintiff: The improvements put upon the land of Lewis Pipkin in 1870, by Brantley & Pipkin, were worth $1,500. About the 10th of March, 1871, the question as to the amount of the rent to be paid by them was decided to be about $700 or $800 in money. The 16 bales of cotton was then being ginned at the ginhouse. About the beginning of March, I first heard

of the 16 bales being claimed as rent. They were not set apart by Brantley & Pipkin; when they were given up they were hauled to Fayetteville and delivered to A. W. Steele & Co., under an arrangement of J. A. Pemberton. When the $800 valuation of rent was decided, E. J. Pipkin remarked that that amount had already been paid.

Lewis Pipkin's corn gave out about February, 1870. We kept the family up for nearly a year. Brantley & Pipkin still owe a small balance on their indebtedness to W. B. Surles. Eight of my mules and a wagon, together with the mules of John W. Pipkin, went to pay this debt. E. J. Pipkin had nothing.

The evidence being closed on the part of the plaintiff, the defendant's counsel asked his Honor to instruct the jury that the plaintiff, upon his own showing, was not in law entitled to a verdict against Lewis Pipkin, for the reason that E. J. Pipkin had no authority in 1871, to sign notes binding upon Lewis Pipkin, at that time a lunatic—the notes not being for necessaries, and he not having been appointed guardian until February, 1872.

His Honor gave the instructions as asked for by defendant's counsel, and remarked to the jury that if such transactions respecting the estates of lunatics as the evidence disclosed, by mere volunteers, were held valid by the Courts, the provisions of law for the protection of lunatics would be rendered nugatory. To this charge plaintiff excepted.

A verdict was rendered for defendant. Rule for a new trial, granted and discharged. Judgment against the plaintiff for costs. Appeal by plaintiff.

B. and *T. C. Fuller*, for appellant.
N. McKay and *Hinsdale*, contra.

SETTLE, J. The plaintiff sues on a money demand of

$867.61, evidenced by three notes set out in the record. These notes were signed by E. J. Pipkin, a son of the defendant, who represented himself as the agent of his father, who was a lunatic. The condition of the defendant was known to the plaintiff, for he states in his evidence that the defendant was a lunatic in 1870, and the arrangement he made in regard to endorsing the notes, shows that he knew that the defendant was not only of unsound mind, but without a guardian.

Under these circumstances, the endorsed notes for the purpose of enabling the son, E. J. Pipkin, to raise money, as the plaintiff says, for the benefit of the estate.

The plaintiff and E. J. Pipkin volunteered to benefit the estate of the defendant by running a farm, and borrowed money at 2½ per cent. per month for that purpose. The lunatic may well wish to be saved from his friends.

The plaintiff does not render necessary services, nor furnish necessary articles for the support of the defendant, but simply enables the self-constituted agent to borrow money on the credit of the defendant.

He does not see to the application of this money, a part of which appears to have been expended in setting up the self-constituted agent as a farmer. The position that a promise will be implied, to pay for necessary services rendered, and necessary articles furnished to a lunatic, is well established. The leading case in England on this point is *Baxter* v. *Earl of Portsmouth*, 12 E. C. L. R. 79, and in this State, *Richardson* v. *Strong*, 13 Ired. 106, but all of the cases go upon the idea that the lunatic had the actual use and benefit of such services and articles.

We were much inclined to sustain the ruling of his Honor, for the plaintiff and E. J. Pipkin were both mere volunteers, and after an inspection of the whole record sent to this Court, it may well be doubted whether the son and guardian is not himself a fit subject for guardianship; but

as the defendant may have received some *necessary* support from this money, it should have been left to the jury to find how that fact was.

The plaintiff can only recover so much of his debt as he can show was actually expended for the necessary support of the defendant, and such of his family as were properly chargeable upon him. Upon the inquiry before the jury the defendant will also have an opportunity of establishing his counterclaim.

PER CURIAM. *Venire de novo.*

JOHN and NANCY GREGORY v. FEREBEE GREGORY.

A, B and C are tenants in common of a tract of land; C dies in debt, and his widow becomes his administratrix. A and B filed their petition for a partition of the land into three parts: *Held*, that the widow of C, being entitled to dower, and also as representing the creditors of C, was a necessary party to such petition, both as widow and as administratrix.

The widow, but being the representative of her husband, who has no exclusive or superior right to any particular portion of the land to be divided, has no right to have any particular part of such land assigned to her as dower.

In a petition for partition of a tract of land consisting of twelve and three-fourths acres, worth $199.40; the commissioners appointed for the purpose, having divided the tract into three parts, worth respectively, the dwelling house share, $144.15, and the two others, $34 and $21.25: *Held*, in such case an actual partition with a reasonable equality of values could not be made without impairing the value of some of the shares, and that the Court ought to have ordered the land to be sold for an equal division.

CIVIL ACTION, petition for partition, to the Probate Court of PASQUOTANK county, submitted to *Albertson, J.*, and by him determined, 14th day of January, 1873, upon the following facts agreed:

Ferebee Gregory died intestate, leaving three children, to-wit: Hosea Gregory, and the petitioners, John and Nancy. She left no estate except twelve and three-fourths acres of

land upon which she resided, which land descended to her children.

Sometime after the death of his mother, Hosea died intestate, leaving a widow, but no children. At the time of death he was greatly in debt; he left no estate except his interest in the lot above mentioned.

John and Nancy filed a petition for partition, and commissioners were appointed by the Court, who went upon the land and divided it into three parts of four and one-fourth acres each; upon one of the lots were all the buildings, and this was valued at $144.15, another lot was valued at $34, and the third lot at $21.25. The commissioners then caused the lots to be drawn for, when the $34 share was drawn for Hosea; the $21.25 share for John, and the share with the dwelling and out-houses, valued at $144.75 was drawn for Nancy, the more valuable dividend being charged with amounts to be paid to the shares of less value, to make equality of partition. The commissioners so reported, and the attorney for the petitioner moved for a confirmation of the report; upon which exceptions were taken by the widow of Hosea Gregory, through her counsel, assigning for cause:

1. That actual partition of said estate could not be made equitably.

2. That the children by a former marriage, who were minors without guardian, were creditors of the said Hosea, and that as such, they ought to be represented in this proceeding.

3. That if partition could be made by this manner of proceeding, the shares ought to have been allowed by the commissioners, and that share with the dwelling and out-buildings upon it ought to have been set apart to her, as the widow of said Hosea; and that having such an interest she ought to have been a party in the proceeding.

The clerk refused to confirm the report, and the petitioners appealed. Afterwards, the widow applied for and ob-

tained letters of administration upon the estate of her husband, the said Hosea, when she made further exceptions to the confirmation of the said report, for the cause that the creditors generally of the said Hosea should be represented in a proceeding for partition of lands in which said Hosea had an interest in common with others.

His Honor being of opinion with the petitioners, reversed the judgment of the clerk, and confirmed the report of the commissioners.

From this judgment, Ferebee Gregory, the widow and administratrix of Hosea Gregory, appealed.

No counsel in this Court for appellant.

Smith & Strong, for petitioner, submitted the following brief:

1. The whole legal title in the tract is in the petitioners alone, and in a proceeding for partition between them, no one can become a party thereto.

2. As this proceeding is only at the instance of the two tenants in common, the partition is only affectual as between them, and does not affect other interests in the subject matter.

3. The widow is not entitled to dower in that part of the tract containing the buildings. She is entitled to the dwelling only in a proceeding between herself and her husband's heirs or devisees, where the land on which they stand belonged to her husband. She is only entitled to one-third for life of the unascertained share of her husband. And if she may, in asserting this claim, treat the land as held in common, notwithstanding the partition, as to her right of dower, she cannot interfere in a proceeding which is solely for a division among them in whom the legal title rests.

4. The administrator has not, nor have creditors any interests in the real estate such as to prevent the heirs from

making a division between them, and this they may do by executing deeds between them, or by partition.

5. The administrator may procure license to sell to pay his intestate's debts, and though a partition meanwhile may be made by tenants, the administrator has no such right, before applying for such license, to interfere with the proceeding.

6. It may be that neither the widow, in respect to her claim for dower, or homestead, nor the administrator, in respect to obtaining license, are affected by the result of the proceeding for partition, and may treat the entire land as still in common, in getting the share and value of the intestate's part, still it is plain they have no legal ground on which to interfere in the proceeding.

RODMAN, J. The principles governing this case are plain and familiar; the only difficulty is in applying them to an unusual state of facts:

1. Upon the death of Hosea Gregory, his estate in one undivided third of the land descended to his heirs—John and Nancy, the surviving co-tenants and the plaintiffs in this proceeding, who thus became sole seized. Their counsel contends that because the widow and administrator of Hosea had no *estates* in the land, the widow who united both characters in herself, was improperly made a party. He also contends that inasmuch as the two plaintiffs were thus exclusively "*domini litis*," they were entitled by the aid and ministry of the Court to make any such partition as they could make by deeds *inter se*. That a partition so made and sanctioned by the Court would affect no persons not parties. This proposition assumes that a Court in an action concerning property will look only to estates in the property, and not to any rights or interests which are not estates. This may in general be true where the persons having the estates may fairly be considered to represent all the rights

and interests affecting them. So in suits respecting the personal property of a decedent, the administrator is generally deemed a sufficient representative of the creditors and distributees of the deceased. In an action by a widow for divorce, the heirs or other terre tenants are deemed sufficiently to represent the creditors of the deceased. But in all such cases, whenever it appears (as it did in the present) that the supposed representative has an interest adverse to that which he represents, the real party in interest may demand to be made a party.

Such was always the rule in equity, though not at law. Hence, although a judgment for partition among the heirs of a decedent, if it appears to have been made by fraud and collusion to injure his estate, will be set aside at the instance of his widow and creditors; yet *prima facie* it is valid, and would be confirmed by their acquiescence.

To diminish litigation by preventing the necessity of a second action to set aside the first judgment, and to adjust and determine all interests in the subject matter by a single suit, as far as may conveniently be done, the C. C. P., sec. 61, 62, requires or permits all persons having *interests* to be made parties. In our opinion the widow was properly made a party in both her characters.

2. Assuming that the land was capable of an actual partition, without injury to the interest of any party, as it probably would have been if there had been no building on it, to give a greatly disproportionate value to the part on which it stood, then the partition into three equal parts would have been proper. The assignment of those parts by lot would also have been proper. The claim of the widow of Hosea to have the part on which the house is, assigned as his share of the estate, in order that she may have the house assigned to her in her dower, cannot be maintained. Her husband was not sole seized of the house, nor did he have any exclusive or superior right to it on a

partition in his life time. As his doweress she is *pro tanto* his representative, and cannot have any greater rights than he had. Her right is to one-third of the value of her husband's third for her life.

3. The principal question is, whether the Court below should not have held that under the circumstances, an actual partition could not be made without injury to some or all of the parties interested, and upon that ground have ordered a sale for partition.

Every co-tenant is entitled of right to an actual partition, if it can be made without injury to some or all of the parties interested. The presumption in every case is, that it can be so made until the contrary appears. When the contrary does appear, it is the duty of the Court to order a sale. Acts 1868–'69, ch. 122, sec. 13, p. 314.

The area of the land in question is twelve and three-fourths acres. The value of the whole as reported by the commissioners who made the partition is $199.40. If divided into three parts of equal area, that share on which the buildings stand would be worth $144.15, and the other shares respectively, $34 and $21.26. An equal share in value would be $66.46.

We do not mean to say that as an universal or even as a general rule, the fact that land cannot be divided into lots of equal area and nearly equal values, is a sufficient reason for a sale. Equality of area may generally be disregarded if a reasonable approximation to equality in value can be attained. But if, as in the present case, no reasonable approximation to an equality of values can be attained without cutting up a dwelling, only large enough for the moderate accommodation of one family, between two or more persons, it is a strong reason against an actual partition, and in favor of a sale. Neither can it be said that anything like an exact equality of value of shares is necessary on an actual partition. The extent to which a variance from ex-

act equality is reasonable and allowable and will not amount to a controlling argument for sale, will depend on the circumstances of each case, and no definite rule can be laid down. This observation, however, may be useful; if one share be very greatly in excess of another, the assignee of the most valuable share is compelled in effect to buy it at an arbitrary and perhaps an extravagant valuation, while the assignee of the least valuable share is compelled to sell a considerable part of his estate at a value perhaps greatly inferior to its true one. To avoid the hazard of such evils the Legislature give the Courts a power to order a sale in proper cases.

In the present case, an actual partition with a reasonable equality of values cannot be made without dividing the dwelling, and thus impairing its value. An actual partition in which there is a gross inequality of values, is generally injurious to some party. In the partition made in this case the assignee of the most valuable share would receive in land two and one-fifth times his equal share, and the assignee of the least valuable share would receive in land less than one-third of his equal share. We are of opinion that an actual partition would be injurious, and that an order of sale is proper. After a sale of the whole land, the widow of Hosea may have dower assigned her out of his one-third, as provided for in the Act of 1868–'69, chap. 122, sec. 18, and the residue of that third, (which may include the value of the reversion after the widow's dower,) will go to his administrator, to be administered in the usual course. Judgment reversed. An order may be drawn in conformity with this opinion; or if the parties prefer, the case may be remanded to the Superior Court of Pasquotank, to be there proceeded in according to law.

PER CURIAM. Judgment reversed.

STATE v. A. C. MOODY and another.

An agreement by a Solicitor for the State, to discharge a defendant, if he would become a State's witness against a co-defendant, which he did so far as to go before the grand jury and be examined, and then left the Court, will not relieve such defendant from a forfeited recognizance. A recognizance is a matter of record, and can only be discharged by a record, or something of equal solemnity.

The discharge of a defendant, or the entering a *nol pros.* is within the control of the Court, though in practice, usually left to the discretion of the Solicitor.

CRIMINAL ACTION, (*sci. fa.* upon a forfeited recognizance) tried before *Russell, J.*, at the Spring Term, 1873, of ROBESON Superior Court.

The Solicitor for the State, moved for an execution upon the judgment *nisi* heretofore obtained, whereupon the defendant, Moody, was permitted by the Court, to use the answer filed by him to the complaint of the Solicitor, (the action commencing by summons and complaint,) in which it is alleged, that he, Moody, one of the defendants in the bill of indictment, under which the recognizance, alleged to be forfeited, was taken, did make his actual appearance at the term of the Court, (the second week) to which he was bound; that he was told by the Solicitor, that if he would be used as a witness against the other defendants in the said bill, that his further attendance would not be required; that he went before the grand jury, was examined, and the bill was found, and that in consequence of the assurance from the Solicitor he left the Court, and was called out on his bond.

The following is the record, upon which the Solicitor based his motion for execution, to-wit:

Fall Term, 1871.

"STATE
v.
A. C. MOODY and JOHN BROWN.

The defendant, A. C. Moody, being called, and failing to

appear as he was bound in recognizance to do: *it is ordered* by the Court, that he, together with his sureties, (W. C. Troy and Wm. J. Brown) forfeit *nisi* said recognizance."

His Honor rejected the evidence of the defendant, tending to establish the allegations of his answer, above set out, *holding* that nothing could be heard to contradict the record, and that the only way the same could be used would be to the Court, for the purpose of inducing the Court to relieve the defendant from the forfeiture. This his Honor declined to do, and directed the execution to issue.

From this order, the defendants appealed.

N. McLean, McKay and N. A. McLean, for defendant.
Attorney General Hargrove ahd *Cantwell,* for the State.

READE, J. Suppose it were true, as the defendant offered to prove, that the Solicitor for the State promised him that if he would turn State's evidence against his co-defendant he would not prosecute him; and suppose the defendant had, in all things, complied with his agreement, and the Solicitor had nevertheless refused to discharge him, and the defendant left the Court, and the Solicitor called him out, and had judgment entered against him and his sureties upon his recognizance. The defendant could not plead the promise of the Solicitor in bar or in discharge of the judgment, because that is matter of record, and the discharge must be of record or of equal solemnity. But if it could be so pleaded, still the defendant would have to show that he did in all things comply with his agreement. And here the agreement must be understood to have been that he would become a witness for the State and testify upon the *trial,* as well as before the grand jury. But all that he alleges was that the did testify before the grand jury, and then, understanding that a bill had been found against him about another matter, he left the Court to avoid that indictment,

and did not appear as a witness upon the trial. So that it would seem he did not comply with his agreement, and for that reason it could not avail him for any purpose. His Honor held that while the alleged agreement could not operate to discharge the defendant, yet he could consider it as an excuse or in mitigation; and so considering it, he was of the opinion that there was nothing in the conduct of the defendant which would induce his Honor, in the exercise of his *discretion*, to remit the forfeiture, or any part of it. And in this we cannot say that his Honor erred.

It was discussed at the bar whether it is within the power of a Solicitor to discharge a defendant, or to enter a *nol. pros.*, &c., or whether that is the province of the Court. The rule is that it is within the *control* of the Court, but it is usually and properly left to the discretion of the Solicitor. It is scarcely to be supposed that a Solicitor would abuse this confidence to the prejudice of a defendant, and it is always within the power of a defendant to protect himself by having his discharge entered of record at the time of the agreement. And it would be a dangerous practice to allow defendants to have themselves discharged upon allegation of some out door agreement.

The reason which his Honor gave for his judgment, and whether he heard the evidence offered, even to enlighten his discretion, is not very clearly stated. If, however, we have misunderstood his Honor, no irreparable injury need result to the defendant, as he can move the matter again before his Honor at the next, or even at any subsequent, term before the money is paid.

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

PER CURIAM. Order affirmed.

JAMES LEACH v. H. J. HARRIS.

Although arbitrations are favored in law as being a court selected by the parties, and a cheap and speedy method of settling difficulties; and although awards are to be liberally construed so as to effect the intention of the arbitrators, without regard to technicalities or refinement, yet it is well settled that where the arbitrators undertake to make the case turn upon matters of law, and mistake the law, their award is void.

It is equally well settled that arbitrators are not bound to decide a case "according to law," being a law unto themselves, but may decide according to their notions of justice, and without giving any reasons.

(Case of *Ryan* v. *Blount*, 1 Dev. Eq. 386, cited and approved.)

CIVIL ACTION, commenced by summons before a Justice of the Peace, on the 4th day of September, 1871, and removed to the Superior Court of DAVIDSON county, where it was tried before *Cloud, J.*, at Spring Term, 1873.

Plaintiff demanded judgment on three promissory notes, given by defendant to the trustees of Normal College, 23d August, 1858; one for $18, payable eighteen months after date, and the two others for $16 each, payable six and twelve months from date; notes expressed to be for value received, and were not sealed, nor indorsed.

The defence was, that there was a failure of consideration; that there had been an arbitration of the subject matter between plaintiff and defendant, and an award in favor of defendant, and the statute of limitations.

On the issue as to the award, the defendant offered evidence tending to show that the parties, plaintiff and defendant, had agreed to arbitrate the claims of plaintiff on these notes; that plaintiff selected one man and defendant another, and that the four then went to a place of meeting agreed upon; that plaintiff produced an arbitration bond, which he had prepared, and proposed that the defendant should sign the same, which he declined to do; that they then agreed to dispense with the bond, and one of the arbitrators proposed to the other, to select an umpire, which was

done in the presence of both plaintiff and defendant, and not objected to by either.

The arbitrators on the 12th August, 1871, heard the statements of the parties, and decided that the plaintiff could not recover on the notes, for the reasons: first, because the notes were not legally assigned to plaintiff; and second, because there was such a failure of consideration, that neither the plaintiff, nor the trustees of the Normal College could recover on the same. The notes were returned to plaintiff, that he might pursue his remedy against the trustees, to whom he had paid value for them. All this was done by parol, and for the defendant evidence was offered tending to prove that the plaintiff assented and agreed that the award need not be reduced to writing.

Defendant further offered in evidence a paper, purporting to be an award between the parties on the same subject matter, (the finding and reasons being substantially the same as is above set forth,) dated 28th of September, 1871, which was after the trial before the Justice of the Peace. The introduction of this paper being objected to, because it was written and delivered since that trial, the defendant obtained leave to amend the pleadings, so that the same might be pleaded as "an award since the last continuance," and in support of the plea, read the award.

For the plaintiff, there was evidence showing that he had agreed to arbitrate the matter; that each of the parties selected one man, and at their meeting, he proposed to sign an arbitration bond, which defendant refused to do; that the parties had some further conversation about the matter in dispute, but that he, the plaintiff, did not consent to an arbitration, nor know that one was had.

On the trial the plaintiff insisted:

1st. That to constitute an award, the terms of the arbitration and the names of the arbitrators should appear by the proof to have been agreed on, and there was no proof

of the submission of the matter in dispute to the three persons who acted, or to the two who did, with leave to choose a third man.

2nd. That the two first named as arbitrators had no legal power to select an umpire upon their own motion, unless that authority had been expressly given to them by agreement of plaintiff and defendant.

3d. That the appointment of such umpire should be in writing, or should appear in the award to have been made by the arbitrators or the parties.

4th. That the award should be in writing, and made known to the parties.

5th. That the arbitrators were *functus officio*, after their action on the 12th day of August, and could not afterwards make an award, viz: after the trial before the Justice, on the 28th September, 1871.

6th. That the authority of the arbitrators to act was revoked by the act of the plaintiff, in beginning a suit, by issuing a summons, 4th September, 1871, which was served on the defendant, and of which the arbitrators, as appears in the proof, had notice before their award was written or delivered.

7th. That neither the parol award nor the written award was a good defense; because it appeared that the arbitrators undertook to decide the question in dispute according to law, and they erred in law in the only two reasons given in support of their award, to-wit: As to the assignment and the consideration of the notes sued on.

The Court charged the jury that if it was agreed to refer the matter to arbitrators, each to select a man, and one of the arbitrators suggested an umpire, and the plaintiff assented to the umpire, he is bound by the award; that the plaintiff had the right to recover unless there was a good award, and that depended whether the plaintiff assented to the third man; that although the arbitrators attempted to

decide according to law, and mistook the law, yet as there was an issue of fact submitted to them, to-wit: As to the consideration of the notes as well as the question of law, their award would bind the parties. His Honor held, that if the evidence was believed, one of the notes was not barred by the statute of limitations, and that there was no failure of consideration.

The jury found all the issues in favor of the defendant. Rule for a new trial; rule discharged. Judgment against the plaintiff for costs, from which plaintiff appealed.

In support of the defense of a failure of consideration, there was evidence tending to show that the notes were given to the trustees of Normal College, in consideration that the College would erect another building; that defendant owned land at or near the College; that the building had never been erected, though some brick had been obtained for the purpose in 1870, and the same is now in process of construction. There was further evidence tending to show that the consideration of the transfer to the plaintiff of the notes before they were due, was the purchase from him of additional land to add to the College *campus*.

Bailey, for the plaintiff, argued:

That the main point is, that the arbitrators attempted to find the law and missed it.

When this is the case, the law is well settled that the award will be set aside on the ground that as the arbitrators show that they intended to find according to the law, and have failed therein, it is not the award they intended.

The authorities upon this are abundant: *Kent* v. *Estop*, 2 East 18; *Young* v. *Walter*, 9 Ves. Jr. 365; (2nd opinion) *Ryan* v. *Blount*, 1 Dev. Eq. 386; *Pierce* v. *Perkins*, 2 Dev. Eq. 250: *Crissman* v. *Crissman*, 5 Ired. 502.

(1.) The plaintiff is a purchaser of negotiable paper *before*

due, and therefore any supposed equity of Harris as to failure of consideration is, by the express terms of sec. 55, C. C. P., as well as former law, not binding on him.

(2.) The debt was transferred to him by virtue of his purchase, and he is the only real party in interest.

His Honor stated the law, we submit, "exactly wrong." If a "dry question" of law be submitted, no mistake in the arbitrators will be available as a defence *ex gr.*, whether a limitation of a use to A until B return from Vienna, and upon such return to the use of C in fee, limits to C a contingent remainder or a conditional limitation? And it is only where there is a mixed question of law and fact that the award can be held for nought as *ubi supra*.

No counsel in this Court for defendant.

READE, J. The objections insisted upon in thisCourt by the plaintiff, arise out of the award, and we therefore confine our review to them.

The defendant gave his notes to Normal College for $50, under a promise on the part of the College, that it would put up a College building near the lands of the defendant, which it was supposed would benefit the defendant, by reason of the enhanced value of his adjacent lands. The College did not put up the house, but sold the notes to plaintiff, before due, and transferred them by delivery without indorsement. The plaintiff demanded payment of the notes, and the defendant insisted that he ought not to pay them, because the College had not built the house according to promise, and because the notes had not been indorsed to plaintiff. And the matter in dispute was referred to arbitration. The arbitrators decided that the defendant "does not owe the said notes or any part of them to the said Leach, or Trustees of Normal College, by reason of failure of consideration promised when said notes were obtained of said

Harris; nor to said Leach, because it does not appear that said notes, or any one of them had been legally transferred to said Leach."

The plaintiff insists that it appears from the award that the arbitrators undertook to decide two questions of law; and decided them wrong, and that, therefore, the award is void.

Although arbitrations are favored in law, as being a Court selected by the parties, and a cheap and speedy method of settling controversies, and although they are to be liberally construed so as to effect the intentions of the arbitrators without regard to technicalities or refinements, yet it is well settled that where the arbitrators undertake to make the case turn upon matters of law, and mistake the law, the award is void. The reason is, that while it can be seen what their conclusion is, the law being as they suppose it to be, yet it is not seen what their conclusion would have been if they had known the law to be otherwise. Indeed, as they profess to have been guided by the law, and were misled in one direction, it may be assumed that they would have gone in the other direction, if they had known that the law was there. *Kent* v. *Estop*, 3 East, 18; *Young* v. *Waller*, 9 Vesey, Jun. 365; *Ryan* v. *Blount*, 1 Dev. Eq., 386, and other cases cited by plaintiff's counsel are satisfactory authorities upon that point.

It is equally well settled that arbitrators are not bound to decide a case "according to law." For they are a law unto themselves, and may decide according to their notions of justice, and without giving any reasons.

The first question for our consideration is, did the arbitrators intend to be guided by, and decide the case according to law?

The defendant said he did not think that he ought to be compelled to perform his promise to pay the notes, because the college had not performed its promise to build the

house; and the arbitrators say they think so too. But whether they think so as a matter of law, morals or religion, they do not say; and therefore we cannot say that they undertook to decide a question of law, and missed it.

Again, the defendant insisted that there had been no legal transfer of the notes to the plaintiff. And the arbitrators determine that there had been no "legal transfer." Now if the arbitrators found that there was no transfer at all, of course that was decisive against the plaintiff. But we supposed that the proper construction of what they say is, that they find that the mere delivery without an endorsement, was not a *legal* transfer. Now if they had gone further and said that because there was no *legal* transfer, they determined, as a matter of law, that the plaintiff could not recover of the defendant, either in law or equity, and that they must be governed by the law; then the question would arise whether they decided the law right. But they say no such thing. On the contrary, they say that there is no *legal* transfer of the notes to the plaintiff, and therefore the law does not compel us to allow him the notes, but leaves us free to decide according to our notions of right and justice. And so, according to our notions, it being unjust to make the defendant comply with his promise when the College has not complied with its promise, we decide that the defendant does not owe the College or the plaintiff anything.

The plaintiff objects that his Honor erred in charging the jury, that "although the arbitrators attempted to decide according to law, and mistook the law, yet as there was an issue of fact submitted to them, to wit: as to the consideration of the note, as well as qestions of law, their award was good." The authorities already cited do show that his Honor was mistaken in the *reason* which he gave in holding the award good. But still he was right in the main point, to wit: that the award was good. No error.

Judgment affirmed

LAURA L. REED *v.* H. J. FARMER and others.

A suit is referred to A, whose award is to be a rule of Court, and who reports to Fall Term, 1872, a balance due plaintiff; neither party filing exceptions to the report, the plaintiff has a right to a judgment at the term to which the report is made. And upon motion of defendant, the cause being continued, at the ensuing term (still no exception being filed,) judgment being granted pursuant to award, his Honor committed no error in refusing to set aside the judgment, because the defendent filed an affidavit alleging that he had been misled as to the scope and intent of the reference by the referee, and that he could show certain facts in defense, &c.

CIVIL ACTION, tried before *Henry J.*, at the Spring Term, 1873, of HENDERSON Superior Court.

The counsel for the parties in the Court below being unable to agree upon a statement of the case, it was submitted to his Honor, who sent up with the transcript, the following "case settled."

"This case had been referred, by consent, to ascertain the amount due, and the award was to be entered as a rule of Court. There had been no answer by the defendant to the complaint filed by the plaintiff. Referee reported at Fall Term, 1872, stating the amount due to be $713.57. At that term the docket was regularly called *twice* and left the case open at defendant's suggestion, who was present in person, or by his counsel. At the last peremptory call of the docket, on the day of adjournment of the Court, the defendant was not present, and his counsel reported him sick, and asked that the case be continued on that account, which was done. No exception to the report of the referee was made.

At the present Spring Term, 1873, the case was regularly reached, and at the suggestion of the defendant, put at the end of the docket until the last and preremptory call of the docket, the day before the adjournment of the Court, when defendant's counsel asked for a continuance. The plaintiff's counsel demanded judgment, which was granted, there being still no exception filed to the report. Afterwards, defendant's counsel filed the following affidavit, and moved to

open the judgment, which was refused; from which ruling defendant appealed:"

"STATE OF NORTH CAROLINA,
HENDERSON COUNTY.

Spring Term, 1873.

North Carolina, to the use of LAURA L. REED
v.
H. J. FARMER and others. } *Affidavit.*

H. J. Farmer, being duly sworn, says: That the proceedings in this case under the reference to M. E. Carter, Esq., have been conducted in a manner prejudicial to the rights of the defendant, and without due notice to said defendant of the scope or intent of said reference; that at the time the said referee sat to take testimony and account under the rule of reference, this affiant was sick and totally unable to participate in the same without great pain and endangerment of life, as this affiant was advised. And affiant made known his said condition to said referee, when said referee told him this, his only purpose was to ascertain what of balance was due by defendant to plaintiff, that he might report the same to the Court.

Affiant admits that there is a balance due said plaintiff out of the office, but that it is due them out of funds and securities which affiant held as clerk and master under the direction and order of the Court of Equity, which fact he will be fully able to show upon being allowed so to do. That he always expected such right, and was misled by what the referee told him as to scope of his duty and authority under the reference, and but for being thus misled, he would at the time the referee sat, have made application for a postponement, being them unable to attend to it.

HENRY J. FARMER.

Sworn and subscribed, &c."

No counsel in this Court for defendant.
Merrimon, Fuller & Ashe, contra.

SETTLE, J. This appeal must have been taken only for delay. The defendant did not think proper even to answer the complaint. The record shows, however that the case was referred to ———— to ascertain the amount due, and the award was to be entered as a rule of Court.

The referee reported at Fall Term, 1872, stating the amount due to be seven hundred and thirteen dollars and fifty-seven cents.

No exception was taken to the report, but at the defendant's request, indulgence was granted him by the Court, and the case left open until the last day of the term for exceptions, when again upon his motion it was continued to the next term.

Again at Spring Term, 1873, when the case was regularly called it was put at the foot of the docket, at the request of the defendant, and when it was reached a second time, the defendant moved for a continuance, still without having filed any exceptions to the report.

This motion was refused, and judgment entered for the plaintiff in accordance with the award. The defendant then filed an affidavit, alleging that he had been misled as to the scope and extent of the reference, that he was unwell and unable to attend when the referee took testimony; that there was a balance due the plaintiff out of the office, but that it was due her out of a fund and secureties which affiant held as clerk and master under the direction and order of the Court of Equity, &c.

Upon his Honor's refusal to set aside the judgment, the defendant appealed to this Court. We see no reason why the Court should not have entered judgment immediately upon the coming in of the report of the referee in pursuance of

the recital of record that the award was to be a rule of Court.

The defendant took no proper steps to impeach the award, or to test it in any manner.

Much more indulgence has been shown him than he had any right to expect, and it looks like trifling with the Courts to attempt in this way to set aside a judgment, after having every opportunity to bring forward any defence to which he was entitled.

Let it be certified that there is no error.

PER CURIAM. Judgment affirmed.

MARY E. and MARGARET JOHNSON, by their Guardian *v.* H. J. FARMER and others.

(For syllabus aud statement of the facts, see preceeding case of *Laura L. Reed* v. *H. J. Farmer* and others.)

No counsel in this Court for appellant.
Merrimon, Fuller & Ashe, for plaintiffs.

SETTLE, J. The record in this case is a copy of that in *Reed* v. *Farmer,* at this term, except as to the parties plaintiff, and the amount claimed as due. Reference is made to the opinion filed in that case.

There is no error. Let this be certified.

PER CURIAM. Judgment affirmed.

STATE *v.* SAMUEL TAYLOR.

Under the statute requiring "every planter to make a sufficient fence about his cleared ground under cultivation," &c., it is not the intention of the Legislature to visit with pains and penalties mere hirelings and laborers on farms who work by direction of their employers, and have no discretion to originate plans of their own or to change those of their employers.

Nor does the act include a simple employee, with no more discretion as to the management of the farm than is usually vested in those persons whom planters designate as "foremen," whose office is to keep things moving in the direction indicated by the employer; and the fact that such employee receives his wages out of the crop does not change the principle, for that with farmers is a common mode of paying their hands.

CRIMINAL ACTION, tried before *Watts, J.*, at Spring Term, 1873, of CHOWAN Superior Court.

The defendant was indicted for keeping an insufficient fence around his cultivated grounds during crop season, and upon the special verdict returned by the jury, His Honor was of opinion that the interest of the defendant in the crop made him criminally responsible for the condition of the fence, and gave judgment accordingly against him. Defendant appealed.

The rest of the facts are sufficiently stated in the opinion of the Court.

Attorney General Hargrove, for the State.
Gilliam & Pruden, for the defendant.

SETTLE, J. The defendant being indicted for keeping an insufficient fence around his cultivated grounds during crop season, the jury returned a verdict as follows: "That Edward Wood, now deceased, was the owner of a large plantation in Chowan in 1872, of which the defendant was his manager; that Mr. Wood directed the management and culture of the crop, and in what proportion the crops should be planted; that he employed and paid for all the labor, and furnished all the teams, implements and forage; that

the crops were all shipped and sold by him, and the defendant received as wages one-sixth of the net profits; that the fence was in two places less than five feet high."

Upon these facts, his Honor being of opinion that the defendant was guilty, gave judgment against him.

In this we think there was error. The Rev. Code, chap. 48, sec. 1, requires "every *planter* to make a sufficient fence about his cleared ground, under cultivation," &c., and by chap. 34, sec. 41, "*all persons* neglecting to keep and repair their fences during crop time in the manner required by law shall be deemed guilty of a misdemeanor." The description, "every planter," in the first recited act, and "all persons," in the second, refers to and embraces the same class of persons, and however extensive that class may be, we do not think that it was the intention of the Legislature to visit with pains and penalties mere hirelings and laborers on farms, who work by direction of their employers, and have no discretion to originate plans of their own, or to change those of their employers. The special verdict, it is true, states that the defendant was the manager of the plantation, but it goes on with a recital of facts which explain his relation to the owner (Wood), and make him a simple employee, with no more discretion as to the management of the farm than is usually vested in those persons whom planters designate as "foremen," and whose office seems to be to keep things moving in the direction indicated by the employer.

Had he in fact been the real manager or overseer, with discretion to employ the labor furnished in fencing, ditching or otherwise improving the farm, he would have been liable to indictment, but since Wood furnised everything and directed the management and culture of the crops, and the proportion in which they should be planted, the defendant was not authorized to divert that labor to fencing or to anything else which was not directed by his employer.

The fact that the defendant received his wages out of the crop does not change the principle, for that with farmers is a common mode of paying their hands.

We have examined *State* v. *Bell*, 3 Ired. 506, cited by the Attorney General, and find nothing in conflict with the view here expressed.

There is error. This will be certified, &c.

PER CURIAM. Reversed.

L. W. BATCHELOR, Adm'r *v.* L. MACON *et al.*

When a testatrix devised a tract of land to her son, to him and his heirs forever, and added the following: "But should my son die without lawful issue, then and in that case, it is my request (inasmuch as it was his father's wish) that the above given legacy be by him conveyed by will in writing to his brother, J. N. F., or to any one or more of my grandchildren," *it was held* that he took an absolute estate in fee simple in the land, and that upon his death without issue and intestate, it might be sold by his administrator for the payment of his debts.

This was an ACTION in the Superior Court of HALIFAX, in which judgment was rendered for the plaintiff, subject to the opinion of the Court upon the following case agreed:

1. This was an action for the recovery of two notes given by the defendants to the plaintiff for the sum of $1,354, with interest from the 2d day of February, 1870.

2. The notes were given for the purchase of a tract of land sold by the plaintiff, as administrator of John Faulcon, deceased, under proceedings for that purpose, which are admitted to be regular.

3. The defendants alleged that the said John Faulcon had no title to the said lands, and objected to paying the said notes for that reason. And in support of this allegation, he showed the will of Mrs. R. Faulcon by which the

said land was devised to the said John Faulcon. The following is a copy of so much of said will as is material to this case: "Item 4th. I will and bequeath to my beloved son, John Faulcon, all my lands lying west and north of Smiley's Branch, except the Winter tract, and that part of the Atkin's tract given to the children of Christopher B. Allen, also one-half of my negro slaves that I may die possessed of, together with those now in his possession, (except those loaned to my granddaughter, Ann R. Allen, in this will,) to him and his heirs forever. But should my son, John Faulcon, die without lawful issue, then and in that case it is my request (in as much as it was his father's wish) that the above given legacy be by him conveyed by will in writing to his brother J. N. Faulcon, or to one or more of my grandchildren."

4. It is admitted that the land devised by the testatrix in the foregoing clause of her will to the said John Faulcon was the same which was sold by the plaintiff, as the administrator of the said John Faulcon, and purchased by the defendant, and for which the said two notes were given.

5. It is further admitted that the said John Faulcon died intestate and without issue, leaving him surviving, the said Isaac N. Faulcon, and a large number of the grandchildren and great grandchildren of the said testatrix, all of whom are made parties to this action.

It is therefore agreed between the said parties that if the said John Faulcon did not acquire an estate in fee simple absolute in the said land under the said will, then the judgment for the plaintiff shall be set aside, and judgment shall be rendered for the defendant. But if the said John Faulcon did acquire an estate in fee simple absolute under the said will, then judgment shall be rendered in favor of the plaintiff for the amount of said notes and interest."

His Honor *Watts, J.*, at the last term of the Superior

Court, being of opinion with the plaintiff, ordered the judgment to stand, and the defendants appealed.

Badger & Devereux, for the defendants.

Batchelor, Edwards & Batchelor and *Moore & Gatling*, for the plaintiff.

PEARSON, C. J. We consider it useless to make any reference to the many cases cited on the argument, except to remark that "every tub must stand on its own bottom."

In the construction of wills the object is to find the intention of the testator. This must be done by a consideration of the words of the will, and by such other evidence as it is competent for the Court to hear in aid of its "search for truth."

Public policy requires that the alienation of land should be as free as any other article of property, so that its transfer and devolution may be as little clogged by "limitations over conditions," and "trusts," as other subjects of traffic; hence we take the position that whenever a donor by deed or will, gives an estate to "*one and his heirs forever*," direct words must be used in order to have the effect of cutting the estate down to a life estate, or what is in effect the same thing, and that no expression of a request, or hope, or expectation can be allowed to have that effect.

If a donor or testator has formed a fixed purpose to curtail the estate of the donee or devisee by a limitation over, a condition or trust, it is very easy for him to say: "In the event that my son should die without issue living at his death, the land is to belong to his brother or to such of my grandchildren as he may by his will direct, and on failure of such appointment, then to my right heirs.

In this will there is no clog or qualification of the kind, but simply a request that her son would do so and so, which he did not comply with.

John Faulcon was, in respect to this land, the primary object of the testator's bounty, and the idea that while professing to give him the absolute estate in fee simple, she had a covert purpose of subjecting his estate *to a trust* so that he could not sell, or charge with the dower of a wife, or make leases to be valid after his death, or have any inducement to make improvements, or right to obtain credit, on the footing of being the owner of the property, is one that we cannot entertain; it would be mockery by a mother to her son.

We declare our opinion to be that John Faulcon had an estate in fee simple absolute under the will.

PER CURIAM. Judgment accordingly.

HENRY NUTT *v* JOSEPH THOMPSON.

The examination of a witness before a referee, which was taken in the presence of the parties to the suit, and signed by the witness, who has since died, may be read as evidence on the trial of the suit, in which such examination was taken.

CIVIL ACTION for a breach of contract, tried before *Buxton, J.*, at the January (Special) Term, 1873, of ROBESON Superior Court.

The suit commencing by writ under the old system, was instituted 26th August, 1863. It was subsequently referred, and upon the investigation by the referee, one Robert McKenzie was examined for the defendant, in the presence of the plaintiff's attorney and the defendant, and his examination was signed by himself and witnessed by referee. Nothing ever became of the reference, and the deposition of McKenzie remained in possession of defendant.

On the trial below this deposition of McKenzie, who is dead, was offered in evidence by defendant. It was objected to, and ruled out by his Honor. There was a verdict for the plaintiff. Judgment and appeal by defendant.

Other facts pertinent to the decision will be found in the opinion of the Court.

W. L. McKay and *Strange*, for appellant.
N. A. McLean, contra.

BOYDEN, J. The first and the only question necessary for a decision of the case in this Court, is that in relation to the deposition of Robert McKenzie, taken by the referee, McRae. The case was referred to McRae for decision, and the parties, after due notice, appeared before McRae, the referee—the defendant in person, and the plaintiff by his attorney; and the case states, that by consent between plaintiff's counsel, and the defendant, Robert McKenzie was sworn and examined for the defendant, and it further appears that this witness' testimony was taken down in writing by the referee, and that the plaintiff by his counsel cross-examined the witness. This witness' evidence thus taken down in writing by the referee was produced on the trial and offered to be read, but the plaintiff objected to its being read for the following reasons:

1st. That it could not be read as a deposition taken in the cause, because it had not been taken for that purpose; it had not been authorized by the Court; it had never been filed in Court, but was produced now for the first time after a lapse of many years, and from the custody of the defendant; and lastly, the authority under which it had been taken had been revoked, and the plaintiff had good reason to suppose that everything done by the referee would go for nothing, and consequently he had taken no steps to correct

the statements of the witness made in his absence by re-examination or otherwise.

2d. It was objected that it could not be read as the evidence of a deceased witness, taken on a former trial between the same parties; because there had been no former trial. That the deposition of McKenzie, was both competent and relevant is too plain for argument. In the first place, it has the required tests to elicit the truth, as the witness was regularly sworn by the referee, who had authority to administer the oath, and he was subjected to a cross-examition on the part of the plaintiff, and it was taken in this idential case between these parties; and the witness is now dead. Both the reason of the thing, and the authorities cited by defendant's counsel, fully establish its competency.

But the plaintiff objects to its being read, on the ground that he was surprised, and had no opportunity to contradict the witness, or to show the falsity of the deposition. Is this so? According to the evidence, this witness testified to a conversation between the witness and the plaintiff himself, and it does not appear that any other person heard this conversation; and it does appear that the plaintiff was a witness himself, and could have contradicted the statements of the witness, if false, and could have explained them if erroneous in any particular; and if the witness was unworthy of credit, he could have impeached him. He needed no time to prepare to impeach the witness, as parties are not allowed, as a general rule, to continue causes for a witness to impeach another witness.

In the case of *Jackson on dem. Potter & Calvin*, 2 Johnson, 17, it was held that what a deceased witness had sworn before commissioners appointed by an Act of the Legislature to settle disputes concerning titles to land in the county of Onandaga, was competent testimony in a suit thereafter tried between parties claiming title to the same lands, although neither of the suitors were parties or had a chance

to cross-examine the deceased witness. In this case the evidence was oral, and one of the commissioners was permitted to prove what the deceased witness had sworn.

This case is full authority to establish the competency of the evidence rejected.

There is error.

PER CURIAM. *Venire de novo.*

B. L. PERRY *et al. v.* MERCHANTS' BANK OF NEWBERN *et al.*

Where a suit is pending against A, and he, in consideration that the suit be dismissed, &c., agrees to pay one-half of the claims in cash, and to pay 50 per cent. of his assets, or so much as may be necessary, as they may be reasonably collected to discharge the balance of the claim, this is as between the parties, a valid equitable assignment, and makes A trustee for his creditor to the extent of the agreement; and where a second creditor of A afterwards brings suit and obtains a judgment, and upon the return of an execution *nulla bona*, procures supplemental proceedings to subject enough of the debt of a debtor of A to satisfy his judgment, such second creditor only acquires a lien on the debt owing to A, subject to the first creditor, and an account ought to be taken. Questions which may arise after an account reserved.

PROCEEDINGS SUPPLEMENTAL TO EXECUTION, begun before the clerk of the Superior Court of EDGECOMBE county, and by him transmitted to his Honor, W. A. MOORE, Judge of the Second Judicial District, for decision. His Honor gave judgment against the debtors of the defendant in favor of the plaintiffs.

Defendants appealed.

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

A. S. Merrimon, for appellants.

J. L. Bridges, Jr., and *Perry*, contra.

RODMAN, J. On 3d December, 1869, the defendant being indebted to the Carolina National Bank of Columbia, in over $19,000, agreed with it to pay immediately one-half of the debt, viz: $10,306.63, and to pay the remainder of the debt by paying over to the Carolina Bank fifty per cent. of the assets of the defendant as the same shall be reasonably collected, or so much as may be sufficient therefor. In consideration of this agreement the Carolina Bank released the stockholders of the Merchants' Bank from personal liability, and agreed to dismiss a suit then pending. The cash payment was made, but in order to make it the Merchants' Bank borrowed of certain of its stockholders about $2,000 which it agreed to repay out of the remainder of the assets. Afterwards, to wit: On 29th April, 1872, the plaintiff recovered judgment against the defendant for $3,207.03 debt, besides costs, upon which an execution issued, which was returned "*nulla bona.*" The plaintiff thereupon, upon affidavit that Gooding and Jerkins were indebted to the Merchants Bank procured process requiring them to appear and answer, &c. The parties then agreed upon a statement of facts, in substance, that Gooding and Jerkins were indebted to the defendant bank, by note, before and at the date of the above mentioned agreement with the Carolina Bank, and were still indebted. The above agreement was set up as a defense to the supplemental proceedings of the plaintiff. His Honor, the Judge of the Second District, gave judgment against Gooding and Jerkins in favor of the plaintiff, from which they appealed.

The agreement between the Merchants' Bank and the Carolina Bank of 3d December, 1869, although no assets were specifically described in it, and although the Merchants' Bank remained in possession of the assets, was, as between the parties to it, a valid equitable assignment according to its terms, and the Merchants' Bank became a trustee of the Carolina Bank to carry out the agreement.

What effect the agreement (not having been registered) would have as respects other creditors of the Merchant's Bank, upon such proceedings as have been had in the present case; whether the assignee, notwithstanding the non-registration, would have priority over the other creditors, we think it unnecessary to inquire at present, and we express no opinion on that point.

Conceding that the Merchants' Bank became a trustee for the Carolina Bank, and for those stockholders of the former, who, by the agreement with them, became substituted to the rights of the Carolina Bank to the amount of their advance, to the extent of one-half the assets as they should be collected, and conceding for the present purpose a priority to the Carolina Bank over the other creditors of the Merchants' Bank to the extent required by the agreement; yet it is clear that the assets not assigned, remained subject to the claims of the other creditors of the Merchants' Bank as fully as they would have been in the absence of the assignment.

No right to any specific or particular debt was created by the agreement. The trust was that the Merchants' Bank should pay over the one-half of each debt as it might be collected, and if it failed to do this, then after all the debts were collected, it should pay out of the one-half of the fund.

The plaintiff by this proceeding has acquired a lien on the debts owing by the present garnishees, subject to the claim of the Carolina Bank to one-half of the whole assets, including of course the debts of the present garnishees.

According to the principle that where one of two creditors has a lien upon several funds, and the other has a lien upon one of them only, the former shall exhaust the funds not liable to the latter creditor before resorting to the one liable to him; the Carolina Bank must in the first instance look for payment to such of the assets as the plaintiff has no claim to. The stockholders of the Merchants' Bank who

made the advance, as far as the plaintiffs are concerned, stand on the same footing with the Carolina Bank.

The assets upon which the plaintiff has no lien, may be sufficient to pay off the Carolina Bank. Whether they are, or not, can only be ascertained upon an account of:

1. What is now owing to the Carolina Bank?

2. The assets of the Merchants' Bank at the date of the agreement, and of the amount which has been, or ought to have been, and may be collected.

For the purpose of taking the account the Carolina Bank should be made a party to this proceeding.

If it shall appear that the Merchants' Bank is not using due diligence to collect its assets, it will be competent for the plaintiff to move for the appointment of a receiver.

If, upon taking the account, it shall appear that one-half the assets of the Merchants' Bank at the date of the agreement are insufficient to pay the Carolina Bank, either party may apply for such relief as may be proper. The questions which may then arise are reserved in the mean while.

PER CURIAM. Judgment below reversed, and a judgment may be drawn remanding the case to be proceeded in conformably to this opinion. The plaintiff will recover costs in this Court.

RULES

OF THE

SUPREME COURT.

ADOPTED AT

JUNE TERM, 1873.

The Supreme Court, by virtue of its power to exercise a general supervision and control of the inferior Courts, makes the following rules:

I. Every clerk of a Superior Court, and every commissioner appointed by such Court, who by virtue, or color, of any order, judgment, or decree, of the Court, in any action pending in it, has received or shall receive any money, or security for money to be kept or invested for the benefit of any party to such action, or of any other person, shall, at the term of such Court, held on, or next after the first day of January in each year, report to the Judge a statement of said fund, setting forth the title and number of the action, and the term of the Court, at which the order or orders, under which the officer professes to act, was made; the amount and character of the investment, and the security for the same, and his opinion as to the sufficiency of the security. In every report, after the first, he shall set forth any change made in the amount or character of the investment since the last report, and every payment made to any person entitled thereto.

II. The reports above required, shall be handed by the Clerk of the Superior Court, to the Register of Deeds, and acknowledged or proved by said Clerk, and said reports shall be registered at the cost of the fund. The originals shall be returned after registration to the clerk of the Superior Court, and filed among the papers in the cause.

III. The above rules shall apply to the clerks of the Supreme Court, and to any commissioner appointed by it to receive and invest funds. His report shall be registered in the county from which the appeal was taken in the cause in which the order is made.

IV. A breach of the above rules shall be punishable as a contempt of the Court to which the report is required to be made.

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ACTIONS, CIVIL.

1. *On an unsealed note:* Under the new Constitution, and since the adoption of the C. C. P., a civil action may be brought upon a note without seal, and an allegation may be made that the note was intended to be under seal, but that the seal was omitted by accident or mistake, and upon sufficient proof the accident or mistake may be corrected and a recovery had accordingly. *McCown, Adm'r.* v. *Sims*, 159.

2. *Evidence of a seal:* In an action involving the correctness of a mistake in omitting to put a seal to a note, the circumstances that the note was taken by way of accommodation, for another, to which the seal was attached, that the words "witness my hand and seal" were in the note, and that the parties were a sister and a brother of the half-blood living in the same house on terms of the most intimate family relations, are all admissible in evidence tending to prove that a seal was intended to be put to the note, but was omitted by accident or mistake. *Ibid.*

3. *Sheriff may maintain against bidder:* A sheriff selling land under execution may maintain an action in his name against the purchaser for the amount bid, upon tendering a deed for the land sold. *McKee* v. *Lineberger*, 217.

4. *Sheriff's rights against purchaser, &c.:* The relation of creditor and debtor exist between the sheriff and such purchaser, by force of contract of sale, and the sheriff is left to enforce his rights by the usual remedy of action, unless he elects to rescind the contract of sale and sell the land again. *Ibid.*

5. *Not necessary to make return:* Nor is it necessary to enable the sheriff to bring such action, that he should first make a return of the sale on the execution. *Ibid.*

6. *Former suit, when a bar:* A suit in our former Courts of Equity by A, the equitable assignee of a bond against B, the assignor, to compel B to allow the use of his name in a suit at law against D, the obligor in the bond, which suit was dismissed, is no bar to a suit by A, the party in interest, under the new system against D. *Swepson* v. *Harvey*, 387.

7. *Same:* Nor does the fact that after the equity suit was dismissed, D having notice of the equitable assignment, paid off the bond to B, affect A's right to recover. *Ibid.*

8. *When not maintainable:* The administrator of a deceased guardian cannot maintain an action on the bond of a clerk and master for a fund alleged to be due to the ward. *Davis* v. *Fox*, 435.

9. *Possession, when necessary:* An action for the recovery of the possession of personal property, (in the nature of *detinue* under our old system,) will not lie against one who was not in possession of the property at the time the action was commenced. *Haughton* v. *Newberry*, 456.

10. *What can be recovered under the general prayer for relief:* Nor can a plaintiff in such action, under a general prayer for "other relief," recover the judgment warranted by the facts proven. For although the names and technical forms of actions are abolished by the Constitution, yet in the very nature of things, there must be distinctions respect to the remedies applicable to different cases. *Ibid.*

ACTION, CRIMINAL.

Petition to Rehear: The Supreme Court has no power to entertain a petition to rehear a criminal action. It never passes judgment in such cases, but only gives its opinion, and orders it to be certified to the Court below, to be carried into effect by that Court. *State* v. *Jones*, 16.

AGENT.

1. *Evidence tending to prove:* If a manufacturing company knowingly permits a person to sell goods in a store-house with their name over the door, though in a town distant from their place of business, it is a circumstance which, taken with others, such as that he sold their manufactured articles, and bought bacon and other country produce for them, must be considered as tending to prove the fact that he was acting as their agent. *Gilbraith & Co.* v. *Lineberger & Co.*, 145.

2. *Acts of agents binding, when:* When one permits another to hold himself out to the public as his agent to sell and buy certain kinds of goods for him, he is bound by the acts and contracts of such agent within the scope of his authority, but that authority does not extend to the borrowing of money or buying clothes for himself. *Ibid.*

3. *Of a lunatic:* A plaintiff who has indorsed the notes of a self-constituted agent of a lunatic, to enable such agent to raise money ostensibly for the benefit of the family of such lunatic, which money was used by the agent in cultivating the farm of the lunatic, can only recover, in a suit against the lunatic upon the notes signed by the agent, so much of his debt as he can show was actually expended for the necessary support of the lunatic, and such of his family as were properly chargeable upon him. *Surles* v. *Pipkin*, 513.

AGREEMENT.

1. *Judgment to be discharged upon part payment:* If upon confessing judgment in a suit by a bank against one of its debtors, it be agreed and entered upon the docket at the foot of the judgment, that it may be discharged upon the payment of a certain *per cent.* of the amount in United States currency, or the full amount in the notes of the bank, the plaintiff will be bound by the agreement, and an execution issued for the full amount in United States currency more than two years afterwards, may be set aside, and the bankruptcy of the bank will not alter the case. *Hardy*, Casher, v. *Reynolds*, 5.

2. *Void:* An agreement by a creditor to take from his debtor one-half of the amount of his debt then due in discharge of the whole, is without consideration and void, and this is so though the debtor is a surety, and the debt is due by bond. *Bryan* v. *Foy*, 45.

3. *Rights of sureties:* Where, upon the purchase of a chattel personal, the purchaser gave his note with sureties for the price, and it was agreed by

parol between the parties at the time that the chattel should belong to the sureties until the note was paid: *It was held*, That the effect of the agreement was to pass the title to the chattel from the seller to the sureties, and not from the seller to the purchaser, and then from him to his sureties for their indemnity, for in the latter case it would have been a mortgage which would have been void for want of registration. *Worthy et al.* v. *Cole et al.*, 157.

4. *Between husband and wife, when valid*: An agreement by the husband that the wife shall receive the price for which land belonging to her, sold in personal property, and hold the same to her separate use, to enable her to purchase another tract of land with the same, is valid, such price not vesting in the husband, *jure maritii*, so as to subject the same to the claims of his creditors. *Teague* v. *Downs*, 280.

5. *By Solicitor to discharge defendant*: An agreement by a Solicitor for the State, to discharge a defendant, if he would become a State's witness against a co-defendant, which he did so far as to go before the grand jury and be examined, and then left the Court, will not relieve such defendant from a forfeited recognizance. A recognizance is a matter of record, and can only be discharged by a record, or something of equal solemnity. *State* v. *Moody*, 529.

AMENDMENT.

1. *Judge's right to allow:* Pending a motion for final judgment, the Judge below has a right to allow an amendment, striking out a demurrer which had been adjudged during the same term to be frivolous, and the defendants to answer, especially when satisfied that the demurrer was interposed in good faith, and that the defendants had a valid *prima facie* defence. *Norwood* v. *Harris*, 204.

2. *Power of Courts to permit:* As a general rule every Court has ample power to permit amendments in the process and pleadings of any suit pending before it; but the Courts have no such power, when an amendment proposed to be made will evade or defeat the provisions of a statute. *Cogdell*, Assignee, v. *Exum*, 464.

ANSWER.

SEE PLEADING, 1, 5.

APPEAL.

1. *Practice in; undertaking:* Upon an appeal from a judgment of the Superior to the Supreme Court, the whole case is taken up to the latter Court, whether the appellant give an undertaking with sufficient security (or in lieu thereof make a deposit of money) to secure the amount of the judgment, or to secure the costs, only as provided in sections 303 and 304 of the C. C. P., the right of the appellee to issue execution in case of the undertaking being to secure the costs of the appeal only is given, instead of the deposit of money to abide the event of the appeal. *Bledsoe* v. *Nixon et al.*, 81.

2. *Same; new trial:* When an appeal is taken from the Superior to the Supreme Court, a proceeding to obtain a new trial on account of newly-discovered testimony cannot be instituted in the Superior Court, but

must be brought in the Supreme Court, and upon a proper case that Court will remand the cause so that the Superior Court may take jurisrisdiction and proceed to do what may be right. But if the newly-discovered testimony applies to only a part of the judgment, the Supreme Court will retain the cause and order proper issues to be made up upon the alleged newly-discovered testimony and sent down for trial in the Superior Courts, and will impose such terms upon the applicant for the new trial as may be deemed proper. *Ibid.*

3. *Power of Judge below to set aside judgment:* When an appeal is taken from the final judgment of the Superior to the Supreme Court, the whole case is taken up to the latter Court, and if the judgment be affirmed, remains there, so that the Judge of the Superior Court has no power to set aside the judgment upon the ground of mistake, &c., under the 133d section of the C. C. P. *Isler* v. *Brown et al.*, 125.

4. *Affidavit, when necessary:* To enable insolvent defendants, convicted in criminal actions to appeal from judgments of the Court below, it must appear by affidavit that they are wholly unable to give security for the costs, and that they are advised by counsel that they have reasonable cause for the appeal prayed for, and that the application is in good faith. *State* v. *Divine et al.*, 390.

5. *Not effectual until entered on judgment docket:* Until the entry on the judgment docket by the clerk, no appeal from a judgment rendered in term time is effectual, and such entry must be within ten days after the judgment is rendered. Notice of such appeal may be given in a reasonable time afterwards. *Bryan* v. *Hubbs*, 423.

6. *Undertaking; notice:* The undertakings necessary to perfect an appeal may be given within a reasonable time after notice of the appeal has been given. And after such appeal has been perfected, it is the duty of the clerk to give notice thereof to the sheriff, in order that any execution which may have issued may be superseded. *Ibid.*

SEE IN FORMA PAUPERIS; GROWING CROPS.

ARBITRATION AND AWARD.

1. *Awards, construction of, when set aside:* Although arbitrations are favored in law as being a court selected by the parties, and a cheap and speedy method of settling difficulties; and although awards are to be liberally construed so as to effect the intention of the arbitrators, without regard to technicalities or refinement, yet it is well settled that where the arbitrators undertake to make the case turn upon matters of law, and mistake the law, their award is void. *Leach* v. *Harris*, 532.

2. *Not bound to decide according to law:* It is equally well settled that arbitrators are not bound to decide a case "according to law," being a law unto themselves, but may decide according to their notions of justice, and without giving any reasons. *Ibid.*

3. *Judgment on award:* A suit is referred to A, whose award is to be a rule of Court, and who reports to Fall Term, 1872, a balance due plaintiff; neither party filing exceptions to the report, the plaintiff has a right to judgment at the term to which the report is made. And upon motion of defendant, the cause being continued, at the ensuing term (still no exception being filed,) judgment being granted pursuant to award, his

Hon··r committed no error in refusing to set aside the judgment, because the defendent filed an affidavit alleging that he had been misled as to the scope and intent of the reference by the referee, and that he could show certain facts in defense, &c. *Reed* v. *Farmer*, 539; *Johnson* v *Farmer*, 542.

ARREST OF JUDGMENT.

SEE CRIMINAL PRACTICE, &c., 3, 11.

ARSON.

Burning a Mill-house in 1863: The Constitution does not repeal s ction 2, ch. 34, of the Revised Code; it repeals only so much of it as imposes death as a punishment: *Hence*, one can be now indicted, convicted and punished for burning a mill-house in 1863. *State* v. *King*, 419.

ASSETS.

SEE EX'RS AND ADM'RS, 7.

ASSIGNEE.

May sue in State Courts: An assignee in bankruptcy may sue or be sued in Courts of the State, on claims for or against the estate of the bankrupt, our Courts having concurrent juisdiction with the United States Courts in the premises. *Cogdell* v. *Exum*, 464.

SEE ACTION, CIVIL, 6, 7; BANKRUPT 2; DEED, 4; PAYMENT, 2.

ASSIGNMENT.

Equitable, effect of: Where a suit is pending against A, and he, in consideration that the suit be dismissed, &c., agrees to pay one-half of the claims in cash, and to pay 50 per cent. of his assets, or so much as may be necessary, as they may be reasonably collected to discharge the balance of the claim, this is as between the parties, a valid equitable assignment, and makes A trustee for his creditor to the extent of the agreement; and when a second creditor of A afterwards brings suit and obtains a judgment, and upon the return of an execution *nulla bona*, procures supplemental proceedings to subject enough of the debt of a debtor of A to satisfy his judgment, such second creditor only acquires a lien on the debt owing to A, subject to the first creditor, and an account ought to be taken. Questions which may arise after an account, reserved. *Perry* v. *Merchant's Bank of Newbern*, 551.

ATTACHMENT.

Affidavit, when defective: An affidavit for a warrant of attachment, under the C. C. P., sec. 201 (Battle's Revisal chap. 67, sec. 201) which states that "the defendant is absent so that the ordinary process of law cannot be served upon him," without an averment that the absence "was with intent to defraud his creditors and to avoid the service of a summons," is fatally defective. *Love & Co.* v. *Young et al.*, 65.

ATTORNEYS.

1. *Compromise, power to:* An attorney cannot compromise his client's case without special authority to do so, nor can he without such authority, receive in payment of a debt due his client anything except the legal currency of the country, or bills which pass as money at their par value by the common consent of the community. A subsequent ratification of the acts of the attorney is equivalent to a special authority previously granted to do those acts, but it must be the ratification of the client himself and not of his agent. *Moye* v. *Cogdell*, 93.

2. *Fraudulent conduct, how cognizable:* The alleged fraudulent conduct of a defendant and an attorney employed by the plaintiff, cannot be inquired into upon a writ of false judgment. *Caldwell* v. *Beatty*, 365.

SEE PRACTICE, 3; GUARDIAN AND WARD, 3.

BANKS AND BANK BILLS.

SEE AGREEMENT, 1; TAXES, 2, 5, 7.

BANKRUPT.

1. *Assignee may sue in State Courts:* An assignee in bankruptcy may sue or be sued in the Courts of the State, on claims for or against the estate of the bankrupt, our Courts having concurrent jurisdiction with the U. S. Courts in the premises. *Cogdell, Assignee* v. *Exum*, 464.

2. *Stat. Limitation:* A, a bankrupt, brings a suit in his own name against B, on the 19th day of September, 1870; on the 11th of March, 1872, A's assignee in bankruptcy C, who was appointed the 25th of February, 1869, is made party plaintiff in the suit commenced by A: *Held*, That at the right of action against B accrued to C, the assignee, at the time of his appointment, and that he was barred by the limitation contained in section — of the bankrupt act. *Ibid.*

BASTARDY.

Impotency, a defence: On the trial of issue of bastardy, the impotency of the putative father, if true and proven, would be a complete and satisfactory defence; it is therefore error in the Judge below to reject any competent evidence, introduced for the purpose of proving that the putative father was impotent at the time the child is alleged to have been begotten. *State & Mary Hargett* v. *Broadway*, 411.

BILL OF EXCEPTIONS.

SEE CRIMINAL PRACTICE, &C., 2.

BONDS, OFFICIAL.

1. *Securities not responsible, when:* The condition of a bond given by the Treasurer of a Railroad Company that he "shall faithfully discharge the duties of the office, and well and correctly behave therein," does not bind him to keep the money of the Company safely against all hazards. It only binds him to an honest, diligent and competently skillful effort to keep the money. Hence, where the Terasurer deposited the money of

the Company to his credit as such in a banking house, which was at the time in good standing and credit, and was considered by the community a safe place of deposit for money: *It was held*, That he and his sureties were not responsible for its loss by the sudden and unexpected failure of the banking-house. *Atlantic & N. C. Railroad Co.* v. *Cowles et al.*, 59.

2. *By-Laws, obligation of sureties:* Though the officer of a Railroad Company is bound to know the by-laws of the corporation, it does not follow that the sureties to his bond are presumed to know them unless there be a reference to them in the bond. The obligation of the sureties is confined to the words of their bond, and cannot be extended beyond them. *Ibid.*

3. *Guardian bond; construction:* An instrument intended as a guardian bond in which the names of the wards are recited in the wrong place, and in another part of said bond the names are inserted. A, B and others, wards, by a just and liberal construction is sufficient as a guardian bond under the statute. *State ex rel. Sprinkle* v. *Martin*, 175.

SEE GUARDIAN AND WARD, 5.

BOND, ADMINISTRATOR'S.

SEE PLEADING, 3, 5.

BOND TO MAKE TITLE.

SEE DEED, 4.

BY-LAWS.

SEE BONDS, OFFICIAL, 2.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

SEE JUDGMENT, 4.

CLERK AND MASTER.

SEE GUARDIAN AND WARD, 6, 7.

CLERK OF SUPERIOR COURT.

1. *Investment of money:* When money is invested by a clerk or other officer under the orders of a Court, the clerk or other officer cannot change the investment without the sanction of the Court or the parties, and if he does so he will be responsible for any loss that may accrue, for he will be held to a much stricter accountability than a guardian or trustee would be under similar circumstances, because the clerk or other officer might get the consent of the parties or the advice and direction of the Court, while the guardian or trustee would be compelled generally to act upon his own judgment. *Rountree* v. *Barnett et al.*, 76.

2. *Same:* While generally a clerk or other officer cannot change an investment which he has made under the order of a Court, yet if a sudden and unexpected loss is threatened, he may do so, but in such cases he must show a necessity for such prompt action, and that he acted in good faith and with ordinary prudence; and he must as soon as he can report his action to the Court. *Ibid.*

3. *Authority to receive money:* Whenever it is sought to establish an authority in a clerk, to bind a plaintiff by the receipt of depreciated currency in payment of a judgment, it must be shown either that the receipt was expressly authorized by the plaintiff, or that the plaintiff has done acts from which such an authority may fairly be implied. *Purvis* v. *Jackson*, 174.

4. *Agency of clerk in receiving money:* Acts from which such an agency in the clerk beyond what the law (Rev. Code, chap. 31, sec. 127,) gives him, may be implied, must be such as under the circumstances were reasonably calculated to induce the debtor to believe that the clerk was the creditor's agent for the purpose; as for instance, that the creditor had procured an order to collect the money; or had issued an execution without instructing the sheriff what kind of money he was to receive in payment, &c. And if, from such acts the debtor has reasonably led to believe that the clerk was authorized to receive payment of a judgment in Confederate money, and acting on that belief, pays the judgment in such money, it is immaterial whether the clerk was really the agent or not; the creditor being estopped from denying the agency, and the debtor protected in his judgment. *Ibid.*

See CORONER; UNDERTAKING.

CODE OF CIVIL PROCEDURE.

(*Cited and commented upon:*) Sec. 73, *Witkousky & Rintels* v. *Wasson*, 38.
Secs. 95, 57, 100, 104, 245: *Flack* v. *Dawson*, 42.
Sec. 201; *Love & Co.* v. *Young*, 65.
Secs. 303, 304; *Bledsoe* v. *Nixon*, 81.
Sec. 133; *Isler* v. *Brown*, 225.
Sec. 254; *Hoppock, Glenn & Co.* v. *Shober*, 153.
Secs. 95, 217; *Green* v. *Green*, 294.
Sec. 126; *N. C. Land Co.* v. *Beatty*, 329.
Sec. 343; *Gilmer* v. *McNairy*, 335.
Sec. 67; *Jones* v. *Comm'rs of Bladen*, 412.
Secs. 80, 189, 300 *et seq.*, *Bryan* v. *Hubbs*, 423.
Secs. 128, 129, 132; *Haughton* v. *Newberry*, 456,
Sec. 63, 126; *Wooten* v. *Maultsby*, 462.
Secs. 5, 86, 176 *et seq.*, *Holmes* v. *Godwin*, 467.

COMPROMISE.

SEE ATTORNEY, 1.

CONSIDERATION.

SEE AGREEMENT, 2.

CONSTITUTION.

(*Cited and commented upon:*) Art. II, sec. 5; *Comm'rs of Granville* v. *Ballard*, 18.
Art. IV, sec. 30; *Witkousky & Rintels* v. *Wasson*, 38.
Art. IV, sec. 11; *Sinclair, Owens & Brown* v. *The State*, 47.
Art. X, sec. 1, *et seq.*, *Hager* v. *Nixon*, 108.
Art. IV, Secs. 15, 33, *Fell & Bro.* v. *Porter*, 140.
Art. VIII, sec. 2; *Barrington* v. *Neuse River Ferry Co.*, 165.
Art. XI, secs. 1, 2; *State* v. *King*, 419.
Art. IV, sec. 4; *State* v. *Davis*, 395.

CONSTRUCTION.

SEE BONDS, OFFICIAL, 3.

CONTEMPT.

Not obeying an order of the Court: If, in the case of proceedings supplemental to execution, an order be made appointing a receiver and directing a certain person to deliver a bond alleged to belong to the execution debtor to the receiver, he is *prima facie* guilty of a contempt of Court if he hand the bond to an attorney for collection instead of delivering it to the receiver, though he may be discharged upon swearing that he only intended for a certain purpose to get a judgment and not to collect the money, and that thereby he had not *intended* any contempt of the Court, but his discharge should be granted on his paying the costs. *Bond* v. *Bond*, 97.

CONTRACT.

1. *Warranty:* If a person agree to purchase articles to be delivered by a certain time, and which are promised to be of a certain good quality, and after payment for the same, and after it is too late to return them without prejudice to himself, he finds out that they are of inferior quality, he may sustain an action to recover damages on account of the inferior quality of the articles, although he has taken and used them. *Cox et al., Trustees* v. *Long*, 7.

2. *Evidence of:* The rule that when a contract has been reduced to writing, no evidence of its contents is admissible except the writing itself, is confined to contracts, and does not extend to receipts on the payment of money, unless they contain something more, so as to amount to contracts. *Miller* v. *Derr*, 137.

3. *Vague and indefinite, when:* A contract to convey "a certain piece of land in the county aforesaid adjoining the lands of" A and B "and others, being a part of the Alexander tract, supposed to contain 30 or 35 acres," is so vague and indefinite that a Court cannot enforce it specifically. *Grier* v. *Rhyne*, 346.

SEE SALES, 1.

CORONER.

Clerks may appoint: Under the Constitution, art. 4, sec. 30, where there is no coroner in the county, the Clerk of the Superior Court may appoint one to execute process against the sheriff, where he is interested in, or a party to the suit; or in such case, under the C. C. P., sec. 73, may issue to the sheriff of an adjoining county. *Witkousky & Rintels* v. *Wasson*, 38.

COSTS.

When defendant, Adm'r, entitled to: A defendant who is an administrator, is entitled to costs in an action wherein the plea of "fully administered" has been found for him, and a judgment *quando* rendered. See 67 N. C. Rep. 38. *Lewis* v. *Johnston*, 392.

SEE CONTEMPT; IN FORMA PAUPERIS.

COUTERCLAIM.

When not bound to assert: A defendant is not bound to assert a set off or counterclaim in an action brought against him whenever he may do so; nor does the plaintiff's recovery bar a subsequent action for such counterclaim, which the defendant might have, but did not plead in the original action. *Woody* v. *Jordan et al.*, 189.

COUNTIES.

1. *Changes of dividing line:* The Act of 1872-'73, chap. 143, which changes the dividing line between the counties of Granville and Franklin, and thereby adds a portion of the territory of the former to the latter county, is constitutional, not being necessarily in conflict with the provision of the 5th section of the 2d article of the Constitution relating to the Senatorial Districts, nor with the provision of the 6th section of the same article, which relates to the apportionment of members in the House of Representatives. *Commissioners of Granville County* v. *Ballard*, 18.

2. *Same; not unconstitutional:* The Act of 1872-'73, chap. 143, changing the dividing lines between the counties of Granville and Franklin, and thereby adding a portion of the territory of the former to the latter county, is not unconstitutional, and the carrying out of its provisions cannot be enjoined at the instance of a creditor on behalf of himself and the other creditors of the former county. *Moore et al.* v. *Ballard*, 21.

COURTS.

1. *Jurisdiction:* Where two or more Courts have equal and concurrent jurisdiction of a case, that Court in which suit is first brought acquires jurisdiction of it, which excludes the jurisdiction of the other Courts. *Childs* v. *Martin et al.*, 126.

2. *Fraud, &c.:* The persons who allege that the judgment had been obtained in the first action by a fraudulent combination and contrivance, instead of bringing a second action, in another Court, ought to have made themselves parties to the first action and to have asked as "a motion in the cause" to have the judgment reheard, and in the meantime for a supersedias, &c. *Ibid.*

3. *Power to amend:* As a general rule, every Court has ample power to permit amendments in the process and pleadings of any suit pending before it; but the Courts have no such power when the amendment proposed to be made will evade or defeat the provisions of a statute. *Cogdell* v. *Exum*, 464.

SEE PRACTICE, 4; AMENDMENT, 1.

COURTS OF EQUITY.

Seals in: A Court of Equity never regards a seal, and since law and equity is now administered in the same Court, a seal has lost much of its ancient dignity. *Bryan* v. *Foy*, 45.

SEE ACTIONS, CIVIL, 6, 7.

COURTS OF PROBATE.

1. *Jurisdiction:* No Court except that of the Probate Judge, or some Court acting on appeal from him, has jurisdiction to issue execution against the assets of a decedent. *Vaugh, Adm'r, &c.*, v. *Stephenson, Adm'r.*, 212.

2. *Actions against administrators:* An action may be brought in any Court having jurisdiction against an administrator, and judgment obtained, but no issue of fully administered can be tried, and a judgment for the plaintiff merely ascertains the debt. *Ibid.*

COURT, SUPREME.

1. *Claims against the State:* That provision in the Constitution of the State, art. 4, sec. 11, which ordains that "the Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory," &c., ought not to be invoked in matters of small value, particularly when there is no doubt about the law. The claimant should apply at once to the Legislature for relief. *Sinclair, Owens & Brown* v. *State N. C.* 47.

2. *Practice in:* As a general rule the Supreme Court will not decide a case where nothing but the question of costs is involved; but if some important substantial right be involved, and exception will be made and an opinion given. *Martin* v. *Sloan et al.* 128.

3. *Relief to be sought in the Superior Court:* The relief sought in the complaint of a plaintiff must be sought in the Court below, and must not be sprung in the Appellate Court for the first time. *Kennedy* v. *Johnson*, 249.

4. *Certainty in judicial proceedings:* That there may be some certainty in judicial proceedings, the Supreme Court will not for a moment entertain the consideration of a judgment in favor of a plaintiff given upon a state of facts not alleged in the complaint, and inconsistent therewith. *Shelton* v. *Davis*, 234.

5. *No jurisdiction to rehear a criminal action:* The Supreme Court has no power to entertain a petition to rehear a criminal action. It never passes judgment in such cases, but only gives its opinion, and orders it to be certified to the Court below, to be carried into effect by that Court. *State* v. *Jones*, 16.

See PETITION TO SELL LAND, 1.

COVENANT.

See DEED, 1.

CRIMINAL PRACTICE AND PROCEDURE.

1. *Petition to rehear:* The Supreme Court has no power to entertain a petition to rehear a criminal action. It never passes judgment in such cases, but only gives its opinion and orders it to be certified to the Court below to be carried into effect by that Court. *State* v. *Jones*, 16.

2. *Bill of exceptions:* A point which the bill of exceptions or case stated shows was not taken in the Court below cannot be taken in this Court. *Ibid.*

3. *Arrest of judgment:* It is no ground for the arrest of judgment that the indictment charged the offence to have been committed in the said "county," as it had caption, "Cumberland county," and the defendant

was stated to be o that county. It is an informality which is saved by the Rev. Code, chap. 35, sec. 14. *State* v. *Evans*, 40.

4. *Remarks of Solicitor*: Where, on a trial of a white man for the murder of a negro, the Solicitor for the State in the closing argument stated to the jury that he had been informed that there was a general feeling and purpose among the white citizens of the county, which had been pretty generally expressed during the trial, that no white man was to be convicted for killing a negro until a certain negro should be convicted for killing a white man in the county, and that he referred to the rumor not to create a prejudice in the minds of the jury against the prisoner, but to remove all prejudice from their minds opposed to a fair, manly and independent verdict according to their oaths, and to the law and testimony in the cas: *It was held*, That the prisoner had no ground for complaint against the remarks of the Solicitor as being improper for the occasion. *State* v. *Baker*, 147.

5. *Right to instruction* A prisoner has no right to an instruction from the Court that if the jury do not believe the estimony of two named witnesses he is entitled to an acquittal, when the case stated shows that there were other witnesses who gave material testimony tending to prove his guilt. *Ibid.*

6. *Judges Charge:* The charge, given at the request of the prisoner's counsel on the trial below, "that the case of the *State* v. *Ingold*, relied upon the defence, was law in North Carolina, *but it was on the extreme verge of the law*," is no ground for a new trial. *State* v. *Harrison*, 264.

7. *Cooling time, a question of law:* The question of "cooling time," is a question of law to be decided by the Court, and not a question for the jury. *State* v. *Moore*, 267.

8. *Same:* If such a question be left to the jury, and they decided it as the Court should have decided it, this error is no cause for a new trial. *Ibid.*

9. *Same, how long:* The separation of two persons engaged in fist-fight, which eventually terminates in a homocide, to justify a verdict of murder, must be for a time sufficient for the passions excited by the fight to have subsided, and reason to have resumed its sway. *Hence*, Where one witness testified that the prisoner was "absent no time," and another, that after the first fight he started to go home, and looking back the parties were again fighting: *Held*, There was not such sufficient cooling time as to justify a verdict of murder. *Ibid.*

10. *Objection, not available:* After declaring himself ready for trial, a prisoner cannot object for want of time in which to produce a paper alleged to be in his possession, having had two days notice to produce it. *State* v. *Ben. Davis*, 313.

11. *Arrest of judgment:* It is no ground for arresting a judgment because the jury did not find on which count in an indictment for arson, the defendant was guilty; the first count being the only one charging the defendant, the second charging others as aiders and abetters. *State* v. *Jones*, 364.

12. *Variance:* The mis-description (if any) in describing the Court in which the false oath is alleged to have been taken as "before Joseph Z. Pratt, a Justice of the Peace in, and for said county," instead of, as "a Court of a Justice of the Peace for township A, of Chowan county," is not a sub-

stantial variance from the true description, and is cured by Act of 1811, Rev. Code, sec. 14, chap. 35. It would also be cured by sections 15 and 16, of chapter 35 of Rev. Code. *State* v. *Harvey Davis*, 495.

13. *Agreement with solicitor*: An agreement by a Solicitor for the State, to discharge a defendant, if he would become a State's witness against a co-defendant, which he did so far as to go before the grand jury and be examined, and then left the Court, will not relieve such defendant from a forfeited recognizance. A recognizance is a matter of record, and can only be discharged by a record, or something of equal solemnity. *State* v. *Moody*, 529.

14. *Nol. pros., who to enter*: The discharge of a defendant, or the entering a *nol. pros.* is within the control of Court, though in practice, usually left to the discretion of the Solictor. *Ibid.*

DEED.

1. *Covenant; Limitation in*: Where three persons upon receiving a deed from their father J. T., made with him the following covenant: "That J. T. and his family shall have their home upon the land, he has this day as executor of J. C., conveyed to them, and that he and his family shall have the use of all the personal property this day conveyed so far as is necessary for their use and convenience, and further, that they shall have a support out of what shall be made upon said land during the life of J. T.: *It was held*, That the limitation in the last sentence, "during the life of J. T." applied to all the clauses in the deed, and that after the death of J. T., his said sons were entitled to the possession and enjoyment of all the property conveyed by the deed. *Terrell et al.* v. *Terrell*, 56.

2. *Title of remainderman*: When a defendant admits that the plaintiffs are the owners of the remainder in fee of the land sued for, but contends that he is tenant for life of the said land under a certain deed executed by the plaintiff, he cannot controvert the title of the plaintiffs to the land, but is confined to his claim under that covenant, and the validity of his claim to a life estate will depend upon a proper construction of it. *Ibid.*

3. *Where the word heirs is left out*: Where the premises in a deed of bargain and sale omitted the word heirs in the limitation of the estate to the bargainee, but the habendum and warranty clauses were as follows: To have and to hold free and clear from all just claims, I, the said J. B., doth warrant and defend the right and title of the said tract of land, to have and to hold free and clear from me and my heirs, and the claims of any other persons, unto him the said G. P., his heirs and assigns: *It was held*, That the clauses were not a mere warranty to the bargainee and heirs, but were in effect, in addition to the warranty, a habendum to him and his heirs, thus conveying to him an estate in fee simple. *Phillips* v. *Davis et al.* 117.

4. *Bond to make title*: Where, upon the sale of land, a bond to make title upon the payment of the purchase money was given to the purchaser, and afterwards upon the assignment of his interest, the money was paid by the assignee: *It was held*, That he, before a deed was executed to him had such an unmixed trust as was liable to be sold under execution. Battle's Revisal, chap. 44, sec. 5. *Ibid.*

DEMURRER.

SEE PLEADING, 2, 4. AMENDMENT, 1.

DETINUE.

SEE ACTION, 9.

DISSENTING OPINION.

RODMAN, J., IN *Jones* v. *Com'rs of Bladen*, 415.

DISTURBING A CONGREGATION.

Singing not indictable: The disturbance of a religious congregation by singing, when the singer does not intend so to disturb it, but is conscientiously taking part in the religious services, may be a proper subject for the discipline of his church, but is not indictable. *State* v. *Linkhaw*, 214.

DIVORCE AND ALIMONY.

1. *Husband a competent witness:* In a suit for divorce, *a vinculo matrimonii*, the plaintiff, the husband, is a competent witness to prove the impotence of the wife. *Barringer* v. *Barringer*, 179.

2. *Suit, before whom brought:* Prior to the 1st July, 1872, suits for divorce were properly instituted before the Superior Court clerk, but since that date, by virtue of the act of 1871-'72, chap. 193, the Superior Court in term time alone has jurisdiction. *Ibid.*

3. *What bars petition:* In a petition for divorce, and for alimony *pendente lite*, it is error in the Court below to decide, at the return term upon matter alleged as a bar to the petitioner's right to a decree. And upon the petitioner's making out a *prima facie* case, she is entitled under the Act of Assembly to alimony *pendente lite*. *Sparks* v. *Sparks*, 319.

4. *Record of former suit, its effect:* Defendant in answer to a petition for divorce, relies upon a record of a former suit between the petitioner and himself, his answer in which suit alleged adultery on the part of the petitioner, and in which the jury found that the petitioner had been guilty of adultery with J. M., or with some one else:" *Held*, That such allegation was so indefinite and so vague as to be void and of no legal effect. *Ibid.*

DOWER.

See WIDOW, 1, *et seq.*

ELECTION.

1. *Validity of:* The disqualification of the persons who hold an election for State and county officers will not affect the validity of the election. Such persons are *de facto* officers, whose acts are valid as to third persons, and cannot be collaterally impeached. *Wilson* v. *Peterson*, 113.

2. *What material to the validity of:* In the absence of fraud it is not material to the validity of an election that the persons appointed judges to hold it electioneered, or were absent from their posts at different times during the day. *Ibid.*

3. *Voting on separate tickets, unlawful:* Under the Act of 1871-'72, chap. 185, sec. 16, (Battle's Revisal, chap. 52, sec 18,) it is unlawful for a voter to vote for different county officers on separate tickets; but he is not bound to vote for more of the candidates for the different officers than he chooses, and if a ticket be found in the ballot box containing a vote for only one of the proposed officers, it must be counted for him, unless it can be shown that the person who voted it voted also for other candidates on another ticket, in which latter case his tickets must all be thrown out. *Ibid.*

4. *Where two persons of same name are voted for:* If there be two candidates for different offices having the same name, and a ticket be found in the ballot box having that name and no other on it, it may be proved by intrinsic evidence for which of the candidates it was given. *Ibid.*

EMANCIPATION.

SEE WILLS, 2.

EVIDENCE.

1. *Receipt:* If a plaintiff offer in evidence a receipt which he had given to the defendant, and which he had obtained from the defendant upon a notice to him to produce it on the trial, he is not hereby precluded from showing that the receipt had the words "in full" in it when it was given, but that they had been since obliterated. *Miller* v. *Derr*, 137.

2. *Friendly feelings, &c.:* Evidence of the friendly feeling existing between two of the joint obligors of a bond, offered for the purpose of proving that one of them, who denied the fact, signed the same, is inadmissible. *Heileg* v. *Dumas, et al.*, 206.

3. *Proof without allegation:* Proof without allegation is as ineffective as allegation without proof; *Hence*, The Court cannot take notice of any proof unless there be a corresponding allegation. *McKee* v. *Lineberger*, 217.

4. *Conversation with deceased testator:* In a suit on a bond, alleged to be due the plaintiff's testator, who died in 1863, which bond was given in 1858, and was executed at the request of the testator, in renewal of an older bond of date some ten years previous, both of which bonds, it was claimed by defendant, were given as vouchers or receipts for money due her from the estate of her husband, of which the plaintiff's testator was executor: *It was held*, that although the defendant could not testify directly as to any conversation or understanding she had with the plaintiff's testator at the time of the execution of the first bond, concerning its use, it was competent for her to relate that conversation in her evidence as to what was said and what took place between herself and the agent of said testator at the time of the execution of the other, or second bond—the one in suit. *Gilmer* v. *McNairy* 335.

5. *Same:* Direct evidence of a conversation and understanding with the plaintiff's testator is, under section 343, Code of Civil Procedure, incompetent; a rehearsal of that conversation, however, in a conversation with an agent of such testator is competent, as a part of the *res gestæ*. *Ibid.*

6. *Record, when evidence:* The record of a suit between A and B, in which a certain assignment was adjudged valid, is no evidence of the validity of

such assignment in a suit between A and D, D being no party to the former suit. *Swepson* v. *Harvey*, 387.

7. *Exceptions to:* A party objecting to the introduction of evidence must state with certainty the points excepted to; and if the ground stated for such objection be untenable, it is error to reject the evidence, though inadmissible if properly objected to. *Bridgers* v. *Bridgers*, 451.

8. *Confession:* On the trial of the mother for the murder of her infant child it is error in the Court below to permit a witness to relate a statement made by the mother of the prisoner and in her presence, that the prisoner "had a child this way before, and put it away," to which the prisoner made no reply, and the reception of such evidence entitles the prisoner to a new trial

9. Evidence of a distinct, substantive offence cannot be admitted in support of another offence. *State* v. *Shuford*, 486.

10. *In a trial of bastardy:* The impotency of the putative father, if true and proven, would be a complete defence: it is therefore error in the Judge below to reject any competent evidence, introduced for the purpose of proving that the putative father was impotent at the time the child is alleged to have been begotten. *State & Mary Hargett* v. *Broadway*, 144.

11. *Examination before referee admissible:* The examination of a witness before a referee, which was taken in the presence of the parties to the suit, and signed by the witness who has since then died, may be read as evidence on the trial of the suit, in which such examination was taken. *Nutt* v. *Thompson.*

SEE AGENCY, 1, 2; ACTION, CIVIL, 1, 2; BASTARDY, DIVORCE AND ALIMONY 1; PARTNERSHIP, 1.

EXECUTION.

1. *Teste of:* The Act of Assembly, 1870-71, chapter 42, by which executions issued on judgments in civil actions, are required to be tested as of the term next before the day on which they are issued, is merely directory, and its omission does not vitiate the process. *Bryan* v. *Hubbs*, 428.

2. *What may be sold under:* Where, upon the sale of land, a bond to make title upon the payment of the purchase money was given to the purchaser and afterwards upon the assignment of his interest, the money was paid by the assignee: *It was held*, That he, before a deed was executed to him, had such an unmixed trust as was liable to be sold under execution. *Phillips* v *Davis*, 117.

EXECUTORS AND ADMINISTRATORS.

1. *Venue; Action against:* Under the Act of 1868-'69, chap. 258, an administrator or executor must be sued as such in the county in which he took out letters of administration or letters testamentory, provided he or any one of his sureties lives in that county, whether he is sued upon his bond, or simply as administrator or executor. *Stanley* v. *Mason*, 1.

2. *Sci. fa. vs. the heirs to sell land:* Where, under the former practice, it was necessary to sell the land of an intestate to pay his debts, after the plea of fully administered had been found in favor of the administrator, the record showed an order for a *sci. fa.* to be issued to the "heirs" of the intes-

tate without naming them, but showed that they were named in the order appointing a guardian *ad litem*, and then, though the fact that a *sci. fa.* had issued was not stated, it appeared that there was an entry of judgment according to *sci. fa.*, and thereupon the land was condemned and ordered to be sold; *It was held*, That these proceedings were sufficient to uphold the sale of the land made under them. *Phillips* v. *Davis et al.*, 117.

3. *Adm'r de bonis non:* An action commenced before the adoption of the C. C. P., in the name of an administrator *de bonis non* on a bond given to the first administrator as such may be sustained, although such administrator *de bonis non* has paid it over to one of the next of kin of the intestate in a settlement of the estate with him, and has taken his receipt therefor. *Setzer & Rhodes, Adm'rs* v. *Lewis, Adm'r et al.*, 133.

4. *Suit on Admr's bond, when to be brought:* Where an administrator wastes the personal assets, and does not apply them to the payment of the debts of his intestate, and then is removed for misconduct and another person is appointed administrator *de bonis non*, the latter must sue on the bond of the former administrator, if the sureties thereon are solvent, before he can apply by petition for the sale of the land of the intestate. *Latham* v. *Bell*, 135.

5. *Cannot sue in certain cases:* The administrator of a deceased guardian cannot maintain an action on the bond of a clerk and master for a fund alleged to be due the ward. *Davis* v. *Fox*, 435.

6. *Costs, when entitled to:* An administrator, defendant, is entitled to costs in an action wherein the plea of "fully administered" has been found for him, and a judgment *quando* rendered. *Lewis* v. *Johnson*, 392.

7. *Execution against assets, what Court to issue:* No Court except that of the Probate Judge, or some Court acting on appeal from him, has jurisdiction to issue execution against the assets of a decedent. *Vaughn* v. *Stephenson* 212.

8. *Action against:* An action may be brought in any Court having jurisdiction against an administrator, and judgment obtained; but no issue of "fully administered" can be tried, and a judgment for the plaintiff merely ascertains the debt. *Ibid.*

9. *Pleading:* When one is sued individually, upon a judgment obtained against him years since as administrator, and wishes to take advantage of such variance, he should plead *nul tiel record*. By pleading to the merits he waves the objection. *Purvis* v. *Jackson*, 474.

See PLEADING, 3, 5; COURTS OF PROBATE, 1, 2; ACTION, 8; VENUE; PETITION TO SELL LAND, 2.

EXECUTORS DE SON TORT.

1. *Evidence to charge one:* Evidence to charge one as *executor de son tort*, need not be sufficient to warrant a conviction of felony. *Israel* v. *King*, 373.

2. *Year's provision to be deducted:* In seeking to charge a widow as *executrix de son tort*, the value of her year's provision should be deducted from the assets found to be on hand. *Ibid.*

3. *Who to be made parties:* The personal representative of a deceased administrator is a necessary party to a suit against his widow, seeking to charge her as *executrix de son tort*. *Ibid.*

FEE SIMPLE.

SEE DEED, 3.

FENCES.

1. *Who responsible for:* Under the statute requiring "every planter to make a sufficient fence about his cleared ground under cultivation," &c., it is not the intention of the Legislature to visit with pains and penalties mere hirelings and laborers on farms who work by direction of their employers, and have no discretion to originate plans of their own or to change those of their employers. *State* v. *Taylor*, 548.

2. *Same:* Nor does the act include a simple employee, with no more discretion as to the management of the farm than is usually vested in those persons whom planters designate as "foremen," whose office is to keep things moving in the direction indicated by the employer; and the fact that such employee receives his wages out of the crop does not change the principle, for that with farmers is a common mode of paying their hands. *Ibid.*

FERRIES.

1. *Authority of county courts to grant:* Under the Act of 1813, the county courts had no authority to make an irrevocably grant of an exclusive ferry. *Barrington* v. *Neuse River Ferry Company*, 165.

2. *Used of forty years:* And the General Assembly, by its Act of 1872, granting to a company the privilege of establishing a ferry, within two miles of another which had been used for over 40 years, did not divest any vested right belonging to the owner of such old ferry. *Ibid.*

3. *Constitutional restrictions:* Article 8, section 2, of the Constitution, giving to the commissioners of counties a geneneral supervision and control over schools, roads, bridges, &c., does not deprive the Legislature of the power of special legislation over these subjects. *Ibid.*

4. *Power of the Legislature:* The Legislature, under its right of eminent domain, has the power to grant the franchise of a ferry to any one, and to authorize the condemnation of the land of a riparian owner as a landing place. *Ibid.*

FORGERY.

1. *Destruction of forged paper, its equivalent:* In an indictment for forgery, if it appears that the instrument is kept out of the possession and knowledge of the jury by the action of the prisoner himself, the act is equivaent to the destruction of the instrument. And such destruction is sufficiently alleged, under the circumstances, when it is charged in the indictment that the prisoner has "disposed of" the instrument. *State* v. *Ben. Davis*, 313.

2. *Proof of:* Indictment for forging a bond or other instrument is sustained by proof of the forgery of the name of one of the obligors in the bond. *Ibid.*

SEE INDICTMENT, 5, 8.

FRAUD.

SEE GUARDIAN AND WARD, 9.

GROWING CROPS.

Who entitled to: Where the plaintiff in a suit for land at the Spring Term of the Superior Court of a county recovers judgment and the defendant appeals, but gives an undertaking for the costs only, and at the next ensuing term of the Supreme Court in June, the judgment is affirmed, and then the plaintiff takes out a writ of possession from the Superior Court which is executed, he will be entitled to the crops growing on land for that year. *Cox* v. *Hamilton*, 30.

GUARDIAN AND WARD.

1. *Buying claims against ward:* Where a guardian purchases a claim against his wards he cannot charge them with more than he paid, and the fact that he was the creditor by having made proper advances to his wards, and afterwards became bankrupt, and then purchased the claim from his assignee, does not alter the principle. But the guardian must be taken to have paid himself as soon as funds of his wards came to his hands, which he could lawfully so apply, and the assignee took the claim subject to these deductions. *Moore* v. *Shields et al.*, 50.

2. *May supply necessaries from his own store:* A guardian, who is a merchant, may, if he acts in good faith, supply the necessary wants of his wards from his own store, and may charge a reasonable profit upon them. *Ibid.*

3. *Attorney's fee allowed:* While a guardian cannot be allowed in a settlement with his wards for fees paid to his attorney to aid him in keeping them out of their just rights or in supplying an uncertainty or confusion in his accounts, produced by his own negligence, or even in defending an action brought by them for a settlement, yet he may claim the allowance of a reasonable fee paid in a suit for the protection of their interests. *Ibid.*

4. *Responsibility of:* A guardian who acted in good faith was held not to be responsible for omitting to collect a note during the late war, when it appeared that both of the two obligors were solvent during the war, and were made insolvent by its results. *Love et ux.* v. *Logan et al.*, 70.

5. *Construction of bond:* An instrument intended as a guardian bond in which the names of the wards are recited in the wrong place, and in another part of said bond the names are inserted, A, B and others, wards, by a just and liberal construction is sufficient as a guardian bond under the statute. *State ex rel. Sprinkle* v. *Martin*, 175.

6. *Right to purchase land of ward:* A guardian had a right to purchase the land of his wards at a sale by a clerk and master of our former Courts of Equity, made by order of such Court. *Lee and wife* v. *Howell et al.*, 200.

7. *Clerk to make title, when:* Our present Courts have the power to order their clerks to make title directly to a subsequent *bona fide* purchaser, when it appears that no title was made by the clerk and master to the first purchaser, or if made, was lost. *Ibid.*

8. *Interest of ward in land sold:* The guardian of A sells the land of his ward under an order of our late Court of Equity, which is purchased by B, the

mother of A. B intermarries with C, and with her husband, conveys the land in trust to secure the payment of the purchase money. C afterwards becomes guardian of A, and directs the trustee to sell the land and to pay the purchase money, which is done, and C buys it. A brings suit for the land or for its value and for the rents, &c: *Held*, that the only interest that A had in the land was as a security for debt, and that the action could not be maintained. *Winborne* v. *White*, 253.

9. *Settlement with ward, when set aside:* When a guardian has a settlement with his ward, shortly after the ward's majority in the absence of her advisers and friends, the law, founded in public policy, presumes fraud, and throws the burden of rebutting that presumption upon the guardian. *Harris* v. *Carstarphen*, 416.

HEIRS.

See DEED 3.

HOMESTEAD.

1. *Widows' right to:* A widow cannot, under the Constitution and Act of 1868-'69, chap. 137, sec. 10, have a homesterd laid off for herself and minor children after the death of her husband when he died without leaving debts. *Hager et al.* v. *Nixon et ux. et al.*, 108.

2. *Not restricted to any certain tract:* Before the Act of 1868, the owner of land was not restricted by the Constitution in the choice of his homestead to the tract upon which he resided, nor to contiguous tracts, but the same might have been assigned from any land of the required value. *Mayho & Parker* v. *Cotton*, 289.

3. *Law, not unconstitutional:* The homestead laws of North Carolina do not impair the obligation of contracts, and are not unconstitutional. *Garrett* v. *Chesire*, 396.

4. *Law, not an increase, but a restriction:* Our homestead law is not an *increase*, but a *restriction* upon former exemptions, and they were not made to *defeat debts*, but to *secure necessaries and comfort* to our citizens. *Ibid.*

HUSBAND AND WIFE.

1. *Settlement; presumption of fraud:* If a husband obtain from his wife a provision in his favor much more beneficial to him than that wish was stipulated for him in an antenuptial marriage settlement, it comes within the principle applicable to other intimate fiduciary relations, and raises a presumption of fraud unless rebutted by evidence to the contrary. *McRae et al.* v. *Battle, Ex'r et al.*, 98.

2. *Right of husband to surrender estate, &c.:* Since the Act of 1848, a husband has the right to surrender his estate as tenant by the curtesy initiate, and let it merge in the reversion of his wife, who, with the assent of her husband, may sell the same and receive the whole of the purchase money. *Teage* v. *Downs*, 280.

3. *Agreement between husband and wife:* And an agreement that the wife shall receive such price in personal property and hold the same to her separate use, to enable her to lay it out in the purchase of another tract of land, is valid, such price not vesting in the husband, *jure mariti*, so as to subject the same to the claims of his creditors. *Ibid.*

INDICTMENT.

1. *Killing live stock:* An indictment under the Act of 1868-'69, chap. 253, (Battle's Revisal, chap. 32, sec. 95,) for the killing live stock under certain circumstances, which charges that the defendant on &c., at &c., "A certain mule of the value of one hundred dollars, *the property of one* J. S. E., the said mule being then and there within an inclosure not surrounded by a lawful fence, unlawfully and wilfully did abuse, injure and kill contrary," &c., is sufficient, though it would have been more satisfactory if it had stated whose the inclosure was, whether the defendant's or some other person. *State* v. *Allen*, 23.

2. *Receiving stolen goods:* If a person receive stolen goods, knowing them to be such, not for the purpose of making them his own, or of deriving profit from them, but simply to aid the thief in carrying them off, he is guilty of the crime of receiving stolen goods, knowing them to have been stolen. *State* v. *Rushing*, 29.

3. *Stealing a horse:* Where an indictment charged the larceny of a horse to have been committed at a certain time since the passage of the statute which prescribed the punishment of such a larceny, and the defendant was found guilty, judgment cannot be arrested upon the ground that prior to that time there had been several statutes prescribing different modes of punishment. *State* v. *Evans*, 40.

4. *Different counts; stealing and receiving stolen goods:* On an indictment charging the defendant in the first count with stealing, and in the second with receiving stolen goods, he may be found guilty generally, because the offenses are of the same grade, and the punishment is the same, and the verdict may be sustained, though on a trial at the preceding term, the jury found the defendant guilty of receiving stolen goods, which verdict the judge set aside and ordered a new trial. *State* v. *Speight*, 72.

5. *Forgery, what to allege:* Where an indictment charged the forgery of the name of a firm with intent to defraud two persons whose names were stated, but it was not alleged that they composed the firm, and the testimony proved the forgery with an intent to defraud the firm, but it was not proved that the two persons named composed the firm, *held* that the allegations of the indictment were not proved, and that it was error in the court to charge otherwise. *State* v. *Harrison*, 144.

6. *Variance:* In an indictment for perjury, where the defendant is charged with having been sworn "on the Holy Gospels of God," and it appeared that he was not sworn as charged, such variance is fatal and will entitle defendant to a new trial. *State* v. *Mat. Davis*, 383.

7. *Perjury, what should be charged:* In a criminal action for perjury, it should appear on the face of the indictment that the oath taken was material to the question depending, not by setting forth the circumstances which render it so in describing the proceedings of a former trial, but by a general allegation that the particular question became material. *State* v. *Davis*, 495.

8. *Forgery, proof necessary:* Indictment for forging a bond or other instrument is sustained by proof of the forgery of the name of one of the obligors in the bond. *State* v. *Ben. Davis*, 313.

SEE FORGERY, 1, 2.

IN FORMA PAUPERIS.

Appeal to Supreme Court: A Judge of the Superior Court has no power to make an order authorizing a person who has been permitted to sue *in forma pauperis* to appeal to the Supreme Court without giving security for the costs of the appeal, and for the want of such security the appeal will be dismissed with costs. *Mitchell and wife* v. *Sloan, Ex'r et al.*, 10.

INJUNCTION.

1. *Affidavit, what to state:* In an application for an injunction, an affidavit for it made by a person not a party, that what he has stated in the complaint as of own knowledge is true, &c., is insufficient, because not being a party he has stated nothing. *Martin* v. *Sloan et al.*, 128.

2. *Bond:* A bond for $5,000 given by a party upon obtaining an injunction, and one for $10,000 given by a receiver upon being appointed such, are palpably insufficient where several hundred thousand dollars are involved in the issue. *Ibid.*

3. *Error to grant perpetual injunction, when:* A perpetual injunction against issuing an execution on a judgment at law, granted upon *motion* and *affidavits* is erroneous. It is not in accordance with and allowable mode of proceeding under the old system or the new. *Whitehurst, Trustee* v. *Green, Ex'r*, 131.

4. *Restraining the sale of lands:* An order restraining the sale of certain premises, to which the plaintiff claims title, will be continued to the final hearing, and the plaintiff's right protected, if the complaint and affidavits disclose merits on his part. *Dockery* v. *French*, 308.

SEE COUNTIES, 2.

INSOLVENT DEFENDANTS.

To enable them to appeal, what must appear: To enable insolvent defendants, convicted in criminal actions to appeal from judgments of the Court below, it must appear by affidavit, that they are wholly unable to give security for the costs, and that they are advised by counsel that they have reasonable cause for the appeal prayed for, and that the application is in good faith. *State* v. *Divine et al.*, 390.

SEE APPEAL, 4.

INTEREST.

Promissory note: When a promissory note is given with a stipulation that the interest is to be paid annually or semi-annually, the maker is chargeable with interest at the like rate upon each deferred payment of interest, as if he had given a promissory note for the amount of such interest. By this mode of computation compound interest is not given, but a middle course is taken between simple and compound interest. *Bledsoe* v. *Nixon et al.*, 89.

INVESTMENT OF MONEY.

1. *Duties of Clerk, &c.*: When money is invested by a clerk or other officer under the orders of a Court, the clerk or other officer cannot change the

investment without the sanction of the Court or the parties, and if he does so, he will be responsible for any loss that may accrue, for he will be held to a much stricter accountability than a guardian or trustee would be under similar circumstances, because he clerk or other officer might get the consent of the parties or the advice and direction of the Court, while the guardian or trustee would be compelled generally to act upon his own judgment. *Rountree* v. *Barnett et al.*, 76.

Same: While generally a clerk or other offices cannot change an investment which he has made under the order of a Court, yet if a sudden and unexpected loss is threatened, he may do so, but in such case he must show a necessity for such prompt action, and that he acted in good faith and with ordinary prudence, and he must, as soon as he can, report his action to the Court. *Ibid.*

JUDGE OF SUPERIOR COURT.

SEE AMENDMENT, 1; IN FORMA PAUPERIS; PRACTICE, 4.

JUDGE'S CHARGE.

SEE CRIM. PRACTICE, & C., 5.

JUDGMENT.

1. *Irregular, how set aside:* An irregular judgment may be set aside at any time, and an injured party is not confined to a year after he has notice of it. A motion to vacate such judgment is the proper course to pursue, giving the opposing party notice of such motion. *Cowles* v. *Cooper*, 406.

2. *Parties to an action on:* A judgment is rendered on a note against the maker, B, a citizen of Cumberland, in favor of the payee, A, a citizen of Lenoir; the judgment is assigned, and after assignment, C, also a citizen of Lenoir, writes his name across the back of the note. In a suit by the assignee against B and C on the judgment: *Held,* That B and C were improperly joined in the action: *Held further,* That if C's name had been stricken from the process the Justice had no jurisdiction. *Wooten* v. *Maultsby*, 462.

3. *Value of property, when to be assessed:* In an action for claim and delivery of personal property (Replevin, Rev. Code, chap. 98), when the property cannot be re-delivered by plaintiff in specie, the value thereof, in case of a judgment for defendant, should be assessed at the time of the trial, and not at the time of its seizure by the sheriff. *Holmes* v. *Godwin*, 467.

4. *Payment to clerk, how shown:* Whenever it is sought to establish an authority in a clerk, to bind a plaintiff by the receipt of depreciated currency in payment of a judgment, it must be shown either that the receipt was expressly authorized by the plaintiff, or, that the plaintiff has done acts from which such an authority may fairly be implied. *Purvis* v. *Jackson*, 474.

5. *Same, clerk as agent:* Acts from which such an agency in the clerk beyond what the law (Rev. Code, chap. 31, sec. 127,) gives him, may be implied, must be such as under the circumstances were reasonably calculated to induce the debtor to believe that the clerk was the creditor's agent for the purpose; as, for instance, that the creditor had procured an order to collect the money; or had issued an execution without instructing the

sheriff what kind of money he was to receive in payment, &c. And if, from such acts, the debtor has been reasonably led to believe that the clerk was authorized to receive payment of a judgment in Confederate money, and acting on that belief, pays the judgment in such money, it is immaterial whether the clerk was really the agent or not; the creditor being estopped from denying the agency, and the debtor protected in his judgment. *Ibid.*

6. *Same in Confederate money:* Where a plaintiff, before the war, obtained a judgment against an administrator, but issued no execution thereon and demanded no payment thereof, either before or during the war, and upon the defendant's voluntarily paying the amount of the judgment into the clerk's office in 1863, the plaintiff as soon as he heard thereof at once repudiated such payment: *Held*, That notwithstanding prudent business men in the same community and at the time were receiving Confederate money in payment of debts, still the plaintiff might disregard such payment by the defendant altogether, and recover the whole amount of the original judgment. *Ibid.*

7. *When a lien:* By virtue of sec. 254, C. C. P., a judgment from the time it is docketed is a lien on all the interest of whatever kind the defendant has in real estate, whether it be such as can be seized under execution or not. *Hoppock, Glenn & Co* v. *Shober*, 153.

8. *Lien on lands, &c.:* Under our former system a judgment did not bind lands *proprio vigore*, but if an execution (*fi. fa.*) was taken out upon the judgment, it would bind the land from its *teste*, and the lien thus acquired could be continued by issuing of *alias* and *pluries* executions regularly from term to term without intermission, but not otherwise. *Hadley* v. *Nash*, 162.

See AGREEMENT, 1; COUNTERCLAIM, 1; LIEN, 1.

JUSTICE OF THE PEACE.

1. *Jurisdiction:* A Justice of the Peace has no jurisdiction under the Constitution, art 4., sec. 15 and 33 of a suit on a constable's bond, the penalty of which is more than $200, although the damages to be assessed are less than that sum, and Act of 1869-'70, chap. 169, sec. 13, cannot be allowed the effect of conferring such jurisdiction.

It seems that as against the officer alone a Justice of the Peace has jurisdiction of a suit for a sum less than $200 collected by the plaintiff and not paid over. *Fell & Bro.* v. *Porter et al.*, 141.

2. *Same, account split up:* A party has a right to "split up" his account so as to include a certain number of items under one warrant and a certain number under another, and so on, so as to bring the several warrants under the jurisdiction of a Justice of the Peace. *Caldwell* v. *Beatty*, 365.

3. *Same, a question of law:* The question whether a certain account is over the jurisdiction of a Justice of the Peace is a question of law to be decided by the Court, the amount of the account being a question of fact for the jury to decide. *Ibid.*

4. *Finding fact, not a matter of review:* The finding of certain facts by a Justice of the Peace, on the trial of an action in which the recovery is for less than $25, is final, and not the subject of review by the Judge or the Superior Court. *Cauble* v. *Boyden*, 434.

5. *Jurisdiction, how proven:* The jurisdiction of a Justice of the Peace when necessary to be proven, being a question of law, cannot be proved by witnesses (if properly objected to), but must be determined by the Court. *Bridgers* v. *Bridgers*, 451.

6. *Jurisdiction, when sufficiently averred:* The jurisdiction of the Justice of the Peace of the complaint upon the examination whereof the alleged perjury was committed, is sufficiently averred where it is in this case, that the Justice had power to administer the oath. *State* v. *Davis*, 495.

7. *Jurisdiction, parties, &c.:* A judgmennt is rendered on a note against the maker, B, a citizen of Cumberland, in favor of the payee, A, a citizen of Lenoir; the judgment is assigned, and after its assignment, C, also a citizen of Lenoir, writes his name across the back of the note. In a suit by the assignee against B and C on the judgment: *Held* that B and C were improperly joined in the action: *Held further*, that if C's name had been stricken from the process, the Justice had no jurisdiction. *Wooten* v. *Maultsby*, 462.

SEE JUDGMENT, 2.

JURISDICTION.

SEE JUDGMENT, 2.

KILLING LIVE STOCK.

SEE INDICTMENT, 1.

LANDS DEVISED.

SEE WILLS, 3.

LARCENY.

SEE INDICTMENT, 3, 4.

LEGISLATURE.

SEE FERRIES, 4.

LIEN.

1. *Judgment, when:* By virtue of the C. C. P., sec. 254, (Battle's Revisal, chap. 17, sec. 254,) a judgment from the time it is docketed has a lien on all the interest of whatever kind the defendant has in real estate, whether it be such as can be seized under an execution or not. *Hoppock, Glenn & Co.* v. *Shober*, 153.

2. *Debts to U. S. Government, lien when:* The United States Government has an undoubted right to priority of payment in case of a general conveyance of his property by an insolvent, but that right is subject to a prior lien, and if a lien be acqnired by a docket judgment it will not be defeated by a subsequent assignment, unless the insolvent be thrown into bankrupcty by proceedings commenced within four months thereafter. *Ibid.*

3. *Judgment, when lien on land:* Under the former system a judgment did not bind lands *proprio vigore*, but if a *fieri facias* execution were taken out upon the judgment it would bind the land from its *teste*, and the lien thus acquired could be continued by the issuing of *alias* and *pluries* executions regularly from term to term without intermission, but not otherwise. *Hadly* v. *Nash et al.*, 162.

LIBEL.

1. *When complaint sufficient:* When the complaint in an action for libel says the defendant "published concerning the plaintiff in a newspaper, &c., a certain article containing the false and defamatory matter following," &c., it sufficiently avers that the defamatory matter was concerning the plaintiff. The article—which is the whole article and every part of it—is averred to be concerning the plaintiff, and as the whole includes all its parts, the defamatory part must be concerning the plaintiff. *Carson* v. *Mills*, 122.

2. *Words, what libelous:* An article in a newspaper containing the following words: "No! counsellors and friends of the Adairs, (who had been convicted of murder,) I blame not an attorney or attorneys for taking fees and defending the most guilty criminals as far as the law and respectable evidence will justify in giving them a fair trial, but after that, going to the streets among people, proclaiming their innocence, trying to influence public opinion, hiring or otherwise procuring false hearted and unprincipled scoundrels to perjure themselves by giving affidavits and implicating other innocent persons to obtain the pardon or release of the Adairs. Your slanderous and false charges against innocent men must fall to the ground, but they show your unprincipled course," is apparently libelous. *Ibid.*

LIFE ESTATE.

SEE WILLS, 1.

LIMITATION, STAT. OF.

SEE BANKRUPT, 2.

LUNATIC.

Suit against agent of, what recoverable: A plaintiff, who has indorsed the notes of a self-constituted agent of a lunatic, to enable such agent to raise money ostensibly for the benefit of the family of such lunatic, which money was used by the agent in cultivating the farm of the lunatic, can only recover, in a suit against the lunatic upon the notes signed by the agent, so much of his debt as he can show was actually expended for the necessary support of the lunatic, and such of his family as were properly chargeable upon him. *Surles* v. *Pipkin*, 513.

MISTAKE.

SEE BONDS, OFFICIAL, 3.

MORTGAGES AND DEEDS IN TRUST.

1. *Act of* 1868'-69, *ch.* 76, *sec.* 9, *unconstitutional:* The 9th section of the Act of 1868-'69, chap. 76, which enacted that "no property shall be sold under any deed of trust or mortgage, until the debts secured in said deed are reduced to judgments according to the provisions of this act," was unconstitutional, because it not only attempted to impair the obligation of a contract, but to alter it by adding a condition. (The above section was repealed by the Act of 1869-'70. chap. 28.) *Latham, Ex'r, et al.* v. *Whithurst*, 33.

2. *Practice; calculating interest:* In an action to foreclose a mortgage, the Judge may, if necessary, refer the matter to the clerk to settle the details and report the balance due, but if nothing is to be done except to calculate interest, the Judge may do it himself, or direct the clerk to do it *instanter*, and give judgment accordingly. *Ibid.*

1. *Widows' rights, &c.:* The widow of a mortgagor, as against the legatees and next of kin as well as against the heirs and devisees of her deceased husband, has a right to have the mortgaged land exhonorated from the mortgaged debts, but as against his other creditors she has no such right. As to them, she has only the right to have the two-thirds of the land not embraced in the dower, and the reversion of the dower sold, and the proceeds applied to the payment of the mortgage debt, and to have the residue of that debt, if any, paid rateably with the other debts of the deceased out of the personal assets, and if there still be any part of the mortgage debt unpaid, it will be a charge on the dower, *Creecy* v *Pearce*, Adm'r, 67.

SEE PRACTICE, 11.

NEW TRIAL.

1. *What will entitle a party to:* Entries in a book showing a state of facts not materially different from those appearing on a trial, will not entitle one of the parties to have the judgment set aside and a new trial, although the existence of such entries was unknown at the trial and was subsequently discovered. *Tull* v. *Pope*, 183.

2. *Discretion in Judge to grant:* Granting a new trial because of newly discovered evidence must necessarily always, or nearly always, be within the discretion of the presiding Judge, and his decision can very rarely in such cases, be on a naked matter of law or legal inference, so as to authorize an appeal. *Holmes* v. *Goodwin*, 467.

SEE APPEAL, 2; PRACTICE, 5.

NON RESIDENTS.

SEE TAXES, 1.

NOTICE.

SEE JUDGMENT, 1.

NUL TIEL RECORD.

SEE PLEADING, 18.

OFFICERS.

1. *Validity of election:* The disqualification of the persons who hold an election for State and county officers will not affect the validity of the election. Such persons are *de facto* officers, whose acts are valid as to third persons, and cannot be collaterally impeached. *Wilson* v. *Peterson*, 113.

SEE ELECTION, 2, 3, 4.

PARTIES.

SEE PLEADINGS, COURTS, 2.

PARTITION.

1. *Plea of sole seizure:* 1. In a petition for partition, if the plea of "sole seizure" is not put in before the order of partition is made, it will be considered as waived, and the parties to the proceeding will be taken to be tenants in common. *Wright and wife* v. *McCormick*, 14.

2. *Description of land:* In a proceeding for partition in which the petition sets forth a particular description of the land, and upon an order for partition the commissioners appointed to make it return a report of their proceedings in the division of the land, and the defendant objects to the confirmation of it, upon the allegation that they have not divided the land described in the petition, he cannot complain of an order of the Judge referring it to the clerk to take and state evidence with regard to the identity of the land. *Ibid.*

3. *Widow, a necessary party, &c.:* A, B and C are tenants in common of a tract of land; C dies in debt, and his widow becomes his administratrix. A and B filed their petition for a partition of the land into three parts: *Held*, That the widow of C, being entitled to dower, and also as representing the creditors of C, was a necessary party to such petition, both as widow and administratrix. *Gregory* v. *Gregory*, 522.

4. *What capable of division:* In a petition for partition of a tract of land consisting of twelve and three-fourths acres, worth $199.10; the commissioners appointed for the purpose, having divided the tract into three parts, worth respectively the dwelling house share, $144.15, and the two others, $34 and $21.25: *Held*, In such case an actual partition with a reasonable equality of values could not be made without impairing the value of some of the shares, and that the Court ought to have ordered the land to be sold for an equal division. *Ibid.*

PARTNERSHIP.

1. *Evidence of:* If one buy goods of a manufacturing company from time to time, and sell them on his account, the company not participating in his profits, nor being liable for his loss, it does not afford the slightest evidence of a partnership between him and the company. *Gilbreath & Co.* v. *Lineberger & Co.*, 145.

2. *Settlement of:* A, as surviving partner of A and B, sold in 1863, certain cotton belonging to the firm, on a credit of six months, the purchase money to be paid when due in funds current at the time. C, also a partner of A in another business bought the cotton, giving A, the surviving partner, a note for the amount, to-wit: $5,681.20, which amount was paid to A when the note became due, whereupon A tendered to D the administra-

tor of B, the deceased partner, one-half of the cotton money, to-wit: $2,840.60, which D refused to receive, and A funded the amount in Confederate 4 per cent. bonds, holding the bonds for D's benefit. In a suit by D against A for a settlement of the copartnership, and in which D seeks to charge A with the whole amount of cotton sale. *It was held*, that in a settlement of the copartnership, A should be allowed as a credit the amount funded in Confederate securities, which was lost, and that he should be charged by the firm with the one-half of the sale, $2,840.60, which he retained to his own use. *Thompson* v. *Rogers*, 357.

3. *Responsibility of partners: Held further*, That A, the surviving partner had acted in good faith in a fiduciary character; the scale as applied to contracts generally does not apply in this case, A being responsible only for the value of the Confederate money at the time he received it. *Ibid.*

PAYMENT.

1. *In depreciated currency:* Where a plaintiff, before the war, obtained a judgment against an administrator, but issued no execution thereon and demanded no payment thereof, either before or during the war, and upon the defendant's voluntarily paying the amount of the judgment into the Clerk's office in 1863, the plaintiff, as soon as he heard thereof, at once repudiated such payment: *Held*, That notwithstanding prudent business men in the same community and at the time were receiving Confederate money in payment of debts, still the plaintiff might disregard such payment by the defendant altogether, and recover the whole amount of the original judgment. *Purvis* v. *Jackson*, 474.

2. *United States has priority:* The United States Government has an undoubted right to priority of payment in case of a general conveyance of his property by an insolvent, but that right is subject to a prior lien, and if a lien be acquired by a docket judgment it will not be defeated by a subsequent assignment, unless the insolvent be thrown into bankruptcy by proceedings commenced within four months thereafter. *Happock, Glenn & Co.*, v. *Shober*, 153.

SEE AGREEMENT, 2; PARTNERSHIP, 2; SURETIES, 1.

PERJURY.

SEE INDICTMENT, 6, 7.

PETITION TO SELL LAND.

1. *Practice in; jurisdiction of Supreme Court:* Where a petition to sell land was filed in the Court of Equity prior to the adoption of the Constitution in 1868, and orders were made therein before that time, and after that year a motion was made against the clerk and master in the same cause, the new mode of procedure will apply to it, and upon an appeal, the Supreme Court will not take jurisdiction to rehear any issues of fact decided by the Judge in the Court below, but if it appears that such issues were decided by the Judge without objection from the parties, and that his decision was clearly right, the Supreme Court will proceed to act upon it and confirm his judgment. *Rountree* v. *Barnett et al.*, 76.

2. *Persons claiming, have the right to be made parties:* Upon a petition by an administrator to sell land for the purpose of making assets to pay debts,

any person who claims to be the owner of the land has the right to be made a party and to have an inquiry made as to his title in due course of law. *Gibson. Adm'r.*, v. *Pitts et al.*, 155.

PLEADING.

1. *Answer*: An answer which avers that "no allegation of the complaint is true," is not a compliance with the C. C. P., s c. 100, which requires that the answer must contain "a general or specific denial of *each* material allegation;" that is, it must deny either the whole of *each* material allegation, or some material or specific part thereof. Such answer is a sham plea, and ought to be stricken out on motion as provided in C. C. P., sec. 104. *Flack, Adm'r*, v. *Dawson, et al.*, 42.

2. *Sham Plea:* A plea that the Court had no jurisdiction of the action is a sham plea. The objection to the jurisdiction must be taken by demurrer, C. C. P., sec. 95, sub sec. 1. *Ibid.*

3. *Necessary Parties:* In a suit upon an administration bond, the next of kin of the intestate are not necessary parties, C. C. P., sec. 57, and in such a suit, the administrator or the principal in the bond need not be joined. *Ibid.*

4. *Sham Plea:* A plea alleging the want of parties is a sham plea, as the objection ought to be taken by demurrer, C. C. P., sec. 95, sub sec. 4. *Ibid.*

5. *Plea in answer to complaint:* A plea in answer to a complaint on an administration bond of "performance of the condition of the bond by payment to the next of kin," is good in substance, and an issue may be taken upon it; and such issue is the subject of a compulsory reference under the C. C. P., sec. 245, sub sec. 1. *Ibid.*

6. *Reference of pleas:* A reference of issues upon sham pleas is erroneous, but if the reference embrace an issue on a good plea which may be referred, it will be sustained as to that while it is reversed as to others. *Ibid.*

7. *Joinder of parties:* Under the C. C. P., the failure to join a proper party is an important matter, but the joinder of unnecessary parties, either as plaintiffs or defendants, is immaterial, save only as it may affect the question of costs. *Rowland et al.* v. *Gardner*, 53.

8. *Fraud:* The rule that a person cannot take advantage of an allegation of fraud, unless it be made in the pleadings, does not apply to a case agreed where all the facts are stated, and the matters of law or legal inference left to the Court. *McRae et al.* v. *Battle, Ex'r, et al*, 98.

9. *Action pending, effect of:* A plaintiff having an action pending, cannot maintain a second action against the same defendant for the same cause. Such pending action should be pleaded in abatement. *Woody* v. *Jordan et al.*, 189.

10. *A judgment no bar, when:* But a judgment in an action brought to recover certain property specifically is no bar to a subsequent action between the same parties seeking to recover damages for the taking and conversion of such property. *Ibid.*

11. *Irregular process, no justification:* Irregular process, after it has been set aside, is no justification to the plaintiff in the action, or his attorneys and aiders. *Ibid.*

12. *Rights of life-tenant:* A B and C, tenants in common, sells a tract of land to D, reserving "to themselves the right to live in the dwelling house upon said land, and to use all necessary outhouses, and to cultivate so much of said land as they may need during their natural lives." A and B die, and the survivor, C, sells the land to E, who takes possession of all of the tract not used by C. In a suit by D against E, to recover possession of the land and for damages: *Held*, That C, the life-tenant, was properly admitted to defend the action; and that the said action for the recovery of the land being commenced during the life time of C was premature, and could not be sustained. *Kennedy* v. *Johnson*, 249.

13. *Relief, where to be sought:* The relief sought in the complaint of a plaintiff, must be sought in the Court below, and must not be sprung in the appellate Court for the first time. *Kennedy* v. *Johnson*, 249.

14. *Misjoinder of parties:* The misjoinder of unnecessary parties, either as plaintiffs or defendants, is mere surplusage, and under the liberal system of pleading introduced by our Code of Civil Procedure, is not a fatal objection. *Green* v. *Green*, 294.

15. *Joinder of causes of action:* A plaintiff cannot join in the same complaint a count (or cause of action) in contract, against one of two defendants, with a count (or cause of action) on the fraud of the both. *N. C. Land Co.* v. *Beatty et al.*, 329.

16. *Same:* Any number of causes of action belonging to any one of the classes enumerated in section 129, of the Code of Civil Procedure, may be united, provided they all affect the parties, but no two belonging to different classes. *Ibid.*

17. *Venue:* Suits against the board of county commissioners ought to be brought in the county of which they are commissioners. (C. C. P., section 67.)
RODMAN, J., dissenting. *Jones* v. *Commissioners of Bladen*, 412.

18. *Null tiel record, when pleaded:* When one is sued individually, upon a judgment obtained against him years since as administrator, and wishes to take advantage of such variance, he should plead *nul tiel record*. By pleading to the merits, he waves the objection. *Purvis* v. *Jackson*, 474.

19. *Value of property, when assessed:* In an action for claim and delivery of personal property (Replevin, Rev. Code, chap. 93,) when the property cannot be redelivered by plaintiff in specie, the value thereof, in case of a judgment for defendant, should be assessed at the time of the trial, and not at the time of its seizure by the sheriff. *Holmes* v. *Godwin*, 467.

SEE ACTION, CIVIL, 6, 7, 8, 9, 10; COUNTER CLAIM; LIBEL, 1, 2; PARTITION, 1.

POSSESSION.

SEE TITLE.

PRACTICE.

1. *Confession of judgment:* It is a well recognized practice to confess a judgment with a defeasance, and the Courts will take notice of the condition, and will not permit an execution to issue in violation of it. 1 Tidd. Pr. 560. *Hardy, Cashier* v. *Reynolds*, 7.

2. *Deposition, reading of:* It is too late to object to the reading of a deposition after a trial has begun, merely on account of irregularity in the taking of it, provided, it shall appear that the party objecting had notice of its being taken, or had notice that it had been taken and was on file long enough before the trial to enable him to present the objection. *Carson, Adm'r* v. *Mills*, 32.

3. *Pleadings made up; plaintiff's authority for appearing:* When the pleadings have been made up and the case called for trial, it is too late for the defendant to demand of the plaintiff's attorney his authority for appearing. *Rowland et al* v. *Gardner*, 53.

4. *Dismission of suit:* Though a Judge of the Superior Court may refuse a motion made by the defendant to dismiss a suit upon a ground which appears upon the record, yet he may entertain a like motion at a subsequent term, and dismiss the cause upon the same ground. *Love & Co. Young et al.*, 65.

5. *Newly discovered testimony:* The rules in relation to applications for new trials upon the ground of newly discovered testimony and the principles upon which they are founded, discussed and explained in the opinion filed by the Chief Justice. *Bledsoe* v. *Nixon et al.*, 81.

6. *Former practice in equity*: Under the former system if an equity cause was set down for hearing upon the bill, answer, proofs, reports, accounts, exceptions, &c., the Chancellor might himself find the facts and pronounce the law thereupon, and was not bound to adopt the facts reported by the clerk and master, nor to confirm his report, though no exceptions were filed thereto. *McMillan, Adm'r* v. *McNeill et al.*, 129.

7. *Time to answer:* A summons served on defendant commanding him to answer on a day certain, which day is less than twenty days from the time of service, is not necessarily on that account void, and the Probate Judge is not bound to dismiss it. He should have allowed the defendants the time allowed by the Code for an appearance. *Guion* v. *Melvin*, 242.

8. *Reference to take an account:* A reference made by the Court to take an account to be used in an action pending before it, is not such a reference as can be ended at the election of either party before it, upon the notice prescribed in the Code of Civil Procedure, sec. 247. *Green* v. *Green*, 294.

9. *Defendant unable to give bond, may defend, &c.:* In an action for the recovery of possession of land, where the defendants filed their affidavit alleging they were unable to give the bond required in ch. 193, sec. 11, Acts of 1869-'70, and counsel certified that the plaintfff was not entitled to recover: *Held*, To be error in the Judge below to require the defendants to give bond before they would be permitted to defend said action. *Jones* v. *Fortune*, 322.

10. *Conduct of attorney*: The alleged fraudulent conduct of a defendant and an attorney employed by the plaintiff cannot be inquired into upon a writ of false judgment. *Caldwell* v. *Beatty*, 365.

11. *Payment of mortgaged debt:* Where, by the finding of a jury, it is left an open question, whether a certain debt secured by a mortgage has not been in part paid, the mortgagor, or those representing him, have the right to have the fact of such payment and its proper application at the time made, found by the jury; and for that purpose, the case will be re-

manded from this Court, and the issue made up and responded to by a jury in the Court below. *Barnes* v. *Brown*, 439.

See EXEC'RS AND ADM'RS, 1; COURTS, 2; AGREEMENT, 1; IN FORMA PAUPERIS; Partition, 2; Divorce, 2; Appeal, 2, 3, 10; Mortgage, 2; Amendment, 1; Probate Court, 1, 2.

PRINCIPAL.

SEE AGENT, 2.

PROCEEDINGS SUPPLEMENTAL TO EXECUTION.

Contempt: If in the case of proceedings supplemental to execution, an order be made appointing a receiver and directing a certain person to deliver a bond alleged to belong to the execution debtor to the receiver, he is *prima facie* guilty of a contempt of Court if he hand the bond to an attorney for collection instead of delivering it to the receiver, though he may be discharged upon swearing, that he only intended for a certain purpose to get a judgment and not collect the money, and that thereby he had not *intended* any contempt of the Court, but his discharge should be granted on paying the costs. *Bond* v. *Bond*, 97.

PROMISSORY NOTES.

SEE INTEREST, 1; ACTION, CIVIL, 1, 2.

PURCHASER.

SEE ACTION, CIVIL, 3, 4.

RECEIPT.

Evidence admissible to explain: If a plaintiff offer in evidence a receipt which he had given to the defendant, and which he had obtained from the defendant upon a notice to him to produce it on trial, he is not thereby precluded from showing that the receipt had the words "in full" in it when was given, but they had been since obliterated. *Miller* v. *Derr*, 137.

RECEIVING STOLEN GOODS.

SEE INDICTMENT, 2, 4.

RECORD.

SEE DIVORCE, 4; EVIDENCE, 6.

RECORDARI.

1. *Used as a writ of false judgment, when:* A writ of *recordari* is sometimes used as a writ of *false judgment* to bring up a case in order to review an alleged error in law, and it is sometimes used as a substitute for and appeal, in which case the whole matter is tried *de novo* in the higher Court. *Caldwell* v. *Beatty*, 365.

2. *Defect of jurisdiction, corrected by: Arguendo.* **Where the error alleged is a defect of jurisdiction such error may be corrected upon a writ of *recordari*, used as a writ of false judgment, although the party may have neglected to avail himself of the right of appeal.** *Ibid.*

REMAINDERMAN.

SEE DEED, 2.

SALE OF LAND FOR TAXES.

Notice, to whom to be given: The mortgagee, being the legal owner of the land mortaged, is the person to whom notice must be given by the sheriff of a levy and sale of such land for unpaid taxes. *Whitehurst* v. *Gaskill*, 449.

SALE OF LAND UNDER SCI. FA.

2. *Sci. fa. vs. the heirs to sell land:* Where, under the former practice, it was necessary to sell the land of an intestate to pay his debts, after the plea of fully administered had been found in favor of the administrator, the record showed an order for a *sci. fa.* to be issued to the "heirs" of the intestate without naming them, but showed that they were named in the order appointing a guardian *ad litem*, and then, though the fact that a *sci. fa.* had issued was not stated, it appeared that there was an entry of judgment according to *sci. fa.*, and thereupon the land was condemned and ordered to be sold; *It was held*, That these proceedings were sufficient to uphold the sale of the land made under them. *Phillips* v. *Davis et al.*, 117.

SEE DEED 4. EX'S & ADM'RS, 2.

SCALE.

1. *Of contracts under the Act of 1866, ch. 38:* In a suit on a bond given in Jan. 1864, and expressed to be for value received, the value of the property for which the bond was given is the rule to be applied under the Act of 1866, chap. 38, in ascertaining the amount to be recovered, and this is not varied by the fact that the parties agreed at the time when the bond was given that it might be paid in Confederate money. Nor will it be varied by the assignee in bankruptcy of the obligor having given the following receipt: "Received of M. M., $60, on account of a note held by me as assignee of W. J. B., and which I have agreed to settle according to the scale as adopted by law. *McRae, assignee*, v. *McNair*, 12.

2. *Note for land, &c., due in July, 1862:* Where, under a parol contract for the purchase of land in January, 1862, the purchaser took possession, and in September of the same year gave his note for the purchase money with interest from the preceding January: *It was held*, That in a suit upon the note, the value of the land and not the value of Confederate currency according to the legislative scale, was the amount which the plaintiff was entitled to recover. *Bryan, to use of Ricks*, v. *Harrison*, 151.

3. *Judgment during the war:* A judgment during the war is subject to the legislative scale in regard to Confederate notes to be applied at the date of the contract, or the time of the breach complained of. *Stokes* v. *Smith*, 352.

4. *Same, when scale to be applied:* Verdict that the "plaintiff is entitled to the amount of the judgment taken at February Term, 1865, subject to the legislative scale," and his Honor had charged the jury that the scale was to be applied at the date of demand, August, 1863; *Held*, that the judgment was to be scaled as of August, 1863, and his Honor ought to have directed the clerk to aid the jury in the calculation necessary for the application of the sale, so as to fix the amount for which the judgment should be rendered. *Ibid.*

SET OFF.

SEE COUNTERCLAIM.

SHERIFFS.

1. *Not liable criminally:* A sheriff having an execution in his hands is not indictable for levying upon and seizing property in the possession of and belonging to a son of the defendant in the execution, when he acts *bona fide* under a bond of indemnity. He is liable civilly but not criminally. *State* v. *Tatom*, 35.

2. *Bond to return process:* A sheriff is bound to return every process which come to his hands, not void, with a statement of his action under it; and if he has not completely obeyed it, with a lawful reason for his omission. *Bryan* v. *Hubbs*, 423.

3. *Execution stayed, his duty:* Until the sheriff received notice that the execution has been superseded, he is to obey it according to its tenor. On receiving such notice, it is his duty to stop proceeding, and to return the writ with a statement of his action under it, and the reason for his ceasing to act. *Ibid.*

SEE UNDERTAKING.

SHERIFF'S SALES.

1. *Rights of bidders:* A bidder at a sheriff's sale occupies a relation altogether different from a bidder at a sale made by order of a Court of Equity. In the latter case, the Court takes the bidder under its protection and control, and manages the whole proceeding until the sale is in all things carried into effect: *Whereas*, In the former the sheriff makes the sale by himself, without any confirmation or other act of the Court, and acts by force of a statutory power to sell, &c. *McKee* v. *Lineberger*, 217.

2. *Same:* A bidder at a sheriff's sale of a tract of land, known as the "Neagle tract," cannot avoid his bid, because the sheriff refused to convey a narroow strip of land and mill site and water power adjoining the same, and which the sheriff did not sell, although such water power, &c., was some six months before the sale, advertised as beloning to the "Neagle tract." *Ibid.*

SOLE SEIZURE.

SEE PARTITION, 1.

SOLICITOR.

SEE CRIM. PRACTICE, &c., 4; AGREEMENT.

STATUTE, PUBLIC.

1. *Construction of:* **Where a statute may be construed, without violence to its provisions, in a sense which would make it constitutional, a Court will give it that construction, rather than a contrary one, which would make it unconstitutional and void.** *Comm'rs of Granville County* **v.** *Ballard*, 18.

2. *Act of* 1870-'71, *to what does it apply:* **The Act of 1870-'71, chap. 267, applies only to offences committed after its passage; and does not repeal the Act of 1868-'69, chap. 20, as to any offense committed before.** *State* v. *Jones*, 364.

Cited and commented on.

Act of 1868-'69, chap. 258. *Stanley* v. *Mason*, 1.
Act of 1866, chap. 38. *McRae* v. *McNair*, 12.
Act of 1872-'73, chap. 143. *Comm'rs of Granville* v. *Ballard*, 18.
Act of 1868-'69, chap. 253. *State* v. *Allen*, 23.
Rev. Code, chap. 35, sec. 4. *State* v. *Evans*, 40.
Act of 1868-'69, chap. 137, sec, 10. *Hager* v. *Nixon*, 108.
Act of 1871-'72, chap. 185, sec. 16. *Wilson* v. *Peterson*, 113.
Act of 1868-'69, chap. 169, sec. 13. *Fell & Bro.* v. *Porter*, 140.
Act of 1871-'72, chap. 193. *Barringer* v. *Barringer*, 179.
Act of 1868-'69, chap. 76. *Guion* v. *Melvin*, 247.
Rev. Code, chap. 45, sec. 1; chap. 56, sec. 1. *Teague* v. *Downs*, 285.
Act of 1868-'69, chap. 43. *Mayho & Parker* v. *Cotton*, 289.
Act of 1868-'69, chap. 193, sec. 11. *Jones* v. *Fortune*, 322.
Act of 1870-'71, chap. 267. *State* v. *Jones*.
Rev. Code, chap. 34, sec. 2.
Act of 1868-'69. chap. 167, sec. 6. "*State* v. *King*, 419."
Act of 1870-'71, chap. 42. *Bryan* v. *Hubbs*, 423.
Act of 1871-'71, chap. 60. *Wooten* v. *Mautsby*, 423.
Act of Rev. Code, chap. 31, sec. 127. *Purvis* v. *Jackson*, 474;
Rev. Code, chap. 35, sec. 14.
Act of 1868-'69, chap. 178. "*State* v. *Davis*, 495."

Unconstitutional.

Act of 1868-'69, chap. 76, sec. 9. *Latham* v. *Whitehurst*, 33.
Act of 1868-'69, chap. 108, sec. 32. *Sinclair, Owens & Brown* v. *State*, 47.

SURETIES.

1. *Payment of a note:* **Where the sureties to a note given by the purchaser for the price of a personal chattel took the title to themselves until the note should be paid, and afterwards the chattel was wrongfully converted by another person, and a judgment was obtained by the seller on the bond against the sureties:** *It was held*, **That the amount recovered by the sureties for the wrongful conversion of the chattel might be adjudged to be applied to the satisfaction of the judgment obtained on the note.** *Worley et al.*, v. *Cole et al.*, 157.

2. *By-laws, not binding on sureties:* **Although an officer of a railroad company is bound to know the by-laws of the corporation, it does not follow that the sureties to his bond are presumed to know them unless there be a reference to them in the bond. The obligation of the sureties is confined to the words of their bond, and cannot be extended beyond them.** *Atlantic & N. C. Railroad* v. *Cowles et al.*, 59.

TAXES.

1. *On non-residents, unconstitutional:* The Act of 1868-'69, chap. 108, sec. 32, which declares that "every non-resident who shall sell any spirituous liquors, by sample or otherwise, whether delivered or to be delivered, shall pay an annual tax of fifty dollars, and a tax of like amount as is payable by residents on their purchases or sales, as the case may be, of similar articles" is an act of the State imposing a discriminating tax upon non-resident traders trading in the State, and is repugnant to the Constitution of the United States and void. *Sinclair, Owens & Brown* v. *State of N. C.*, 47.

2. *Bank deposits:* Money deposited in banks loses its distinct character as money, and becomes a debt due to the depositor from the bank, and as such, is a proper subject for taxation. *Lilly* v. *Commissioners of Cumberland*, 300.

3. *Solvent credits:* Solvent credits are property, and like other property are liable to taxation under our revenue law. Nor does it make any difference if such credits were derived from the trade of a merchant in the usual course of a business, also taxed. *Ibid.*

4. *Right of State to tax National bank bills:* ARGUENDO: The State until forbidden by Congress, has the power to tax National bank bills.—*Ibid.*

5. *Money on deposit:* Where money is placed in a bank on deposit, in the usual course of business, it is a *general deposit*, and the depositor has no right to the particular money deposited, as he has in the case of a *special deposit:* Therefore *held* to be error in the Judge below, to charge that money so deposited, remained the *money* of the depositor. *Ruffin* v. *Com'rs of Orange*, 498.

6. *U. S. Treasury notes, not taxable:* United States Treasury notes, being one of the means used for the support and administration of the general government, cannot be taxed by a State. Nor can Congress for the same reason, tax any of the necessary means used to administer the government of any of the States. *Ibid.*

7. *National Bank bills, taxable:* The power of a State to tax the circulation of the National Banks, depends upon whether such circulation is for the use of the United States Government or for private profit. Congress can protect the circulation of those banks by forbidding the States to tax it; until this is done, the States have the right to tax it. *Ibid.*

TENANT BY THE CURTESY.

SEE HUSBAND AND WIFE, 2.

TITLE.

The operations of building a shed, quarrying rock, erecting a lime-kiln and cutting wood to burn it for the purpose of making lime on the land in dispute, continued uninterruptedly for more than seven years, constitute such a possession as will give a good title to the person claiming adversely under it. *Moore* v. *Thompson et al.*, 120.

SEE DEED, 2; GUARDIAN AND WARD, 7.

TRUSTEES.

1. *Appointment of:* The appointment of a trustee by a Judge of Probate, in cases where the former trustee has died, removed from the county, or become incompetent, cannot be done on an *ex parte* motion or petition. The application for such appointment is in the nature of a civil action, and all persons interested must be made parties, and have full time and opportunity to set up their respective claims. *Guion* v. *Melvin*, 242.

2. *Removal of:* The removal of a trustee at the request of the *cestui que trust*, and the appointment of some other person to sell the lands conveyed in the deed, in which such trustee is appointed, is purely a matter of discretion for the Court below, and one which the Court should not do without good cause. *Ward* v. *Dortch*, 277.

UNDERTAKING.

Necessary to perfect an appeal: The undertaking necessary to perfect an appeal may be given within a reasonable time after notice of the appeal has been given; and after such appeal has been perfected, it is the duty of the clerk to give notice thereof to the sheriff, in order that any execution which may have issued may be superseded. *Bryan* v. *Hubbs*, 423.

SEE APPEAL, 1.

VARIANCE.

SEE CRIM. PRACTICE, &C., 12.

VENDOR AND VENDEE.

Right of assignee: When land is sold and the title is retained by the vendor until the payment of the promissory notes given by the vendee to secure the purchase money, and these notes are assigned by the vendor with the knowledge and consent of the vendee, the assignee will have a right to have the notes paid out of the land in preference to any claims which may have been acquired by other persons subseqbent to the time when the sale was made and the notes were given. *Hadley* v. *Nash and wife*, 162.

VENUE.

Actions against administrators: Act of 1868-'69, chap. 258, an administrator or executor must be sued as such in the county in which he took out letters of administration or letters testamentary, provided he or any of his sureties lives in that county, whether he is sued upon his bond or simply as administrator or executor. *Stanly* v. *Mason*, 1.

SEE EX'RS AND ADM'RS, 1.

WARRANTY.

SEE CONTRACT, 1.

WIDOW.

1. *Right of dower in mortgaged premises:* The widow of a mortgagor as against

the legatees and next of kin as well as against the heirs and devisees of her deceased husband, has a right to have the mortgaged land exonerated from the mortgage debts, but as against his other creditor she has no such right. As to them, she has only the right to have the two-thirds of the land not embraced in the dower, and the reversion of the dower sold, and the proceeds applied to the payment of the mortagaged debt and to have the residue of that debt, if any, paid rateably with the other debts of the deceased out of the personal assets, and if there still be any part of the mortgage deb unpaid, it will be a cha ge on the dower. *Creecy* v. *Pearce*, 67.

2. *No right to dower in a particular portion of certain lands:* The widow, but being the representative of her husband, who has no exclusive or superior right to any particular portion of the land to be divided, has no right to have any particular part of such land assigned to her as dower. *Gregory* v. *Gregory*, 522.

3. *Must be a party in a petition for partition:* A, B and C are tenats in common of a tract of land; C dies in debt, and his widow becomes his admistratrix. A and B filed their petition for a partition of the land into three parts: *Held*, that the widow of C, being entitled to dower, and also as representing the creditors of C, was a necessary party to such petition, both as widow and as administratrix. *Ibid.*

SEE HOMESTEAD, 1; MORTAGE, 4.

WILLS.

1. *Construction; Life Estate:* Where a testator gave to his wife all his lands and many articles of personal property, and added "all of which property to be her's during widowhood; in the event of her marriage, the one-third of the above property to be her's forever, and the balance to be divided among my children, and subject to the same restrictions as hereafter mentioned," which restrictions were that other property given to his children should be their's for life with limitations to their children: *It was held*, That as the wife never married again the interest which she had taken in the lands was for life only, and upon her death they descended to the heirs-at-law of her husband. *Pettis* v. *Smith et al.*, 3.

2. *Bequest of Slaves:* Where a testator, who died in 1863, bequeathed that a certain slave should be sold and the proceeds equally divided between two sons who were appointed executors, and one of the sons bought the interest of his brother in the slave, and kept him until he was emancipated by the results of the late civil war: *It was held*, That the purchaser of his brother's interest had not thereby converted the slave, and was not responsible for his value or any part of it, but that he was responsible for the services of him and of the slaves which he had kept up to the time when they were emancipated. *Green*, Ex'r, v. *Green et al.*, 25.

3. *Debts charged upon lands devised:* When lands are devised in seperate parcels to different persons, and it becomes necessary to sell land to pay the debts of the testator, the debts are a charge upon all the lands, and must be raised out of them all according to their respective values. *Ibid*

4. *Estate, when absolute:* Testatrix, after providing for the payment of her debts and funeral expenses, says: "The balance of my property of all kind, I give to my grandson, John Thomas Hollowell, to him and to his

heirs; and if he should die and leave no lawful heirs of his body, then and in that case I give," &c : *Held*, that the estae of John Thomas was an absolute one at the death of the testatrix, and went upon his death to his representatives. *Davis* v. *Parker*, 271.

5. *Words af limitation, not effectual:* When a testatrix devised a tract of land to her son, to him and to his heirs forever, and added the following clause: "But should my son die without lawful issue, then and in that case, it is my request, (inasmuch as it was his father's wish) that the above given legacy be by him conveyed by will in writing, to his brother, J. F. N., or to any one or more of my grandchildren: *It was held*, that he took an absolute estate in *fee simple* in the land, and that upon his death without issue and intestate, it might be sold by his administrator for the payment of his debts. *Batchelor* v. *Macon*.

WITNESSES.

1. *As to character:* A witness is not competent to testify as to the general character of another witness, simply because he had known him several years, when the question is asked without explanation, and without the preliminary question, whether he knew the general character of the witness, and the means by which he had acquired the knowledge,—*State* v. *Speight*, 72.

2. *Who competent:* In action against a surety on a constable's bond, alleging certain breaches of the condition of the bond by the constable, now dead, the plaintiff is not a competent witness to prove any transaction or conversation between himself and such deceased constable in regard to the matters in controversy. *State & Bryant* v. *Morris*, 444.