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NORTH CAROLINA REPORTS.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA,

JUNE TERM, 1875

VOL. LXXIII.

By TAZEWELL L. HARGROVE, Attorney General.

RALEIGH:
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1875.

JUSTICES OF THE SUPREME COURT.

AT JUNE TERM, 1875.

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

JUDGES OF THE SUPERIOR COURTS.

First Class.			*Second Class.*		
MILLS L. EURE,	1st	District.	WILLIAM A. MOORE,	2d	District
AUG. S. SEYMOUR,	3d	"	SAMUEL W. WATTS,	6th	"
ALMOND A. MCKAY,	4th	"	JOHN M. CLOUD,	8th	"
RALPH P. BUXTON,	5th	"	D. M. FURCHES,	10th	"
JOHN KERR,	7th	"	JAMES L. HENRY,	11th	"
DAVID SCHENCK,	9th	"	RILEY H. CANNON,	12th	"

ATTORNEY GENERAL.

TAZEWELL L. HARGROVE.

CLERK OF THE SUPREME COURT.

WILLIAM H. BAGLEY.

INDEX TO CASES REPORTED.

CASES

ARGUED AND DETERMINED

IN THE SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

JUNE TERM, 1875,

MARY B. DAY *v.* GEO. HOWARD and JOSEPH H. BAKER.

A delay by a *feme covert*, tenant in common, for three years and a few months after the death of her husband, and for seven years and a few months after the falling in of the life estate of her father, do not raise a presumption of an actual ouster by her co-tenants in common, so as to defeat her title, and under the statute of limitations bar her action.

(*Williams* v. *Lanier*, Busb. 30; *Cloud* v. *Webb*, 4 Dev. 290; *Thomas* v. *Garvan*, 4 Dev. 223, cited and approved.)

CIVIL ACTION, for the recovery of the possession of real estate, tried before *Moore, J.*, at the July (Special) Term, 1874, of EDGECOMBE Superior Court, upon the following

"CASE AGREED.

Bythel Bell, of Edgecombe county, died in 1802, leaving a will which was duly proved and recorded, and a copy of which is filed, &c. His widow and five children, to wit, Marmaduke N. Bell, Henry C. Bell, William W. Bell, Elizabeth Bell and

Margaret Bell survived him. Elizabeth Bell died soon afterward, without issue and intestate. In the year 1809, and after the death of the said Elizabeth, the said Wm. W. Bell died without issue and intestate. Afterwards the widow of said testator died. In 1806, the said Margaret Bell married Robert Joyner, she being then under the age of twenty-one years, and had by said marriage, Mary Joyner and other children, all of whom died without issue and intestate, except the said Mary.

No deed can be found of record, conveying the interest of said Margaret Joyner and her husband Robert, or either of them, in the land of which testator died seized, which descended to her as one of the heirs of said Wm. W. Bell. In a petition filed in 1810, November Term of the County Court of said county, by one William Foxhall and the said Henry C. Bell, it was alleged that the said Marmaduke N. Bell had purchased of the said Robert Joyner and wife Margaret, their share of the interest in said land, which descended from said William W. Bell, and had conveyed one-half of all the land of which said testator died seized, to the said William Foxhall. (Copies of said petition, &c., filed as part of the case, but which are not necessary to be inserted.) Henry C. Bell and William Foxhall sold the entire tract of land to James L. Battle, by deed in fee simple after 1810, but in the lifetime of Mrs. Joyner, and Battle took possession of the whole tract immediately; and the defendants and those under whom they claim, have had possession ever since, claiming the land as their own, by conveyances in fee simple from Battle and others succeeding b[illegible] Defendants claim that this in law amounts to an actual ouster. Neither said Robert Joyner nor his wife Margaret has had possession of any part thereof, since the date of said report.

The said Mary Joyner married W. H. Day in the year 1830, she being then eighteen years of age. The said Robert Joyner died in 1854, having survived his wife, the said Margaret Joyner, many years. The said W. H. Day died on the 14th

day of November, 1859. The said Mary Day survived him, and is the plaintiff in this action, which was commenced by summons on the 4th day of November, 1871.

If the Court should be of opinion, that the plaintiff is entitled to recover, and is not barred by the statute of limitation, then judgment shall be rendered in favor of the plaintiff, for such a proportion of the hereinafter described land, as the Court shall be of opinion she is entitled to.

But if the Court shall be of opinion that she is barred by the statute of limitation, then judgment shall be rendered for the defendant"

His Honor being of opinion that the plaintiff's action was barred by the statute of limitations, gave judgment accordingly in favor of defendants.

From this judgment plaintiff appealed.

Batchelor, for appellant.
Perry and *Bridgers*, contra.

PEARSON, C. J. The action "to recover possession of land and damages" under C. C. P. is a substitute for the action of "Ejectment and Trespass for mesne profits."

Ejectment could not be maintained by a tenant in common against a co-tenant unless there had been an *actual ouster*. The same rule applies to the present action.

We assume from the "case agreed" that any technical objection in respect to actual ouster is waived, and the ouster is admitted for the purposes of the action so as to present the case upon the title of the parties, growing out of the operation of the statute of limitations.

For the sake of illustration and to analyse the question, we we will suppose that Mrs. Joyner owned the whole tract in severalty. In 1810, Bell & Foxhall, upon an allegation that they had purchased the title of Joyner and wife, procure partition of the land to be made under an order of the County Court, and soon afterwards sell and convey the whole tract to

Battle, who takes possession in pursuance of his deed; and he and those claiming under him down to the defendants, have held possession of the land under these mesne conveyances without interruption until the commencement of this action.

It is clear that Mrs. Joyner had no right of entry during her lifetime, and the statute of limitations did not begin to run as to her, because her husband was entitled to an estate for his life, as tenant by the curtesy initiate. *Williams* v. *Lanier*, Busb. 30. At her death, in 1830, the title descended to Mrs. Day, subject to the life estate of Joyner. She had no right of entry and the statute of limitations did not begin to run as to her until the death of Joyner, in 1854. So she had seven years from that date, and three years from the death of her husband, in 1859, in which to sue for her land. Counting out the time from May, 1861, to January 1870, her action was commenced a little over seven years after the death of her father, and a little over three years after the death of her husband; and as these computations of time are concurrent and run together, according to the construction, *strictissi* or *jurismi* put on the statute. *Crump* v. *Thompson*, 9 Ired. 496. She is *behind time*, and her land is lost by three months delay. This is a hard case. The plaintiff was obliged, by law, to wait until the death of her father, and then she was restrained by the the inertness of her husband.

Such would be the result upon the supposition that Mrs. Joyner *owned the land in severalty*. We are to see how the question of law is affected by the fact that Mrs. Joyner and the plaintiff, as her heir, is a tenant in common with her two brothers, under whom the defendants claim, and could not maintain an action to recover an undivided part of the land until there had been an "actual ouster." So the case turns upon the question: at what time was there an actual ouster of the plaintiff, by her co-tenants, so as to divest her estate and drive her to an action?

There is a fellowship between tenants in common. The law assumes they will be true to each other; the possession of one

is the possession of all, and one is supposed to protect the rights of his co-tenants and is not tolerated in taking an adversary position unless he acts in such manner as to expose himself to an action by his fellows on the ground of a breach of fealty; that is, an actual ouster. The tenant in possession may *talk as he pleases*, claiming the whole, and denying the title of any other as co-tenant; nay, he may receive the whole rents and profits of the land, denying the right of all other persons; but these acts of his, and this *big talk*, does not give his co-tenant a right of action—which is the gist of the matter—and is not allowed in law the effect of an "actual ouster," unless submitted to for more than ten years by one who is not under disability, and unable to assert his right. The plaintiff was under disability of coverture, and was also unable to assert her right, for she could not sue until after the death of her father, who had an estate for life as tenant by the curtesy, and at his death, there being no actual ouster, her husband was tenant by the curtesy initiate. *Williams* v. *Lanier*, *supra*; and so the plaintiff, owing to a combination of circumstances, had no right of action and no right of entry within a little more than three years before the action was commenced.

When was there an actual ouster? The earliest period that can be supposed is at the time of the death of her husband. She was then, for the first time, relieved from the disability of coverture, and the encumbrances of life estates. Conceding an actual ouster at that time, her right could not be barred according to the provisions of the statute of limitation, except by an adverse possession for seven years from that date, when her right of entry accrued. Unless this effect be given to the relation of tenants in common, it will have no effect at all. Whereas, we find from the books, that very important consequences result from it. In *Cloud* v. *Webb*, 3 Dev., 317, the effect of a tenancy in common is discussed by the late Patrick WINSTON with so much ability and the learning on the subject is so clearly set out, as to make it superfluous to say anything more, and I prefer giving him the credit of having disposed of

the subject rather than to attempt to make a *re-hash* of it by borrowing his reflections and learning upon so abstruse a subject. The decision following the line of Mr. Winston's argument declares that the estate of a tenant in common, is not defeated by the fact that her co-tenants had conveyed their shares and the grantors and those claiming under them, had held possession of the whole, claiming to be entitled to the whole, and having exclusive possession, receiving rents and profits without claim or interruption from their co-tenant. After the lapse of forty years, during which time the plaintiff was under coverture, and *fifteen years* after discoverture, before the commencement of the action, *Cloud* v. *Webb* was again before the Court. 4 Dev., 290. The decision affirms the same principles of law, but suggests, *obiter*, that if the mesne conveyances had been accompanied by a change of possession, it might have altered the result. I am not able to perceive the idea which this *dictum* intends to convey, unless it be taken in connection with *Thomas* v. *Garvan*, 4 Dev., 223, by which it is decided, the sole enjoyment of the property by a tenant in common, for a great number of years, (say twenty-one,) without claim from the co-tenant, who is *under no disability*, raises the presumption of an actual ouster.

If a tenant in common conveys to a third person, the purchaser occupies the relation of a tenant in common, although the deed purports to pass the whole tract and he takes possession of the whole; for, in contemplation of law, his possession conforms to his true and not to his pretended title. He holds possession for his co-tenant and is not exposed to an action by reason of his making claim to the whole and having a purpose to exclude his fellow.

It is evident that such a purchaser, (for instance, Battle in our case,) must be looked at in a light somewhat different from the original co-tenant under whom he claims. The obligation of fealty to his fellow, was not assumed so certainly, but was imposed upon him by the law, as an incident growing out of the connection of his bargainor. It follows he may get

rid of this obligation as soon as he can do so, according to the rules of law, without trenching upon the ground of good morals. By an analogy taken from the statute by which the time for putting an end to stale demands, and quieting titles, is reduced from twenty years (fixed by the Judges in England as the rule of the common law) to ten years, we are inclined to the opinion, that a purchaser from a tenant in common who buys and takes a deed for the whole tract, and under this deed holds exclusive possession of the whole tract for ten years, (the co-tenant being under no disability and there being no particular estate to prevent an immediate assertion of the title), acquires a good title by the presumption of an "actual ouster" and his adverse possession. That state of facts is not presented in this case, and we give no opinion.

The relation of landlord and tenant, furnishes another analogy. The fealty of a lessee to his lessor, in a term for years, forbids the lessee, or one who, in the forcible language of the books, "stands in his shoes," to deny the title of the lessor, and if he holds over, after the expiration of the term, although he claims to do so upon an independent title, to-wit: a deed in fee simple of a stranger, and holds possession without payment of rent and without interruption for an indefinite number of years, is not allowed to take any benefit therefrom, and is treated as a *tenant at sufferance*, who is not allowed to dispute the title of his lessor. The time in which such uninterrupted possession by a tenant at sufferance, is allowed to bar the action and defeat the title of the lessor, although left indefinite at common law, is fixed by statute. Bat. Rev., chap. 17, sec. 26, and is put at *twenty years*, "notwithstanding the tenant may have acquired another title, or may have claimed to hold adversely to his landlord."

We declare our opinion to be, that a delay to sue for three years and a few months after the death of her husband, and for seven years and a few months after the falling in of the life estate of her father, do not raise a presumption of an actual

ouster, by her tenants in common so as to defeat her title, and by the statute of limitations bar her action.

There is error. Judgment reversed and judgment for plaintiff, (according to the case agreed,) to be let into possession with the defendants, of one undivided ninth part of the land.

The damages for mesne profits will be ascertained by reference.

This will be certified.

PER CURIAM. Judgment accordingly.

E. L. SHERRILL *v.* MARTIN SHERRILL, and others.

One who has the title to a tract of land, who participates in actually misleading another, and induces such other to purchase the land from one who has no title thereto, cannot afterwards assert his title and defeat that of the purchaser.

(The cases of *Devereux* v. *Burgwyn*, 5 Ired. Eq. 351; *Sasser* v. *Jones*, 3 Ired. Eq. 19; *Saunderson* v. *Ballance*, 2 Jones Eq. 322, cited and approved.) And *Cousin* v. *Wall*, 3 Jones Eq. 513; *Hargrove* v. *King*, 5 Ired. Eq. 430, cited and distinguished from this.)

CIVIL ACTION, tried before *Mitchell, J.*, at Spring Term, 1875, CATAWBA Superior Court.

The action was brought for the purpose of cancelling a deed, and also to restrain the defendant from bringing suit to recover the tract of land in controversy. The facts in the case are as follows:

In 1852 ,one Nelson Sherrill conveyed in fee to Robert Sherrill, the ancestor of the defendants, a tract of land in the county of Catawba, containing about sixty-two acres. In 1857, Nelson Sherrill conveyed the same land, except nineteen acres, to Elbert Sherrill, the plaintiff, by deed, in fee with warranty.

Nelson Sherrill was introduced as a witness by the plaintiff,

who offered to prove by him that at the time of the conveyance to the said Robert, that the agreement was that the land was to stand good for itself, and if he could not pay for more than nineteen acres, which he then did, he was to surrender the deed to be cancelled.

Afterward, in 1857, he called on the said Robert to pay the balance of the purchase money, which he was unable to do, and agreed to surrender the deed and take a deed for nineteen acres.

This evidence was objected to on the ground that the witness was interested and that it was a transaction between the witness and Robert Sherrill who was dead.

The objection was overruled by the Court, and the evidence admitted.

The plaintiff offered to prove by the witness that only nineteen acres was paid for at $3.00 per acre. The defendant objected to this evidence on the ground that this would contradict the deed made by the witness to the said Robert, and that the deed could not be contradicted by parol evidence. The consideration in the deed was two hundred dollars. The Court overruled the objection and the evidence was admitted.

It was in evidence that after the conversation, as detailed by Nelson Sherrill, that Nelson Sherrill sold the land to the plaintiff Elbert Sherrill, in 1867. Nelson and Robert and Elbert L. Sherrill and the Surveyor, met on the premises in controversy and the land was surveyed, and the deed prepared in the house of the said Robert and signed by Nelson and witnessed by Robert, and a plot for the nineteen acres made by the surveyor. The evidence as to the signature of Robert Sherrill was objected to by the defendant but admitted by the Court.

It was also in evidence that the survey was made by the deed from Nelson Sherrill to Robert Sherrill, and it was the understanding of the witness that Elbert Sherrill knew that Robert Sherrill claimed the land, but the said Elbert testified that he did not know then that Robert had a deed for the land.

The witness further testified that Elbert did not then know that Robert had a deed for the land in controversy, but stated that it was generally known that Robert claimed the land and had been in possession thereof since 1852.

It was stated by the plaintiff, Elbert, in his testimony that he knew that Robert claimed the land and had been in possession thereof for a number of years, cultivating the same. It was further in evidence that after the deed was made by Nelson Sherrill to Elbert Sherrill, that Elbert took possession of the land and had kept it ever since that time.

The defendant's counsel asked his Honor to charge the jury:

1. "That if at the time that Robert Sherrill signed the deed by Nelson Sherrill to the plaintiff as a witness, the plaintiff knew that Robert had a deed from Nelson for the same land, the plaintiff could not recover.

2. That if at the time that Nelson made the deed to plaintiff, and Robert witnessed the same, and plaintiff knew that Robert claimed the land, and had it in his possession cultivating it for a number of years, and plaintiff neglected to inform himself by proper inquiries as to the facts in the case, that he could not recover.

His Honor refused to charge the jury "that the law was that one who knowingly stands by and permits another to purchase his land, shall not be allowed to set up an opposing equity or take advantage of the legal title by which it is supported.

That if Robert Sherrill aided in surveying the land and induced the plaintffff to believe that he was willing that Nelson Sherrill should make him a title, and a deed was made to the land in controversy by his consent, and he witnessed the deed to the said land, he is estopped from denying the plaintiff's title to the land in controversy."

To the refusal of his Honor to charge as requested, the defendants excepted.

The jury returned a verdict for the plaintiff, and thereupon

the defendants moved for a new trial. The motion was overruled by the Court, and the defendants appealed.

Hoke, for appellants.
M. S. McCorkle, contra.

BYNUM, J. In 1852, Nelson Sherrill sold and conveyed a tract of land to Robert Sherrill, under whom the defendants claim. The subsequent facts of the case, as disclosed by the pleadings and the findings of the jury, upon issues submitted to them, are these: Robert Sherrill being unable to pay more of the purchase money than amounted to nineteen acres of the land, it was agreed by parol between Nelson, Robert and Elbert Sherrill, that Robert should retain the 19 acres paid for, and that Nelson, who was entitled to the residue of the purchase money, might sell and convey the remainder of the land unpaid for by Robert, to the said Elbert Sherrill. That in pursuance of this arrangement a surveyor was called in, and all parties being present, the 19 acres were run off, plotted and taken possession of by Robert, who up to that time had been in possession of the whole, under his original purchase; and the residue of the tract was surveyed and deeded by Nelson to Elbert Sherrill with warranty. That the subscribing witness to the deed from Nelson to Elbert, was Robert Sherrill himself, who was present at the whole transaction and assenting thereto. That in pursuance of said purchase and deed, the plaintiff took exclusive possession of the land so bought by him, and has been in the adverse possession thereof ever since, and has at times rented the said land to some of the defendants. That Robert, after the purchase by the plaintiff, set up no claim to the land, but that he is now dead, and that the defendants, who are his widow and children, now set up claim to the land by virtue of the legal title which was outstanding in Robert and by his death devolved upon them, and are threatening the plaintiff with an action for the land. The prayer of the complaint is for an injunction and further relief.

The plaintiff, in his complaint, alleges positively that at the time he purchased he had no knowledge that the legal title to the land was in Robert, and did not believe that he had a deed from Nelson. The answer does not meet this allegation by a positive denial, but responds evasively, by alleging that the plaintiff knew, at the time of his purchase, that Robert "*claimed* title to the land." Claiming a title and having a deed are very different things. It was true, and the plaintiff well knew, that Robert did claim the land up to the purchase by Elbert, but that he knew that the legal title was in Robert is wholly inconsistent with the fact that he recognized the legal title to be in Nelson Sherrill by taking the deed from him, and that Robert informed him that he had the legal title, or that he desired the plaintiff to understand that he had the legal title, is wholly inconsistent with the fact that he, Robert, not only stood by and permitted one to make a deed to another of lands to which he had no title, and of lands the title to which he knew to be in himself, and that he actively participated in misleading the plaintiff by assisting in running off the land and becoming a subscribing witness to the deed made by Nelson Sherrill. When in addition to this, both Nelson and Elbert Sherrill testify positively that the plaintiff did not know, at the time of the purchase, that a deed had been made to Robert, we must assume as a fact established, that the plaintiff was ignorant of the existence of such deed, and that the conduct of Robert was calculated and intended to mislead the plaintiff in that particular, and did mislead him. The case then presents this question: If one having the title to land intentionally induce another to purchase from one who has no title, can he be permitted, afterwards, to assert his title and defeat the purchaser? In *Devereux* v. *Burgwyn*, 5 Ired. Eq., 351, the Court says: "If one acts in such a manner as intentionally to make another believe that he has no right, or has abandoned it, and the other, trusting to that belief, does an act which he otherwise would not have done, the fraudulent party will be restrained from asserting his right, unless it be such a case as

will admit of compensation in damages." *Sasser* v. *Jones*, 3 Ired. Eq., 19, was much like the case before us. In that case. Arthur Jones, Sr., executed and delivered to his son, Arthur, Jr., a deed for more than half his estate, consisting of land and slaves. This transaction was concealed from his other children. Two years afterwards the father called all his children together and made a deed of settlement and division of all his estate, including that previously conveyed to the son Arthur, equally among all his children. Arthur, Jr., was present at the making of this deed of settlement and did not make known his older deed and claim, but assented to the deed of settlement and took into possession the property assigned to him under it, Afterwards he brought his action at law and recovered judgment for the property which had been conveyed to him under the first deed. Upon a bill in equity being filed to restrain him from taking out execution upon his judgment, and the hearing of the case upon the pleadings and proofs establishing the foregoing facts, this Court adjudged, not only that the plaintiffs should be quieted in the title and possession of the property claimed by them, but that they should have restitution of whatever was lost by the recovery had against them at law.

Judge GASTON put the decision upon the ground that the deed of settlement was one which bound the conscience of the defendant, and which a Court of equity will not permit him to contravene. To the same effect is the case of *Saunderson* v. *Ballance*, 2 Jones' Eq., 322, which is where A, having an unregistered deed for half a tract of land, stands by and sees the same sold at auction by a trustee as the land of another, and permits B to buy it and afterwards to pay the purchase money and take a deed for it from the trustee, under the impression that he was getting a good title for the whole; which impression is well known to A, and he does not disclose his title at the auction sale nor afterwards, before the money is paid; there the concealment was held to be a fraud upon B, and the Court compelled A to convey his moiety to B upon

the repayment of what he gave for such moiety. The cases we have cited differ from *Cousin* v. *Wall*, 3 Jones' Eq., 43; *Claninger* v. *Summit*, 2 Jones' Eq., 513; and *Hargrove* v. *King*, 5 Ired. Eq., 430, in that these latter were cases where the equitable matter and trust preceded the acquisition of the legal estate and was coupled with its acquisition, thus constituting the relation between the parties to be that of trustee and *cestui que trust*, which the Courts will enforce. In the former cases it is seen that the legal title was first acquired, unaffected by fraud or trust, and by matter subsequent became impressed with all those circumstances of fraud and faithlessness which invoke the jurisdiction of equity for the enforcement of the principles of honesty and fair dealing. The statute of frauds does not apply to either class of cases, nor do we see that equity is less reluctant to take hold of one than the other, or when it does take jurisdiction, that it will hesitate to do complete justice.

In our case, Robert Sherrill being unable to pay the purchase money for part of the land, agreed that Elbert Sherrill might take it by discharging him from the debt. The plaintiff accordingly paid the purchase money due from Robert, who was discharged by Nelson from further liability. Nelson, then, who was in equity and good conscience the owner of the land until paid for, executed the deed to the man who had paid him for it, who received the deed under the belief that the title was in his bargainor, and was induced so to believe and act, by the fraudulent conduct of Robert Sherrill. The case, therefore, falls within the principle of *Sasser* v. *Jones* and *Saunderson* v. *Ballance*, where by reason of the fraud, equity will interpose and where, when it does interfere, will not stop halfway, by simply enjoining the party from taking advantage of his legal title, but will go further and do complete justice by compelling the party to do what in equity and good conscience he is bound to do—make his representation specifically good. Adams' Eq., 150; Sugden on Vendors, 262.

The defendants here claim under Robert Sherrill, as privies in estate, and are subject to all equities against him.

The plaintiff is entitled to an injunction, as prayed for, and also to a decree that the defendants execute to him a deed to that part of the land purchased by him.

We have not noticed either the objections raised below to the evidence admitted, or to the instructions asked for, as the counsel for the defendants in this Court, properly enough, desired the case to be decided on the merits.

PER CURIAM. Judgment affirmed.

JOHN A. VINCENT and wife, and others *v.* WILLIAM J. MURRAY and ALBERT MURRAY, Ex'rs, and others.

A devised as follows: "It is my will that my wife Nancy Murray have a lot of land including the house I now live in, sufficient for a one-horse crop, as little to the prejudice of the whole as can be done, with sufficient woodland to support it, to her use during her natural life."

The will then proceeded to give many articles of personal property, enumerating them, and also the use of a small part of the meadow land, and then said: "All this I will during natural life, and at her death to be sold and equally divided between my children, and the balance of my property I will as follows: "I will all my land I now live on, be equallly divided among my four daughters," &c.: *Held*, that the words "all this" referred only to the personal property, and that after the death of the widow, the land was to be equally divided among the four daughters.

CASE AGREED, and submitted without action, and heard before *McKay, J.*, at Chambers, in the county of GUILFORD.

The facts agreed are as follows:

Eli Murray, late of Alamance county, died in 1870, seized in fee of a tract of land on which he lived, containing about

five hundred acres. That he left a last will in writing, duly executed, so as to pass both real and personal estate, which after his death was duly proved and recorded in the Court of Probate for Alamance county.

William J. Murray and Albert Murray, named as executors in said will, duly qualified as such, and took upon themselves the duties of that office.

That the female plaintiffs are the four daughters, and the defendants are the two sons mentioned by the testator in his will. Nancy Murray, his widow, is now dead.

Under the will of the testator, the executors set apart and allotted to said Nancy, the widow, a tract of land containing eighty acres, including the dwelling house, for and during the natural life of the said Nancy, and she held the same during her life as provided by the will. No part of the real estate of the testator is necessary for the payment of the debts of the testator.

That the copy of the will annexed hereto as a part of this case, is a true and correct copy. Upon this the plaintiffs contend:

1. That the devise in the said will to the said four daughters of the testator, of the tract of land on which he lived, and the mill, is to them exclusively, and that it vests in them a fee simple estate in the whole of said land, to be equally divided between, subject only to the life estate devised to Mrs. Nancy Murray, in the lot of land to be laid off to her.

2. That the defendants, William J. Murray and Albert Murray, have, under said will, no right or interest in said lands or the proceeds thereof as devisees or legatees, and no right as executors to sell it or otherwise to interfere with it.

The defendants contend:

1. That under the true and proper construction of the will of the said Eli Murray, the lot of land directed by said will to be cut off and set apart to Nancy Murray, the widow of the said Eli Murray, for and during the natural life or widowhood of said Nancy, and which was set apart by the said executors

as directed under said will, did not pass solely to the four daughters of said Eli Murray after the death of the said widow.

2. That it was the right and duty of the defendants as executors, to sell the tract of land so set apart and to divide the proceeds of the sale, as well as the proceeds of the sale of the personal property, among all the children of Eli Murray.

3. That the said William J. Murray and Albert Murray, in their own right, are each entitled to one-sixth part of the proceeds of the said lot or parcel of land, devised to Nancy Murray, the widow, during her natural life, and directed to be sold by the executors (as they insist) after the death of the said Nancy.

The plaintiffs pray that their rights may be declared under said will to said land, by the judgment of the Court, and that the defendants may be perpetually enjoined from interfering with the same.

1. The defendants pray that they, in their individual right, may be declared entitled to each one-sixth interest in the said tract of land devised to Nancy Murray for life and set apart to her as directed by said will.

2. That under the will of the said Eli Murray, they as executors may be declared entitled to sell the said lot of land so set apart to the said Nancy for and during her natural life, she now being dead, and to divide the proceeds of such sale among all the children, both sons and daughters of the said Eli.

3. That a true and proper construction of the said will of the said Eli Murray may be given or made by this Court, and directions given to the said executors concerning the rights of all the parties named therein.

The following is a copy of the will:

STATE OF NORTH CAROLINA, }
Alamance County. }

I, Eli Murray, of the county and State aforesaid, being old

and knowing it is appointed once for all men to die, I do constitute this my last will and testament: First of all, I will that my body have a decent, christian burial, with full assurance of its resurrection at the last day. As it regards my worldly effects wherewith God has blessed me with, I will and bequeath after the following manner: First, I will that all my just debts be paid, of which I don't know that I owe five dollars at this date, then it is my will that my wife, Nancy Murray, have a lot of land including the house I now live in, sufficient for a one horse crop as little to the prejudice of the whole as can be done with sufficient wood land to support it, to her use during her natural life, and I will that she have two beds and furniture, one horse, one milch cow, sow and pigs, my carryall and buggy, a good one horse turning plow and bull tongue plow, and such of my house furniture as is necessary to have, including her bureau and my currill press and sufficient number of chairs, and if she desires it my sofa and parlor chairs to remain during her natural life, and I also will that she have two hundred dollars in money. I will a sufficient quantity of meadow land be laid off for her as she can't keep much of it. I also will that my wife have as much of my kitchen furniture as is necessary, and one year's support; all this I will during natural life, and at her death to be sold and equally divided between my children, and what she accumulates during her sojourn for her to will as she please. And the balance of my property I will as follows: I will all my land in the tract I now live on be equally divided between my four daughters Aveline, Sarah Ann, Margaret Jane and Emma Virginia, including my mill. And I will that my daughter Emma Virginia have two beds and furniture and horse and saddle and her bureau and set of chairs, all equal to what the rest of my daughters have had, and it is my will that such of my houses is not necessary for one lot, to be taken off or divided so as to make the lots as equal as they can be. All I will to my children and their heirs, and all that I have given to my children to have and to hold, and such of my son John Alvis' estate as fell to me by law and is still remaining at Fac-

tory I will to my two sons William James and Albert Murray, and his gold watch which I now carry I will to my grandson Edwin Cranford Murray, at my death I also will my desk to my son Albert Murray to kept in family, and also will my first wife's bureau I will to my daughter Aveline. And the balance of my property I will, just to be valued by some disinterested men and then put up and sold, and if it does not bring the sums the valuation to be divided equally among my children, first when it is put the cryer to start it the valuation and if don't bring that to be divided among my children at the valuation equally. All my property except such as I have willed to be sold, stock of horses and wagons and harness, cotton mill, gin, threshing machine, molasses mill, my cider mill I wish to remain here with my wife as long as she may need it to the use of my children when they come here and use it, and all the other property as above stated to be sold at public sale and divided equally among all my children. There is a great many articles too tedious to mention, all to be collected and valued and either sold or divided, and what money I have on hand or invested any way to be equally divided among my children and as above stated what I have advanced to my children heretofore as above stated what fell to me by law from my son John Alvis' estate, and what I have advanced to two sons Wm. James and Albert to have and to hold forever, and should my wife become old and incapable of managing her affairs I will that my executors attend to it and manage to her best advantage and to see that she has a sufficient support. And as to the interest I hold in a lot of land where Mason lives, if I do not dispose of it sooner I will it to be sold and as my other property equally divided.

After due reflection I think I have mentioned all that is necessary, and should there be any article not mentioned let it be sold and divided as above stated, and this is my will, and I wish it carried out, and to this end I constitute and appoint my two sons Wm. James and Albert Murray my whole and sole executors to this my last will and testament, and desire that it be recorded as such.

In testimony whereof I have hereunto set my hand and affixed my seal this third day of June, in the year of our Lord one thousand eight hundred and sixty-nine.

ELI MURRAY, [Seal.]

Acknowledged in the presence of
JAMES W. LEA,
ALVIS KING.
June 3rd, 1869.

Upon these facts agreed, the Court adjudged:

1. That under the will of Eli Murray the *feme* plaintiffs are entitled to the whole of the tract of land mentioned in the said case agreed and on which the said Eli Murray lived, to be equally divided between the said four *feme* plaintiffs, including the lot of land set apart to Nancy, widow of said Eli.

2. That the defendants have no interest in said tract of land and no right as executors to sell the same.

3. That the cost of this action be paid by the executors out of the general assets of the said Eli Murray.

From this judgment the defendants appealed.

Dillard & Gilmer and *Graham & Graham*, for appellants.
Norwood & Webb, contra.

READE, J. To ascertain the will of the testator through the words which he has used, aided by circumstances, is the rule for construing wills. The one under consideration is so inartificially written that there is danger of misunderstanding it after the most careful reading.

The question is, whether the portion of the testator's home place, given to his wife for life, goes to his *four daughters*, to whom the balance of the home place is given; or, whether it is to be sold after his wife's death, and the proceeds divided among *all* of his children.

"It is my will that my wife, Nancy Murray, have a lot of land, including the house I now live in, sufficient for a one-

horse crop, as little to the prejudice of the whole as can be done, with sufficient wood land to support it, to her use during her life." The will then proceeds to give the wife a great many articles of personal property, enumerating them, and also the use of a small part of the meadow, and then "All this I will during natural life, and at her death to be sold and equally divided between my children." Does "all this" include the land or only the personal property? We think it includes only the personal property. When he gave the land, as above to his wife for life, he dropped that subject and took up the personal property, and before leaving it, directed it to be sold at his wife's death. And then he returns again to the land, and says: "And the balance of my property I will as follows: I will all my land in the tract I now live on, be equally divided among my four daughters," &c.

The construction which we put upon it is the same as if he had given the home tract to his daughter's encumbered with the life estate of the wife in the lot set apart for her.

There is no error. This will be certified.

PER CURIAM. Judgment affirmed.

STEPHEN MORTON and wife and others *v.* WM. LEA, Adm' &c.

In an action for an account and settlement, where the defendant relies upon the plea of a former account and settlement, the answer must allege and set forth an account stated between the parties, and that the account, as settled, is just and true.

(*Harrison* v. *Bradley*, 5 Ired. Eq. 136, cited and approved.)

CIVIL ACTION, for an account, originally begun in the Probate Court, from which it was transferred and tried before *McKay*, *J.*, at Spring Term, 1875, PERSON Superior Court.

All the facts necessary to an understanding of the case as decided in this Court, are stated in the opinion of Justice BYNUM.

J. W. Graham, for appellant.
No counsel *contra* in this Court.

BYNUM, J. The plaintiffs, who are the next of kin, and distributees of the estate of James Covington, sue the defendant as administrator, for an account of the estate in his hands and their part of it. The defendant, among other defences, pleads in bar of the account demanded, that he had fully accounted with the plaintiff, and he sets forth a copy of what he claimed to be a settlement with them, which is in the following words:

"This day, Wm. Lea and us the undersigned had a settlement of the estate of James Covington, deceased.
Due Bell Covington, $675.25.
Due Susannah Covington, $675.25.

The above amount due us, said Lea pays interest on this debt from date."

BELL V. COVINGTON.
SUE A. COVINGTON.

Upon the complaint, answer and exhibit, the defendant moved the Court of Probate to dismiss the action. The Court refused the motion and adjudged *quod computet*, and proceeded to take and state an account of the estate.

Upon the coming in of the report the defendant filed many exception thereto, and among them, that the aforesaid plea raised an issue of fact, to be tried by a jury. Before the exceptions were passed upon, the Clerk went out of office and another was inducted into office, who held that the said plea did raise an issue of fact, whereupon he transferred the case to

the Superior Court in Term. In that Court the presiding Judge affirmed the judgment of the Clerk, and adjudged that the defendant had a right to a jury trial upon the issue raised by his plea of "settlement." From this judgment the plaintiffs appealed.

There is error. The plea offered by the defendant as a bar to any further account is wholly defective in this, that it does not allege and set forth any account stated between the parties, and that the account as settled is just and true.

In the old action of account, to which this is analogous, the first judgment is *quod computet*—that the defendant do account. If in order to defeat this preliminary judgment, the defendant pleads *quod plene computant, &c.*—that he has fully accounted, &c.—he must allege and show the manner of it, as for instance, that the account was stated in writing and settled and signed by the parties, in which case it would be a bar to a bill for another account. *Harrison* v. *Bradly*, 5 Ired. Eq., 136. In our case it is expressly averred by the plaintiffs and not denied by the defendant, that no account was stated in writing or otherwise and exhibited to them. As a plea in bar of an account, this defence wholly fails. Both parties agree as to the nature of this alleged settlement and the circumstances under which it was made; its legal effect as a bar to the account demanded is a question for the Court only. What effect it is to have with the creditor in stating the account it may not be necessary now to decide. It seems to be entitled to no consideration any where, except as an attempt to overreach two unprotected orphans, to whom the defendant stood in a near fiduciary relation. For it appears from the account stated that much more is due them than the sum stated in the alleged settlement, and that the other distributees of the estate had received from the defendant over twice that amount in the payment of their shares. As an agreement to take a less sum than the debt, it was void for the want of a proper consideration, and at most it can have the effect of a memorandum of a settlement begun only but not completed.

The ruling of Tuck, the first Judge of Probate, was not erroneous, and the case properly stands upon the exceptions of the defendant, filed to the account, as stated by him.

The Superior Court will remand the case to be proceeded with in accordance with this opinion.

PER CURIAM. Judgment reversed.

T. L. HARGROVE, Attorney General of North Carolina, in the name of the People of said State and upon the relation of N. N. TUCK, *v.* JOHN W. HUNT.

An action brought as follows: "T. L. Hargrove, Attorney General of North Carolina, in the name of the people of the said State, and upon the relation of N. N. Tuck *v.*," &c., is well brought, and no advantage can be taken of it on demurrer.

(*Green* v. *Green*, 69 N. C. Rep. 294, cited and approved.)

CIVIL ACTION, tried before *McKay, J.*, at Spring Term, 1875, PERSON Superior Court.

The facts in the case are not necessary to an understanding of the case as decided in this Court.

The defendant demurred to the complaint, for that the action was brought in the name of T. L. Hargrove, Attorney-General of the State of North Carolina, in the name of the people of the State and upon the relation of N. N. Tuck, &c., whereas the defendant insists it should be "The people of the State of North Carolina upon the relation of N. N. Tuck," &c.

The Court sustained the demurrer, and the plaintiff appealed.

Battle & Son, for appellant.
Edwards and *Batchelor*, contra.

SETTLE, J. The defendant demurs to the plaintiff's complaint, because the action is in the name of "T. L. Hargrove, Attorney General of North Carolina, in the name of the people of the State, and upon the relation of N. N. Tuck," whereas it should be "The people of the State of North Carolina upon the relation of N. N. Tuck," &c.

"An action may be brought by the Attorney General in the name of the people of this State upon his own information, or upon the complaint of any private party against the parties offending in the following cases: (1.) When any person shall usurp, intrude into, or unlawfully hold or exercise any public office." &c. Bat. Rev., chap. 17, sec. 366.

The form suggested by the demurrer has received the approbation of this Court in what are known as "the sheriff cases" in 65 N. C. Rep., and the Penitentiary and Asylum cases in 68 N. C. Rep., and it would have been better to have followed an approved precedent in bringing this action, or to have removed the defendant's objection by an amendment, after the supposed defect was called to the attention of the pleader. But the simple fact that the name of the Attorney General is set forth in the complaint, although unnecessary, cannot defeat the action.

It may be treated as surplusage, or it may be construed as an assent on his part to the bringing of this action, which, in fact, he had given in writing. The people of the State, upon the relation of Tuck, are parties plaintiff, and we answer the objection that the Attorney General is improperly joined, in the language of the Chief Justice in *Green* v. *Green*, 69 N. C. Rep., 294.

"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 unnecessary parties made *plaintiffs*, it is their own concern, to be made liable for costs; as to unnecessary parties made defendants, they are allowed to disclaim and have judgment for costs."

"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," &c.

The judgment of the Superior Court is reversed.

PER CURIAM. Judgment reversed.

STATE *v.* JOHN BRITE.

Where A and B are jointly indicted for larceny, the declarations of B are competent evidence against himself; and the fact that these declarations tend to convict A. does not affect their admissibility.

Although the offence of receiving stolen goods is declared to be a misdemeanor by sec. 55, chap. 32, Bat. Rev., the effect of secs. 25 and 29 of the same chapter is, to authorise the Court to punish the offence in the same manner as larceny is punished; that is, by confinement in the States' prison or county jail for not less than four months, nor more than ten years.

In an indictment for larceny a third person may be described by any particulars which furnish sufficient identification; and initials are a sufficient designation of the christian name.

(*State* v. *Henderson*, 68 N. C. Rep. 348, cited and approved.)

INDICTMENT for *Larceny*, tried before *Eure, J.*, at Spring Term, 1875, PASQUOTANK Superior Court.

The indictment charged the defendant with stealing two coats, the property of one S. S. Fowler, and also it contained a count charging him with receiving the coats knowing them to have been stolen.

The State introduced S. S. Fowler as a witness, who testified that the defendant went to his house twice on the day of the alleged larceny, in company with one Culpepper who was jointly indicted with defendant. The last time they went into

the store, Culpepper carried with him a small bag, and Brite made some purchases and told Culpepper to put them in the bag. Culpepper was at the time standing near the counter where the coats were. They then left the store together. Fowler suspecting the parties, pursued them within a few minutes, and found the bag and goods in the possession of Culpepper. Upon examination, he found one of the coats in the bag, but did not at the time make a thorough search. Culpepper looked at Brite and said, "We can raise five dollars, wont that settle it?" Brite at the same time declared his innocence. The coat was taken out of the bag, and Culpepper taken into custody. The bag and contents was then given to Brite by Fowler, and Brite started home. Shortly afterward Fowler went in pursuit of Brite, found him with the bag, and upon examination found another coat in the bag. Brite at the time declaring that he knew nothing of the coat, and that he had paid for all the goods he purchased of Fowler.

The State then offered Culpepper as a witness against Brite, and refused to place Brite on the stand as a witness against Culpepper.

The defendant Culpepper then offered to prove by Frank Eason and Job White, (colored,) that the defendant Brite while in jail admitted to them that he alone was the guilty party, and that Culpepper was innocent, having had nothing to do with taking the coats.

To this testimony the defendant Brite objected, the Court overruled the objection, and Brite excepted.

Brite introduced many witnesses, all of whom testified to his good character.

His Honor charged the jury that they could find one defendant guilty and acquit the other, or they could convict both of the larceny, or one of the larceny and the other of receiving stolen goods knowing them to have been stolen.

The defendant Brite excepted to the charge of his Honor.

The jury returned a verdict of guilty of larceny as to Culpepper, and guilty of receiving as to Brite.

Brite then moved for a new trial, the motion was overruled, and defendant sentenced to the State penitentiary for four years.

From this judgment defendant appealed.

Busbee & Busbee, for the prisoner.
Hargrove, Attorney General, for the State.

SETTLE, J. The defendant's first exception is that his Honor allowed Culpepper, a co-defendant, to introduce witnesses to prove his (Brite's) declarations while in jail, which tended to exonerate Culpepper.

While these declarations are not evidence, either for or against Culpepper, being, as to him, *res inter alias acta;* and made by one not under oath, and subject to cross examination, yet they are clearly admissible against Brite, and it makes no difference whether they were called forth by the State, or by Culpepper, without objection, or rather with the sanction of the State.

Such appears to have been the view taken by the Court and followed by the jury, for both Culpepper and Brite were convicted, one of larceny, and the other of receiving stolen goods, knowing them to have been stolen.

After the judgment of the Court sentencing the defendant Brite to the State's prison for four years, he made the further exception that "receiving stolen goods is by law a misdemeanor only, that misdemeanors are not infamous offences, that the Court can only sentence to the penitentiary for infamous offences, and that this was not a case of much aggravation, nor was he a hardened offender, the testimony showing him to be a man of good character." It is true that the receiving of stolen goods, knowing them to have been stolen, &c., is declared in Bat. Rev., chap. 32, sec. 55, to be a misdemeanor; but it is enacted by the same section that on conviction, "such receiver shall be punished as one convicted of larceny." And the effect of sections 25 and 29 of the same chapter is to an-

thorize the Court to punish the offence of larceny by confinement in the State's prison, or county jail, for not less than four months nor more than ten years, in the discretion of the Court, according to the aggravation of the case, or the character of the offender.

In this Court the defendant's counsel moves to arrest the judgment for that the indictment charges the goods stolen to be the property of S. S. Fowler, whereas the full christian name of Fowler should have been set forth.

How does it appear that the letters S. S., which are said by the counsel to be initials, is not the full name of baptism? There is not the slightest intimation in the record that there was any proof to the contrary, or that S. S. was not Fowler's full christian name.

But admitting S. S. to be merely initials, a third person may be described by any particulars which furnish sufficient identification; and "initials, it seems, are a sufficient designation of the christian name, and at all events cannot be excepted to after verdict." Whart. Cr. L., §255.

State v. *Henderson*, 68 N. C., 348, and authorities there cited.

Let it be certified that there is no error.

PER CURIAM. Judgment affirmed.

J. M. WOODHOUSE *v.* B. F. SIMMONS, Ex'r. of B. B. SIMMONS, deceased.

A mere entry of a part payment on a bond, without other evidence tending to show that such entry was made at a time when it was against the interest of the holder to make such entry, is not of itself sufficient to repel the statutory presumption of payment.

A part payment is necessarily made by the obligor, or at least with his privity; *Therefore*, where A held a bond executed by B and payable to C, and a set off in favor of B, was allowed and entered on the bond by A: *Held*, that this was not a part payment as to C, and did not repel the presumption of payment.

Under sec. 343, C C. P., an obligor of a bond is not a competent witness to prove any transaction between himself and the obligor, when such obligor is dead at the time of trial, although he may have previously asssgned the bond.

(The cases of *Walker* v. *Wright*, 2 Jones 155; *Buie* v. *Buie*, 2 Ired. 87; *Wood* v. *Dean*, 1 Ired. 280; *McKeathan* v. *Atkinson*, 1 Jones 421: *Lowe* v. *Powell*, 3 Jones 67; *Williams* v. *Alexander*, 6 Jones 137, cited and approved.)

APPEAL from a Justice's Court, tried before *Albertson, J.*, at Spring Term, 1874, CURRITUCK Superior Court.

The action was brought upon the following bond:

On demand, with interest from the 28th of May, 1850, and for value received, the undersigned promise to pay to Hodgers Gallop or order, two hundred dollars for value received.

Witness our hands and seals.

R. R. HEATH. [L. S.]
B. F. SIMMONS. [L. S.]

The defendant pleaded the statute of limitations, to which the plaintiff replied, partial payment within ten years. The plaintiff offered in evidence a receipt upon said bond, and introduced H. Gallop, the payee of the bond, who swore that

the receipt endorsed upon said bond was for money due to R. R. Heath for professional services, and so credited.

The plaintiff then offered to prove that the bond had not been paid. Both the obligors of the bond being dead, his Honor ruled out this evidence. To this ruling plaintiff excepted.

His Honor being of the opinion that the receipt on the bond and the evidence of Gallop, the payee of the bond, were not sufficient evidence of a payment within ten years, gave judgment for the defendant. Thereupon the plaintiff moved for a new trial. The Court refused the motion and the plaintiff appealed.

Busbee & Busbee, for appellant.
Smith & Strong, contra.

1. It is the payment of part of a bond, not the endorsement of such payment, that repels the presumption from lapse of ten years of payment of the bond. 2 Greenl. Ev., sec. 444.

2. The endorsement is only evidence to prove the fact of such payment when in the handwriting of payee and in the absence of evidence of knowledge or assent of obligors thereto, when it is shown that such payment was evidenced before the presumption of payment arose. *Williams* v. *Alexander*, 6 Jones, 137.

3. Admissions made after such lapse of time by one of several makers, not admissible against the others. Rev. Code, chap. 65, sec. 22.

4. The payee was not a competent witness to prove the fact of payment in favor of the plaintiff who claims under him. *People* v. *Maxwell*, 64 N. C. Rep., 313; *Isenhour* v. *Isenhour*, 64 N. C. Rep., 640; *Hallyburton* v. *Dobson*, 65 N. C. Rep., 88; *State* v. *Morris*, 69 N. C. Rep., 444.

RODMAN, J. Title IV of the Code of Civil Procedure, entitled "Limitations," is not applicable in the present case; that

statute being confined to causes of actions which arose after August, 1868, C. C. P., sec. 16. The question respecting the payment of the bond sued on is governed by the law existing when it became due. The Act of Assembly bearing on it is, Rev. Code, chap. 65, sec. 18: "The presumption of payment or satisfaction on all judgments, decrees, contracts and agreements, had or made, shall arise within ten years after the right of satisfaction on the same shall have accrued, *under the same rules which now prevail.*

It was not the object of this act to create a presumption which did not exist before, but merely to shorten and accurately define the time within which it should arise. Under this act it was settled that the lapse of time had an artificial and technical force beyond what a jury might give to it as merely a portion of evidence on the question of actual payment, and that unless repelled in some way allowed by law, the presumption was conclusive. *Walker* v. *Wright*, 2 Jones, 155.

It was held, however, that the presumption might be repelled by proof of circumstances that clearly showed that payment had not in fact been made. What circumstances would suffice for this purpose was matter of law. *Buie* v. *Buie*, 2 Ired., 87; *Walker* v. *Wright*, 2 Jones, 155.

The fact that there was no person authorized to receive payment was of course sufficient. *Buie* v. *Buie*, 2 Ired., 87. The continued insolvency of the debtor was a circumstance from which a jury might infer against the presumption that the bond had not in fact been paid. *Wood* v. *Dean*, 4 Ired. 280; *McKinder* v. *Littlejohn*, 4 Ired., 198. It may be doubted whether the ruling was consistent with the true theory of a statutory presumption, having an artificial and technical weight. But it is not necessary to consider it in this case.

It was also held that a part payment of the bond, by the debtor, repelled the presumption. *McKeathan* v. *Atkinson*, 1 Jones 421; *Lowe* v. *Powell*, 3 Jones 67. And that a credit of a part payment entered by the obligee, before the expiration of the ten years and within ten years of the bringing of the

suit, was evidence of the payment, and rebutted the presumption. *Williams* v. *Alexander*, 6 Jones, 137.

The question then arises: Does the entry on the note in suit in this case bring the case within the rule established in *Williams* v. *Alexander?*

In the first place, it must be noted that there is no evidence, other than the date given in the entry itself, that it was made within ten years after the bond became due. The reason why the entry by the obligee of the payment is received as evidence, is because it was against his interest when made, and by reason of his death or incompetency as a witness, the fact cannot be proved in any other way. Evidently this reason requires and presumes that there is evidence *aliunde*, that the entry was made at a time when it was against the interest of the holder to make it; that is to say before the presumption had arisen. In *Williams* v. *Alexander* there was such proof. Otherwise the presumption might be evaded by a false entry at any time. For this reason we are of opinion that the entry (supposing it to have been an entry of a part payment) was not evidence that it was made at the date stated in it, or before the presumption had arisen, and was therefore insufficient by itself to rebut the presumption.

Secondly. The entry under consideration is not an acknowledgment of a part payment. It was an acknowledgment by the obliger or holder that Heath had a set-off to the amount of $10, which the holder was willing should be applied as a part payment. A part payment is necessarily made by the obligor or with his privity. It may be fairly construed as an acknowledgment of the bond as a valid subsisting debt, and as equivalent to a promise to pay the residue. But this cannot be said of an appropriation by the obligee alone, and without the privity of the obligor, of a set-off in favor of the obligor, as a part payment on a bond. This is exclusively the act of the obligee, of which the obligor has no knowledge, and it cannot be held as an acknowledgment by him of the validity of the debt, or as his promise to pay it.

Third. Was Gallop a competent witness to prove the non payment of the bond?

Assuming for the present that there was nothing in the merely negative character of the testimony offered to make it incompetent, it must be conceded that he would have been a competent witness at common law, for at the time of the trial, he had no interest in the result of the suit. It is said that he was not rendered incompetent by section 343, of C. C. P., because the object of this act was to lessen and not to increase the grounds of disqualification. As a general proposition this is certainly true. But it is equally clear that unless we disregard the language of the proviso, in sec. 343, the present case is an exception to it. No person who has ever had an interest which may be affected by the event of the action, "nor any assignor of anything in the action, shall be examined in regard to any transaction, &c., at the time of the trial." Although we may not perceive any sufficient reason for disqualifying a witness who has once had an interest, but has parted with it *bona fide*, and not for the purpose of enabling him to testify; yet the language of the act is too plain and positive to leave us at iberty to disregard it.

It is said, however, that Gallop was not offered to prove any transaction or communication with the deceased obligors, but to prove that there was *no* transaction. This argument is obnoxious to the maxim, "*qui haeret in litera, haeret in cortice.*" The intent of the act evidently extends to the denial of a transaction which presumptively occurred, the effect of the disproof of which would be to charge the estate of the deceased. Perhaps if alive, they might contradict the denial. There is here no opportunity for oath against oath. We think the witness was incompetent to rebut the presumption of the payment of the bond.

PER CURIAM. Judgment affirmed.

ROBERT L. D. HENRY *v.* WILLIAM H. WILLARD, surviving partner of R. F. MORRIS & SON.

The declarations of a supposed partner are not admissible against the other, if made in his absence, unless the partnership is first established *aliunde*.

The fact of partnership can only be established by evidence foreign to, and disconnected from the declarations of the alleged partner.

(The cases of *Grady* v. *Ferebee*, 68 N. C. Rep. 356; *McFayden* v. *Harrington*, 67 N. C. Rep. 29; *McCoombs* v. *N. C. Railroad Co.*, 70 N. C. Rep. 178; *Stenhouse & McCauley* v. *The C. C. & A. Railroad Co.*; Ibid, 542, cited and approved.)

CIVIL ACTION, tried before *Kerr*, *J.*, at Fall Term, 1874, ORANGE Superior Court.

The summons was originally issued against the defendant as surviving partner of R. F. Morris & Son. At Fall Term, 1874, the plaintiff obtained leave to amend his complaint (which was granted on payment of cost), by adding a complaint against the defendant as *executor de son tort* of Robert F. Morris, deceased. The defendant filed an answer to the additional complaint, and the case was transferred for trial to Orange county.

The complaint alleges that for several years immediately preceding the 13th of September, 1872, the firm of R. F. Morris & Son existed and transacted business in the town of Durham, buying and selling tobacco, and manufacturing tobacco and selling the same. That defendant was a partner in the said firm. At divers times preceding the aforesaid date, the plaintiff sold and delivered to the said firm at the instance and request of R. F. Morris, several thousand pounds of tobacco, on which partial payments were made, leaving a balance due, of principal money, at the date aforesaid of $1,093.85, which the said firm promised to pay. R. F. Morris died in the year 1873 leaving the defendant surviving partner of the firm. Payment of the said money had been demanded before the commencement of this action, and refused; and that no part of the balance and interest have been paid.

For a second cause of action the complaint alleged that after the death of R. F. Morris, the defendant took possession through his agent, R. H. J. Blount, of all the property he could find belonging to R. F. Morris. That Blount sold the same, turning over the proceeds to defendant, except about the sum of $300, which was allowed the widow of Morris as her year's support and defendant has rendered himself liable for the debt due from R. F. Morris & Son or R. F. Morris, to the plaintiff.

The defendant in his answer denied that he was a partner or a member of said firm, or that he was interested in said firm, or that he had any connection therewith. Defendant farther denied that he was surviving partner of the firm and that said firm continued to exist after the 15th day of April, 1872. The defendant denied on information and belief that said firm was ever indebted to plaintiff in the sum of $1,093.85. Defendant denied that R. F. Morris died at the time alleged in the complaint, but alleged that said Morris died about the middle of the year 1872.

As a farther answer to the complaint the answer alleged that prior to the 1st day of September, 1869, defendant and one Edward A. Morris and the said R. F. Morris together formed a limited partnership in which defendant was the special partner and R. F. Morris and his son E. W. Morris were the general partners, under the firm name of R. F. Morris & Son, and that the articles of said partnership or certificate thereof was duly recorded in the records of Orange county, in conformity with the provisions of an act of the General Assembly, entitled "An act to provide for limited partnerships." By the terms and limitations of said articles, said partnership was to expire and did expire on the 1st day of September, 1869. On said day the partnership ceased to exist and was never renewed, and after that date defendant was never, at any time, a partner of R. F. Morris After that date a new partnership transacted business under the same firm name, but defendant was in no wise connected with said firm and had no interest therein, and

defendant was informed and believed that E. W. Morris was not connected therewith.

Defendant denied that the limited partnership of R. F. Morris & Son, which expired on the 1st day of September, 1869, had any dealing with the plaintiff now remaining unsettled, and denies that said firm owes the amount demanded or any part thereof. Defendant alleged that he never at any time resided at Durham, and that he never at any time transacted any business for the firm of R. F. Morris & Son, whereof he was a special partner, and never at any time did he deal with the plaintiff, for or on account of said firm, or for or on account of any other firm, or for himself individually, and defendant farther alleged, that at no time did he ever hold himself out as a general partner of the firm whereof he was a special partner or of the subsequent firm of R. F. Morris & Son, and at no time did he ever have any dealings for or on account of the subsequent firm.

And for a farther defence the defendant alleged that Edward W. Morris and the administrator of R. F. Morris are necessary parties to this action.

That a special partner is not personally liable for the contracts of a limited partnership.

That the said supposed claim of plaintiff did not accrue within three years before the commencement of this action.

Before the jury was empanneled the defendant objected to the joinder of the two causes of action set forth in the complaint. The Court overruled the objection and defendant excepted.

On demand of the defendant the plaintiff furnished a bill of particulars of his claim.

The plaintiff contended that in addition to the limited partnership from September 1st, 1866, to September 1st, 1869, the terms of which are set out in the answer of the defendant, the same firm of R. F. Morris & Son was continued as a general partnership, or that a new one was formed between the defendant and R. F. Morris at or before the close of the first, as

a general partnership under the same name of R. F. Morris & Son, and the several lots of tobacco, for the balance of which he claimed payment, was sold and delivered to the same firm or firms, in which he alleged the defendant to be a partner, upon contracts of purchase made with the said R. F. Morris.

The plaintiff was introduced as a witness in his own behalf, and also other persons who gave evidence tending to show that the plaintiff resided in the county of Person, some twenty-five miles from Durham, where the alleged partnership business was carried on.

The plaintiff testified that he commenced dealing with them in 1868, in which year he sold them, through said Morris, tobacco to the amount of $371, of which sum he received at that time $200, leaving a balance due him of $171. In July or August, 1869, according to his impression, certainly before the 10th of September, he sold them another lot of tobacco, amounting to between $400 and $500, of which he received twenty-two dollars.

The plaintiff was proceeding to state a sale to the firm in 1870, when the defendant objected. The plaintiff's counsel stated that he should offer evidence to show that defendant was a partner at that time. His Honor then allowed the witness to proceed, with the understanding that the evidence was to be ruled out if such evidence was not adduced.

The witness then stated that in the summer of 1870 he sold said firm, through Morris, another lot of tobacco, amounting to about $700. To this evidence the defendant excepted. Notes had been given plaintiff at each of his two first transactions for the balance due, by R. F. Morris, signed R. F. Morris & Son. In the fall of that year Morris sent to plaintiff $400, which was applied as payment on said note. On the 24th of February, 1871, the plaintiff and said Morris met, and calculating the interest due on said note, and deducting payments made, including the $400 aforesaid, Morris executed and delivered to plaintiff the note for $487.05 now named in the bill of particulars and now produced, and a draft on the Ral-

eigh National Bank for $200, payable in thirty days to secure the balance then due. Both the note and draft were signed "R. F. Morris & Son." On the 27th of March ensuing, the plaintiff having gone to Durham, on his way to Raleigh to realize the draft, which had fallen due, Morris told him he need not go, that the firm had funds in New York on which he would draw, and accordingly gave him the bill of exchange of that date for $200, signed R. F. Morris & Son, mentioned in the bill of particulars. Plaintiff handed said bill to one T. C. Ellis, a merchant at Cedar Grove, and told him to collect it and account to him. This bill was produced on the trial, with protest for non-payment by a Notary Public in New York, and with it a letter to said Ellis, dated "Durham, April 17th, 1871," to the effect that the writer had received the bill of exchange aforesaid and would go to Raleigh for money and pay it off. This letter was signed "R. F. Morris & Son, per Blount," and was in the hand-writing of R. H. J. Blount. The plaintiff farther testified that in May, 1872, he sold to R. F. Morris, for said firm, his whole crop of tobacco for 1871, and that by agreement made at the time of the sale, which was made at plaintiff's residence, parts of the tobacco were to be delivered at the factory, and other parts at the public warehouse for the sale of tobacco at Durham, to be delivered at said warehouse in the name of plaintiff and so sold, and plaintiff was to get the proceeds, and if it brought an excess above the price agreed on, such excess should be credited on the debt due to the plaintiff. In carrying a load of it to the factory in May, 1872, Blount, who was in charge thereof, refused to receive it, saying he knew nothing about it, but Morris arriving soon afterwards, after some conversation between him and Blount, it was received. Going thence to the house of Morris to dine, Morris inquired if he wanted the money for this load, and upon plaintiff's replying that he did, Morris directed his son, John B. Morris, to go to the factory, or to Mr. Blount, and bring it. The young man went out and brought and paid to the plaintiff $100, which was the value of that load. Ware-

house bills were produced of the tobacco mentioned in the bill of particulars, which the plaintiff deposed were delivered in pursuance of the contract of May, 1872, at prices agreed on with Morris. That the tobacco sold for less than Morris agreed to pay. He received from the warehousemen the amount for which it sold, and the balances of $155.52 and $178.84, named in the bill of particulars were still due.

On offering to prove these items in 1872, the defendant objected, the plaintiff replying that he expected to show that the defendant was connected with it. The evidence was admitted subject to be ruled out unless such evidence was shown, and the defendant excepted.

The plaintiff farther testified, that in the summer of 1870 he was in the hotel kept by R. F. Morris, in Durham, and had retired for the night; after the arrival of the train from Raleigh, Morris desired him to yield his bed in a separate room to a passenger who had just arrived, and go into another room. While dressing for that purpose, Morris brought in the defendant and introduced him to the plaintiff and remarked "We have been buying this man's tobacco, and he does not need money and has given us time," to which defendant replied "Well! time is worth something. On the next morning in a conversation between Morris and the defendant, he heard the defendant say in reply to some remark of Morris in respect to an engine, "I have an engine at New Berne, bring that up." Afterwards in 1871 or 1872, he saw a steam engine attached to the factory.

On cross examination the plaintiff was asked why he could remember so well the language used by Morris and Willard and could not recollect dates? He replied, "I had been selling them tobacco and was watching their manœuvres."

Plaintiff farther testified on cross examination, that he subsequently demanded payment of Mr. Blount for his tobacco, at the factory, and Blount refused, saying that his name was not on his books, and that he owed him nothing.

He saw the advertisement in the Hillsborough Recorder, of

the limited partnership alleged in the defendant's answer, about the time of its formation. The advertisement being read in court, stated the time of commencement and duration of partnership to be as stated by defendant.

W. T. Blackwell was introduced on behalf of the plaintiff and testified as follows:

That the same sign board over the door of this factory with the inscription "R. F. Morris & Son," continued there from 1867 until the fall of 1872. Defendant was frequently at Durham during this time, sometimes had gone on to a cotton factory which he owned in Orange, but often came to Durham and went no farther. Spent his time with R. F. Morris, but had no business there of which witness was aware, except with Morris. Had often seen him at the factory. Morris was reported insolvent during all this time.

Henry Malone testified that the same year that Morris bought the plaintiff's crop he also bought the crop of witness, to be delivered at the public warehouse in Durham, for the firm of R. F. Morris & Son. The tobacco was delivered according to the agreement, and a part thereof remains unpaid for. Witness was about to state what Morris said at the time, when defendant objected. The plaintiff then read in evidence a deed dated April 10th, 1871, between Morris, Blount and Willard, which he alleged was evidence that Willard was a partner with Morris. His Honor admitted the evidence, and the witness stated that Morris said at the time of purchase that he had been considered broke but he had now a strong partner, in Mr. Willard, the President of the bank in Raleigh. To this evidence defendant excepted.

Many other witnesses were examined, and several exceptions taken to the ruling of his Honor, but as they were not considered in this court it is not necessary to state them.

The jury returned a verdict for the plaintiff, and thereupon the court gave judgment in his favor, from which judgment the defendant appealed.

Merrimon, Fuller & Ashe for appellant.
Graham and *Graham*, contra.

BYNUM, J. This was an action against the defendant, as the surviving partner of R. F. Morris. The defendant denied that he was a partner when the causes of action arose, and the following issue, among others, was submitted to the jury to wit: "Was the defendant a partner with the said Morris at the time or times of said sales?" Upon this issue the plaintiff offered much testimony tending to establish the partnership as alleged, and then introduced one Henry Malone, who testified that in 1872, the said Morris, while out on a "tour" purchasing tobacco, bought his crop, and at the time of the purchase remarked, "that he had been considered broke, but he had a strong partner now in Mr. Willard, the President of the bank in Raleigh." This testimony was objected to by the defendant, but admitted by the Court, and in that there was error. No principle of evidence is better established than that the declarations of a supposed partner are not admissible against the other, if made in his absence, unless the partnership is first established *aliunde*. It is true, in this case, that other evidence had been previously given, tending to establish the partnership, and perhaps sufficient to authorize the Court to admit the declarations of Morris touching his acts and conduct under the partnership. But this is something altogether different from admitting declarations, the natural and only apparent effect of which was to establish the fact itself of the partnership. This fact can be established only by evidence foreign to and disconnected from the declarations of the alleged partner. Declarations which presuppose the existence of a partnership are not competent to establish the partnership, and use to them for that purpose, is to substitute the effect for the cause. It is true that the same declarations which are incompetent generally, may be made competent specially, and for a particular purpose. But when declarations which are, by a general rule, inadmissible, are objected to, they will always be excluded unless the

party offering them brings them out of the general rule by specifying the exceptional and special purpose for which they are admissible. If, for instance, the defendant had got in declarations of Morris that he was not a partner, it would have been competent in the plaintiff to offer his declarations that he was a partner, not, however, for the purpose of establishing the partnership, for which they would be inadmissible, but for the purpose of contradicting the other evidence. No such special purpose was avowed or necessary here, and it is evident that the declarations were introduced and used as a circumstance, among others, to establish the partnership. That was the single issue before the jury upon which it can be pretended that the declarations were offered in evidence. The general rule must therefore prevail, that the acts and declarations of a third person are not evidence against a party, unless such third person be his agent or partner, and the agency or partnership must be established before such acts and declarations are admissible. *Grandy* v. *Ferebee*, 68 N. C. Rep., 356; *McFayden* v. *Harrington*, 67 N. C. Rep., 29; *McCombs* v. *N. C. R. R. Co.*, 70 N. C. Rep., 178; *Stenhouse & McCauley* v. *C. C. & A. R. R.*, 70 N. C. Rep., 542.

As we consider the declarations of Morris excluded by long and well established rules of evidence, we have not adverted to the objection that they are excluded by C. C. P., sec. 343, as being the declarations of a person since deceased. Nor is it necessary to examine any of the many other exceptions raised by the defendant, which, however, seem to prevent but little difficulty. For the error we have designated there must be a *venire de novo*.

PER CURIAM. *Venire de novo.*

STATE *v.* BIRD BISHOP.

Upon an indictment for larceny, where the evidence is circumstantial, the acts, declarations and opportunities of the prisoner are competent evidence. But the acts and opportunities of a third party are not competent in such case, unless made so by other direct evidence connecting such third party with the transaction.

The jury, upon a trial for larceny, in the absence of counsel, returned a verdict of "guilty of the larceny of a fifty dollar note," and the Court informed the jury, that the prisoner was not indicted for stealing the bill, but the trunk, and the jury retired and brought in a verdict of "guilty of the larceny of the trunk as charged in the bill of indictment:" *Held*, that as the verdict as first rendered was not received nor recorded, and the jury had not been discharged, it was competent for them to correct the inadvertence so as to make the verdict responsive to the indictment.

(*State* v. *May*, 4 Dev. 328; *State* v. *Duncan*, 6 Ired. 236; *State* v. *White*, 68 N C. Rep. 158, cited and approved.)

INDICTMENT, *Larceny*, tried at the Spring Term, 1875, of BERTIE Superior Court, before his Honor, *Judge* MOORE.

The facts pertinent to the points decided in this Court, together with the evidence relating thereto and the exceptions taken, are fully set forth in the opinion of *Justice* BYNUM.

His Honor, on the trial in the Court below, overruled the exceptions of the defendant in relation to rejection of certain evidence offered by him, and also the defendant's objection to the verdict as recorded. From the rulings of his Honor, the defendant appealed.

W. W. Peebles, for the defendant.

Attorney General Hargrove and *Gilliam & Pruden*, for the State.

BYNUM, J. The defendant was indicted for the larceny of a leather trunk, the property of one W. J. Bishop. It was in proof that the trunk, when stolen in the month of October,

1874, contained one new fifty dollar bill of the Exchange National Bank, of Norfolk, Va.; that the prisoner had previously been in the service of the prosecutor, as a laborer on his farm, and had occasionally waited upon the office from which the trunk was stolen, and was familiar with the locality and with the habits of the prosecutor; that he was at the time in the service of one Capehart, a mile and a half distant, and very frequently visited the prosecutor's premises, on which his father and brother lived. In the month of December following the larceny, the prisoner passed to one Charles, for small bills, a new fifty dollar bill, of the same Exchange Bank of Norfolk, at the same time cautioning Charles not to use his name when passing off this bill, and that the prisoner left the county the next day for Raleigh. The evidence of the prisoner's acts and declarations as to the fifty dollar bill, was objected to by him, and constitutes his first exception.

It was also proved by the State, that the prisoner had no means but his labor, and that he had received for his labor, in 1874, but about thirty dollars. This testimony was objected to by the prisoner, and its admission makes his second exception. The prisoner offered to prove that one Bryant, who, together with other laborers, worked on the prosecutor's farm at the time of the larceny, was familiar with the locality, and had waited upon the prosecutor's office in the year 1873, and also that said Bryant, who then lived on the farm was seen two hours after the larceny, the same night, to enter the grove of the prosecutor, in which was his house, by the least frequented of two paths leading there. This evidence was objected to by the State and ruled out, and its rejection constitutes the third exception of the defendant.

The first two exceptions are clearly untenable. In a case turning wholly upon circumstantial evidence, the acts, declarations and opportunities of the prisoner were competent, because they were the acts and declarations of the prisoner himself, who was on trial, and to exclude them would be to destroy

the very foundation upon which criminals may be convicted upon circumstantial testimony.

The third exception seems to be equally untenable, as has been decided in the leading case of *State* v. *May*, 4 Dev. 328, followed by the *State* v. *Duncan*, 6 Ired. 236, and *State* v. *White*, 68 N. C. 158.

Bryant's guilt or innocence was not necessarily connected with the guilt or innocence of the prisoner. The crime charged upon the prisoner might be so readily committed by many as by one—both might be guilty with entire consistency. Proof of the guilt of Bryant would, therefore, not tend, in the least, to establish the innocence of the prisoner. The confessions of Bryant establishing his own guilt, or even a judgment against him upon the plea of guilty, would not be competent evidence for the prisoner. The same principle extends to the acts as to the declarations of Bryant,—they are all the acts and declarations of a third person not on trial, and are excluded as *res inter alios acta*, unless made competent by other direct evidence connecting Bryant with the *corpus delicti*. Testimony to any part of the *res gestæ*, constituting Bryant's alledged guilt, would have been competent and relevant, but the prisoner offered no evidence of the kind. If Bryant had been on trial, these acts of his would have been competent against him, because they were his acts, but he was a stranger to the matter in dispute here, and his acts cannot be admitted in evidence for or against a third party.

An exception was also made to the regularity of the verdict. The jury came into Court, in the absence of the counsel, and announced as their verdict that they found the prisoner guilty of the larceny of the fifty dollar bill; when the Court informed them that the prisoner was not indicted for stealing the bill, but the trunk; whereupon they retired to their room, and after consideration, came into Court and in the presence of the counsel of the prisoner, rendered a verdict of guilty of the larceny of the trunk, as charged in the indictment. The objection is without force. The verdict offered was not received or re

corded, nor the jury discharged. The whole matter was still in the breast of the jury, and it was entirely competent to correct an inadvertence so as to make the verdict responsive to the indictment. They certainly did not intend to acquit, but to convict the prisoner, and he has no just cause of complaint.

There is no error.

PER CURIAM. Judgment affirmed.

G. L. WINBURNE *v.* BATTLE BRYAN.

An execution debtor is entitled to damages to the amount of all loss sustained by reason of the failure of a sheriff to perform the duties which the law requires him to perform. Therefore where a sheriff, having an execution in his hands against A, sold a lot or parcel of land belonging to A, under execution, and failed to serve upon him the written notice required by law to be served upon the owner, before the sale of land under execution: *Held*, that it was error to charge the jury that the plaintiff was only entitled to nominal damages, unless he proved that the property sold for less than it would have sold for if the notice had been given: *Held further*, that it was error to grant a new trial on the ground that the damages are excessive, when the evidence showed the actual amount of damage, and a verdict was rendered accordingly.

CIVIL ACTION for damages, tried before *Moore, J.*, at July Term, 1874, EDGECOMBE Superior Court.

The plaintiff alleged that on the 15th day of February, 1873, Stern & Goodman obtained a judgment against him, before a Justice of the Peace, for $18.25 and cost. On the 15th of February, 1873, a *fi. fa.* was issued on said judgment, and delivered to the defendant, who was then the duly elected and qualified sheriff of Edgecombe county. On the 20th day of April, 1873, defendant offered for sale under said execution a

portion of the real estate of plaintiff, to-wit: a lot in the town of Tarboro. Defendant negligently failed to serve on the plaintiff a copy of his advertisement relating to the sale of said real estate, ten days before the sale thereof. Defendant failed to advertise said real estate, thirty days before the sale thereof, as required by law. Said real estate, owing to the negligence of defendant, sold for a sum greatly below its value.

The defendant denied failing to serve a copy of the advertisement of sale, and also the failure to advertise said real estate thirty days before the day of sale. Defendant also alleged that said real estate was fairly sold to the highest bidder, and whether or not it brought its value, defendant was not it fault.

The following issues were submitted to the jury:

1. Did the defendant Bryan give the plaintiff Winburne the notice required by law?

2. If he did not, what was the amount of damages?

The plaintiff was introduced as a witness in his own behalf, and testified as follows:

The defendant, as sheriff, had an execution against me for about $20. On Sunday before Court, he sent me a paper by the jailor. I laid it down without reading it, thinking it was about some work done in the jail, about which there had been a controversy. The next day Mr. Odenheimer came to my house and told me the sheriff had sold my lot. I then examined the paper, and found that it was a notice that he should sell my property that day. Upon cross examination the plaintiff testified: Several weeks before Court, Bryan came to my house. I was sick in bed, and had been nearly dead. I was then getting better. He asked me for the debt. I told him when I got up I would attend to the matter. He did not say he should advertise and sell my property. He never did tell me so. I did not know it until Mr. Odenheimer told me my lot was sold.

William M. Pippin, a witness for the plaintiff, testified as follows: I happened to be near the Court house on Monday, and heard the sheriff crying the Winburne lot, about a dozen

persons standing around. I went up and asked if Winburne knew it. The sheriff said he did. I bid off the lot at $177. Others also bid. The lot is worth at least $325. I was offered $400 for it, on time, one-fourth cash. On cross examination, witness testified as follows: I let Winburne have it back, by paying me $100 profit. I considered it a concession.

Defendant testified as follows: About five weeks before sale, I went to Winburne's house and told him I should advertise and sell his property. I was going to New York in a few days. I met Winburne on the street about two weeks before Court, and told him I had advertised and should sell his property at Court. Eight or nine days before Court, I gave the jailor notice to serve on Winburne. On cross examination, defendant testified: Winburne had been very sick, but was able to get out two or three weeks before Court.

Jailor testified: I gave the notice to plaintiff on Sunday evening before Court. I did not tell him what it was, only that Bryan sent it.

The plaintiff was recalled, and testified as follows: The conversation on the street, was about the work in the jail. Bryan did not tell me he had advertised and would sell my property. Had been able to walk out two or three weeks before Court, but had a relapse just before Court.

His Honor charged the jury that plaintiff was only entitled to nominal damages, unless the property sold for less than it would have sold for if the notice had been given; that the damage must be the direct result of the want of notice, and that the plaintiff must prove that.

The jury found the issues in favor of the plaintiff, assessing the damages at $100.

There was a motion for a new trial, on the ground that the verdict of the jury was contrary to the weight of the evidence on the question of damages, and that the damages were excessive.

Plaintiff's counsel resisted the motion on the following grounds:

1. All the evidence supports the verdict. There is no evidence upon which the jury could have given less.

2. It is not necessary to prove that the damages resulted directly from failure to give notice.

3. If it is necessary, then the proof of failure to give notice, and the damages, justified the jury in the inference that the damages did directly result from the failure of notice.

The Court allowed the motion, and the plaintiff appealed.

Perry and *Howard*, for appellant, insisted:

1. An appeal is allowed from an order of a judge granting a new trial, which involves a matter of law or legal inference. C. C. P. secs. 299, 236, par. 4.

2. There was error in granting a new trial.

(a) His Honor was mistaken in the rule of damages. The statute, Bat. Rev. chap. 44, sec. 14, requires a written notice to the plaintiff, to apprise him of the particular property to be sold.

(b) There was no evidence to rebut the presumption that the damage sustained by plaintiff was caused by the defendant's negligence. *Jenkins* v. *Troutman*, 7 Jones 169; Sedgewick on Dam. 509, 518.

No counsel *contra* in this Court.

PEARSON, C. J. The defendant was in default, by failing to give the written notice which the law made it his duty to give, and the plaintiff was entitled to be indemnified for all loss he had suffered by reason of this default.

We cannot concur with his Honor in the opinion that the plaintiff was only entitled to nominal damages unless he proved that the property sold for less than it would have sold for, if the notice had been given. *Non constat*, that the property would have been sold if the defendant had performed the duty required of him by law. On the contrary it is almost

an irresistible inference from the evidence, that the plaintiff would have satisfied the execution and prevented a sale, if he had received the required notice, and this is the very purpose of the statute. The execution was for only about $20, the land was worth $300 in cash—plaintiff a short time after sale gave the purchaser $100 for his bid—that is, paid up the execution cost and $100 over and above; and so he had the ability and would of course have satisfied the execution and stopped the sale if he had received notice.

The plaintiff is out of pocket $100 over and above the amount of the execution, by reason of the default of the defendant, and why he should not be indemnified to that extent, we are unable to conceive; indeed we incline to the opinion that the jury might have been justified in going farther and making some allowance for the inconvenience of being compelled to raise $100 extra, when, had the defendant done his duty, $20 would have answered; to say nothing of the fact of his being obliged to beg the purchaser to let him have back his lot, at that loss, or of the aggravating circumstance that the plaintiff was sick, taken with a relapse, and on the point of death, which incidents tend to move creditors and officers to give indulgence to debtors, and would seem to aggravate the default of the officer in forcing a sale without due notice.

We think the amount of damages found by the jury not excessive, and his Honor erred in granting a new trial on that ground.

PER CURIAM. Judgment according to verdict in Court below.

ALEXANDER S. ROWLAND *v.* THOMAS J. JONES.

In cases of bailment, what is due care is a question to be decided by the Court. Whether the bailee has exercised such care is a question to be decided by the jury. Therefore where A brought an action against B to recover the value of a horse, hired to B: *Held*, That it was not error for his Honor to charge the jury "that it was for the jury to say from the evidence whether the defendant had exercised that care which a prudent man would have used with his own property."

CIVIL ACTION to recover the value of a horse, tried before *Clark*, *J.*, at Fall Term, 1874, ROBESON Superior Court.

All the facts necessary to an understanding of the case are stated in the opinion of the Court.

There was a verdict and judgment in favor of the plaintiff, and the defendant appealed.

W. McL. McKay, for the appellant.
N. A. McLean and *Leitch*, contra.

READE, J. The defendant hired of the plaintiff a horse and buggy and driver to go from L. to F., a distance of 33 miles, which he traveled in seven hours and a half, on a very hot day in September, and the horse was overcome with heat and died.

The defendant asked his Honor to charge, that there was no such negligence as to make him liable. His Honor declined; but charged that it was for the jury to say from the evidence "whether the defendant had exercised that care which a prudent man would have used with his own property."

We think this charge was right. What is due care is a question for the Court; and his Honor correctly defined it to be "the care which a prudent man would take of his own." Whether the defendant took such care depended upon the facts which the jury should find. And the jury found that he did not. The facts are not stated in detail; and at the first blush it does not seem that 33 miles in seven hours is hard

driving. But then the condition of the road, the supply of water, &c., make a great difference. Deep sand, no water, a heavy load and a hot sun may have exhausted the horse. The testimony was that he was "overcome with heat and died next morning." And the jury find the fact that the defendant did not take the care which a prudent man would of his own.

There is no error.

PER CURIAM. The judgment must be affirmed.

C. W. SKINNER *v.* WILLIAM HETTRICK and JOHN HETTRICK.

Albemarle Sound being a navigable water, is not subject to entry; but every citizen of the State has the liberty and privilege of fishing therein.

While the owner of a beach has the right of drawing his seine to that beach, in exclusion of others, yet he cannot acquire the sole right of fishing in a certain portion of the waters of the Sound, independently of all others.

To constitute a several fishery, there must be a right of soil; which no person has in Albemarle Sound. At common law, there could not be a several fishery in a navigable stream.

The *regulation* of the right of fishing in navigable streams is a proper subject of legislation, and has been treated as such in this State, by acts establishing "lay days" and the like.

(The cases of *Collins* v. *Benbury*, 3 Ired. 277; *Same* v. *Same*, 5 Ired. 118; *Ward* v. *Willis*, 6 Jones, 183, cited and approved.)

CIVIL ACTION and application for an Injunction, heard before *Eure, J.*, at the Fall Term, 1874, of CHOWAN Superior Court.

The following are the material facts, as transmitted by his Honor to this Court, as a statement of the case:

The plaintiff is the owner of a ten year lease of a fishery on Albemarle Sound, known as Long Beach Fishery, and began to repair his beach, windlasses, &c., sometime in the summer

of 1874. He fishes a seine about 2200 yards long, and lays it out about a mile from the shore, in the direction ———, up and down the sound.

In repairing the windlasses, the plaintiff placed them on his own land in the same position formerly occupied by them; and in the management of his fishing operations, the same custom prevails now that has existed since the establishment of the fishery many years since.

When the wind and tides prevail from the East, the seine is shot down the sound and across a straight line from the line of plaintiff's land, so as to counteract the wind and tides and to allow for the drifting of the seine up the sound; and when the wind and tides set from the West, *e converso*.

The defendants, in 1873, purchased the Snow Hill place, which adjoins the Long Beach Fishery on the West; and in February began to drive a line of stakes in the sound opposite their land, and running perpendicular to and more than a mile from their beach. The stakes were about thirty feet long and from six to eight inches in diameter—driven solidly in the sound with a pile driver. To them were attached what are known as "pond nets" or "Dutch nets." These stakes were within half a mile, (about six hundred yards,) of the extreme Western windlass of the plaintiff, and were a permanent obstruction in the sound. His (the plaintiff's) seine on one occasion drifted against and became entangled with the stakes and was badly torn.

At the time the defendants were driving the stakes, the plaintiff urged them not to do so, stating the damages which would result to his seine, and offered of himself to remove the stakes already driven, and to assist the defendants to drive their line of stakes more to the Westward, opposite their own land and beyond the reach of the plaintiff's seine or that of any other person. To this one of the defendants replied that "he had a right to fish anywhere in the sound; if his" (the plaintiff's seine runs into my net, it may tear the seine, but will not hurt my net." The defendants afterwards drove

down a similar row of stakes to the East and near to their nets, as fenders, and to which the nets were attached; some of which stakes were in twenty foot water.

It was stated by the witness, Joshua Roberts, who owns and fishes the fishery to the East of that of the plaintiff's, that his (the plaintiff's) fishery was fished this year in the usual manner; and that the seine of that fishery, as of all others on the sound, would sometimes be drifted by wind and tide from one-half to three-quarters of a mile up or down the sound, according to the prevalence of the wind or current; that there was plenty of fishing ground for defendants farther to the West of plaintiff's, and opposite the defendants' shore, where the defendants could set their nets without any interference with plaintiff's or any other seine.

It was also in evidence that the defendant, John Hettrick, came, on the 14th of March, to the witness's fishery and stated that he, Hettrick, had just seen the plaintiff, and had agreed to remove his nets further from the plaintiff's; that he had put them there supposing the plaintiff to be unfriendly to him and desired to prevent his fishing on the North side of the sound; but being now satisfied that he was misinformed, and that it damaged the plaintiff, he intended to remove the stakes; but they were not removed until taken away by the Sheriff, since which time the defendants had re-set them further to the Westward of the plaintiff.

It was further stated that after the act of the Legislature was passed, (making it a misdemeanor to set a Dutch or pond net within one-half mile to the Eastward or Westward of the outside windlass of any fishery, &c.,) the defendants were duly notified of its passage and of its provisions by the sheriff, and that the plaintiff offered to remove their net stakes; that the defendants again refused to remove them or cause them to be removed, and threatened to drive another row of stakes directly in front of plaintiff's shelter on his beach, or at his centre stake. This was anterior to the passage of the act before referred to. On the 31st of March and 1st and 2d days of April,

the Sheriff of Chowan, in obedience to the order of the Court removed at the expense of the plaintiff all the stakes and nets of the defendants, which were within one-half mile of the outer Western windlass of the plaintiff's fishing beach. As long as the stakes and nets were within one-half mile, there was constant danger to plaintiff's seine, and he was prevented from a free use of the sound for fishing, in the event of strong tides or winds.

The plaintiff's outlay in fishing operations was from $15,000 to $20,000 *per annum*, and the receipts generally from $20,000 to $30,000 annually, at that and other similar fisheries on the sound.

The defendants claim that their property in land and fishing material is worth $5,000. For the defendants it was also stated that since the removal of their stakes and nets, the seine of the plaintiff has been torn, as it was before removal. To this plaintiff replied, and proved that the seine became entangled in a lost anchor in the sound and was thus damaged.

On the hearing the defendant moved to dissolve the injunction, which was refused, and the same continued until the hearing.

From the foregoing order the defendants appealed.

Smith & Strong, for appellants.
Mullen and *Moore* and *Gilliam & Pruden*, contra.

SETTLE, J. The plaintiff having commenced an action against the defendant to recover damages for obstructing his right of fishing in Albemarle Sound, obtained an order from the Court restraining the defendant from setting Dutch or pond nets in the sound except upon such conditions as are imposed by the act of 1874–'75, chap. 115. A motion to dissolve the restraining order was refused, and the injunction continued to the hearing of the cause, from which order the defendants appealed to this Court.

The bare statement of a few general principles will be sufficient to decide the question involved.

1. Albemarle Sound, being a navigable water, is not subject to entry, but every citizen of the State has the liberty and privilege of fishing therein.

2. While the owner of a beach has the right of drawing his seine to his beach, in exclusion of others, yet he cannot acquire the sole right of fishing, independently of all others, in a certain portion of the waters of the sound.

3. To constitute a several fishery there must be a right of soil, which no person has in Albemarle Sound.

4. At common law, there could not be a several fishery in a navigable stream.

5. The *regulation* of the right of fishing in navigable streams is a proper subject of legislation, and has been treated as such in this State, by acts establishing lay days, and the like.

Apply these principles to the case at bar. The defendant, by driving stakes for a mile and a quarter into the sound, made an exclusive appropriation to his own use of that portion of the sound embraced within his pond, and materially interfered with the common right of fishing, as it had been enjoyed by all those operating the Long Beach fishery for many years.

The winds and tides had always, during the fishing season, drifted the seine of the plaintiff over a portion of the ground which was enclosed within the defendant's pond. And while the right of the defendant to fish over the same, or any other ground, is fully recognized, yet he had no exclusive and several right of fishing in that or any other portion of the sound.

Shults on Aquatic Rights, 24 Law Lib., p. 100, says: "Whatever opinions may be formed or whatever arguments may be advanced, in regard to a fishery in public streams being a royal franchise derivable from the crown, and claiming exclusively by grant charter or prescription, they must, we conceive, yield to the plain and incontrovertible fact adverted to by our earliest, as well as our modern writers, that every subject of common right may fish in the sea and in navigable rivers, un-

less restrained or prohibited by the local usage of any particular place." And he adds "that such a private appropriation of fishery authorized by grant in a navigable river being incompatible with the public right, cannot exist in law." This is broad ground, which we need not occupy for the purposes of this case.

We are of opinion that the plaintiff is entitled to have the defendant enjoined from appropriating, exclusively to his own use, any portion of the waters of the sound, without calling to his aid the act of 1874–'75, which has already been referred to.

We will remark, however, that we think the Legislature had the right to pass the Act under its power to *regulate* the right of fishing; and further, that the objection to the act, as being *ex post facto*, can avail nothing in this action, for while it may be so in so far as it makes the past act of setting and fishing any Dutch or pond net a misdemeanor, yet for the *main* purposes of the act, to-wit, the regulation of fishing in Albemarle Sound, it is not open to the criticism made by the defendants. *Collins* v. *Benbury*, 3 Ired. 277; *Collins* v. *Benbury*, 5 Ired. 118; *Ward* v. *Willis*, 6 Jones 183.

The judgment of the Superior Court is affirmed.

Let this be certified, &c.

PER CURIAM. Judgment affirmed.

F. C. MILLER *v.* DAVID PARKER, and others.

It is error to grant an injunction without requiring the plaintiff to give the bond required by C. C. P., sec. 192.

(*Sledge* v. *Blume*, 63 N. C. Rep. 47; *Hirsh* v. *Whitehead*, 65 N. C. Rep. 516 cited and approved.)

PETITION for an injunction, tried before *Eure*, *J.*, at Chambers in PERQUIMANS county, April 15th, 1875.

The plaintiff instituted an action against the defendants upon certain notes secured by deeds in trust, and moved the Court for an order restraining the defendants from selling the real estate conveyed by the trust deeds, under a prior deed in trust, until the equities of the several parties might be adjudged. As the case was decided in this Court upon a rule of practice it is unnecessary to state the facts further than set forth in the opinion of the Court.

The Court below allowed the motion for an injunction, and the defendants appealed.

Smith & Strong, for appellant.
J. A. Moore, contra.

BYNUM, J. The case is here on the appeal of the defendant from the order of the Court below, granting an injunction to the hearing.

The objection is raised that the order of injunction was irregularly made because no undertaking was required by the Court or given by the plaintiff preliminary to the order; and for that irregularity a motion is now made by the defendants to vacate the order of injunction.

The objection is well taken and in apt time. The statute, C. C. P., section 192, is peremptory: "Upon granting an order for an injunction the Judge *shall require, as a condition precedent* to the issuing thereof, that the clerk shall take from the plaintiff a written undertaking, with sufficient sureties," &c. The Court, therefore, is not at liberty to disregard a mandatory statute of great importance in the due administration of justice, and which was intended for the protection of parties against the abuse of the process, when the objection is properly brought to the attention of the Court. *Sledge* v. *Blume*, 63 N. C. Rep., 274; *Hirsh* v. *Whitehead*, 65 N. C. Rep., 516.

On the argument here it was suggested that the undertaking might be filed in this Court, in which case the Court would not vacate the injunction order on that account. The case of

Richardson v. *Bauman*, 65 N. C. Rep., 152, gives support to this suggestion, but as the undertaking has not been filed or tendered here, the effect it would have upon the motion to vacate, cannot be considered.

As the order appealed from will be reversed and the case go back for further proceedings in the Court below, it may be proper to suggest that the causes set forth as the ground for the injunction seem to be insufficient. It cannot be pretended that the legal rights of creditors can be made to depend upon seasons, crops or the money market. For aught we know all these may be more unpropitious in the fall than they now are, and the plaintiff's condition worse. Nor is the solvency of the trustee, of itself, a sufficient cause for an injunction; but the non-residence of the trustee is a sufficient cause for his removal and the substitution of another trustee; for where the distribution of the fund is in dispute, the trustee should be within the jurisdiction, and under the control of the Court. So also, if it is suggested and made to appear that loss and injury are likely to befall a party in interest from the conduct or qualification of the trustee he will be removed from his office.

As all the parties in interest are before the Court, it is suggested that a sale of the land should be made, under the direction and by a trustee appointed for the purpose, and in such lots as will yield the most money. A reference can then be made as to the proper disbursements of the proceeds of sale and on exceptions to the report filed by the parties aggrieved, their rights will be regularly presented for the decision of this Court.

The interesting questions raised by the different modes of probate and registration of the two deeds of trust are not without difficulty, but are not now properly before us.

PER CURIAM. Order vacated and case remanded.

S. A. RIGHTON, Receiver of JOHN BOND, *v.* WM. D. PRUDEN, Adm'r of H. A. BOND.

Those creditors only, are entitled to the benefit of Supplementary Proceedings under the Code of Civil Procedure, who bring themselves within the provisions of the statute, by instituting such proceedings

Therefore, where A obtained a judgment, and alone instituted Supplementary Proceedings against B, and a Reciver was appointed, and before he filed his bond B paid off the judgment, and the Receiver having afterwards filed the requisite bond, brought suit against one C: *Held*, that by the payment of the judgment by B, the Receiver was *functus officio;* and that it was error in the Court below to allow the pleadings to be so amended as to make other creditors parties plaintiffs.

(The case of *Rowland* v. *Gardner*, 69 N. C. Rep. 53, cited and approved.)

SUPPLEMENTARY PROCEEDINGS, under the provisions of the Code of Civil Procedure, sec. 266, heard, upon a *motion* to amend the pleadings and make new parties, before his Honor, Judge *Eure*, at the Spring Term, 1875, of CHOWAN Superior Court.

The facts pertinent to the point decided in this Court at this term, are sufficiently stated in the opinion filed by Justice BYNUM.

The plaintiff having moved to make others than those originally named in the pleadings parties to this proceeding, and his Honor having allowed the motion, the defendant appealed.

Gilliam & Pruden, for appellant, cited 15 How. N. Y. Rep. 19; Ibid, pp. 10, 17, 355; Voorhies' Code, 557; and argued, that to terminate Proceedings, the whole debt, principal, interest and costs must be paid. This terminates it. 17 Abott, 315; Vor. Code, 558, note c.

Presumption of payment discontinues Special Proceeedings. 24 Howard, 135; Vor. Code, 503, note m.

Other parties must positively make themselves *parties of record* before they can take part in proceedings. 21 How.

469; Vor. Code, 572. They can only make themselves parties of record, by instituting Special Proceedings; for they cannot be made plaintiffs, as only the Receiver can sue.

A Receiver under our statute, represents only those judgment creditors who institute special proceedings. In N. Y. it is different; he represents *all* creditors.

Jno. A. Moore, contra, submitted:

(1.) The Receiver was appointed for the benefit of all the judgment creditors who had unsatisfied executions, and had commenced proceedings to enforce their collection. They were substantially parties, as they filed notice of their claims immediately upon the appointment of the Receiver. (*Parks* v. *Sprinkle*, 64 N. C. 637.) Why begin supplementary proceedings, when they would have to stop as soon as he was appointed, in *Norfleet* v. *Bond*, or at all events would have to consolidate their suits?

(2.) The fact that it was satisfied before the filing of the bond can have no effect, as the property vested in the Receiver before the bond was filed, and even if it had *never* been—(see the order in *Norfleet* v. *Bond*.) The property being in *custodia legis*, remained so for all the creditors.

(3.) The objection comes too late, as they should have demurred in the beginning, stating the several causes of demurrer.

(4.) The amendment asked for was merely to facilitate justice; in which case the practice is very liberal. C. C. P., sec. 132; *Bullard* v. *Johnson*, 65 N. C. 436; *Bramer* v. *Hawkins*, Ibid, 645; *Sudderth* v. *McCombs*, 67 N. C. R. 353; *Carlton* v. *Byers* 71, N. C. R. 331.

(5.) This point is *res adjudicata*—see *Bond* v. *Bond*, 69 N. C. R. 97; *Skinner* v. *Maxwell*, 68 N. C. 400.

BYNUM, J. Before November, 1870, James E. Norfleet, as executor, recovered a judgment against John Bond, upon which

an execution was issued and returned unsatisfied. He then instituted supplementary proceedings, under the provisions of C. C. P., sec. 266, alleging as the ground thereof, that Alexander H. Bond was the fraudulent assignee of certain bonds, &c., which were the property of John Bond, the debtor.

On the 26th November, 1870, the plaintiff, Righton, was appointed, in this supplementary proceedings, the receiver of the property of John Bond, the execution debtor, with power to sue for its recovery. Before the appointment of the receiver, other creditors obtained judgments against John Bond, and issued executions, which also had been returned unsatisfied, but they had not instituted supplementary proceedings thereon. As soon as the receiver was appointed, he had notice of these other judgments.

On the 26th November, 1870, after the appointment of the receiver, but before he gave bond or qualified as such, the defendant John Bond, paid the Norfleet judgment, and satisfaction thereof had been entered of record.

After the Norfleet judgment was thus satisfied, the plaintiff filed his bond and was qualified as receiver, and instituted this action against the defendant, A. H. Bond, the alleged fraudulent assignee. These are the facts as they appear by the complaint and answer and case stated.

At the Spring Term, 1875, the plaintiff Righton, moved to amend the pleadings, by joining the other judgment creditors as parties plaintiff. This was resisted by the defendant, but was allowed by the Court, and the defendant appealed to this Court.

As Norfleet was the plaintiff and creditor in the action wherein Righton was appointed receiver, and as these proceedings were instituted by Norfleet, for the single purpose of getting satisfaction on his judgment, it would seem too clear for argument, that when the judgment had been satisfied before the receiver began his suit, that he was proceeding without having a cause of action. The creditor whose suit it was, had

been satisfied, and was out of Court, and the receiver who was his instrument, went with him.

But it is urged that the receiver, by virtue of his appointment, was vested with the property of the defendant, John Bond, and it was his duty as the officer of the Court to obtain and hold it for the benefit of the other judgment creditors, although they had not instituted supplementary proceedings. We do not think this is the proper construction of C. C. P., sec. 266, under which this action was brought. Those creditors only are entitled to the benefits of the supplementary proceedings, who bring themselves within the provisions of the statute, that is, actually institute them. These proceedings are unlike a creditor's bill, where all having claims may come in and prove them, whether due by judgment or simple contract, but they are given to those only who have obtained judgments, had their executions issued and then made the affidavit there prescribed. So that, in this case, if the receiver, having a cause of action, had recovered of the defendant, he would have held the fund for the benefit of those only who have pursued the property by supplementary proceedings. If the other judgment creditors had, like Norfleet, instituted proceedings subsequent to the executions, it would have been the duty of the Judge to notice the fact in the appointment of the receiver who, in that case, under the provisions of sec. 270, C. C. P., would have been the receiver of all who had thus gained a standing in Court. Having failed in this, they have no cause of complaint.

But whether the receiver instituted this suit, with or without a cause of action, the amendment making new parties plaintiff, ought not to have been allowed. The receiver only was authorized by the order appointing him, to begin and prosecute an action. If the action had been properly brought by the receiver, the joinder of other parties would have been immaterial and disregarded as surplusage. *Rowland* v. *Gardner*, 69 N. C. 53, C. C. P., sec. 95. But the receiver had no cause of action, and was, in effect, *functus officio*, by the pre-

vious discharge of the judgment, and the making of new parties, therefore, was the beginning of another action in other rights, which cannot be done in this way.

There is error.

PER CURIAM. Judgment reversed and the action dismissed

J. C. L. HARRIS, Solicitor, *ex parte*.

One who has been convicted of murder, and is under sentence of death, is a competent witness; and the Solicitor for the State is entitled to a *habeas corpus* to bring such condemned prisoner into Court, for the purpose of testifying before the grand jury.

Chapter 54, sec. 40, Bat. Rev. applies only to parties strictly so called, and not to the State.

(*State* v. *Adair*, 68 N. C. Rep. 68; *State* v. *Garland*, 7 Ired. 48, cited and approved.

PETITION for a *habeas corpus*, heard before *Watts, J.*, at Spring Term, 1875, of NORTHAMPTON Superior Court.

The Solicitor filed the following affidavit:

* * * "that Cornelius Williams is now in the jail of this county, having been convicted at Fall Term, 1874, of this Court, of the murder of one Samuel Presson; that said Williams appealed to the Supreme Court, and that the judgment of this Court was affirmed. That said Williams is now under sentence of death for the said murder, and that said Williams is a material witness for the State in a case of murder to be enquired into by the Grand Jury at this Term." * * Wherefore he prayed that the said Williams might be brought into Court to testify, &c.

His Honor, after deliberation, gave judgment refusing the

prayer of the petition. From this judgment the Solicitor appealed.

Harris, Solicitor, for the petition, argued:

That the Constitution prescribes no disfranchisement as to witness. That the act of 1866 makes Williams a competent witness; and that the act of 1868, chap. 116, sec. 37, does not bind the State. See *State* v. *Adair*, 68 N. C. Rep., 68.

BYNUM, J. This case is governed by the decision of this Court in the *State* v. *Adair*, 68 N. C. Rep., 68, which is so directly in point, that his Honor must have overlooked it or he would have allowed the motion. It is there held that the act of 1868, Bat. Rev., chap. 54, sec. 40, applies only to parties strictly so called, and not to the State, upon the maxim that general statutes do not bind the sovereign unless expressly mentioned in them. *State* v. *Garland*, 7 Ired., 58. The prisoner by our existing law is a competent witness, and the State is therefore entitled to his evidence, which may be procured in the way prescribed by law. Neither the Court below or this Court has the right to presume that the officers of the law, chosen to represent the public justice of the State, will abuse that high trust by either an inhuman or injudicious exercise of their powers.

The case does not present a fit occasion for the animadversion contained in his Honor's judgment.

There is error.

PER CURIAM. Judgment reversed.

GEO. S. P. BOND and wife *v.* W. E. BOND, Ex'r. of A. W. MEBANE.

Where an instrument is produced and read as evidence by one party, the whole is to be read, if the adversary require it.

This was a CIVIL ACTION brought to recover the value of a lot of brandy, tried at the Spring Term, 1874, of BERTIE Superior Court, before his Honor, Judge *Albertson*.

On the trial before, it appeared that the wife of the male plaintiff, then Mrs. Shields, delivered in February, 1863, to a negro wagon driver, belonging at the time to the testator of the defendant, eighty-five gallons of apple brandy, for which she charged $5 per gallon.

The plaintiffs then offered in evidence, under the instructions hereinafter noticed, the following account and note, proved to be in the hand writing of the testator of the defendant, viz:

"MRS. SHIELDS,

To A. W. MEBANE.

1866.

Feb. 3.	To 12 yards Mohair plaids, @ 40c.....	4 80
	" 8 yards Calico, @ 30c.....	2 40
	" 10 yards Cotton, @ 40c.....	4 00
		$11 20

I think you charge too much for your brandy. I think $3 is a large price for it.

Yours respectfully,

A. W. MEBANE."

Of this the plaintiff offered to read the date; omit, and not offer in evidence the account and its items, and to read the note concerning the price of the brandy. To this, the defendant objected, and insisted that the whole paper, if any, must

be offered in evidence. His Honor overruled defendant's objection, and permitted the plaintiff to read that portion of the paper before alluded to, and to omit the balance; at the same time informing the defendant, that he was at liberty to read the omitted part of the paper to the jury, but by doing so, he would make it his evidence. Defendant excepted.

The defendant offered other objections to the plaintiff's recovery, which, not being considered in this Court, are needless to mention.

The jury returned a verdict for the plaintiff. Judgment and appeal by defendant.

D. C. & P. H. Winston, for appellant.
W. W. Peebles, contra.

BYNUM, J. The defendant objected to the reading in evidence against him, a part of the paper writing, without reading the whole. His Honor overruled the objection and allowed the plaintiff to read the part he desired, but informed the defendant that he was at liberty to read the other part, but that he could offer it only as his own independent evidence. There is error. It is a universal rule that where any document is produced and read by one party, the whole is to be read, if the adversary require it; for unless the whole be read, there can be no certainty as to the real sense and meaning of the entire document. So it is a general rule, that whenever a party makes a statement or admission, whether oral or written, which is afterwards used against him as evidence of the stated or admitted fact, the whole of the statement or declaration must be received. 1 *Stark*, 372. A party who reads an answer, makes the whole of it evidence, and if upon exceptions taken, a second answer has been put in, the defendant may insist upon having that read to explain what he swore in the first. *B. N. P.*, 237. 1 *Stark*, 291.

There is nothing in this case, to take it out of these general principles. If the part of this writing, offered in evidence by

the plaintiff, tended to show that the defendant got the brandy, the itemized account against the plaintiff, in the same instrument, which the plaintiff refused to read, was evidence of a set off to that amount, or what was of more importance, it was evidence tending to show that the defendant regarded the plaintiff as his debtor. At all events, the whole should have gone to the jury together, as the evidence of the plaintiff. The error of his Honor, consisted in holding that the omitted part could only be introduced as the evidence of the defendant.

PER CURIAM. *Venire do novo.*

SARAH H. DULA and another *v.* ZEPHANIAH YOUNG and C. W. CLARK, Adm'r., &c.

(*Dula* v. *Young*, 70 N. C. Rep. 450, affirmed.

PETITION to re-hear this case, which was decided in this Court at January Term, 1874.

The case is fully reported in 70 N. C. Rep., 450.

READE, J. The learned argument of the counsel for the petitioner failed to satisfy us that we had mistaken any important fact, or misapplied any principle of law or equity. We must therefore adhere to our decision, and for the reasons stated in the opinion of our learned brother, Justice Settle.

There will be judgment against the petitioner for cost.

PER CURIAM. Judgment accordingly.

STATE *v.* JOHN BAILEY and ABNER KENNEDY.

A general verdict of guilty upon an indictment of two counts—one for stealing and the other for receiving stolen goods of a value less than five dollars is correct, notwithstanding the act of 1874–'75, chap. 62.

INDICTMENT for larceny and receiving stolen goods, tried at the Spring Term, 1875, of IREDELL Superior Court, before his Honor, Judge *Mitchell.*

The defendants were charged with the larceny of a pocket book of the value of fifty cents, and of a one dollar bill, (U. S. currency,) of the value of one dollar and of a two dollar bill, (U. S. currency,) of the value of two dollars, making the aggregate value of the property stolen, three dollars and a half, and in another count they were charged with receiving the same, knowing the articles to have been stolen.

On the trial the defendants asked his Honor to charge the jury, that the Court had no original jurisdiction of the offence charged in the second count of the indictment, to wit, the receiving stolen goods, and that they should only inquire whether, from the evidence, the defendants were guilty of the larceny as charged in the first count. This instruction his Honor declined, and charged the jury that the Court had jurisdiction of the offence charged in the second count; and that if they found from the evidence that the defendants received the goods, knowing them to be stolen, it would be their duty to find them guilty.

The jury returned a general verdict of guilty. Motion for a new trial; motion refused. Judgment and appeal by defendants.

Furches, for defendants, argued:

(1.) The Superior Court has no original jurisdiction of the offence of receiving stolen goods of a value less than five dollars. Bat. Rev., chap, 33, secs. 14 and 17, page 344; Acts

1873–'74, chap. 176, sec. 13, page 261; *State* v. *Perry and Briggs*, 71 N. C. Rep., 522.

(2.) Therefore it was error for the Court to charge the jury that if they believed the defendants received the goods, knowing them to have been stolen, they should find them guilty.

(3.) The Court must judicially know from the record what offence the defendant is convicted of. *State* v. *Wise*, 66 N. C. Rep., 123, 124.

(4.) How can the Court judicially know in this case whether the defendant was convicted on the charge of larceny or on the charge of receiving stolen goods? If convicted on the latter, it was erroneous and he should to be discharged.

Attorney General Hargrove, for the State, cited and commented on chap. 33, sec. 117, Bat. Rev.; Act of 1873–'74, chap. 176; Act of 1868–'69; Constitution, art. IV, sec. 33; Act of 1874–'75, chap. 62; *State* v. *Davis*, 65 N. C. Rep., 299; *State* v. *Perry and Briggs*, 71 N. C. Rep., 522.

READE, J. Suppose it was true, as contended by the defendant, that the count for receiving stolen goods is bad—then we have the case of an indictment with two counts, one good and one bad, and a general verdict of guilty. That is to be taken as a verdict upon the good count, and there may be judgment.

There is no error. This will be certified.

PER CURIAM. Judgment affirmed.

MARY A. MIDDLETON *v.* CHARLES DUFFY and wife NANCY.

Objection, for irregularity in the service of original process should be made in the first instance: *Therefore*, it is error for the Court to set aside proceedings against a defendant, who had appeared and overlooked such irregularity for two or three terms.

This was a MOTION to amend the return of a sheriff, heard before *Clarke, J.*, at the Spring Term, 1874, of the Superior Court of ONSLOW county.

The following are the substantial facts as they appeared upon the hearing in the Court below, and which are certified to this Court by the Judge presiding, the counsel for the parties litigant being unable to agree upon a statement of the case.

The motion was based upon certain affidavits as to the service of the original summons in the case, and upon the summons itself and docket entries made in the progress of the cause. The summons was returnable to Fall Term, 1872, Onslow Superior Court. The sheriff had made thereon the following endorsement: "Received September 23d, 1872, served September 23d, 1872, upon Charles and Nancy C. Duffy only." That when the summons came into the hands of the sheriff on the 23d day of September, 1872, the summons was against Charles Duffy, Nancy C. Duffy and C. Stephens.

Upon the return of the summons to Fall Term, 1872, the plaintiff struck out the name of C. Stephens, from the writ. No other summons had been issued after the one hereinbefore mentioned as returnable to Fall Term, 1872. Upon the reading of the affidavits filed by defendants, and hearing of the case, the sheriff was required to amend his return, which was done as follows: "Received September 23d, 1872; served September 23d, 1872, upon Charles and Nancy Duffy only, by leaving a copy at their home with Miss Lucy Duffy, daughter of Charles and Nancy Duffy, and by stating to them the same

day that "I had left it there," which they both acknowledged as sufficient service.

Nancy Duffy then moved to have her name stricken from the case, as she had never appeared thereto by attorney or otherwise, and there never had been any personal service of the summons upon her by the sheriff; and that two terms of the Court had passed without the plaintiff's taking out any other process against her; and that his failure so to do, worked a discontinuance of the suit.

His Honor allowed the motion, whereupon the plaintiff appealed.

Battle & Son, with whom was *Hubbard*, for appellant, submitted.

If there be any irregularity or defect in mesne process, the defendant should take advantage of it before he has appeared, and when the service of the writ is irregular, but the defendant on receiving notice of the declaration says, "it is all right; I will call and settle the debt and costs," the irregularity is waived. Tidd's Practice, 513.

A paper improperly served should be promptly returned with a statement of the reasons for so doing. *Wilkie* v. *Gilman*, 13 Howard, 225. See also *McGowan* v. *Leavenworth*, 3 Code Rep., 151.

Irregularties in the manner of service like all other mere irregularities are waived by retaining the paper served or acting upon it. See *Georgia Lumber Co.* v. *Strong*, 3 Howard, 246; see also *Hunter* v. *Lester*, 10 Abb., 263; *Myers* v. *Overton*, 2 Abb., 344.

Empie, contra.

Both husband and wife were necessary parties to the action, as the relief sought was asked out of the separate estate of the wife, and the summons must be served upon her. *Eckerson* v. *Vollmer*, 11 Howard, page 42; and *Rowland* v. *Perry*, vol.

64, N. C. Rep., 578, and authorities there cited. Section 82, C. C. P., directs that the summons by which an action shall be commenced, shall be served by delivering a copy thereof as follows:

1. If the suit be against a corporation, to the President, &c.
2. If against a minor, to him and also to his father, &c.
3. If against an insane person, to his committee.
4. In all other cases, to the defendant personally.

In this case there was no service of the summons personally upon the defendant Nancy Duffy. Service means serving the defendant with a copy of the process, and showing him the original, if he desires it. *Alderson B. Googs* v. *Huntington*, 12 M. & W., 502; *Williams* v. *Van Valkenburgh*, 16 Howard, page 152.

Section 89, of the C. C. P., directs that the proof of the service of the summons, must be:

1. By the certificate of the sheriff or other proper officer.
2. In case of publication, the affidavit of the printer, or his foreman, or principal clerk, showing the same, and an affidavit of a deposit of a copy of the summons in the post-office as required by law, if the same shall have been deposited; or
3. The written admission of the defendant.

The acknowledgement of the defendant, *verbally*, is not a sufficient service. Where the proof of service is an admission by the defendant, the admission must be in writing verified and identified, so as to satisfy the Court that the admission is signed by the defendant or with his assent; there is no legal fiction by which the Court is presumed to know the signature of a party defendant who has not appeared in the cause. 2 Hill, 369; *Litchfield* v. *Burwell*, 5 Howard, 342; *Welsh* v. *Walker*, 4 Porter, 120; *Norwood* v. *Riddle*, 4 Porter, 926.

The summons in this case issued returnable to the Fall Term, 1872. Motion was made at Spring Term, 1874, to have the name of Nancy Duffy stricken from the case. No other summons had been issued except the one returnable to Fall Term,

1872. Where process is executed against one of the defendants only, and not run out against the other, this will amount to a discontinuance of the suit. *Fullbright* v. *Tritt*, 2 Dev. & Batt., 491; *Hanna* v. *Ingram*, 8 Jones, 55; *Governor* v. *Welsh*, 3 Iredell, 249.

SETTLE, J. The application to set aside proceedings for irregularity should be made as early as possible, or as it is commonly said, in the first instance; and when there has been any irregularity, if the party overlook it and take subsequent steps in the cause, he cannot afterwards revert back to the irregularity and object to it. 1 Tidd Pr. 513.

The use of a summons is to bring a party into Court, but if a defendant sees proper to appear without a summons, or upon a defective summons, he thereby waives all irregularity in that respect.

Here, it appears from the record, that the defendants, at the return term, notwithstanding the return of the summons by the sheriff, endorsed "too late to hand," applied to the Court and obtained an order to take the deposition of one Rhodes to be read in evidence on the trial of the cause. However, as a second summons was issued returnable to Fall Term, 1872, and on it the sheriff returned "served on Charles and Nancy C. Duffy only," and the record at that term shows that the defendants appeared by attorney. At Spring Term, 1873, the record shows that the defendants appeared by counsel and obtained from the Court further time to file their answers.

At Spring Term, 1874, Nancy C. Duffy moved the Court to strike her name from the action on the ground that there had been no personal service of the summons upon her.

Affidavits were then filed on both sides, but they all establish the fact that the sheriff, after leaving copies of the summons at the house of the defendants, with their daughter, in the morning, met the defendants, later in the day, returning home, when he informed them what he had done, and proposed to step from their gate to their house, fifty yards distant,

and get the summons and serve it personally on Mrs. Murphy, when she said he need not take that trouble, as she would accept it as a good service. So, from 1872 to 1874, we hear no complaint of the summons, but at each term of the Court the parties "take subsequent steps in the cause." Upon these facts we think the order of his Honor was erroneous.

Let this be certified, &c.

PER CURIAM. Order reversed.

WILLIAM L. BARHAM and wife *v.* ALBERT LOMAX, Guardian.

In an action against a guardian to falsify an account of settlement, on the ground of fraud recently discovered, inasmuch as the relief sought might have been substantially obtained in a Court of law, the action became barred by the statute of limitations, after the lapse of three years.

(*Whitfield* v. *Hill*, 5 Jones Eq. 316; *Whedbee* v. *Whedbee*, Ibid. 392; *Taylor* v. *Dawson*, 3 Jones Eq. 86; *Wheeler* v. *Piper*, Ibid, 249, cited and approved.)

CIVIL ACTION, tried before *Kerr*, *J.*, at Fall Term, 1874, ROCKINGHAM Superior Court.

The following are the substantial facts necessary to an understanding of the case as decided in this Court:

The defendant, Albert Lomax, was appointed guardian of the *feme* plaintiff (who was at that time a minor and unmarried) on the 27th day of May, 1851. On the same day he executed his bond and assumed the duties of guardian.

His ward, the *feme* plaintiff, married William L. Barham, the other plaintiff, in 1865, and was at the commencement of this action, of full age.

The defendant as guardian received the estate of said ward, amounting to the sum of one thousand dollars or thereabout.

At February Term, 1866, of the county court of Rockingham he reported the sum of $1,292.03 due his said ward. At February Term, 1867, of the said Court, commissioners were appointed to settle with the defendant, as guardian of the *feme* plaintiff. The commissioners reported a balance in the hands of her said guardian, of one thousand one hundred and thirty-seven dollars and fifty-eight cents.

The plaintiff, William L. Barham, received from the defendant on the 24th day of May, 1867, certain bonds in payment of the indebtedness of the defendant, to the *feme* plaintiff his wife, and gave defendant a receipt in full, and a release of all indebtedness as guardian of his ward.

This action was brought to cancel this receipt and release and recover the amount of the bonds, on the ground that the defendant had fraudulently procured the execution of the bonds aforesaid at a time subsequent to the dates they bore, and that the obligors were insolvent at the time of their execution.

As one of several defences, the defendant relied on the statute of limitations. Preliminary to a trial by jury, of the other issues raised by the pleadings, on motion by the defendant, the cause was heard upon the complaint, and the statute of limitations set up in the answer.

Upon the hearing, the Court gave judgment for the defendant. From this judgment the plaintiffs appealed.

Tourgee & Gregory, for appellants.
Dillard & Gilmer, contra.

RODMAN, J. The only question at present presented is whether the statute of limitations as applied by Courts of Equity, bars the plaintiff's action.

Title IV of C. C. P., entitled "Limitation of Actions," does not apply. By section 16, the provisions of the Title do not extend to cases where the right of action accrued before the adoption of the Code in August, 1868. It is argued, however, for the plaintiff, that as by sub-section 9 of section 34, it is pro-

vided, that in actions for relief on the ground of fraud, &c., the cause of action shall not be deemed to have accrued until the discovery of the fraud; the cause of action in this case did not accrue until the discovery of the fraud, which was within three years before the action was commenced. Evidently this is reasoning in a circle. The cause of action did not arise, because the statute applies to prevent it, and the statute applies, because the cause of action did not arise. The question is to be governed by the law as it existed before and without reference to that Title of the Code.

But the question as to the application of the sub-section of the Code above cited, we conceive not to be so important as it seems to have been supposed by counsel. For if that sub-section intended and is construed to introduce a new rule of law, its effect will be to apply the statute of limitations, to cases in which its application had been previously held to be within the discretion of Courts of Equity.

2. The rules by which Courts of Equity, independently of the Code, are governed in their application of the statutes of limitations, may be considered settled in a general sense, although the common difficulty of course exists, of applying them properly to the particular case.

As was said by Lord REDESDALE in *Hovenden* v. *Annesley*, 2 Lch. & Lef. 630, a case which is the foundation of most of the doctrine found in the books on this subject, that Courts of equity, although not within the words of the act, are within its spirit, and equally bound by it as Courts of law, in all cases in which the subject matter of the action, and the relief demanded are substantially such as a Court of law would have jurisdiction of, although the form of relief in the two Courts might be different, as it generally is.

The same doctrine has been often repeated by the Courts of this State, and is too familiar to need the citation of authority in its support.

The authorities are numerous, that in cases of fraud and mistake the statute will not run except from the time when they

were discovered, or by reasonable diligence might have been discovered. 2 Story Eq. Jur. S. 1521—1521a. *Hovenden* v. *Annesley*, 2 Sch. and Lef. *ubi. sup.*; *Hunter* v. *Hunter*, 50 Miss. 445; *Henry Co.* v. *Winnebago Drainage Co.*, 52 Ill. 299.

But the cases hereafter cited establish that this rule is not unlimited, or of universal application. It would be difficult to draw from the decisions any exact definition of the line which separates cases in which Courts of equity will apply the statute, or will reject a demand as stale, notwithstanding the adverse claim originated in fraud or mistake, from those in which they will refuse to apply it, and will give relief notwithstanding the lapse of time. It is unnecessary, however, to make the attempt in this case, because it seems to us that under the authorities, the present case falls clearly within the rule applicable to those in which Courts of law and equity have concurrent jurisdiction of the subject matter of the action, and of the relief demanded, and in which the statute is applied. When it may be difficult to draw a line of division between the classes of cases that approximate and are liable to encroach on each other, it is the more important to adhere strictly to the authorities on either side that go to settle that line.

In *Taylor* v. *Dawson*, 3 Jones Eq. 86, the defendant Dawson had purchased land at a sale by a trustee under a deed in trust to secure debts, and had obtained it by a conspiracy with the other defendant and certain creditors to stifle competition. The bill was by the injured creditors to declare the defendant a trustee. It was held that the statute of limitations was a bar to the plaintiff's claim, and the Court hold, that when it is sought to convert a defendant into a trustee against his assent, upon the ground of fraud, the statute runs from the time he acquires the legal estate, notwithstanding it was acquired by fraud, and that it is immaterial whether the fraud was constructive merely or actual and intentional. To the same effect are *Whitfield* v. *Hill*, 5 Jones Eq. 316, and *Wheeler* v. *Piper*, 3 Jones Eq. 249; *Whedbee* v. *Whedbee*, 5 Jones Eq. 392 is substantially the same with this case. There a guardian settled

with his ward who gave a release, and the bill alleged that the release was obtained by fraud and imposition, and sought to set it aside, and to surcharge and falsify the account. It was held that inasmuch as the relief sought was substantially such as a Court of law would have jurisdiction to give the statute applied, and the plaintiff was barred in three years.

It is attempted to distinguish this case from that on the ground that it is not sought here, to falsify the account as to the amount due the ward, but merely in respect to the fact that certain notes fraudulently represented to be guardian notes, which the ward was under an obligation to receive, were in truth not such. But we can see no difference in principle or substance. The attempt here is to falsify the account which the guardian rendered, and on the basis of which the settlement was made. There is like jurisdiction at law as there was in the cases cited, and in each case there was a release which could be set aside in equity only.

We concur with the Judge below that the plaintiff's claim is barred by the statute.

PER CURIAM. Judgment affirmed.

STATE on the relation of H. B. ARMFIELD and M. L. ARMFIELD *v.* JOHN D. BROWN, THOMAS E. BROWN and LUKE BLACKMER.

Where the parties to an action have mutually agreed to a reference, they cannot after an adverse decision, as a matter of right, claim a trial of the issues arising in the cause, by a jury.

Every Court has the power to amend its records, so as to make them speak the truth; but when a Court, after hearing evidence, refuses to amend its records, no appeal lies from such refusal.

A guardian is responsible not only for what he receives, but for all he might have received, by the exercise of ordinary diligence and the highest degree of good faith.

CIVIL ACTION, tried before *Wilson, J.*, at Fall Term, 1874, ROWAN Superior Court.

This case was before this Court at January Term, 1874, and is fully reported in 70 N. C. Rep., 27.

The defendants after notice and upon affidavits filed in the cause, moved the Court to amend the record, *nunc pro tunc*, so as to show that the order of reference heretofore made was not by consent, but compulsory, which motion was refused by the Court.

To the ruling of his Honor, the defendants excepted.

The defendants then moved the Court for a jury to try the issues of fact arising on the referee's report, which motion was also refused, and the defendants again excepted.

The case was then heard upon the exceptions to the referee's report, and the exceptions were overruled and the report confirmed.

From the judgment of the Court confirming the report of the referee, the defendants appealed.

W. H. Bailey, for appellants.
Craige & Craige, Jones & Jones, contra.

SETTLE, J. 1. When this case was before us on a point of

practice involving the right of a party to have issues tried by a jury, after a reference by consent, we held "that the reference in this case was by consent duly given, and that parties, after selecting their forum and meeting with an adverse decision, will not be allowed as a matter of right to turn round and successfully assert a right which they had renounced." *Armfield* v. *Brown*, 70 N. C. Rep., 27. In the face of this decision the defendant moved the Court for a jury to try the issues of fact arising on the referee's report, and makes the denial of the motion a point of appeal to this Court. Comment is unnecessary. *Lippard* v. *Roseman*, 72 N. C. Rep., 427.

2. As to the motion of the defendant to amend the record, *nunc pro tunc*, so as to show that the order of reference heretofore made in this case was not by consent, but was compulsory, we have only to say, every Court has the power to amend the entries on its records so as to make them speak the truth, but when a Court, after hearing the evidence, in the exercise of its discretion refuses to amend a record because, as we must infer, the evidence does not satisfy the Court that the record ought to be amended, there is no appeal from such refusal to this Court.

3. What is the liability of the defendants?

A guardian is liable not only for what he receives, but for all he ought to have received of his ward's estate. And while infallible judgment is not expected of him in the management of his ward's estate, yet ordinary diligence and the highest degree of good faith is expected and required of him in the execution of his trust.

The guardian, John D. Brown, ought to have collected from Thomas E. Brown, the administrator of Jonathan Armfield, the estate of his wards in good money, for all the parties were solvent on the 7th of November, 1863, when the guardian received Confederate money, which had depreciated to the extent of fifteen dollars for one in gold. No sufficient reason has been shown to justify this transaction. Thomas E. Brown, the administrator of Jonathan Armfield, had seen fit, in 1856,

to take the individual note, without security, of Sarah J. Armfield, the widow of the intestate, for a large portion of the estate, which remained unpaid until November, 1863.

John D. Brown was appointed guardian of the relators in November, 1863, and received of the defendant Thomas E. Brown, who is one of the sureties on his guardian bond, Confederate money in payment of his ward's interests in their father's estate, and the only account ever rendered by the guardian purporting to be an exhibit of the condition of the estate of the relators in his hands, was filed at May Term, 1865, of the Court of Pleas and Quarter Sessions for Rowan county.

All these facts would indicate that the estate of the relators has been, from first to last, most negligently managed.

We see no error in the rulings of the Superior Court. Let the judgment be affirmed.

PER CURIAM. Judgment affirmed.

STATE *v.* J. L. BURKE.

Upon an indictment for "highway robbery," it is not necessary to prove both violence and putting in fear; either is sufficient.

Such indictment charging the robbery to have been committed "in the public highway," is sufficient, without specifying to what points the highway led.

It is not necessary to charge in such indictment the kind and value of the property taken; because force or fear is the main element of the offence.

Offences which were punishable with death at the time of the adoption of the present State Constitution, are now punishable under sec. 13 chap. 32, Bat. Rev.

INDICTMENT for highway robbery, tried before *Schenck, J.*, at Spring Term, 1875, RUTHERFORD Superior Court.

Only two witnesses were introduced, and both of these testified on behalf of the State. W. A. Owens, the prosecutor, testified that he and his brother had been to Spartanburg, in the State of South Carolina, to market. That he went in a wagon, his brother, P. W. Owens, accompanying him. He was fifteen years of age, and his brother three or four years older. On the 25th day of November, 1874, he and his brother were returning along the public highway leading from Spartanburg to Rutherfordton, and at a point in Rutherford county, between eight and ten o'clock at night, the witness was in the wagon driving, and his brother walking. At that time the moon was shining brightly. Witness heard the defendant "holler," and then "defendant seemed to be trying to get into the wagon." Defendant then came in front of the wagon and caught the lines and stopped the oxen. After stopping the oxen, defendant asked them where they had been. Witness answered, and the defendant then asked what they got in Spartanburg, and other questions all of which they answered. The defendant then said that he had been robbed by some men sometime ago, and accused the witness and his brother of being the persons who robbed him. Witness and his brother denied this, saying that they had not been to the place at which defendant alleged he was robbed. The defendant then caught hold of the brother of the witness, and told him he had to go back to Spartanburg or with him, and his brother refused to go. "Defendant then demanded our money, and said he intended to have our money or our lives, and if we attempted to go on he would shoot us." That his brother told him that he had no money. Defendant then said if we would give him one dollar, he would let us go; and being still refused, he went to the fence and got a rail and put it across the road in front of the wagon, and said if we came up to it, he "would shoot out our hearts," and he asked us what we were going to do. I then told him, if he would let us go on home, I would give him a dollar. I then took out a one dollar United States Treasury note and handed it to him. He held it about a minute and

threw it down, saying it was only fifty cents; and he intended to have seven dollars. Defendant then caught hold on witness, and turned to his brother and jerked a switch out of his hand and broke it. His brother then said to witness, "throw me the axe out of the wagon." Witness threw the axe to his brother, and the defendant ran off in the old field, and they started off again. When they had gone about twenty steps, the defendant approached them again with rocks in his hand, and threw one at his brother, which struck him in the face and felled him to the ground. He threw another and struck him on the head and on the side. His brother was severely hurt. That he then threw at witness and struck him also.

Witness also testified that he gave the defendant the dollar because he was afraid of him, and that it was on the public highway. The money was the property of witness. He had sold some corn, which he raised, for four dollars and a half in Spartanburg, and the dollar was a part of that money.

P. A. Owen was introduced as a witness on behalf of the State, and corroborated the testimony of his brother, and exhibited the wounds he received from the defendant. The defendant's counsel asked his Honor to charge the jury as follows:

"That the acts of the defendant must have been such as to induce the prosecutor reasonably to believe that he was in danger of his life or great bodily harm, in order to make the prisoner guilty of robbery."

His Honor declined to charge, as requested, and charged the jury:

"That robbery was the fraudulent and felonious taking of the personal property of another by force or by putting him in fear, that if the act was committed at or near a public highway it then became highway robbery.

That in order to constitute robbery there must have been such a demonstration of force as was calculated to put the prosecutor in fear, and that it did actually put him in fear.

That if the defendant did make such a demonstration of

force and put the prosecutor in fear, and under that fear prosecutor gave him the United States Treasury note of the denomination of one dollar, and he kept it one minute, and that this occnrred at or near a public highway in Rutherford county, he was guilty on the first count of highway robbery, and if the offence was not committed at or near a public highway, then it was simple robbery and the defendant was guilty on the second count.

That it was the duty of the State to satisfy their minds of the truth of all the material allegations which constitute the crime of robbery or highway robbery, and if the evidence did not so satisfy them they should acquit the prisoner."

The jury rendered a verdict of "guilty of highway robbery" on the first count. The counsel for the defendant then moved for a new trial. The motion was overruled and the counsel for the defendant then made a motion in arrest of judgment on the following grounds:

1. That the highway was not sufficiently described, that the bill of indictment ought to mention the points to which the highway led.

2. That the description of the money in the bill of indictment was defective.

The motion in arrest of judgment was overruled and the Court then sentenced the defendant to the State prison for fifteen years at hard labor.

The defendant again excepted because the Court sentenced the prisoner under sec. 13, instead of sec. 29, of chap. 32, Battle's Revisal.

The exception was overruled, and the prisoner appealed.

J. F. Hoke, for the prisoner.

Attorney General Hargrove, for the State, insisted:

1. His Honor's charge was correct as to the definition of robbery. Bishop's Cr. L., vol. 11, 1108–1109, Battle's Revisal, chap. 32, sec. 19, Rev. Code, chap. 34, sec. 2. "In or

near a highway" sufficient. *State* v. *Anthony*, 7 Ired. 234, *State* v. *Cowan*, 7 Ired. 237.

2. Description of money sufficient. Battle's Revisal, chap. 32, sec. 19. *State* v. *Thomason*, 71 N. C. Rep., 146.

3. Penalty for highway robbery at the time of the adoption of the Constitution was death. Rev. Code, chap. 34, sec. 2, therefore sentenced under sec. 13.

BYNUM, J. Robbery at the common law, is "the felonious taking of money or goods of any value from the person of another or in his presence against his will, by violence or putting him in fear." 2 *East Pl.* 707. From this definition of the books it is clear that the instructions asked for by the prisoner, as to what constitutes the crime of robbery, were properly refused, and that the instructions given by his Honor, were substantially correct, except where he erred in favor of the prisoner.

Unlike larceny, the gist of the offence in robbery is not in the taking, but in the force or terror used, and the rule is different in the two offences, both as to the value of the article taken and as to what constitutes a sufficient taking. Hence, when his Honor charged, in accordance with the fact proved, that if the prisoner kept the money in his hands, "one minute," it was a sufficient taking, although he then threw down the money and abandoned it, he was supported by all the authorities. Thus, where a lady was coming out of an Opera house and the prisoner snatched at her ear-ring and tore it from her ear and it fell into her hair where it was found on her return home, it was adjudged a sufficient taking to constitute robbery. *Rex* v. *Lapier*, 2 East. Pl. 557. And where the prisoner took the prosecutor's purse and immediately released it, saying, "if you value your purse you will please take it back again and give me the contents of it," and the prosecutor took it back, and the prisoner was apprehended at that moment, it was held a sufficient taking. *Rex* v. *Peal*, 1 Leach 228. Ros. Crim. Pl. 837. Nor is it necessary in this

offence, to prove both violence and the putting in fear, as his Honor charged. Either is sufficient. If the man is knocked down and lies insensible while the thief rifles his pockets, this is robbery though there is no putting in fear. And where there is no violence and fear becomes the essential ingredient, the law *in odium spoliatoris*, will presume it, where there appears just ground for it. 2 East. P. C. 711. *State* v. *Cowan*, 7 Ired. 239. But in our case there were both violence and the putting in fear.

Another exception is that his Honor charged that if the offence was committed at or near the public highway, it was highway robbery. In *Cowan's* case, the indictment charged that the robbery was committed *in* the highway, and it was there held that the offence must be proved as laid, and that it was incompetent to give evidence that the robbery was near the highway. Our statute, Rev. Code, ch. 34, sec. 2, makes the offence to consist in "robbing any person in or near any public highway." Without stopping to inquire whether an indictment following the very words of the statute and laying the offence "in or near" the public highway, would be good, it is sufficient to say, that the indictment in this case charges the offence to have been committed *in* the highway, which is the most precise and unobjectionable, if not the only proper way of laying it, instead of in the disjunctive. No evidence was offered that the robbery was near the highway, but the whole testimony was confined to the offence committed in the highway, the facts of which were not controverted. His Honor submitted the case to the jury upon a hypothesis which was not supported by any evidence, but unless it appears to the Court that the prisoner's case was prejudiced by it, a new trial cannot be awarded. No harm could possibly result to the prisoner from this inadvertence in the charge, because *all* the evidence was as to the occurrence *in* the road, and if the jury acted at all, it could only have been, upon what was in evidence. If they believed the testimony the prisoner was guilty as charged in the indictment, and if they did not believe it, there

was nothing for them to go upon. Had there been any evidence given of a robbery *near* the highway, upon an indictment for robbery *in* the highway, the charge of the Judge would have been erroneous and the prisoner entitled to a new trial. The prisoner moved in arrest of judgment because the public highway was not sufficiently described in the indictment. The answer is, that the form adopted in this case, follows the ancient and approved precedents. However it might be in England, where there are several kinds of highways, the prisoner could not have been misled in this State, where there is but one kind of highway, which is well understood in the law and in fact, to be a public road, over which all citizens may go at will, on foot, on horse back, or in carts or carriages.

It was also moved in arrest of judgment, that the money or property taken, was not sufficiently described in the indictment. This is not an open question, for in the *State* v. *Thompson*, 71 N. C. 146, which was a case of larceny, the property stolen was of the same kind, and was described in the same way, as in this indictment, and it was held to be sufficient. In robbery the kind and value of the property is not material, because force or fear is the main element of the offence. Thus, where a man was knocked down and his pockets rifled, but the robbers found nothing except a slip of paper containing a memorandum, an indictment for robbing him of the paper, was held to be maintainable. *Rex* v. *Bingley* 5, C. & P. 602.

The last exception of the prisoner is, that the Court sentenced him under the provisions of chap. 32, sec. 13, Bat. Rev. instead of the 29th section of the same chapter. The 13th section provides for the punishment of persons convicted of crimes which were punishable with death, by the laws existing at the time the present Constitution went into effect. The 29th section provides for the punishment of offences which were punishable with public whipping or other corporal punishment, at the time the present Constitution went into effect.

Robbery in the public highway, was a capital felony, at that time, and is the subject of punishment under the 13th section of the statute.

There is no error.

PER CURIAM. Judgment affirmed.

JAMES JORDAN *v.* JAMES B. LANIER.

It is error for a Court to grant an injunction in a case where the party applying therefor has an adequate remedy by an action for damages.

(The cases of *Bogey* v. *Shute*, 1 Jones Eq. 180; *Thompson* v. *Williams*, Ibid. 176; *Clement* v. *Foster*, 71 N. C. Rep. 36, cited and approved.)

CIVIL ACTION for a trespass on land, and an application for an injunction, heard before *Cloud, J.*, at Chambers, in the county of DAVIE, May 6th, 1875.

The following statement, signed by counsel, is sent with the record, as containing facts sufficient for the decision of this Court:

This was a motion upon notice to the plaintiff, to dissolve the injunction heretofore granted without notice by his Honor at Chambers.

The plaintiff brought a civil action against the defendant for trespass on his land, claiming one hundred dollars damages, also praying for an injunction. The injunction was granted upon the plaintiff's affidavit, without notice to the defendant. On the same day the summons was issued; and after answering the plaintiff's complaint, the defendant, upon notice, moved to dissolve the injunction.

His Honor, after hearing the affidavits offered by the respective parties, gave judgment refusing the motion to dissolve, and continued the injunction to the hearing. From this judgment defendant appealed.

Craige & Craige, for appellant.
Bailey, contra.

PEARSON, C. J. If the fence which the defendant has built, and the parts of the outside fence which he has taken away, are on his own land, no Court, either of law or of equity, has any power to interfere with him in thus using his own property. If his operations are upon the land of the plaintiff, he has exposed himself to an action by which the plaintiff will be able to establish his line and to recover full compensation by way of damages for the injury. So the plaintiff has, (if aggrieved,) *adequate relief* at law, and there is no ground upon which to invoke the extraordinary power of a Court of equity.

Under the old mode of procedure, the plaintiff, after bringing an action of ejectment, or of trespass *quare clausum fregit*, in order to set up his supposed equity for an injunction, as ancillary to his action at law, would have been obliged to file a bill in equity and pray the chancellor to interfere in his behalf, and by the extraordinary writ of injunction, prevent the defendant from removing a few panels of fence until the dividing line could be fixed; basing his application on the ground that this injunction was necessary in order to prevent irreparable injury. To which the Chancellor, on refusing the application, would have said: "You have not a pretext to go on. Damages to the amount of a few dollars will be adequate compensation, and you do not *allege that the defendant is insolvent.*" See *Bogey* v. *Shute*, 1 Jones Eq., 180; *Thompson* v. *Williams*, Ibid. 176.

So there is no allegation of an intended destruction of things which cannot be replaced—as cutting down ornamental shade trees; or even the intention to commit a trespass which the defendant will not be able to respond to by payment of damages.

By the new mode of procedure, one tribunal deals out both law and equity; but we have had occasion to decide in several cases that this change in the mode of procedure does not in any wise affect the principles of law and the principles of

equity; and it is just as essential now, as it ever was, to keep them separate and distinct. For unless that be done, we are at sea, without rudder or compass, and everything will depend on the notions of different Judges as to "the broad ground of substantial justice."

We are aware that having but one tribunal to administer both law and equity tends to cause the principles of law and the principles of equity to run into each other and become confounded, as is illustrated by the case before us. For, had the plaintiff been put to the necessity of filing a bill in equity to stop the removal of a few panels of fence, the effects of which removal he could have met at a cost of some $25 or $30 in having rails split and hauled to build some twenty-five panels of fence, (admitting a necessity to have the rails hauled one mile,) when, if he was right about the dividing line, he would have been entitled to both fences. The application would have been *smiled* out of Court. But coming as it did in the case *Clement* v. *Foster*, 71 N. C. Rep., 361, (where the same supposed equity was prayed for and *refused*, as upon a motion in that case, and coming as it now does, as a motion for a restraining order and an injunction in the action of *Jordan* v. *Lanier*, for the recovery of land and damages, in other words, an action of trespass *quare clausum fregit*, (except that we are not allowed by C. C. P. to give the action a name,) it had an imposing appearance of *substantial justice*, and his Honor confounded the distinction between the principles of law and of equity and the notions of justice, which latter no Courts can administer and which he left to depend on public feeling.

Error. Reversed. To be certified.

PER CURIAM. Judgment reversed.

STATE *v.* HILLIARD GASTON.

All persons who counsel, aid, abet or advise a larceny, are equally guilty with those who actually commit the offence.

(*State* v. *Barden*, 1 Dev. 518, cited and approved.)

INDICTMENT for *Larceny*, tried before *Kerr*, *J.*, at Spring Term, 1875, BRUNSWICK Superior Court.

The defendant was arraigned and tried upon the following bill of indictment, to-wit:

"STATE OF NORTH CAROLINA, } In the Superior Court,
Brunswick County. } Fall Term, 1875.

The jurors for the State, upon their oath present, that Hilliard Gaston, late of the county of Brunswick aforesaid, on the first day of November, in the year of our Lord one thousand eight hundred and seventy-four, with force and arms at and in the county of Brunswick aforesaid, one cow, of the value of one dollar, of the goods and chattels of William Starkey then and there being found, feloniously did steal, take and carry away against the peace and dignity of the State.

NORMENT, Solicitor."

The counsel for the defendant asked his Honor to charge the jury "that this being a felony, only those who were present could be guilty as principal, and those advising and counselling could not be convicted under this bill of indictment."

The Court refused to charge, as requested, but charged the jury "that if the prisoner counselled, aided or abetted, or advised the larceny, he was guilty.

The jury returned a verdict of guilty, and the prisoner was sentenced to the State prison. From this judgment the prisoner appealed.

Attorney General Hargrove, for the State.
Russell, for the prisoner.

SETTLE, J.: The defendant being charged in a bill of indictment, containing a single count, with the larceny of a cow, "of the value of one dollar," prayed the Court to charge the jury "that this being a felony, only those who were present could be guilty as principals, and those advising and counselling could not be convicted under this bill of indictment." The Court refused the prayer, and charged that if the prisoner counselled, aided, abetted or advised the larceny, he was guilty.

The text books tell us that in high treason and petit larceny there are no accessories, but all concerned are principals, for different reasons however, which we need not state here, as the learning is so familiar. 1 Hale, 715; 2 Hawk. P. C. c. 29, 1, 24; 4 Black. Com., 36; 1 Bish. Cr. L., 39, 622. These authorities are followed by our own decisions. In *State* v. *Barden*, 1 Dev., 518, it is said "all who are concerned in petit larceny are principals," &c. In this indictment the value of the cow is laid at more than twelve pence, to wit, one dollar, which, at common law, constituted grand larceny, and the defendant was entitled to the charge prayed for if the evidence made it appropriate, unless our statute abolishing all distinctions between grand and petit larceny, has the effect to reduce grand larceny to the grade of petit larceny.

Bishop, in his work on Criminal Law, sec. 622, says "whether grand is reduced to petit larceny under American statutes, abolishing or modifying the general distinction between grand and petit larceny, is a question upon which we appear to have no adjudications.

The defendant's counsel argues that after the distinction between grand and petit larceny was abolished by 7 and 8. Geo. IV., every larceny in England was raised to the grade of grand larceny. So it was. But an examination of the English statute will show that it is just the reverse of ours, and while it raised, in express terms, petit to grand larceny, ours draws grand down to the grade of petit larceny.

We quote them in contrast. The English statute enacts "that the distinction between grand larceny and petit larceny

shall be abolished, and every larceny, whatever be the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents in all respects as grand larceny was before the commencement of this act," &c., and provides for trying all accessories to such larceny."

Our statute enacts: "All distinctions between petit larceny and grand larceny, where the same hath now the benefit of clergy, is abolished; and the offence of felonious stealing, where no other punishment shall be specifically prescribed therefor by statute, shall be punished as petit larceny is," &c Bat. Rev. ch. 32, sec. 25.

Our conclusion is, that the charge of his Honor was correct.

Let it be certified that there is no error.

PER CURIAM. Judgment affirmed.

JOHN J. PACK and others *v.* THOMAS H. GAITHER.

A specific performance of a contract will not be decreed where it appears that such performance is obviously impossible.

CASE AGREED, tried before *Cloud, J.*, at Spring Term, 1875, DAVIE Superior Court.

The following are the facts agreed:

This is an action for the specific performance of a contract to convey real estate.

The following is the contract:

NORTH CAROLINA, Davie County. } July 4th, 1863.

Know all men by these presents, that I, T. H. Gaither, am held and firmly bound by these presents, doth bind myself, executors or administrators in the sum of ten thousand dollars to John Pack and others.

The condition of the above obligation is such that, whereas the said T. H. Gaither hath this day bargained, sold and delivered all except what is in cultivation unto John J, Pack, B. N. Allen, Conrad Hendrix and Jacob Cormatzer, about ninety acres of land, more or less, it being a part of the Cabner tract, lying on Crouse's creek, and taking their note ninety days after date, payable to I. G. Lash for five thousand dollars with approved security, Now, whenever the said I. G. Lash will receive said note, then the said T. H. Gaither will make, or cause to be made, a good and lawful title for said land. Then the above obligation to be void and of no effect, otherwise to remain in full force and effect. Signed, sealed and delivered in the presence of

J. R. WILLIAMS. T. H. GAITHER.

At the time of the execution of the above contract, the defendant had no deed for the premises, but had purchased the same at a Clerk and Master's sale prior to the late war, and had given his note with surety for the purchase money.

The defendant and his surety having become insolvent, the sale was set aside and a new sale ordered, at which another party became the purchaser.

The plaintiff executed the note to I. G. Lash, which was accepted in lieu of the note of defendant, and that the note of defendant was surrendered to him.

Since the war, a judgment was taken on the note executed to Lash, which was compromised on the payment of four hundred and twenty-five dollars.

The defendant had received his certificate as a discharged bankrupt before the commencement of this action. The plaintiff made demand before suit.

If upon the foregoing facts the Court shall be of opinion with the plaintiffs, a judgment for specific performance is to be entered, otherwise judgment for the defendant.

His Honor being of opinion that the plaintiffs were not en-

titled to the relief demanded, gave judgment for the defendants. From this judgment the plaintiffs appealed.

W. H. Bailey, for the appellants.
Craige & Craige, contra.

SETTLE, J. A specific performance of the contract cannot be decreed in this case, because it is not practicable.

It is true, the plaintiffs have complied with their part of the contract, but the defendant never had, either at the time of executing the said contract or since, a deed for the land, the conveyance of which is now sought to be enforced. He had bid it off at a Clerk and Master's sale, prior to the rebellion, and had given his note, with security, for the purchase money, but the sale (the defendant and his surety having both become insolvent,) was set aside, and a second sale was ordered by the Court, when another party became the purchaser. The defendant is a discharged bankrupt, and was such at the commencement of this action.

How is it possible for him to comply with his contract? It is certain that he has not the land, and it is almost certain that he has not the means with which to purchase it.

The Court will not decree either a vain or an impossible act to be performed.

Adams, at page 81, says: "If the defendant cannot fulfill the contract which he has made, it may be ground for exempting the plaintiff from costs on the dismissal of his bill, but it cannot authorize the Court to decree an impossibility. Such, for example, is the case where the vendor of property has no estate, or only a limited estate therein; where he holds it as a trustee without authority to sell; or where, being the absolute owner at the time of his contract, he subsequently conveys to a stranger who is ignorant of the prior sale, and is therefore bound by no equity to give it effect.

"In this last case, the vendor's misconduct may be a ground

for charging him with costs, but a decree for performance of the contract is obviously impossible," &c.

If the defendant either had title to the land, or could procure it by any reasonable means, the plaintiffs would undoubtedly be entitled to have a specific performance of the contract; but to make such a decree in this case, would simply amount to the perpetual imprisonment of the defendant, without accomplishing the object sought to be obtained.

The judgment of the Superior Court is affirmed.

PER CURIAM. Judgment affirmed.

RICHARD H. SMITH, Adm'r., *v.* JOHN T. LAWRENCE.

Where, in 1864, A hired of B, a guardian, certain slaves, the property of his wards, upon condition that the price of the hire should be secured by note, payable twelve months after date, in whatever might be the currency of the country at the time the note was collected - stipulating however that Confederate money would not be received; it was further agreed that A should execute her note for the hire, payable to the guardian, and which when due was to be credited on a bond held by A against B; when A's note became due she refused to credit her bond with it, as agreed, and collected from B the whole amount of his bond due her: *Held*, that A became liable for the whole amount of her note to the guardian B, and upon his delivering the same to one of his wards, she then became liable to the ward; and that her administrator was entitled to credit for the full amount of the bond which he had paid to the ward.

CASE AGREED, heard before *Watts, J.*, at June Term, 1875, HALIFAX Superior Court.

The following are the material facts as agreed:

Richard H. Smith, as administrator, with the will annexed of Margaret W. Davis, claims to recover of John T. Lawrence two hundred and seventy-eight dollars and seventy-six cents,

with interest on one hundred and sixty dollars, from March 22d, 1874, and the defendant resists the claim.

The controversy depends upon the following grounds: On the first day of January, 1874, one William H. Shields, being the guardian of two infant children named respectively Indiana Shields and Alice Shields, domiciled in Halifax county, at Greenwood, a public hiring place in said county, put up to hire to the highest bidder, at public auction, for the twelve months next ensuing, certain slaves, the property of his said wards, making at the time the said slaves were put upon the block, and before the same were bid off, proclamation to the effect that he should require as security for the hire of said slaves, notes payable to him as guardian of said children twelve months after the day of the hiring, in whatsoever might then be the currency of the country, at the same time giving distinct notice that Confederate currency would not be received in payment thereof.

One of said slaves was bid off by one Vaughan, as the agent of the testatrix of the plaintiff, after the proclamation and notice aforesaid, at the price of three hundred and twenty-five dollars. After said slave was bid off, and on the same day, Vaughan informed the said guardian that the said testatrix would give her note for the hire.

A few days thereafter the guardian called upon the testatrix at her residence in said county to get her note for the hire, and the testatrix offered to pay the same in Confederate currency, and the said guardian refused to accept the same in payment, stating to her the terms upon which the slave was hired.

The guardian was indebted to the testatrix before the late war, to the amount of two thousand dollars, borrowed money, and executed to her his note, and the same was due and unpaid at the time when he called on her for her note as above stated. After the refusal of the guardian to take Confederate currency in payment for the hire of the slave, the testatrix immediately proposed that the full amount of the hire, to-wit, the sum of three hundred and twenty-five dollars, should be credited on the

note which the said guardian had executed to her. To this the guardian assented, and the arrangement was about to be made, when a mutual friend of the parties came in and advised them that inasmuch as the hire was not due and there was some difference between discount and interest, it would be better for the testatrix to execute her note for the hire, and when it fell due it should go as a credit on the note of the guardian. To this arrangement both parties assented, and such became the understanding and agreement, and in accordance thereto the testatrix executed her note for the hire of said slave.

When the note of the testatrix for the hire of said slave became due, the guardian applied to the testatrix to have the credit made on the note of the guardian for two thousand dollars according to the aforesaid agreement, and the testatrix refused so to do.

Since the close of the war the said W. H. Shields has paid to the testatrix the full amount of the said note, in currency of the United States.

W. H. Shields qualified as guardian of the said children, at February Term, 1857, of the Court of Pleas and Quarter Sessions of Halifax county, and hired out their slaves annually thereafter until their emancipation in 1865.

After the first year of the war the said slaves were hired out each and every year upon the terms hereinbefore set forth.

Margaret W. Davis died, domiciled in the county of Halifax, in the month of May, 1873, leaving a last will and testament in which no executor was named, which will and testament was on the 19th day of May, 1873, duly admitted to probate in the Probate Court of Halifax county, and on the 17th day of June next ensuing, the defendant, John T. Lawrence, was by said Court appointed collector of her estate, and letters of collection were immediately issued to him, and he qualified as such, and took into his possession the personal estate of the decedent.

On the 11th day of February, 1873, the said Indiana Shields intermarried with one J. B. Bishop, who, on the 1st day of

January, 1874, had a settlement on account of the guardianship of his wife, with the said guardian, W. H. Shields. In this settlement the said note for $325 was transferred to and accepted by Bishop and his wife at its nominal value as cash, and on the 22d day of March, 1874, the defendant, John T. Lawrence, as collector, paid to Bishop the full amount of the nominal value thereof, and interest, to-wit, $541.60, with which amount he has credited himself in his account as collector.

On the 10th day of December, 1874, the plaintiff, Richard H. Smith, was appointed and qualified as administrator with the will annexed of the said Margaret W. Smith, by the Probate Court of Halifax county.

The said Richard H. Smith has applied to the said John T. Lawrence, the defendant, for a settlement as collector, and Lawrence has exhibited an account wherein he claims credit for the sum of $541.61 paid J. B. Bishop, as aforesaid. The plaintiff refuses to allow the same, insisting that the defendant is only entitled to credit for the actual amount of the hire of the slaves on the first day of January, 1864, with interest thereon to the 22d day of March, 1874, making $262.85.

On the first day of January, 1864, the hire of said slaves for the twelve months next ensuing was one hundred and sixty dollars.

None of the admissions herein contained are in anywise to affect either party, or to be regarded as made, except for the purposes of the submission of this controversy.

The question submitted to the Court upon the case is as follows:

Is the defendant, John T. Lawrence, entitled to credit for $541.61 on the 22d day of March, 1875?

If this question is answered in the affirmative, then judgment is to be rendered against the defendant for cost; if in the negative, judgment is to be rendered againt the defendant for the sum of $278.76 with interest on $165 from the 22d day of March, 1874, the difference between the nominal value of said note and the hire of the slaves.

The Court gave judgment for the plaintiff, and thereupon the defendant appealed.

Hill, with whom were *Mullen & Moore* and *Batchelor*, for the appellant, insisted:

Under the statute of frauds parol evidence cannot be introduced to contradict, explain or vary a written contract.

To this rule there is an exception arising under the ordinance of 1865 and the act of 1866, chap, 38.

The ordinance enacts that all executory contracts, solvable in money, made between certain dates, shall be deemed to have been made with the understanding that they were solvable in money of the value of Confederate currency, according to a scale which the legislature was required to furnish subject to evidence of a different intent of the parties to the contract. The first section of the act of 1866, chap. 38, is loose and ungrammatical, but it must be understood to enact that as to contracts of the sort above mentioned proof might be admitted of the consideration, and the jury should determine its value in the present currency.

These acts allow parol evidence to vary written contracts:

1. When the consideration of the promise to pay money was a sale of property, (or hire,) to show the value of property (or hire,) &c.

2. When the consideration was either a sale (or hire) of property, a loan of money, to show that payment was agreed to be made not in Confederate money, as was presumed, but in *some other money or article*. *Ferrell* v. *Walker*, 66 N. C. Rep., 244.

"The general rule does not apply in cases where the original contract was verbal and entries and a part only of it was reduced to writing." Greenleaf Ev. 5, 284. *Perry* v. *Hill*, 68 N. C. Rep., 417; *Robbins* v. *Love*, 3 Hawks, 82; *Nichols* v. *Bell*, 1 Jones, 32; *Tendy* v. *Sanderson*, 9 Ire. 5, *Manning* v. *Jones*, Bus. 368; *Daughtry* v. *Boothe*, 4 Jones, 87.

Where proclamation was made at a hiring by executors in January, 1865, that such money would be received as would pay the debts of the estate, reference being made specially to a bank debt, held: That although no allusion to this was contained in the bonds given for such hires, it was competent for the obligors to show the proclamation and also the market value of the notes of the bank. *Woodfin* v. *Sluder*, Phil. 200.

Action on bond made 14th November, 1863, payable two years after date in current funds of the country when due. The consideration was the lease of land.

They say that at the making of the note it was agreed that it should be paid in Confederate currency.

The act of 1866-'67, which presumes that all contracts to pay money during the war were intended to be paid in Confederate money, cannot apply where the writing shows a different intent. But where the contract on its face shows in what currency it must be paid, parol evidence not admissible to show it was payable in some other. *McKesson* v. *Jones*, 66, N. C. Rep., 258.

In all other kinds of contracts the value of the property or *other consideration* may be shown in evidence, and the jury must estimate the value in United States Treasury notes. *Robeson* v. *Brown*, 63 N. C. Rep. 554.

Note dated 28th July, 1864, payable for negro hire, January 1, 1866, in current funds at the time the note falls due.

In our case it is evident that the parties knew that Confederate money was rapidly depreciating, and they were willing to take the chances of a future and different condition of things; and they expressly agreed that the note was to be paid in funds which were current when the note became due. Defendant not relieved by the statutes of 1866. *Hilliard* v. *Moore*, 65, N. C. Rep., 540; see also *Chapman* v. *Wacasen*, 64, N. C. Rep., 532.

Note one day after date for $1,000, dated November 10th, 1862. Given for land. Expressly agreed between parties that it was to be paid in good money after war. Agreement not inserted in bond.

The fair and reasonable construction of the collateral contract was to make the words "good money after the war" refer to the kind of money in which the note was to be *solvable*, and *not to the time* at which the note was *to be payable*. This construction does not vary the written contract, but explains it, &c. Held that the plaintiff recover fair value of note. *Lowns* v. *Ernhardt*, 64 N. C. Rep., 96.

In 1864, Smith purchased hats from Garrett agreeing to pay 30 pounds lint cotton per hat. Plaintiff held entitled to recover gold or its equivalent value of cotton. *Garrett* v. *Smith*, 64 N. C. Rep., 94.

Administrator sells effects of intestate at public sale, making proclamation of terms that Confederate notes would not be taken. Sued on bond dated 18th January, 1865. Judgment for face value of note.

Before the sale was made it was announced by the auctioneer that Confederate money would not be received in payment from the purchasers. This evidence fully rebutted the presumption created by the ordinance of October 18th, 1865, and acts of 1866, chaps. 38 and 39. Judgment affirmed. *Cherry* v. *Savage*, 64 N. C. Rep., 103.

Note 23d of November, 1864, given C. M. E. for land at 12 months. Condition of sale that it was to be paid in undepreciated currency. Held that it was payable in "greenbacks and not in gold." *Blackburn* v. *Brook*, 65 N. C. Rep., 413.

In our case there was an express contract to pay in the currency of the country at the time of payment. Confederate money was expressly ignored. It cannot be that this should be scaled according to value of hire, because the express agreement was to pay the hire in the full amount in currency. There being at the time of payment no currency except U. S. currency, it was right to pay in that the full amount of principal and interest.

Moore & Gatling contra, argued:

A note is executed on the 1st day of January, 1864, wherein

the promiser agrees to pay $325 *twelve months* after date in whatsoever might be the currency of the country when the said note *should be collected.* The promisee notified the promiser before executing the note, that Confederate money would, under no circumstances, be taken.

The note fell due on the 1st day of January, 1865, and on that day Confederate money was the currency of the country; but for the stipulation that Confederate money would not be taken, the note would be subject to scale. *Davis* v. *Glenn, et al.*, 72 N. C. Rep., 520.

Except Confederate money there was no currency when the note fell due. If any force be given to the stipulation concerning the Confederate money, the value of the consideration of the note, to wit, the hire of the slave for one year, must, of a necessity, be inquired into. His Honor so held, and he is not in error. *King* v. *W. & W. R. R. Co.*, 69 N. C. Rep., and cases cited.

READE, J. The guardian, Shields, on 1st January, 1864, hired his ward's slave to the plaintiff's testator for the year 1864, under a proclamation, that the hire must be secured by note, payable twelve months after date, in whatever might be the currency of the country when the note should be collected, but that Confederate currency would not be received.

As the note was to be payable in currency when due, (for so we understand it) and was not to be payable in Confederate currency, (and there was no other) it is difficult to tell in what it was payable when it fell due on 1st January, 1865. So that, if the decision of the case depended upon that, we would probably solve the doubt by requiring the payment of the value of the services of the slave. But we put the decision upon another ground.

When the guardian, a few days after the hiring, applied to plaintiff's testatrix to comply with the terms of the hiring by giving bond, she declined to give the bond, and offered to pay down Confederate money; which the guardian declined to re-

ceive. She then proposed to have no bond about it; but to settle the matter then, by entering the amount as a payment upon a bond which she held against the guardian; which was not subject to any scale. To this the guardian consented, and the bargain was struck. And they were about to endorse the amount on the bond as a credit, when a friend suggested that as the hire was not due for twelve months, if it were entered on the bond then, she would lose the interest; and to prevent that, it was agreed that she should execute her bond for the amount of the hire, and when it fell due, it was to be credited on the bond. It was upon this compromise and agreement that the bond was executed; and it was a valid contract. When the bond fell due, she refused to credit the amount upon her bond against the guardian, and collected the whole amount of her bond out of the guardian. We are of the opinion that she thereupon became liable for the whole amount of her bond to the guardian; and upon the guardian's delivering over the bond to his ward, she became liable to the ward; and therefore, the defendant was justified in paying it off. We say that the defendant was justified in paying it off; because it was admitted by plaintiff's counsel on the argument that no point was intended to be made as to the right of the defendant to pay whatever sum the plaintiff's testatrix was liable for. Else we would have to enquire whether the defendant, as collector, had the right to pay the debts of the estate.

There will be judgment here for the defendant according to the case agreed, for his costs.

PER CURIAM. Judgment accordingly.

JAMES McK. ROBESON *v.* DAVID LEWIS and ROBERT M. DEVANE.

An action on a bond, executed by a defendant, and conditioned to pay and satisfy all costs and damages which might be awarded to the plaintiff, in a certain action then pending, is well brought against such defendant and his surety, although judgment had gone against the defendant in the original action, which judgment was claimed to have been satisfied.

Where a jury, by the consent of the parties to the action, brought in their verdict in the absence of the presiding Judge, and found all the issues in favor of the plaintiff, but failed to assess damages as they had been instructed to do, in case they should so find, and the verdict was received and recorded by the Clerk; and the Judge coming in before the jurors left the Court room, directed them to retire, and find a verdict according to their instructions, (no suggestion of any improper conduct on the part of the jury being made): *it was held*, that there was no such irregularity in the return of the verdict as would vitiate it, and justify a new trial.

(The case of *Willoughby* v. *Threadgill*, 72 N. C. Rep. 438, cited and approved.)

CIVIL ACTION, tried before *Russell, J.*, at Spring Term, 1874, BLADEN Superior Court.

The complaint alleged:

That previous to the commencement of this action, the plaintiff commenced an action against the defendant, David Lewis, for the recovery of real estate, and damages for withholding the same. Before answering the complaint in said action, the said defendant, and the defendant Robert M. Devane, executed under their hands and seals, and filed with the Clerk of the Superior Court of Bladen county, a bond whereby they bound themselves, their heirs, executors, administrators and assigns in the sum of five hundred dollars, to the plaintiff. The condition of which bond was such, that if the said David Lewis should pay and satisfy all cost and damages which might be awarded to the plaintiff in said action, and well and truly pay all judgments obtained against him in said action, the above obligation should be void, otherwise it should remain in force."

In that action the plaintiff obtained a judgment against the defendant, David Lewis, for three hundred dollars damages, and one hundred and thirty dollars cost. Execution issued on said judgment, and was returned unsatisfied. The plaintiff demanded judgment for five hundred dollars and cost.

The defendants denied the allegations in the complaint, and alleged:

That the plaintiff has a judgment of the Superior Court of Bladen county, against the defendant for this very cause of action, and that the same has been satisfied.

The plaintiffs by an instrument in writing and under seal, released the defendants from all claims for damages arising from the cause of action set out in the complaint, on condition of the peaceable surrender of certain lands, and the payment of certain rents, which terms have been strictly complied with and performed in every particular.

After his Honor had charged the jury and they had retired, he asked if there was any objection to the verdict being taken by the Clerk. The counsel for both parties assenting for the Clerk to take the verdict, his Honor, after directing the Clerk to keep the Court open and take the verdict, left the bench. During his absence, and a very short time before his return, the jury came in and returned a verdict in favor of the plaintiff, without saying anything as to the damages. This verdict was received and recorded by the deputy clerk.

Upon his Honor's return to the bench, he asked what the verdict was, and upon hearing it, directed the jury, who were still in Court, to again retire and return a verdict according to the instructions which they had received; which were "that if they found certain issues in favor of the defendants, to return a verdict in favor of the defendant, and say nothing more; but if they found these issues for the plaintiff, then to inquire into the damages, and return a verdict assessing the damages.

One of the jurors said to his Honor that, as he understood it, the jury had agreed on three hundred dollars damages, if any had to be assessed.

His Honor then directed the jury to go to their room and make up a verdict according to the instructions.

The counsel for the defendant was present, and his Honor asked how long the jury had been separated, and was informed that they had not been out more than five minutes.

He then asked if there was any suggestion that jurors had been spoken to about the case by interested parties or others? No suggestion of this kind was made.

The jury again came into Court and rendered a verdict in favor of the plaintiff, assessing damages at three hundred dollars.

The defendants thereupon moved for a new trial; the motion was overruled and judgment given for the plaintiff, and thereupon the defendants appealed.

N. A. McLean, *Giles Leitch* and *W. McL. McKay*, for appellants.

Lyon & Lyon, contra.

BYNUM, J. 1. The parties are not the same in this as in the former action, nor is the cause of action the same. The liability of the defendants, by the express provisions of the bond, was a contingent one, dependent upon the failure of the defendant, Lewis, to pay damages which should be assessed against him in the action for the recovery of the land. This action, therefore, was properly brought.

2. The objection to the regularity of the verdict is put to rest, adversely to the defendant by the decision of this Court in the case of *Willoughby* v. *Threadgill*, 72 N. C. 438, and many other cases. Indeed, the case stated, does not show that any objection to the regularity of the verdict was made at the time in the Court below, nor does it show upon what points the appeal was taken. In this the case is defectively stated.

There is no error.

PER CURIAM. Judgment affirmed.

WM. C. WOOD, Ex'r of EDWARD WOOD, and CAROLINE WOOD *v.* ELIZABETH CHERRY, widow, &c,

A Trust can only be created in one of four modes, to wit:

(1.) By transmutation of the legal estate, when a simple declaration will raise the use or trust.

(2.) A contract based upon *valuable* consideration, to stand seized to the use, or in trust for another.

(3.) A covenant to stand seized to the use of or in trust for another upon *good* consideration.

(4.) When the Court by its decree converts a party into a trustee, on the ground of fraud.

No conveyance or act done after the execution of a will, unless it amounts to a revocation, will affect its provisions.

This was a CIVIL ACTION to recover possession of real estate, tried before his Honor Judge *Eure* and a jury, at the Spring Term, 1875, of the Superior Court of CHOWAN county.

The facts relating to the points decided in this Court are substantially the following:

In April, 1863, James C. Johnston, of Chowan county, made and published his last will and testament, by which he devised and bequeathed to Edward Wood, the testator of the plaintiffs, all his real and personal estate in the county of Chowan, subject to certain trusts and conditions contained in a private letter of the same date and filed with his said will.

Before making his will, the testator executed to one G. J. Cherry, afterwards the husband of the defendant, a lease of the following tenor, which was proved and registered.

HAYS', 12th March, 1863.

Know all men by these presents: That whereas, Mr. G. J. Cherry has expended much time and labor in setting out a peach orchard and grapery, and has not as yet reaped any profit therefrom, on a place belonging to me, called Collins' Point: Now, therefore, to remunerate said Cherry, I, James C. Johnston, have leased, and by these presents do lease, to

said G. J. Cherry all that tract of land, with improvements thereon, called Collins Point, and which I bought from Alexander Cheshire, he paying me rent for the same according to the profits of said farm and improvements, or just as much as he may find it convenient to spare, and after my death to have it rent free, or as much as he may find it convenient to pay, provided, always, that the said Cherry shall not sell or transfer his life estate in this land, and that it shall not at any time be subject and liable to his creditors for any debts he may owe them.

In witness whereof I have hereunto set my hand and seal the day and year above written.

JA. C. JOHNSTON, [SEAL.]

A short time before the death of Mr. Johnston, the testator, he addressed to the said lessee, G. J. Cherry, the following letter, written by Edward Wood, his executor, and signed by himself.

HAYES, March 20th, 1865.

G. J. Cherry, Esq.:

MY DEAR SIR: I address you this note to say to you that it is my desire that after my death you shall continue to occupy your present residence at my Point plantation, retaining possession of the negroes now on the farm, named Jacob, George and Maggy, during your natural life, fulfilling with my executor in Chowan county the same conditions and terms of rent as agreed upon and understood between you and myself heretofore. I further desire that should you leave a wife at your death, she shall retain possession of said place during her widowhood and occupancy of it upon the same terms.

Very truly,

Your friend,

JA. C. JOHNSTON.

The foregoing lease and letter are relied on by the defendant, the widow of the lessee, to sustain her claim to the premises, which she has occupied ever since the death of her husband in 1870. The defendant is still a widow.

Edward Wood, the executor of James C. Johnston, died in 1872, having devised the lands in controversy to his executor until 1878, and then over to the other plaintiff. Under this will the plaintiff claims.

Upon the trial of the cause in the Court below, the jury, under the instructions of his Honor, found a verdict for the defendant. Judgment accordingly, and appeal by the plaintifis.

Gilliam & Pruden, for the appellants, insisted:

(1.) That no trust can be raised in respect to lands devised, after the execution of the will, except by a writing sufficient in form to revoke the will.

(2.) That no parol understanding or agreement is sufficient, upon which to found a trust in respect to lands devised, after the execution of the will.

(3.) No trust arises as to Mr. Johnston, because no agreement in writing was executed by him, with such formalities as are required by law; the paper offered being in the handwriting of another, unattested and in possession of a third person at Mr. Johnston's death.

(4.) The letter to the lessee, Cherry, was not referred to, nor contemplated by the testator, at the writing of his will.

J. A. Moore, with whom was *A. M. Moore* and *Mullen*, filed the following brief:

The lands in question, conveyed in the will of J. C. Johnston, deceased, were held by the devisee Wood in trust for Cherry. Leaving out of consideration the fact that the devisee, Edward Wood, promised the testator to carry out his intentions, (and the express trust which we hold was created for defendant,) according to the rules of construction from the will itself and the letter, an implied trust was created.

1st. Where words "precatory," "recommendatory" or "expressing a belief" are used by a testator, an implied trust arises. Lewin on Trusts and Trustees, 168; Willis on Trustees, 54, 55, *et seq.* Note herewith the will of Mr. Johnston: "To him, the said Wood, his heirs and assigns," &c., "subject to such *disposition*" and "*instruction*," "*trusting* entirely to his honor and integrity," &c. Phillips' Law, page 252. "But only entirely on the integrity, fidelity and moral sense." *Ibid*, page 255.

2d. The releasing his executors by the testator from all legal liability in the will, wes intended by the testator to apply only to the provisions made or intimated in the will and letter as made, for the benefit of testator's *next of kin.* The tenor of the will is to *deter them* from opposing its validity, and the *purpose* of it was to bequeath his property to parties to whom he was attached and whom he considered proper to manage his estate, and who had not deserted him. The language there had no application to any provision made for Cherry or his intended wife. The purpose of the *lease* was intended to be more fully carried out, as evidenced by the *letter* and the fact that the testator knew of the intended marriage of Cherry and promoted it.

3rd. If there had been an agreement between the Devisee and Testator to execute an unlawful trust, the beneficial interest would result to the heir at law.

But when the devise is a beneficial one upon the face of it and the testator communicates his will to the devisee and requests him to be a trustee for such purpose as he will declare and he *fails* to declare. the devisee will not be allowed to hold.

Apply then to this case—Lewin on trusts, 74, Ibid 77. *Smith* v. *Attersoll*, "a devise to Joseph and John, his sons, and executors in trust for certain purposes, "which had been fully stated to them." Note language there and in will of J. C. Johnston, Phillips law page 526, "I have high respect to carry out my wishes" or

4th. The Statute of Frauds exempts from the provisions "Implied Trusts." Willis on Trustees, 55 and 56.

"They arise from the manifest intention of the parties." (Sanders on Uses and Trusts,) "or the nature of the transaction where there is *no written evidenee* of the trust."

5th. Plaintiffs say that because the letter is not contemporaneous with *date* of the will, the trust on reality cannot arise. This was the law, when devises of realty took effect from the *date* of the will. Trusts as to *personalty* before the statute were different, and now bequests of realty being the same as to time as those of *personalty*, the law applicable to trusts on personalty, is the same as to realty. The will now is ambulatory and takes effect from the time immediately preceding the death of the testator.

Reference by Johnston in his letter to "the lease and the terms contained in it," is a renewal of the lease and the letter is signed to meet the Statute of Frauds. 2. Parsons on Contracts, 503, 511. 3. Parsons on Contracts, 6 and 7, and notes.

The consideration in the lease was sufficient to support a bill for specific performance. So, if the reference to it in the letter is a renewal of the lease, the defendant stands in as good a position, as she would, had a decree for specific performance been made.

The Statute of Frauds is not in force in this State. *Shelton* v. *Shelton*, 5 Jones, Eq. 293. *Shelton* v. *Shelton*, 6 Jones, Eq. 119. *Fergerson* v. *Hoas*, 64 N. C., 772, and other cases therein cited.

But in our case an express trust was created by the testator and accepted by the devisee Wood.

The trust was observed by Wood, and the condition of rental complied with by the beneficiary. The case shows that immediately preceding the death of the testator, Wood and he had full conversation on the matter, and Wood promised to carry out his intentions. The Court will not permit the manifest

intention of Mr. Johnston and the agreement between him and the devisee Wood, to be violated.

PEARSON, C. J. According to *justice*, using the word in its broadest sense, as distinguished from law or equity, the defendant ought not to be disturbed in her occupation of the premises during her lifetime or widowhood, and we have considered the case in every point of view to see if we could sustain the decision of his Honor in her favor. But we can find no ground on which to do so.

I. The *promise* of Wood cannot be enforced on the ground of its creating a trust, for a trust can only be created in one of four modes.

1. By *transmission of the legal estate* when a simple declaration will raise the use or trust.

2. A contract, based upon *valuable consideration*, to stand seized to the use or in trust for another.

3. A covenant to stand seized to the use of or in trust for another upon *good consideration*.

4. When the Court, by its decree *converts a party into a trustee*, on the ground of fraud.

If we can sustain the defendant, it must be upon this point, that is to say the *fraud* in writing the title, (referred to in the pleadings) at the dictation of the testator and the *promise* to carry out his wishes in respect thereto, as understood between them; whereas the present action runs counter to the letter and violates the promise.

This is met by the fact that the will had been executed several years before, and an implied trust is expressly excluded by statute. Bat. Rev., ch. 119, sec. 44. "No conveyance or act done *after the execution of a will*, shall affect its provisions, except it is so executed as to amount to a revocation." The letter and the promise are both excluded by the words of this statute.

The suggestion that the time of the execution of a will is the time it takes effect, to-wit, the death of the testator, calls

for no remark, but it is all that the idea of a trust can rest on, so that ground fails.

II. The lease to Cherry, intended by "the letter" so as to give defendant a life estate, is an executory contract which the plaintiffs will be decreed specifically to perform. The difficulty here is to determine from the lease (as it is called) and the letter, what was this executory contract, or if it will make it any stronger, "lease under which the husband of defendant entered and held possession for many years.

It is clear that, by its proper construction, the husband of defendant was by virtue of the lease to have the right to occupy the premises during his lifetime, and by "the letter" this privilege of occupancy was extended to the defendant during her life or widowhood; but the question is, what was the consideration of "this grant to occupy;" and how can the Court carry it into effect as an executory contract and decree what is to be done on the one side, and what is to be done on the other side, incidents necessary in every decree for specific performance, supposing her to be sufficiently connected with this lease or executory contract, so as to be able to make title under it, by means of "the letter," mentioned in the pleadings. How can this Court declare what she is to do in consideration of the *privilege* of being allowed to *occupy* the *premises* as Ja. C. Johnston, the testator, looked at it, or consideration of the *rent* of the premises, as the defendant now looks at it. The paper executed by J. C. Johnston grants a life estate to Cherry, "he paying me rent for the same according to the profits of said farm, improvements, or *just as much as he may find it convenient to spare*, and after my death to have it rent free, or as much as he may find it convenient to spare, provided said Cherry shall have no right to transfer his interest, nor shall it be sold for his debts.

This instrument is too vague and uncertain to make it practicable to decree its specific performance. Indeed, it seems to have been intended merely as evidence of Mr. Johnston's *bounty* or charity towards one who seems to have been depen-

dent upon him, and it is the misfortune of the defendant that it was not done in such a manner as to give it legal effect.

Our conclusion is, that the lease and the letter and the promise confer upon the defendant no rights which can be recognized either in a court of law or of equity.

Error. Judgment reversed.

This will be certified.

PER CURIAM. Judgment reversed.

STATE v. EDWARD DOZIER.

Breaking and entering a store-house, with an intent to steal the goods, &c., therein, is not a criminal offence at common law; and there is no statute in this State making such act a crime.

INDICTMENT for breaking, &c., a store house, with intent to steal therefrom, tried in CRAVEN county at the Fall Term, 1874, of the Superior Court, before his Honor, Judge *Seymour*.

The defendant was convicted on the following indictment, to-wit:

"The jurors," &c., "present, that Edward Dozier, late of Craven county, on the 20th day of September, A. D. 1874, with force and arms, at and in said county, about the hour of 10 o'clock in the night time of the same day, the store house of Washington Spivy, there situate, unlawfully and wickedly did break, with an intent to steal, the same store house to enter and the goods and chattels of the said Washington Spivy, in the said store house then and there being, then and there feloniously to steal, take and carry away, contrary to law, and against the peace and dignity of the State."

Being convicted, the defendant moved in arrest of judgment, upon the ground that the indictment was insufficient in law:

(1.) Because no such offence as "an intent to steal" is known to the common, or our statute law.

(2.) That the breaking in the store house was a distinct act from his conduct after he had entered; and hence no inference could be drawn from that act as to his intentions after he had entered.

(3.) That there is a difference between an intent to do a thing and an attempt: *Hence*, if the defendant had attempted to steal after he had broken in, and had been prevented from so doing by the owner of the store house, he would have been guilty at common law. But as he made no such attempt to steal, it was submitted, that the indictment charged no offence known to our law.

His Honor refusing the motion the defendant appealed.

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

BYNUM, J. The defendant is indicted for breaking and entering the store house of Washington Spivy, with the intent to steal the goods and chattels of the said Spivy therein; and the indictment concludes at common law.

This was not a criminal offence, at common law, and there is no statute of this State making it a crime. By 24 and 25 Vict., chap. 96, sec. 58, it is made a misdemeanor in England in any one who shall be found by night, armed with any dangerous or offensive weapon, with intent to break or enter a dwelling or other building whatsoever, and to commit a felony therein, or who shall be found by night, having in his possession, without lawful excuse, any pick-lock, key, bit or other implement of house breaking; or who shall be found by night, in any such building, *with intent to commit any felony therein.* Roscoe Crim. Ev., 321.

Whether an obvious defect in the law, should not be supplied by some similar statute in this State, is a matter for the consideration of the Legislature.

There is error.

PER CURIAM. Judgment reversed.

SUSAN PACE *v.* P. P. PACE, Adm'r., &c., of MARY VADEN.

A devised as follows: "I give and bequeath to my executor, &c., in trust for the use and support, &c, all my stock, &c.; and none of the above named money or property to be subject to the disposal or debts of the said, &c.: *Held*, that as the property and money was not limited over in case of disposal, the prohibition against disposing of the same was void.

Where B agreed to act as agent and settle the estate of the testator without letters of administration, and C agreed to support D, provided she would assign her life interest in the notes and money bequeathed in trust for her by the testator, to certain parties mentioned in the will, and in pursuance of this agreement D did assign her interest: *Held*, that as to B, the consideration was unlawful, and as to C, it was too vague and indefinite to support the assignment; and that D was entitled to an account of the notes and money from B, who after the agreement took out letters of administration.

(The cases of *Dick* v. *Pitchford*, 1 Dev. & Bat. Eq. 480; *Mebane* v. *Mebane*, 4 Ired. Eq. 131, cited and approved.

CIVIL ACTION, in the nature of a special proceeding, to recover a legacy, tried at the January (Special) Term, 1875, of the Superior Court of WAKE County, before his Honor, *Judge Henry.*

The suit is brought against the defendant as the representative of Mary Vaden deceased, to recover a legacy, to-wit: the interest on all the money of said Mary Vaden, during the lives of the plaintiff and her husband Willis Pace, and the life of the survivor of them—the said Willis being dead at the commencement of this action.

The defendant pleaded that the plaintiff had released and assigned the said legacy to the persons to whom the money was given by the said will after the death of the plaintiff and her husband. Those thus taking were seven in number, as will appear from the following copy of said Mary Vaden's will, to-wit:

"In the name of God, amen: I, Mary Vaden, of the State of North Carolina, Wake county, being of sound and perfect mind and memory, Bless be God for the same! do, this 13th day of May, in the year of our Lord, 1862, make and publish this, my last will and testament, in manner following:

After paying all my just debts: First, I give and bequeath to my executor or executors hereafter mentioned, and their survivors, the following property, viz.: All my lands now belonging to me—one tract adjoining Jesse Bunch and William Parrish, and one other tract adjoining Benjamin Marriott and others, containing two hundred acres, more or less, in trust for the use and better support of Willis Pace and his wife, Susan Pace, during their life, or the survivor of them during life. And at their death my will and desire is that all the above named land, (say two hundred acres,) be equally divided between Willis Pace's three sons, share and share alike—that is, I give and bequeath the said land to Sidney T. Pace, Presley P. Pace and Wesley W. Pace, to them and their heirs forever.

I give and bequeath to Mazra J. Pace, one feather bed, stead and furniture.

I give and bequeath to Ann E. Pace, one feather bed, stead and furniture.

I give and bequeath to Burline L. Pace, one feather bed, stead and furniture.

I give and bequeath to Sidney T. Pace, one feather bed, stead and furniture.

I give and bequeath one feather bed, stead and furniture, to W. W. Pace.

I give and bequeath to my executor or executors hereafter mentioned, and their survivors, in trust for the use and support of Willis Pace and his wife Susan Pace, during their natural lives, all my stock of horses, cattle and hogs, and all my household and kitchen furniture, and one gig and harness, one cart and wheels, one side and one man's saddle, and all my farming utensils; also all my money and notes, the interest of which, my will and desire is, may be applied to the support of the said

Willis Pace and wife, Susan Pace, during their lives; and none of the above named money and property to be subject to the disposal or debts of the said Willis or Susan Pace. And at the death of the said Willis Pace and wife, Susan Pace, or the survivor of them, my will and desire is, that his six daughters, viz.: Martha B. Bagwell, Phutha O. Bunch, Mary H. Pace, Mazra J. Pace, Anne E. Pace and Burline L. Pace, receive equal dividends, share and share alike, from my executor, all the money and notes then in hand, to them and their heirs forever. Also at the same time, my will and desire is, that the above named daughters, with the said Willis Pace's three sons, Sidney T. Pace, Presley P. Pace and Wesley W. Pace, making nine of them, receive, share and share alike, equal from my executor, all my stock of horses, cattle and hogs, household and kitchen furniture, and all other perishable estate, not above given away, to them and their heirs forever.

I do hereby nominate and appoint my friends Joseph Fowler, Jr., and Daniel Scarborough, executors to this my last will and testament.

In witness whereof," &c.

Issue being joined upon the pleadings in the Probate Court of Wake county, the case was carried up to the Superior Court for trial; and the following issues were submitted to a jury at the term before stated, to-wit:

(1.) Did Susan Pace execute a release of her interest in the estate of Mary Vaden, (except the land,) to those entitled according to the will?

(2.) Did Susan Pace sign an instrument relinquishing her interest in the estate of Mary Vaden, knowing at the time that she had an interest in the note and money of the estate?

(3.) Was the paper writing in question signed by Susan Pace; did she know its contents, and was it under seal?

It was in evidence that the plaintiff had executed and delivered a paper writing, purporting to be her relinquishment of her interest under the will of Mary Vaden, to the next kin

as named in said will, and that said paper writing had been lost.

Upon the question as to whether it was under seal, R. C. Badger, Esq., an attorney of the Court, was introduced as a witness, and testified, that said relinquishment or release had been exhibited to him as an attorney, by the defendant, and his counsel asked upon the effect; that he had advised him that the same was a valid release in law, of the legacy mentioned by the plaintiff to the parties aforesaid; but that he had no distinct recollection as to whether said paper was under seal or not. The counsel for the defendant then asked the witness whether he would have advised the defendant as aforesaid unless such relinquishment had been under seal. This question was objected to by the plaintiff, but admitted by the Court; and the witness stated that he would not so have advised had there not been a seal.

D. G. Fowle, Esq., another attorney of the Court, being sworn as a witness, stated that he had seen and had in his possession the paper writing, and had advised the defendant that it was a valid release, and that he would not have done so had it not been under seal.

It was in evidence that the executors under the will having renounced, P. P. Pace had agreed to act as agent to settle the estate; and that an agreement was drawn up and signed by all the parties authorizing him so to act. And that on the day of sale he refused to act further unless the plaintiff signed the release; and that all the parties signed the agreement above mentioned; that the paper was read over to plaintiff and she assented thereto, having previously executed and delivered it. It was in evidence also that W. W. Pace had agreed to support her, provided she executed the release.

The counsel for the plaintiff asked the Court to charge the jury that said instrument was not in law a release, but an attempted assignment of a chose in action. That in law no valid assignment could be made of such chose in action; and that the same could only be supported in equity when founded on a valuable consideration. In this case there was no evidence

of a valuable consideration, and they must find for theplaintiff. This prayer for instructions was refused by his Honor, and the plaintiff excepted.

Upon the issues submitted to them, the jury found:

1. That Susan Pace did execute a release of her interest in the estate of Mary Vaden, except the land, to those entitled under the will.

2. That Susan Pace did sign an instrument relinquishing her interest in said estate, knowing at the time that she had an interest in notes and money of said estate.

3. That the paper writing in question was signed by Susan Pace; that she knew its contents, and it was under seal.

Judgment was thereupon rendered against the plaintiff, who appealed.

Smith & Strong, Pace and *Lewis*, for appellant.
Fowle and *Bledsoe*, contra.

RODMAN, J. By will proved in 1863, one Mary Vaden gave to her executors certain personal chattels consisting of horses, furniture, &c., of small value, and also, all her money and notes, in trust for the support of Willis Pace, and of the plaintiff, Susan, his wife, for their lives and the life of the survivor. Willis Pace died soon thereafter, leaving the plaintiff surviving. The will continues: "And none of the above named money and property, to be subject to the disposal or debts of the said Willis or Susan Pace, and at the death of the said Willis and Susan, or the survivor of them, my will and desire is, (an immaterial repetition of words is here omitted,) that his six daughters, viz: Martha, &c., receive equal dividend, share and share alike, from my executor, all the money and notes then in hand to them and their heirs forever." The will then proceeds to give to the said daughters, and to the three sons of Willis, the horses, furniture, &c., after the death of Susan.

The executors appointed in the will renounced, and Presley P. Pace, the defendant, was appointed administrator with the

will annexed, in 1866 or 1867, and took possession of the property of the testatrix. The estate now in his hands consists mostly, or wholly, of a note for $750 or thereabouts. The complaint sets forth the above facts and prays for an account, &c.

The defendant resists an account, on the ground that the plaintiff released and assigned all her estate and interest under the will, (except in certain lands mentioned in it,) to the legatees in remainder. The answer, however, does not allege that there was any consideration for the release or assignment, or that they have ever made any claim under it.

The supposed assignment had been lost; but a jury found that such a writing had been executed. The right of the plaintiff to recover, turns on the validity and effect of this instrument.

Before considering that question, it will be convenient to dispose of a question of evidence which was raised upon the trial.

1. Badger and Fowle, two members of the bar to whom the assignment had been exhibited for the purpose of obtaining their opinions as to its effect, were permitted to testify against objection, that they did not remember whether or not the lost instrument had a seal, but they severally advised that it was valid, and thought they would not have given such advice, unless it had been given under seal. The jury found that the instrument was under seal. We do not know of any law which requires an assignment or surrender of an equitable estate in personal chattels, or in a chose in action, to be under seal. A seal to a contract at law, dispenses with proof of a consideration, but in equity it has no such effect.

The fact which the evidence tended to prove was an immaterial one, and as its admission could not prejudice the plaintiff, she is not entitled to a new trial whether it was in law competent or not.

2. The prohibition in the will of the disposal of their estates in the property, by the legatees for life, was void. It is settled

that by no form of words, can property be given to a man, or to another in trust for him, so that he shall not have a right to dispose of his estate in it, unless there be in the instrument of gift, a provision that upon an attempted alienation, it shall go over to some third person. *Dick* v. *Pitchford*, 1 D & B. Eq., 480. *Mebane* v. *Mebane*, 4 Ire. Eq., 131.

The plaintiff had the right to surrender or assign her estate.

3. The only remaining question is, did she do so by a valid and effectual conveyance? No doubt a person by a transaction *inter vivos* may *give* to another an equitable, as well as a legal estate, in property, without consideration, and if the conveyance be *executed*, so as to pass the estate, a Court of equity will support the title of the volunteer, and in the absence of fraud or imposition, will not permit the donor to revoke it, unless there be a clause reserving that right. 1 Story, Eq. Jur., s. 433, note 6, Id. s. 706, a. 973. *Kekewick* v. *Manning*, 1 De G. M. & G. 176, and cases cited in note.

We need not consider whether if a gift was intended in the present case it was so executed as to pass an absolute estate to the donors, because it is clear that a *gift* was not intended. The plaintiff certainly supposed that she was to receive a consideration, and that it was to her interest to execute the instrument. On this point the case reads as follows: "It was in evidence, that the executor under the will having renounced, P. P. Pace, had agreed to act as agent to settle the estate, and that an agreement was drawn up and signed by all the parties, authorizing (him) to do so, and that on the day of sale, he refused to act further, unless the plaintiff signed the release, and that all the parties signed the agreement above mentioned, and that the paper was read over to plaintiff and she assented thereto, having previously executed and delivered it. *It was in evidence, that W. W. Pace had agreed to support her, provided she executed the release.*" There was no issue submitted to the jury as to whether the plaintiff received a valuable consideration. The counsel for the plaintiff, however, requested the Court to instruct the jury, that the assignment was not

good unless founded on a valuable consideration, which his Honor refused to do: probably supposing, that a seal dispensed with the necessity of proof of a consideration. In this his Honor clearly erred.

Was there a sufficient consideration? The consideration divides itself into two parts:

1. The agreement by the defendant, P. P. Pace, to settle the estate as agent of the legatees, without taking out administration, which he agreed to do if plaintiff would execute the assignment. It was discovered afterwards, however, that he could not legally do this. Revised Code, chap. 46, sec. 14. It was contended for the plaintiff, that this part of the consideration was illegal and against public policy, and that where *a part of the consideration* is illegal, the contract founded thereon is void. Without considering whether that admitted doctrine would apply, when the intent to do the illegal act was never acted on, and was abandoned: it will suffice for the present purpose to say, that the agreement constituted no consideration for the assignment. It could not legally be, and was not in fact, acted on.

2. The second part of the supposed consideration was an agreement by W. W. Pace to support the plaintiff, provided she executed the release. Not only is this supposed agreement not stated in the answer, but that pleading does not set forth that there was any consideration for the release at all, and as a defence it is defective in that respect.

As the evidence respecting the promise to support the plaintiff received without objection, we will consider it as properly received. As stated in the evidence, it is extremely indefinite. Neither the time when, nor the circumstances under which, it was made appear with particularity. It is not *expressly* said that it was made directly to the plaintiff, or so as to bind W. W. Pace (who is no party to this proceeding). It does not appear for what length of time the support was to be given; or of what it was to consist—whether it was to include the usual comforts, or only the barest necessaries of life; or that it was

ever acted on, or that its performance was ever demanded or tendered.

If there be a valuable consideration for a contract, a Court of Equity will not refuse to enforce it merely on the ground that the consideration was inadequate, unless the inadequacy be so gross as to prove that fact alone or coupled with the other circumstances of the case, fraud and imposition. But still there must be a consideration substantially of value. Taking the promise in this case, to have been in the words stated in evidence, and giving the defendant the benefit of the fact of such promise as if it had been pleaded and found by the jury, we are of opinion that under the circumstances it was too vague and indefinite to amount to a substantial consideration. There are cases, no doubt, in which the uncertainty of the words of such a promise standing by themselves, may be supplied from the relations of the parties, or the circumstances under which it was made. They may sometimes fairly be construed as a promise to supporrt in the customary manner of living. But no circumstances appear here, which make that meaning the necessary one. It is difficult to conceive of any reason to induce W. W. Pace to promise to the plaintiff a support costing more than the interest of the fund she had in the estate, and it is equally difficult to conceive of any reason on him to make, or on her to receive the promise, if the support was to cost the equal of the interest. We can make the conduct of the parties intelligible, only by supposing that the ideas of both were that the support should be of *less* value than the interest of the fund, and that the deficiency of the consideration was to be made up by P. P. Pace, settling the estate as agent of the parties without an administration. In that case clearly the release was without a substantial consideration, and although no actual fraud is to be imputed to any one, yet it was executed under such circumstances of surprise and mistake that it ought not to be enforced.

PER CURIAM. The judgment below is reversed, and it is

declared that the plaintiff is entitled to the amount demanded, and the case is remanded in order that it may be taken. The plaintiff will recover costs in this Court.

Let this opinion be certified.

DAVID R. JACKSON *v.* G. T. EVANS, Adm'r.

In an action against an administrator, the testimony of a witness is not admissible to prove a transaction between the witness and the defendant's intestate, whereby certain bonds, the subject of this action, were assigned to the witness who assigned them to the plaintiff; although upon the cross examination, a question, explanatory of a statement made in his examination in chief, relative to such tranaction, had been asked the witness, and he had answered it.

(The case of *Gray* v. *Cooper*, 65 N. C. Rep. 183, cited, distinguished from this, and approved.)

CIVIL ACTION, tried before *Moore, J.*, at Spring Term, 1875, PITT Superior Court.

The plaintiff declared upon the following bonds:

"GREENVILLE, N. C., Feb. 1st, 1862.

$133.00.

For value received I promise to pay to A. & W. J. Evans or order, one hundred and thirty-three dollars, with interest.

Witness my hand and seal.

W. J. EVANS. [L. S.]

GREENVILLE, N. C., Aug. 4th, 1862.

$168.06.

For value received I promise to pay to A. & W. J. Evans or order, one hundred and sixty-eight dollars and six cents, with interest.

Witness my hand and seal.

W. J. EVANS. [L. S.]"

The defendant's intestate and Amos Evans were partners, under the firm name of A. & W. J. Evans. W. J. Evans, the defendant's intestate, died in the month of October, 1872. The plaintiff sues as the assignee of Amos Evans, the surviving partner of A. & W. J. Evans.

Amos Evans was introduced as a witness by the plaintiff and testified as follows: The copartnership is insolvent, there being now outstanding debts unpaid, and the business of the firm remains unsettled. The copartnership was insolvent at the death of W. J. Evans. He passed the notes to the plainttiff for value. The witness then offered to prove that he became the owner of the notes in the lifetime of W. J. Evans, and how he became the owner. To this evidence the defendant objected, and the Court sustained the objection.

Upon cross-examination the defendant's counsel asked the witness if the notes in suit were passed by him to the plaintiff in payment of a copartnership debt or an individual debt of his own? Witness answered that he passed them in payment of his individual debt.

On re-direct examination witness was permitted by the Court, after objection by the defendant, to testify that by an arrangement between himself and the defendant's intestate, the note became his individual property. To this evidence the defendant excepted.

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

J. E. Moore, with whom was *Gilliam & Pruden*, for appellants, insisted:

That the testimony is inadmissible. C. C. P.; Battle's Revisal, chap. 17, sec. 343.

Our case is distinguished from *Gray* v. *Cooper*, 65 N. C. Rep. 183. In that case the testimony was as to an independent and separate fact outside of and distinct from any transaction between the parties. Our case is a direct transaction between the parties.

No counsel *contra* in this Court.

SETTLE, J. It is clear that the witness, Amos Evans, could not, without violating section 343 of chapter 17, Battle's Revisal, be allowed to testify that by an arrangement between him and the defendant's intestate, the notes, which are the subject of this action, became his (witness's) individual property, unless the question asked by the defendant on the cross-examination of the witness opened the door for this evidence and made it admissible. The witness, who is the surviving partner of the firm of A. & W. J. Evans, had been permitted, without objection, to testify that the corpartnership was insolvent, that there were outstanding debts unpaid, that the copartnership was unsettled, and that it was insolvent at the death of his partner, W. J. Evans. In answer to a further question of the plaintiff, he testified "that he passed the notes to the plaintiff for value."

The plaintiff offered to prove further by this witness, "that he, witness, became the owner of the notes in the lifetime of W. J. Evans, the deceased partner, and how he became the owner." This, upon objection, was excluded.

Upon the cross-examination of the witness, the defendant asked him if the notes referred to were passed by him to the plaintiff in payment of a copartnership debt or an individual debt of his own. Witness answered that he passed them in payment of his individual debt.

On the re-direct examination of the witness, he was permitted by the Court, after objection by the defendant, to testify that by an arrangement between him, witness, and the defendant's intestate, the notes became his, witness's, individual property. His Honor was clearly right in excluding this evidence when first offered, and we cannot perceive that a question of the defendaut on the cross-examination, which only sought an explanation of a statement already made at the instance of the plaintiff, to wit, "that he had passed the notes to the plaintiff for value," could have the legal effect to render

all communications of the witness with his deceased partner competent. The question of the defendant did not introduce new matter. It only called for an explanation, on a single point, of matter already introduced by the plaintiff.

The position of the defendant, as the representative of a dead man, would indeed be embarrassing if he dare not open his mouth to test a single statement called out by his adversary lest he thereby open the door for all other statements.

How did the considerations which operated between the plaintiff and the witness, of which the intestate could know nothing, render arrangements and transactions between the witness and the intestate competent ?

In *Gray* v. *Cooper*, 65 N. C. Rep., 183, the defendant asked a question which the plaintiff could not have asked, and proved a new fact, as to which the plaintiff's witness became the witness of the defendant, and therefore the plaintiff was permitted to examine the witness in explanation of the new matter introduced by the defendant; but in this case, the question asked by the defendant was a legitimate one on the cross-examination of the witness in regard to matter introduced by the plaintiff.

The admission of improper testimony entitles the defendant to a *venire de novo.*

Let this be certified.

PER CURIAM. *Venire do novo.*

L. W. KEENER *v.* J. W. DEN.

The right to enforce the specific performance of a contract is vested exclusively in the Superior Court, sitting in term.

The Special Proceedings prescribed in chap. 84, Bat. Rev. for obtaining partition of land between tenants in common, or the sale thereof, when actual partition is impracticable, do not apply to a case where tenants in common have by contract agreed upon terms as to the manner and extent of the partition sought to be made.

SPECIAL PROCEEDING, begun in the Probate Court, and heard upon appeal before *Logan, J.*, at Spring Term 1874, LINCOLN Superior Court.

The plaintiff alleged that in October 1872, he purchased a tract of land sold under a decree of Court, and a deed was executed to him and the defendant as tenants in common.

On the 12th day of November, 1872, the plaintiff and defendant executed an agreement under seal, that the purchase should be a joint one, for the benefit of both parties and that each should pay one half the purchase money, which has been done. In the agreement it was stipulated that a division of said land was to be made according to certain specifications therein set forth. The defendant refuses to make partition according to the provisions of the agreement, which was filed as a part of the complaint but is not necessary here to be stated.

Upon this allegation of facts the plaintiff demanded that commissioners be appointed to partition said land in accordance with the agreement.

The defendant demurred to the complaint, and as ground for demurer alleged, that the Court had no jurisdiction. The Probate Court overruled the demurer and gave judgment for the plaintiff according to his complaint, and thereupon the defendant appealed to the Superior Court. At Spring Term 1874, the Superior Court overruled this decision, and thereupon the plaintiff appealed.

The case was brought up to this Court by *certiorari*, and decided at this term.

Smith & Strong and *Cobb*, for appellants.
J. F. Hoke and *Shaw*, contra.

SETTLE, J. No Court has the right to violate a contract, nor has the Clerk or Probate Judge the right to enforce the specific performance of a contract; that power is vested exclusively in the Superior Court, setting in term.

The special proceedings prescribed in Battle's Revisal, chap. 84, for obtaining the actual partition of land, between tenants in common, or the sale thereof when actual partition is impracticable, do not apply to a case where tenants in common have, by contract, agreed upon terms, as to the manner and extent of the partition, both for agricultural or mining interests, the location of the dividing fence, the establishment of the lines, the quantity of bottom and high land that each is to receive, and the mode of ascertaining and adjusting any inequality of value of the separate tracts.

In order to enforce such a contract resort must be had to an action for specific performance of which, as we have said, the Clerk has no jurisdiction.

The judgment of the Superior Court is affirmed.

PER CURIAM. Judgment affirmed.

STATE *v.* WM. H. HALL.

The removal of a criminal case from one county to another, upon the affidavit of the prisoner, lies within the discretion of the presiding Judge of the Court below; from the exercise of which discretion no appeal will generally lie.

(*State* v. *Hill et al.* 72 N. C. Rep. 345, cited and approved.)

INDICTMENT, murder, tried at the Spring Term, 1875, of the Superior Court of BUNCOMBE county, before his Honor, Judge *Henry*.

The following is the statement of the case made up and certified by his Honor, the Judge presiding.

The defendant, with his wife, Clara Hall, were indicted for the murder of A. J. Gillespie, their step father-in-law; the indictment being found at Fall Term, 1874, and on the motion of the prisoner, continued to Spring Term, 1875. At said term, on the motion of the prisoner's counsel, there was a severance, and separate trials ordered.

The prisoner, Wm. H. Hall, being upon trial, filed an affidavit for the removal of his case; and moved the Court to order the same. His Honor refused the motion. He then filed an affidavit for continuance, on account of the absence of a material witness, one Merritt Plemons. His Honor refused to continue, but upon the affidavit ordered a *capias ad testificandum* to issue for the witness, Plemons, who was subsequently brought into Court, but whom the prisoner declined to examine.

The evidence was circumstantial. The deceased being shot down at his door, in the night time, from the garden fence. There was much testimony offered showing threats, motives, tracks, hidden gun, ammunition, confessions, &c., many witnesses being introduced and examined. At the beginning of the trial, at the suggestion of prisoner's counsel, the witnesses were ordered out of the Court room, and separated from those being examined, and not to appear until called.

For the State, J. M. Alexander was examined in the course of the trial, was cross-examined and ordered to stand aside. Subsequently he was recalled by the State, to prove some fact overlooked in his first examination. After stating, that since his first examination in chief, he had been in the court room a few minutes only, his Honor allowed the examination to proceed. To this the prisoner objected, and excepted.

In the course of the argument, the prisoner's counsel read an old and a long case in the notes to Phillips' Evidence, vol. 3, an anonymous case of 1672, taken from the Gentleman's Magazine, 1762, and which details the *facts* purporting to be the evidence in the case of a person, who was arraigned in the reign of Queen Elizabeth for the murder of a man, &c., to the jury. The Court asked the counsel what was the object of reading that case to the jury? Counsel, in a blunt manner, replied, to comment on. His Honor then asked if he designed reading any more cases like that? The reply was, he did. There being no objection, the counsel proceeded.

When the argument was closed, the counsel for the prisoner handed to the Court the following instructions, to be read to the jury, viz:

(1.) If any of the established circumstances be wholly repugnant to the hypothesis of the State, the jury cannot convict, notwithstanding the degree and extent of the circumstances in other respects.

(2.) That circumstantial proof is not of a conclusive nature in respect to the hypothesis proposed, unless it also excludes every other inconsistent hypothesis; and when the evidence leaves a reasonable doubt as to which of several hypotheses is true, or merely establishes some probability in favor of our hypothesis, rather than another, such evidence cannot amount to proof, however great the probability might be.

(3.) It is essential that the circumstances should, to a moral certainty, actually exclude every hypothesis but the one proposed to be proved.

After stating the testimony, as delivered to the jury, his

Honor asked the counsel to "please read the instructions prayed for, (the writing being unintelligible,) and his Honor said: I can't read your handwriting well." The counsel did so, when the Court charged the law to be as stated, &c. In the charge, and in the comments on the law, his Honor charged, that the reading of the facts in circumstantial cases, was hardly proper, but not being objected to was permitted; that it was calculated to lead the minds of the jury away from the issues and facts of the particular case before them; that they (those read) were only the recitation of facts appearing in other cases, and in which mistakes had been made, and the only service that they could be to the jury, was to make them more careful to give the prisoner the benefit of any reasonable doubt; and the more cautious to see that the prisoner was not unjustly convicted. That the facts recited had nothing to do with the testimony deposed to in this case; that each and every case must be decided on its own merits, and according to the evidence, and that without any reference to the mistakes made in other cases. That life was full of error, and every thing human was liable to mistakes; and that the most correct thing we could do, was to act as best we could under the circumstances, having due and conscientious regard to the position we occupy, and the oath we had taken; and that after giving the prisoner the benefit of the reasonable doubt, and after a fair and a just consideration of all the circumstances, if they were fully satisfied, that he had killed Gillespie in the way and manner stated, it was their duty to bring in a verdict of "guilty."

Further, his Honor stated that the trial having occupied a long time, (five days,) he would for the benefit of the jury, sum up the testimony as delivered, and lay before them the theories and arguments of both sides—of the State and of the prisoners.

This his Honor proceeded to do, and asked, after getting through, if any thing had been overlooked, or not sufficiently and intelligibly stated. The counsel for the prisoner suggested that the line of argument in the prisoner's behalf had not been

so stated as to give him the full benefit of its reasoning and effect of the evidence, &c., and suggesting other propositions and arguments used by the defence; the same was fully recited by the Court and commented on. Again, his Honor asking if any thing, for or against the prisoner, had been overlooked in the charge of the Court, and both the State and the prisoner replying that there was not, submitted the case to the jury, again impressing upon them, the right of the prisoner to all reasonable doubts as to his guilt, &c.

The jury found a verdict of guilty. Motion for a new trial. Motion overruled. Judgment and appeal by the prisoner.

Busbee & Busbee and *McCloud*, for the prisoner.
Attorney General Hargrove and *Collins*, for the State.

READE, J. The only point made for the prisoner at this bar, was, whether his Honor below ought to have removed the case upon the affidavit filed.

The case of *State* v. *Hill, et al.*, 72 N. C. R. 345, is an express authority that the matter of removal of causes is under the discretion of the Judge presiding. The naked removal, or refusal to remove, nothing more appearing, is not appealable. We are not prepared to say that circumstances might not accompany a refusal to remove which might make it appealable,—as if, for instance, the presiding Judge should refuse on account of a supposed want of power, and so there may be other instances; but here nothing appears to show that the decision was influenced by any thing but the legitimate discretion of his Honor.

There is no error in the record. Let this be certified together with this opinion, to the end that there may be judgment and execution according to law.

PER CURIAM. Judgment affirmed.

STATE on the relation of JAMES A. BARNES *v.* WM. T. LEWIS.

Where A was appointed guardian of B by a County Court, of which at the time of his appointment he was an acting Justice: *Held*, that the fact that he was so acting, did not render nugatory his appointment, so as to discharge C, a surety on the guardian bond, from liability to the ward.

Where A signed a guardian bond as surety, and at the time of signing the same the name of B appeared in the body of the bond also as surety, though he had not signed the bond, and never did: *Held*, in an action against A as surety by the ward, evidence was not admissible to show that A was induced to sign the bond as surety, by the statement of C, the guardian, that the said B would also sign as surety.

(The cases of *State* v. *Pool*, 5 Ired. 105; *Brinegar v. Chaffin*, 3 Dev. 108; and *Hayes* v. *Askew*, 5 Jones 63, cited and approved.)

CIVIL ACTION, on a guardian bond, tried before *Moore*, *J.*, at Spring Term, 1874, EDGECOMBE Superior Court.

This action was brought against the defendant as surety on a bond executed by John F. Speight, as guardian of his relator the execution of the bond not being denied.

On the trial, the defendant proposed to prove by himself, that as an inducement to his execution of the bond, John F. Speight stated that one Jesse H. Powell would also sign the bond as surety, and upon that promise and understanding defendant agreed to sign the same as surety, and when he signed the same in the presence of the Court, the bond was filled up, and on the face thereof the name of Powell appeared as one of the sureties, and defendant had no knowledge that Powell did not sign the same as surety, until about four years ago.

The counsel for the relator objected to the admission of this evidence, and the Court sustained the objection, and defendant excepted.

It appeared from the evidence that John F. Speight, the guardian of the relator, and two other Justices, constituted the Court at the time of the appointment of Speight as guar-

dian, and the execution of the bond. The defendant insisted, that for that reason the appointment of the guardian and the bond was void.

The Court held that the defendant was liable and gave judgment for the plaintiff; thereupon the defendant appealed.

Battle & Son and *J. W. Johnston*, for appellant.
Howard & Perry, and *D. Battle*, contra.

RODMAN, J. The defendant is sued as surety for one Speight, on a bond given by Speight as guardian for the relator. He makes two defences:

1. When Speight was appointed guardian, the County Court was composed of himself and two other justices of the peace for the county of Edgecombe. In order to have made a Court, Speight must necessarily have taken a part in making the appointment. The argument is that the appointment was void, and that consequently the bond is void also.

There can be no doubt of the general proposition that no man is allowed to act as Judge in a matter in which he has an interest, except to make such formal orders as may be necessary in order to continue the case, or to send it to some other Court competent to try it. *Norfleet* v. ——, 72 N. C. Rep.; Freeman on Judgments, secs. 144, 148.

With that exception the judgments of a Judge who has an interest are said to be void.

But in all the cases cited to illustrate this proposition, which I have been able to find, the question has occurred between the original parties to the judgment, or their privies. Obviously the same reasons would not apply, or, at least, would not apply with equal force, when innocent third persons had acquired rights under the judgment.

But it is unnecessary to pursue the investigation of this subject on general principles. We consider that the liability of the defendant is established by the act of 1842, Revised Code, chap. 78, sec. 9, which enacts, in effect, that every bond

taken under the sanction of a Court of Record for the performance of any duty belonging to any office, &c., shall be valid, notwithstanding any irregularity or invalidity in the conferring of the office. *State* v. *Pool*, 5 Ire., 105.

Independently of this statute, the defendant is estopped to deny that Speight was rightfully appointed guardian of the relator. It is so recited in the bond, and it is established law that although a mere *general* recital in the body of a bond does not create an estoppel, yet a *particular* recital, that is, of such facts as were the inducement moving to the execution of the bond, does. *Hays* v. *Askew*, 5 Jones, 63; Bigelow on Estoppel, 295, 313 *Cutter* v. *Dickinson*, 8 Rik. 386; *Bruce* v. *United States*, 17 How, 437.

2. The defendant "proposed to prove by himself that the said John F. Speight, now dead, as an inducement to his signature of the bond as surety, stated that one Jesse H. Powell would also sign the bond as surety, and that upon that promise and understanding defendant agreed to sign the same as surety, and that when he signed the same in presence of the Court, the bond was filled up, and on the face thereof, the name of said Powell appeared as one of the sureties, and defendant had no knowledge that said Powell did not sign the same as surety, until about four years ago." The Court refused to hear the testimony, and defendant excepted.

The propriety of the rejection of this testimony depends entirely on its materiality. If the facts proposed to be proved, would have made a sufficient defence, either to the whole, or to any part of the relator's claim, the testimony was material, and should have been received. If however, it would not have been a defence, it was immaterial, and was properly rejected.

The authorities bearing more or less directly upon the question thus presented are numerous, and not always consistent, and I have not any where met with an attempt to classify them, and to extract the general rules which they establish. The task would be a laborious, and if fairly done, an useful

one. The members of this Court however have no time for such tasks. All that we shall undertake to do, will be to distinguish certain classes of cases from the present, and to state the grounds of our decision in the present case.

An official bond is presented to a person who is solicited to sign it as a surety, and the names of certain other persons are recited in the body of the bond, and appear signed to it, and the person solicited to sign, believes that their signatures are genuine, when, as afterwards appears, they are forged. The surety is not bound. *Luly* v. *The People*, 27 Ill. 173. *Chamberlin* v. *Beaver*, 3 Bush. (Ky.,) 561. But *contra*, *Bigelow* v. *Coonegys*, 5 Ohio, 256.

2. If it is agreed *between the parties* to an obligation that it shall not be valid unless executed by all of certain persons, it is not valid until so executed. Thus, generally expressed, the rule is unquestionable; but it is subject to be controlled; as for example, if it be afterwards delivered absolutely to the obligee by a part of the proposed obligors only. *State* v. *Peck*, 53 Maine, 284. And the older authorities are, that it cannot be delivered to the *obligee*, as an *escrow*.

In the case of an official bond taken under the authority of a Court, probably a notice *to the Court*, assented to by it, that a surety had signed the bond and left it with the clerk, (and *a fortiori* with another person,) to be delivered on condition only, would defeat a delivery before performance of the condition. It may be doubted whether notice to the clerk, who is not the agent of the Court for such purpose, and has no authority to assent to any such condition, would have any effect. But this question need not be discussed, as it will appear in the present case that no such notice was given to either the Court or its clerk.

3. If the delivery of an official bond made not to the officer authorized to receive it, but to the principal obligor, on the condition that it is not to be delivered until certain other persons named in the body of the bond, shall execute it, and the principal obligor nevertheless delivers it to the agent of the

obligee, without execution by such other persons, and without other notice of the condition than is to be implied from the names of such persons appearing in the body of it, the sureties who have signed are not bound. *Rawlins* v. *United States*, 4 Cranch, 219. This case has been several times questioned, and there are decisions opposed to it, on the ground that the obligee could not be bound by a condition of which he had no notice. But it may, perhaps, be supported, on the ground that the appearance in the body of the bond of the names of persons who had not signed, was of itself notice that the instrument was incomplete, and its delivery by the *principal obligor alone* was unauthorized. Had it been delivered by the sureties who signed, the case would have been different. *Sharp* v. *United States*, 4 Watts, 21, is to the like effect, with the difference, that in that case, the act of Congress under which the bond was given, required *two* sureties, which might help both to induce the one who signed to believe that it would not be taken without the signature of the other, and also to notify the receiving officer that it was incomplete.

Pepper v. *State*, 22 Ind., 399, may be referred to in this connexion, although as that volume of the Indiana Reports is not accessible to us, we can only refer to it.

To return to our case. The following entry appears of record in Edgecombe County Court, at November Term, 1856, at which the bond sued on was given: "John F. Speight is appointed guardian for James A. Barnes, (the relator,) and enters into bond in the sum of $15,000, with William T. Lewis, (the defendant,) as his surety."

It must be inferred from this that Speight never offered to the Court any other surety than the defendant. This the defendant might have known upon inquiry, and his ignorance of it proves at least some degree of negligence.

This record also establishes that the instrument was delivered by Speight and the defendant absolutely as their deed, without qualification or condition. If the defendant then intended that the delivery should be conditioned on Powell's

signature, a prudent caution, as well as fair dealing towards the ward, required him then to have stated such condition to the Court or at least to the Clerk. It may be doubted, as was said before, whether such a statement to the Clerk would have been effectual, as the Clerk is not authorized to receive *escrows*. But that question is immaterial, as the instrument in question was not so delivered. It is contended, however, that the fact that Powell's name as a surety appeared in the body of the bond, was of itself notice that the instrument was incomplete without his signature, and that the delivery was conditional. It will be seen that this proposition is not supported by the cases of *Paulins* v. *U. S.*, and *Sharp* v. *U. S.*, because in those cases the absolute delivery was not made by the surety, but by the principal alone, in the absence of and contrary to the instructions of the surety.

It is not supported by any case that has fallen under our notice. It may be admitted that the circumstance relied on is, ordinarily, and in the absence of any circumstances to control it, proof of notice that the instrument is at the time incomplete. But an absolute delivery as a deed by a party executing it is incompatible with a delivery on condition, and supersedes as to him any previous notice of incompleteness. It estops the party from any defence inconsistent with it. *Adams* v. *Burns*, 12 Mass., 139; *Cutter* v. *Whittemore*, 10 Mass., 442; *Scott* v. *Whipple*, 5 Greenl., 396; *Haskins* v. *Lombard*, 16 Me., 140; *State* v. *Peck*, 53 Me., 284; *Bigilow* v. *Cornegys*, 5 Ohio, 256.

The Clerk, upon the unqualified delivery to him of the bond, executed by all the persons whose execution was required by the order of the Court, might reasonably believe, that if an intention that Powell also should sign had ever existed, it had been abandoned. In this connection we refer to the judicious remarks of the Court in *Luly* v. *People*, 27 Ill. 173, in which the surety had been induced to sign, by the forgery of an antecedent name.

" By a fraud practiced on the defendant, by means of the

commission of a high crime, he was made to assume a different and greater liability than he intended, or supposed he was assuming. It is not like the case where the surety, when he signs the bond, is assured and made to believe that others will afterwards sign it. In that case he acts upon the simple assurance that another will do an act which he knows may be defeated or prevented by various accidents, *and he must therefore take the risk of such assurance being fulfilled.*"

As the case stands, the defendant confides in Speight; his condition that Powell also should sign, is communicated to Speight alone; he fails to use ordinary caution either to protect himself or to protect the relator. Clearly this was negligence. By his negligence, the defendant enabled Speight to become possessed of the *indicia* of a guardian, and to obtain into his possession the property of the relator, which he wastes, and then dies insolvent. No fraud is imputed to the defendant: but no principle of equity is better established than that where one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss, must sustain it.

This doctrine is not confined to negotiable securities, but is of general application, and it would seem to apply with especial force to the bonds of administrators and guardians.

There is no error in the judgment below.

PER CURIAM. Judgment affirmed.

HENRY A. BAKER *v.* WILLIAM G. JORDAN, and others.

Where A, a *feme* sole, engaged to be married to B, on the day before the marriage conveyed to C, without a valuable consideration, a lot, the only property she owned, without the knowledge or consent or B, her intended husband: *It was held*, that such conveyance was a fraud upon the marital rights of the husband, and therefore void.

CASE AGREED, heard before *Clarke, J.*, at Spring Term, 1874, WILSON Superior Court.

On the 10th day of September, 1872, the defendant, Catharine Baker, then Catharine Jordan, was seized in fee as tenant in common with one Eugene Jordan, of a lot in the town of Wilson, containing one acre, it being all the property owned by said Catharine.

On the 11th day of December, 1872, the defendant Catharine conveyed by deed, the consideration of which was love and affection, (as appears upon the face of said deed) her interest in said lot to Mittie S. Jordan, wife of W. G. Jordan and step-mother of said Catharine, with whom she was then living, without the knowledge or consent of the plaintiff, her then intended husband.

On the 12th day of December, 1872, after an engagement of some months, the plaintiff and defendant, Catharine, intermarried.

On the 27th day of January, 1873, the defendant, W. G. Jordan and wife Mittie S. Jordan and Eugene Jordan sold said lot to R. J. Taylor, for the sum of three thousand dollars, which was a fair price for the same.

The defendant, Taylor, knew at the time of the purchase, when the marriage of the plaintiff with the defendant, Catharine, was solemnized; and knew that the deed from Catharine to Mittie S. Jordan, was made on the day before said marriage, but had no knowledge or notice that the plaintiff did not know and consent to the previous conveyance from the said Catharine to Mittie S. Jordan, prior to the marriage.

If the Court shall be of opinion for the plaintiff, such judgment is to be entered as the Court shall be of opinion the plaintiff is entitled to, and for cost. Otherwise judgment is to be entered against plaintiff for cost.

It was adjudged by the Court: That the deed from Catharine Jordan to Mittie S. Jordan, made on the 11th day of December, 1872, be surrendered up for cancellation, and that the defendants, W. G. Jordan, Mittie S. Jordan and R. J. Taylor, reconvey to Catharine Baker her interest in the lot of land conveyed to Mittie S. Jordan by Catharine Jordan, on the 11th day of December, 1872, and that plaintiff recover costs of this action.

From this judgment the defendant, R. J. Taylor, appealed.

Moore & Gatling, for appellant.
Smith & Strong and *Clarke & Son*, contra.

PEARSON, C. J. The plaintiff marries a lady, whose only estate is a lot in the town of Wilson. In a short time he finds out that *on the day before the marriage* she had executed a deed of gift to her step-mother, conveying all of her interest in the lot. So instead of a bride with a fortune of $3,000 (the estimated value of the lot) he has a bride stripped of everything except her clothes.

Before 1868 this would have been declared to be "a bare faced fraud" upon his marital rights. But the new Constitution and the "marriage act," Bat Rev., chap. 69, make very great changes in respect to the rights of the husband; for instead of acquiring *jure mariti*, as by the common law, the property of his wife, and becoming liable as *pater familias* to support her and the children, he is treated *as an overseer* in respect to his wife's property, bound to account for profits received out of her estate if called upon as such overseer or *bailiff*, which is the milder word, to account and pay over within one year.

These radical changes of the common law, in respect to the relation of "*Baron* and *Feme*," call for great consideration on the part of the Courts. We will approach the subject with caution, and not go one inch beyond what it is necessary to decide, in order to dispose of the present case. Mr. Moore, who aided the Court by an elaborate argument, took the ground squarely that a husband, under the Constitution of 1868, and the marriage act to carry it into effect, acquires no right to his wife's estate or to the *use or profits thereof*, and is not to act as her bailiff without being subject to account: *ergo*, he cannot be defrauded by a conveyance made by her on the eve of the marriage without his knowledge.

We do not concur in this proposition. A husband is entitled since the Constitution of 1868, and the marriage act, to the society of the wife, is under an obligation to support her and the children, and for that purpose is entitled to her services, and to *contribution from the profits of her estate.* He has a right to live in his wife's house, and to ride her horse if she own one.

The plaintiff was surprised by the fact that his wife had been induced to give away all the estate she owned, and to which he with reason looked for aid in supporting her. He was deceived, and the question is, was he *defrauded* of any right to which he was entitled as husband? We think he was. The marriage act, Bat. Rev., chap. 69, sec. 17, authorizes a wife to make contracts changing her real and personal estate for her necessary personal expenses, or for the support of the family, &c." So the plaintiff had in legal contemplation a right to look to this lot as a source which would enable his wife to contribute to "her necessary personal expenses, and for the support of the family," and was not only deceived, but was *defrauded* by the secret conveyance made the day before the marriage.

The defendant, Taylor, knew of the fact that this conveyance was made on the day before the marriage. This, as the books say, was enough to put him "upon enquiry." If he had asked

of the plaintiff he would have received the information that the deed was executed without his knowledge, and that he would contest the right of Mr. Jordon to sell the lot.

No error.

PER CURIAM. Judgment affirmed.

N. A. JONES and wife, HARRIET JONES *v.* ABIJAH CARTER.

Since this act of 1848, a husband, as tenant by the curtesy initiate, is not empowered by law to dispose of his life estate in the lands of his wife, yet still as he is entitled to the rents and profits of the same, during the coverture, or until such time as the wife objects to such claims by him, by reason of her complete ownership, he can dispose thereof.

This was a CIVIL ACTION, to recover real estate, and damages for its occupancy, tried before his Honor, Judge *Henry*, at Fall Term, of FRANKLIN Court, upon the following case agreed:

(1.) The plaintiffs, N. A. Jones and Harriet, his wife, were married before the year A. D. 1848, and had issue born alive and are now living.

(2.) By deed dated the 13th of July, 1855, H. L. Perry, brother of the *feme* plaintiff, conveyed the land mentioned in the pleadings to his sister, the *feme* plaintiff. This deed was not proved until the 17th of March, 1873, and was registered on the 3d of the following June. The defendant had no knowledge of its existence till just before the institution of this action.

(3.) On the 13th day of May, 1859, the plaintiff, N. A. Jones, sold the said land, about eighty-five acres, to the defendant, Jno. Chamblee, for the sum of three hundred dollars, and made and delivered to him a deed therefor; and he, said defendant, has been in possession, receiving the rents and

profits of said land since the delivery of said deed. The *feme* plaintiff, Harriet, did not join her husband in the making and execution of the said deed to Chamblee.

Upon the foregoing facts, his Honor adjudged, ordered and decreed that the plaintiff Harriet Jones recover the said land, and that a writ of possession issue, &c. And further, that said plaintiiff is entitled to the rents and profits of said land from the date of the deed to said defendant, Chamblee, and that it be referred to the Clerk to state an account thereof, and report, &c., and that defendant pay costs.

From this judgment defendant appealed.

Battle & Son and *Davis*, for appellant.
Batchelor and *Lewis*, contra.

PEARSON, C. J. At common law a husband, after the birth of issue, became entitled to an estate for his life as tenant by the curtesy initiate, and had a right to convey his estate.

This land was acquired by the wife after the act of 1848. Admit that the effect of that act is to deprive the husband of his right to acquire an estate for life as tenant by the curtesy initiate, which is the only mode by which the provision that he shall not dispose of the land for his life can be carried into effect; still the husband was entitled to the rents and profits during the coverture, until such time as the wife objected to it and set up her claim by reason of her ownership of the land. This she did not do until the commencement of this action, May 5th, 1873. It follows that one who purchased from the husband has a right to recover the price paid for the supposed life estate of the husband under his warranty, so as to recover rents and profits up to the commencement of the action. The judgment below will be modified so as to allow Mrs. Jones, the *feme* plaintiff, damages for the rents and profits only from and after 5th of May, 1873.

This opinion will be certified.

PER CURIAM. Judgment accordingly.

STATE v. THOMAS GLADDEN.

Upon an indictment for murder, it was in evidence that witness heard the deceased say to the prisoner, "Don't you follow me," and deceased then started down the road, and the prisoner replied "Damn you, I will follow you," and picking up a stick started in the direction of the deceased. The witness did not look any farther, but very soon after heard a blow, and looking in the direction of the sound saw the deceased staggering backward. A fence rail was leaning one end against the breast of the deceased, the other on the ground, and as he fell on his back the rail fell across his breast. Deceased was at the time two or three yards from the fence which was built of rails: *Held*, that it was error to charge the jury that there was no evidence of a fight.

INDICTMENT, for Murder, tried before *Schenck, J.*, at Spring Term, 1875, CLEAVELAND Superior Court.

One William Blanton, a witness for the State, testified that in July last he met with the prisoner on the road and went with him to a grocery kept by one Morrison, a woman, about three miles east of Shelby, on the public road. At the grocery they found Calvin Rippy, the deceased, who was "tight." The deceased invited the prisoner to drink, and he refused to do so, saying that "when he drank he wanted a half pint." The deceased was dancing around the house, and Mrs. Morrison ordered him out. The deceased was a very deaf man, and witness thinks did not hear the order. Mrs. Morrison tried to put him out, and called on the prisoner to assist her, and the two together got him out. The prisoner and the deceased then commenced quarrelling, each swearing that he was the "best man." They went off a short distance to a stable and continued quarrelling, witness could not remember what about. Witness was out at the stable, too, and at last heard the deceased say to the prisoner, "Don't you follow me," and deceased started down the road. The prisoner replied, "D—n you, I will follow you." He then picked up a seasoned oak stick, struck it against the corner of the stable, and started in

the direction of the deceased, who was retreating. Witness did not look any farther, but in a very short time he heard a blow, and looking in the direction of the sound, he saw the deceased staggering backwards. A fence rail was leaning one end on the breast of deceased and the other end on the ground, and the rail fell across his breast as he fell on his back. The prisoner struck the deceased again as he fell, with the stick, (which was produced) and deceased died in a few minutes. The stick was about two and a half feet long and two and a half inches in diameter, of seasoned oak, and rough. It was admitted to be a deadly weapon.

Witness further testified that the deceased had gone twenty-five or thirty yards from where he started. He fell two or three yards from the fence, on the side of the road. The fence was a rail fence. Both licks were on the right side of the head. The deceased did not have his hand on the rail when witness looked and saw them. Witness thinks the prisoner took up the first stick he came to. He heard no conversation before the blow. Witness was "tight," but thinks he remembers all he saw. After the deceased fell, the prisoner walked back instantly to where witness was sitting, a distance of about twenty-five or thirty yards, and they had no conversation.

Prisoner's counsel then proposed to prove the declarations of the prisoner to the witness, when he came back. The counsel for the State objected, and the Court sustained the objection. To this ruling of his Honor, the prisoner excepted.

Isabella Morris testified that she kept a grocery. The deceased was there when the prisoner and Blanton came. About two hours before the homicide occurred, she heard the prisoner say "that the deceased had gone to his mother's house and acted the dog, and he intended to give him "the best he had in his shop." The prisoner also said that deceased had cursed his mother when no one was there but his mother and sister.

On cross-examination she stated that the deceased was "tolerable drunk," and was dancing around in the house, and said

"he was fifty-five years old, but was a longways the best man in the house." Witness and the prisoner put him out. The stable was about ten steps from the grocery. She did not think deceased heard the prisoner use the threats or speak of his going to the house of the prisoner's mother, as he was very deaf.

Sometime after the homicide she went out and saw the deceased. She saw blood in the middle of the road. She saw where the body had been dragged aside. The rail was then lying in the middle of the road, about four or five yards from the blood. She thought the rail was taken from the fence behind the stable, as one was missing there. That the rail was nearer her house than when it was on the fence. The rail was four or five steps nearer the stable, where deceased started from, than where the rail was missing from the fence. No rail was missing from the fence in the morning. All three of the men were drunk. The prisoner and Blanton bought a quart and drank freely of it. She thinks Blanton was drunkest of the three, and the deceased drunker than the prisoner. She saw the prisoner take up the stick, but he passed out of her sight as he went off with it down the road.

Dr. Andrews, a witness for the State testified that the wounds on the deceased consisted of several severe blows on the right side of the head and neck. There were three or four blows. The prisoner had lost his right arm, and was twenty-two or twenty-three years old. He is slender but stout. The deceased is about fifty-five or fifty-six years old, deaf. He was quarrelsome when drunk.

The prisoner's counsel then proposed to prove that the prisoner's mother's family only consisted of herself and daughter

The counsel for the State objected and the Court sustained the objection. To this ruling of his Honor the prisoner excepted.

In the argument, the counsel for the prisoner admitted the killing by the prisoner and that a deadly weapon was used and that the case was one of manslaughter.

The Court charged the jury:

"That as the killing with a deadly weapon was admitted by the prisoner it was his duty to prove to the satisfaction of the jury the facts on which he relied to mitigate the offence to manslaughter, or they must arise out of the State's testimony."

In response to instructions prayed by the counsel for the State, his Honor farther charged the jury:

"That if the prisoner pursued the deceased with a present purpose or design to kill or do him great bodily harm, and did kill him in pursuance of this design, it was murder, and it was immaterial in that view whether the prisoner was assaulted by the deceased or not.

That if the prisoner pursued the deceased with a deadly weapon, and the deceased had reasonable ground to believe that the prisoner was about to kill him or do him great bodily harm, the deceased had the right to defend himself with the rail, and this would not mitigate the case to manslaughter, if the prisoner killed the deceased in pursuance of the original purpose or design to kill the deceased or do him great bodily harm."

In response to the position taken by the counsel for the prisoner, in his argument, the Court charged the jury:

"That if the prisoner did not follow the deceased with the purpose or design to kill him and the deceased assaulted the prisoner with a rail, it was manslaughter, and that if both were willing to fight and they entered into a mutual combat, on a sudden quarrel, it would be manslaughter."

The Court then rehearsed the argument of the State's Attorney, who contended that the deceased was standing by the fence when the prisoner struck him and that he pulled the rail on himself as he fell. The theory of the defendant was that the deceased had taken the rail and advanced on the prisoner; and instructed the jury that these were questions for them to solve,—that the facts were for them, and they took the law from the Court.

After his Honor concluded his charge the counsel for the defence asked the following instructions in writing:

1. If the prisoner bore malice against the deceased, and they met by accident and a quarrel ensued, and a fight, whereupon the defendant killed the deceased with a deadly weapon, the rule referring the homicide to the previous malice did not apply.

The Court gave the charge, but told the jury they must be satisfied that there was a fight.

2. That if deceased struck or attempted to strike the prisoner, and the prisoner killed him as detailed, it was manslaughter. The Court declined the instruction, and told the jury that there was no evidence that the deceased struck or attempted to strike, the prisoner.

3. If the quarrel was sudden, and the defendant killed the deceased while the latter held in his hand a deadly weapon, it was but manslaughter, if done in the heat of passion.

The Court declined to charge as requested.

4. If the defendant and the deceased engaged in a fight mutually, and defendant killed the deceased with a deadly weapon it is but manslaughter, and that it does not matter which struck the first blow."

The Court stated that this charge had already been substantially given.

The jury returned a verdict of "guilty" in the manner and form as charged in the bill of indictment.

Counsel for the prisoner then moved for a new trial. The motion was overruled by the Court, and the prisonor then moved in arrest of judgment, because the indictment did not charge that the stick was a deadly weapon. Motion overruled by the Court, and sentence pronounced, whereupon the prisoner appealed.

Hoke, for the prisoner.

Attorney General Hargrove, for the State.

PEARSON, C. J. We do not concur in the view of this case taken by his Honor. We will not advert to his opinion as to the presumption of malice, from the use of a weapon likely to kill, or lay any stress upon the distinction that might be taken between the use of a gun or pistol, and the use of stick or a stone. *The one*, generally used as a means of offence without any positive *deadly* purpose. *The other*, always used with an *intent to kill.*

We might put our opinion on this ground: According to the view his Honor takes of it, "there is no evidence of *a fight.*" This depends upon what is meant by "*a fight.*" Is it necessary that both parties should give and take blows, or is it sufficient that both parties should voluntarily put their bodies in a position to give and take blows, and with that intent? To illustrate: Suppose Rippy had not been killed. Upon an indictment for an affray, would he not have been convicted? Two men go out to fight. One is knocked down on the "first pass," and that is the end of it. Are they not *both* guilty of an affray? That is, "a fight by mutual consent."

But passing all this by, we put our opinion on the ground, that his Honor told the jury, "there was no evidence that the deceased struck, or *attempted to strike*, the prisoner." Upon a consideration of the case, our conclusion is, that there was evidence tending to show, that Rippy *attempted* to strike the prisoner, and had committed an assault, which is defined in the books to mean "an *offer* or attempt to strike another." We have this case: The parties are "*tight*"—talk about manhood—get into a quarrel, and Rippy starts off saying, "Don't follow me." What he meant by these words, was a question for the jury. Was he begging off, or backing out from a fight? Or did he mean, "if you follow me there will be a fight"? This was a question for the jury. The position of the body, the rail, and the blows being on the right side of the head, the prisoner having lost his right arm, was evidence tending to show that Rippy, as soon as he saw that the prisoner was following him, jerked a rail off of the fence, and advanced to

meet him in combat. So then there was a sudden quarrel, a fighting by consent—no evidence of an unfair advantage—the parties take up such weapons as, in their haste, they are able to lay their hands on, and death ensues. Such, as it seems to us, was a view that the prisoner had a right to have presented to the jury. His Honor, after putting the case to the jury, as one where the prisoner pursued the deceased with a present purpose to kill him, and the deceased had a right to defend himself, ought to have presented the other view for their consideration, and instructed them, that if the killing was the result of a sudden quarrel and an affray growing out of it, and the challenge of the deceased, as understood by the prisoner, the law, out of indulgence to the passions of men, does not look upon it as a case of *cold, deliberate murder*, as when one lies in wait and kills of malice, but ascribes it to the *furor brevis*, sudden passion, excited by the quarrel, and the menace, "don't you follow me." He ought to have added, although *mere words* do not amount to legal provocation, yet words, followed up by the hostile announcement of a willingness to fight, and an affray instantly resulting therefrom without "cooling time"—no unfair advantage being taken—no blow from behind—but the parties facing each other and rushing to the conflict in deadly strife, relieved the case from the charge of deliberate murder, and put it under the mitigated offence of manslaughter, *i. e.* when one kills another in the heat of passion excited by legal provocation.

There is error.

PER CURIAM. *Venire de novo.*

JOHN L. HINTON *v.* B. F. WHITEHURST, Adm'r, and others.

Where partition had been made of land between the heirs at law who were entitled thereto by descent, and a part of the heirs had sold their shares and the creditors of the ancestor had instituted proceedings to subject the land to the payment of his debts, it having been decided that the plaintiffs had a right to subject the whole of the land to the payment of their debts: *It was held*, that the defendants who had not sold their land were not entitled to pay their rateable portions of the debt and retain their land discharged therefrom: *Held further*, that they were not entitled to have their land valued by commissioners to be appointed by the Court and to account for the value thereof, instead of having the land sold in the usual way: *Held further*, that an heir who had sold his land for more than his rateable share of the debt was not entitled to be discharged from liability upon payment of such rateable share.

This was a CIVIL ACTION, originally commenced to subject lands to the payment of debts, and heard now upon a motion to reform or modify the report of the referee, before his Honor, Judge *Eure*, at the Spring Term, 1875, of PASQUOTAN kSuperior Court.

This case was before the Court at January Term, 1873, and again at June Term, 1874. See 68 N. C. Rep. 316, and 71 N. C. Rep. 66, the report of which discloses all the facts in connection therewith. Upon the hearing below at last Spring Term, it was admitted that the entire share of Wm. T. Whitehurst in his father's (Davis Whitehurst) land was covered by the dower of his mother, who is still living, and that he had received no rents nor profits from said share; and he asked the Court to charge him with his *pro rata* part of the debt of the plaintiff; and upon his failure to pay upon a fixed time, to be named by the Court, then for the Court to order the sale of his interest in the land. He further asked, in case this should be refused, that the Court should appoint commissioners to value his interest in the land and permit him to have an opportunity to pay said valuation before a sale was ordered;

assigning as cause for this, that without one of these methods of sale, there could be no competition between the plaintiff and other bidders—the plaintiff's bid being already paid, and being the difference unpaid by the others upon the judgment. The Court refused both applications, upon the ground of a want of power so to order the sale.

The defendant, Jonathan Woods, then asked the Court to give judgment against him only for his *pro rata* part of the debt, assigning as the reason, that the Chief Justice, when this case was before the Court at January Term, 1873, in delivering the opinion of the Court, expressly declared that the husbands of the *femes*, whose land had been sold, and not re-invested for the *femes*, should only be charged with a *pro rata* part of the debt; and that the decision of the Court, as reported in 71 N. C. Rep. 66, expressly affirms the former, though it stated a different rule.

The defendants, Wm. T. Whitehurst and Jonathan Woods, then asked the Court to adjudge that the other defendants who had sold the land assigned to them in their own rights, and in the rights of their wives, should pay interest on the respective amounts for which they had sold, from time of sale to date; that the judgment should be in favor of the plaintiff; if not, then in favor of the defendants, Wm. T. Whitehurst and Jonathan Woods, as they would be required to pay a larger portion of this judgment than any of the other defendants, and the Court could, to some extent, equitably adjust and more nearly equalize between the defendants themselves the respective amounts they should pay. This the Court also refused, for want of power.

After argument, judgment was rendered for the plaintiff, at the same time apportioning among the defendants the several amounts in which they were liable.

To this judgment the following exceptions were filed in the Court below, by *Martin*, attorney for the defendants, to wit:

1. The plaintiff, Hinton, by failing to bring his suit until after the expiration of *two* years from the qualification of the

defendant, B. F. Whitehurst, as administrator of Davis Whitehurst, and permitting him to turn over the personal estate to the next of kin of the intestate, was guilty of great *laches*, and should be the sufferer rather than those who were in no way in default.

2. The plaintiff, knowing his *laches*, relied upon the refunding bonds of the next of kin of intestate to protect him in case of the failure of the principal to pay his debt, and a necessity to resort to the surety (the intestate) to secure its payment, and having made his own selection, the failure of the security thus voluntarily accepted by him, should result in loss to him and not to innocent parties.

3. In N. C. Rep., vol. 68, page 320, the Chief Justice, in delivering the opinion of the Court in this same cause, uses this language: "In respect to the shares of the *femes covert*, that have been converted by sale, the husbands are chargeable with a *pro rata* contribution, unless the purchase money is secured for the separate use of the *feme covert*, in which event the fund would be charged." This decision is affirmed by Justice Rodman in the same cause, N. C. Rep., vol. 71, p. 66.

4. The main object of the decision of the Court in the cause as reported in N. C. Rep., vol. 71, page 66, was to direct the Court below to have the value of the land unsold ascertained, and although Justice Rodman does say that the land is to be sold to ascertain its values, it is submitted that it was not intended to bind the Court below to that *mode*, and no other, and that the Court being required to ascertain the value of the land, could do that in any equitable and fair mode that might be suggested, it is submitted that the mode suggested by the defendant, W. I. Whitehurst, is a fair mode of ascertaining the value of the land unsold, and could have been adopted by the Court.

5. The Court could and ought to have required by its judgment, that the defendants who had sold their lands for less than their *pro rata* portion of the debt of plaintiff, should pay interest on the same from date of sale, if not, to the plaintiff,

then to the other defendants, who are required to pay more than a *pro rata* part of the plaintiff.

The defendants, Wm. T. Whitehurst and Jonathan Wood, appealed.

No counsel for appellants in this Court.

Smith & Strong, contra, argued:

I. The points presented in appellant's exceptions have been passed on and decided on the two former occasions when this case was in this Court, reported in 68 N. C. Rep., 320 and 71 N. C. Rep., 66, except perhaps that relating to a valuation instead of a sale. And it is a universal rule in such case to ascertain value by sale.

II. The principle, on which the former adjudications rest, is the right to have his debt paid out of the *debtor's property* before any part can be held by his heirs. In this regard the plaintiff's rights are not affected by partition among the tenants in common. His desire is to have his debt paid out of the debtor's property, and the *pro rata* apportionment is proper only when each share is adequate to pay its part of the debt, and the creditor is not prejudiced thereby. In such case the *equities inter partes* of defendants are adjusted, consistently with the creditor's rights.

III. The plaintiff cannot be delayed nor injured by the allegation as to the proper mode of distributing the common burdens among the defendants.

IV. The judgment appealed from is in strict accordance with the opinion and judgment of this Court.

READE, J. This case has been twice before this Court heretofore—68 N. C. Rep. and 71 N. C. Rep.

It is now before us upon the following points:

1. There having been partition of the land among the defendants as heirs at law, some of whom have sold and some of whom have retained their shares; and it having been decided that the plaintiff creditor has the right to subject the land

which has not been sold, and the proceeds of what has been sold, to the satisfaction of his demand, one of the defendants who has not sold, asks that he may be permitted to pay his ratable part of the debt, and retain his land.

That cannot be allowed; because, as has been decided, the creditor has the right to subject the land itself. And if that defendant has more than a ratable part of the land, the whole value of that part of the land must be applied to the debt, if necessary.

2. The same defendant asks, that if he must account for the whole value of his share of the land, and not for his ratable part of the debt, his share of the land may be *valued* by a commission to be appointed by the Court, and to be allowed to account for the *value*, instead of having the land sold in the usual way at auction.

The reason which he gives for that request, shows that it ought not to be granted, to-wit: That the creditor will make the land sell for more than he, the defendant, is willing or able to give. While the interests of the defendant are not to be capriciously interferred with, yet the interests of the creditor are paramount, and he is entitled to the usual process for realizing the best price for the land—which is a sale to the highest bidder. If the sum which the defendant offers to pay would satisfy the debt, then of course there would be no necessity for a sale, and it would not be allowed.

3. Another of the defendants, who has sold his share of the land for more than his ratable part of the debt, asks that he be required to pay only his ratable part of the debt.

It has been already substantially answered, that that cannot be allowed. Just as the land would have been liable if he had not sold, so the proceeds of sale are liable to the full amount. The proceeds represent the land.

4. A defendant who has received no rents or other profits, and whose share of land is liable, asks that other defendants who have received rents or interest or other profits, may be compelled to account for such profits, to the relief of his land.

It was decided when the case was here before, that that could not be done in favor of the plaintiff creditor, because he does not ask it in his complaint. How it may be as among the defendants themselves, the case as presented does not enable us to determine. It is a principle in equity, that where several are liable in common, "equality is equity;" but then the defendants have already had *equality of partition*, and whether that does not satisfy all equities among them is worthy of consideration.

In what we have said, it is assumed that the whole of the land unsold, and the whole proceeds of what has been sold, are required to pay the debt.

There is no error. This will be certified.

PER CURIAM. Judgment affirmed.

CHARLES C. PRICE and others *v.* H. C. ECCLES.

Where in an action for an account the defendant in his answer admitted a partnership, but in avoidance of a general account pleaded a full settlement as to matters prior to a certain date except certain debts due to and from the partnership which were thereafter to be accounted for by the defendant: *Held*, that as under the provisions of C. C. P., sec. 127, the settlement must be taken as denied, it was error to grant an order of reference to state an account before trying the issue raised by the pleadings as to the settlement.

CIVIL ACTION, for an account, tried before *Wilson, J.*, at Fall Term, 1874, ROWAN Superior Court.

The plaintiffs moved for an order of reference, which was allowed as to certain notes and accounts admitted by the defendant to have been left in his possession, on a settlement with the plaintiffs, and refused as to a general account. All other facts necessary to an understanding of the case, as decided

in this Court, are stated in the opinion of Justice RODMAN.

From so much of the above order as refuses a general account the plaintiffs appealed.

Bailey, for appellant.
Barringer, contra.

RODMAN, J. The complaint alleges a partnership between the plaintiffs and defendant, which has expired by its own limitation, and that defendant received the partnership assets and has not accounted, and prays an account. Of course, on this statement the plaintiffs are entitled to the decree prayed for.

The answer admits the partnership, but in avoidance of an account of matters prior to 31st of December, 1872, sets up a full settlement on that day, with the exception of certain debts and accounts due to and from the partnership, which were thereafter to be accounted for by the defendant.

Sec. 127, C. C. P., so far as is pertinent to the present question, reads as follows: "But the allegation of new matter in the answer, not relating to the counter-claim, or of new matter in reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require."

If the alleged settlement had been admitted or established, the question which it seems was intended to be presented by the appeal, would arise, namely, whether the plaintiffs were entitled to go behind that settlement into an investigation of the accounts prior to it. But as the settlement is denied—which seems to have escaped the attention of the Judge below—no such question can be presented until the issue upon it made by the answer, and by the replication thereto, which the Code assumes, shall be determined. The Judge, in his judgment, assumes the fact of the settlement as pleaded, in which he was clearly in error.

As to the effect of a settlement, such as that pleaded in the answer, if it shall be established, we would not be justified in

expressing any opinion until the question shall be presented to us. All we can do is to say that the Judge erred in his judgment.

Judgment reversed, and case remanded to be proceeded in, &c. Let this opinion be certified.

PER CURIAM. Judgment reversed.

E. C. YELLOWLY *v.* THE COMMISSIONERS OF PITT COUNTY.

All bonds, bills, notes and bills of exchange, and liquidated and settled accounts bear interest from the time they become due, provided such liquidated and settled accounts are signed by the debtor unless it be especially expressed that interest is not to accrue until a time mentioned in the writings or securities. Therefore, where A brought an action upon an order upon a County Treasurer, signed by the Chairman of the Board of County Commissioners: *Held*, that he was entitled to recover interest upon the amount of the order from the time of demand of payment.

CIVIL ACTION, tried before *Moore, J.*, at Spring Term, 1875, PITT Superior Court.

The plaintiff brought an action upon an order issued by the Board of Commissioners in 1870, in these words and figures to-wit:

No. 39. "GREENVILLE, Oct, 27th, 1870.

Treasurer of Pitt county pay to E. C. Yellowley or order six hundred and thirty dollars and sixty-nine cents out of the taxes of 1870, when collected.

By order of the Board of County Commissioners.

W. G. LITTLE, *Chairman.*

W. A. CHERRY, *Clerk.*

The plaintiff demanded the payment of the order and interest thereupon. The defendant admitted that the amount of the order was due, but denied that the plaintiff was entitled to interest upon the amount.

It was in evidence that prior to the 13th of October, 1868, the plaintiff held several small claims against the county, contracted during the existence of the county court. On the 13th day of October, 1868, he presented these claims to the Board of Commissioners to be audited, and in auditing the same the Board of Commissioners added the interest on his claims and gave him an order for the amount of principal and interest, which order was for the same amount, and similar in form, to the one sued upon. On the 27th day of October, 1870, he surrendered that order and received from the Board of Commissioners the order upon which this action is brought, nothing being said about interest. The plaintiff demanded payment of the County Treasurer in the Fall of 1870.

It was also in evidence that prior to 1873, the County Treasurer paid interest on such county orders, whenever it was demanded, but generally no interest was demanded. Since the Fall of 1873, no interest has been paid to any one in consequence of an order of the Board of Commissioners. In a few instances the Board of Commissioners in issuing county orders have added interest to the date of issue, and in a few instances the orders were so written as to bear interest.

The answer of the defendant alleged that the defendant was not liable for interest unless it was expressed upon the face of the order, and that when it was intended for interest to be paid, it was so expressed.

The following issues were submitted to the jury :

1. Was there any express contract at the time of issuing the order sued upon, that interest was to be paid upon the said order ?

2. Was it the custom of the county to pay interest on county orders, at the time the contract sued upon was made, unless it was so expressed in the face of the order?

3. When was demand made for payment of the order sued upon?

The jury rendered a verdict in favor of the plaintiff, finding in response to the issues:

1. That there was no express contract at the time of issuing the order that interest was to be paid upon the same.

2. That at the time the contract sued on was made it was the custom of the county to pay interest on county orders if demanded, although it was not so expressed on the face of the order.

3. That demand was made for the payment of the order, in the Fall of 1870.

His Honor gave judgment for the principal and refused judgment for the interest on the order, and thereupon the plaintiff appealed.

D. M. Carter, *Mullen & Moore*, and *Gilliam & Pruden*, for appellant.

Fowle, *Batchelor* and *J. E. Moore*, contra.

READE, J. The statute provides that "all bonds, bills, notes, bills of exchange, liquidated and settled accounts, shall bear interest from the time they become due; provided such liquidated and settled accounts be signed by the debtor, unless it be specially expressed that interest is not to accrue until a time mentioned in the said writings and securities." Bat. Rev., ch. 10, sec. 4.

The plaintiff's claim is evidently such a security; it is not expressed in the writing that interest is *not* to be paid until a future time; and therefore it bears interest from the time of *demand* upon the county treasurer, as we think it just to hold as against the *county;* as the treasurer is not presumed to know of the claim until presented to him for payment, and as it was the duty of the plaintiff to present it, but interest from the *date* of the writing, if it were against an individual. It is insisted, however, that a *county* ought not to pay interest.

We see no reason for this. A county, like an individual, may enter into contracts and sue and be sued. And if there is any difference between an individual and a county, it would seem to be the greater obligation on a county to keep its faith. The reason most urged why this should not be, is the alleged fact, that persons dealing with the county do not expect prompt payment, and therefore they get a higher price, which stands in the place of interest; so that, in effect, they take interest in advance. If such is the fact, it is a strong reason why the county should change its custom; for there certainly are cases in which a county pays promptly; and if in every case interest is taken in advance by way of a higher price than in a case of prompt payment, the advanced price is a total loss to the county. Prompt payment or interest, as damages, is the just rule.

We have already said that, as against a county, interest would run from the date of the demand. The jury in this case do not find the precise date of the demand, but say that it was "in the *fall* of 1870." The order is dated 27th October, 1870. So the demand must have been about, and probably was, just the same date of the order. And we assume it to have been the same. The Clerk of the Court will calculate interest from the date of the order, and there will be judgment here for principal and interest.

The plaintiff is not entitled to back interest prior to the order. Admit that there was back interest which he might have claimed; still we think that it must be understood that the order embraced all that was due at its date.

There will be judgment here for the plaintiff for the principal sum of the order, with interest from its date, and for cost.

PER CURIAM. Judgment accordingly.

E. P. COVINGTON, Guardian of H. B. COVINGTON and others *v.* ELIZA J. COVINGTON.

Where in a special proceeding for partition issues of fact were raised by the pleadings: *It was held* to be error to refuse a motion to submit the issues so raised to a jury for decision.

PETITION FOR PARTITION, heard before *Buxton, J.*, at Spring Term, 1875, RICHMOND Superior Court.

The petition alleged that the plaintiff was the guardian of H. B. Covington and John P. Covington, and that his wards are tenants in common with Virginia Covington, of a tract or parcel of land in the town of Rockingham known as the John P. Covington Store house and lot, and now occupied by Covington, Everett & Co. Said lot descended to the wards of the plaintiff and their co-tenants in common from John P. Covington, deceased, as his heirs at law. The defendant, Eliza J. Covington, is the widow of the said John P. Covington, deceased, and is entitled to dower in said lot. The said Eliza is a non-resident of this State. Actual partition cannot be made without injury to the interests of the parties interested in the same.

The complaint prayed that the said land might be sold, and that the value of an annuity of six per cent. on one-third of the nett proceeds paid to the defendant during her life, and the remainder be paid to the tenants in common, each one-third part in severalty.

Service of summons was duly made by publication, and the defendant failing to appear, it was ordered by the Court that the land be sold for cash, in accordance with an affidavit filed by the plaintiff that it was for the interest of the parties concerned that it should be sold for cash.

In accordance with the order of Court directing the sale, the land was sold, and Covington, Everett & Co., became the purchasers at $3,500.

Afterwards the report of the Commissioner for the sale of the land was confirmed, and it was decreed that $756.50 be

paid to the defendant as an annuity during her life, in lieu of her dower in said land.

On the 27th of February, 1873, an affidavit was filed in the cause by E. P. Covington, for himself, as guardian of John P. Covington, and W. J. Everett for Covington, Everett & Co., alleging among other things that "on the 6th day of July, 1872, D. Stewart (Commissioner) offered said property for sale when and where Covington, Everett & Co., became the last and highest bidders in the sum of thirty-five hundred dollars, and complied with the terms of sale by paying the purchase money. That said sale was confirmed on the 25th day of July, 1872, by the Probate Court of said county, and approved 5th day of August, 1872, by Hon. R. P. Buxton, Judge of the 5th District, &c., and that in August, 1872, D. Stewart, Commissioner as aforesaid, executed a deed to Covington, Everett & Co., conveying all the interest of John P. Covington, dec'd., in and to said lot. That said lot was sold and bought, all parties believing that the same was the sole and entire property of the heirs-at law of John P. Covington, deceased, and that his widow was entitled to dower in the whole of said lot, and that the purchasers believed they were getting title in fee to the whole of said lot. That since the making of said deed to Covington Everett & Co., and within twelve months since said sale was confirmed, they have discovered that one undivided one-half of said lot belongs to E. P. Covington, J. W. Covington, Thomas Covington, William Covington, Mary A. Bostick and Nancy W. Ellerbee, wife of M. Ellerbee, as heirs-at-law of W. L. Covington, deceased, and that the heirs-at-law of John P. Covington, deceased, owned but one undivided half of said lot, notwithstanding the whole lot was sold as belonging to them. That the purchasers were deceived and mistaken with regard to the interest in said property of John P. Covington's heirs-at-law. That E. J. Covington is not a resident of this State. That H. B. Covington is not a resident of this State. Wherefore these affiants pray that a notice may issue to Alexander Stewart and wife Virginia Stewart, formerly Vir-

ginia Covington, notifying them to appear before the Clerk of the Superior Court of Richmond county, at his office in Rockingham, on Saturday, the third day of May, 1873, and that publication be made for E. J. Covington and H. B. Covington, non-residents, for six successive weeks in the Pee Dee *Courier*, a newspaper published in the town of Rockingham, notifying them to be and appear before said Clerk at said time and place, and show cause why the purchase money should not be refunded, and the aforesaid heirs at-law be made parties to the petition for sale of said lot of land, and such other proceedings had as will protect the rights of the purchasers of said lot of land, and all parties having an interest therein.

The defendants, Alexander Stewart and Virginia Stewart, having been summoned in pursuance of the above motion, filed an answer, in which, among other things, they alleged, upon information and belief, that the firm of Covington, Everett & Co. knew when they purchased said property that there was no deed recorded in the office of the Register of Deeds of the county of Richmond, which conveyed, or purported to convey the land in question to W. L. Covington and John P. Covington, or either of them. And they believe, further, that the said firm, or some one or more of the members thereof, did know the existence of what purports to be a deed from George S. Hubbard to W. L. and J. P. Covington, made some time in the year 1839, upon an alleged recent discovery of which the said parties and others, the heirs at-law of W. L. Covington, base their claim for the relief demanded in the petition;

That they are informed and believe that the firm of Covington, Everett & Co. consists of the following persons, to-wit: Edwin P. Covington, John W. Covington, who are the sons of William L. Covington, deceased, William J. Everett and Stephen W. Webb; Edwin P. Covington is the executor of William L. Covington, and is also guardian of John P. Covington, and was guardian of H. B. Covington and Virginia Covington, now Virginia Stewart, one of your affiants;

They are informed and believe that John P. Covington and those who claim under him, have been in the sole enjoyment and possession of the property in dispute for a great number of years, to wit, over twenty years, without any claim from William L. Covington, or any one claiming under him, who are under no disability to assert their claim, if any existed. During this time John P. Covington, and those claiming under him, were in the sole pernancy of the profits of said land and the rents thereof, without any claim to a participation therein, by the said William L. Covington or those who claim under him; That Edwin P. Covington himself, for several years before the year 1862, as tenant of said land to the heirs of John P. Covington, paid rent therefor to the guardian of said minors and to the agent of the widow; that John W. Leak & Co., of which firm Edwin P. Covington was a partner, also paid rent for the said land to the said guardian and agent. Edwin P. Covington, guardian of the minor heirs of John P. Covington, in his account made to the Probate Court, May 10th, 1872, charged himself with rents received from the property in dispute. Many years ago, W. L. Covington substantially disclaimed any interest or title in and to said land, and in pursuance of what the affiants believe to have been a mutual understanding of the parties as to their rights and interest in said property, John P. Covington rendered the same for taxation as his sole property as far back as the year 1842, and paid the taxes on the same during his life, and since his death the taxes have been paid by his representatives.

The affiants therefore prayed that they be discharged and recover costs, &c.

The plaintiff moved the Court to submit the issues raised by the pleadings to a jury for decision. The motion was overruled and the plaintiffs appealed.

J. D. Shaw, for appellants.

Steele & Walker and *Busbee & Busbee*, contra.

PEARSON, J. The answer or affidavit of Mrs. Virginia Stewart denies squarely the allegation that the heirs of William L. Covington are entitled to one-half the lot, and makes the issue that from the exclusive possession of her father during his lifetime, from 1839 to 1857, that the lot was commonly called "the John P. Covington store house;" and the "descent cast" and exclusive possession by his heirs without any claim or interruption, their title being concurred in and acted upon by E. P. Covington, their guardian, who is one of the heirs of William L. Covington, there is a presumption in law, in order to bar stale claims and to quiet titles, that William L. Covington released or abandoned or surrendered his estate in the land to John P. Covington, her ancestor. To these allegations the plaintiffs enter "similiter," that is, accept the issue. His Honor erred in refusing to have the issue tried by a jury, with instructions from him as to the effect of exclusive possession for a great number of years, in England twenty, in this State ten, and if actual ouster by one tenant in common, submitted to or acquiesced in for a great many years, the party being under no disability when the exclusive possession was taken. From this ruling of his Honor the plaintiffs appeal, and this is the only question presented to us. See *Day* v. *Howard* at this term.

In looking over the record it appears that E. P. Covington, who is the guardian of John P. Covington, Bascombe having arrived at age, and who is also one of the heirs at law of William L. Covington, makes use of the name of his ward in order to maintain a motion in the original proceeding, which is directly opposed to the interest of his ward, and works to his own benefit, both as one of the purchasers and as one of the heirs of William L. Covington, and he uses the name of his ward to set up a title adverse to him; and but for the fact that one of his wards, to-wit, Virginia, had married and was beyond his control, and now alleges the sole seizure of their father, by the management of a guardian, his wards would have been deprived of one-half of their patrimony. This is outside of the

matter, covered by the appeal, but we feel it to be our duty to call the attention of his Honor to this irregularity, apparent upon the face of the papers sent up to us, so that some other guardian may be appointed, and the heirs of John P. Covington be put on one side and the heirs of William L. Covington and the purchasers be put on the other, and the issue which involves the sole seizure of John P. Covington may be passed on by a jury, with special instructions, or else that the proceeding be dismissed, and the heirs of William L. Covington be left to assert their title by a petition for partition (See *Smith* v. *City of Newbern*, at this term,) met by a plea of "sole seizure," so as to present the issue directly, and in a way to be binding upon all persons concerned. We also feel it to be our duty to call the attention of his Honor to this anomaly in the proceeding—petition to sell land for partition made by the guardian of infant heirs—no cause set out why it was necessary to sell instead of renting out the "store house and lot." Guardian is a member of the firm that buys the house and lot, leaving the inference that his object was to divest the title of his wards and put it into the firm; and then to cap the climax, he sets up claim to one half of the house and lot for himself and the other heirs of William L. Covington.

These circumstances show that the pleadings, if they can be called such, should be amended so as to put all the heirs of John P. Covington as defendants, and the heirs of William L. Covington and the firm of Covington, Everett & Co., as plaintiffs, or petitioners.

We will call the attention of his Honor to another matter. The Judge of Probate, Dr. Stewart, orders the sale, and allows himself $55 for his services, and reports to the Judge who confirms his action. Does it conform to the orderly course of the Court to allow the Judge of Probate to act as commissioner in selling, &c.?

Let this opinion be certified.

PER CURIAM. Judgment accordingly.

HENRY WILLIAMS *v.* C. B. HASSELL, Adm'r., and others.

A devised all of his estate, both real and personal, to his children, in equal portions, requiring his executor to take from each legatee only his or her individual receipt, or the receipt of the husband or guardian of his daughters. The respective shares of the children were to be received, used and enjoyed by them during their natural lives respectively, and upon the death of any one of them, all the property including the principal money of any bonds to which such child was entitled, was devised to the living issue of such child absolutely and forever. The testator left him surviving three children, B. C, and D; B is still living and has five children, C is still living and has two children. The testator contracted for the purchase of a tract of land, and since his death the executor paid for and obtained a title to the same, to be made directly to his children. In an action brought by B against the surviving children of the testator, and the children of the deceased children of the testator, and others entitled in remainder: *It was held:*

1. That the land referred to went to the devisees as real estate.
2. That the children of the testator took only a life estate in the land, and that the children of B who survives him take his share in remainder.
3. That as those who are to take in remainder are not yet ascertained, it was error to order a sale for the purpose of making partition.

CIVIL ACTION, for partition, tried before *Moore, J.*, at Spring Term, 1875, MARTIN Superior Court.

The following are the facts in the case:

Henry Williams died in Martin county in 1860, leaving a will which was duly admitted to probate, and J. R. Stubbs, the executor named therein, qualified and assumed his duties as such. At the time of his death Henry Williams was domiciled in the county of Martin.

The testator left him surviving Henry Williams, the plaintiff, Annabella, wife of J. D. Young, defendant, and Mary, (now dead,) wife of J. R. Stubbs, his only children and general legatees.

Mary Stubbs died intestate in 1861, leaving the defendants, Henry W. and Jesse Stubbs, her only children and heirs-at-

law. J. R. Stubbs died intestate in 1870, leaving the estate of the testator unsettled, and the defendant was appointed administrator *de bonis non.*

The defendants, Laura E., Harry, W. K., Maria A., and Alfred A. Williams, are infant children of the plaintiff, Henry Williams, and the defendants, Eliza W. and Samuel H. Young, are children of J. D. and Annabella Young, and the defendant, C. B. Hassell, is the administrator *de bonis non* of the testator.

Prior to his death, the testator had contracted to purchase from B. A. Capehart and his wife, Maria A., a tract of land in Washington county known as "Woodlawn," but died without paying for or obtaining title to the same, and the executor paid the purchase money therefor out of the personal estate of the testator and procured title to be made directly to the children of testator, Henry Williams, Annabella Young and Mary Stubbs.

The testator devised all of his estate, both real and personal, (after some special legacies, which have been paid,) to his said children in equal portions, requiring the executor to take from each legatee only his or her individual receipt, or the receipt of the guardian or husband of the daughters.

By the 8th section of the will, the respective shares of his children were to be received, used and enjoyed by them, for and during the terms of their natural lives respectively, and by the 9th, 10th and 11th sections he devised, upon the death of any one of his children, all the property, including the principal of any bonds to which such child was entitled, to the living issue of such child absolutely and forever.

The 12th section provided that in case of the death of any one of his children, leaving no issue, his or her share, including the principal of bonds received by him or her, should go to the survivor of them.

The plaintiff demanded that said land be declared a part of the personalty of Henry Williams, deceased, belonging in severalty two-thirds to the plaintiff, Henry Williams, and one-third to Henry W., and Jesse Stubbs, defendants absolutely,

and that some proper person be appointed commissionor to sell the same on such terms as may be proper; and upon the said Henry Williams, J. D. Young and T. B. Slade, guardian, executing their respective receipts to C. B. Hassell, administrator *de bonis non*, for their respective shares therein, that the Commissioner pay over the proceeds of such sale, after deducting proper expenses, two-thirds to Henry Williams, plaintiff, and one-third to T. B. Slade, guardian of Mary W. and Jesse Stubbs.

It was admitted that the land could not be actually divided, and a sale was necessary for partition.

Upon these facts it was adjudged by the Court:

1. That the interest of the parties in the "Woodlawn" arm was personal estate, to be distributed under the will of Henry Williams.

2. That the children of the testator, under the will, took only a life estate in said fund as part of the personalty, and the remainder was the absolute property of Henry Williams' children as to his share; that Mrs. Young's children took the remainder of her share at her death, and that the Stubbs children took their mother's portion absolutely.

It was ordered by the Court that the land be sold and the proceeds divided as above declared, after assessing the life estate of Henry Williams and Mrs. Young, and that their individual receipt was not sufficient to authorize them to receive the interest of their children, but that their portions be paid to their guardians when appointed, and in the meantime be retained. That the cost of this action be paid out of the fund arising from the sale of the land.

To this judgment the plaintiffs excepted, upon the ground:

1. That the plaintiff and J. D. Young and wife take an absolute estate in one-third of the fund arising from the sale of Woodlawn farm, instead of a life estate only therein.

2. That the decree does not permit the plaintiffs, Henry Williams and J. D. Young, to collect the entire third thereof each, upon executing their individual receipts to the defendant

C. B. Hassell, Administrator *de bonis non*, or to the Commissioners of sale therefor.

The Court overruled the exceptions and the plaintiff appealed.

Moore & Mullen, for appellant.
Gilliam & Pruden and *J. E. Moore*, contra.

READE, J. 1. Suppose the testator had taken a title to the land in his lifetime, but left the price unpaid as a debt against his estate; and the executor had paid the debt out of the personal estate, which is primarily the fund for paying debts; that would not have changed the land into personalty. It is the same in this case, where the testator had only *contracted* for the title. There was error in the ruling of his Honor upon this point.

2. His Honor was right in ruling that the children of the testator took only a life estate in the land, (personalty as he considered it,) but he was in error in holding that the children of the children take the remainder. The remainder is "to the *living* issue of such child absolutely and forever." So that they are not the children of the testator's son Henry that take Henry's share in remainder; but only *such* of his children as may be living at Henry's death. And so of the rest.

3. It will be seen, therefore, that the persons who are to take the remainders are not ascertained. They may be the same who are now in existence, or they may be added to by subsequent births, or diminished by deaths.

As the persons who may be entitled to the remainder are not ascertained, so they cannot be represented; and as their numbers and conditions are not known, so the propriety of a sale of the lands cannot be determined.

It was error to order a sale of the land.

This will be certified.

PER CURIAM. Judgment accordingly.

JOHN H. THREADGILL *v.* THE CAROLINA CENTRAL RAILWAY COMPANY.

A Clerk who held over from the day of a general election, to wit, the first Thursday in August, until the first Monday in the ensuing September, when his successor was installed, was at least Clerk *de facto;* and his acts cannot be collaterally impeached, and are valid as between third parties.

(The cases of *Gilliam* v. *Riddick*, 4 Ired. 368, and *Norfleet* v. *Staton*, decided at this term, cited and approved.)

MOTION, in the nature of a plea in abatement to quash the summons, heard before *Buxton, J.*, at Spring Term, 1875, ANSON Superior Court.

The ground upon which the motion was based is, that Jas. H. Covington, who, through his deputy, issued the summons on the 27th day of August, 1874, was not on that day Clerk of the Superior Court, his term of office as Clerk having expired on the day of the last general election, the 6th day of August, 1874, at which election the present incumbent, John C. McLauchlin, was elected, who, on the first Monday in September following, qualified before the Board of Commissioners.

Covington was elected in April, 1868, and continued to act as Clerk until his successor qualified as such.

The summons was issued by Covington after McLauchlin was elected, but before he qualified as Clerk.

Upon the hearing, his Honor refused the motion, and required the defendants to answer.

From this ruling the defendants appealed.

Battle & Son and *Strange*, for appellant.
Dargan, Pemberton and *Busbee & Busbee*, contra.

RODMAN, J. The summons in this case was issued on the 27th August, by the deputy of one who had been the Clerk

of the Superior Court up to the election, which had taken place on the first Thursday in that month, at which a successor was elected. The successor, however, had not qualified at the date of the summons, and did not do so until the first Monday of the following September, and in the meanwhile the old Clerk continued in possession of the records, and to perform all duties of the office.

The defendant moved to quash the summons, as issued without authority. His Honor refused the motion, and the defendant appealed. We concur with his Honor. It is unnecessary to inquire whether the old Clerk rightfully held over until the qualification of his successor or not. That question can scarcely be presented except in a case where the old Clerk refuses to perform the duties of the office after the elevation of his successor, and is sued separately, or on his bond for such refusal, or for a malfeasance, or in an action by such Clerk to recover his fees. We express no opinion on that question. We conceive it to be clear, that under the circumstances of this case, the old Clerk was at least Clerk *de facto*, and his acts cannot be collaterally impeached, and are valid as between third parties. All or most of the authorities, bearing on this question of who is a *de facto* officer, and the effect of his acts may be found in the case of *Norfleet* v. *Staten*, decided at this term. Among these, the case of *Gilliam* v. *Riddick*, 4 Ire., 368, seems to cover the present question.

Judgment affirmed. Let this opinion be certified.

PER CURIAM. Judgment affirmed.

STATE *v.* ROBERT RAWLSTON.

Upon the trial of a criminal action for stealing certain cattle, charged in one count to be the property of A, and in another count to be the property of some person to the jurors unknown, evidence that A about the time lost a number of cattle, will not justify a verdict that the defendant stole certain cattle, the property of some person to the jurors unknown.

CRIMINAL ACTION, *Larceny*, tried at Spring Term, 1875, of the Superior Court of BEAUFORT county, before his Honor Judge *Moore*.

The following statement of facts accompanies the record as part of the case.

The indictment contained eight counts.

1. For stealing a cattle beast, the property of Judson C Blakely.

2. For receiving the same.

3. For stealing ten pounds of beef, the property of said Blakely.

4. For receiving the same.

5. For stealing a cattle beast, the property of some person to the jurors unknown.

6. For receiving the same.

7. For stealing ten pounds of beef, the property of some person to the jurors unknown.

8. For receiving the same.

It was in evidence that the prosecutor lived in Pitt county, nine miles from the town of Washington, and that the defendant lived in the same county, one mile from the prosecutor. That he, the defendant, during the Fall of 1874, sold at various times in the streets of Washington, seven or eight beeves from his cart, ready butchered, and as many hides.

It was further in evidence, that the prosecutor had had stolen from him fifteen cattle during the Fall of 1874; and that the defendant, when selling this beef, said that he was obliged to kill and sell his cattle, to make up for money which he had

lost at cards at a circus that had been a short time before at Washington. The defendant had seven head of cattle before the beginning of the Fall of 1874, and had the same cattle in the Spring of 1875.

There was no evidence of the loss of cattle by any other person but the prosecutor, nor any other proof than that above stated.

The jury returned a verdict of guilty of stealing cattle, the property of some person to the jurors unknown. The defendant moved to set aside the verdict, as not authorized by the proof. Motion overruled. Judgment and appeal by defendant.

D. M. Carter, for defendant.
Attorney General Hargrove, and *J. A. Moore* for the State.

BYNUM J. Indictment for larceny. It is only necessary to refer to two of the counts in the bill. One charges the defendant with stealing a "cattle beast," the property of Judson C. Blakely, and the other with stealing a cattle beast, the property of some one to the jurors unknown; and the defendant was convicted on the *latter* count.

If we should exclude the evidence that the prosecutor, Blakely, had stolen from him several cattle about the time that the prisoner was selling butchered beef in the town of Washington, it could hardly be contended that there was evidence to convict the prisoner; for the case states that "there was no evidence of the loss of cattle by any other person but the prosecutor, Blakely. On the other hand, if we do not exclude that testimony, which of course was competent, then whatever weight it was entitled to, tended to show a larceny of the cattle of Blakely, a person "known." It was therefore error in the jury to find the prisoner guilty of stealing the cattle of some one, to the jurors "unknown."

Judgment reversed.

PER CURIAM. *Venire de novo.*

THOMAS J. JONES *v.* THE BOARD OF COMMISSIONERS OF BLADEN COUNTY.

The demand necessary to support an action against the Commissioners of a county for the recovery of a debt, must show that it was made upon the person authorized by law to pay, or if authorized to pay, that the plaintiff had placed himself in a situation to make the demand, by having had his claim previously audited.

The complaint in such action should aver that the plaintiff having had a claim audited and allowed by the Board of County Commissioners, presented it to the County Treasurer for payment, and that he declined to accept the same and make payment, of which the defendants had notice: *otherwise*, such complaint will be subject to demurrer.

(The case of *Love* v. *Commissioners of Chatham*, 64 N. C. Rep. 706, cited and approved.)

CIVIL ACTION for the recovery of money loaned, tried upon complaint and demurrer, before his Honor Judge *Kerr*, at Spring Term, 1875, of the Superior Court of BLADEN county.

In this complaint, among other things, the plaintiff charged that in 1864 he loaned to the county of Bladen $16,000, for which he received a bond signed by the Chairman of the Court of Pleas and Quarter Sessions, and countersigned by the Clerk of said Court, and under the seal thereof. That the Justices of said Court did not pay, nor have the defendants, as their successors since paid the said sum of $16,000, and interest upon the same, nor any part thereof, though the same has been demanded by the plaintiff before the bringing of this action, &c.; prays judgment, and for a writ of *mandamus*.

The defendants demurred, alleging for cause:

That the complaint does not show that the claim was submitted to and audited by the Board of Commissioners, and an order on the County Treasurer given therefor; nor,

Does the complaint show that the plaintiff presented his claim to the proper officer for payment; nor that he demanded payment; nor that said officer refused to accept the same, and that the defendants had notice of its non-acceptance.

Upon the hearing, his Honor overruled the demurrer and the defendants appealed.

T. H. Sutton, for appellants, filed the following brief:

1. The bond declared upon by the plaintiff comes under the meaning and purview of the act of 1868, chap. 19, page 21, ratified the 22d of August, 1868, which declares:

"That it shall not be lawful for the County Treasurers of this State to pay out of the funds of the counties any order or *other certificate of indebtedness* issued by the late County Courts, *unless* the same shall have been audited by the Board of County Commissioners." Bat. Rev., chap. 30, sec. 11, p. 285.

2. The exercise of such authority by the Board of Commissioners is incidentally referred to in *Love* v. *Com. of Chatham*, 64 N. C. Rep., 706, and *Mauney* v. *Com. of Montgomery*, 71 N. C. Rep., 486, going to show that all such "certificates of indebtedness" must be audited by the Commissioners, because the law so says.

3. The complaint does not aver that the defendants refused to give the plaintiff an order for his claim, as allowed by them, if it had been presented and audited; nor a demand upon the *proper officer*, nor that he declined to accept such order, or make payment of the same, nor that the defendants had notice of such non-acceptance or non-payment. *Love* v. *Commissioners of Chatham*, 64 N. C. Rep., 706. Nor that the prosecutor did all in his power to obtain redress. *Alexander* v. *Commissioners of McDowell*, 67 N. C. Rep., 330.

Merrimon, Fuller & Ashe, contra.

BYNUM, J. That a demand was necessary before action begun is well settled. *Love* v. *Commissioners of Chatham*, 64 N. C. Rep. 706. If, therefore, it had appeared from the complaint that no demand had been made, that would have been good cause of demurrer. If it had appeared that a demand had been made,

but upon the wrong party, that also would have been cause of demurrer. The averment of demand is in the following words: "That the justices of the late Court of Pleas and Quarter Sessions did not pay, nor have the defendants, as their successors, since paid the said sum of sixteen thousand dollars and interest upon the same, nor any part thereof, though the same has been demanded by the plaintiff before the bringing of this action." Demanded of whom? The late County Court? The County Commissioners? Or the Treasurer of the county?

After the adoption of the present Constitution of the State the powers and duties of the late County Courts in respect to the finances of the county, were devolved upon the newly created officers of the county, under the rules and regulations prescribed by the act of 1868-'69, Bat. Rev., chap. 30. By chap. 30, sec. 8, it is made the duty of the county treasurer to receive all monies belonging to the county and to apply them as required by law. By section 11 it is provided that "it shall not be lawful for the County Treasurers of this State, to pay out of the funds of the counties any order or other certificate of indebtedness, *issued by the late County Courts*, unless the same shall have been audited by the Board of County Commissioners."

It was therefore the duty of the plaintiff, 1st. To apply to this Board and have his claim audited and allowed; 2d. If allowed, to present it to the Treasurer and demand its payment. A demand of payment made upon the Board would be no demand at all, for the Board has power only to audit and allow or disallow. A demand upon the Treasurer, without the certificate of the Board that the claim was audited and allowed, would be no legal demand, for he can only pay claims which have been so allowed.

If the plaintiff had alleged in his complaint that he had presented his claim to the Board of Commissioners to be audited and allowed, and that they had refused to act or had disallowed it, he would have had a cause of action; or had he alleged that he presented to the Treasurer a claim so allowed, and that he

had refused payment, he would have had a cause of action. The demand as set out is clearly insufficient, in that it does not show that it was made upon the person authorized by law to pay, or if authorized to pay, that the plaintiff had placed himself in a situation to make the demand, by having had his claim previously audited.

It is insisted by the plaintiff that under C. C. P., sections 119 and 120, pleadings are to be liberally construed with a view to substantial justice, and that, therefore, when the allegations in a pleading are indefinite and uncertain, the Court may require them to be made certain and definite by amendment. That argument more properly should be made in the Court below where only amendments can regularly be made. But when the defendant, by demurrer, points out the defects of the complaint, and the plaintiff then fails or refuses to amend, as he would be allowed to do, he is not taken by surprise, and has no right to claim a benefit in this Court, which he has refused in the Court below. Nor would substantial justice be done to the parties by a construction of the pleadings so liberal as to hold that the demand here was both made upon the proper officer, and after a compliance with all the pre-requisites to a valid demand; for *non constat*, that if the plaintiff had first had his claim audited and allowed, and then demanded payment of the treasurer, that it would not have been paid without suit. The complaint should have avowed that the plaintiff, having a claim audited and allowed by the Board of Commissioners, presented it to the County Treasurer for payment, and that he declined to accept the claim and make payment, and that the defendants had notice of this. As was said in *Love* v. *Commissioners of Chatham*, "this was clearly necessary to constitute a cause of action against the commissioners, as much so as a demand upon the drawee, and notice to the drawer or endorser of an inland bill of exchange."

There was error. Demurrer sustained and action dismissed.

PER CURIAM. Judgment reversed.

WESLEY R. WHITAKER *v.* HARRIS H. ELLIOTT.

The Constitution provides that "no property shall be exempt from sale for taxes or for the payment of obligations contracted for the payment of said premises:" *Therefore*, where A sold and conveyed to B a tract of land, taking in payment therefor notes of C payable to B, and by him endorsed to A: *Held*, that this was an obligation within the meaning of the provisions of the Constitution, and as against a judgment obtained upon the notes, B was not entitled to a homestead.

SETTLE, J., *dissenting*.

CIVIL ACTION, to recover the possession of land, tried before *Schenck, J.*, at Spring Term, 1875, RUTHERFORD Superior Court.

The plaintiff introduced a transcript of the Superior Court of Henderson, showing a judgment in favor of Solomon Whitaker against H. H. Elliott, the defendant, dated Oct. 19th, 1863. It was also in evidence that the land in controversy had been sold under execution issuing upon the judgment in September, 1870. The deed from the sheriff made in pursuance of the execution was also proved. The defendant was in possession at the time of the sale, and also at the commencement of this suit.

The judgment in pursuance of which the land was sold was obtained upon a note for $100, given by S. Wilkins to the defendant for borrowed money, and endorsed by Elliott to the plaintiff, and by the plaintiff to Solomon Whitaker. The plaintiff testified, that in November, 1860, he sold and conveyed the land in controversy to Elliott. In February, 1860, he had sold Elliott some corn and fodder amounting to about sixty dollars, which had not been paid for when the land in controversy was sold in November of the same year. When he sold and conveyed the land to Elliott, the price agreed upon was $800, which he paid in notes which he held against Wilkins, by endorsing the notes to plaintiff. These notes in the aggregate amounted to $812, and the excess over and above the price of the land, by agreement, was allowed as a credit

on the account for the corn and fodder. The judgment under which the land was sold was obtained upon one of the notes endorsed to the plaintiff by the defendant in payment for the land, as endorsee. The sheriff laid off a homestead for plaintiff when he sold the land, which was all that defendant owned, and was only worth about $600. The defendant did not own sufficient personal property to pay the debt, and none subject to execution.

1. The plaintiff insisted that the judgment being obtained on the endorsement of Elliott on the Wilkins note, which he endorsed in payment for the land, the defendant was not entitled to a homestead against the judgment.

2. The endorsement being made prior to 1868, and being an old debt the defendant was not entitled to a homestead against it.

The Court instructed the jury that the plaintiff was not entitled to recover. There was a verdict and judgment for the defendant, and the plaintiff appealed.

Jones & Jones, *Churchill* and *Whitesides*, for the appellant.
Shipp & Bailey and *Hoke*, contra.

BYNUM, J. The case is this: In 1860, the plaintiff sold and conveyed the lands in dispute, to the defendant, and in payment therefor, took from him the notes of one Samuel Wilkins, which were payable to the defendant and by him endorsed to the plaintiff. A judgment was obtained against Elliott on one of these notes in 1868, and execution was levied upon the land after the adoption of the present Constitution, and the land was sold under a *ven. ex.* in 1870, and purchased by the plaintiff, who brings this action to recover possession under his said purchase and the sheriff's deed. The defendant claims a right of homestead in the land; and whether he is entitled to it, is the question.

Art. 10, *sec.* 2, of the Constitution provides, "That every homestead and the dwelling and buildings used therewith, not exceeding in value one thousand dollars, to be selected by the

owner thereof," &c., * * * * "shall be exempt from sale under execution or other final process obtained on any debt. But no property shall be exempt from sale for taxes or for the payment of obligations contracted for the purchase of said premises." This language of the Constitution is so unambigous and plain, that the only enquiry left to us is, was this note on which the judgment was rendered and the land sold, "an obligation contracted for the purchase of the premises," by the defendant?

In the construction of a State Constitution, words are not to be taken in a narrow and technical sense, but in a general and popular sense, so as to give effect to the intent of the people in adopting it. The word "obligation" as here used, therefore means a debt contracted to be paid, or a duty to be performed by the purchaser, as the consideration of the purchase of the premises.

If the plaintiff had accepted the notes of Wilkins, without endorsement, the land would have been paid for as effectually as if he had received the entire consideration in cash. But when he required as a part of the trade, that the defendant should endorse the notes, and they were accordingly so endorsed by him, then the notes were not received as cash, but as the "obligations" of the defendant as well as of Wilkins. The transaction is the same in effect, as if the plaintiff had sold the land to the defendant, taking the joint notes of Wilkins and himself for the purchase money. The case then falls directly within the restriction of the Constitution, excluding him from a homestead which he has not paid for, and of which, therefore, he is not the "owner" as against the obligation contracted for its purchase. The principle is a salutary one, and founded on the highest degree of morality and good faith.

There is error. Judgment reversed, and judgment for the plaintiff.

PER CURIAM. Judgment accordingly.

SETTLE, J. Dissents.

STATE *v.* WILLIAM ELWOOD.

Upon a trial of an indictment for murder, when there is not one single circumstance in the immediate transaction to justify, excuse or mitigate the homicide, the Judge presiding committed no error in telling the jury that malice was implied, and that the offence was murder.

INDICTMENT for *Murder*, originally found in the Superior Court of CLEAVELAND county, and removed upon affidavit to the county of Gaston, from which it was subsequently removed to the county of MECKLENBURG, and there tried before his Honor, Judge SCHENCK, at Spring Term, 1875.

After the jurors were sworn but before they were empanelled, the counsel for the prisoner moved the Court to adjourn, stating that he wished to examine the record to make objection, if necessary, but that he had no specific objection to make at that time. The Court refused the motion, and the prisoner excepted. The jury was then empanelled and the witnesses sworn, and the Court took a recess. After the Court met the counsel for the defendant filed a paper, of which the following is a copy. "Objections to the transcript":

1. That the transcript of the record from Cleaveland county is not certified by the Clerk of Gaston as a true record, but only sets out the transcript of the record, as furnished by the Clerk of Cleaveland.

2. That the transcript of the record from Cleveland should be sent from Gaston as the best evidence of the record.

3. That the transcript of the record from Cleaveland does not set forth that a foreman of the grand jury was appointed by the Court, nor that the person who signed the bill as such, was such foreman.

4. That in the certificate of the transcript of the record from Gaston county, the Clerk certifies that the seal of the Court was affixed at Dallas, and not at the office of the Clerk.

The counsel for the prisoner then moved that the record be not received.

The Court informed the counsel that if they would ask for a *certiorari*, alleging that the record was untrue, the Court would send for it at once and suspend the trial until a proper record was received. The counsel for the prisoner replied, "we would rather it would go on," and the record was received and the trial proceeded.

George L. Foushee was introduced as a witness for the State, and testified as follows:

He was a boarder at the house of J. B. Falls, in Cleaveland county, as was also William Elwood, the prisoner, and Alexander Sandford, the deceased. Witness and Sandford worked as laborers in King's Mountain mine. On Sunday, the 17th day of May, 1874, about seven o'clock in the morning, he was out at the door of Mr. Falls' house, and the prisoner and the deceased came out of the house, near him, and stopped. Elwood then pulled out a box of cartridges and showed them to the deceased, and said: "Don't you want a dose of these?" Sandford laughed, and extended his hand as if to take one, and Elwood, drawing his own hand back, said: "No, you can't have these, but I have one for you. Stop, and I will give it to you." Elwood then immediately walked off in a path, about eight steps, the deceased following behind. No word was spoken until they had gone about eight steps, when the prisoner, looking back over his shoulder, said: "Stop, you are too close," and immediately jerked out, with his right hand, a pistol from the hip of his pants, and wheeling around on his left foot fired quickly at the deceased. The ball entered the head of the deceased a little to the right of the left eye. Deceased fell, and instantly died. The prisoner and the deceased were facing each other at the time the pistol was fired. Witness did not think the prisoner cocked the pistol while turning around, as it was done so quickly. When deceased fell, the prisoner came to where the witness was, eight steps off, then walked back to where deceased lay, then returned to witness again, and said: "I have shot this man." Witness replied,

"I reckon not." The prisoner then said, "Yes, I have." The prisoner then walked back to where the deceased lay, and again returned to where witness was standing, eight steps off, and said: "Now, I have killed this man, and I hate it. Lord have mercy on my soul!" The prisoner then went back into the house; and nothing else was said. The deceased was about two feet from the muzzle of the pistol when it was fired, and about four feet from the prisoner when his arm was extended.

A pistol was exhibited, and admitted by both parties to be the pistol with which the homicide was committed. It was a breech loading cartridge Derringer, about one half inch in the bore. The pistol was loaded by touching a spring and turning the barrel to one side and inserting the cartridge. When the barrel was turned to one side, it threw the cartridge out and left the cylinder empty to receive a new one. The cock of the pistol had to be drawn back with the hand, and then thrown by pulling the trigger, before it could be fired. The cock had two catches, so that it could half cock or whole cock.

On cross examination the witness testified, that the range of the ball through the head of the deceased was about level. The prisoner and deceased had no quarrel that witness ever heard. They were friendly as far as he knew; they seemed to have been intimate. They did not appear angry when they came out. The prisoner went into the house and remained until the doctor came; except that one or two hours after the homicide occurred, witness and prisoner went away and then returned together.

Counsel for the prisoner then proposed in order to rebut malice to ask witness "if he and the prisoner did not go to a magistrate's house, and that prisoner did not try to escape?"

The evidence was objected to by the Solicitor, and the Court sustained the objection, whereupon the prisoner excepted. The witness then stated that the prisoner was arrested about dark that evening at Fall's house. The magistrate came there. Witness thinks Dr. Ware sent for the officer. The prisoner

was kept under arrest all night at Fall's house and taken to Shelby on Monday morning.

In reply to the question "How prisoner looked after the homicide," witness said "he looked frightened." Witness was asked why he said to the prisoner "I reckon not," when the prisoner said "I have killed that man;" he replied "because I did not expect it." The witness further stated that the prisoner had been absent from Fall's for three days and had returned the night before the homicide occurred. He had seen the prisoner and deceased play together at the boarding house. Sandford was a laborer in the mine, Elwood was not. They both boarded at Fall's.

John Noblett testified as follows: He was a boarder at Fall's where the homicide was committed. On the morning it occurred he was up in the loft of the house laying on the bed. The house was a double log cabin, with a passage down stairs. The stairs to the loft went up outside. Before breakfast, and about one hour and a half before the homicide, he heard the prisoner and the deceased talking in the passage. Deceased said to the prisoner: "What knocked the skin off your chin?" The prisoner replied, "my horse ran under a limb with me." Deceased then said "I expect some one rocked you," and the prisoner replied "it was you, damn you, and I will shoot you." On cross-examination the witness testified as follows: They seemed to be in friendly tone, not angry. "They talked like common." He saw them together after that, talking friendly. He had seen them play together. From where he was lying in the loft to the passage was eight or ten feet. He could not be mistaken as to the language, he certainly heard that. There were other parts of the conversation that he did not hear.

W. H. Rule being introduced as a witness, swore that he was in the passage with the prisoner and the deceased on Sunday morning, before the homicide. Sandford said to the prisoner, "What made that scar on your chin." The prisoner replied "my horse ran under a limb with me." Deceased said, "How

far off was the man who threw at you." The prisoner replied "fifteen steps." Some remarks followed, which witness did not hear. Witness was two or three steps off. Could have heard it all if he had tried to do so. They did not seem to be mad. Witness had only been there three or four days. Prisoner then put his right hand in the right hip pocket of his pants and drew out his pistol, but kept it down by his side and looked down at it. Witness does not think that Sandford saw the pistol. Prisoner's left side was toward the deceased. Witness was in front of them. This was an hour or more before the homicide occurred.

The prisoner introduced no evidence, but asked the following written instructions:

I. That if the jury believe the defendant was not moved by malice towards the deceased it is but manslaughter; in any event.

That if they believe the defendant was in sport in presenting the pistol, and either did not know it was loaded, or if loaded did not know it was cocked, he is not guilty of murder.

3. That if they are satisfied the defendant had no malice to the deceased, but was showing the deceased, at his request how he could spring the breech from the stock and fling the cartridge out, that he was guilty of no offence, and should be acquitted altogether.

The Court, among other things, charged the jury: "That murder was the killing of a fellow being in malice, and where there was no malice, there was no murder. But wherever a killing with a deadly weapon is proved or admitted, the law presumes that it was done in malice, and nothing else appearing in the case, it would be the duty of the jury to convict of murder.

So, in this case, it is admitted by the defendant's counsel that the prisoner did kill the deceased with a pistol, which is a deadly weapon, and the law presumes it was done in malice. This presumption, however, may be rebutted, and the *onus* of doing this, is on the defendant. It is his duty to satisfy your

minds that this presumption, raised by the law, is in fact in this case erroneous.

The defendant says in reply to this presumption of law, that the evidence shows that the shot was accidental, or in sport, and not fired in malice; and if this were so, if it was accidental or in sport, it would at least mitigate the offence to manslaughter. I have listened to the argument of counsel patiently and have fully reflected on the testimony given in the case, and I feel it to be my duty to charge you that there is no evidence "fit to go to a jury" to establish the defence of accident or sport. It may be sufficient to raise a conjecture, but that is not the character of evidence required by the law. If, therefore, you believe that the prisoner shot the deceased, as described by the witness, Foushee, with a pistol and killed him, the law presumes malice, and it is your duty to convict."

The jury retired and after being out sometime returned in a body to the Court and took their seats in the box. The Court inquired if they had agreed, and the foreman informed his Honor that they had not. The Court then asked if they desired any instructions in regard to the law, and the foreman replied in the negative. The Court then told them that they could not be discharged, that they must again retire and try to agree. The foreman then informed the Court they could not agree as to the question of malice. The Court then told the jury that the killing with a deadly weapon being admitted by the prisoner, the law presumed malice, and there was no evidence in this case to rebut the testimony.

The jury returned a verdict of guilty, and thereupon the prisoner moved for a new trial, which motion being refused, he moved in arrest of judgment, was overruled and judgment of death pronounced. From this judgment the prisoner appealed.

Hoke and *Battle*, for the prisoner.
Attorney General Hargrove, for the State.

READE, J. It was admitted for the prisoner, and it was

also clearly proved on the trial, that he killed the deceased. And it was also admitted and proved that the deceased gave the prisoner no provocation. Why, then, is not the prisoner guilty of murder?

The prisoner puts his defence upon the ground of accident. "That the prisoner was showing the deceased the pistol, and either to alarm him, or show him how the cartridge could be thrown out, brought the pistol round and it accidentally fired." His Honor charged the jury that there was no evidence to support this defence. And whether there was or not, is the only question before us.

There was but one witness who testified as to the immediate circumstances of the killing. He was standing in the yard, and the prisoner and the deceased came up to him; and the prisoner pulled out a box of cartridges and said to the deceased, "Don't you want a dose of these?" Deceased laughed, and offered to take one; and prisoner said, "No, you can't have these; but I have one for you; step out and I will give it to you." Prisoner walked immediately off, and deceased followed. Prisoner looked back over his shoulder and said to the deceased, "Stop, you are too close;" and immediately jerked out a pistol, wheeled around and fired quickly, and shot the deceased through the head and killed him.

We have looked earnestly for some feature of the transaction that would tend to favor the theory of the defence, "that the prisoner was just showing the deceased his pistol, and how the cartridge could be thrown out; and that it fired accidentally." Every circumstance disproves it. He had not said a word about showing the deceased his pistol. He had shown his box of cartridges, and asked the significant question, "Don't you want a dose?" And the deceased offered to take one. Prisoner said, "No, not these; I have one for you; come out and I will give it to you." Why not give it to him there? Why want to step aside? Why not show his pistol then and there? Why step aside? If he wanted to show his pistol and explain it, why *jerk* it out, and *wheel* and fire *quickly*? If his object

was to show the pistol, or the cartridge, why say "Stop, you are too close?"

There not being one single circumstance in the immediate transaction to justify, excuse or mitigate the homicide, his Honor could do no other than tell the jury it was murder.

Although that may be true of the immediate transaction, yet the prisoner says that there were circumstances before and after the transaction which support his theory.

The circumstances relied on are, first, that they were upon friendly terms before the transaction; secondly, that he manifested sorrow immediately after the transaction; and, thirdly, that he had an opportunity to escape and did not do it. And there was evidence tending to prove these circumstances; so that we must take them to have been proved. And we must leave out of view the evidence that the prisoner had that morning cursed the deceased and threatened to shoot him, and charged him with having thrown a rock at him the night before and hit him. We must leave that out, and take the circumstances relied on by the prisoner; because his Honor held that, taking the circumstances relied on by the prisoner to be true, they amounted to nothing.

Where the *immediate* circumstances of the killing are such as to make it of *doubtful* character, then it is proper to look to circumstances farther off to enable us to solve the doubt. But, if without the slightest justification, excuse or provocation occurring at the time, A takes a pistol from his pocket and shoots B and kills him, how is it possible that any circumstances further off can mitigate the crime? If the prisoner says that he and the deceased had always been friendly, it only makes it the worse for him to have killed his friend. If he says they were enemies, it tends to show that he killed him of malice. If he regrets it, repentance may secure pardon, but cannot remove guilt. If he does not attempt to escape, it relieves him from that slight confirmatory evidence of guilt, but it does not change or explain the transaction. It is said that, as it is settled that an attempt to escape is evidence of

guilt, so the converse ought to be true, and not attempting to escape is evidence of innocence. But that is sophistical. It may be proved against a prisoner that he acknowledged his guilt, but he cannot prove as evidence of his innocence that he denied his guilt. Much less can he rely upon the fact that he shut his mouth and said nothing. A prisoner cannot manufacture testimony for himself after the event, either by words or acts. As neither of these circumstances by itself amounts to anything, do they when all put together? A and B are friends. A, without any apparent excuse, justification or provocation, takes a pistol from his pocket and shoots B and kills him; expresses his regret, but makes no explanation, and does not flee. Is it possible to state a plainer case of murder? The prisoner says that the fact that there was no cause for it, is some evidence that he did not do it of malice. But the rule is, and the sacredness of human life requires that the rule should be, precisely the contrary. Where the killing is without cause—without provocation—then malice is *implied*. A man is no more excused for killing his friend than he is for killing his enemy. He that sheddeth man's blood by *man* shall *his* blood be shed. But the prisoner insists that if he killed him without provocation, that fact shows that he did not kill him of malice. And it is clear that if he did kill him upon sufficient provocation, that rebuts malice. And so it comes to this, that a killing, with or without provocation, is not murder!

We have considered the case as if the prisoner had proved all that he offered to prove, and there is nothing to sustain his theory of accident, or to rebut the presumption of malice. But that is a very favorable view for the prisoner, because there was evidence that he had that morning charged the deceased with having thrown a rock at him the night before and hit him; and he cursed the deceased and threatened to shoot him. At the same time drawing the pistol and holding it so that the deceased could not see it.

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

PER CURIAM. Judgment affirmed.

THE PEOPLE of the STATE of NORTH CAROLINA, upon the relation of ADRIAN H. VAN BOKKELEN and others *v.* WILLIAM P. CANADAY and others.

Cities and towns, like counties and townships, are parts and parcels of the State, organized for the convenience of local self-government; and the qualifications of voters are the same, to wit, citizenship, twenty-one years of age, twelve months residence in the State, and thirty days in the city or town.

The General Assembly cannot in any way change the qualifications of voters in State, county, township, city or town elections. *Hence*, so much of the act amending the charter of the city of Wilmington, ratified on the 3d day of February, 1875, as requires a residence of ninety days instead of thirty, is unconstitutional and consequently void.

The 8th section of the act amending the charter of the city of Wilmington, ratified the 3d day of February, 1875, providing for the registration of voters, directs that the different wards of the city should be divided into precincts; in this division, a large portion of the third ward is not included in any precinct, and cannot register or vote: *Held*, that the election had under said act, on the second Thursday of March, 1875, was therefore void.

So much of said Act as requires a voter, when challenged, to prove by other persons of credibility, known to them, that the voter is of lawful age, has resided twelve months in the State and ninety days in the lot, in the block and in the ward specified in the registration book, is a practical denial of the right to register and vote, and is void.

So much of said act as gives to each of the first and second wards, with 400 voters each, a representative of three aldermen, and to the third ward with 2,800 votes, also a like representative of three aldermen, violates the fundamental principles of our Constitution, and is void.

(The cases of *Perry* v. *Whitaker*, 71 N. C. Rep. 475, and *Jacobs* v. *Smallwood*, 63 N. C. Rep. 112, cited and approved.)

CASE AGREED, tried before *Kerr, J.*, at Spring Term, 1875, NEW HANOVER Superior Court.

The case was submitted for the decision of the Court upon the follow facts agreed:

That on the first Monday in May, A. D. 1873, under the act of the General Assembly, ratified the 20th day of Decem-

ber, A. D. 1870, entitled "An Act Concerning the City of Wilmington," Alrich Adrian, S. H. Fishblate, Roger Moore, Jacob Wise, and the defendants W. P. Canaday, L. E. Rice, Duncan Holmes, W. H. Banks, Hiram Hawkins and Henry Brewington were duly elected Aldermen of the City of Wilmington, and immediately thereafter entered upon the duties of the said office. On the 15th day of July, 1873, Jacob Wise resigned his said office and Isaac B. Grainger was elected by the Board of Aldermen to fill the vacancy. On the 2d day of October, 1874, the said Grainger resigned his office, and John W. Atkinson was elected to fill the vacancy. On the 10th day of March, 1875, the said Alrich Adrian, S. H. Fishblate, Roger Moore and John W. Atkinson all resigned their offices, and the other defendants, Jesse J. Cassiday, Joseph H. Neff, Thomas M. Gardner and Benjamin G. Bates were, by the said Board elected to fill the vacancies caused by the resignation of the parties aforesaid, and immediately entered upon the duties of their offices.

By an act of the General Assembly, ratified the 3rd day of November, A. D. 1873, entitled "An Act relating to the City of Wilmington," it was directed that the election for aldermen of said city should be held "biennially on the days which now are, or hereafter may be, appointed by law for the election of the Board of Trustees for the township of said city. It was further provided by said act, "that the persons who may be in office as Mayor and Aldermen of said city on ... first day of May next, (that is to say, on the 1st ... 1874,) shall continue in office until their successors shall be elected, at the next regular election as herein provided, and until such successors shall be duly qualified.

At the time of the ratification of the said act, the next regular election for the Board of Trustees for the township of said city was appointed by law to be held on the first Thursday in August, 1875.

By an act of the General Assembly ratified the 3rd day of February, A. D. 1875, entitled "an act to amend the charter

of the city of Wilmington," it was enacted that the said city should be divided into three wards therein described and bounded, that the corporate powers granted to the city should be exercised by a Board of Aldermen to consist of nine members, three to be elected by each ward, and that an election for nine Aldermen of said city should be held on the second Thursday in March, 1875. The Aldermen elected at the first election held under the said act "shall enter upon the discharge of their duties, when the term of office of the present Board of Aldermen shall expire by operation of law, and shall hold their offices until the first Thursday in April, 1877.

An election was duly held according to the terms and provisions of said act, at which election the relators, A. H. Van Bokkelen, F. W. Kerchner and W. L. DeRosset, in the first ward, W. L. Smith, L. H. Bowden and S. W. Vick in the second ward, and J. D. Love, T. W. Player and W. D. Mahn in the third ward, received a majority of all the votes cast; all the provisions of the said act were duly complied with, and the judges of election for the several wards publicly proclaimed the result of the voting, and certified in writing according to the provisions of the said act that they were duly elected Aldermen of the said city for the several wards as aforesaid, and filed copies of the said certificates with the Clerk of the city, and published the same in the newspapers of the city as required by the provisions of the act.

The Aldermen above named duly qualified by taking and subscribing before a Justice of the Peace, for the county of New Hanover the oath prescribed in the said act, and since the said election and qualification of the relators, the defendants have continued to exercise the duties of the said office, and have withheld and continue to withhold from the relators the said offices of Aldermen of the city.

All the acts of the General Assembly hereinbefore referred to, are declared to be a part of this case for all intents and purposes, as if they were herein fully set forth.

The whole number of male persons, citizens of the United

States, twenty-one years old or upwards, being inhabitants of said city, as estimated upon the basis of past elections is about thirty-six hundred, of whom about twenty-two hundred are colored, and the remainder white. The number of such persons in the first ward, is about three hundred and ninety-seven, of whom about two hundred and ninety-one are white, and the remainder colored.

The number of such persons in the second ward is about three hundred and sixty, of whom about two hundred and eighty-one are white and the remainder colored. The whole number of such persons in the third ward is about twenty-eight hundred, of whom about eight hundred are white and the remainder colored.

The assessed valuation of the real estate of the city of Wilmington as to the several wards is as follows, to wit: In the first ward $950,000, in the second $1,180,000 and in the third about $2,000,000.

At the election held on the 11th day of March, 1875, votes were cast as follows: In the first ward the whole number of votes cast was one hundred and sixty, in the second ward the whole number of votes cast was one hundred and ninety-three, in the third ward the whole number of votes cast was three hundred. The defendants did not participate in said election nor recognize its validity, but on the contrary they, or a part of them, advised and counseled the people not to recognize the election.

That portion of the territory within the corporate limits, designated on the map as third ward, west side of the river, is not embraced in any of the registration precincts provided for in the act of Feb. 3rd, 1875, but is included in the third ward, as set out in said act.

Prior to the meeting of the last General Assembly notice was given for thirty days by publication in the "Daily Journal," a newspaper published in the city of Wilmington, and which circulates in the county of New Hanover. The following was the form of said notice, to-wit:

"Application will be made to the next General Assembly of North Carolina to amend the charter of the city of Wilmington, and for other purposes."

A considerable portion of the third ward consists of unimproved and uninhabited lots, on the outskirts of the city.

Upon the foregoing facts it is submitted to the Court to determine the following questions:

1. Whether the relators of the plaintiff are now entitled to the said offices of aldermen of the said city.

2. If not entitled now will they be so entitled from and after the first Thursday in August next, being the day appointed by law for holding the next election for the Board of Trustees for the township of said city.

And it is agreed that if the Court shall be of opinion in the affirmative upon either of the said two questions, judgment shall be rendered that the defendants be ousted from the said offices and that the relators be put in possession thereof.

His Honor gave judgment in favor of the relators of the plaintiff, that the defendants be ousted from the possession of said offices and the relators be put in possession, &c. From this judgment the defendants appealed.

Russell, Shipp & Bailey, Fowle, Badger and *Haughton*, for appellants, submitted.

CAN THE LEGISLATURE CHANGE THE CONSTITUTIONAL ELECTORAL QUALIFICATION?

That the General Assembly has no such power is so manifest that it is surprising that the question should ever have been raised. Yet authorities are abundant.

Rison v. *Farr*, 24th Ark., 161; *Wisconsin* v. *Williams*, 5th Wisconsin, 308; *St. Joseph & D. C. R. R. Co.* v. *Buchanan county*, 89th Missouri, 585; *Davies* v *McKerby*, 5th Nevada, 169; *McClafferty* v. *Guyer*, 59th Penn., 109; *Page* v. *Allen*, 58th Penn., St. R., 338, 347; *Thomas* v. *Ewing*, 1st Brewst. 103. But the question is, has the Assembly under-

taken to change the constitutional qualification? This carries us to the question:

DOES THE POWER TO SELECT MUNICIPAL OFFICERS RESIDE IN THE VOTERS OF THE CORPORATION QUALIFIED ACCORDING TO ARTICLE VI, SECTION 1?

The power of appointments by art. 3, sec. 10, is expressly prohibited to the General Assembly. The General Assembly cannot exercise this power in any case or in any shape, whether the office be created by the Constitution or by statute. *Clark* v. *Stanly*, 66 N. C.

Says READE, Judge, in *People ex rel Nichols et al.* v. *McKee et al.*, "reading the whole Constitution, and without any hypercriticism, it is plain, that such officers as are not elected by the people at the polls—and most of them are so elected—are to be appointed by the Governor, except the immediate officers of each branch of the Legislature and the immediate officers of the Supreme Court."

According to the settled doctrines established in this line of cases, *Clark* v. *Stanly*, 66 N. C.; *People ex. rel. Nichols* v. *McKee*, 68 N. C.; *People ex. rel. Walker* v. *Bledsoe*, 68 N. C.; *People ex rel. Badger* v. *Johnson*, 68 N. C.; *People ex. rel. Rogers* v. *McGowan*, 68 N. C.; *North Carolina ex. rel. Howerton* v. *Tate*, 68 N. C., the power is in the Governor, or in the people. Either view is sufficient for the defendants in this action.

The Legislature cannot do by indirection what they cannot do directly. They cannot *delegate* the power of appointment. But it will not be denied that if they can change the constitutional qualification, as this act does, there is no limit to their discretion or their will. They may establish woman suffrage, educational qualification, elect a class of persons to whom they commit the power of electing officers or select the officers themselves. All this must be conceded to the Legislative power if the claim of plaintiffs is admitted. There is no mid-

dle ground. The power is in the Governor, the Legislature or the people. Plaintiffs' case can be sustained on no principle save the absolute sovereignty of the Legislature over municipal corporations, and the absence of all organic restraints expressed or implied upon its supreme will. And this power is sought to be derived by invoking the well settled principle that, the power to create involves the power to destroy, and that municipal corporations being the creature of the Legislature are, in general, subject to its authority. This is not denied. But we submit that our Constitution restricts this general power in the matter of selecting municipal officers; and that is the question to be decided. The power of Legislative appointment is sought to be derived from Art. 8, Sec. 4: "The Legislature shall provide for the organization of cities and towns." Does this grant of power carry with it authority to reverse the whole order of things as established by the Constitution, to make the Legislature the depository of the appointing power against the general policy and express inhibitions of the instrument, and to deprive the people of cities and towns of local self-government? Or does it mean simply what it says, that the Legislature shall *organize* cities, that is perform the ordinary and necessary acts of the legislation, create the offices, fix the salaries, prescribe the duties of officers, lay off the city into proper divisions, and generally to prescribe rules and regulations for the municipal government? Mark the connection: "The Legislature shall provide," &c., *and* "restrict the power of taxation, assessments, borrowing money, contracting debts and loaning their credits"—showing that the idea of the draftsman was to provide for the *establishment, creation and supervision* of these local governments without ever supposing that he was interfering with the other parts of the Constitution which fix the appointment of officers, or by irresistible implication leave their election to the reserved rights of the people. This is precisely analogous to the point decided in *People ex. rel. Welker* v. *Bledsoe*, 68 N. C. There the argument was made that, as the Constitution conferred

power on the Legislature to provide for the "*conduct*" of State's prison, this carried the power of appointing directors of the prison. The contrary was held by this Court. The Court stated the distinction as above.

But it is objected that the suffrage clause, Art. VI., sec. 1, applies only to State and county elections. This objection is plainly answered by the Constitution itself. That this clause establishes a general and universal electoral qualification, applying to townships, to towns, cities, villages and other municipal divisions less than a county, is conclusively shown by sec. 5 and by sec. 7 of Art. VII. Of course the *residence* qualification, when the election is for a township or city, applies only to actual residents in the township or city. The qualified voters of the county cannot vote in the city election any more than they can go into a township, outside of their own, and vote at a township election. Whether the thirty days in the county can be construed to require the same length of domicil in the township or city, or whether the residence in the State and county for the twelve and one months respectively, and actual residence in the township or city on the day of election constitute a full suffrage qualification, it is not material here to inquire. Will it be said that the "qualified voters" in sec. 7, Art. VII, mean such persons as the *Legislature may declare* to be qualified? If so, then the section furnishes no guarantee against the evils to remedy which it was intended; because it will only be for the Legislature to exclude those who are opposed to contracting the debt and leave it to be voted on by its promoters and advocates! But the same claim may be set up with the same propriety in reference to the township clause, sec. 5, Art. VII. Yet who doubts that the "qualified voters" thus mentioned refer directly to the suffrage clause, sec. 1, Art. VI? Some things are too plain to be argued.

DOES THE UNCONSTITUTIONALTIY OF THE ACT VITIATE THE ELECTION?

The rule is well settled that mere irregularities in the poll

occasioned by failure of election Judges to observe the directory clauses of the statute, do not affect the validity of the election.

It is equally conceded that the reception of illegal votes or rejection of qualified votes does not *per se* vitiate the poll. To have this effect it is ordinarily necessary that it should appear that such unlawful votes received or such lawful votes rejected would have changed the result. But when upon a canvass of the whole return the Court sees that lawful votes have been rejected or unlawful votes received to such an extent as to throw a cloud over the result and to make an accurate canvass impossible, the poll must be set aside.

In the language of Judge THOMPSON in *Thompson* v. *Ewing*, 1 Brewst., 107, "when the conduct of election of officers (though actual fraud be not apparent) amounts to such gross and culpable negligence, such a disregard of their official duties as to render their doings unintelligible or unworthy of credence and the result of their action unreliable"—in all such cases the election is void. It was said in *People* v. *Cook*, 8 N. Y., 69, should the ballots be partially destroyed or the boxes be partly crammed so as to render it impossible to ascertain the number of genuine ballots, *the whole should be rejected.* So in the leading case of the Scranton Borough election, *Bright. Lead. Cases*, 455, it is said: "If it appear that an erroneous rule was adopted which did improperly keep legal voters from voting or which prevented legal voters from offering their votes, it would be an undue election—more clearly, however, *to be set aside by the Court* if, under the evidence, it be reasonably probable that if such votes had been received the result would have been different or *have been left in doubt.*"

All the authorities seem to agree that if the irregularity is such that the errors cannot be accurately corrected, or such as to cast the result into doubt and confusion, the poll must be vacated. *Littlefield* v. *Green*, Brightley, 493; *Mann* v. *Cassidey*, 1 Brewst., 60; *Weaver* v. *Green*, Ibid, 140; *Battery* v. *Megany*, Ibid, 162; *Gibbons* v. *Sheppard*, 2 Brewst., 1; *Harper* v. *Greenbank*, 1 Brewst., 189. This principle is re-

cognized and assumed in *Platt* v. *People*, 29 Ill., 72. Now is our case one where the rejection casts the result in doubt and confusion? And does it appear that such rejection in all reasonable probability changed the result?

Look at the facts here: In the 1st Ward, out of 397 voters, Relators received *a majority* of the 160 votes cast; in the 2d Ward, out of 360 voters, Relators received *a majority* of the 193 votes cast; in the 3d Ward, out of 2,800 voters, Relators received *a majority* of the 300 votes cast. Out of 3,600 voters, 653 votes were cast. Where were the other 2,937 qualified voters? True the case shows that a part of the Respondents ignored the election and advised against it; but who can say how many qualified electors had come into the city in the preceding 90 days? Who can say how many had moved from one ward to another? Who can say how many had moved from one block to another? Who can say how many had not resided continuously in one lot or yard? The case shows that a large part of these people were colored, and all of them were inhabitants of a commercial city—the former just rescued from slavery and transitory in their habits—all of both races subject to the mutations of life incident to residence among a commercial population. These things the Court will take notice of judicially. Does it require any stretch of the imagination to see that enough were thus unlawfully disqualified to have changed the result? How many would it have taken to change the result the case does not show—it only states that relators received *a majority* of the votes cast, which (that is, the number of votes cast,) is in the First and Third Wards, less than a majority of the votes in each ward. If relators were elected by a bare majority, then, of course, one or two votes in each ward would have changed the result. Even supposing that relators received all the votes cast—a most violent and unreasonable presumption—it is easy to see that a proscription like this, applying to large classes of citizens, whose number no man knows or can ascertain, could, and most reasonably did, change result. Take, for example, the Third Ward: Out of

2,800 voters only 300 voted. Who can say that there were not 300 others disfranchised? So that when upon the settled principles apply to lawful and regular elections, this one was invalid.

But no such rules can apply to a case like ours. In case the irregularity is not an incident to a lawful election, but the election is based upon and owes its very existence to the unlawful element. Ours is a case where the Constitution having established the electoral body, the Legislature undertakes to *change* it, and proceeding on an assumption of its power to do, ordains another and a different body, excluding a part contrary to the Constitution.

Suppose the act had excluded all white men and declared that only colored persons should be entitled to register and vote. Would the Court wait to enquire whether there were enough whites to have changed the result? And would it be said that these whites should have tendered their votes and have had witnesses to prove it? Is there no difference between an improper exclusion of voters in a lawful election conducted on lawful principles and a systematic, collosal proscription of lawful electors proceeding from the mandate of the act to which the election owes its existence?

An election begun and held with the avowed purpose of taking the sense of a *part* only of the electoral body—with full notice to the rest that they are to be ignored. Does it stand on the same ground with a legitimate and regular election in all respects unexceptionable save that by mistake or fraud a stated number of persons were improperly rejected? Take an example: Our Constitution, Art. VII, Sec. 7, provides "that no city shall contract a debt unless by a vote of a majority of the qualified voters therein." Suppose the Legislature should order an election under this clause and direct that the question should be submitted to the that part of the electors residing on the west side of the river, while those on the east side shall not vote! Would it be gravely contended that this election is good unless the disfranchised voters tendered

their votes somewhere and to somebody and then established by proof that there were enough of them so offering to vote, and that they would have voted in such a way as to have changed the result? Would any Court hesitate to say, the law itself being in its very terms unconstitutional and void, conferred no power upon the poll holders and to declare the election a nullity? Suppose the Legislature should provide that the electors of Brunswick should elect a sheriff for New Hanover or that the electors of Wilmington township should elect Commissioners for the county of New Hanover? If the position contended for by the relators be the true one, then these elections could not be assailed unless the disfranchised voters tendered, were rejected and then proved that their votes would have changed the result! *Reductio ad absurdum.*

Innumerable cases may be supposed as showing the fallacy of applying the ordinary rules of counting and canvassing returns—rules adopted for the purpose of correcting the errors and frauds of election judges without affecting the legal votes actually cast—to an election held upon a *foundation of illegality, created by an unconstitutional law, and operating upon a part only of the electoral body.* Suppose the Legislature should change the Constitutional qualification, so that only the men over 50 years, and all the women and female children should vote, and under such an act an election is held. According to the position maintained by the other side, this election would be good until it was made to appear that the qualified voters under 50 years offering to vote, being added, and the female voters being substracted, the result would have been changed. After this, illustration is fruitless.

When an erroneous rule is adopted by the election judges, operating to exclude a class of qualified voters, they are not required to go through the vain and empty form of tendering their votes. *Scranton cases, ante.* But here the voter who tendered his vote, not having the qualifications prescribed, was subject to indictment. The act of 20th December, 1870, sec. 4, in the matter of the penalty denounced against any one

"offering to register, not being entitled," is not repealed by, because not inconsistent with, the act of 1875. So that all these disfranchised voters would have been exposed to criminal pains and penalties had they offered their votes. True, it may well be said that, as to lawful electors, the penalty was void. But every man is not a Constitutional lawyer; and what better is calculated to deter a citizen from the exercise of his rights than a criminal penalty denounced against the attempt? Is the citizen to run the gauntlet of a criminal prosecution in order to put himself in a position where he can assert his rights?

In this case, besides the exclusion by reason of the unconstitutional tests imposed, it is to be observed that a large part of the voters resident therein, are excluded from all rights to register or vote. Twenty-five blocks—an area as great as of the first or second ward—are totally shut out from all participation in the election. The number of qualified voters thus disfranchised, the case does not state. If we are to surmise from what does appear in the case stated—and this is the only way of estimating the number—it would appear that some three hundred or three hundred and fifty electors are thus excluded. This excluded territory is larger than the second ward and but one block smaller than the first ward. They contain, the former three hundred and sixty and the latter three hundred and ninety-seven voters. Where should these electors have offered to vote? No place was provided. They were absolutely and entirely excluded. This of itself takes this case out of the ordinary rules and doctrines applying to elections, and establishes that this was in no sense an election by the qualified voters of the city, but simply an attempt to delegate to certain favored individuals the power of selecting municipal officers. To show the effect of legalizing this exclusion by running out the principle to its natural and inevitable results, would be superfluous. To the suggestion that the act does not exclude these twenty-five blocks, we answer that the act plainly divides the third ward into four precincts and ex-

pressly prescribes their boundaries. Why name the lines and boundaries of these precincts, if not for the purpose of embracing the voters within the boundaries? True, in other sections reference is made only to the block, the lot and the ward. To have inserted in every place after the word "ward," when used in connection with the act of registering or voting the words: "and (if such voter resides in the third ward) in the precinct in which he offers to vote"—would have been more explicit, but it was not necessary. The act must be construed together so as to make all of it stand. To say that a voter living in the fourth precinct could vote at the other end of the city in the first precinct, is to make nonsense of the section which prescribes the boundaries of the precincts.

In *People* v. *Hastings*, 29 Cal. 449, it is held that as the Constitution provides that the assessors should be elected by the qualified voters of the town in which the property is situated, an assessor elected by a district embracing a more extended area than the town had no authority, and the tax itself was void. So grossly unlawful did the Court seem to regard this sort of an election that they disregarded the officer's title even in a collateral proceeding. *A fortiori* is it a nullity when the constitutional division is split and the election given to a fraction of the electoral body.

This identical question is settled by a well considered opinion of this Court. *Perry* v. *Whitaker*, 71 N. C. Rep. That case is "on all fours" with ours as to the effect upon the election of excluding a class of voters from the rights of the ballot.

SUPPLEMENTARY BRIEF.

People v. Hulbert, 24 Mich.; Const. of Michigan, Art. 15, sec. 14, provides: "Judicial officers of cities and villages shall be elected, and all other such officers shall be elected or appointed at such time and in such manner as the Legislature may direct." Art. 15, sec. 13, is the same as the clause in our Const. Art. 8. sec. 6: "Legislature shall provide for the

incorporation (this word in our Constitution is omitted) and organization of cities and villages and shall restrict," &c. Ours was evidently copied from that.

Constitution of Michigan contained no express inhibition on Legislative appointments nor any "reserved rights" clause as does ours. Legislature of Michigan, by an act amending the charter of Detroit, appointed certain persons to fill the municipal offices. The Supreme Court of Michigan decides that the act is void because contrary to the *spirit*, and *meaning*, and *scope*, and *policy*, of the Constitution.

The opinions of Chief Justice CAMPBELL and Judge COOLY assert broadly the right of local self-government in the corporators of cities and villages, and deny that anything but *an express grant of Legislative power* can take it away.

The power to control the selection of municipal officers as conferred by the authority to "organize" was not claimed by counsel on the argument, nor was it deemed worthy of notice by the Court.

When a Constitutional provision is borrowed from a sister State, the construction given to it by the judiciary of such State is high authority as to its meaning. *Langdon* v. *Applegate*, 5, Ind. 327.

So has the Supreme Court of the United States held that the construction given by the State judiciary to their own Constitution is binding on the Federal Courts. 5 Cranch, 222; 9 Cranch, 87; 12 Wheat, 153, 166; 5 Pet. 151; 7 How. 767; 2 Cush., 189; 4McLean, 488; 1 Black 436.

"*Optimus interpres rerum usus.*" Cool. Const. Lim 35. The Constitution must be construed according to the *thoughts which it expresses* which must be arrived at not only in the light of its language, but also its history, its policy and the condition of and political usages of the State. Legislation which contravenes them is void. *Marbury* v. *Madison*, 1 Cranch 137. *Gibbons* v. *Ogden*, 9 Wheat., 188. *Newell* v. *People*, 7 N. Y., 97. 1 Doug., Mich., 354. 2 Mich., 587. 5 Mich., 53. 7 Mich. 345. 11 Mich., 120 and

139. *State* v. *Underwood*, 63 N. C. Rep. *Maize* v. *State*, 4 Ind., 342.

The general scope and purport of the Constitution is to make all officers elective by the electors of the locality comprised in the election District. The elective franchise, whether derived from the Constitution or an inherent right reserved to the people in so far as not restricted by the Constitution in express terms, cannot be interfered with by the Legislature beyond merely regulating the formal details of its practical exercise.

Art. XIV, sec. 5, of the Constitution supports the view taken by this Court in the numerous cases here cited as fixing the power of Gubernatorial appointment or popular election. Here the Constitution divides the "offices in this State" into two classes, recognizing no others, to-wit: Those appointed by the Governor and those elected by the people.

Sec. 16, Art. II, of the Constitution recognizes counties, cities and towns as political entities in the political divisions of the State.

The Ordinances of the Convention of 1868 amending the charter of Wilmington and Raleigh conclusively show that the framers of the Constitution thought the suffrage clause, Art. VI, sec. I, applied to cities and towns. These give us a cotemporaneous construction placed upon the Constitution by the body which formed it, and the people ratified it with notice of this construction.

THE ELECTION WAS VOID.

In the case of *Fort Dodge City School District* v. *the District Township of Wakansa*, 17, Iowa 85, it was distinctly held by the Supreme Court of Iowa—a high authority—in an opinion delivered by Chief Justice WRIGHT and concurred in by Judge DILLON, one of the most profound and accomplished lawyers in America—that, when the notice of an election, instead of providing for taking the vote of all qualified elec-

tors, provided for a vote by only a portion thereof, *the election was void, although the votes thus excluded were not enough to have affected the result.* The reasoning of the Court is pointed, forcible and conclusive.

People v. *Maynard* 15, Michigan 463. The Legislature attempted to lay off a new county, but so arranged the voting precincts, &c., so as to exclude a part of the electors: *Held*, the act was void and no county was established.

Lanning v. *Carpenter*. 20 N. Y. 447. The Legislature attempted to lay off a new county comprising parts of two Senatorial Districts, so that the people of the new county could not vote in either District: *Held*, the act was void.

Attorney General v. *Supervisors of St. Clair*, 11, Michigan 63. The Legislature submitted to the vote of the people the question of moving the county seat, but so arranged the voting places as not to give the electors in a certain locality a chance to vote at all: *Held*, the act was void—*without regard to the number of voters excluded, or whether their votes could have changed the result.*

Kinney v. *City of Syracuse*, 30, Barbour 364. A part of Syracuse was incorporated in the town of Dewitt, but not attached to any election precinct in the latter town, so that the electors of this detached section could not vote in Syracuse because they were no longer residents, and they could not vote in Dewitt because not attached to any precinct: *Held*, to be a fatal objection to the validity of the act, which was declared void. The same principle by implication is decided in *Ramsay* v. *People*, 19 N. Y. 41.

The case of the *State of Wiscon. ex. rel. Knowlton* v. *Williams*, 5 Wis. 308, settles this question so far as authority can settle anything. The residence qualification in the Constitution of Wisconsin is *twelve months in the State.* The Legislature ordered an election to be submitted to the "qualified electors of the county of LaFayette" with a provision that "no person shall be deemed qualified to vote *unless he shall have resided in the town where he offers his vote at least thirty*

days previous to the election: *Held*, That the Legislature might provide that electors should vote only in the town where they reside because this would only be to prescribe manner and place, where and how the rights should be exercised; but to add a residence qualification not mentioned in the Constitution is a violation of that instrument. The act authorizing the election being in this respect unconstitutional, *the election is void.* "The question is whether the legal voters have had an opportunity to express their wishes. If the act had submitted the question to the legal voters of the county, then a most material question of fact might have arisen in regard to the qualifications of those whose votes were refused by the inspectors of election. But the act in question, in express terms, prohibited persons from voting although they had all the qualifications which the Constitution requires. They, *therefore*, were not allowed by the act to vote, and if they had offered to do so their votes would have been rejected. It follows that the *legal voters* of the county had no opportunity to vote." And the court says in positive words, that it makes no sort of difference whether they tendered their votes or whether their votes might have changed the result.

To the same effect and affirming the same principle is *Denver City R. R. Co.* v. *Buchanan*, 39, Missouri 485. The Constitution of Missouri fixes a general electoral qualification as does ours. The Legislature in submitting the question of subscribing to stock in a Railroad required the voter to be a tax-payer: *Held*, That the attempt to depart from the constitutional qualification vitiated the act and rendered the election void.

Page v. *Allen*, 58 Pen. St. R. 338, 347. The expression of one thing in the Constitution is the exclusion of things not expressed. Lord Bacon's remark that "as exceptions weaken the force of a general law, so enumeration weakens as to things not enumerated," expresses a principle of common law applicable to the Constitution which is always to be understood in its plain, untechnical sense. In electors is vested a

high, and to freemen a sacred right of which they cannot be divested by any but the power which established it. The Legislature must prescribe necessary regulations as to the plans made, manner and whatever else may be required to insure its full and free exercise. But these regulations must be subordinate to the right the exercise of which is regulated. The right must not be impaired by the regulation. It must be regulation purely, not destructive. "As a corrallary to this, no constitutional qualification of an elector can in the least be abridged, added to, or altered by legislation or the pretense of legislation." No regulation can be valid which will have the effect to increase the residence as fixed by the Constitution.

"A law intended to take away or unnecessarily postpone or embarrass the right of an elector will be set aside as unconstitutional." The Constitution of Pennsylvania required ten days residence previous to the election. The registry act required registration to be ten days before the election and allowed only those to register who had resided ten days—thus making the residence twenty instead of ten days: *Held*, The act to be void for this reason.

Bill of Rights, sec. 10. How can an election be free when a part of the voters are driven from the polls by a Legislative exclusion?

Strange and *Smith & Strong*, contra.

The act of the General Assembly of February 3, 1875, amending the charter of the city of Wilmington, section 11, contains these words:

"Every male person twenty-one years old and upwards, shall be entitled to registration, who shall have resided twelve months in the State and ninety days next preceding the election, in the lot, the block and the ward in which he resides at the time of applying for registration, and no other person shall be so entitled."—*Act* 1874-'75, *chap.* 43, *sec.* 11, *p.* 467.

The validity of this clause is called in question by defendants

and the power denied to the General Assembly to superadd any further qualifications of the elector than such as are contained in the 6th article of the Constitution, in providing for the organization of municipal corporations, as directed in article VIII, sec. 4.

In opposition to this construction of the Constitution, and in support of the power exercised, requiring a residence of ninety days preceding an election in the ward, block and lot whereon the voter resides as a condition of voting, for the relator it is insisted:

I. The 6th article of the Constitution, so far as it relates to residence, is confined to such as vote in State and county elections, in the choice of officers of those political divisions of the State contemplated in the Constitution itself.

II. The entire territory of the State is divided into counties, and the Constitution further provides for a division of counties into townships. These are the only political communities recognized therein as necessary in the working of the machinery of the State government.

III. And even in the sub-division into townships, it is apparent that *residence* in a township is an essential condition of the right to vote in a township election, from the language used in Article VII, sections 5 and 7. Township officers are to be elected "*by the qualified voters thereof*" and debts can be made and taxes levied, except for necessary expenses, only "by a vote of a majority of the qualified *voters* therein." It is thus manifest that persons who have resided twelve months in the State and thirty days in the county, cannot vote in a township election unless they have the further qualification of *actual residence* in such township. If county voters could vote in township elections upon the possession only of the qualifications prescribed in Article VI, such townships would cease to be distinct political communities, and inextricable confusion and disorder would follow.

IV. The same principle, by the express words of Article VII, section 7, is applicable to *cities* and other municipal corpora-

tions, and *residence* in them is a pre-requisite to the right to vote.

V. Cities and municipal bodies, other than those mentioned, and into which the whole State is, under the Constitution, to be distributed, are to be formed and organized by the General Assembly under the express requirement of Article VIII, sec. 4, which declares it to be "the duty of the Legislature to provide for the organization of cities, towns and incorporated villages, and to restrict their power of taxation," &c. The power given is unlimited, and the duty positive to provide a government and define its powers and duties for such of these corporations as the public interest may require to be formed. The act, when within the power of the Legislature, proves the fundamental law of their respective organizations.

VI. As *residence* is a necessary condition of the right to vote in such municipal bodies formed by law, the period of that residence must be left to the discretion of the General Assembly to prescribe, and such residence for one or more months, when so required, is not only not in conflict with the Constitution, but in harmony with its provisions and its spirit.

VII. If the right to vote is given to every person who may reside in the city on the day of election, (and not otherwise disqualified), there could be no registration made in advance of such election as required by Article VI, sec. 2, inasmuch as necessarily such residence would then have to continue from such registration to the day of such election, an interval to be defined in the act itself.

VIII. If any county voter could have made himself a voter in a city by removing into such city on the day of election, not only would registration be impracticable, but stable and sound government would be impossible, and all the securities and safeguards of rights of person and property be destroyed, a result not contemplated by the Constitution.

IX. The General Assembly then must have power to mould and form these governments according to its own judgment

and discretion, except as restrained by the Constitutions of the State and of the United States.

X. The Constitution, superseded by that now in operation, conveys no distinct power to the General Assembly to organize cities and towns, and these have been formed according to its discretion. The present Constitution declares all powers, not granted, to be retained by the people, and hence it became necessary to delegate the power conferred in the Article VIII, sec. 4, and enjoin its exercise as a duty. Thus under the present, as under the former Constitution, the power of the General Assembly over cities and towns is full and complete, except as controlled by restrictions, to be found in the Constitution itself.

XI. The same construction seems to have been given by the very Convention which framed the organic law of the State in the passage of an act amending the charter of the city of Wilmington, ratified March 14th, 1868. Ordinances of Convention,uses. 1868, chap. 48, page 87.

This act recites in its preamble the incompatibility of certain provisions of the charter, then in force, and which had been ratified February 1st, 1866, with the new Constitution, then being formed, and proceeds to repeal certain clauses in the charter which required a free-holder in the city, of $1000 value as a qualification for the office of Mayor and Alderman, and a freehold qualification. Section three then directs an election to be held for Mayor and Aldermen," which election "shall be in conformity with the provisions of this ordinance and in the manner prescribed by the 17th section of the before menioned act of incorporation."

To ascertain the force and effect of this clause, reference must be made to the act of February 1, 1866, entitled "An Act to incorporate the inhabitants of the town of Wilmington. Private Laws of 1866, chap. 2, p. 27, section 17, declares the qualifications of the candidates and the voters at such elections shall be the same which are required of such persons by the

previous provisions of this act." Ibid, page 39, section 3, prescribes the qualifications for office, and section 4 those of voters. The latter declares: "No person shall be entitled to vote for Mayor and Aldermen, unless he shall be qualified and entitled to vote for members of the General Assembly of this State, and *shall have resided for six months next preceding the day of election within the corporate limits of said city*, nor shall any person be entitled to vote for "Aldermen of any particular ward, unless he *shall have resided in such ward for* 30 *days next before the day of election.*"

Following this interpretation, the General Assembly at its session of 1870–'71, chapter 24 of the acts of that session, passed a general law for the government of incorporated cities and towns, and confines the right of voting to such only as have, previous to any election, "resided 90 days within the corporation and 10 days within the ward in which he desires to be a voter." Battle's Revisal, page 824, section 9.

Thus we have a contemporaneous construction put upon the Constitution by the very Convention which framed it, and while it was in the very process of formation, and a ratification of the Constitution as thus interpreted by a popular vote.

The same construction has been put upon it by successive Legislatures in a series of acts extending over years, and not until now judicially questioned, organizing cities and town, and even in the very law under whose operation the defendants now hold their official positions. It is submitted that the matter is thus settled.

READE, J. Our government is founded on the will of the people. Their will is expressed by the ballot. The ballot embraces every citizen twenty-one years old, who has had a residence in the State for twelve months and in the county where he offers to vote, for thirty days. There is no other qualification required. Property qualification for voters and office-holders, which our former Constitutions required, and which

many thought important, have passed away, and are now regarded as antiquated. Not only is freedom to vote and hold office secured in our present Constitution, but it is so imbedded in the hearts of the people that it was thought necessary to stipulate against any interference with it by a contemplated Convention to alter the Constitution. The act of the last General Assembly calling a Convention has a provision that the Convention "shall not require, or propose any educational or property qualification for office, or voting," and requires the delegates to take an oath to observe it.

Whether that is wise or unwise, the Court can give no opinion. Our province is to expound the Constitution and laws as they are made, and not to make them.

The Constitution provides that every male person twenty-one years old, resident in the State twelve months, and in the county thirty days, shall be an elector—Art. VI, sec. 1. An elector for what? The Constitution does not say for what. Does it mean elector for President, or for members of Congress, or for Governor, or for Judges, or for members of the General Assembly, or for county officers, or for township or town officers, or for what else? There it stands by itself, without explanation—that every such person shall be an elector —a voter. It evidently means to designate those persons as a *class*, to vote generally whenever the polls are opened and elections held for anything connected with the general government, or the State or local governments. Just as a class of persons are designated as qualified for jurors.

And so in Art. VII, sec. 1, it is provided that all *county* elections shall be by "the qualified voters thereof." But who are they? There is no way of determining except to look back to the *class* designated above.

And so the 5th section provides, that *township* elections shall be by the "qualified voters thereof." And we have to look to the *class* to find out who they are.

And so Art. VII, sec. 7, provides that no county, *city*, *town*, or

other *municipal corporation* shall contract any debt, &c., unless by a vote of a majority of the "qualified voters therein;" and we have to look to the *class* to find who they are.

Here counties, cities and towns are grouped together; and so are their qualified voters. And except in this way there are no qualifications prescribed for voters in cities and towns. But cities and towns, like counties and townships, are parts and parcels of the State, organized for the convenience of local self-government. And the qualifications of their voters are the same. It follows, that the General Assembly cannot in any way change the qualifications of voters in State, county, township, city or town elections.

And yet the act, which we are considering, requires a residence of ninety days, instead of thirty. And if ninety days may be required, a year, or years, may be. And so, in many of our young and growing towns, a majority of the citizens may be excluded, and the government given to "the oldest inhabitants;" or, if long residence may be made a qualification, so it may be made a disqualification, and then the government may be given to the youngest inhabitants. And so, if *these* qualifications may be added, then any *others* may; just as we find that in one of the town charters granted by the last General Assembly, it is provided that, in addition to the citizens of the town, all persons who have lived in the county twelve months "and who own taxable real estate in said town, who have paid all the taxes," &c., shall be allowed to vote. Acts of 1874–'5, chap. 157, private laws. Surely the Legislature had no power to put any portion of the people of the State under such a government. If they can do that, then they can put Wilmington under the government of the land owners of New Hanover county.

For illustration: a man presents himself at a town election and says, I have voted in the State election, in the county election, in the township election, and now I want to vote in the town election, where I have lived thirty days. His vote is re-

jected, because he has not resided there ninety days. In vain we look in the Constitution for any such qualification. The General Assembly has disfranchised him, and that in a case which comes much nearer home to him than any other election; for the town government affects his business, trade, market, health, comfort, pleasure, taxes, property and person.

We are of the opinion that the qualifications for a voter in a city or town are, citizenship, twenty one years of age, twelve months' residence in the State, and thirty days in the city or town.

II. Again: The act provides that before an election there shall be a registration of voters, and only those who register, can vote. The first ward is made a registration and election precinct; and so with the second. The third ward is divided by metes and bounds, into four precincts. Of course every voter must register in the ward and in the precinct where he lives, and in no other, and must vote where he registers, the object being to prevent fraud by "repeating." But a large portion of the third ward—on the west side of the river—was, by mistake probably, not included in any of the precincts. And of course they cannot register or vote. And *Perry* v. *Whitaker*, 71 N. C. Rep., is an express decision that that makes an election void.

Indeed, it would seem that the registration provision for such parts of the city as are embraced, are so impracticable as to amount to the disfranchisement of the voters.

The Constitution ordains that the General Assembly shall provide for the registration of voters, and that no one shall vote without registration. Art. VI, sec. 2. This means that the General Assembly shall provide the conveniences and necessaries, so that the voters can register. It is to facilitate the exercise of the right of the ballot; and not to defeat it. It is true that this includes the power and the duty to throw such guards around, as will protect the ballot from fraud. And therefore our general election law provides, that when a voter offers to register, or vote, he may be challenged, and required

to take an oath as to his qualifications. And so in our general law regulating town elections. (Battle's Revisal.)

There can be no objection to that, and it prevents no man from voting, and puts him to no inconvenience. If a man will swear that he has the qualifications, then he can register and vote; unless it can be proved against him that he is not entitled. And in that case he can be rejected. But the act under consideration is framed upon the idea of making the ballot as difficult as possible. Indeed it makes it impracticable. It provides that "any elector may, and it shall be the duty of the registrar to challenge the right of any person to register, known or suspected not to be lawfully entitled to register; and when such challenge shall be made, it shall be the duty of the registrar to require such person to prove to the satisfaction of the registrar the fact of his being of lawful age to vote, the fact of his residence for twelve months in the Sate, and for ninety days in the lot," &c. It will be noted that any bystander may challenge the voter without proving anything against him, and the voter is not allowed to swear to his qualifications; but he must prove them by the oaths of others, and these others must be known to the registrar, and the registrar must be satisfied. Now, how is it possible for persons who move into Wilmington from other counties in the State to get witnesses from a distance known to registrars in Wilmington to prove their ages and their residences? It is impossible. It is a practical denial of the right to register and vote.

III. It has been already said that towns and cities are but parts and parcels of the State for the convenience of local self-government, and that the voters, and the rights of voters, are the same as in the State government. A fundamental principle in the State government is, that representation shall be *apportioned* to the popular vote *as near as may be.* Large counties and large districts shall have more representatives than small ones, so that not only every man may vote, but his vote shall count in the representative body.

The Act creates a representative legislative body—Board of

nine Aldermen, for the city of Wilmington. Now, if every voter could vote for all of the nine Aldermen, of course every man's vote would count. Or, if the city were divided into three wards, as nearly equal as may be, and each ward elect three of the Aldermen, then every vote would count. But instead of that the city is divided into three wards—the first has about 400 voters; the second about 400; and the third 2,800. So that one vote in the first and second wards counts as much as seven votes in the third ward. That this is a plain violation of fundamental principles, the apportionment of representation, is too plain for argument. That the Legislature never intended such a result, we are obliged to assume. Nor is there anything stated in the case that can reasonably account for it. To the suggestion that it was to protect property from irresponsible voters, it is answered, that it is stated in the case, that the valuation of property in the third ward is about equal to the valuation in both the other wards put together. And to the suggestion that it was to separate the colored from the white vote, it is answered, that while most of the colored voters are in the third ward, yet there are also more white voters in the third than in both the other wards together. And to the suggestion that it was to favor the intelligent and educated and give them the control of the city government, it is answered, that by the same Legislature such a principle is expressly repudiated as existing in the present Constitution, and is expressly prohibited from being incorporated in any subsequent Constitution. The Convention "shall not require, nor propose any educational or property qualification for office or voting." And to the suggestion that it is a plan devised by the city for its better government, it is answered, that not one voter in five voted at the election.

At any rate, without questioning the intent of the Legislature, we see that the effect of the act is to violate the fundamental principles of the Constitution, and their own cherished and declared purpose to maintain free manhood suffrage, and to eschew educational or property qualifications. And, as is

said in *Jacobs* v. *Smallwood*, 63 N. C. Rep., it is the *effect* of the act, and not the *intention of the Legislature*, which renders it void.

It is usual in *quo warranto* to inquire first into the title of the *defendant* to the office; but we are precluded from that inquiry here by the case sent us, as we are confined to the record, which is as follows:

'Upon the foregoing facts it is submitted to the honorable, the Superior Court of New Hanover county, to determine the following questions:

1. Whether the relators of the plaintiff are now entitled to the said office of Aldermen of said city?

2. If not entitled now, will they be so entitled from and after the first Thursday in August, &c.?"

And it is agreed that if the Court shall be of opinion in the affirmative upon either one of said two questions, judgment shall be rendered that the defendants shall be ousted from the said offices, and that the relators be put in possession thereof.

(Signed) ROBERT STRANGE,
GEORGE DAVIS,
Attorneys for the Plaintiffs.
DANIEL L. RUSSELL,
EDWARD CANTWELL,
Attorneys for Defendants.

It was insisted upon the argument here, that if the title of the relators is bad, the title of the defendants is bad also, and for the same reason. But it will be seen that the only point presented to us is, as to the title of the *relators*.

There is error.

RODMAN, J. I concur in the judgment of the Court; but as I cannot concur in some of the reasons of the majority, as expressed by Justice READE, it is proper to state wherein I differ from my Associates, and my reasons for the difference:

1. I concur in thinking that the Legislature has no right to

require a residence of *ninety* days in the city of Wilmington, as a qualification of voters in a city election. Much less has it a right to require such a length of residence on *the same lot.* The Constitution requires as a qualification of voters, a residence of twelve months in the State, and of thirty days within the county where they offer to vote. It says nothing about residence in a city as a necessary qualification to vote in a city election. It must be conceded, however, that no person can vote at a city election unless he resides in the city at the time he offers to vote.

I think also, that it is within the power of the Legislature to require as a qualification that the voter shall have resided for a reasonable time within the city. There can be no reason why every person (otherwise qualified,) who *actually and bona fide* resides in a municipality, be it a State, county, township or city, at the time he offers to vote therein, should not be allowed to vote. But it is also reasonable to require that the *bona fides* and intended permanency of the residence shall be clearly proved, and this can be best done by showing that it has existed for a time long enough reasonably to create the presumption of good faith and permanency.

This time, the Constitution has fixed as to counties, at thirty days. And the rule is equally applicable to cities, if the Legislature think proper to apply it. The Legislature may shorten the time which will create the presumption of good faith and permanency, but they cannot extend it beyond what the Constitution says shall be sufficient for that purpose. If they can extend the time beyond thirty days, there is no limit.

As a ward of a city has no separate government or interest distinct from that of the city, there would seem to be no reason in requiring any time of residence in a certain ward as a qualification for voting for city officers, as distinct from ward officers, if there be any such.

But to require that the voter shall have resided for any definite time on the same lot, evidently makes a disqualification which can find no sanction in the Constitution, or in justice

or in reason. In large cities most of the inhabitants are boarders or tenants. Under the act we are considering, if a voter should leave a hotel for another, or if his lease should expire and he should remove to another residence in the same city, within ninety days before an election, he would be disqualified. It cannot be necessary to say more on this part of the case, except to observe that the act was enacted only about forty days before the election.

2. I also agree with the majority of the Court in its view of that part of the act which requires voters, before being registered, and also if challenged, before voting, to prove their qualifications by witnesses, *personally known to the registrars and poll-holders.*

These officers are, in a certain sense, judges. The registrar (to confine myself to him,) must be satisfied of the qualifications of a voter before registering him, by the same rules of evidence which apply to other judges of facts, and an action would be against him if, after reasonable proof of qualification, he should *maliciously* refuse to register a person entitled to registration. No doubt the Legislature may enact *general laws* admitting or disqualifying certain classes of witnesses, but its power cannot be unlimited in this respect. I conceive it has no right to enact a rule of evidence for a particular case; or to impose such qualifications on witnesses as practically leave the admission of the evidence to the arbitrary opinion of the Judge, without liability to review; or to make the competency of witnesses in a particular class of cases dependent on a mere accident, and independent of any rule professing even to be founded in reason. What could be said for a law which made the competency of a witness in all cases, for example, on trials for murder, to depend upon the irrelevant accident, that the witness was, or was not, *personally* known to the Judge, or jury; and which left it in the discretion of the Judge to admit or deny his personal acquaintance, according to his caprice.

The injustice and folly of such a law would be so gross, that

its validity would not find an advocate. Yet that is a part of the act we are considering. The right to vote is property, and no man can be deprived of it "but by the law of the land." (Bill of Rights, sec. 17,) and the arbitrary will of a registrar or of a judge is not "the law of the land" in the well settled meaning of the Bill of Rights.

The requirement that the witnesses to the qualification of a voter shall be personally known to the registrar, is a new and most unreasonable addition to the qualifications for voters, which the Constitution prescribes, and in my opinion is clearly beyond the power of the Legislature.

3. In the third proposition of the majority, I do not concur.

The Constitution gives to the Legislature the general power of legislation, subject only to certain specified restrictions. The legislative power includes as part of itself the power to create and regulate municipal corporations, to prescribe what officers there shall be, the manner of electing them, (subject of course, to any Constitutional provisions which may be applicable,) their powers, &c. The Legislature may do this by a special act for any particular municipality, for this power is clearly given by Art. VII., sec. 1, of the Constitution. In the power to create and provide for the orgnization of a city, whether this power be derived from any special provisions of the Constitution,or general grant of legislative power, it seems to me, must be included the power to divide it into wards. [See 1 Dillon Mun. Corp., sec. 19.] This being conceded, I find nothing in the Constitution which restrains the legislative power in its action on this subject, or requires that the several wards shall be equal in area, population or taxable property; or forbids that each ward, however unequal in all of those respects, shall send the same number of representatives to the city council. It must be admitted that there is no express restraint on the legislative power in these respects. But it is argued that there is a general spirit of intent to be gathered from the Constitution, to the effect that every voter shall have an equal weight in electing public officers, and in the govern-

ment of the State, or of the subordinate municipality to which he belongs. It has been said by some one before, that it is dangerous to undertake to construe a Constitution upon what may be supposed to be its general spirit, for one may be easily misled by a prepossession as to what that spirit ought to be, and the results, even of the most impartial inquiry into so uncertain a subject, can never be certain. For my part, I find no indication of any such general intent, and certainly of none which can be applied to cities and towns, by any admitted rules of reasoning.

Art. II, sec. 6, says that the House of Representatives shall be composed of one hundred and twenty representatives, to be elected by the counties respectively, according to their population, *and each county shall have at least one representative, although it may not contain the requisite ratio of representation.* Section 7 provides how the ratio of representation shall be ascertained, and how fractions shall be carried over, with the view of producing something like an approximation of representation to population.

These provisions are merely directory. They look only to the existing, or some similar division of the State into counties. It is left open to the Legislature to create new counties, as it has repeatedly done, without any objection to its constitutional power to do so. For aught that I see in the Constitution, it might divide the State into one hundred and twenty counties of unequal area, population and taxable property, when each would be entitled to one representative in the House. I think this instance, without going farther, is sufficient to show that there is no general controlling intent in the Constitution restraining the Legislature from an unequal distribution of political power.

That this power may be abused for partizan ends, there can be no doubt. It is indifferent to me whether in this case it has been abused, or not. This Court has authority to repress an usurpation of legislative power, but not to correct a mere

abuse of it. For that, the Legislature is responsible to the people alone.

It is proper here to notice a position taken in argument by the learned counsel for the plaintiff, which might seem to find some countenance in the generality of my expressions, as to the legislative power to create, organize, and regulate, municipal corporations. The contention of the learned counsel was, that the Legislature might itself *appoint* the municipal officers, and consequently, if it allowed them to be elected, had an unlimited power to prescribe the qualifications of the electors. I do not think that this conclusion fairly follows, from the concession to the Legislature of general legislative power over such corporations. The appointment of officers, except merely temporarily, and for the purpose of organization, is not properly a part of the legislative power. It is not included under the general grant, and clearly, it is not elsewhere specifically granted. Therefore, under section 37, of the Bill of Rights, it remains with the people, that is to say, with the people of the locality in which the office is to be exercised.

From this reasoning my conclusions are:

1. That the Legislature may constitutionally divide a city into wards unequal in population, &c., and give to each ward an equal representation in the city council.

2. That it cannot require any qualification for voters in city elections additional to those required by the Constitution for voters in general.

3. It may require a residence of thirty days within the city before voting, as an assurance of *bona fide* residence within the city at the time of voting.

4. That the proof of the qualification of a voter cannot be materially other than is competent under the general rules of evidence.

PER CURIAM. Judgment reversed, and judgment here that the relators are not entitled to the office.

LOCKWOOD HYATT *v.* R. L. and T. H. B. MYERS.

Where on a former trial of an action to abate a nuisance, the jury found a verdict not touching the merits of the case; and at a subsequent term, the plaintiff moved to make the injunction prayed for perpetual, when the defendant *bona fide* tendered certain issues involving the merits, and asked that such issues be found by the jury: *it was error* in the Judge to refuse to submit to the jury the issues so tendered, and not to allow further time, in which the question of nuisance or no nuisance, under all the surroundings of the case, with special instructions, could have been submitted to the jury, together with a distinct inquiry upon the question of damages.

(*Dargan* v. *Waddell*, 9 Ired. 244; *Eason* v. *Perkins*, 2 Dev. Eq. 38 cited and approved.)

MOTION in the cause heard before *Moore, J.*, at Spring Term, 1875, PITT Superior Court.

The plaintiff brought an action against the defendants at Spring Term, 1874, of Beaufort Superior Court, alleging That the defendants had erected a steam cotton gin and grist mill in front of the residence of the plaintiff, and that the smoke stack of the gin and mill stand within sixty feet of the plaintiff's residence. When the wind is blowing from the South, the smoke, soot and cinders from the smoke-stack blow into the residence of the plaintiff in such quantities as to injure the health and comfort of himself and family and seriously damage and soil his furniture, and is in consequence thereof a great nuisance. To avoid the smoke, soot and cinders when the wind is blowing from the South, his family are compelled to close the doors and windows on the South and front side of his residence, thus depriving himself and family of the health, comfort and luxury of the southerly winds and keeping them in continual alarm on account of fire. On the 24th day of November last, the wind was blowing in a direction from said smoke-stack directly on the house of the plaintiff, and the live sparks from the smoke-stack set the plaintiff's dwelling on fire, and but for the timely discovery of the said fire and the prompt

effort of the firemen and citizens of the town, his residence, together with a large portion of the town, would have been burned up.

Upon these alleged facts, the plaintiff demanded judgment for one hundred and fifty dollars damages, and that the defendant be enjoined and restrained from working the said steam engine in its present locality and condition, and for cost, &c.

In their answer the defendants alleged: That in 1869, they erected and commenced to use a furnace and engine in the same position in which those they now use are, and attached thereto two gins. About the first of December, 1870, they purchased and attached thereto a grist mill for the convenience of the public, and about the same time attached thereto a linter. Finding that the boiler and furnace they then had were too small for their use, they purchased a larger boiler and furnace and put them in the place of the boiler and furnace aforesaid. Subsequently they purchased and attached thereto a steam cotton press. The said cotton gins and mills have been of great utility and convenience to the citizens of Beaufort and adjoining counties. The boiler and furnace are of sufficient size to run a sixty-horse power engine and having attached thereto only one of twenty-horse power, but little draught is created, so little in fact, that although the defendants purchased at great expense a spark arrester, by reason of the small amount of fire used and the slight draught consequent therefrom, the same cannot be used, as the draught from the furnace is no greater than from an ordinary chimney, nor does it emit more sparks and smoke. Defendants have carefully observed while the furnace and engine were in use, yet they have never seen sparks reach so great a distance as from the smoke-stack to the plaintiff's house. At the time of the erection of the smaller boiler and furnace, the house mentioned in the complaint was the property of Jos. Robinson, who slightly objected to the erection of the said fixtures and talked of obtaining an injunction to prevent their erection,

but never did so, and permitted the defendants to erect the same without hindrance. The plaintiff purchased the house after the erection of the same, after full notice, and until the said fire has never made any objection, but has allowed the defendants to attach many valuable improvements without objection. At the time of the said fire the wind was not blowing in the direction of plaintiff's house, but the smoke was carried between plaintiff's house and one east of it, and in order to reach the place where the fire is said to have originated, a spark would have had to travel at an angle of forty-five degrees against the wind. Since the plaintiff purchased the said house he has not only suffered the defendants to make great improvements upon the said fixtures, but has himself worked thereupon in making and repairing the smoke-stack.

The advantage and convenience to the public arising from the use of said fixtures greatly outweigh any temporary inconvenience and annoyance to the plaintiff arising therefrom, &c.

The following issues were submitted to the jury:

1. Was plaintiff's residence set on fire by defendant's mill on the 24th of November last, and is it highly dangerous in its present location to the plaintiff's residence?

2. Does the plaintiff and his family suffer great inconvenience and annoyance from the smoke, soot and cinders being blown from defendant's mill on and in the plaintiff's house, rendering his condition and that of his family uncomfortable and disagreeable, so as to be a nuisance to him?

The jury could not agree as to the first issue, but found in response to the second, "that it is a nuisance to the plaintiff and family, and assess damages at one cent."

Upon the finding of the jury it was adjudged by the Court that the defendants add twenty feet to the height of their smoke-stack, and attach to it a spark-arrester, on or before the first day of August next.

If, upon experiment, the nuisance is not abated by this addition to the smoke-stack, the plaintiff has leave to renew his motion for a perpetual injunction.

At Spring Term, 1875, the plaintiff moved the Court for a perpetual injunction, after due notice and upon affidavits filed in the cause, when and where the defendants tendered the following issues and demanded that they be submitted to a jury:

1. Whether the mill and factory are not a great public convenience to the citizens of the town of Washington and the vicinity, greatly outweighing any private injury to the plaintiff?

2. Whether the expense to defendants, by the removal of their mill and factory, would not be excessively disproportionate to the injury alleged by the plaintiff to himself?

3. Whether the plaintiff did not purchase his residence long after the erection of defendants' mill, and at a reduced price on account of its locality?

4. Whether the entire water-front of the town of Washington, on which this mill is located, has not been devoted to commerce and manufactures from time immemorial?

5. Whether plaintiff is not actuated by malice and personal unfriendliness to defendants, and seeking to injure them, instead of redressing a wrong?

6. Whether, in its present condition, the mill and fixtures of the defendants are a nuisance to the plaintiff?

7. Whether the plaintiff has not waived his right to complain of the alleged nuisance by permitting the defendants, since the purchase of his residence, to erect other valuable and costly improvements without objection, working thereon himself, as alleged in the answer herein, and not denied by the plaintiff?

The Court refused the motion.

To the ruling of his Honor the defendants filed the following exceptions:

1. That his Honor refused to allow the issues of fact arising upon the pleadings and proof, to be tried by a jury.

2. That he refused to allow them time to abate the alleged nuisance by removing the top of the new spark-arrester, the same having been erected by them under the former order of

the Court in this case, and against their own judgment and wish.

3. That he refused to submit the issues tendered by the defendants to a jury.

Upon the affidavits filed in the cause, the Court rendered the following judgment:

1. That the mill of the defendants is a great convenience to the public for the purpose for which it was constructed.

2. That said mill can be removed to many other localities in the town of Washington, where it will be equally convenient to the public.

3. There is another steam grist mill situated within said town, capable of supplying the public demand for breadstuffs.

4. That the nuisance complained of by the plaintiff and found by the jury, has not been abated by the elevation of the smoke stack and use of a spark arrester, as prescribed by former order in this action.

On motion, it is adjudged by the Court that the defendants and each of them, and all persons claiming under them, or acting under authority of them, or either of them, are hereby perpetually enjoined and restrained from using said mill and fixtures or either of them, to the nuisance of the plaintiff in his present dwelling house.

From this judgment the defendants appealed.

D. M. Carter, for appellants.
Mullen & Moore, contra.

PEARSON, C. J. What is a nuisance, is a question of law. Nuisances are divided into public and private. There is no suggestion of a public nuisance, that is, an injury to the town of Washington; but the complaint is of a nuisance to the dwelling house of the plaintiff, by reason of exposure to being set on fire by sparks, and of the annoyance and inconvenience arising from the smoke, soot and cinders coming from the chimney of the defendants' steam grist mill, factory, &c.

In regard to the exposure of the house to being set on fire, the jury disagreed and were not required to give a verdict, so we are to take it there was no danger of fire from sparks. That is out of the case.

Private nuisances vary in degree, and it depends upon the circumstances attendant on each particular case, whether either a Court of law or a Court of equity will give relief.

If a man, instead of contenting himself with the quiet and comfort of a country residence, chooses to live in a town, he must take the inconvenience of noise, dust, flies, rats, smoke, soot and cinders, &c., &c.; and he cannot in law complain of the owner of an adjoining lot, by reason of smoke, soot and cinders, caused in the use and enjoyment of his property: *Provided*, the use of it is for a reasonable purpose, and the manner of using it is such as not to cause any unnecessary damage or annoyance, and he takes all prudent precautions to avoid annoying his neighbors; and even then, neither a Court of law or a Court of equity will treat it as a nuisance unless the damage is material, so as to exceed what the owner of property ought to be allowed to put upon the owner of property adjoining, in the reasonable enjoyment of his own property, under the maxim, "*sic utere tuo ut alienum non lædas*," which depends upon the circumstances of the case. "Does the nuisance arise from an establishment made for personal gratification or mere private profit? Or does it promote the convenience of the public?" What is the extent of the damage? If slight, the Courts of law may treat it as a nuisance, and give a remedy in damages; if great and irreparable, so that compensation cannot be made, then a Court of equity will interfere by injunction. These general principles are announced and discussed in *Dargan* v. *Waddell*, 9 Ired., 244, a case showing when Courts of law give relief, and in *Eason* v. *Perkins*, 2 Dev. Eq., 38, a case showing when Courts of equity will interfere by the extraordinary writ of injunction.

A perusal of these cases will show that our case has never been tried upon its merits.

At the first trial, the jury find on the issue, "Does the plaintiff and his family suffer great inconvenience and annoyance from the smoke, soot and cinders being blown from defendant's mill over in the plaintiff's house, rendering his condition and that of his family uncomfortable and disagreeable, so as to be a nuisance to him?" "We think it is a nuisance to plaintiff and family," is the verdict—assessing no damages—but upon the idea that the law implies at least nominal damages in every case of nuisance, the verdict was amended under the instructions of the Judge so as to find damages to the amount of one cent.

It is apparent from the case sent up to us, June Term, 1874 (see *Hyatt* v. *Myers*, 71 N. C. Rep., 271,) that the Judge in the Court below, upon this finding, hesitated and did not see that he would be warranted by the doctrine of the Court of equity, to put forth the omnipotent arm of the chancellor, and order the grist mill, &c., of the defendants to be torn down; and concluded to adopt some other mode of abating the supposed nuisance, until the question of nuisance or no nuisance had been disposed of more in accordance with the principles of law. So he makes an order that the chimney be raised higher. From this order, the defendants appeal.

In this Court it is held, that whether the Judge below ought to have left the plaintiff to his remedy at law, or ought to have interfered by injunction, is a matter which this Court is unable to determine, upon the facts set out in the record. "We can see no error in the order to raise the smoke stack and put on the spark arrester." It would have been more appropriate, simply to have allowed the defendants time to abate the nuisance.

Whether the inconvenience and annoyance suffered by the plaintiff, and his family, by reason of the smoke, soot and cinders, amounted to a nuisance or not, taking into consideration the surroundings of the case, was a question of law, about which the Judge ought to have given the jury special instructions, instead of leaving them to say in the abstract, "we think

it is a nuisance to the plaintiff and his family." Whether the inconvenience and annoyance to the plaintiff and his family in his dwelling house, was to such an extent, that the house was no longer fit for a habitation, in which case the interference by injunction was called for on the ground of irreparable injury, or was merely annoying and uncomfortable when the wind was from a certain point so as to admit of compensation in damages, in which case, the plaintiff ought to be left to his remedy at law, is a question which was not submitted to the jury, and yet it is a most material fact, touching the merits of the case.

As the mode of preventing the supposed nuisance directed to be tried by the former order did not answer any good purpose, we think his Honor, upon what seems to have been a *bona fide* offer on the part of the defendants to try some other mode, erred in not allowing further time, until the next term, at which time the question of nuisance or no nuisance under all the surroundings of the case, with special instructions, could have been submitted to a jury, together with a distinct inquiry upon the question of damages, so as to see if the injury, if any, was insignificant, and fell under the rule, *de minibus non curat lex*, which the Court will not class under the head of nuisance, but will treat as an annoyance, which persons who live in towns, near the water-front, where the business of the town is mostly done, are supposed to have made up their minds to endure, by reason of the compensatory advantages of the situation. Or to see whether the injury by reason of the fact that the defendants were causing unnecessary damage for the want of proper precautions and due care, amounted to so much, as the Court would require to be compensated for, in damages and treat as a nuisance. Or to see whether the injury amounted to such a destruction of the property as to be an irreparable injury, by rendering it unfit for habitation; so as to call for the extraordinary writ of injunction.

The fact of the extent of the damage done to the plaintiff, if any, has not been found by either the jury at the first trial,

or by the Judge at the second trial, we are not to be understood as conceding the right of the Judge to find the fact of damage or of the surrounding circumstances as he does in the case now before us.)

Thus we are unable now, to decide the case upon its merits, and for that reason find there is error in making the injunction perpetual, in the absence of any finding by a jury of the amount of damage done to plaintiff.

After taking the papers to write an opinion to this effect, it occured to me, that water grist mills, and steam grist mills, were both conducive to the public convenience, and equally so, according to location, and I was led to the reflection, why should water grist mills be protected from vexatious litgation, except where the damages exceed $20 *per aannm*, and steam grist mills (the number of which has greatly increased of late years) be left to the rigid rules of the common law in regard to nuisance?

Upon looking at Battle's Rev. "Mills" chap. 72, I find section 1. "Every water grist mill, steam mill or wind mill that shall grind for toll, shall be deemed to be a public mill." Section 2 and 3, apply to these three kinds of mills—then comes sections applying to water mills only, until section 13, which, and the sections following, "include *any grist mill* or mill for other useful purpose; and prescribe the mode in which any person conceiving himself injured by the erection thereof *must* (using that word in the sense of *may*, as in the construction of 8 and 9, will and may in respect to assigning breaches in action on bonds with condition articles 68 and 69)—proceed to seek relief—" this I am inclined to think puts an end to the present action; but as the point is new, and was not adverted to on the argument, we express no opinion and leave it for the consideration of his Honor in the Court below.

Error. This will be certified.

PER CURIAM. Judgment reversed.

JOHN H. THORPE *v.* JOHN BEAVANS, Trustee of ANDREW GUNTER and others.

The purchaser at an execution sale, cannot be held liable for any device of the defendant in the execution, of which he was innocent and ignorant.

When a relation of the defendant in an execution, purchases property and then conveys it to the defendant, it raises a suspicion which, with other circumstances, should go to the jury to be weighed by them in determining the question of fraud.

The purchaser of property at an execution sale, has the right to buy up the debts of the execution creditors, and thus obtain a certain amount of control over the sale; and to the amount of the execution debts bought, such purchaser has a right to have them credited on his bid, in lieu of paying the whole of it in cash.

A purchaser at an execution sale, may lawfully buy the property of the insolvent debtor, with the intent of afterwards giving the whole or a part thereof to such debtor, or his family.

This was a CIVIL ACTION for the recovery of land and damages for its detention, tried before *Watts, J.*, and a jury at June Term, 1875, HALIFAX Superior Court.

The action was originally instituted in the name of Joel Wells, a citizen of Nash county, against the defendant, Andrew Gunter, alone, but Wells having died during the pendency of the action, his executor and sole devisee, the present plaintiff, was admitted to prosecute the suit; and at the same time the defendant, Beavans, having asserted his claim to the land in controversy, under a deed in trust, hereafter mentioned, was made a party defendant, whereupon an agreement of record was entered into between the parties plaintiff and defendant, that the title to the land in controversy should be tried upon its merits.

At the trial the plaintiff gave in evidence a judgment of the Superior Court aforesaid, for about the sum of $1,000, principal and interest, recovered by Wells at Spring Term, 1867, against Gunter and one Pittman, which judgment was duly

docketed in the Clerk's office of the Superior Court of the county of Halifax, on the second day of February, 1869. Execution having issued thereupon, was stayed by military order. A *fi fa.* was issued upon said judgment on the 1st day of April, 1869, and was levied upon the two tracts of land in controversy. A *ven. ex.* issued out of said Court tested of February Term, 1869, under which said land was sold according to law, on the 5th day of June, 1869, when the said Wells became the highest bidder, bidding five dollars for each tract, and a deed, duly recorded and proven, from the sheriff of Halifax county, whereby the land was conveyed in fee simple to the said Wells.

The plaintiff then introduced witnesses who identified the land mentioned in the execution and deed, as the land described in the complaint, and stated that Gunter had originally owned and had continued in possession of said land. The plaintiff here rested his case.

The defendant offered in evidence three judgments of the Superior Court of Halifax county against Gunter. The first recovered by Tannahill, McIlwaine & Co., at Fall Term, 1868, for $417.73. The second, recovered by Branch & Herbert, at Fall Term, 1868, for $211.17. The third, recovered by J. H. Parker, for $1,178.83 at —— Term, 1867. On the third, a payment had been made leaving due a balance of $531.84. The defendant also offered in evidence various executions which had been issued upon said judgments, and which were levied upon certain personal property of the defendant, Gunter, and upon the lands in controversy. The return upon said executions after setting forth a levy upon said lands, describing them as "the land on which said Gunter now resides," was as follows: "On the 28th December, 1868, I sold the personal property of A. Gunter, which brought the sum of $194.50; and on the first Monday in February I sold at the Court house door the following lands (described in the levy) belonging to said Gunter, one tract containing 440 acres, adjoining the lands of A. McDaniel and others, when the said McDaniel became

the last and highest bidder at the sum of $440; one other tract, containing four hundred and seventy acres, adjoining the above tract and lands of the heirs of Gov. Branch, when A. McDaniel became the last and highest bidder at the sum of $470; also his homestead, containing four hundred acres, when A. McDaniel became the last and highest bidder at $250, which said sums amounting to $1,354.50, I have appropriated as follows: $446.13 to payment of judgment, interest, cost, commissions, &c., of this *fi fa.*, (Tannahill, McIlwaine & Co.,) and $231.75 to execution in favor of Branch & Herbert against Jesse Parker and A. Smith, and $54.11 to payment of said Gunter's taxes for 1868, and balance of $41.00 paid to G. V. Hardie. Upon the executions in favor of McIlwaine & Co., and Branch & Herbert, was the following endorsement: "For value received the within *fi. fa.* is transferred to G. V. Hardie, 30th of January, 1869."

The defendant then introduced a deed of said sheriff, duly recorded and proven, whereby the aforesaid lands were conveyed in fee simple to the said McDaniel; and also a deed from McDaniel to the defendant, John Beavans, dated the 29th day of March, 1869, duly proven and recorded on the same day, whereby the said lands were conveyed in trust for the use and benefit of the defendant, Gunter, during his natural life, and after his death for the use and benefit of the said Gunter's children, with a proviso that the interest of the said Gunter in the said lands should not be subject to the payment of any of his debts contracted prior to the execution of said deed in trust, but should be subject to the payment of such debts as he should thereafter contract. The defendant here rested his case.

The plaintiff then introduced a witness, who testified that McDaniel was the uncle of Gunter's deceased wife, and that the defendant, Beavans, was Gunter's son-in-law. It was admitted that McDaniel was seventy years of age, was wealthy, and had never been married.

The plaintiff then called G. V. Hardie as a witness, and

asked him if, at the time of the said sales, he was not the agent of Gunter. The witness answered that he was not; that he was friendly to Gunter, but was the agent of McDaniel. That a short time previous to the said sales, McDaniel requested him to buy the defendant, Gunter's land for him, and get him a good title thereto. Upon cross-examination, the defendant asked the witness, with whose money the bid made by McDaniel was paid? The plaintiff objected to this question as bringing out matter new to the examination in chief, and insisted that the defendant could only ask the question by making the witness his own. The objection was overruled by the Court, and plaintiff excepted. Upon the re-direct examination his Honor allowed the plaintiff to re-examine the witness as an adverse witness.

The witness further stated that McDaniel had furnished $481.31 and that he, the witness, had furnished $10.00 from his individual funds and about $223 from a fund which he held in his hands as agent of McDaniel and two other parties to meet certain expected liabilities by reason of their having become sureties for a constable, towards the payment of McDaniel's bids. The two last sums mentioned had been repaid to him by McDaniel. Witness had gone on his own business to the town of Enfield, on the 30th day of January, 1869, being Saturday before the sale on the following Monday. That while there he had consulted with an attorney at law who, at that time, represented the firm of Branch & Herbert, as to what steps he should take to prevent Parker from postponing a sale of the lands, which he understood had been threatened by Parker in order to enable him to reduce to judgment certain other claims which he held against Gunter. The witness regarded this as necessary, because Parker was a man of wealth, and held unsecured claims to a considerable amount against Gunter, and witness wanted to get rid of Parker's money. The attorney advised him that it was necessary for him to control the judgments of Tannahill, McIlwaine & Co., and of Branch & Herbert, whereupon the witness took from the attorney an assign-

ment of the judgments of Branch & Herbert, and the same day despatched the defendant, John Beavans, to Petersburg, in the State of Virginia, where Tannahill, McIlwaine & Co. did business, who obtained from them an assignment to witness of their judgment. McDaniel and Gunter were both in town on that day, but the parties had not met by any preconcerted arrangement. Witness had conferred with McDaniel about the matter, but not with Gunter. He had never had any conference with Gunter concerning these lands. Some four or five months before the sale of Gunter's personal property, Gunter had asked him to buy in an execution then outstanding against him, for the purpose of having his personal property sold under it, and had offered him the money for that purpose; but he laughed at Gunter, and asked "if that was the way he did business," and refused to do so. That Gunter had also asked him, just before the sale, to buy in his personal property for him and allow him, (Gunter,) to repay him the money so expended. Witness consented to this, and did buy in the personal property, and Gunter has since repaid him the money. At the sale of the land the witness bid for McDaniel. McDaniel was not present. Parker's judgment was satisfied by his accepting the note of the principal debtor, Jesse R. Parker, in payment of the balance due thereon, secured by the name of McDaniel. He did not know whether or not McDaniel had paid the note. There was a matter of cost, amounting to $81, over and above the balance due Parker, which the witness paid to the sheriff, but which was shortly thereafter repaid to him by the sheriff, and by witness given to Gunter. Witness received no remuneration for his services, either from Gunter or McDaniel.

The plaintiff introduced a paper writing which, after the death of McDaniel, had been found by one Alsop, his administrator, among his valuable papers. The paper writing was in words and figures as follows:

"$495.31

"With interest from first day of February, 1869, I promise to pay A. McDaniel or order the sum of four hundred ninety-five dollars, thirty-one cents for value received. My hand and seal, this 15th March, 1870.

[cut out] [seal.]

This note was cancelled, the name of the maker having been cut out. Upon the back of said note was the following endorsement: "A. Gunter's note, $431.95."

Gunter was then introduced by the defendant, and testified that he had executed the note to McDaniel at the time it bore date. McDaniel was unwilling to take the note, but witness feeling grateful for the kindness McDaniel had shown him, insisted upon making some return, and pressed McDaniel until he finally accepted the note. A short time afterward, McDaniel met witness and told him "that he had cancelled the note. That he did not wish it said that witness had never paid the note, or furnished any part of the money which paid for the land." At the time of the sale witness was insolvent, and had no money. He had no recollection of having asked Hardie to buy in the execution, to which Hardie had referred in his examination. He had written to Branch & Herbert sometime in January, 1869, concerning money which they had in their hands, but the money belonged to his tenants, and was the proceeds of cotton shipped for them by him to Branch & Herbert.

One of the said tracts of land contained about eight hundred and sixty acres, of which a little more than one half was cleared; and the other tract contained four hundred and forty acres, of which a considerable portion was cleared, but only about one good horse crop was fit for cultivation. On the latter tract was a good dwelling house and out buildings. These lands were situated within from one to three miles of the town of Enfield, and the larger tract was very fair land, and would produce one half bale of cotton per acre on an aver-

age. He was in Enfield on the 30th day of January, 1869—had no particular business there. He went there almost every day. He saw McDaniel and Hardie there, but had no conference with them about his matters. He felt no anxiety on account of the approaching sale. He had owned the lands a long time, and had not removed since the sale.

The defendant then introduced several witnesses for the purpose of proving the good character for truth, of G. V. Hardie, the witness introduced by the plaintiff, and of A. Gunter, the witness introduced by defendant. These witnesses testified that they knew the general character of both Hardie and Gunter was good for truth.

The counsel for the plaintiff requested his Honor to charge the jury:

That if in the management of the sale of Gunter's lands, any device was resorted to by McDaniel himself, or by Hardie, his agent, or by Gunter, the defendant in the execution, to prevent the property bringing its best price, the deed to McDaniel is void as to creditors, even if he paid the whole amount of his bid out of his own funds.

2. The plaintiff having shown title by sheriff's deed under a sale under execution issued on a judgment against the said Gunter—that Gunter had remained in possession after the sale until the action was brought, and that the transactions under which the defendant now claims title were had between near relations of the said Gunter, the burden of satisfying the jury of the good faith of those transactions rested upon the defendant.

3. That if Hardie, as the agent of McDaniel, conspired to hinder creditors of Gunter, his principal is affected by the conspiracy, and the jury must regard the action of the agent as the action of the principal so far as the rights of the plaintiff are concerned.

His Honor declined to charge as requested, and charged the jury, "That the only question involved in the action was, was the land bought with Gunter's money or McDaniel's money?

"That if the jury believed that Gunter, the defendant in the executions, and G. V. Hardie, nothing else appearing, combined together to cheat, defraud, hinder and delay the creditors of Gunter, and that if McDaniel bought without notice of the combination, he is an innocent purchaser and his title good."

The plaintiff excepted to the charge of his Honor. There was a verdict and judgment for the defendant, and the plaintiff appealed.

Busbee & Busbee and *Moore & Gatling*, for the appellant.
Batchelor, contra.

RODMAN, J. I. It became a question in the cause whether the purchase of the land in controversy by McDaniel, through his agent Hardie, was fraudulent or not, which involved the question by whose money the price bid had been paid. The plaintiff who alleged that the sale was fraudulent, introduced Hardie as a witness, and asked him if he, at the time of the sale, was not the agent of Gunter. The witness replied in substance, that he was not, but that he was the agent of McDaniel. On cross examination, the defendant asked the witness with whose money the bids for McDaniel were paid. The plaintiff objected to the question as bringing out matter new to the examination in chief, and insisted that defendant could only ask the question by making the witness his own. The Judge overruled the exception and permitted the defendant to proceed in his examination. To this the plaintiff excepted. His Honor, however, afterwards allowed the plaintiff to re-examine the witness as an adverse one; that is, as we infer, to ask him leading questions. At a later stage of the case it appears that the Judge permitted the defendant to introduce witnesses to support the character of Hardie.

There is some difference in the authorities as to whether a party is confined on a cross-examination to the matter proved in chief, or may extract from the witness new matter material

for his case, and whether if he does so he thereby makes the witness his own. 1 Greenl. Ev., sec. 445. We think it is not necessary for us to express any opinion on the question, as the Judge practically gave to the plaintiff the benefit of the rule he contended for by allowing him to put leading questions to the witness on his re-examination. There are but two other advantages which could have accrued to the plaintiff under any circumstances from considering Hardie as the witness of the defendant for all purposes, viz: the right of impeaching his credibility, and of the reply, before the jury. The first of these he does not appear to have claimed, and the second he had. If an error was committed in the ruling of the Judge it had no practical result.

II. The plaintiff requested the Judge to charge the jury,

1. "That if in the management of the sale of Gunter's land, any device was resorted to by McDaniel himself, or by Hardie his agent, *or by Gunter the defendant in the execution*, to prevent the property bringing its best price, the deed to McDaniel is void as to creditors, even if he paid the whole amount of his bid out of his own funds."

We do not see on what principle, a purchaser at execution sale, should be held liable for any devices of the defendant in execution, of which he was innocent and ignorant. If this were the law, a purchaser at execution sale, could never be sure that the sale was valid, and it might be used to defraud him. No authority was cited to support the proposition, and the instruction was rightfully refused.

2. "The plaintiff having shown title by sheriff's deed, under a sale under execution issued on a judgment against the said Gunter, that Gunter had remained in possession after the sale until the action was brought; and that the transactions under which the defendant now claims title were had between near relatives of the said Gunter, the burden of satisfying the jury of the good faith of those transactions rested upon the defendant.

As far the facts in evidence made this charge a proper one,

we think the Judge gave the plaintiff the benefit of it, when he put on the defendant the necessity of showing that McDaniel paid for the land from his own means. The sheriff was no relation of Gunter. When a relation of the defendant in the execution purchases property, and then conveys it to the defendant, it does raise a suspicion; and these circumstances, with others, should go to the jury to be weighed by them in determining the question of fraud. But these circumstances seem to have been fairly left to the jury in that view.

3. "That if Hardie, as the agent of McDaniel, conspired to hinder creditors of Gunter, his principal is affected by the conspiracy, and the jury must regard the action of the agent as the action of the principal, so far as the rights of the plaintiff are concerned."

The Judge refused all the instructions asked for, and told the jury "that the only question involved in the action was—was the land bought with Gunter's money or McDaniel's money? That if the jury believed that Gunter, the defendant in the execution, and Hardie, nothing else appearing, combined together to cheat, defraud, hinder, and delay the creditors of Gunter, and if McDaniel bought without notice of this combination, he is an innocent purchaser, and his title good."

Whether the charge of the Judge was right or not, presents a very interesting question, upon which there is no authority that we have been referred to, or that occurs to us. But it is one that we are not called on to decide. The prayer of the plaintiff assumes that there was evidence of a fraudulent conspiracy between Hardie and Gunter, or between Hardie and some others, to suppress competition among bidders, and prevent a sale at a fair price. The Judge also assumed that there was evidence to that effect, but held it to be immaterial. Now, although if there had been such evidence, the Judge might have been mistaken in supposing it immaterial, yet, if there was no such evidence, the question which he submitted to the jury was the true one in the case.

The counsel for the plaintiff earnestly contended that the

uncontradicted and admitted facts established such fraud on the part of Hardie, as would vitiate the sale if McDaniel was affected by it. We do not think that a jury could reasonably draw such a conclusion from the facts to which the counsel adverted.

We assume it to be established by the verdict, that McDaniel paid for the land from his own means, and not from Gunter's, and that there was no understanding between him and Gunter, that Gunter should repay him the price, or any part of it, and have an interest in the land. We may therefore put out of view all the evidence which tends merely to negative the finding of the jury on this point. The circumstances which the counsel relies on as conclusive of fraud are these:

1. That Hardie bought up before the sale the debts of the execution creditors, and thus obtained a certain amount of control over the sale; and, to the amount of the execution debts bought, a right to have them credited on his bid in lieu of paying the whole of it in cash. We know of no reason why this should be illegitimate or forbidden in one who wishes to purchase property at an execution sale, and there is no authority which holds it to be so. That Hardie or McDaniel owned the debts did not tend to suppress competition any more than if original creditors had continued to own them. Parker, as well as all other persons, might still have bid. There was nothing to forbid or discourage them.

2. The property, after its purchase by McDaniel, who was related to the wife of Gunter, was conveyed by McDaniel to the defendant, as a trustee for Gunter for life, with remainder to his children.

We have already said that these facts were competent and proper evidence upon the question, whether the price of the land was really paid by Gunter or by McDaniel. But we do not perceive their relevancy as tending to prove any other sort of fraud, such as a suppression of competition at the sale. A purchaser at execution sale may lawfully buy the property of the insolvent debtor with the intent of giving the whole or a

part of it to him or his family afterwards. There is no principle of law which forbids such an act of benevolence, and if the value of the property thus given, comes within the limit of the homestead exemption, the debtor may enjoy it free from interference by his creditors.

We have considered this case simply on the points made by the record, and are of opinion that the judgment below should be affirmed.

PER CURIAM. Judgment affirmed.

STATE v. ROBERT HALL.

The lessee of a stall in a market house, who furnishes meals to the public, does not keep an "Eating House," within the meaning of the Revenue Act of 1872-'73, which requires that such persons should take out a license, and pay a license tax.

INDICTMENT, for keeping an eating house without having obtained license therefor, tried before *Watts, J.*, at January Term, 1875, WAKE Superior Court.

The jury returned a special verdict, (which is fully stated in the opinion of the Court), and thereupon it was adjudged by the Court that the defendant was not guilty. From this judgment the State appealed.

Attorney General Hargrove and *Harris*, for the State.

No counsel for the defendant in this Court.

RODMAN, J. The act under which this bill of indictment was drawn, is chap. 144, of the acts of 1872-'73. Its language so far as is material to the present case, is as follows:

"SCHEDULE B. The taxes in this schedule imposed, are license

tax, for the privilege of carrying on the business, or doing the act named," &c.

"SEC. 13. On the gross receipts of hotels, boarding houses (except those used for educational purposes) restaurants and eating houses, the tax shall be one-fourth of one per centum."

"SEC. 26. Every person required in this act to pay a tax on receipts or sales, shall list on oath to the Register of Deeds on the first days of January, April, July and October of each year, the amount of receipts or sales for the preceding quarter and the Register of Deeds shall keep a record of the same in a book kept for that purpose."

The Register shall furnish the sheriff with a copy of the lists, who shall immediately proceed to collect the taxes, &c. Any person failing to list shall be subject to a double tax, &c.

"SEC. 27. No person shall follow any of the trades or professions taxed by this act, or in any other act, &c., without first listing the same to the Registers of Deeds and obtaining a license from the sheriff of the county in which the trade or profession is to be followed," &c.

SEC. 28. Gives the form of the license.

"SEC. 32. Every person who shall practice any trade or profession or use any franchise taxed by the laws of North Carolina without having first paid the tax and obtained a license, as herein required, shall be deemed guilty of a misdemeanor, and shall also forfeit and pay," &c.

The special verdict states:

I. "That the defendant, Hall, leased at the time specified in the bill of indictment, a stall in the market house, in the city of Raleigh, and kept therein for sale articles of food, such as potatoes, onions, apples, and other vegetables.

II. That the said Hall also furnished for the public, in said stall, meals, such as are furnished by restaurants and other boarding places, which were partaken of for pay, by such as chose to go there and eat. That this was habitually done, and the public was accommodated by having meals furnished at any time of the day."

We conceive the only question to be, whether the defendant kept "an eating house" within the act. When a statute uses a word which has no fixed and definite meaning, and the context furnishes no guide to the meaning, there is but one rule to which we can resort by which to ascertain what meaning the Legislature intended it should have, and that is, its meaning in common conversation. Now, we think that in ordinary conversation, nobody would speak of a stall in a market as a house,—although perhaps, for some purposes, it might be so held. Nor, because meals were sold at the stall, would it be ordinarily spoken of as an "eating house."

To give the word the extensive meaning contended for by the State, would make it include every person who, along an unfrequented highway, sold meals whenever called on by a traveller, however rare the said travellers might be; and a multitude of other petty dealers, whose useful industries, although they might well afford to pay the tax of one fourth of one per centum on their gross receipts, would be prohibited if the dealers were required to keep an account of their receipts at the beginning of each quarter, to go through the various ceremonies which the act prescribes; to pay the prescribed fees, and, for the least omission, to be subject to the very heavy penalties imposed by the act, including the costs of a prosecution by the Solicitor, whose fee alone, without counting those of the clerk and sheriff, might, and in many cases would, many times exceed the tax. Such a construction would be vexatious and oppressive to a great number of poor and useful persons, without materially increasing the revenue.

In an act taxing "provision dealers," as "eating houses" are taxed in this act, the Legislature probably would not intend to include the boys who sell peanuts in the rotunda of the Capitol. *De minimis lex non curat.*

PER CURIAM. Judgment below affirmed.

STATE, on the relation of the BOARD OF COMMISSIONERS OF BLADEN COUNTY *v.* DANIEL J. CLARKE and others.

The County Treasurer is the officer whose duty it is to receive payment of the county taxes from the sheriff; and it is also his duty to bring suit, on failure of the sheriff to account. If the County Treasurer fails to bring suit, the County Commissioners are required to do so.

When the County commissioners are the relators in a suit against a sheriff, the complaint should state the failure of the County Treasurer to bring the suit, as the reason of their doing so.

A Sheriff, or Tax Collector, is an insurer of the safety of all money officially received by him, against loss by any means whatever, including such losses as arise from the act of God, or the public enemy.

County Commissioners have no power to release a Sheriff from his liability to pay the county taxes. Being a corporation, they have no powers except such as are given by statute.

(The case of *Dockery* v. *French*, 72 N. C. Rep. cited and approved; and *Atkinson* v. *Whitehead*, 66 N. C. Rep. 296; *Atlantic & N. C. Railroad Company* v. *Cowles*, 69 N. C. Rep. 59, cited, distinguished from this and approved.

This was a CIVIL ACTION to recover $2,000 State and school taxes, tried before his Honor Judge KERR, at Spring Term, 1875, of the Superior Court of BLADEN county.

The defendant, who was the sheriff of said county, had collected the sum of $2,000 as taxes, and failed to pay the same to the proper officers.

It was admitted by the plaintiff that the defendant had deposited the money in an iron safe, the property of a merchant in Elizabethtown, in the county of Bladen, for safe keeping, and that without the knowledge, consent, contrivance, negligence or default of the defendant, it had been stolen therefrom by robbers.

It was also admitted by the plaintiff, that a former Board of Commissioners had passed an order relieving the defendant from the payment of the sum of $1,900, stolen from the said safe.

Upon this statement of facts his Honor gave judgment in favor of the defendants, and thereupon the plaintiff appealed.

T. H. Sutton, for the appellant.
Lyon & Lyon, and *W. McL. McKay*, contra.

RODMAN. J. 1. This is an action on the official bond of the defendant as sheriff. As the complaint now stands, it is on the relation of the Commissioners of the county. We are of opinion that the act of 1872–'73, chap. 115, secs. 39 and 41, (Bat. Rev., chap. 102, secs. 39 and 41,) changes in that respect the previous act of 1868–'69, chap. 157, sec. 10, (Bat. Rev., chap. 30, sec. 9.) The County Treasurer is the officer whose duty it is to receive payment of the county taxes from the sheriff. (Sec. 39, Bat. Rev., chap. 102,); and by sec. 41, it is made his duty to bring suit on a failure of the sheriff to account. It is only in case of his failure to do so that the Commissioners are required to sue; and if they be named as relators, the complaint should state his failure as the reason. No error is now assigned by the defendants in this respect, as the action was brought in the name of the County Treasurer as relator, and changed by order of his Honor, upon a demurrer by the defendants assigning that as a cause. The plaintiff should not be prejudiced by the change, and we only notice it as erroneous now, in order that it may not be regarded as a precedent as it stands, and in order that it may be corrected when the case goes back, as in consequence of our opinion on other points it must.

We also call the attention of the plaintiff to what appear to be defects of his complaint in other respects, in order that he may amend them if he thinks proper to do so. The breaches are not clearly assigned. It is not clearly stated that the sheriff had collected any taxes which he failed to pay over. It does not clearly appear that the action is to recover the sum collected and not paid over with interest on that, as prescribed by the statute. The complaint says that the object of the

action is to recover the penalty of $2,500. If the non-payment of the penalty be intended to be alleged as a breach of the bond, several questions might be raised, which we do not mean to notice. In the present state of the case, we are not called on to decide any questions arising upon any supposed defects of the complaint, because they all appear to have been waived for the purpose of the decision; and we proceed to give our own opinion on the case, as it is presented in the "case," and in the judgment of the Court, assuming the complaint to be correct in form, and such as it should have been on the facts stated.

2. The first question is, whether the defendant is liable under the circumstances for the county taxes collected by him as tax collector. We are of opinion that he is. The law imposes on him the duty to collect and pay over to the county treasurer, and although provision is made for his relief in case of his inability to collect by reason of the insolvency of the tax debtors, Bat. Rev., chap. 102, sec. 36, none is made for his relief in the case the money, after it is collected, is lost by any means whatever. The bond sued on is in the form prescribed by law. Bat. Rev., chap. 106, sec. 8. It requires that the sheriff shall collect the county and poor taxes, "and shall faithfully and honestly account for and pay over the same as required by law." By the terms of the bond, the obligation to pay over is absolute. The argument for the defendants regards the sheriff as a bailee of the county money, liable for its loss only by reason of negligence. But he is properly to be regarded as a debtor to the county for the amount of each tax from the time he receives it. That is the language of the Court of Appeals of New York, *Muzzy* v. *Shattuck*, 1 Denio, 233. It must not be inferred from this, however, that the money belongs to the sheriff, to be dealt with as his own, as a bank deals with its deposits, or otherwise than he is permitted by law.

The authorities are decidedly in favor of the doctrine that a tax collector is an insurer of the safety of all money officially

received by him against loss by any means whatever, including such losses as arise from the act of God or the public enemy. In the Courts of the United States this absolute liability is put partly on the positive language of the official bond, but mainly on public policy and the evil consequences which would follow from any less rigid rule. *United States* v. *Dashiell*, 4 How. 182; *United States* v. *Prescott*, 3 How. 587; *United States* v. *Keeler*, 1 Wall. 83. The reasons apply with equal force to State officials who receive public money, and the same doctrine has accordingly been held in several of the States besides New York. *Thompson* v. *Board of Trustees*, &c., 30 Ill. 99; *Hancock* v. *Hazzard*, 12 Cush. (Mass.) 112. The case of a public officer differs in principle from that of a guardian who is held liable only for honesty and diligence. *Atkinson* v. *Whitehead*, 66 N. C. Rep., 296. A guardian has a much wider latitude in the custody and use of his ward's money than a tax collector has in the money which he collects.

So also the case of a tax collector differs from that of a treasurer of a railroad company. The duties of the latter are not prescribed by law, but entirely by the contract between the parties, and no rule of public policy intervenes to influence the construction of the contract. *Atlantic & N. C. R. R. Co.* v. *Cowles*, 69 N. C. Rep. 59.

3. We think the county commissioners had no power to release the sheriff from his liability to pay the county taxes. The commissioners are a public corporation which has no powers except such as are given by statute; and there is no statute which expressly or by reasonable implication gives it the power in question. If it were true that the board of commissioners was the proper relator in this action, it would not follow that it had power to release the debt. The rule that he who can recover a demand can also release it, does not apply to trustees and others who sue in another's right. An unlawful release by a trustee is disregarded in equity. *Dockery* v. *French*, 69 N. C. Rep.

The liability which the law imposes on a sheriff or tax col-

lector is not excessive or unreasonable so far as it requires him to pay over what he has collected. It must be assumed that he knew his responsibilities when he accepted the office, and he can always relieve himself of risk by paying over to the county treasurer. As to the penalties in the way of interest and otherwise, it does not appear from the case that they were insisted on in the Court below. If they shall be hereafter, it may be for the Legislature to say whether, considering that they were apparently intended for cases of wilful malfeasance, they should be enforced in a case where there is admittedly no intentional or moral wrong. We do not undertake to express any opinion as to the legal liability of the bond of the sheriff to these penalties.

The judgment below is reversed.

PER CURIAM. *Venire de novo.*

R. D. RHYNE *v.* G. M. MCKEE.

An execution issuing from the Supreme Court, upon a judgment obtained therein, to a county in which the defendant has land, is a lien upon the land from its *teste*.

MOTION in the cause heard before *Schenck, J.*, at Spring Term, 1875, LINCOLN Superior Court.

The following are all the facts necessary to an understanding of the case, as decided in this court: At Spring Term, 1873, of Lincoln Superior Court, the defendant obtained a judgment against one Jacob Lineberger. From this judgment there was an appeal to the Supreme Court, but no bond was filed to stay execution.

At June Term, 1873, the Supreme Court affirmed this judgment, and execution was issued thereupon, returnable to the

next term of the Supreme Court. The appeal was docketed at the commencement of the term, and execution actually issued on the 1st day of August, 1873.

One James Wright obtained a judgment against Lineberger, in a Magistrate's Court, and docketed the same in the Superior Court of Gaston County on the 28th day of August, 1873, and execution issued thereupon on the same day.

The sheriff of Gaston County, R. D. Rhyne, had executions on both of these judgments in his hands at the time he levied on the land and sold under them. At this sale the defendant in this suit (the plaintiff in execution) became the purchaser. He failed to pay the purchase money, and was sued by the plaintiff in this action, and judgment was obtained against him at Spring Term, 1875, Gaston Superior Court.

The defendant thereupon moved the Court to have his judgment against Lineberger credited with the amount of his bid, with the exception of the cost of the suit and the Sheriff's commissions, and to stay the execution of the plaintiff to that amount.

The Sheriff and James Wright, who were notified, resisted the motion on the ground that the Magistrate's judgment, docketed as aforesaid, has priority, and should be first paid, and the balance, if any there be, applied to the payment of McKee's judgment.

The Court refused the motion, and the defendant appealed.

J. F. Hoke, for appellant.
B. C. Cobb, contra.

RODMAN, J. The only question in this case is, whether an execution issuing from this Court upon a judgment obtained therein to a county in which the defendant has land is a lien upon the land from its teste? A lien is a right to hold, or to sell, property in satisfaction of a debt. It is property itself, and cannot be arbitrarily divested. That such was the law before the enactment of C. C. P. cannot be doubted. It has not been

changed by sections 252, 253 and 254 of C. C. P. because these, by their terms, are confined to the Superior Courts; nor by any other legislation; and is recognized as existing, by rule 9, of June Term, 1868, of this Court. The only argument which can be advanced against the present existence of the former law is *ab inconvenienti*, an argument which we have repeatedly said, in questions of mere practice, "availeth much." It is argued that the same reasons which induced the enactment that judgments of the Superior Courts should be a lien on the land of the defendants from the time of docketing in the county, and not before, apply to judgments in the Supreme Court. The law should be extended by analogy to all Courts. Thus an intended purchaser would be able by inquiry in a single county, to inform himself of all incumbrances. Whereas by a different construction, he will be compelled to search the records of this Court also, not only for judgments, but also for actions pending, which for ought he can know, may be reduced to judgment, upon which an execution may issue, ante-dating his purchase, and creating a prior incumbrance. Under the old law a purchaser could not be sure of getting a title clear of incumbrances, without examining the records of every Court in the State, both State and Federal, including the Supreme Court. Confessedly the new law is a great improvement, even if it goes no farther than all agree that it does; that is to say, if it is confined to the Superior Courts, and if the purchaser must still search the records of the Supreme Court. It cannot be denied that this argument has a certain weight. But let us hear the other side, and consider the inconveniences of extending the new law to the Supreme Court, and of holding that its judgments create no lien on land until docketed in the county. The judgments of this Court, for the purpose of the present discussion, may be divided into two classes.

1. The Court wholly or in part affirms the judgment of the Court below, that a plaintiff or defendant, as the case may be, recover of the other, a sum of money. In that case there is no *new* judgment of this Court, (by which I mean that there is

not a judgment of this Court to all purposes, but only that it is an affirmatory judgment,) except for the costs of its clerk. The party in whose favor the judgment was below, had a right to docket it in any county, and as a judgment is not now vacated by an appeal, upon the *affirmance* of the judgment in the Supreme Court, his lien dates from the docketing of the judgment below. If the affirmance be in part only, and the judgment in the Supreme Court be for less than the judgment below, then the latter stands only to the extent to which it was affirmed. If the party who obtains judgment below, neglects to docket it in any county, (as the defendant in this case neglected), then, upon obtaining judgment in the Supreme Court, he will clearly have no lien prior to the *teste* of his execution from that Court, and will come within the second class, which I proceed to notice.

2. There are cases in which this Court, under its duty to give such judgment, as upon the record, it appears that the Court below should have given, gives judgment that plaintiff or defendant recover a sum for which he did not have a judgment below, which he might have docketed, and thereby have secured a lien from that time. These may be called *new* judgments. On the same footing with these, and within the same reasons, stand all the judgments of this Court for its own costs; they are judgments not in affirmance of one below.

It will be seen that the question we are discussing, has no bearing on the first class, of what may be called *affirming* judgments, unless the successful party by his neglect to docket his judgment, (as in this case,) has put himself in the second class of *new* judgments.

In this class the party successful in this Court was of right entitled to judgment in the Court below. He failed to obtain it through an error of the Court. He has, in any event, lost the lien which he might have acquired if the Court below had decided correctly. Shall he be put to the inconvenience, expense, and delay of keeping an agent here until the Court shall have given judgment in his case, and of then docketing the

judgment in the proper county, getting the lien *from that time*, which he ought to have had before? We cannot give him priority of lien from the time when rightfully he was entitled to it; but there is no law that forbids us to give him a lien by relation from the time when his appeal is, or is supposed to be, docketed in this Court.

The rule contended for by plaintiff would be a serious inconvenience to suitors, and especially to those who recovered the costs of this Court only. The course of this Court will not usually permit a judgment to be put in form for docketing very speedily after it has been pronounced. To docket every judgment would add to the labor and costs of suitors, it seems to us, unnecessarily. It is unnecessary to go further into details. The experience of every lawyer, upon reflection, will supply them. These inconveniences, we consider, overbalance those of the supposed purchaser, who can protect himself by a not immoderate degree of diligence. We do not wish to be understood as making a new rule of Court by holding as we do. We conceive that rules of Court should be always prospective, and affect only cases arising after their promulgation. We have endeavored, in the first place, to ascertain the law of the case from existing authorities, and as to the conclusion from them there can be but little doubt. And upon considering the question in the light of public convenience, we can see no sufficient reason to change it, if we felt at perfect liberty to do so.

As the land was sold under both executions, there is no question as to title of the purchaser.

We think the defendant was entitled to priority in the appropriation of the proceeds of the sale, and a judgment may be drawn here in conformity to this opinion.

PER CURIAM: Judgment below reversed, and judgment here for defendant in conformity to this opinion.

M. C. BUIE *v.* JOHN CARVER.

It is error to permit the testimony of a witness, as to what a deceased witness swore on a former trial, to go to the jury, unless the witness can state the whole of the evidence given in at the time by such deceased witness. The reception of such fragmentary testimony entitles the party excepting to it to a new trial.

CIVIL ACTION, in the nature of Ejectment, tried at the Spring Term, 1875, of CUMBERLAND Superior Court, before his Honor, Judge *Buxton*.

The only point raised and decided in this Court, was a question of the admissibility of certain evidence. A statement of the facts and the evidence bearing on other points in the case, is, at this stage deemed unnecessary.

During the trial, the plaintiff introduced Wm. B. Baker, to prove what one Daniel Cornbow had sworn to on a former trial. Baker, upon his preliminary examination to test his competency, stated: That he was present at the previous trial was a witness himself and the son-in-law of the plaintiff. That he paid attention to the examination of Daniel Cornbow, but was hard of hearing, and did not hear all that he said; but he did hear and did remember what Cornbow testified as to what land he had owned, and what he had sold to John Carver. Upon this statement the defendant objected to the competency of Baker. His Honor overruled the objection and allowed him to be examined. Defendant excepted.

There was much other evidence, written and oral, introduced, but not being pertinent to the decision of this Court, a statement of the same is omitted.

The verdict of the jury was in favor of the plaintiff. Judgment and appeal by the defendant.

W. McL. McKay and *Guthrie*, for appellant.
Ray, contra.

PEARSON, C. J. It is a familiar rule of evidence that when any part of a document is read in evidence to the jury, the opposing party is entitled to have the whole of it read, whether it be a deed, answer in equity, will, letter or any other paper writing. It follows as a corollary to this rule, that when a part of a paper writing has been torn off and lost, or defaced so as to be illegible, the fragment preserved cannot be put in evidence to show the contents of the writing, although it may be competent evidence to prove the naked fact, that there had been a paper writing, setting out matter of one kind or another, for it cannot be told how far the missing fragment would change the meaning and construction of the entire instrument. The same rule applies to conversations. If one party proves that the other said so and so, the other party has a right to have the whole conversation put in evidence, so that the jury may not walk in the dark, but have an opportunity to consider all of the surroundings.

The same principle applies to evidence, of what a deceased witness swore to, upon a former trial. Unless the jury are informed of all that the deceased witness swore to, how can they pass on the full scope and effect of his testimony, its credibility, and its consistency with the testimony of other witnesses, &c.?

The witness Baker, upon his preliminary examination, on the question of competency, swore that "he paid attention to the examination of Daniel Cornbow, but was *hard of hearing*, and *did not hear all that he said*, but he did hear what he said, as to what land he had owned, and what land he had sold to Carver." How Baker knew that he did not hear *all* that Daniel Cornbow swore to, was a matter for himself. He swears directly that he *did not hear all that Cornbow said.* This made his testimony "*fragmentary*," as the books express it, and of course it was error. We are inclined to concur with his Honor in his rulings upon the merits of the case, and regret to be forced to grant a *venire de novo* upon a question of evidence, especially as another witness professed to testify to

all that the deceased witness swore to on the former trial, and in all probability many of the jury recollected the testimony of the deceased witness, and might have been called instead of the deaf witness.

So it was bad management on the part of the plaintiff, to press his deaf witness upon the Court and jury, unless he had some especial reason for it. However this may be, there is no telling the extent to which the jury were influenced by this incompetent evidence, and the defendant is entitled to a *venire de novo.*

Error.

PER CURIAM. *Venire de novo.*

STATE *v.* JAS. W. BUCK.

The Act of the 18th March, 1875, chap. 200, of the laws of 1874–'75, divesting the Superior Courts of jurisdiction of the offence of failing to list the poll for taxation, is an Act of Amnesty, and applies as well to acts committed before, as to those committed after its passage; and an indictment for such offence, found before the passage of the Act, will be dismissed, upon the payment of said tax and costs.

(*State* v. *Upchurch*, 72 N. C. Rep. 146; *State* v. *Blalock*, Phill. 242; and *Franklin* v. *Vernoy*, 66 N. C. Rep. 145, cited and approved.)

INDICTMENT, for failing to list his poll tax, tried at Spring Term, 1875, of the Superior Court of WAKE county, before his Honor, *Watts, J.*

The defendant was indicted at January Term, 1875, of Wake Superior Court, for failing to list his poll for taxation for the year 1873.

Since the indictment was found, the defendant has paid his poll tax for said year, and exhibited on the trial below, a receipt for the same; and also has paid into the office of the

Clerk of the Court, one dollar and fifty cents for costs, refusing to pay any more.

The defendant moved to dismiss the indictment, as under the circumstances the Court did not have jurisdiction. His Honor refused the motion, and the case was put to the jury, and the defendant convicted.

Judgment and appeal by defendant.

Fowle and *Battle & Son*, for defendant.
Attorney General Hargrove and *Haywood*, for the State.

READE, J. The case of *State* v. *Upchurch*, 72 N. C. Rep., 146, is an express authority that the Superior Court has jurisdiction unless the act of 18th March, 1875, chap. 200, ousts the jurisdiction. The title of said act is "An act to divest the jurisdiction of the Superior Courts," &c. This clearly expresses the purpose of the act.

The rule is, to give to legislation a prospective operation unless the intent is clear to the contrary. So that the meaning of the act is, that all prosecutions for offences of the kind *after* the act, shall be cognizable before a Justice of the Peace, and not before the Superior Court, unless for some other reason the Justice of the Peace should not acquire jurisdiction.

But the question before us is, what is the effect of the act upon *pending* indictments for offences committed *before* its passage? The third section of said act is as follows:

"SEC. 3. That the Solicitors of the several districts are hereby required to dismiss all indictments now pending under the sections referred to in section one, of the act, upon the exhibition by the defendant of his tax receipt for such year or years for which indictments have been found against him, and the payment of the costs," &c.

For the defendant it is insisted that the act under which the indictment was found, (making a failure to list a poll tax a misdemeanor,) if not "hasty legislation" did, at least, take the public by surprise, and involved many thousands of very poor

persons. And what made it worse, was the fact, that it was the intention of the Legislature to make the offence cognizable before a Justice of the Peace, where the expense and trouble would be trifling; but, by carelessly fixing the limit of punishment at "thirty days" instead of "one month" imprisonment, the Justice of the Peace could not take jurisdiction; and the prosecutions had to be in the Superior Courts, where the costs and trouble made them cruelly oppressive. As soon as the Legislature discovered this, it passed the act under consideration to remedy the evil by directing that the former acts be overruled by substituting "one month" for "thirty days," so as to be cognizable before a Justice of the Peace, and that pending indictments should be dismissed upon the payment of the tax, and one dollar and fifty cents costs. And so the defendant insists that the act was intended to cure a mistake into which the Legislature itself had fallen, and which was unintentionally severe upon a large number of the poorest persons, and is to be treated as an *act of amnesty.*

For the State it is insisted that the third section of the act is *ultra vires;* that the legislative and judicial departments of the government are "separate and distinct;" and that the Court, having the possession of the case, cannot be controlled by the Legislature.

We fully recognize the propriety of the independent action of the several departments, each in its sphere, but yet, so as to harmonize, and not to jar. We do not perceive that the intent or effect of the act in any way affects the independence of the judiciary; but the intent and effect are to co operate with the Court in relieving a large number of citizens from oppression. We consider the act a just and gracious one; and we administer it with pleasure. *State* v. *Blalock*, Phil. R. 242; *Franklin* v. *Vernoy*, 66 N. C. Rep., 145.

To entitle the defendant to the benefit of the amnesty of the act it was necessary that he should exhibit his receipt that he had paid his tax; and that he should also pay $1.50 costs.

It will be certified to the Court below that the defendant is

entitled to be discharged upon exhibiting his tax receipt and paying $1.50 costs. Upon his failure to do this, there will be such further procedure as the law directs.

Let this be certified.

PER CURIAM. Judgment accordingly.

STATE *v.* NEWTON A. SIMPSON.

An indictment under the act of 1868, Bat. Rev., chap. 32, sec. 95, for killing and abusing a cattle beast, the property of, &c. in an inclosure not surrounded by a lawful fence, is defective, for the reason that it does not charge the act to have been done "unlawfully and wilfully," or words of equivalent meaning.

(*State* v. *Stanton*, 1 Ired. 424, cited and approved.)

INDICTMENT for abusing and killing stock in an enclosure not surrounded by a lawful fence, tried before *Eure, J.*, at Spring Term, 1875, of the Superior Court of CHOWAN County.

The prisoner was arraigned and tried upon the following bill of indictment, to wit:

"STATE OF NORTH CAROLINA, } *Superior Court,*
CHOWAN COUNTY. } Fall Term, 1874.

The jurors for the State, upon their oath, present that N. A. Simpson, late of the county of Chowan, aforesaid, on the first day of January, in the year of our Lord one thousand eight hundred and seventy-four, with force and arms, at and in the county of Chowan aforesaid, one cattle beast, to wit, the property of John Roberts, of the value of ten dollars, did abuse and kill in the enclosure of the said N. A. Simpson, not surrounded by a lawful fence, against the form of the statute in such cases made and provided, and against the peace and dignity of the State."

The jury returned a verdict of guilty, and thereupon the defendant moved in arrest of judgment on the ground that the indictment did not charge that the abusing and killing was "unlawful and wilfull," as required by Sec. 95, Chap. 32, Bat. Rev.

The Court overruled the motion, and the prisoner appealed.

No counsel in this Court for the prisoner.

Attorney-General Hargrove and *Gilliam & Pruden*, for the State.

PEARSON, C. J. The defendant was convicted under the Act of 1868. "If any person shall kill or abuse any horse, cow, hog, &c., the property of another, in any enclosure not surrounded by a lawful fence, such person shall be deemed guilty of a misdemeanor." Bat. Rev., chap. 32, sec. 95.

It is apparent from the nature of things that these words are too broad and go beyond the meaning of the law makers. The statute by its necessary construction must be qualified by the addition of the words, "*wilfully* and *unlawfully*" kill or abuse any horse, cow, &c. Common sense forbids the idea that it was the intention of the General Assembly to send to jail every person who by *accident* kills, &c., or injure the horse, cow, &c., of another in any enclosure not surrounded by a lawful fence; or every person who kills his neighbor's cow by his permission; for instance, suppose a man complains to his neighbor, "you have a mischievous cow that no fence can turn, for she will push down or jump any fence; your cow is doing me every night more damage than she is worth." And his neighbor says, "I know she is mischievous and you have leave to kill her the next time she breaks into your field, *provided* you will pay for her, or butcher her, and bring me the meat and hide and tallow." Such instances of good neighborship are not of rare occurrence where but few keep lawful fences. Can any one suppose it was the intention of the General Assembly to make such acts indictable? Yet they come

within *the words* of the statute, which shows the necessity of adding the words "unlawfully and wilfully" in order to take such cases out of the operation of the statute. That these or equivalent words were omitted by inadvertence on the part of the draftsman and must be added by construction in order to express the meaning of the act, can be seen by adverting to the 94th section of the same chapter, making it a misdemeanor to kill or injure live stock running in the range or in the field or pasture of the owner, where the words, "unlawfully or on purpose" are used to describe the offence, and to the 96th section of the same chapter, making it *larceny* to kill any horse, cow, &c., in the counties of Marion, Jackson and other specified mountain counties, in which the protection of stock is a matter of great importance by reason of the extensive range lying in these counties.

In this act, in order to describe the offence and show the meaning of the Legislature, the words "maliciously or wilfully and wantonly" are used to qualify the word "kill."

We declare our opinion to be that the indictment is defective, because it does not allege that the act was done "unlawfully and wilfully," which are the words used in the precedents, and for the sake of conformity ought to be followed in statutes as well as in indictments, although other equivalent words answer the same purpose, as "unlawfully and on purpose," used in the 94th section, or "maliciously or wilfully and wantonly," used in the 96th section. *State* v. *Stanton* and *State* v. *Allen*, have no bearing except as precedents where "unlawfully and wilfully" are used.

It was said on the argument, "The Solicitor is not supposed to be wiser than the members of the General Assembly. It is not his province to supply words necessary to express the meaning of a statute, and it is sufficient if the indictment follows the very words used by the law makers."

That proposition is true, as a general rule; but there are some exceptions to it, and the case before us is one. The Solicitor is not supposed to be wiser than the members of the

General Assembly, but he is supposed to be a lawyer, to whom the duty of drawing bills of indictment is entrusted, and it is his province to set out in the bill of indictment every allegation necessary to describe the offence, so as to bring it within the meaning of the statute, and enable the Court to see from the face of the indictment that if the matters set out are true, the defendant is guilty of an indictable offence. This indictment does not exclude the idea of a killing by accident or by license of the owner, and the Court cannot *know*, taking all of the allegations to be true, that the defendant has committed an indictable offence.

In *State* v. *Stanton*, 1 Ired., 424, it is said, "As it is certain that the indictment was intended to describe the offence which the statute describes, it follows, from the use of the very same language in both, that the one means what the other does, neither more nor less. It is true that some few exceptions from this rule have been established by adjudication; but they have not appeared to us to embrace the present case. Thus a statute may be so inaccurately penned that its language does not express the whole meaning the Legislature had, and by construction its sense is extended beyond its words. In such a case the indictment must contain such averments of other facts, not expressly mentioned in the statute, as will bring the case within the true meaning of the statute: that is, the indictment must contain such words as ought to have been used in the statute, if the Legislature had correctly expressed therein their precise meaning. In our case the indictment does not contain such words as ought to have been used in the statute, "if the Legislature had correctly expressed therein their precise meaning;" and it was necessary for the indictment to aid the want of accuracy by adding the words necessary to express the meaning of the statute, and to qualify the general words used.

Error.

PER CURIAM. Judgment arrested.

W. O. DUNN v. W. E. BARNES, Adm'r

After the decision of a Judge of the Superior Court overruling a demurrer as frivolous, the right to answer over is not a matter of course, but depends upon the sound discretion of the court.

Any informality in the demand for judgment in a complaint is not ground for demurrer, and must be disregarded, when the sum demanded, and how it is due, sufficiently appear from the summons and complaint.

In an action upon a bond "payable in gold or its equivalent in currency," the amount which the plaintiff is entitled to recover, must be measured by ascertaining its equivalent in currency.

It is error, and contrary to the practice and decisions of our Courts to render judgment in the alternative.

An absolute judgment against an administrator ascertains the debt only, and has no effect in fixing the defendant with assets, or in disturbing the order of administration.

(*Garrett* v. *Smith*, 64 N. C. Rep. 93; *Gibson* v. *Groner*, 63 N. C. Rep. 10; *Oates* v. *Gray*, 66 N. C. Rep. 442; cited and approved. *Rowland* v. *Thompson*, 71 N. C. Rep. 457, cited and distinguished from this and approved.)

This was a CIVIL ACTION, for the recovery of money only, tried before *Watts*, *J.*, at Spring Term, 1875, HALIFAX Superior Court.

The plaintiff alleged that Margaret Dunn, the defendant's intestate, on the 27th day of December, 1865, executed a promissory note, whereby she promised to pay, twelve months after date with interest from date, to L. L. Dunn and F. M. Parker, executors of B. W. Dunn deceased, the sum of six hundred and seventy two dollars and seventy-five cents in gold, or its equivalent. That said Margaret died on or about the first day of January, 1873, and defendant was appointed her administrator on the first day of May, 1873. The said note has been rejected by him. On or about the fifteenth day of August, 1874, the note was transferred for value, to the plaintiff. No part of the note has been paid. That one dollar in

gold was worth in United States currency on the 27th December, 1866, one dollar and forty cents.

The plaintiff prayed judgment against the defendant for the sum of ——— dollars with interest thereon from the 27th day of December, 1866, until paid and the cost of the suit, &c.

The defendant demurred to the complaint and for ground of demurrer alleged:

1. That the prayer for judgment does not set out any amount claimed whatever, and demands judgment for nothing.

2. That it would seem from the complaint that the plaintiff desired to claim the value of gold at the time of making the note, and not the value at the time of the payment which the defendant submits is wrong in law.

His Honor overruled the demurrer as frivolous. The counsel for the defendant stated that he had filed the demurrer in good faith and not merely for delay, and that he had a substantial defence. His Honor said that he could not tell what was in the mind of the counsel at the time the demurrer was filed, and he was bound by the face of the demurrer. Counsel then moved the Court for leave to answer the complaint. His Honor overruled the motion and gave judgment in favor of the plaintiff for $957.32, and interst on $672.75 from date in gold or its equivalent in Federal currency, to-wit: $1100.91.

From this judgment the defendant appealed.

Walter Clark, for the appellant.
Busbee & Busbee, contra.

BYNUM, J. The Court did not err in overruling the demurrer, and we concur also, that the demurrer was frivolous. In such case the right to answer over, is not a matter of course, but depends upon the sound discretion of the Court. C. C. P., 131.

A demurrer to a complaint does not lie at all except in one of the following cases:

1. Where it appears from the face of the complaint, that

the Court has no jurisdiction of the person of the defendant, or the subject of the action.

2. That the plaintiff has no legal capacity to sue.

3. That there is another action pending between the same parties for the same cause.

4. That there is a defect of parties plaintiff or defendant.

5. That the complaint does not state facts sufficient to constitute a cause of action. As the complaint is clearly sufficient in all these respects, it was a case which did not allow of the interposition of a demurrer. C. C. P., sec. 95.

Treating the demurrer as "frivolous" or no demurrer, and the judgment as one given for the want of an answer, did his Honor render such a judgment as was warranted in law, and was it rendered according to the course and practice of the Court? Any informality in the demand of judgment in the complaint, must be disregarded when the sum demanded and how it is due, sufficiently appear, from the summons and the complaint. The action is on a note, under seal, for $672.75 "in gold or its equivalent in currency," dated the 27th December, 1865, and payable twelve months after date, with interest. On overruling the demurrer, and refusing to allow the defendant to answer, his Honor gave judgment in favor of the plaintiff for $957.32 in gold and interest on $672.75, the principal money from the 10th May, 1875, the date of the judgment, *or* its equivalent in Federal currency, to-wit, $1,100.91, and interest on $672.75, from 10th May, 1875, until paid. The Court erred in giving an *alternative* judgment, as it is not in accordance with the practice and decisions of our Courts. *Mitchell* v. *Henderson*, 63 N. C. 643. It was also error to give judgment for gold, as it has been repeatedly held by this Court, that the value of a gold contract must be measured by ascertaining its equivalent in currency, and that judgment must be rendered for the amount so ascertained. *Garrett* v. *Smith*, 64 N. C. Rep., 93; *Brown* v. *Foust*, 64 N. C. Rep., 672; *Gibson* v. *Groner*, 63 N. C. Rep., 10. After finding the gold value of the note up to the rendition of the judgment,

the premium for gold at that date should have been added, and the sum so converted into national currency, was the amount for which judgment should have been given. Such was the rule adopted by the Court in ascertaining the value of the gold note, in currency, and had he not also given judgment for the value of the note, in gold, there would have been no error. But this Court will not grant a new trial, when the whole record is before us, and the Court here can see and correct the error, and give such judgment as the Court below ought to have given upon the whole record. To do this, it is only necessary to strike out, or treat as surplusage, the gold judgment.

The remaining question is, was it competent for the Court below to ascertain and assess the premium upon gold, without the intervention of a jury?

The cases cited by the defendant to show that a jury must assess the premium upon gold, as damages, have no application here, for these were cases where the defendant put in an answer and defended, which stand upon a different footing. Those cases stood upon issues raised by the pleadings, and, as held in *Rowland* v. *Thompson*, 71 N. C. Rep., 457, where there appears upon the record no waiver of a jury trial, it is error for the Court to pass upon facts. But in our case, judgment was taken for want of an answer, where a very different rule prevails, and where the case falls within the provisions of C. C. P., sec. 217, 218. The substance of sec. 217, so far as it is applicable to this case is, that if the taking of an account or the proof of any fact be necessary to enable the Court to give judgment, the Court may take the account or hear the proof, or may order a reference for that purpose. And where the action is for the recovery of money only, or of specific real or personal property with damages for the withholding thereof, the Court may order the damages to be assessed by a jury or by a reference. It was, therefore, competent for the Court to pass upon the facts or to refer them to a jury, in his discretion. Such is the construction given to this section of the Code in

Oates v. *Gray*, 66 N. C. Rep., 442. A jury would have been a useless formality in this case, as it was only necessary to look into a newspaper to find the market premium on gold. No exception is taken to the correctness of the finding of the Court, and as the defendant has not been prejudiced thereby, it would seem to be immaterial whether the fact was found by the Court or a jury. The judgment is, in fact, for less than the computations in the defendant's brief indicate that it should be, and in one respect the judgment is erroneous in his favor. It gives interest in currency upon the gold principal of the note from the date of the judgment until it is paid, instead of upon the value of the note in currency. To this the plaintiff was entitled, but he has not excepted to the judgment.

The administration of the defendant was since July, 1869, and is governed by the provisions of chap. 45, Bat. Rev.; and the defendant suggested that it was error to give an absolute judgment against the administrator, as it fixes him with assets. By reference to the 95th section of chap. 45, Bat. Rev., it will be seen that it has no such effect. An absolute judgment ascertains the debt only, and has no effect in fixing the defendant with asse or in disturbing the order of administration The judgment of the Court below is corrected by striking out the alternative judgment for gold and affirming the judgment then rendered in currency, to-wit, for $1,100.91 with interest on $672.75 from 10th May, 1875, until paid.

Judgment corrected and affirmed.

PER CURIAM. Judgment accordingly.

In the matter of W. G. BRINSON, Public Administrator.

Probate Courts have the power to order the removal of Public Administrators, and at the same time order that they make immediate return and settlement of estates in their hands. The refusal to obey such order is a contempt, which the Probate Court has the power to punish.

(The case of *Taylor* v. *Biddle*, 71 N. C. Rep. 1, cited and approved.)

This was a PROCEEDING by the Probate Judge of CRAVEN county, removing the Public Administrator, heard upon appeal by *Seymour*, *J.*, at Chambers.

The facts of the case are fully stated in the opinion of the Court.

His Honor reversed the order of the Probate Court finding the defendant for contempt, whereupon the Probate Judge appealed.

Lehman and *Stephenson*, for appellant.
Green, contra.

SETTLE, J. The Probate Court of Craven County, on the 6th day of September, 1873, made an order, reciting that as W. G. Brinson, Public Administrator of said county, had failed to renew his official bond as required by law, he was removed from said office; and he was ordered to make immediate return to said Court, of all estates in his hands for settlement and for the better securing of the same.

No further step seems to have been taken until the 27th day of March, 1875, when the Probate Court issued another order to the said Brinson, (reciting the facts of his failure to renew his official bond, and to render his accounts as required by law, and his disobedience of the former orders of the Court in that behalf.) and requiring him to appear before the Court on the 4th day of May, 1875, to show cause why the letters of administration theretofore granted to him on certain estates, should not be revoked; and also to show cause why he should not be

attached for contempt, in disobeying the orders of the Court theretofore issued to him as administrator on the said estates.

On the day specified the defendant appeared and contented himself with the simple answer that in September, 1873, he had received notification from the Probate Court of his removal from the office of public administrator, and that one Manix was immediately thereafter appointed by said Court public administrator, and has ever since been recognized as such by the said Court.

He takes no notice whatever of the order requiring him to make return and settlement of the estates, specified in the order, ten in number, nor does he allege that he has settled the said estates with Manix, or any other person; but so far as appears from the record he has continued to intermeddle with the same without bond or other safeguard for their proper administration after notice of his removal.

A public administrator is required to enter into bond conditioned faithfully to perform the duties of his office and obey all lawful orders of the Probate or other Court, touching the administration of the several estates that may come into his hands. And he is further required to renew his bond every two years. Bat. Rev., chap. 45, secs. 18 and 20. The power of the Probate Court to remove an administrator for a failure to discharge the duties of his office, is conferred by our statutes. But, as is said in *Taylor* v. *Biddle*, 71 N. C. Rep., 1, "without invoking the aid of our statutes, the power of removal is inherent in the office at common law, and must, of necessity, be so, to prevent a failure of justice."

But of what value is an order of removal, if a delinquent administrator can disregard it, and continue to intermeddle with and waste the estate of the intestate? When there is a right there should be a remedy. And such a case is amply provided for by the enactment that "in all cases of the revocation of letters, the Judge of Probate must immediately appoint some other person to succeed in the administration of the estate; and pending any suit or proceeding between parties

respecting such revocation, the Judge of Probate is authorized to make such interlocutory order as, without injury to the rights and remedies of creditors, may tend to the better securing of the estate." Bat. Rev., chap. 45, sec. 143. But the defendant contends that, upon his removal, he passed beyond the jurisdiction of the Court, and was no longer subject to its orders.

This defence is more technical than reasonable, and if allowed would enable faithless agents and officers to laugh at Courts while abusing their trusts, and to waste everything in their hands before a remedy can be applied.

When troubles arise in the administration of an estate, it is the duty of the Judge of Probate to make such interlocutory orders as may tend to the better securing of the same. Here there was not only an order of removal, for good cause, but also an order that the administrator make immediate return and settlement of all estates in his hands. The order of removal and settlement went together, and the defendant was not beyond the reach of the Court until both parts of the order were complied with.

The order for settlement certainly tended to the better securing of estates which were in the hands of an administrator who had failed to renew his bond, or to exhibit his dealings to the Court.

We think it clear that the Probate Court had the power to make the order which it did, and that the refusal of the defendant to comply with the same, was a contempt, for which the Probate Court could inflict punishment.

The judgment of the Superior Court is reversed.

Let this be certified to the end, &c.

PER CURIAM. Judgment reversed.

JOSEPH THORNBURG *v.* JOHN G. HERRON.

The defendant in a suit before a Magistrate's Court, upon judgment being rendered against him, prays an appeal to the Superior Court, but takes no further steps to prosecute the appeal. The Superior Court committed no error in submitting the case to a jury, who found a verdict for the plaintiff in the same sum for which the Magistrate rendered judgment.

This was a CIVIL ACTION, originally commenced in a Magistrate's Court, and carried on appeal to the Superior Court of GASTON county, where it was tried before his Honor Judge *Schenck*, at Spring Term, 1875.

The facts in the case are as follows:

Plaintiff introduced in evidence a Justice's docket, and proved by one J. G. Gullick that in the year 1870, he was a Justice of the Peace in and for the county of Gaston, and that the docket in evidence was the docket or record of cases tried before him as Magistrate. He made the following entry therein:

"JOSEPH THORNBURG,
v.
J. G. HERRON.

"Plaintiff filed his complaint which was substantially as follows: Demand $60, money paid for defendant's use. Plaintiff distilled whisky to the amount of thirty gallons, which he was compelled to pay the tax on.

Case came on for trial March 26th, 1870. Defendant pleads former judgment for demurrer, and general issue and set off for answer. It is adjudged that the plaintiff do recover of the defendant the sum of sixty dollars damages, and the further sum of $1.80 cost of this action. Appeal prayed and granted No execution to run."

The witness further testified that both the plaintiff and the defendant were present personally and represented by counsel,

and that he gave the above judgment at the time stated in the foregoing copy of his record.

The defendant then proposed to show by the witness, that prior to the rendition of the judgment sued on, he, witness, had heard a trial in the Court of another Justice of the Peace, between the plaintiff and defendant, wherein judgment had been rendered in favor of the defendant upon the same matter in which the witness had given the judgment on which this action is brought.

The counsel for the plaintiff objected to this testimony. The Court sustained the objection, and the defendant excepted.

It was admitted that the judgment had not been paid or discharged.

The case was submitted to the jury on this testimony, and the counsel for the defendant contended that the foregoing entry of "appeal prayed and granted," made by the Justice in his docket, had the effect of vacating said judgment, and it could not be sued on as such. That the plaintiff's remedy was to take the case up to the Superior Court for confirmation.

The Court declined to instruct the jury to that effect, but told them that if they believed the testimony, the plaintiff was entitled to recover.

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

Shipp & Bailey, for appellants.
B. C. Cobb and *Smith & Strong*, contra.

SETTLE, J. If the position contended for by the defendant can be maintained, then a cheap and easy method of defeating recoveries of sums within the jurisdiction of Justices of the Peace has been discovered.

A defendant prays an appeal, takes no further steps, and claims that he has effectually closed the Courts from 1870 to 1875.

PER CURIAM. Judgment affirmed.

M. W. BUFFKIN v. BAIRD & ROPER.

When a party to a contract, by his own fault or wrong, prevents the other from fully performing his part of the contract, the party thus in fault cannot be permitted to take advantage of his own wrong, and screen himself from payment for what was done under the contract.

In such case the measure of damage is, that the plaintiff is entitled to recover for his labor and expense in endeavoring to perform his contract, as upon a *quantum meruit*.

(The cases of *Young* v. *Jeffreys*, 4 Dev. & Bat. 216; *White* v. *Brown*, 2 Jones 403; *Brewer* v. *Tysor*, 3 Jones 180; *Mizell* v. *Burnett*, 4 Jones 249; *Nibbett* v. *Herring*, Ibid 262; *Dula* v. *Cowles*, 7 Jones 290; *Woodley* v. *Bond*, 56 N. C. Rep. 397, cited and approved.)

CIVIL ACTION, tried before *Eure*, *J.*, at Spring Term, 1875, CAMDEN Superior Court.

The following are the facts as disclosed by the statement of the case as settled by his Honor and sent up to this Court as a part of the record:

The plaintiff believing that he was the owner of one undivided fourth of a tract of land in Pasquotank county, known as the Sawyer patent, by deed from J. S. Proctor, offered to sell the same to the defendants. The defendants declined to buy so small an interest, but expressed a willingness to buy three-fourths of the whole. The plaintiff represented that he owned one fourth and could control two other fourths, whereupon the following agreement was entered into:

"This is to certify that we, Baird & Roper, do bind ourselves to pay to M. W. Buffkin, thirty-three hundred dollars cash for three fourths of a tract of swamp land known as the F. B. Sawyer Patent, said to contain twelve hundred and fifty-eight acres, and situated in Pasquotank county, North Carolina; the money to be paid upon the delivery to us of a good and sufficient deed or title deed, to be delivered to us within one hundred days.

Pasquotank county, April 13th, 1870.

(Signed) BAIRD & ROPER.

Witness: M. J. BUFFKIN.

"This is to certify I, M. W. Buffkin, have this day bound myself to make to Baird & Roper a good and sufficient title to three fourths of a tract of land known as the F. B. Sawyer Patent, situated in Pasquotank county, North Carolina, said to contain twelve hundred and fifty-eight acres, for the sum of thirty-three hundred dollars, to be paid on delivery of a good and sufficient deed of general warranty, the deed to be made within one hundred days. Should the parties now holding a portion of the title to the above mentioned land die before I can procure a deed, I am to be released from the above obligation.

April 13th, 1870.

(Signed) M. W. BUFFKIN.

Witness: M. J. BUFFKIN.

It was in evidence that immediately after the execution of the contract by the plaintiff and the defendants, the plaintiff began his efforts to secure the title to the land mentioned in the contract, and to that end he employed counsel to investigate the title and to go South, if necessary, to purchase the moiety belonging to M. V. Moore, or from such parties as he might ascertain to have the title. In eight days after the execution of the contract, the defendants employed counsel to purchase said land for them, and within a few days thereafter and within one hundred days, he obtained a deed for one moiety of said land from M. V. Moore, of Mississippi. The deed conveyed all her interest therein. The defendants purchased the other moiety of said land from the owner in Kentucky, about two years after that time. The whole tract cost them two thousand dollars.

The plaintiff learning that the defendants had purchased an undivided half interest in the land within the one hundred days, directed his counsel to make no further efforts to secure the title to any portion thereof. The plaintiff expended but a few dollars in his effort to obtain the title.

Upon these facts the plaintiff contended:

1. That defendants by purchasing one undivided moiety o

said land within the one hundred days, had violated their contract with him, by coming between the plaintiff and the owner of said land and had put it out of his power by their own act to comply with his contract.

2. By their purchase from M. V. Moore, they had obtained title to the entire tract of land for the sum of two thousand dollars and that the plaintiff could have purchased it for that sum.

3. That the defendants were answerable to him in damages, and that the measure of the damages was the difference between what it cost defendants to purchase three-fourths interest in said land and what they had contracted to pay him for the three-fourths interest.

The defendants contended:

1. That the plaintiff by false statements and misrepresentation of facts in regard to the land, had induced them to enter into the contract with him. That they were not bound by it and had the right to purchase within the one hundred days from the owners.

2. That they had purchased only an undivided moiety from M. V. Moore, and the other moiety they had purchased from the Cowper heirs in Kentucky.

3. That if defendants had violated their contract, the plaintiff was entitled to recover only nominal damages, or at most to recover as damages only such amounts as he had paid out in his effort to secure title to said land, and for his time and trouble to secure the same.

4. That it was one of those contracts for the valuation of which the plaintiff sought to recover damages for the "loss of a good bargain," and that this was the only loss sustained by plaintiff and therefore he was not entitled to recover.

The following issues were submitted to the jury, and responded to as stated:

1. Did the defendants Baird & Roper by their own acts, their agents or attorneys, before the expiration of one hundred days from April 13, 1870, put it out of the power of the plain

tiff to comply with his contract to make a good title to three-fourths interest in the F. B. Sawyer patent.

The jury find that they did.

2. Did the plaintiff Buffkin, by misrepresentation, induce the defendants Baird & Roper to enter into the contract made with him on April 13, 1870?

The jury find that he did not.

3. Was an estate in fee simple in the F. B. Sawyer patent on April 13, 1870, in Mary V. Moore, under the will of Elizabeth Proctor, or was one half of the patent in Mary V. Moore and the other half interest in the heirs of Wills Cowper?

The jury find that one half interest was owned by the Cowper heirs.

4. If the defendants, Baird & Roper, did prevent the plaintiff Buffkin from complying with his contract; and if the plaintiff Buffkin did not induce the defendants by misrepresentation to enter into said contract, what damages has the plaintiff sustained by reason of his being prevented by defendants from complying with his contract?

The jury assess the damages of the plaintiff at eighteen-hundred dollars.

The Court charged the jury, "That if the defendants, by their own acts, put it out of the power of the plaintiff to comply with his contract and the contract was not induced by the misrepresentation of the plaintiff, the plaintiff was entitled to recover. That the defendants should have given the plaintiff one hundred days to perform his contract and the purchase by them of any interest in said land, greater than one-fourth interest, within the one hundred days was a violation of the contract and entitled the plaintiff to damages.

In regard to the measure of damages, the Court charged the jury that the amount of damages to be assessed was a matter for them. The general rule of law is that where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same condition with respect to damages as if the contract had been performed.

So in this case, if the jury find the first and second issues in favor of the plaintiff the measure of his damages may be placed at the difference between what it would have cost the plaintiff to have procured the three fourths interest in the land and the price the defendants contracted to pay the plaintiff for the three fourths interest, they might consider the amount it actually cost the defendants as some evidence on that point.

The Court further charged the jury that if the plaintiff by misrepresentations induced the defendants to enter into the contract, he would not be entitled to recover and that they should find for the defendants.

The defendants excepted to the charge of his Honor.

1. For that the plaintiff having no interest in the land at the time he contracted to sell cannot maintain this action. His only interest was the anticipated profits of a good bargain.

2. For that the rule of damages was incorrectly laid down by the Court, in saying that the jury might assess the plaintiff damages at the difference between what it would have cost him to have procured the three-fourths interest in the lands and the amount the defendants contracted to pay him for said interest. That the plaintiff was only entitled to nominal damages.

Upon the finding of the jury the defendants moved for a new trial. Motion overruled and judgment rendered according to the verdict. From this judgment defendants appealed.

Gilliam & Pruden, for appellants.
Busbee & Busbee, contra.

RODMAN, J. The two writings executed by the plaintiff and by the defendants, respectively, formed a single contract, by which the plaintiff was bound to convey to the defendants a good title to three-fourths of the Sawyer land within one hundred days, and the defendants were bound on receiving such title to pay the plaintiff $3,300.

Ordinarily, it is proper to consider first the right of the

plaintiff to recover, as unaffected by any supposed defence. But in this case it will be convenient first to consider and dispose of a defence which goes to the foundation of the contract, and, which if it could be maintained, would render any further consideration of the case unnecessary. The defendants allege that they were induced to enter into the contract with the plaintiff, through his representation that he owned one-fourth of the land, and could control the title to an additional half, which representation turned out to be false in both particulars. The jury find that the defendants were not induced to make the contract by misrepresentation. They do not say there was no misrepresentation. It appears from the complaint that the plaintiff claimed to own one fourth of the land when the contract was made; and also, when the action was brought, which fact he says was known to the defendants at the making of the contract. In this claim, it seems from the case, he was mistaken, as Mrs. Moore owned one-half the land, and the Cowpers the other half. Whether the misrepresentation or mutual mistake, as to the plaintiff's estate in the land, induced the defendants to enter into the contract, is matter of law, and we are of opinion that taken in connection with the plaintiff's statement to the defendants that he did not own the other three-fourths, it was not such a *material* inducement as would require a court of equity to set aside the contract by reason of it. It was immaterial to defendants whether the plaintiff at the time of the contract owned any estate in the lands or not, provided he performed his contract by buying from the actual owners.

This was evidently the view of the defendants, as when they discovered the mistake, as they say they very soon did, they gave no notice to the plaintiff of their intention to rescind the contract, but permitted him to continue to act upon it as if it was in force. This defence, therefore, may be put out of view. We return now to the consideration of the plaintiff's case. Is it clear that the conveyance of a good title to three-fourths of the land by plaintiff, or a tender of a conveyance,

was a condition precedent to the liability of the defendants to pay him the sum stipulated for. If a person contracts to do a certain entire act, for which he is to receive a certain sum, he cannot recover the price as upon a complete performance, notwithstanding it was prevented by inevitable accident. *Cutter* v. *Powell*, 1 Smith, L. C., 1, and notes; *Appleby* v. *Myers*, E. L. R., 2 C. P.; *Young* v. *Jeffreys*, 4 Dev. & Bat. 216; *White* v. *Brown*, 2 Jones, 403; *Brewer* v. *Tysor*, 3 Jones, 180; *Mizell* v. *Burnett*, 4 Jones, 249; *Nibbett* v. *Herring*, Id., 262; *Dula* v. *Cowles*, 7 Jones, 290.

The complaint, however, is not framed upon the idea that the plaintiff is entitled to recover upon the express contract. The plaintiff contends that there results from the express terms of the contract, a promise by defendants that they will do nothing within the one hundred days to prevent plaintiff from performing his part of the contract, for the breach of which he is entitled to damages. It cannot be doubted that when a party to a contract (as the defendant in the present case) by his *fault* or *wrong*, prevents the other from fully performing his part of the contract, the party thus in fault cannot be permitted to take advantage of his own wrong and screen himself from payment for what has been done under the contract. 2 Pars. Cont., 523. But the defendants in the present case do not admit that by their contract they restricted themselves from buying the land in question for any time whatever. They argue that it is no more than if they had made a contract with plaintiff for the delivery to them of a quantity of corn, within a certain time, for a certain price, which would not prohibit them from offering a higher price for other corn, although the incidental effect might be to raise the price, and perhaps throw a loss on the plaintiff. We think, however, the cases are not analagous, and that there was an implied contract on the part of the defendants to do nothing within the hundred days to prevent the plaintiff from buying the land. This was held in the case of *Marshall* v. *Craig*, 1 Bibb. (Ky.,) 379. It is clear, upon common sense and numerous authorities, that

inasmuch as the defendants made it impossible for the plaintiff to comply with his contract, they discharged him from it, and would not be entitled to recover anything from him by reason of his failure to perform. Com. Dig., condition L., 6.

We think it follows from what has been said that the plaintiff is entitled to recover *some* damages from the defendants by reason of their injurious interference. We have found it more difficult to say what should be the measure of damages. This is a question of law, although the jury must apply the rules of law to the facts, if they be in dispute. His Honor, the Judge below, was of opinion that the plaintiff was entitled to recover the difference between what defendants actually paid for three-fourths of the land, and what they had agreed to pay plaintiff for it, thus putting the plaintiff in the situation he would have been in if, without trouble or other expense, had he bought within the hundred days, at the price at which the defendants bought.

Expressions may be found in the text books, to the effect that if one party be prevented from performing his contract by the act or default of the other, he is in the same condition as if he had performed it. But an examination of the cases (so far as I have been able to examine them) will show, that this doctrine applies only:

1. To protect the party failing to perform from an action by the party preventing him.

2. Perhaps also in cases where the plaintiff has agreed to do work or furnish materials which defendant has prevented being fully done, and the like cases in which it was certain that but for the unlawful act or default of the defendant the contract could have been performed, and the labor and expense of the plaintiff in performing it could be calculated from certain data, and consequently his profits upon performance, which may thus not unjustly be made the measure of damages. *Masterton* v. *Mayor of Brooklyn*, 7 Hill, (N. Y.) 61; *Sedgwick on Damages*, 223; *Bingham* v. *Richardson*, 1 Winst., 217.

3. And to cases in which the plaintiff has substantially, al-

though not literally, performed his contract, as in *Ashcraft* v. *Allen*, 4 Ired., 96.

Whatever may be said of such cases, we think that this rule will not apply to a case like the present. It is impossible to say with certainty, that the plaintiff would or could have bought the land at the price at which defendants bought it, and within the time allowed him; and also what would have been his expense and labor in doing so. The owners might have refused to sell at all, or refused except at a price greater than the plaintiff was to receive, or might have died before selling, in which case the contract by its terms was to have no effect. The damages would have to be calculated as under the conditions existing at the time of the breach of defendants' contract, and the success of the plaintiff at that time was subject to contingencies which did not admit of a certain calculation. His anticipated profits were merely precarious and speculative, and it cannot be said with certainty that he has sustained any damage beyond the value of his labor and expense. To give to the plaintiff the full benefit of the defendants' purchase, as if made by the plaintiff, would be to give to him the benefit of the defendants' labor, skill and good fortune without exertion on his part. It may be useful too to observe what damages the defendants could have recovered of the plaintiff in case he had failed to procure a title without the excuse of an act of theirs. They could not have recovered the difference between what they were to pay the plaintiff, and any greater price which they might afterwards have paid. The authorities are that where a vendee has paid nothing, he can, in general recover nominal damages only, upon an inability in the vendor to make title. *Sedgwick on Damages*, 183; *Flurean* v. *Thornhill*, 2 W. Bl., 1078; *Worthington* v. *Warrington*, 8 Man. Gr. & S., 133; *Hopkins* v. *Grazebrook*, 6 Barn. & Cres., 31; *Robinson* v. *Harmon*, 1 Ex., 850; *Allen* v. *Anderson*, 2 Bibb., 415; *Nichols* v. *Freeman*, 11 Ired., 99, does not resemble the case supposed.

In the present case the plaintiff is entitled to recover for his

labor and expense in endeavoring to perform his contract, as upon a *quantum meruit.*

Such we think is the rule established by the modern authorities. 2 Pars. Con., 523.

In *Blanche* v. *Colburn*, 8 Bing., —, the plaintiff had agreed to write a treatise on ancient armor to be published by defendants in a serial publication called the *Juvenile Library.* Defendants were to pay plaintiff £100 for the work. The plaintiff had prepared about one half of his work, and had incurred some expense, when defendant abandoned his serial publication, and refused to receive the treatise of the plaintiff, or to pay him any part of the compensation. It was held that the plaintiff was entitled to recover, not the price of the treatise as if he had completed it, but upon a *quantum meruit* for the labor he had done, which the jury had found to be $50.

Similar in principle to this are the numerous cases which hold that where a plaintiff who has been employed for a year, at a yearly sum, has been wrongfully dismissed during the year, he cannot recover the whole year's wages, as if he had served during the whole year, but only for the service actually performed, and in some cases with an addition of damages by reason of inability to find other employment. The statement doubtingly made in Smith's notes to *Cutter* v. *Powell*, that *perhaps* a servant wrongfully dismissed might wait until the end of the year and recover as upon a constructive service, has not been approved in England or in the United States. *Goodman* v. *Pocock,* 15 Ad. &. Ell., (2 B.,) 576; *Ellerton* v. *Emmens*, 6 Man. Gran. & Scott, 178, (60 E. C. L. R.;) *Woodly* v. *Bond*, 66 N. C., 397; *Alges* v. *Alges*, 10 Serg. & Rawle, 235. In this last case the language of GIBSON, J., is so terse as to deserve quoting:

"Here the plaintiff below claimed to recover for the whole time for which he had been employed, on the ground that an act, the performance of which has been prevented by the person for whose benefit it was to be performed, shall, as to him, be taken to have been actually performed. This holds so far

as to give an action on the contract where actual performance would otherwise have been a condition precedent, but not to create an implied promise to compensate the party as if the act were actually performed." See also *Perkins* v. *Hart*, 11 Wheat., 237.

There was an error in the instructions of his Honor.

PER CURIAM. *Venire de novo.*

E. T. BLUM, Ex'r., *v.* ISAAC W. ELLIS.

The Bankrupt law does not divest a lien; but as all the property of a bankrupt, as well that subject to mortgages and liens, as that which is unencumbered, passed to the assignee and is in *custodia legis*, subject to priorities and liens, it follows that the Bankrupt Court is the proper tribunal in which to administer the remedies for the enforcement of liens.

All claimants against the estate of a bankrupt, are required to prove their debts, however evidenced.

MOTION for leave to issue execution, heard before *Cloud, J.*, at Spring Term, 1875, FORSYTHE Superior Court.

At May Term, 1870, of Forsythe Superior Court, the plaintiff's testatrix, Miss M. N. Transon, obtained a judgment for $761.75 and cost against the defendants, Isaac W. Ellis and Holden Smith, on their promissory note, executed to the testatrix of the plaintiff, as sureties for one S. E. Smith.

A transcript of this judgment was sent to the Clerk of the Superior Court of Davie county, on the 12th day of August, 1871, and made a judgment roll of that Court, the defendants residing and holding real estate in that county. Both of the defendants at that time had their homesteads laid off, which covered their real estate.

The testatrix of the defendant died on the 7th day of May, 1872. On the 30th day of May of that year, the plaintiff qualified as her executor; and on the 23d day of April, 1873, he was made a party plaintiff to said judgment on the docket in Forsythe county, but not on the judgment roll of the court docket in the county of Davie. Since August, 1870, no execution has issued on said judgment.

At May Term, 1874, of Forsythe Superior Court, the plaintiff moved for leave to issue an execution against the defendant, Isaac W. Ellis, upon notice duly served upon him, returnable to that term, the defendant Holden Smith having prior thereto obtained his certificate of discharge from his debts in the Bankrupt Court.

It also appeared that Isaac W. Ellis, on the 30th of June, 1873, obtained his discharge from the Bankrupt Court, and that the reversionary interest in the real estate owned by him in the county of Davie, at the date of the judgment aforesaid, was re-conveyed to him by his assignee in Bankruptcy, no creditors having proved their claims in the Bankrupt Court, under the order of said Court.

It further appeared that the plaintiff's judgment against the said Ellis was duly scheduled in the name of M. N. Transon, the testatrix, in his Bankrupt petition which was filed in the Bankrupt Court March 24th, 1873, and that notice was mailed by the assignee to M. N. Transon, the testatrix, to Salem, her place of residence, which the executor never received. No notice was ever mailed to said executor nor served on him in any way whatever.

The usual publication in the newspaper was made and the executor filed an affidavit, in which he stated that he did not have any knowledge of the proceedings in Bankruptcy, until the defendant Ellis had obtained his certificate of discharge and said real estate had been re-conveyed to him by his assignee, and it was proved that said judgment had not been paid.

Upon this statement of facts, the plaintiff insisted that the judgment roll of the Superior Court of the county of Davie,

created from its date, to wit, August, 1870, a lien on the real estate of Ellis in said county, which was not divested by the proceedings in Bankruptcy; and that the plaintiff had the right to enforce this lien in the State Court, and moved the Court for leave to issue execution to keep alive said judgment.

The Court refused the motion, and the plaintiff appealed.

D. H. Starbuck, for appellant.
Smith & Strong, contra.

SETTLE, J. Congress has power, under the Constitution of the United States, to establish uniform laws on the subject of bankruptcies, throughout the United States.

In order to make the laws uniform the bankrupt tribunals must act independently of State tribunals, and must control them in all things pertaining to the bankrupt and his estate, for it would entirely destroy the system, by preventing that uniformity which is enjoined by the Constitution, if suitors should be permitted, at their pleasure, to withdraw from the bankrupt courts into the State tribunals, cases involving any of the questions which grow out of the administration of the assets of a bankrupt.

It is not denied that Congress could have withdrawn from the State Courts all cases pending against a bankrupt at the time of the adjudication of his bankruptcy, but for convenience, as it was supposed, this was not done, and the assignee of a bankrupt is permitted to prosecute or defend an action in the State Courts, either to recover the estate of the bankrupt or to ascertain the liabilities and liens upon it.

The bankrupt law does not divest a lien, but as all the property of a bankrupt, as well that subject to mortgages and liens as that which is unencumbered, passes to the assignee, and is *in custodia legis*, subject of course to priorities and liens, it follows that the bankrupt court is the proper tribunal in which to administer the remedies for the enforcement of liens.

The State Courts, as we have said, may be employed to col-

lect the assets of a bankrupt, and also to ascertain the liens which may exist upon such assets, but it is one thing to ascertain a lien, and quite another to liquidate it; and if a party can liquidate his own liens, through the intervention of State Courts, in the absence of the assignee, who represents the general creditors, there is no protection to other creditors against collusion and fraud between the bankrupt and such a claimant; further, the settlement of the estate of a bankrupt may be indefinitely postponed by tedious litigation in the State Courts.

While all subsisting liens are fully protected by the bankrupt act, we think, by the true interpretation of that act, all claimants against the estate of the bankrupt are required to prove their debts however evidenced. If not so, why, in addition to the requirement that the bankrupt shall enter upon his schedule all secured debts, &c., does the 22d section of the act require the claimant to prove his demand and disclose "whether any and what securities are held therefor?" The first section confers jurisdiction upon the bankrupt court to ascertain and liquidate the liens and other specific claims upon the assets of the bankrupt. Here are several courses open, in the bankrupt court, to the secured creditor, but he must adopt some one of them; he will not be permitted to sleep upon his lien until everything is closed in the bankrupt court, and then virtually nullify the whole thing by proceedings in the State Courts. If he remains outside of the bankrupt court, he does so at the risk of having his debt barred, and he may also lose the benefit of his securities. We are aware that cases may be found, in great abundance, both supporting and opposing the positions here assumed. We do not feel called upon to cite or comment upon them, but feel ourselves at liberty, in this conflict of authority, to adopt what appears to us to be the most reasonable interpretation of the bankrupt act, and one which will lead to the least confusion in the administration of the assets of a bankrupt. Indeed when we behold the obscurity in which this subject has been involved by the conflicting decisions of different courts, we are inclined to think that it would have been

better, had Congress withheld entirely from State tribunals all questions touching the bankrupt, his creditors and his assets.

We give no weight to the suggestion that the plaintiff in this case had no notice of the proceedings in bankruptcy, for this debt was entered upon the defendant's schedule, and notice was sent by mail addressed to the plaintiff's testatrix, and the usual publication of notice was made in the newspapers.

This Court has held in *Knabe & Co.* v. *Hayes*, 71 N. C. Rep., 109, that the discharge of a bankrupt does bar the claim of a creditor who had no knowledge of the filing of the petition in bankruptcy, and whose name was not inserted in the schedule of creditors, and to whom no notice was mailed, unless the creditor alleges and can show that the omission to give notice was the result of fraud on the part of the debtor, and not the result of forgetfulness, accident or mistake.

PER CURIAM. The judgment of the Superior Court is affirmed.

THE BOARD OF COMMISSIONERS of CRAVEN COUNTY *v.* THE BOARD OF COMMISSIONERS of PAMLICO COUNTY.

When in the Act establishing a new county, providing for the appointment of Commissioners to adjust the amount of the public debt owing by the county from which the new one is formed between the two, and assign to the new county its proper proportion of the stock, &c., owned by the old, *it is enacted*, "That should the Commissioners of Craven (the old county) neglect or refuse to turn over to the Commissioners of Pamlico (the new county) their portion of the stocks in, &c., within one year after the demand for such settlement has been made by the Commissioners of Pamlico county, then the Commisioners of said Pamlico county, and the citizens thereof, shall not be held bound to Craven county, for any part of said debt contracted as subscription, &c.; and on the 3d of February, 1873, the Commissioners of Pamlico demanded such settlement and transfer, which was not complied with by Craven county until the 3d February, 1874: *Held*, that the Act, containing the foregoing provisions did not intend to make the precise time of the essence of the obligation, and that Craven county therefore had a right to recover the amount ascertained and agreed upon, and is entitled to a *mandamus*, if the same is not paid within a reasonable time.

(The case of *Moore* v. *Ballard*, 69 N. C. Rep. 21, cited and approved.)

CIVIL ACTION, tried before *Seymour*, *J.*, at Spring Term, 1875, LENOIR Superior Court.

The action was commenced at Spring Term, 1874, of Pamlico Superior Court to recover the sum of thirty-five thousand four hundred and nineteen dollars and thirty-three cents, claimed to be due the plaintiffs by the defendants as the portion of the debt of the county of Craven, assessed to be paid by the county of Pamlico, in pursuance of the provisions of Chap. 182 Sec. 2 Laws of 1871-72, and also for a *mandamus* to enforce the payment of the same.

Among other defences, the defendants insisted that the plaintiffs had failed to settle within one year after the demand (settlement, as provided in said act, and that according to the

provisions of the act aforesaid the defendants were discharged from all liability on that account.

Exceptions were taken to the rulings of his Honor upon this and other points not pertinent to the case as decided in this Court.

All other facts necessary to an understanding of the case will be found in the opinion of the Court.

Both the plaintiffs and the defendants appealed.

R. F. Lehman, for the plaintiffs.
Smith & Strong, contra.

RODMAN, J. By the act, chapter 182, of the acts of 1871'-72, it was provided that a new county, to be called Pamlico, should be formed out of portions of Beaufort and Craven counties, provided that the voters of the territory, to form the new county, should approve the act and assume the obligation to pay the proportionate part of the new county in the debts of Beaufort and Craven counties. The voters of Beaufort rejected so much of the act as related to them. The voters of that part of Craven which was concerned, accepted it, and that part alone, is now embraced in the county of Pamlico. The name of Beaufort county may be henceforth omitted in the consideration of this case.

By chapter 182, section 11, of the acts of 1871–'72, it is required that the Commissioners of Pamlico and Craven should appoint commissioners to ascertain what part of the debt of Craven should be assumed by Pamlico; the adjustment to be based on the amount of taxable property and polls in each county, according to the valuation and enumeration of 1860, when the debt was contracted. The act further provided, that should the commissioners of Craven neglect or refuse to turn over to the Commissioners of Pamlico their portion of stocks in the Atlantic & N. C. R. R. Co., or any other bonds or stocks held by the county of Craven, "*within one year after the demand for such settlement has been made by*

the Commissioners of Pamlico county, then the Commissioners of said Pamlico county, and the citizens thereof, shall not be held bound to Craven county for any part of said debt contracted as subscription to the Atlantic & N. C. R. R."

On February 3d, 1873, Pamlico county demanded a settlement from Craven county; commissioners were thereupon appointed by the two counties, who reported that Pamlico county should be bound for the fifteenth part of the debt of Craven, and should receive the same proportion of the stock held by Craven in the A. & N. C. R. R. Co. This report was accepted by Pamlico on April 19th, 1873, and by Craven on February 3d, 1874, on which day the Commissioners of Craven caused to be transferred on the books of the Company, two hundred shares of the stock aforesaid, to the county of Pamlico. This county, when afterwards informed of the transfer, refused to accept it, and contends that, by the terms of the act, it is discharged from liability for any portion of the debt of Craven, by reason of its failure to make the transfer within a year after the demand.

This is the only defence which goes to the merits of the whole case. There were some other questions relating to the amount and form of the judgment, which will be noticed in order.

I. We consider that it is unnecessary to decide the question, which was argued with much earnestness and learning, by the respective counsel, whether the year after the demand for a settlement expired at midnight on February 2d, or whether Craven still had the next day within which to accept of the report of the Commissioners, and to make the transfer of stock. We are of opinion that the act in question did not intend to make the precise time of the *essence* of the obligation. Divers causes may be imagined, which might protract a settlement, without any dilatory intent on either part, and no wilful delay is imputed to Craven in this case. Analogies may be found in the doctrines of Courts on contracts to convey land, and pay the price, within a certain time. In such cases, in *general*, time is

not of the essence of the contract, though it may be made so. In this case there is no reason why it should have been made so.

The error of the defendant consists in assuming that the act of the Legislature *created* the mutual rights and obligations of the parties instead of merely providing a convenient means for adjusting them equitably.

The law, as to the effect of a division of a county upon its indebtedness, cannot be said to be settled in the United States. Expressions may no doubt be found in decided cases which imply the proposition of the defendant; but in no case which I have seen have they been necessary to the decision; and with great respect for the courts to whose reports we refer, we think such expressions were inconsiderate, and that the learned judges did not give due attention to the equities of the parties which existed before any legislation, to the end of defining and adjusting them. When a county contracts a debt, the obligation must be that it will provide for its payment by taxes upon all taxable subjects within its jurisdiction, to the extent of its legal powers. When such debt is created with the consent of the State, that is to say, in conformity to law, there is an obligation implied on the part of the State that it will not materially and injuriously diminish the fund which is looked to at the time of the contract as the security for its payment. This principle may not apply, as between the creditors and the original or old county, *provided*, the subjects of taxation left in the old county, after the division, still constitute an ample fund from which the creditors may enforce payment without any greater inconvenience by reason of the division. *Moore* v. *Ballard*, 69 N. C., 21.

As between the taxpayers of the two counties, we know of no reason why the general principles of equity which govern the relations of joint or common debtors, as between themselves, should not apply, subject to such exceptions as the nature of the case may require. It is of course competent and proper for the Legislature to define these equities, and to provide for their settlement, and unless a Legislature should in

such definition and regulations clearly violate some principle of natural equity or justice, or impair the obligation of some contract, it would be the duty of the courts to aid and effectuate the intent of its legislation.

Nothing of that sort is alleged in this case. We are of opinion, however, that there were equities, amounting to an implied contract, between the two portions of the divided county which the Courts were competent to enforce without any aid from special legislation to that end. And if it were conceded, (as it is not, but the contrary is believed,) that the Legislature intended to discharge Pamlico, as between it and the remaining portion of Craven, from its obligation to pay a just proportion of the common debt in the event that Craven should fail to make a division of the common property by a certain day, such discharge would impair the obligation of the implied contract between the tax payers of the two present counties represented by their respective Commissioners, and would be void. Even if Craven had refused to assign to Pamlico its portion of stocks, its obligation to do so could have been enforced. In using the term "common property," we do not mean to include in it the court house, jail, &c., as all the cases hold that in the absence of a legislative provision, these belong to the county in which they are locally situate. The county of Craven is entitled to a judgment for the amount of the debt which it has paid since the division, according to its demand, subject to the set-off claimed, which is conceded to be just; and is also entitled to a *mandamus* to the Commissioners of Pamlico, requiring them to pay such sum out of any moneys in the county treasury not needed for other county purposes, and to pay the residue by a levy of taxes as soon as conveniently may be done.

II. Craven is also entitled to a judgment that Pamlico is liable to pay the holders of the bonds of Craven, issued for the benefit of the railroad, its proportion as ascertained by the report of the principal and interest thereof, accrued, due and payable since the last payment by Craven, on behalf of Pam-

lico, or to become payable hereafter; and in case payment of such dues shall not be duly made by Pamlico, then Craven will be at liberty to move from time to time in the Superior Court in which this action may be pending, for a *mandamus* requiring the Commissioners of Pamlico to pay their proportion of such interest and principal, or in due time, by a levy of taxes, to provide for the payment of the same.

It is unnecssary to go into further detail in this opinion. A judgment will be drawn in conformity with it, and the case is remanded to the Superior Court, to be further proceeded in in conformity to this judgment.

Let this opinion be certified.

PER CURIAM. *Judgment accordingly.*

ANN L. SMITH *v.* THE CITY OF NEWBERN.

The Superior Court has no power, under section 133, C. C. P., to set aside a judgment once rendered, upon the motion of a stranger to the original cause, and to order such stranger to be made a party thereto.

When a case is at an end ——— judgment, and money paid into office, there can be no motion in the cause, even if the matter thereof be germain to the case.

(*McBride v. Patterson*, at this term, cited and approved.)

This was a MOTION to set aside a judgment affirmed in the Supreme Court, January Term, 1874, (70 N. C. Rep., 14,) and also to make one Francis A. Dey a party to the action, and to restrain the plaintiff from further proceedings, &c., heard at the Spring Term, 1875, of CRAVEN Superior Court, before his Honor, Judge *Seymour*.

Upon the hearing below the following facts were found:

Smith & Dey were partners in trade at Newbern, N. C.

In June, 1866, Dey removed to Newark, N. J., where he has ever since resided. The last work performed by them as partners was the building of a market-house in Newbern, finished in the early part of the year 1866, for which service the voucher for $930.38 was issued, and upon which the plaintiff, as administratrix of her husband, obtained a judgment against the city.

Smith & Dey were in business a little over a year, and since his departure, Dey has never returned to the State. Before leaving, Dey sold to Smith all the tools, &c., belonging to the concern. Smith continued to reside in Newbern, where he died in March, 1869, and the plaintiff in this action, administered on his estate.

John L. Smith, the partner, was in possession of the voucher when he died, and it had never been assigned to the plaintiff, Ann, by Dey, the surviving partner; nor had there ever been any formal dissolution of the copartnership.

The voucher alluded to had no market value in 1866, having been issued in January, 1866, by the Provisional Government; it was not recognized by subsequent boards until after the decision of this Court in *Boyle* v. *The City of Newbern.*

The firm of Smith & Dey were indebted to Dey & Sons for money and goods furnished them in 1865, and for which indebtedness two several drafts were drawn, in 1867, by Smith, in the name of the firm of Smith & Dey. F. A. Dey, of the firm of Smith & Dey, was also at the time a member of the firm of Smith & Sons.

Upon the hearing his Honor found, as facts, that there had been no transfer of the voucher to Ann L. Smith, the plaintiff, and that the same, at the commencement of this action was, and is still the property of Smith & Dey; and thereupon adjudged:

(1.) That the motion to set aside the judgment be denied.

(2.) That the petitioner, Francis A. Dey, be made a party plaintiff.

(3.) That a reference be had to the Clerk of the Superior

Court, to ascertain and report the indebtedness of the said firm of Smith & Dey; and that upon such reference, the evidence of said Francis A. Dey, taken before the Judge of this Court at Chambers, (counsel for all parties being present,) be read and considered.

(4.) That the fund now on deposit in the National Bank of Newbern, remain as heretofore, until the further order of this Court.

(5.) That upon the coming in of the report of said Clerk, the said fund be distributed as follows:

First. To the creditors (if any) of the said firm of Smith & Dey, according to law;

Second. If there be no such creditors, or if there be such, the surplus, if any, then to be divided between the surviving partner, Francis A. Dey, of the firm of Smith & Dey, and Ann L. Smith, the administratrix of John L. Smith, deceased, after paying all costs of suit.

From this judgment plaintiff appealed.

Lehman, for appellant, submitted the following brief:

The question is, whether the Court can after the lapse of two years from the rendition of judgment, on motion of a stranger, add the name of a person as co-plaintiff who is neither a party or privy to the action?

It is conceded that the judgment in favor of plaintiff was taken according to the due course of a Court of competent jurisdiction and is in all respects regular. It is the final determination of the rights of the parties. C. C. P. sec. 216. The title has been adjudged to be in the plaintiff. When issue had been once taken and found, and judgment rendered, it is conclusive between parties and privies. 2 Cowen's & Hill's notes to Phil. Ev. 804 to 810, 971; 2 Smith's L. cases tit. Estoppel. *Duchess of Kingston's* case.

A void judgment only, can be collaterally impeached. *Hervey & Co.* v. *Edmunds*, 68 N. C. Rep. 243. The debt on which the

judgment is founded is admitted to be *bona fide*. The Court, after issue is regularly concluded, have no right to deprive the plaintiff of the standpoint she has gained, by re-opening issues. *Isler* v. *Brown & Cox*, 67 N. C. Rep. 175.

The defendant alone, upon allegations that the judgment was obtained by fraud, could make a motion in the cause to relieve it. *Childs et. al.*, v. *Martin*, 69 N. C. Rep. 126. The judgment, if erroneous, must be impeached by a separate action for that purpose, and not by a motion in the cause at the instance of a stranger.

The amendment of the record, by adding the name of Dey, in effect divests the title of the plaintiff, and enables him to defeat the plaintiff's rights without giving her a day in Court. The power of amendment under sec. 132, C. C. P. cannot be exercised to the prejudice of parties who have acquired rights, without due notice. *Williams et. al.*, v. *Sharpe*, 70 N. C. Rep. 582; *Williams* v. *Houston*, 71 N. C. Rep. 163; *Philipse* v. *Higdon*. Busbee 380. It cannot be made at the instance of a per- not a party to the record. *Davidson* v. *Cowan*, 1 Dev. 304. When a final judgment is affirmed by the Supreme Court, the Superior Court had no power to set it aside. *Isler* v. *Brown*, 69 N. C. Rep. 125; by parity of reason it had no power to amend.

The surviving partner had neglected to assert his rights and removed from the State; his whereabouts were unknown—it was the duty of plaintiff under the circumstances to collect the debt. *Drake* v. *Blount*, 2 Dev. Eq. 353. The fact that suit was brought in her own name does not affect it. The presumption is that Smith transferred it to plaintiff.

If the voucher was not assigned to Smith, it was left with him as the selling partner; and the retiring partner left it at his own risk, discharged from all liens of co-partners or creditors. *Allison* v. *Davidson*, 2 Dev. Eq. 79; *McCulloch* v. *Dashiel*, 1 A. S. C. 589.

The representative of a deceased partner is equally liable with surviving partner for partnership debts. Revised Code 178, sec's. 84, 85. This fund is in Court. The representative

of a deceased partner is a tenant in common with surviving partner of all property in possession, and the moment a joint *chose* is reduced to possession, the right of the representative attaches. *Jarvis* v. *Hyer, et. al.*, 4 Dev. 369.

This is substantially a proceeding for an account, and that plaintiff be declared a trustee for the creditors of the firm. She is entitled to a day in Court to make a defence.

The Statute of Limitations is a bar to this claim. Dey waited at least eight years—he delayed more than four years after Smith's death, nor does he show any excuse for the delay. *Clemmons* v. *Haughton*, 70 N. C. Rep. 534.

A court of equity acts by analogy, to the Statute of Limitation at law. *Knox* v. *Gye*, 4 English Reports (Moaks notes) 44. The Court say where there is a remedy at law, and a correspondent remedy in equity supplementing that of the common law, and the legal remedy is subject by statute to a limit in point of time, a Court of Equity in affording the correspondent remedy will act by analogy to the statute, and impose on the remedy it affords, the same limit as to time.

In *Tatam* v. *Williams*, 3 Hare, 847, vice Chancellor WIGRAM dismissed a bill filed by a surviving partner against the executor of a deceased partner who had died 13 years before suit on the ground of lapse of time, and he added that a court of equity will not after six years (Statute 21 *Jac*, which limited actions of account to 6 years) acquiescence, unexplained by circumstances or countervailed by acknowledgment, decree an account between a surviving partner and the estate of a deceased partner."

The drafts taken and accepted by Dey & Sons, operated on the previous debt by way of accord and satisfaction. The transaction was *per se* a payment, or at least a substitution of the drafts for what was due and owing to Dey & Sons, and the necessary implication is that they were given in full settlement of this voucher as well as for other property sold to Smith. Dey admits that he sold him the implements.

His Honor's findings are not warranted by the facts. Smith

as a partner had the power, from the time that Dey left in June 1866, till his death in March 1869, to sell or assign the voucher to the plaintiff. The presumption is, that the plaintiff had the legal title from the fact of possession, independently of her title by judgment,—this presumption is not rebutted.

PEARSON, C. J. There is no precedent to support the motion to set aside the judgment, at the instance of Dey. Possibly the city of Newbern, upon the disclosure of the fact, that Dey was the surviving partner might (for the purpose of delay) have maintained a writ of error, for *matter of fact*. But the idea that Dey can have the judgment set aside, so as to have himself substituted as plaintiff, and the judgment against the city of Newbern reinstated in his name as surviving partner, has no reason or authority to support it.

Concurring with his Honor on this point, we differ in respect to the orders, making Dey a party plaintiff, and directing an account of the indebtedness of the firm of Smith & Dey, so as to have a settlement of the firm, upon a motion in the case of *Smith* v. *City of Newbern*. His Honor erred in making these orders, and carried the practice of "motions in the cause" farther than is warranted by the cases.

In *McBryde* v. *Patterson*, at this term, it is said: "The Code of Civil Procedure, in effect, requires or at least strongly recommends, all matters of controversy, growing out of the same transaction, or concerning the same subject, between all parties having an interest therein, to be disposed of in *one action*. This mode of procedure answers a good purpose, in the general, by saving costs, and preventing the necessity of resorting to more than *one Court;* but in particular cases, (of which the one now under consideration is a notable instance,) it produces so much confusion and complication as to almost put it out of the power of any one Court to deal with the case."

There, the complications accumulated in the progress of the

case. But here, the case is at an end—judgment; money paid into office. So there can be no motion in the cause, even if the matter thereof was germain to the case. But here, it is merely a controversy as to the settlement of the firm of Smith & Dey.

His Honor ought to have left that matter to be disposed of by an action of account by Dey, surviving partner, against Mrs. Smith, the administratrix of the deceased partner, in which action the plaintiff might have a restraining order to protect the fund, that is, the money paid into office on the judgment, *Smith* v. *City of Newbern*, until the account of the firm was taken and the manner of distribution fixed.

It is not necessary to notice the other orders made by his Honor, in *anticipation* of the report of the Clerk. It is the practice to let such matters fall under the entry, "retained for further directions."

There is error.

PER CURIAM. Judgment below reversed, and judgment dismissing the motion, &c., at Dey's cost.

WILLIAM T. BLACKWELL *v.* WESLEY A. WRIGHT.

Every manufacturer has the unquestionable right to distinguish the goods that he manufactures and sells, by a peculiar label, symbol or trade mark, and no other person has a right to adopt his label or trade mark, or one so like his as to lead the public to suppose the article to which it is affixed, is the manufacture of the inventor. But before the owner of the trade mark can invoke the power of the Courts to prevent an infringement thereof, he must show a clear legal title to the trade mark, and a plain violation of it.

If it appear that the trade mark, alleged to be an imitation, though in some respect resembling that of the plaintiff, would not probably deceive the ordinary mass of purchasers, an injunction will not be granted.

CIVIL ACTION, tried before *Kerr, J.*, at Fall Term, 1874, ALAMANCE Superior Court.

The action was originally begun in the county of Orange, and upon affidavit of the defendant removed to the county of Alamance. The plaintiff alleged: That he is a manufacturer of smoking tobacco at Durham, and as such has owned and used since the month of April, 1870, a trade mark, in order to distinguish the smoking tobacco made by him from other such tobacco. The trade mark so used by him, containing the words, "Genuine Durham (Trade Mark) Smoking Tobacco, Manufactured only by William T. Blackwell, (successor to J. R. Green & Co.,) Durham, N. C.," was annexed as a part of the complaint, and is fully set out and described in the opinion of the Court.

The plaintiff farther alleged that the trade mark was purchased by him of J. R. Green, now deceased. From the skill displayed by the plaintiff and his predecessor in manufacturing said tobacco distinguished by said trade mark, a large and profitable business has grown up in the hands of the plaintiff. The defendant has infringed upon the rights of the plaintiff by making and using a trade mark substantially the same as that of the plaintiff and by encouraging others to do likewise.

In this way the defendant has caused great injury to the plaintiff, not only by selling an inferior article of tobacco as and for genuine Durham smoking tobacco, but also by taking possession of a part of the market for such tobacco, and so cutting short the sales thereof by the plaintiff.

For a second cause of action, the plaintiff alleged that the defendant well knowing the premises and intending to injure the plaintiff and to cause the public to believe that the plaintiff's above said claim to such trade mark was unfounded, as this plaintiff is informed and believes, has maliciously published and declared in this and several other States, that the exclusive claim of the plaintiff to sell "Genuine Durham Smoking Tobacco" was unfounded; and has threatened to prosecute persons, agents and consignees of the plaintiff in case they should sell tobacco marked with the above said trade mark That great pecuniary damage has thereby been occasioned to the plaintiff. The plaintiff therefore demanded judgment for five thousand dollars damages, and for an injunction against the defendant using such trade mark or one substantially the same, as well as against his slandering the title of the plaintiff.

The defendant demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action:

1. In that it does not allege that the plaintiff has at any time purchased the interest of the persons composing the company with J. R. Green, or was at any time a partner with J. R. Green, and has entitled himself as a successor to J. R. Green & Co. to the sole manufacture of "Genuine Durham Smoking Tobacco;"

2. That the said complaint does not state facts sufficient to show that the exclusive claim of the plaintiff to sell "Genuine Durham Smoking Tobacco" is well founded, and that the defendant has slandered the title of the plaintiff in stating the fact that the plaintiff did not possess such exclusive claim.

The case coming on to be heard upon the demurrer, it was adjudged by the Court that the demurrer be overruled, and

that the defendant, his agents and employees be particularly enjoined and restrained from using the trade mark which is alleged in the plaintiff's complaint to have been used by the defendant, or any trade mark substantially the same as that of the plaintiff, or the trade mark alleged in the complaint to have been used by the defendant, and also that the defendant, his agents, servants and employees be particularly enjoined from slandering the title of said plaintiff to his said trade mark as set forth in his complaint.

It was also ordered that W. A. Albright, Clerk of Alamance Superior Court, be appointed a Commissioner to state an account of the profits which the defendant has made by the use of said trade mark, and that the plaintiff recover cost of this action.

From this judgment the defendant appealed. All other facts necessary to an understanding of the case, as decided here, are stated in the opinion of the Court.

Jones & Jones and *J. W. Graham*, for appellant.
Merrimon, Fuller & Ashe, contra.

BYNUM, J. Unless the inventor is protected by a patent obtained out of the Patent Office of the United States, he has no exclusive right to make and vend his own invention, but any other person has the right to make and vend the same article, or one precisely like it. But he has no right to manufacture and sell it as the article made by the inventor. Every manufacturer has the unquestionable right to distinguish the goods that he manufactures and sells by a peculiar mark or device, so that they may be known as his in the market, and he may thus secure the profits which their superior reputation as his may be the means of gaining. If, therefore, the inventor or manufacturer adopts a label, symbol or trade mark, to distinguish the article he thus manufactures and sells, no other person has the right to adopt his label or trade mark, or one so like his as to induce the public to suppose the article to

which it is affixed, is the manufacture of the inventor. This rule is grounded upon a two-fold reason: 1st, that the public may be protected from being imposed upon by a spurious or inferior article, as an imitation or counterfeit almost always is; and 2d, that the inventor may have the exclusive benefit of the reputation which his skill has given to the article made by him. When one, therefore, adopts a symbol or device, and affixes it to the goods he thus manufactures and puts upon the market, the law will throw its protection around the trade mark thus affixed, as his property and a thing of value. And it would seem to be immaterial whether an infringing trade mark is adopted by fraud or mistake, for the injury is the same. When an article, not of his manufacture, is sold with the mark or device affixed, which he has adopted to distinguish his own goods, a damage results to him. His label indicates to his customers that the article is made or sold by him, or by his authority, and he will be protected against any who attempts to pirate upon the good will of his friends or customers by using such sign without his authority. American Trade Mark cases, 142, 72, 87.

But before the owner of a trade mark can thus call upon the Courts, he must show not only that he has a clear legal right to the trade mark, but that there has been a plain violation of it; and where a violation is alleged, the true enquiry is, whether the mark of the defendant is so assimilated to that of the plaintiff as to deceive purchasers. And it will make no difference whether the party designed to mislead the public or whether the symbol adopted was calculated to deceive. But if it appear that the trade mark alleged to be imitated, though resembling the complainant's in some respects, would not probably deceive the ordinary mass of purchasers, an injunction will not be granted. An imitation is colorable, and will be enjoined, which requires a careful inspection to distinguish its mark and appearance from that of the manufacture imitated. Apply these general principles to our case.

The plaintiff alleges that he is a manufacturer of smoking

tobacco, at Durham, North Carolina, and as such has owned and used a trade mark to distinguish his from other smoking tobacco; that the trade mark, so used by him, is as follows: "Genuine Durham Smoking Tobacco, manufactured only by W. T. Blackwell, (successor to J. R. Green & Co.,) Durham, N. C.," with the picture of a bull in the centre of the label, over which are the words ("trade mark"). He alleges that the defendant has infringed upon this, his trade mark, by adopting and using one substantially the same, whereby he is enabled to sell an inferior article of smoking tobacco, as and for the plaintiff's genuine article, and has thus encroached upon and injured his custom. He then proceeds to set out and describe the assimilating trade mark of the defendant, to-wit, that it is "on glazed paper of the same color and general appearance with that of the plaintiff;" and that the words, "the original Durham smoking tobacco," are printed thereon, and on the said label are the words, "manufactured by W. A. Wright," above which words is the head of some bovine animal, which the plaintiff alleges to be a Durham bull. The The labels containing these trade marks of both parties, are attached as a part of the case.

We are unable to see from the pleadings, or upon inspection of these labels, how or wherein the trade mark of the plaintiff is infringed upon, by that of the defendant. The plaintiff does not allege in his complaint that the color and appearance of the paper label is any part of his trade mark, and had he done so, it is far from clear that one can have a trade mark in a color or general appearance of paper, a thing in universal use. Nor can the word "Durham," the name of the town where both parties are doing business, be exclusively appropriated as a trade mark. The word "genuine" is unlike the word "original," used by the defendant, and the words "smoking tobacco," a thing in general use by that name, of course is not pretended to be the subject of appropriation. The names of the manufacturers printed on the labels are entirely unlike, and the figure of an entire animal upon the label

of the plaintiff, and of the head only, of an animal upon that of the defendant, so far from misleading by the similarity, would rather tend to distinguish the one from the other. Certainly, in connection with the many other dissimilarities of the two labels, the head of an ox or bull cannot be held to be a colorable imitation of the trade mark of the plaintiff. So, after thus examining the several parts, composing these trade marks in detail, if we put the parts together and examine each trade mark as a whole, what colorable or descriptive assimilation is there, between the words "genuine Durham (trade mark) smoking tobacco; manufactured only by W. T. Blackwell, (successor to J. R. Green & Co.,") and the "original Durham smoking tobacco manufactured by W. A. Wright"? Those who purchase by a trade mark, of course must examine it, and as soon as that is done in our case, there is no ground for being misled. We must assume that dealers and consumers of such a commodity have ordinary intelligence and adopt ordinary precaution against imposition and fraud. To adopt a different rule, would be productive of the greatest confusion and mischief in an age remarkable beyond all that has preceded it, for the multiplication of its inventions and discoveries and the infinitely diversified forms of its trades and manufactures.

To our mind the plaintiff does not disclose a case which entitles him to injunctive relief or to an action for damages. The term "original Durham smoking tobacco" seems a fair set off to "genuine Durham smoking tobacco;" neither term so much indicating any peculiar excellence of the stuff, as a usual trick of trade, by which competitors in business cry up their own wares or cry down their rivals.

There is error. The demurrer is sustained and the action dismissed.

PER CURIAM. Judgment reversed.

THE N. C. R. R. COMPANY *v.* GEO. W. SWEPSON and others.

After a cause (under our former Equity practice) has been set for hearing in the Court below and transferred to the Supreme Court on appeal, and the rights and liabilities of the parties have been there declared, and the cause remanded to be proceeded in, in accordance with the opinion and decree of the Supreme Court: *It is error* for the Court below to set aside the order setting the cause for hearing, and to give the defendant leave to take additional testimony.

(The case of *Benzien's Executors* v. *Lenoir et al.*, 4 Hawks 403, cited, distinguished from this, and approved.)

MOTION in the cause, heard before *Henry, J.*, at Fall Term, 1874, WAKE Superior Court.

This case is fully reported in 71 N. C. Rep., 350. All other facts necessary to an understanding of the case, are stated in the opinion of the Court at this term.

His Honor allowed the motion and the plaintiffs appealed.

Moore & Gatling, for appellants.

Merrimon, Fuller & Ashe, contra. Cited *Ashe* v. *Moore*, 2 Murphy, 383; *Austin* v. *Clarke*, 70 N. C. Rep., 458, and *Simonton* v. *Lanier*, 71 N. C. Rep., 498.

BYNUM, J. This was a suit in equity, began under the old system, and was set for hearing at the Fall Term, 1870, of Wake Superior Court, and was heard at the Spring Term, 1874. Upon an appeal of the plaintiffs from the judgment rendered below, the case was heard in this Court, at the June Term, 1874, and is reported in 71 N. C. Rep. 350. This Court then declared the rights of the plaintiff and the liability of the defendants, upon the merits; and the cause was remanded to the Superior Court to the end that it proceed in accordance with the opinion and decree of this Court. Upon this being certified, it became the duty of the Court below, in obedience to the decree, to assess the value of the twenty-three bonds

which had been converted by the defendants, and to give judgment therefor.

But instead of this, when the cause was remanded, a motion was made by the defendant, Swepson, and the Superior Court, in compliance therewith, set aside the order of the Court made at Fall Term, 1870, setting the case for hearing, and also gave the defendants leave to take other testimony.

The judgment of the Supreme Court was thus not only arrested in its execution, but, in effect, a new trial is granted by the subordinate Court, in the face of the opinion and decree of this Court, in this very cause. Of course, no improper object was intended, but that such a practice is allowable, cannot be entertained for a moment. While the cause was pending in the Court below, and prior to the appeal and judgment in this Court, it was competent, in a proper case, for that Court to set aside an order, putting down the case for hearing. But after a party has taken his chances and had an adverse decision, it is against every principle upon which the laws are administered in Courts of justice, that he should be allowed, by such a subterfuge as this, to nullify and defeat the judgment of the Court of last resort. None of the cases cited by the defendants sustain their motion. The strongest is that of *Benzien's executors* v. *Lenoir et al.*, 4 Hawks, 403. But that case has no application, because there the decrees sought to be reviewed were held to be, not decrees of the Supreme, but of the Superior Court, and as such they were re-examinable, by bill or petition, in the Superior Court. The direct purpose of the motion made in the Court below, in our case, was to obtain a re hearing in that Court of a case tried in the Supreme Court and disposed of by a judgment then rendered, and to deprive the plaintiff of the fruits of the recovery. It is the duty of the subordinate Courts not to defeat, but to obey and carry out the decrees of the appellate Court.

There is error.

PER CURIAM. Judgment reversed.

AMOS WADE *v.* THE CITY OF NEWBERN.

Although section 133, C. C. P., in terms, applies only to a Judge of the Superior Court, the spirit and equity of its provisions equally extend to this Court; and the same power resides here to relieve from a judgment taken against a party through "mistake, inadvertence surprise or excusable neglect." And where it appears that the bond, on an appeal to the Supreme Court, was not filed in the time prescribed by law, through mistake and excusable neglect on the part of the appellant, the judgment rendered here will be vacated.

(The cases of the *Rail Road Co.* v. *Vinson*, 8 Jones 119; *Griel* v. *Vernon*, 66 N. C. Rep. 76; and *Love* v. *Commissioners of Chatham*, cited and approved.)

PETITION by defendant to *re-hear* this case, dismissed at the last term of this Court for the reason that an appeal bond had not been filed within the time prescribed by law.

The facts are fully stated in the opinion of Justice BYNUM.

Smith & Strong and *Haughton*, for petitioner.
Green and *Fowle*, contra.

BYNUM, J. At the last term of this Court, 72 N. C. Rep., 498, the appeal in this case was, on motion, dismissed, because the undertaking required upon appeal, had not been filed within the ten days from the rendition of judgment, as prescribed by the Code, secs. 203 *et seq.*, and no legal excuse for the omission to file the bond, was made to appear. As a sufficient excuse might have existed, leave was given to the appellant, upon laying a proper foundation therefor, to move the Court, thereafter, for a *certiorari* to bring up the case for review as on appeal. That motion is now made upon affidavits which are met by counter-affidavits. Most of these affidavits are irrelevant, because they relate only to the matters which delayed the perfecting the appeal in other respects, than the filing the undertaking. Those most material to the very point, are the affidavits of James Campbell and A. S. Seymour, Esqs. From

these we ascertain the following facts: That Campbell was Mayor of the defendant City of Newbern, and representing it in this action. That Mr. Seymour was the city attorney, and was entrusted with the conduct of the cause, and relied upon by the Mayor to do, or have done, all things necessary to the management of the case to its ultimate termination. That the said attorney did not instruct him to file an undertaking on appeal, or inform him that it was required, and that as soon as he understood that it was required, he immediately filed the bond, having at no time any intention of abandoning the appeal, and believing that the merits were with the city; that Mr. Seymour was laboring under the belief that he had informed the Mayor that the bond had to be filed, which belief was erroneous, as Mr. Campbell swears. These facts bring this case clearly within the principle of the *Railroad Co.* v. *Vinson*, 8 Jones, 119. There a railroad president gave instructions to a station agent to attend the trial of a suit against the company, and in case of a recovery against it, to appeal; but the agent, through ignorance, failed to give an appeal bond. This was held to be not such laches on the part of the president as to deprive the company of the right to a *recordari*. To the same effect is *Griel* v. *Vernon*, 65 N. C. Rep., 76. There a judgment was taken by default for want of a plea, because the attorney who was employed to enter the plea, neglected to do so, and the facts found were held to constitute surprise or excusable negligence.

Although C. C. P., sec. 133, in terms, applies only to a Judge of the Superior Court, the spirit and equity of its provisions extend equally to this Court, and the same power resides here to relieve from a judgment taken against a party through "mistake, inadvertence, surprise or excusable negligence." The facts of this case now appearing, show that the appeal bond was not filed in the time prescribed by law, through mistake and excusable neglect on the part of the defendant.

As the provisions of C. C. P., prescribing the rules for perfecting an appeal and the time within which it must be done,

have been explained and interpreted in the former decision of this case, 72 N. C. Rep., 498, the Court will hereafter enforce them, without any departure, except in those cases where the appellant can bring himself strictly within one of the exceptions specified in section 133. As was said in *Love* v. *Commissioners of Chatham*, "there is no use in having a scribe unless you cut up to it."

The very purpose of the Code of Civil Procedure, was to establish regulations for the government of actions in all their stages. This case affords an apt illustration both of the propriety of such rules and the evils of a departure therefrom; for had they been observed and adhered to, the Court and the parties would have been saved much time and trouble.

Motion of defendant is allowed.

PER CURIAM. Motion allowed.

JOSEPH A. HAYWOOD *v.* MARCELLUS ROGERS.

A contract betwe n A and B, that A might tend so much of B's land as he could cultivate with one horse during the year 1871; and that A was to pay B as rent, two bales of cotton out of the first picking—no part of the crop to belong to A until the rent was paid—constitutes A a cropper, and not a tenant of B.

(*Dean* v. *Rice*, 4 Dev. & Bat. 431, cited and approved.)

CIVIL ACTION tried before *Henry, J.*, at January (Special) Term 1875, WAKE Superior Court.

The plaintiff alleged: that on or about the first day of January, 1871, he agreed with the defendant, that defendant might tend so much of plaintiff's land as he could cultivate with one horse, during the year 1871. That he was to pay as rent for the same two bales of cotton to be paid out of the first picking. No part of the crop was to be the property of

the defendant until the rent was paid. The defendant raised upon said land, more than two bales of cotton; but took possession of the same and refuses to deliver the same to the plaintiff, alleging that the contract was to pay one-fourth of the crop.

That plaintiff has had two bales of said cotton levied on by the process of this court in order to discharge said rent. The plaintiff therefore demanded judgment that said two bales of cotton be delivered to him, &c.

The defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action:

1. In that said complaint shows upon its face that defendant is a tenant and not a cropper.

2. That the complaint does not allege that the contract upon which this action was brought was in writing.

His Honor overruled the demurrer and gave judgment for the plaintiff, and thereupon the defendant appealed.

Busbee & Busbee, for appellant.
Fowle, contra.

PEARSON, C. J. The legal effect of a lease for years, is to vest the ownership of the land in the tenant during the term, leaving a reversion in the landlord. This has been settled law ever since the days of Chief Justice ROLLE, when it was considered that the plaintiff in an action of ejectment should have a writ of possession. The tenant is entitled to estovers, house bote, cart bote, &c., and *the crop belongs to him.*

The landlord has no right to put his foot upon the land during the term, and has no more right to interfere with the crops than a mere stranger. *Dean* v. *Rice*, 4 Dev. Bat. 431.

The demurer waives all other proof and the defendant undertakes to show on the argument, that the relation of landlord and tenant is established by the allegations of the complaint.

The only thing set out in the complaint that squints at the relation of landlord and tenant is the use of the words "The defendant was to *pay* as *rent* two bales of cotton," &c. This feature of the case looks like a term for years.

Per contra, as the merchants say, item 1. The land is not identified, and it is necessary to make a lease valid, that the subject matter be certain. "As much land as he could tend with one horse" is too indefinite to pass an estate. Admit that under the maxim *id certum est, quod certum reddi potest*, this certainly was fixed by the fact that the defendant undertook to work with one horse a certain number of acres. Still the want of identification in the first instance points at the relation of a cropper, rather than that of tenant.

Item 2. No provision is made as to where the defendant is to live during the supposed lease, and have his estovers as is provided, wherever a lease is intended.

Item 3. "No part of the crop is to be the property of the defendant, until the two bales of cotton are received out of the first picking." This stipulation excludes the notion that the defendant was to be put on the footing of a tenant, and stamps on him by an unmistakable mark, the character of a cropper. Was it a lease? Whereas the defendant says, this shows it was not a lease. Our conclusion is, that this stipulation, with the surroundings of the case as set out in the complaint, establish the relation of owner and cropper, and not the relation of landlord and tenant. Upon the allegations of the complaint we take this view of the matter.

The plaintiff wanted to get some one to work his land; the defendant wanted to work as much land as he and his horse could cultivate. So it is agreed, work as much land as you can cultivate with your one horse—at a rent of two bales of cotton for the use of the land, taking your pick and choice, and in order to secure the payment of said two bales of cotton, it is agreed that you are not to be a lessee for years entitled to an estate in the land, estovers and the property in the crop—

but you are to be a cropper. The whole crop is to be mine, until I get two bales of cotton out of the first picking, and then you have the balance in payment for your labor. No error.

PER CURIAM. Judgment affirmed.

HENRY VON GLAHN *v.* GEORGE HARRIS.

In an action against A, as a stockholder in the bank of C, to recover the value of certain notes or bills issued by said bank; the charter of the same providing that in case of insolvency, or ultimate inability of the bank to pay, the individual stockholders shall be liable to creditors in sums double the amount of the stock by them respectively held: *It was held*, that the creditors of the bank were joint obligors, and that such action must be brought in the name of the plaintiff and all the other creditors, who will become parties to the action, and prove their debts, so as to entitle them to a part of the fund.

CIVIL ACTION, tried at the Spring Term, 1875, of the Superior Court of NEW HANOVER county, before his Honor, Judge *McKoy*.

This was an action brought 22d of May, 1871, by plaintiff to recover of defendant, one of the stockholders of the Commercial Bank of Wilmington, alleging that the defendant was a stockholder to the extent of 20 shares of stock at the value of $100 per share, making $2,000. That the Bank is insolvent, and was so at the commencement of this action, and that the defendant was, and is liable under the clause of the charter, which reads: "That in case of insolvency or ultimate inability of the Bank to pay, the individual stockholders shall be liable to creditors in sums double the amount of the stock by them respectively held," &c. By agreement the issues to be submitted to the jury were:

1st. Was the Bank as well known by the name of the Commercial Bank, as by the name of the President and Directors of the Commercial Bank?

2d. Was the defendant a stockholder at the time the suit was brought; if so, to what amount?

3d. Was the defendant a stockholder at the time of the judgment obtained against the Bank by the plaintiff, and has he transferred his stock?

4th. Was the Bank insolvent at the time the suit was commenced and demand made?

5th. Was the Bank insolvent at the time of the transfer, and was the transfer made with the intent to avoid liability under the charter?

The jury by consent and in accordance with the direction of the Court, passed upon these issues, finding all in favor of the plaintiff and fixing the value of the 15 shares owned by the defendant at $1,500. The issues of law were passed upon by the Court.

The plaintiff proved that the corporation was chartered and organized and operated. That defendant was a stockholder as found by the jury, and found the amount that he deposited with the said Bank, $36,445.38. That the plaintiff sued the corporation and obtained judgment in New Hanover county, at December Term, 1869, for $23,259.89, with interest on $16,545.38 from 13th December, 1869, and for $25.55 costs, with a remittance at same term of $992.72. That the plaintiff issued execution, on which were made $76.05 on 13th May, 1870, $90.67 on the 2d June, 1870, and $41.74 on the 16th February, 1870, and as to the balance of the judgment and execution, the return of the sheriff was *nulla bona.*

After the finding of the jury, the plaintiff asks for judgment for the amount of $3,000, being double the nominal value of the 15 shares of stock owned by the defendant. The Court then heard the other issues raised by the pleadings. The defendant insists that no judgment can be rendered on the finding of the jury for the following reasons:

1st. The liability of the stockholders is secondary only, and if plaintiff's claim against the Bank is extinct, his claim against the stockholder is extinct also.

2d. Plaintiff's claim against the Bank is extinct, because by the 3d section of the charter, (which is produced and proved,) the corporation ceased to exist on the 31st December, 1871.

3d. In reply to plaintiff, who says this is not so, for the reason that the Revised Code, chap. 26, sec. 5, continues the corporation in existence for three years longer, the defendant says this act is not retrospective and does not include corporations like this, which were in existence at the time of its passage.

4th. If it is held to be retrospective and to include this corporation, then it continues the corporation only for the purposes expressly mentioned; that is, for the purpose of actions against the corporation only, and not for the purpose of actions against the stockholders.

5th. If the corporation is continued for the purpose of keeping alive the debts against the stockholders, then the act is unconstitutional, as impairing the value of the franchise of the corporation by extending the liability of the stockholders for three years, as any limitation which impairs the value of a franchise in the least degree, is unconstitutional.

6th. That if by chap. 26, sec. 5, Revised Code, the corporation is continued for three years only, that they have expired since 31st December, 1871.

7th. That the proof shows that there are other creditors who should be made parties.

8th. That the assets of the Bank should be exhausted before the individual stockholders should be made to answer for the debts of the corporation, and that a reasonable effort should be made by the plaintiff to exhaust the $74,000 in N. C. bonds, with coupons attached, before he calls upon the defendant to answer for the debts of the Bank, it having been in proof that the State bonds issued during the war under an act of the

Legislature prior to 1861, were issued in aid of the W., C. & R. R. R.

9th. That the corporation of the Bank should be made a party.

10th. That there are other solvent stockholders who should be made parties. To this plaintiff replies that the debt of plaintiff having been reduced to judgment against the Bank and a return of *nulla bona* on the execution, then it becomes the debt of the stockholder, George Harris, the defendant.

Upon the questions reserved, the Judge presiding, being of opinion that the plaintiff ought not to recover, entered judgment against the plaintiff for the costs of this action.

From which judgment the plaintiff prayed an appeal.

Appeal granted. Notice of appeal waived.

W. S. & D. J. Devane and *R. S. French*, for appellant:

Upon the point, "the individual stockholders shall be liable to *creditors* in sums double the amount of stock by them respectively held in said corporation." Charter of the Commercial Bank 1847–'8, sec. 8.

"In the construction of *all statutes*, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the General Assembly, or repugnant to the context of the same statute, that is to say: 1st. Every word importing the singular number only, may extend and be applied to several persons or things, as well as to one person or thing; and every word importing the plural number only, may extend and be applied to one person or thing as well as to several persons or things." Rev. Code, chap. 108, sec. 2. We submit that this alters the common law rule of joinder of all parties as plaintiff, where the *contract* is created by statute.

Battle & Son and *Strange*, contra, filed the following brief:

The defendants insist that no judgment can be rendered on the finding of the jury, for the following reasons:

1st. The liabilities of the stockholders are secondary only, and if plaintiff's claim against the bank is extinct, his claim against the stockholders is extinct also. *Malloy* v. *Mallett*, 6 Jones Eq., 345; *Fox* v. *Hurrah*, 1 Iredell Eq., 358; *Wintry* v. *Webb*, 3 Dev., 27.

2d. Plaintiff's claim against the bank is extinct, because by the third section of the charter, (which is produced and proven,) the corporation ceased to exist on the 31st day of December, 1871.

3d. In reply to plaintiff, who says this is not so, for the reason that the Revised Code, chap. 26, sec. 5, continues the corporation in existence for three years longer, the defendant says this act is not retrospective, and does not include corporations, which were in existence at the time of its passage. 15 Howard, 421; 24 Ibid, 242; 9 Ired., 288, *Battle* v. *Speight;* 12 Ired., 21, *Williams* v. *Davis;* Potter's Dwarris, 162 to 166.

4th. If it is held to be retrospective and to include this corporation, then it continues the corporation only for the purposes expressly mentioned. That is, for the purposes of actions against the corporation only, and not for the purposes of actions against the stockholders.

5th. If the corporation is continued for the purpose of keeping alive the debts against the stockholders, then the act is unconstitutional as impairing the obligation of contracts. 1 Kent, 461; 8 Wheaton, 1; 11 Iredell, 558.

6th. That if by chapter 26, section 5, of Revised Code, the corporation is continued in existence beyond the term of the charter, it is for three years only, and that has expired.

7th. That the proof shows that there are other creditors who should be made parties.

8th. That the liability of the stockholders is only secondary. That in order to determine the extent of their liability, there must be an account to ascertain the whole debt of the bank and the amount of assets. It may be admitted that the creditors are not compelled to wait for a distribution of the assets,

still the amount of assets which can be subjected in a reasonable time to payment of creditors, must first be ascertained. And the balance of debt, after applying these assets, is the amount for which all the stockholders are liable—not any individual stockholder, to any one creditor. The charter provides: "The individual stockholders"—not each individual stockholder—" shall be liable to creditors"—not to *a creditor*. So that in case of the insolvency of the bank, all the stockholders, and not a stockholder, shall be liable to creditors, and not a creditor, in sums double the amount of stock by them respectively held. In other words, upon the ultimate failure of the bank assets to pay all the creditors, a new fund is to be raised out of *all* the stockholders for the joint benefit of all the creditors; and that each stockholder is bound to contribute to this fund in the same proportion that the number of shares held by him bears to the whole number of shares of stock in the bank.

If one creditor can select any one or more of the solvent stockholders, and obtain satisfaction of his debt out of them, then the whole fund which is to be raised for all the creditors, may be appropriated by one or more creditors, leaving the others without remedy; and on the other hand, if one stockholder is thus forced to pay the whole debt to one creditor, he will be forced to a suit for contribution against all the other stockholders; if indeed a suit for contribution can be sustained. It is insisted therefore that one creditor cannot sue a single stockholder, that the only remedy is by a creditor's bill, and that all the stockholders must be parties. Morse on Banking, 439; *Pollard* v. *Bailey*, 20 Wall. 520.

The policy of the law requires that as far as practicable, all matters in dispute growing out of the same contract, or liability between the same parties should be settled in one suit.

More particularly is this the practice of the Courts since the adoption of the Code of Civil Procedure. *Bullard, Adm'r* v. *Johnson & Thomason*, 65 N. C. Rep., 438. "The pervading idea being to settle controversies by one action, and thereby

prevent the loss of the labor and money expended in that action and the necessity of incurring like labor and expense in a second."

PEARSON, C. J. Several interesting questions were discussed on the argument. We will confine ourselves to one of them, because a decision of that disposes of the case, and we prefer to let the others stand over for further consideration.

We put our decision on the ground that by a proper construction of the clause of the charter of the bank, making the stockholders liable to the creditors of the bank, one creditor cannot maintain an action; but may sue in the name of himself and all of the other creditors, who will become parties to the action and prove their debts, so as to entitle themselves to a part of the fund, in analogy to a bill in equity, by one creditor in behalf of himself and the other creditors, to have an account of the distribution of the assets of the estate; and in analogy to the proceedings in bankruptcy, where all of the creditors are required to prove their debts and have a dividend of the fund; and in analogy to the proceeding of a creditor of a deceased debtor, to have the account taken and payment of debts as provided in the act, "Estates and Administrators," chap. 45, Battle's Revisal. Otherwise to be excluded from all claim on the fund.

The clause is in these words: "In case of insolvency or ultimate inability of the bank to pay, the individual stockholders shall be liable to creditors in sums double the amount of the stock by them respectively held." Whether the stockholders are sureties for each other, so that the solvent stockholders must answer for the insolvent stockholders within the limits of double the amount of stock held by them, or are only bound for a ratio part of the debts of the bank, is a question into which we will not enter. It is adverted to, only to show the distinction between our case and the numerous cases cited on the argument, all of which turn upon the wording of the several charters; and to have it understood that our decision is

upon the meaning of the words used in the charter under consideration.

Assuming the insolvency of the bank, a liability is imposed upon the stockholders, to the creditors of the bank, in sums double the amount of the stock held by them respectively, in order to raise a fund in aid of the assets of the bank, which are supposed to be exhausted for the satisfaction of the creditors of the bank. Double the amount of his stock is the limit of the liability of a stockholder. Whether he is liable to the full amount of double the value of his stock, or will be discharged of his liability by the payment of a less sum, depends upon the amount for which the bank is in default. For instance, if the amount due to depositors and bill holders and other creditors exceeds or equals the sum of double the whole amount of stock, after exhausting the assets of the bank, then the stockholders are liable for the full sum of double the amount of their stock. But if the amount for which the bank is in default to its creditors is short of double the amount of the stock, then the stockholders are not put under obligation to pay double the amount of their stock, but will be discharged on payment of a less sum. For illustration, suppose the default of the bank reaches only the amount of the stock, or only one half of the amount of the stock, then a stockholder, by payment of the amount of his stock, or one half thereof, is discharged of the liability imposed on him by the charter. This is the necessary construction, for a stockholder is not to pay double when one half will pay the debts of the bank. How can it be fixed with judicial certainty whether the bank is in default, in a sum double the amount of the shares held by its stockholders, or in a sum of equal amount, or of one half thereof, so as to enable the Court to enter judgment against any one stockholder? In order to do this, there must be an account taken of the condition of the bank, and the amount of debts left unpaid by its failure, and thus fix the amount for which the stockholders are liable; whether a sum double the

amount of his stock, or its single amount or half, or other less sum.

An account of this kind, taken in an action by one creditor of the Bank against one stockholder, would not be binding upon the other creditors or the other stockholders; and it is absurd to suppose that the meaning of the charter is, that an account should be taken in the action of every bill holder or depositor against any one stockholder that he may choose to single out. If these innumerable single actions could be maintained at law under the old mode, the stockholders could have invoked the aid of the chancellor to prevent multiplicity of actions, vexation and an unnecessary accumulation of costs, by a bill in equity. Under C. C. P., he is entitled to this relief as a defence to the action. There is another view of the question; in an action by one creditor against one stockholder, it is impracticable to state an account showing the amount of the debts of the Bank. The amount of deposits may possibly be arrived at by the books of the Bank, so the books may show the amount of notes put in circulation; but how can it be ascertained what amount of the notes have been lost or destroyed, and for one cause, or another, will never be presented for payment? So it would be impossible to state the account without resorting to the enlarged powers conferred by act of Congress in cases of bankruptcy, and settling the estates of deceased persons conferred by statute, and the enlarged power exercised by the chancellor's "in creditors' bills," by which, after due notice, all creditors who fail to prove their debts, are counted out in the division of the fund. This would fix the amount of the debts of the Bank and the amount of the liability of the stockholders, but the chancellor has no such jurisdiction at the suit of a single creditor, and only exercises it when necessary to avoid multiplicity of actions, costs, &c., at the instance of one who sees for himself and all others of the same class who will come in and make themselves parties.

There is still another view of the question. An action against one of two or more joint *obligors*, might be defeated

at common law by plea in abatement. This is allowed by statute, making joint obligors "joint or several." An action by one of two or more joint *obligors* was fatally defective, and could be defeated by demurrer, if the error appeared on the face of the declaration, or by plea of the general issue and notice to non-suit for the variance.

The charter of the Bank imposes upon the stockholders an obligation to *pay to* the *creditors of the Bank* double the amount of their stock, if the default of the Bank makes so large a fund necessary. So the creditors of the Bank are joint obligees and they must all be parties plaintiff in an action at law, there being no statute which enables them to sue separately, and no provision of the charter to that effect, as in some charters, set out in the authorities cited. The only mode of avoiding this rule is to proceed in equity, in the name of one or more of the creditors, in behalf of all. This mode of proceeding is without a precedent in our Courts; but under the time-honored maxim, "where there is a right there is a remedy," by force of which the equity jurisdiction of the chancellors in England has grown up, to its vast proportions, the Superior Courts, under the present system may well, upon the analogies referred to, allow an action in the name of one or more of the creditors in behalf of themselves and such other creditors, &c. This clause was put in the charter for the purpose of adding to the credit of the Bank. The stockholders have had the benefit of it. The creditors have now in turn a right to hold the stockholders liable to raise a fund out of their individual means in aid of the default of the Bank. The idea that one creditor can "nibble at the fund" and take judgment against one solvent stockholder and then another until his debt is satisfied, leaving the other creditors to shift for themselves after the fund is frittered away, would seem to be out of the question, on any reasonable construction of the clause in the charter, and contrary to all principles of fairness and equity, the purpose being to raise a fund in aid of the assets of the Bank for the benefit of all the creditors.

In reply to the last view, the counsel of plaintiff calls the attention of the Court to Rev. Code, chap. 108, sec. 2. Most of the provisions of that chapter are merely in affirmance of the common law. Section 2, which is relied on, was intended to avoid the very awkward expressions, "such person or persons," "he, she, or they"—himself or themselves"—to be met with in some badly drawn statutes.

No error.

PER CURIAM. Judgment affirmed.

HENRY VON GLAHN v. Z. LATTIMER, Ex'r., of HENRY SAVAGE.

(The Syllabus in this case is the same as in the preceding case of *Von Glahn* v. *Harris*.)

CIVIL ACTION, tried at the Spring Term, 1875, of NEW HANOVER Superior Court, before his Honor, Judge *McKoy*.

This was an action to recover of the defendant as ex'r. of Henry Savage, double the par value of thirty-two shares of stock owned by the intestate in "The President and Directors of the Commercial Bank of Wilmington" under the provisions of the charter of said bank, tried before McKoy, Judge, at January Term, 1875, of New Hanover Superior Court. By direction of the Court the issues of law arising upon the demurers were reserved.

By agreement of counsel, the only issue of fact submitted to the jury was this:

Was "the President and Directors of the Commercial Bank of Wilmington" at the time of the commencement of this suit, to-wit: on the 23d day of May, 1871, insolvent and unable to pay the plaintiff the balance of his judgment against the said bank?

It was in evidence that the sheriff on the 13th day of May, 1870, made on the execution on the judgment of this plaintiff against the said bank the sum of $76.05, and on the 2d day of June, 1870, the further sum of $90.67, and for the balance of said judgment the executions are returned unsatisfied, and so remain unsatisfied to this day.

It was further in evidence, that while the executions were in the hands of the sheriff he applied to the president of the bank to show him property to levy on, and the president informed him, that he had already surrendered all the property of the bank, and that he had no other property of the bank than that already surrendered.

It was further in evidence, that the plaintiff had another claim of $430 due him as administrator, and after the returns of the executions and before the institution of this suit, he demanded of the president of the bank, a settlement of that deposit account, and he was informed by the president that he had nothing to pay with. It was further in evidence that at the time of the institution of this suit, to-wit: the 23d day of May, 1871, the said bank did have in its possession seventy bonds of the State of North Carolina, each of the par value of $1,000 with coupons attached which were of the par value of about $20,000 making the aggregate par value of the bonds and coupons about $90,000. It was further in evidence that the said bonds were of the following tenor:

No. — CONFEDERATE STATES OF AMERICA, $1,000.

AN ACT to secure the completion of the Wilmington, Charlotte and Rutherford Railroad, Feb. 16, 1861, ch. 142.

It is hereby certified that the State of North Carolina justly owes (A. B.) or bearer, one thousand dollars, redeemable in good and lawful money of *The Confederate States*, at the office of the Treasurer of the State of North Carolina, in the City of Raleigh, on the 1st day of July, 1892, with interest at the rate of six per cent. per annum, payable half-yearly at the said office on the 1st days of January and July in each year from

the date of this bond and until the principal be paid, on surrendering the proper coupons, hereunto annexed.

In witness whereof the Governor of said State, in virtue of power conferred by law, hath signed this bond and caused the great seal of the State to be hereto affixed, and the Treasurer hath countersigned the same at the seat of government of said State, this 1st day of July, 1862.

[L S.] Z. B. VANCE,
Governor.

Countersigned:
JOH'N WORTH,
Public Treasurer.

It was further in evidence that the Wilmington, Charlotte and Rutherford Railroad Company was justly indebted to the bank to an amount equal to the par value of said bonds for money before that time lent to the said Railroad Company, and for which amount the said bank held evidences of the debt, which were good and available, and for these evidences of debt the said bank received the said bonds and surrendered the said evidences of debt. It was further in evidence that at the time of the commencement of this suit the said bonds were worth thirty-five or forty cents in the dollar. It was further in evidence that one Solomon Bear in the Spring of 1871, purchased in Wilmington some of these bonds at thirty-five cents in the dollar and very shortly afterwards went to the City of New York and tried to sell them and could not get an offer for them, but the holders of some of these bonds offered to sell them to him at ten cents in the dollar.

It was further in evidence that the said bank at the time of the commencement of this action held notes and bills of exchange due to the bank and had since that time redeemed about $40,000 of its issue at thirty cents in the dollar.

The plaintiff insisted that his right to payment of his judgment is paramount to the right of the stockholders to have the assets exhausted, and is not bound to wait until the bank can

bring them into a condition to be advantageously turned into money.

The plaintiff requested the Court to charge the jury that if they believe from the evidence that the said executions on the judgment in favor of the plaintiff against the bank have been returned unsatisfied, and the sheriff, while the executions were in his hands, applied to the president of the bank to show him property to levy on, and that he was informed by the president that the bank had no other property than what had been already surrendered, even though they may believe that the president did have in its possession at the time of the commencement of this suit and now holds the bonds, (in evidence), and had at that time the bills of exchange and promissory notes in evidence, that the plaintiff was not bound to wait until the bank can bring its assets into a condition to be advantageously turned into money, but was entitled to immediate payment and they should find for the plaintiff.

The Court refused to give the charge in the language requested by plaintiff, and plaintiff excepted.

The Court charged the jury that in the language of the charter of the bank, viz: "In case of insolvency or ultimate inability of the bank to pay, the individual stockholders shall be held liable to creditors in sums double the amount of the stock by them respectively held," the liability of the stockholders was a secondary liability, contingent upon the insolvency or ultimate inability of the bank to pay. That the jury was to take into consideration all the evidence concerning the bonds, and other assets, the circumstances under which the bonds were issued, together with all the other assets, and all the proof as to their value, and from the whole evidence say whether at the issuing of the summons in the case (the date of the summons being furnished the jury) the bank *was insolvent.* That a creditor was only required to wait a *reasonable time* to have the assets made available or to have the assets exhausted. That in determining the question of insolvency, the Court charged, that in the language of the charter, it meant insolvent

at the date of the summons or that it would be ultimately unable to pay the debt of the plaintiff. That ultimate inability (in the sense in which it was to be taken) meant within a reasonable time. Creditors were not compelled to wait for distribution of the assets. Yet before a creditor could recover from the individual stockholder it must be first ascertained that the bank *is insolvent or ultimately unable to pay the debt.* If at the time the action was brought there were not assets of the bank that could be subjected to the payment of plaintiff's debt, then he is entitled to recover and they should so find. But if at the time, there were assets of bank that could be subjected to the payment, sufficient to satisfy the debt, then there was not that inability on the part of the bank to pay and they must find for the plaintiff.

The plaintiff excepted—verdict for the defendant; plaintiff appealed; notice of appeal waived.

French and *W. S. & D. J. Devane*, for appellant.
Battle & Son and *Strange*, contra.

PEARSON, C. J. It is held in *Von Glahn* v. *Harris*, at this term that all of the creditors of the bank are necessary parties plaintiff, and must be made plaintiffs directly, or by construction, in an action in the names of one or more of the creditors, in behalf of themselves and all of the other creditors who may come in and take part in the proceedings, prove their debts, &c.

That point of law was reserved by his Honor and certain issues submitted to a jury. The case goes on one of the points of law. So his ruling upon the issues are superceded.

No error in the judgment.

PER CURIAM. Judgment affirmed.

HENRY VON GLAHN *v.* JOHN DAWSON.

(For the Syllabus, see the case of *Von Glahn* v. *Harris*, *ante* page 320.)

The points raised in this, and the facts relating thereto, are similar to those in the preceding case of *Von Glahn* v. *Latimer*.

In the Court below, the defendant had judgment, and the plaintiff appealed.

French and *W. S. & D. J. Devane*, for appellant.
Strange and *Battle & Son*, contra.

PEARSON, C. J. Same opinion as in Von Glahn v. Latimer.

PER CURIAM. Judgment affirmed.

R K. McCONNELL and others *v.* S. W. CALDWELL, Adm'r. of JAMES McCONNELL and others.

Where it is alleged, in an action to have the intestate of the defendant declared a trustee of the plaintiffs of a certain tract of land, which said intestate had purchased, as was further alleged, with the means of his father, (also the father and grandfather of plaintiffs,) but took a deed in his own name and claimed the land as his own, the burden of proving the alleged facts lies with the plaintiffs.

In such action, upon the trial of the issue, whether fraud or undue influence was practiced by the intestate of defendant, in having the deed made to himself, the declarations of the father, with whose means the land was purchased, and who was in possession, made after the land was bought, that fraud and undue influence were used by his son, the said intestate, in getting the deed, are not admissible to prove such allegations.

ORIGINAL BILL in Equity, under our former system, filed at the Spring Term, 1861, of the Court of Equity for MECKLEN-

BURG county, tried in the Superior Court of said county, at Spring Term, 1875, upon certain issues sent down from the Supreme Court, before his Honor, Judge *Schenck* and a jury.

The bill charges that James McConnell, the intestate of the defendant, Caldwell, and son of Thomas McConnell, Sr., purchased a tract of land from one Henderson, in the county of Mecklenburg, and paid for it with the money belonging to his father, and took a deed for the same in his own name; that the said James lived with his father, the said Thomas Sr., who was very old, and at the time of the purchase of the said land was much enfeebled in intellect and in his dotage, and that James, who was his youngest son, and had great influence with his father, prevailed upon the old man to sell his farm in Iredell, and pay for that purchased of Henderson, against his wishes and intentions. It is also charged in the bill, that James for a long time managed the business of the old man, cultivated the farm, and appropriated the products to his individual use. There are other allegations charging fraud and undue influence, and also others, in no way pertinent to the issues decided by the jury.

The answer admits the sale of the Iredell place and the purchase from Henderson of the plantation in Mecklenburg, and the part payment therefor with the note of the purchaser of the farm in Iredell. It is alleged in the answer, that his father had often before the said purchase declared, that he intended to give James the plantation, as in some degree, a payment for his services in working and taking care of the family—consisting of his father, an old man, an invalid sister, and a parcel of young negroes, too young to work; charging that the services of James, during a long period, were worth much more than all the money advanced to him by his father. The answer denies that the old man, Thomas, Sr., was imbecile or in his dotage, and charges that he was hale and vigorous for a man of his years, (seventy-four,) mentally and physically; it also denies that James practiced any fraud or used any contrivance or

undue influence in obtaining his father's consent to the transactions set out.

The defendant, Elizabeth, is the widow of James, and has had dower on the land purchased of Henderson; the remaining portion of said land has been sold by the administrator, Caldwell, under a decree of Court, for assets to pay debts.

The case being removed under the old practice to the Supreme Court, the following issues were ordered to be sent down to the Superior Court of Mecklenburg, to be tried by a jury:

(1.) Was the tract of land in Mecklenburg county, purchased from David Henderson, and the legal title to which was made to James McConnell, deceased, purchased with the money or means of Thomas McConnell, the elder, deceased, or any part thereof, and how much did the said Thomas McConnell pay?

To this the jury responded: "No. Thomas McConnell, Sr., was due James McConnell the full amount for services."

(2.) Was said Thomas McConnell, at the delivery of said deed, incapacitated from doing any business?

This issue was abandoned by plaintiffs, who admit that he was not.

(3.) Was the said James McConnell at the time of the purchase of the land from David Henderson, and if before, for what length of time. the genuine agent of said Thomas?

To this the jury says, "No."

(4.) Did the said James McConnell, before, and at the delivery of the said deed, exercise undue influence over the said Thomas?

The jury finds that "he did not."

(5.) Did the said James agree to hold the said legal title in trust for the said Thomas?

Upon this issue, the Court charged the jury that there was no evidence to sustain this allegation, and directed an entry in the negative.

The evidence relating to the above issues, is reported at length in the statement of the case, but is omitted for the rea-

son, that so much thereof as bears upon the points decided in this Court, is fully stated, with the exceptions to its admission, by Justice READE.

Upon the hearing below, his Honor charged the jury, that if Thomas McConnell, Sr., paid the purchase money for the land, either in money or money's worth, it was a payment; but if James had worked for the old man, then the latter was indebted to the former; and if the payment to Henderson was intended to discharge that debt, it would be a payment by James. His Honor further charged, that the *onus* in regard to the alleged undue influence was upon the plaintiffs; and likewise as to the allegation that the defendants agreed to hold the land in trust for his father. But, that if the jury found that James was the general agent, and had the entire management of his affairs, it then devolved on the defendants to satisfy them of the *bona fides* of the transaction.

McCorkle & Bailey and *Jones & Johnston*, for complainants.
Wilson & Son and *Dowd*, contra.

READE, J. This was a bill in equity before the Code, to have the intestate of the defendant declared a trustee for the plaintiffs, as heirs at law of Thomas McConnell deceased, of a tract of land, which, it is alleged, said intestate bought for said Thomas, and paid for with the money of said Thomas, but took a deed in his own name.

The burden of proving this was upon the plaintiffs. We think that the evidence fails to prove the allegation. And to aid us in coming to a just conclusion, we sent down issues to be tried by a jury; and the jury found all the issues against the plaintiffs. This put the questions beyond doubt.

It is, however, objected by the plaintiffs, that upon the trial of the issue, whether fraud or undue influence was practiced by the intestate of the defendant, he offered the declarations of the said Thomas made after the transaction, but when said Thomas was in possession of the land, that fraud and undue

influence were used—which declarations, he says, were competent, because Thomas was *in possession.*

It is true that what one in possession of property says as explanatory of his *possession*, and under certain circumstances as explanatory of his *title*, when he claims title, is competent. But here, the offer was not to prove that he claimed the title, but that he said that the intestate of the defendant had used fraud in getting the deed, not from him, but from Henderson. Now if such declarations would not have been competent if made when he was *out* of possession, it is difficult to perceive upon what principle his being *in* possession would make them competent. But however that may be, let it be taken as proved that said Thomas did say, after the transaction, that the intestate had practiced a fraud; yet the *bona fides* of the whole transaction is so satisfactorily proved, that such declarations would have but little influence with us.

In cases of this kind, the verdict upon the issues *aids* us, but does not *control* us. We are satisfied with the finding of the jury upon all the issues; and it ought not to have been different upon this issue, if the declarations had been let in.

There must be a decree for the defendant.

PER CURIAM. Decree accordingly.

JOHN PEEBLES, Adm'r., *v.* O. C. FARRAR.

A received seven bales of cotton, which he promised to take care of for B. In an action by B against A, to recover the value of the cotton: *It was held*, that A was a bailee, and was estopped from denying B's title.

CIVIL ACTION, to recover the value of seven bales of cotton, tried before *Moore, J.*, at Spring Term, 1875, of the Superior Court of PITT county.

It was in evidence that the plaintiff, by parol contract, rented to one Taylor the lands of his intestate for the years 1869–'70–'71, reserving the sum of four hundred dollars annually, as rent. The defendant agreed to advance to Taylor supplies for the year 1870, to the value of five hundred dollars, secured by mortgage on the crop raised on the land. In addition to that amount he also advanced to Taylor several hundred dollars, for which he had no lien.

The rent for 1870 being unpaid, in February, 1871, the plaintiff called on Taylor for payment, who promised to deliver to him, in Tarboro', seven bales of cotton, raised on the land in 1870.

The plaintiff informed the defendant of these facts, and requested him to store the cotton in his yard and take care of it for him, and the defendant promised to do so. Taylor was present with the cotton, and under this contract placed the cotton in the yard of the defendant. The defendant did not inform the plaintiff of his claim against Taylor. Prior to that time, Taylor had delivered to the defendant more than enough cotton to pay the debt secured by mortgage, but not enough to pay both debts. The defendant, in the absence of instructions, applied a part of the proceeds of said cotton to the payment of the debt which was not secured, and the balance in payment of the mortgage debt.

The defendant, without the knowledge or consent of the plaintiff, shipped the seven bales of cotton to New York, in March, 1871, and in June, of that year, sold them for $401.00 net, and applied the proceeds to the payment of the balance due upon the mortgage, leaving a balance of $49.00, which he paid to the plaintiff's attorney. In the months of January and February, of 1871, cotton was worth in Tarboro' 12½ to 13 cents, and in March about 11 cents. The seven bales weighed 3,000 pounds, and were sold for 15 cts. per pound in New York.

The plaintiff failing to receive any portion of the rent for year 1870, took from Taylor a mortgage, a copy of which is

hereto annexed. Before the institution of this action, the plaintiff demanded of the defendant the cotton which the defendant refused to deliver.

His Honor instructed the jury, that as the cotton was in the possession of the plaintiff at the time the defendant agreed to receive and take care of it, the defendant is estopped from denying the title of the plaintiff thereto, as he received the same as bailee, and that the only questions for the jury were :

1. Whether they would allow the plaintiff interest on his claim by way of damages ?

2. That plaintiff was entitled to recover from defendant the amount he received for the cotton, to-wit, $400.

To the charge of his Honor, the defendant excepted.

The following is a copy of the mortgage referred to :

"STATE OF NORTH CAROLINA, } *ss.*
Edgecombe County. }

Articles of agreement made this 17th day of May, 1870, by and between William A. Taylor, in the county of Edgecombe, in the State above written of the one part, and O. C. Farrar, of Tarboro', in the State of North Carolina, of the other part. Whereas, the said A. Taylor being about to engage in the cultivation of the soil, has applied to the said O. C. Farrar for advancements and supplies, which he has agreed to make upon receiving a lien upon the crops to be made during the year. Now these presents witnesses that the said O. C. Farrar does hereby agree to advance and furnish to the said William A. Taylor merchandise and provisions to the amount and value of five hundred dollars. And the said William A. Taylor hath agreed to give and doth hereby give to said O. C. Farrar a lien upon all the crops to be made by him in the said county of Edgecombe during the year 1870, and on all mules and horses now in his possession to the said amount of five hundred dollars, the said lien to have priority over all other liens now existing or hereafter to be created, by virtue of the act of the

General Assembly of the State of North Carolina, in such cases made and provided.

In witness whereof the said parties have hereunto set their hands and seals the day and year above written.

(Signed) WILLIAM A. his X mark. TAYLOR.

Witness: JOHN O'HAGAN."

The jury ascertained the principal money by deducting from the amount the proceeds of sale, the amount paid to the plaintiff's attorney, and rendered a verdict in favor of the plaintiff for $352.00 and interest, amounting in the aggregate to $434.15.

The Court gave judgment in favor of the plaimtiff in accordance with the verdict, and thereupon the defendant appealed.

D. M. Carter, for the appellant.
J. E. Moore, contra.

PEARSON, C. J. His Honor assuming the evidence to be true, (about which it seems no question was made,) instructed the jury that the receipt of the cotton by the defendant of the plaintiff, with an express promise on the part of the defendant that he would take care of the cotton for the plaintiff, constituted the relation of "bailor and bailee." There can be no doubt about that. His Honor further instructed the jury that a bailee is not allowed to dispute the title of his bailor and set up title in himself. This is familiar learning. The matter is too plain for discussion.

No error.

PER CURIAM. Judgment affirmed.

STATE *v.* ROBERT McDONALD.

Upon an indictment for burglary, the confessions of the prisoner voluntarily made, are competent evidence, even if made without the consent of counsel; but if the counsel, without objection, allow the State to introduce a part of a conversation in evidence, he has no right to exclude either a part, or the whole of such conversation afterwards.

The fact that a witness sat upon the grand jury, which found the bill of indictment, as chairman, does not render him an incompetent witness upon the trial of the prisoner for burglary, especially when such witness did not vote for the bill.

Where upon an indictment for burglary, it was in evidence that the prosecutor discovered in the morning between daylight and sunrise, that his house had been broken into; and the house was situated on a public street in the town of F, and a box and chair had been so arranged as to form steps, which enabled the party breaking to reach the window, &c.: *Held*, that there was evidence, from which, the jury might infer that the breaking and entry was done in the night time.

When an offence is made of a higher nature by statute, than it was at common law, the indictment must conclude against the statute; but if the punishment is less, or the same, it need not so conclude.

(*State* v. *Davis*, 63 N. C. Rep. 578; *State* v. *Ratts*, Ibid. 503, cited and approved.)

INDICTMENT for Burglary, tried before *Buxton*, *J.*, at January Term, 1875, CUMBERLAND Superior Court.

The following is the evidence in the case:

Thomas J. Green, the prosecutor, was introduced as a witness for the State, and testified: I am Captain of a steamboat plying between Fayetteville and Wilmington. On the night of the 11th of August, 1874, my dwelling house on Person street, in Fayetteville, was forcibly entered by prizing open the blinds of a window on the east side of my house. These blinds I had hooked myself the evening before, and left the sash up for air. On the next morning I noticed my axe lying on the ground under the window. A goods box was also under the window and a chair beside it so as to form steps. I noticed

a slight impression or dent in the blinds, and signs of dirt as if from the axe. This was the sleeping room of my little daughter, aged twelve years, and of the nurse. The next morning I found these were the only window blinds open—they were pushed too, but the wrong one first, so as not to shut up tight. The rest of the windows were all closed and the doors were all locked. I had closed and fastened these windows myself before lying down. My own family, consisting of myself and wife and five children, were all at home We also had a guest with us that night, named Mrs. Carver I was the first one to rise next morning. I rose when it was clearly light, between daylight and sunrise. I lost my vest which I had hung up the night before in the passage at my bed room door, and with it my watch which I had left in my vest fob. I also missed my overcoat and $50 in currency. This money was in a memorandum book, which I had handed to my wife the day before. I found the book on the parlor mantle, but no money. The watch was a fine gold lever watch, with thick hunting case. It was of the make of S. J. Tobias & Co., Liverpool, No. 32,398 ; on one side a landscape was engraved and on the other a sportsman in the act of shooting a deer. The hands were large steel hands, unusually large, which I had put on specially to see at night. The watch cost $180, and was 18 carats fine. My kitchen was connected with my dwelling, forming an L, and is sixteen feet from my dwelling. It was entered that same night. The nails over the window sash were broken and the sash was taken out. I think I would recognize my vest, (a vest was then shown to the witness.) This is my vest which my watch was in. I found this vest in a trunk at the prisoner's house, on the 11th or 12th of December last. The trunk was locked, the key could not be got, and the officer broke open the trunk, the prisoner not being present. We found in the trunk this vest ; there were also in it an old coat and pants. We saw another trunk there, the key to which we found ; it contained the regular clothing of the prisoner. I certainly recognize this vest as the one

which contained my watch. I had the prisoner, Robert McDonald, arrested by an officer acting under a State's warrant, at a house four miles from Fayetteville. I had a conversation with the prisoner on our way to town.

The State's counsel proposed to give this conversation in evidence. The counsel for the prisoner objected, and thereupon in reply to questions asked him, the witness answered as follows: The prisoner seemed anxious to communicate. I made no threats, but spoke mildly to him and used no harsh words. The prisoner's counsel then remarked, "It appears no threats were used and that the statement was voluntarily made, the objection is withdrawn."

The witness then further testified: The prisoner then stated that he bought this vest, a bucket of butter and a piece of cheese, weighing five or six pounds, on Friday night, the 4th of December last, between ten and eleven o'clock at night, of a colored man named William Richardson. I asked if this was all he bought. He answered, "yes." I asked,, "Robert, did you ever have my watch?" He answered, "Not as I know of, I sold a watch for William Richardson in September last." He then described my watch nearly as accurately as a jeweller would have done it, except the number. I think the prisoner knew my watch, he had seen it time and time again. He had been with me on my boat from 1870, off and on. His name is on my pay roll from that time, at intervals. I asked Robert, "What did you get for the watch?"

Here the prisoner's counsel renewed the objection to the admission of the conversation, on the ground that the prisoner was under arrest on a criminal charge, was then actually in the custody of the officer, and was not notified that his answer would be used against him as was admitted by the witness. Upon this ground the counsel for the prisoner moved the Court to exclude the whole conversation, both that which was already in evidence, and that which follows.

His Honor ruled that the State was entitled to introduce the whole of the conversation on that occasion, in evidence espe-

cially after a part of the same had been given in evidence upon a withdrawal of objection by the prisoner's counsel. To this ruling of his Honor the prisoner excepted.

The witness then further testified:

He answered, "Twenty dollars." I asked, "To whom did you sell it?" He answered, "To the captain of a vessel." I asked if he knew his name; he replied that he did not. I asked if he could tell me where the vessel was lying. He answered, "At or near the old New York steamship wharf, in Wilmington." This is a wharf near against the wharf of Worth & Worth. I said "Robert, it could not have been possible you sold that watch for $20?" He said, "Yes sir." I said, "Did you know it was a gold watch?" He said he did not know it, but thought it was, that Richardson told him if he could get $20 for it to sell it; that it was a galvanized watch; he had won it gambling. I asked, "Robert, are you telling me the truth? that was a fine gold watch, and I prized it highly. It was a present; can't you put me in the way of recovering it?" He said, "Captain, I sold it." The prisoner lived about a mile from me. I saw him here about election time in August, a few days before. He worked about the river. The pay of a deck hand is $16.50 per month.

Upon cross examination the witness testified as follows:

The prisoner worked for me last Spring, (1874,) a short while. He worked for me some every year since 1870. He had not worked for me regularly for the last two years. He worked more for me in 1871. William Richardson, the colored man to whom the prisoner referred, has worked for me regularly for the last two years; he has not lost ten days. When my boat would come up the river, I usually sent some of the hands, when there was nothing else to do, to my house to saw wood. Richardson was up at Fayetteville the night my house was robbed. He frequently chopped wood at my house. He claimed to stay at Allen Harris', near the flour warehouse, one hundred yards from my house. I had Richardson arrested and put in jail for this same charge. The prisoner was ar-

rested first, and on the same evening I had Richardson arrested. All I had against Richardson was the prisoner's statement. Both were put in jail. I had before this caused the arrest of two other men, Abram Williams and Adam Jessup, who were both discharged. William Richardson was used as a witness. I had twelve boat hands under me. I carried the watch before the war. Richardson had as good a chance to see my watch as the prisoner. I have stood with this watch in my hand, timeing boat hands in rolling barrels. I would not swear the prisoner ever saw the hands of the watch, or the engraving of the hunter on the case. I have never seen my watch since it was stolen. I did not see the vest from the time it was taken, on the 11th of August, at night, until I saw it in the prisoner's house, two weeks after the 4th of December, on Friday. I did not tell the prisoner what he was arrested for. I did not tell him I had got my vest. He told me, without hesitation, about his getting the things from Richardson. Richardson was in town the night my house and kitchen were robbed, and the next day.

Upon re-direct examination the witness testified: The prisoner said the butter was in a tin package, sealed up like a paint can. I asked, "What did you do with that package?" He said, "We used a part and I carried the balance to my sister the day before." This conversation occurred the day of his arrest on a Friday, two weeks after the 4th December, 1874, being the 18th of the month. I did not lose cheese and butter on the occasion of my house being entered on the night of the 11th of August, but on a subsequent occasion when my house was entered again by some one. The prisoner described the watch as having a white face, large steel hands and ordinary chain worn smooth.

Capt. Oldham was introduced as a witness on behalf of the State, and testified as follows: I know the prisoner. I saw him in Wilmington on the 12th of September last, on board of a vessel run by Captain Lyons, lying at Lippitt's wharf. I then saw in the hands of the prisoner on board the vessel a

doubled cased watch with a landscape engraved on one side, and on the other a hunter, a deer, and a dog. It had a white face and large steel hands; its number was 32,398. I made a memorandum at the time. I asked the prisoner his object in selling. He said he was then away from home, without money, and sick, and wanted money to get home with, and that he lived in Charleston; that he would take $75 for it, but would prefer to pawn it for $20, as he had owned it a long time, and hated to part with it. I asked what guarantee he would give that the watch would not be called for. He answered that he had owned the watch a long time, and swinging it around his head said, he would not be afraid to show it in any city. I asked him to give me the names of some people living in Charleston. He mentioned some names. I did not know them. I knew such names in Wilmington. I am not acquainted in Charleston. When I went up to him, he had the watch and chain both in his pocket out of sight. I went to question him in consequence of information I had received. I afterwards, during the same day, searched the wharf for the prisoner, and could not find him. Search was also made by detectives, but we did not find him.

Upon cross examination, the witness testified: I never saw the prisoner before the 12th of September last. I took down the number of the watch. A man came to me and asked me to go and look at the watch. It was Capt. Lyons of the schooner. I told the prisoner that $75 was more than I would give for the watch. Capt. Lyons was on board the vessel when I got there. So was the prisoner. I told Capt. Lyons I had come to see the watch, and he pointed out the prisoner to me. I went up to the prisoner, and asked to see the watch he wanted to sell. I do not know whether Capt. Lyons bought the watch. I left the prisoner on board. I was there some fifteen minutes. I did not search any house in Wilmington for the prisoner. I did not take down the name of the maker of the watch.

William Richardson, a witness for the State, testified as follows: I have been working for Capt. Green for three years. I

never sold a vest, or butter, or cheese to Robert McDonald. I never gave him a watch to sell.

Upon cross-examination the witness testified: I live below the flour warehouse. I work for Capt. Green on the boat, and sometimes cut wood for him at his house. I came up the river the morning of that night on the boat with Capt. Green. That night I was out between 11 and 12 o'clock. There was a little festival going on in town that night. I went there and got home 11 or 12 o'clock. This was the night of the last robbing. On the night of the first robbing there was a procession in Fayetteville, and it was a raining. I was in the street awhile burning barrels. I was at Capt. Green's next morning about 7 o'clock. I lived one hundred yards off. I had heard up the street about the robbing and I went in to see and look about. I saw they had robbed the house. I was arrested by the deputy sheriff the same day the prisoner was, while I was work on the boat. I proved where I was. Ned Gilmore was one of my witnesses. Julius Evans and Sam Jones proved where I was. They were examined by Squire Whitehead. The prisoner did not get any of the things from me. I know Capt. Green's watch because it was a watch he had a long time and I saw it so often. He pulled it out so often when I worked under him. It had a white face and the largest steel hands I ever saw on a watch. It was a double case gold watch. I never had hold of it. It had a heavy gold or plated chain. I have vests, (the witness had on no vest at the time.' I never sold any to the prisoner. I came from Bladen county and formerly belonged to Dr. Richardson. I used to run on the railroad train, but my partner got his arm cut off and I quit. His name was Wash. Chapman. We were train hands.

Upon re-direct examination the witness testified: I asked the prisoner while we were in jail, why he had me put in jail for nothing? He said somebody like me brought the thing to him. The prisoner was not working on the boat when this happened.

Joseph A. Worth, a witness for the State, testified: On one occasion after the prisoner was committed to jail by the Justice of the Peace, I went to see him in company with the deputy sheriff and Captain Green, to get information about Captain Green's watch. The prisoner was told he was not bound to answer, and that anything he said might be used against him. I asked him where he got the ten dollars in money he had sent his wife.

The prisoner objected to the evidence of the witness, on the ground that he was a witness and also foreman of the grand jury that passed the bill which was now being tried. The counsel for the prisoner took the ground that he was on that account an incompetent witness, as presiding officer of the grand jury, he was, in effect, a judge and could not also be a witness in a case before him. The witness stated that he was foreman of the grand jury and had been sworn as a witness and examined before the grand jury, but did not vote upon the bill. The rest of the grand jury were all present and voted aye on the bill. There was no dissenting voice. It was usual when there was any dissenting voice, to require a division. There was no dissenting voice and no division in this case. His Honor overruled the objection and the prisoner excepted.

The witness then testified: The prisoner in reply to my question, said that he had carried $4.00 away from her with him and had earned the other six on the wharf in Wilmington. I asked him if he really did sell the watch to the Captain of the vessel? He answered "yes."

Upon cross-examination the witness testified: I was present at the trial before Squire Whitehead, the examining Justice. Both Richardson and the prisoner were charged. Gilmore was examined, but not as to an *alibi* for Richardson. Julius Williams was there. Richardson was examined.

Upon re-direct examination the witness testified: I have known the prisoner for several years. His means are limited, he is a laboring man and lives by work.

Thomas J. Green was recalled by the State and testified: I think I know the general character of the witness William Richardson. His associates think well of him. I have never heard him accused of stealing.

Upon cross-examination, the witness stated that he had Richardson arrested about this matter.

The counsel for the prisoner asked the Court to charge the jury:

1. That there is no evidence that the house of the prosecutor, Captain Thomas J. Green, was broken and entered in the night time; that in a charge of this nature *time* was a material circumstance to be established, and by direct and positive testimony, and not by mere inference.

2. That the possession by the prisoner was not a *recent* possession, so as to raise a presumption in law that the prisoner stole them.

His Honor declined to give the first instruction prayed for and charged the jury in relation thereto as follows:

"That it was absolutely necessary for the State to prove to the entire satisfaction of the jury, that the breaking and entering was done in the night time, that is, at a time when there was not day light enough to discern a man's face in the yard. That it was competent to prove this, as well as other indictments of burglary, by circumstantial evidence. The effect of the evidence however must be so convincing on the minds of the jury, as the sworn evidence of a credible eye witness. The jury are not to jump at conclusions. In this case there is some evidence to be considered by the jury, that the breaking and entering was done in the night time. The circumstances detailed in the evidence, tending to show this, have been referred to by the counsel on the part of the State, viz: the early hour when the discovery was made by Captain Green that his house had been entered and robbed, stating that he rose when it was cleverly light, between day-light and sunrise, the preparation made for effecting the enterance, the getting together

under the window, the axe and box and chair, involving the expenditure of time in making these arrangements, the time taken in effecting the entrance and completing the robbery in the house, the situation of the house on a public street in Fayetteville, involving exposure if the entrance had not been effected in the dark." These circumstances were pressed upon their attention by the counsel to satisfy them that the breaking and entering was done in the night time. The State must satisfy the minds of the jury upon this point beyond a reasonable doubt, otherwise a conviction of burglary is out of the question.

To this charge of his Honor the prisoner excepted.

His Honor gave the second instruction prayed for, but added:

"While the possession by the prisoner of the watch and vest, owing to the lapse of time since the loss, was not a recent possession, so as to raise a legal presumption of guilt, yet the fact of possession was a circumstance to be considered along with the other circumstances of the case, in determining the question whether the prisoner was guilty of the larceny. Whether those circumstances were proved and what weight they were entitled to, it was a question for the jury to say. Among these was the circumstance that the articles, the vest and watch, stolen from the house at the same time, are found in the possession of the prisoner; that one of the articles, the watch, was of a nature and value unsuited to the means and condition in life, of the prisoner; that he was contradicted by William Richardson, in his account as to how he came by these articles. The conflicting character of his own statement in reference to the watch, made to Green and Oldham."

To the foregoing portion of his Honor's charge, the prisoner excepted, especially to his Honor's including in the enumeration of circumstances "that one of these articles, the watch, was of a nature and value unsuited to the means and condition in life of the prisoner."

The jury returned a verdict of "guilty of burglary," and thereupon the prisoner moved for a new trial. The motion

was overruled and the prisoner moved in arrest of judgment upon the ground:

1. Because the indictment was concluded at common law, whereas it should have concluded "against the form of the statute."

2. Because the indictment charged that the breaking and entering was for the purpose of committing a larceny; whereas the offense of burglary consists in breaking and entering for the purpose of committing a known felony.

The motion in arrest was overruled and judgment of death pronounced by the Court, from which judgment the prisoner appealed.

W. L. McL. McKay and *Guthrie*, for the prisoner.
Attorney General Hargrove, for the State.

BYNUM, J. None of the objections raised by the counsel of the prisoner are available to him.

1. The confessions of the prisoner were voluntary and admissible, even without the consent of the counsel; but when the counsel withdrew his objections and allowed the greater part of the conversation between the witness and the prisoner to be given in evidence, he had no right, by removing the objection, to exclude a part or the whole. *State* v. *Davis*, 63 N. C. Rep., 578.

2. We know of no rule of evidence which excluded the testimony of Worth because he was a grand juror, even if he had acted as such in finding the bill. But when it appears that he declined to act or vote on the bill, because he was a witness, there is no ground of objection to his competency.

3. The counsel for the prisoner asked the Court to instruct the jury that there was no evidence that the breaking was in the night time. This was properly refused, because there was much evidence given, going to show that the breaking and entry were in the night time. The evidence is set forth in the case, and we think it fully sustains the ruling of the Court;

and when the Court proceeded to charge the jury that they must be satisfied, beyond a reasonable doubt, that the breaking and entry were in the night time, it was then for them to say from the evidence how the matter was.

4. The Court was asked to instruct the jury that the possession of the watch proved, was not such a recent possession as raised the presumption of law, that the prisoner was the thief. This instruction was given, but the jury were told that this possession of the stolen article, was a fact which they might consider with the other facts, upon the question of his guilt. In this there was no error.

5. The counsel moved in arrest of judgment, because the indictment concluded at common law, when it should have concluded against the statute.

This objection is disposed of by this Court in the case of the *State* v. *Ratts*, 63 N. C. Rep., 503. When the offence is made of a higher nature by statute than it was at common law, the indictment must conclude against the statute; but if the punishment is lessened, it need not so conclude. In our case the offence of burglary is the same that it was at common law, and the punishment is neither greater or less than it was at common law, but the same. The conclusion of the indictment was therefore proper. The other objections made in the record have no force in them, and were not insisted upon in this Court.

There is no error.

PER CURIAM. Judgment affirmed.

EDMUND J. LILLY *v.* JAMES PETTEWAY and others.

Where in an action upon a bill of exchange, it was in evidence that the defendant, the payee, had written a letter to the plaintiff and holder of the bill, in which he said: "I have seen M, of the firm of P & M, the drawer of the bill, who says, that in a week or two the note you write me about, will be attended to; if not, please write me—do not bring suit; if they do not attend to it, I will make all satisfactory to you:" *Held*, that the letter contained no evidence that the defendant knew that this bill of exchange had not been presented at the time of writing the letter, and that therefore he was entitled to his discharge.

If the endorser of a bill of exchange, with knowledge of the material facts which discharge him, promises to pay such bill, he is bound to do so.

This was a CIVIL ACTION to recover the value of a bill of exchange, tried before *Buxton*, *J.*, at Spring Term, 1875, of CUMBERLAND Superior Court.

The action was brought by the plaintiff as holder of the following bill of exchange:

"$875.00.

Sixty days after date pay to the order of John Dawson eight hundred and seventy-five dollars value received, and charge to account of

JAMES T. PETTEWAY.

To PETTEWAY & MOORE,
Wilmington, N. C."

Endorsed, "JOHN DAWSON."

It was admitted that the bill was drawn by James T. Petteway and accepted by the drawees, Petteway & Moore, and that it was endorsed by John Dawson, and that it had not been paid.

The defendant, Dawson, insisted that the bill had not been duly presented and payment demanded of the acceptor, Pette-

way & Moore; and if there was a demand of payment and a refusal or failure to pay on the part of the acceptors, that there was not due notice given to defendant, Dawson, of such demand and refusal.

The counsel of the defendant, Dawson, was permitted by the Court, during the progress of the trial, and in his absence, to amend the sworn answer of the defendant, so as to present the points of this defence distinctly. The Court also granted leave to the counsel for the plaintiff to amend the complaint, either then or afterward, in conformity with the facts of the case as proved.

The plaintiff offered no evidence of the presentment of the bill to the acceptors for payment, nor of due notice to the endorser, John Dawson, of its non-payment; but read in evidence a letter of John Dawson to the plaintiff, relating to the paper in suit, of which letter the following is a copy:

"WILMINGTON, Jan. 27th, 1871.

M. E. J. LILLY,

My Dear Sir: In answer to yours of the 24th, received this morning, I have seen R. Moore, of Petteway & Moore, who says, in a week or two the note you write me about will be attended to; if not, please write me. Do not bring suit; if they do not attend to it I will make all satisfactory to you. I thought they had paid it to you long since.

Yours very truly,

(Signed) JOHN DAWSON."

No protest was attached to the bill. It was admitted that Petteway & Moore had gone into bankruptcy. The plaintiff insisted that this letter, being an unequivocal promise to pay the debt made after a default on the part of the plaintiff in presenting the bill to the acceptor and giving notice of the refusal to pay to the endorser, was not only a waiver of such default, but was evidence from which the jury might infer that

the promise of the defendant was made with knowledge of the laches of the holder, and that this dispensed with the necessity of proof of actual presentment and notice, and requested his Honor so to charge the jury.

The defendant, Dawson, insisted:

1. That this letter was a mere proposition on the part of the defendant. That it did not appear that it was accepted by the plaintiff. It does not amount to a promise to pay, and was not, therefore, a waiver of demand and notice, and that defendant was not liable, and requested his Honor so to instruct the jury.

2. That if it was an absolute promise to pay, yet as at the time the letter was written, there had been no demand on and no refusal on the part of the acceptor to pay, the plaintiff at that time had no cause of action against the defendant, the promise was without consideration, and the plaintiff could not recover, and asked his Honor so to instruct the jury.

3. There is no evidence that at the time the letter was written, the defendant had any knowledge that the plaintiff had failed to make demand of the acceptor for payment, and had failed to give notice to the defendant; and that if this letter amounted to an absolute promise to pay, being made without a knowledge of the facts and the *laches* of the holder, that the defendant Dawson was not liable, and requested his Honor so to instruct the jury.

His Honor refused the instruction prayed for by the defendant, and charged the jury:

That ordinarily, in order to charge the endorser with liability, it was necessary for the holder of a bill of exchange to prove a demand on the acceptor at maturity, and due notice, that is, reasonable notice, that such demand was ineffectual. An endorsee might, however, waive laches in the holder, in respect to the demand and notice, by a subsequent promise to pay, made with a knowledge of the circumstances, which, but for the promise, would discharge him. In the present case, there was no evidence of due demand and notice. There was

evidence contained in the letter of John Dawson to the plaintiff of a subsequent promise to pay, and it was apparent that when he wrote the letter, on the 27th of January, 1871, that John Dawson, the endorsee, knew whether he had received notice or not; that being a fact within his own knowledge. While there was no evidence of a demand upon the acceptor at maturity, still if the jury could reasonably gather from this letter that Dawson made the promise therein contained, after a knowledge of the fact that due demand had not been made, then plaintiff was entitled to a verdict. But if the jury could not reasonably so infer from this letter, then the plaintiff was not entitled to recover, and their verdict should be for the defendant, John Dawson. The burden of theproof is upon the plaintiff, and the evidence must preponderate in his favor before he is entitled to a verdict.

To the refusal of his Honor to charge the jury as requested, and to the charge of his Honor as given to the jury the defendant, John Dawson, excepted.

There was a verdict for the plaintiff, and thereupon the defendant, John Dawson, moved the Court for a new trial. The motion was overruled, and the defendant appealed.

Strange and *W. McL. McKay*, for the appellant.
Merrimon, Fuller & Ashe, contra.

RODMAN, J. It is assumed as settled law:

1. That if the holder of a bill of exchange fails to present it to the acceptor for payment at maturity, and if it be dishonored, fails to give due notice thereof to the endorser, he is discharged. This general rule of course has exceptions, which are not material in the present case.

2. If the endorser, with knowledge of the material facts which discharge him, promises to pay the bill, he is bound to do so. It is admitted in the present case, that the bill was not duly presented for payment, and consequently that no notice

of presentment and dishonor was given to the endorser (the defendant).

The plaintiff contends that there is evidence that defendant did promise to pay after he had knowledge of the facts material to his discharge, and that he is therefore bound. The only evidence of such promise and of such knowledge is found in the following letter from the defendant to the plaintiff:

"WILMINGTON, January 27, 1871.

Mr. E. J. Lilly:

MY DEAR SIR—In answer to yours of the 24th, received this morning, I have seen R. Moore, of Petteway & Moore, who says in a week or two the note you write me about will be attended to—if not, please write me—do not bring suit—if they do not attend to it, I will make all satisfactory to you. I thought they had paid it to you long since.

Yours very truly,

JOHN DAWSON."

His Honor instructed the jury, in substance:

(1.) That there was evidence contained in the letter of a promise to pay the plaintiff. In this we concur with his Honor. The words, "I will make all satisfactory to you," admits of no other construction. It is not, as contended by defendant, a mere proposition to pay in case plaintiff will forbear suit, and requiring acceptance in order to make it binding on defendant. Nor was any new consideration necessary to the validity of the promise. The promise to pay did not create a new obligation, which would require a new consideration, but merely waived a defence which the defendant had, and the antecedent liability was sufficient to suport this.

(2.) "That it was apparent, that when the defendant wrote the letter on the 27th of January, 1871, he knew whether he had received notice or not, that being a fact within his own

knowledge." This expression must be taken to mean that defendant knew that he had not received notice. His Honor is supported in it by several cases, which we do not cite because they are cited in 1 Parsons on Bills and Notes, 603. But it is not necessarily true, inasmuch as notice may be given without personal service and consequently without personal knowledge. A man may be absent from home; the mail miscarry, &c. The question whether a defendant knows that notice has not been duly given to him is not, it seems to us, one to be assumed by the Court as necessarily to be inferred from his promise to pay the debt, but it is one proper to be left to the jury upon all the circumstances which may be in evidence in the case. We think his Honor erred in undertaking to decide this fact. In the view we take of the other question in the case, however, it is not material.

(3.) "While there was no evidence of a demand upon the acceptors at maturity, still if the jury could reasonably gather from this letter, that Dawson made the promise therein contained after a knowledge of the fact that due demand had not been made, then the plaintiff was entitled to a verdict. But if the jury could not reasonably so infer from this letter, then the plaintiff was not entitled to recover, and their verdict should be for the defendant. The burden of proof is upon the plaintiff," &c.

His Honor thus held that the letter contained evidence tending to prove, and from which it might be reasonably inferred that the defendant had knowledge that the bill had not been presented for payment. We do not concur with his Honor in this. In what line is such evidence found. Of course it is not to be inferred from his promise to pay, because if so, a promise would be binding in every case. It is said the defendant saw Moore, one of the firm of acceptors, and it *may* be that Moore told him that the bill had been presented. But there is no evidence that Moore himself knew that the bill had not been presented. It might have been presented to his

partner, which though equivalent in effect for most purposes, would not be so to prove actual knowledge by Moore. But the most that can be said is, that it is *possible* that Moore had the knowledge and communicated it to the defendant. If I were permitted to inquire into the probabilities of the matter individually, I should think it most probable that Moore did not communicate a knowledge of the want of presentation to the defendant. If on his applying to Moore to pay the bill, Moore had said to him, "The bill was never duly presented to us for payment; it is no concern of yours; you are discharged," it seems to me that probably the defendant would not have written the letter promising payment. Others might think the probability to be the other way. But take it either way, the probability, it must be confessed, is of the most uncertain kind, giving no sure foothold, and not rising above a conjecture. Then the maxim comes in, that the burden of proof is on the party who affirms the fact; that is, on the plaintiff here, as he affirms the fact of knowledge.

We are of opinion that there was no evidence that the defendant, when he wrote the letter, had knowledge that the bill had not been presented.

I have omitted to refer to any authorities because they are all cited in 1 Parsons on Notes and Bills, 601 and notes.

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

PER CURIAM. *Venire de novo.*

WM. R. PEPPER *v.* CEBURN L. HARRIS and A. W. SHAFFER.

Where A and B purchased of C certain personal property by parol contract, and A executed a paper writing promising to pay C upon certain conditions therein contained, and the amount A had to pay was left blank and never inserted in said writing: *Held*, that the said written contract was of no force on account of such blank; and that the Court below erred in ruling that C was put to his election, either to sue B upon his parol contract of purchase, or to sue A upon the written contract.

This was a CIVIL ACTION, to recover the value of certain personal property alleged by the plaintiff to have been sold by him to the defendants, tried before *Henry, J.* at January (Special Term, 1875, of the Superior Court of WAKE county.

The defendant, Shaffer, filed an answer denying his liability to the plaintiff. The defendant, Harris, filed an answer admitting that he had contracted to purchase of the plaintiff the property mentioned in the complaint, but averred that the contract was in writing and contained certain conditions precedent, which had not been performed by the plaintiff, and insisted that no cause of action had accrued against him. A copy of the writing referred to is annexed hereto, marked "A."

The plaintiff filed a replication alleging that the paper writing referred to had been prepared as containing the contract between the parties, and that the conditions contained therein referred to certain liens existing, upon a tract of land in Halifax county, contracted to be sold by plaintiff to the defendants. The defendants had abandoned the contract of purchase of said lands and by reason thereof the conditions became of no importance to the defendants, and the written contract had never been completed.

The plaintiff further alleged that he had performed the conditions, and that if he had not discharged the same, but was bound to perform the said conditions, the defendants had not been in any wise injured by their non-performance.

The plaintiff being introduced as a witness in his own behalf

was proceeding to speak of the contract as a contract between himself and the defendants, when the counsel for the defendants interposed and asked the witness if the contract had been reduced to writing and was embodied in the paper marked "A," which was then produced; except that the blank had not been filled with the amount representing the value of the property. Whereupon the defendants objected to plaintiff being allowed to give oral evidence of the contract except to fix the value of the property, and in support of their objection produced the paper "B," of which a copy is annexed.

The execution of this paper by the plaintiff was admitted, and to meet the objection of the defendants the plaintiff insisted:

1. That paper "A" being an instrument under seal was in no sense a complete instrument until perfected by the proper ascertainment of the value of the property, and an insertion of that value when ascertained, and that a delivery of such an instrument was conditional, and the sum of the value never having been inserted, the execution had never been completed and the contract had not been in legal intendment reduced to writing.

In this connection the counsel for the plaintiff proposed to ask the witness, "if the paper "A" had been delivered to him by Harris as a complete instrument, or with an understanding that it should thereafter be completed by the ascertainment and the insertion of the value of the property. The question was overruled by the Court on the ground that the witness had already answered it in the affirmative. To the ruling of his Honor the plaintiff excepted.

2. That in any view of the case it was competent to show, that although the contract was taken in the name of Harris alone, the defendant, Shaffer, was equally concerned and liable, and that the defendant Harris was in fact acting in the matter as agent for the defendant Shaffer, as well as for himself.

The Court sustained the defendants and held that the plain-

tiff should proceed against the defendant Harris alone, upon the written contract, or against Shaffer upon the verbal contract, or he would instruct the jury "that the contents of the paper "A" amounted to a variance between the allegations and the proof."

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

The following is a copy of the paper writing referred to:

"A.

STATE OF NORTH CAROLINA, }
Wake county. }

For value received I promise to pay to William R. Pepper or order the sum of —— dollars, when the said Pepper shall have made a full settlement and been discharged from all liability on his certain official bond with J. B. Zollicoffer and as his sureties as administrator of the estate of L. F. Smith: Provided said settlement be made within twelve months from the date hereof, with the understanding, however, that in case any liability other than such as has already been determined by judgment final, now of record in the State or United States court shall arise and be determined by the further judgment of said Court or either of them, and such liability shall not be met and be discharged by the said paper, then the same may be met and be discharged by me, and the sum so expended shall be a credit upon and operate as a payment so far of the said sum of —— dollars.

And it is the understanding of the parties and the true intent and meaning of these articles, that in case the said Wm. R. Pepper shall make said settlement and be legally discharged from all liability on said official bond within twelve months from the date hereof, that upon the exhibition of authentic proof of such settlement and legal discharge, and demand, then the said sum of —— dollars will be due and payable. And in case said Pepper shall fail to make said settle-

ment within said twelve months as aforesaid, then this obligation shall be null and void. Given at Raleigh, N. C., this 12th January, 1872.

C. L. HARRIS, [SEAL.]

Witness: P. A. NOLAN,

Postscript.

By the settlement and legal discharge, mentioned in the foregoing instrument, is meant and intended, the rendition by the said Pepper of his final account as the administrator of the said L. F. Smith to the proper Court, and the auditing of the said account by the proper officer, and such other proceedings as may be prescribed by law for final settlement and discharge from such trusts.

C. L. HARRIS, [SEAL.]

"B."

NORTH CAROLINA, }
Wake County. }

Whereas, I have agreed with C. L. Harris to sell him all the stock, tools, fixtures, crops, provisions, fodder, corn, horses, mules, plows, carts, boats and materials of every kind and sort in use or now employed or being on the plantation, known as the Pepper tract on Jones' Island, in Roanoke river, near Gaston, and which plantation lies in Northampton county; the price to be ascertained after the crop grown on said plantation during the year 1871, shall have been housed, by the opinion of one disinterested person, selected by the said C. L. Harris, and of one disinterested person, selected by me, and of one umpire, to be chosen by the said disinterested persons in case they should not agree. Now I hereby bind myself in consideration of the premises and of one dollar paid to me, to make such selection of one disinterested person whenever I shall be called upon by the said C. L. Harris so to do, to abide his decision or the decision of the umpire chosen as aforesaid, and to deliver the above enumerated property to the said C. L. Harris at the price ascertained as aforesaid, and to receipt to

the said C. L. Harris for the said price under the agreement entered into between us by written articles, dated the —— day of ——, 1872. Witness my hand and seal, the 12th day of January, 1872.

W. R. PEPPER, [SEAL.]

Witness: P. A. NOLAN.

Under the ruling of his Honor, the plaintiff submitted to a judgment of non-suit and appealed.

Moore & Gatling and *Smith & Strong*, for the appellant.
Fowle and *J. C. L. Harris*, contra.

PEARSON, C. J. The action is for the value of certain personal property sold by the plaintiff to the defendants. His Honor assumes that "the contract was made by Harris, as the agent of Shaffer, as well as for himself." But he was of opinion that "the plaintiff should proceed against Harris alone, upon the written contract; or against Shaffer upon the alleged verbal contract." In other words, he was of opinion that although Harris and Shaffer bought the property jointly, yet, inasmuch as Harris had executed paper A, that had the effect of making a severance; and the plaintiff was put to his election, either proceed against Harris, on paper A, or else proceed against Shaffer on the verbal contract, but you cannot proceed against them jointly.

If paper A was not subject to the objection that it amounts to nothing, and has no legal effect because of the blank in respect to its most essential part; and to the further objection, that it makes no reference to the contract of sale, and is senseless and unmeaning as a promise to pay, *provided*, the obligee will make a certain settlement; and cannot be connected with the contract for the sale of the property, except by parol evidence, the opinion of his Honor would seem to be opposed by the reasoning in *Badham* v. *Drake*, 9 Mason & Welsby 79; *Wylde* v. *Northern Railroad Company*, 53 New York, 156. But the fact that paper A is blank, in respect to the

amount that Harris promises to pay, (to say nothing of the fact that it is senseless and unmeaning without the aid of parol evidence to connect it with the sale of the property,) and has no more legal effect than a blank piece of paper, makes it unnecessary for us to go into the learning upon the subject, as to the right of action against all, when a party has entered into a written undertaking, without disclosing the name of one jointly interested, and for whom he is acting as agent.

Our case is, can the action of a vendor against two parties contracting jointly for the purchase of property, be obstructed by a *blank piece of paper*, so as to authorize the Court to put him to his election, sue one on the blank paper, or else sue the other upon the verbal contract?

There is error. Motion for new trial allowed.

PER CURIAM. *Venire de novo.*

LEONARD M. LONG *v.* HENRY J. LONG and others.

Where in a deed the land conveyed is described as follows: Beginning on the 5th corner of the last mentioned 300 acre survey,—running thence a direct line to the Ramsey ford, so, however, as to include the cleared part of Shingle island;" the 5th corner, Ramsey ford and Shingle island are established points, and a direct line from the 5th corner to Ramsey ford will not touch Shingle island: *Held*, that a direct line from the 5th corner to Shingle Island, so as to include the cleared part thereof and thence to the ford, was the proper boundary of said land.

(The cases of *Cherry* v. *Slade*, 3 Murph. 82; and *Shultz* v. *Young*, 3 Ired. 385, cited and approved.)

CIVIL ACTION, in the nature of *Ejectment*, tried before *McKay*, *J.*, at Fall Term, 1874, COLUMBUS Superior Court.

All the facts necessary to an understanding of the case are stated in the opinion of Justice SETTLE.

Smith & Strong, for the appellants.
Battle & Son, contra.

SETTLE, J. The question involved is one of boundary, arising upon the following description in a deed: "Beginning on 5th corner of the last mentioned 300 acre survey, running thence a direct line to the Ramsey ford, so however as to include the cleared part of the Shingle Island," &c.

The 5th corner, Ramsey's ford, and the cleared part of Shingle Island furthest from the ford, are well known and established points.

A direct line from the 5th corner to Ramsey's ford will not touch any part of Shingle Island. How then can we run direct from the 5th corner to the ford, so as to include Shingle Island?

We think our decisions establish beyond doubt, that we shall go from the fifth corner in a direct line to Shingle Island, so as to include all the cleared part thereof, and thence to the ford. This construction comes nearer giving force to all parts of the description than any other that can be adopted, and is in consonance with the general principles of our decisions. *Cherry* v. *Slade*, 3 Murphy, 82; *Shultz* v. *Young*, 3 Ired., 385.

It is unnecessary to notice the other point made in the case, for it will be observed that this description is taken from the report of the jury which laid off the dower of the widow, Dorcas Gore, and hence her true line was the one now claimed by the plaintiff, who bought the land covered by the dower.

We may add, however, that we see no error in the charge of his Honor on the second point.

Judgment affirmed. Let this be certified, &c.

PER CURIAM. Judgment affirmed.

PETER H. SMITH and wife HATTIE *v.* THE MECHANICS' BUILDING AND LOAN ASSOCIATION.

In a suit against a Buildidg and Loan Association to cancel a certain mortgage deed, made to secure the repayment of $1,366 advanced to the plaintiffs for the redemption of fifteen shares of stock therein, and in which an injunction is prayed, restraining the defendant from selling the land conveyed in said mortgage, and against any further proceedings thereunder: *It is error* for the presiding Judge to vacate an order obtained at the commencement of the suit restraining further proceedings under said mortgage, and refusing to grant an injunction, when it appears from the admission of the defendant that the said mortgage covers too much, and is in violation of the Constitution and By-laws of the Association.

CIVIL ACTION, for an account and for the cancellation of a mortgage and praying for an injunction, heard before his Honor, Judge *Kerr*, at Chambers in NEW HANOVER county, on the 6th day of March, 1875.

The following are the material facts relating to the question raised at this stage of the proceedings and decided at this term of the Court:

The plaintiff in September, 1869, subscribed for fifteen shares of stock in the defendant Association. On the 6th of October following, he obtained, by way of loan as he alleges, from the Association the sum of $1,366, by having ten shares of his stock redeemed, (as it is technically expressed in the transaction of the Association,) at $91.60 per share, and five other shares redeemed at $90 per share. To secure the payment of this amount of $1,366, he and the *feme* plaintiff, his wife, executed a mortgage to certain trustees, who afterwards assigned it to said Association, upon real estate in the city of Wilmington, worth $3,000.

The defendant admits that the $1,366, the sum advanced to the plaintiff for the redemption of his fifteen shares of stock, which the said Association allege was no loan, but a sale, was secured in said mortgage to be repaid; charging, however, that

such condition was therein inserted through a mistake, and in violation of the Constitution and By-laws, and asking that the said mortgage be so reformed as to make it conform to the Constitution and By-laws.

Among many other allegations, not relevant to the question argued and decided in this Court, the plaintiff states that he has already paid $1,755.31, a sum more than sufficient to pay off and discharge the said mortgage, with all the lawful interest thereon accrued.

On the 12th of December, 1874, the plaintiff obtained from Chief Justice PEARSON an order restraining the defendant Association from selling the real estate conveyed in the mortgage, as it had advertised to do, until the hearing of the cause before Judge McKOY, at Wilmington; at the same time ordering the defendant to appear at such time and place as Judge McKoy should appoint. In obedience to the order, the plaintiff and the defendant Association appeared before Judge KERR at Chambers in New Hanover county, on the 6th day of March, 1875, when after argument, his Honor vacated the restraining order and refused to grant the injunction prayed for, whereupon the plaintiffs appealed.

Strange, *London* and *French*, for appellants.

Smith & Strong, with whom were *Fowle* and *Batchelor* contra, submitted the following argument:

The defendant was incorporated by an act ratified March 26th, 1870, Private Laws of 1869–'70, chap. 93, page 154. Section 2 of the act fixes the par value of stock at $200 per share, and limits them in number to 6,000 or less, and then provides: The corporation may, according to such rules and regulations to be provided in its by-laws, redeem or purchase the shares, or any number thereof, held by its stockholders, at such prices as may be agreed, and on payment of such price, may take from the stockholders a mortgage on real estate to secure the instalments remaining unpaid on the shares so redeemed or purchased, together with interest at a rate not ex-

ceeding 6 per cent. per annum on the par value of the same, and also all such fines and penalties as may be prescribed by the by-laws for the non-payment, punctually, of such instalment and interest, and such mortgage, and the debts secured thereby, shall be exempt from taxation, the property being taxed in the hands of the mortgagor.

The defendant having paid a small sum in monthly instalments, redeems, that is, accepts a sum payable now in place of a larger sum accumulating under its operations and to be paid in the future. He thus anticipates what he would be entitled to as a shareholder upon the consummation of the purposes of the Association and when its profits will admit of a par payment. It is in no sense a loan, and there is no contract for the repayment of the moneys received upon such sale or redemption, and the stockholder's obligation to continue his monthly payments remains unimpaired as before, except that he must pay at the rate of 6 per cent. per annum the monthly interest on the par value of the stock redeemed. This is expressly authorized by the charter in the section quoted.

To secure these continuing obligations, the mortgage required and executed in conformity to the act, expressly recites that as a condition of the payment or redemption of his stock, such shareholder must still "pay to the association monthly, and every month during its continuance, on the days appointed by the said association for such payment, one half of one per cent. on the ultimate or par value of the said shares so redeemed by way of interest; and will "pay regularly, on the days appointed by the said association for such payment, the monthly dues on the shares held by him in said association, whether the same be redeemed or not;" and will "pay all such fines as may be incurred by any default on his part in making the payments aforesaid at the time aforesaid," &c., &c.

It further provides, "that in the event that default shall be made by him in the payments to be made as aforesaid, or any one of them for the space of three months, or in the other conditions, stipulations and requirements above set forth, or either

of them, in conformity with the provisions of the constitution of said association, that then, and in that event, he or his legal representatives will cause to be paid to the parties of the second part, as trustees of said association, the sum of $252, with interest from the date of these presents."

The proviso declares the deed shall become void if the bargainor comply with "all terms, requirements and conditions on which said sum of $252 was advanced," "or in the event of any default in complying with and performing the same, he shall "pay said sum of $252, with interest from the date hereof." And in case of sale, the proceeds shall be applied to the payment of "the principal and interest of the sum advanced," and all costs and charges incident to said sale, and conveyance, and all fines and monthly dues then remaining unpaid," and the surplus, if any, returned to the bargainor.

It is thus plain that the sum advanced in redemption of stock is but an anticipation of a payment at par value, at a future uncertain time, and in no sense a loan; and it is accepted on the terms that the monthly investment and monthly interest on the sum constituting the par value of the stock, as well as fines, must continue to be paid thereafter as the consideration of such anticipated payment.

If the provisions of the mortgage deed are carried out, that money is never repaid, and the more rapidly the general fund is increased by these means, the sooner will these monthly payments cease and the party be exonerated therefrom.

That the transaction is not usurious, is manifest from the absence of any element of a loan, and is so understood and adjudicated in many cases.

The members of a society raised a fund which was from time to time loaned to its members with legal interest, and such loans were put up to the bidder who would pay the largest sum for the loan, in addition. This is not usury. *Silver* v. *Barnes*, 37 Eng. Com. Law Rep., 571.

Similar associations to ours exist in England, and transactions of the kind complained of in this action have been held

valid. *Burbidge* v. *Colton*, 8 E. L. and Eq., 57; *Seagrave* v. *Pope*, 15 En. L. and Eq. Rep., 477; *Flemming* v. *Self*, 27 En. Law and Eq. Rep. 491; *Mosely* v. *Baker*, following the case preceding, at page 512. And in New York, *Citizens Mutual Loan Association* v. *Webster*, 25 Barbour, (N. Y.) 263; see also *Franklin Benefit Association* v. *Musk*, 5 Dutchers (N. J.) Rep. 225; in Maryland, *Shannon* v. *The Howard Mutual Benefit Association*, 36 (Md.) Rep., 383; *McCohen* v. *Colored Building Association of East Baltimore*, 40 (Md.) Rep. 226.

The provisions of this charter are in substance the same as those in the general law enacted in regard to Building Associations. Bat. Rev. ch. 12.

It is true it was held usurious to effect a loan even in this way under the general law of Pennsylvania. But this decision was not an application of the general act forbidding usury to the transaction of an Association having not the special sanction of law to its acts. *Rupfert* v. *Guttenburg, Building Association*, 6 Casey (Penn.) Rep. 465; but this decision was immediately corrected by a law authorizing such operations under which it is said, there are now some 400 of these Associations in the City of Philadelphia alone. The act was passed in 1859, the decision made in 1858.

The act of incorporation cures old objections to the operations under a voluntary association, and such legislation is valid. Cooley Cons. Lim. 369, et. seq. defective appointment of trustee. *Etheridge* v. *Vernoy*, 71 N. C. Rep. 184, and various cases remedying defects in jurisdiction of courts.

Thus an act curing defect in private examination of a *feme covert*, which would have made the deed inoperative was held valid. *Watson* v. *Mercer*, 8 Peters, Rep. 88. There is no ground laid for interference of the Court as whatever error may exist, there was absent every element of *mala fides*. *Turner* v. *Navigation Company*, 2 Der. Eq. 236.

An error which would be corrected at the hearing will now be disregarded, and the case proceeded with as if corrected. *Millsaps* v. *McCormick*, 71 N. C. Rep. 531.

SMITH and wife *v.* THE MECHANICS' BUILDING AND LOAN ASSOCIATION.

PEARSON, C. J. The complaint alleges, among other things, that the mortgage deed secures the re-payment of $1,366, the sum advanced to plaintiff for the redemption of his stock. The answer admits this fact, and admits further, that it was a violation of the charter and by-laws of the Association to include this sum in the mortgage. It then alleges that the mortgage was so drawn by the mistake of the draftsman, and prays to have the deed reformed by making it conform to the constitution and by-laws.

His Honor, without disposing of the question of reforming the mortgage deed, refuses to grant the injunction. In other words, he vacates the restraining order, and permits the defendant to sell under a deed which, by the admission of the defendant, covers too much, and is in violation of the charter and by-laws of the Association.

There is error. Order reversed and cause remanded, to the end that an injunction issue, as prayed for in the complaint, and continued until further order, and to the end that the pleadings may be so amended as to present an issue of fact to be tried by a jury, under instructions by the Court, to the effect following:

"Was the mortgage deed mentioned in the pleadings drafted so as to include the sum paid to the plaintiff by the defendant, as the price of the redemption of his stock, by accident, mistake or by ignorance of the draftsman? Or, was the mortgage deed, mentioned in the pleadings, drafted so as to include the sum paid by the plaintiff to the defendant as the price of the redemption of his stock, by design and on purpose and with the privity and knowledge of the defendant, and with a view to oppression and wrongful exaction?"

A verdict upon this issue will enable the Court to see whether *the mortgage deed* comes under the rules in regard to the correction and reforming deeds, or under the rules in regard to declaring deeds void for fraud and circumvention.

The case may thus be disposed of upon the matter of the mortgage deed; but should the verdict be that the deed was

made to include too much, by accident, mistake or the ignorance of the draftsman, and the deed be reformed, so as to conform to the charter and by-laws, then the general question, which was argued with much earnestness: Are these Associations a swindle and a means of deluding and cheating ignorant mechanics, which the Courts have power to suppress, as contended for by plaintiff's counsel, or are these Associations *bona fide*, and a means of enabling poor mechanics to borrow money and pay it back by small monthly instalments, so as to ease and favor him, by fitting the payment of interest and dues to what may suit his convenience? And, in the second place, suppose the mechanic comes in, according to the charter and by-laws, and indirectly borrows money from the Association at the rate of 25 per centum, must he abide the consequences? or, in the face of the charter of the Association, have the Courts power to interfere?

Upon this general question we are not now at liberty to express an opinion.

Error. Let this opinion be certified. Remanded.

PER CURIAM. Order reversed.

C. W. OLDHAM and wife *v.* THE MECHANICS' BUILDING AND LOAN ASSOCIATION.

(See the Syllabus in the preceding case.)

CIVIL ACTION, for the cancellation of a mortgage and for an account, and also praying for an injunction, heard before *Kerr, J.*, at Chambers in the county of NEW HANOVER, on the 6th day of March, 1875.

The facts in this case are substantially the same as in the case of *Smith and wife* v. *The Mechanics' Building & Loan*

Association, (the same defendant,) and the same orders were made by his Honor, the presiding Judge.

From the order, vacating the restraining the order and refusing to grant the injunction prayed for, the plaintiff appealed.

Strange, *London* and *French*, for appellant.
Smith & Strong, *Fowle* and *Batchelor*, contra.

PEARSON, C. J. Same opinion as in *Smith* v. *Mechanics' Building & Loan Association.*

Error, and judgment according to that opinion, which will be certified.

PER CURIAM. Order reversed.

WM. D. MAHN and wife *v.* THE MECHANICS' BUILDING AND LOAN ASSOCIATION.

(The Syllabus in this case is the same as in the preceding case of *Smith and wife* v. *The Mechanics' Building and Loan Association*, page 372.)

This was a CIVIL ACTION, similar to the two proceding against the same defendant, heard at the same time by his Honor, *Kerr, J.*, at Chambers in the county of NEW HANOVER.

For the facts, and the orders made in the Court below, from which the plaintiff appealed—see the case of *Smith and wife* against the same defendant, *ante* page 372.

Strange, *London* and *French*, for appellant.
Smith & Strong, *Fowle* and *Batchelor*, contra.

PEARSON, C. J. Same opinion as in *Smith* v. *Mechanics' Building & Loan Association.*

Error, and judgment according to that opinion, which will be certified.

PER CURIAM. Order reversed.

WM. P. WETHERELL and wife MARY E., Executrix of A. M. GORMAN *v.* MAXWELL J. GORMAN and others, and SIDNEY W. WHITAKER.

The sale of land by a fiduciary, on the 4th April, 1865, for Confederate money, can scarcely be supported under any circumstances, against the interests of the beneficiaries.

A bequest to a wife of all the testator's property, after the payment of his just debts, "for the benefit of her and my children, and that she shall hold the same as my executrix and guardian for their mutual benefit: *Provided*, That the principal shall not be used, unless the interest fails to meet their reasonable parts," does not empower the wife to sell a part of the real estate left by said testator; and a sale of such portion by her will be set aside, and the purchaser reimbursed for what he paid, being at the same time charged with the rents and profits.

(*Ransom* v. *Ransom*, 63 N. C. Rep. 251; *Moore* v. *Shields*, 68 N. C. Rep. 327, cited and approved.)

SPECIAL PROCEEDING, for the sale of real estate for assets, commenced in the Probate Court, and thence removed into the Superior Court of WAKE county, and tried at June Term, 1875, before his Honor, Judge *Watts.*

The *feme* plaintiff states that A. M. Gorman, her testator, died in 1865, leaving a last will, in which it is bequeathed and devised as follows:

"I desire that all the property I may possess, after the payment of my just debts, in the case of my death, may be given

to my beloved wife, for the benefit of her and my children, and that she shall hold the same as my executrix and guardian for their mutual benefit: *Provided*, That the principal shall not be used, unless the interest fails to meet their reasonable part."

That she qualified as executrix at February Term, 1865, of Wake County Court, and took into possession, personal property worth some four hundred dollars, which, together with the proceeds of the sale of certain real estate, was expended in the payment of her husband's debts, and charges of administration; and that there are now outstanding debts to the amount of $825.

The executrix, plaintiff, further states, that on the 10th day of April, 1865, she, thinking she had a right under the said will of her husband, sold, or attempted to sell a certain house and lot belonging to the estate, to one Sidney W. Whitaker, for $5,000, Confederate money; that Whitaker paid the Confederate money and entered upon the possession of the property, which he has kept ever since, claiming it in fee. That there is no other property except this lot, so sold to said Whitaker, from which the indebtedness of the estate can be paid. She therefore prays a sale of said lot for assets, &c.

Whitaker, by leave of the Court, was permitted to defend, and alleged a *bona fide* sale to him of said lot by the said *feme* plaintiff, and that she, at the time of said sale, represented that she had power to sell, under the will of her late husband, and that such sale was for the mutual benefit of herself and children; that the property brought a fair price, and that the said executrix stated to him, that if he did not purchase the same, she would sell to some one else.

The defendant, Whitaker, also charged, that several years after the sale, that the said executrix had laid off to her certain real estate in the city of Raleigh, as her dower, and upon which she now lives; that the real estate, which she possesses as dower, is much more than sufficient to pay all the debts of her testator, and should be so applied. Said defendant claims,

that if the executrix did not apply the proceeds of the sale to him in the payment of debts, it was no fault of his; and that his estate is good against the said *feme* plaintiff, and that she will be held to have elected to take the lot sold to him, and is bound by her said election; and that she could not, after making him a deed for the same, take her dower in another portion, thereby dissenting from the will, so as to deprive the defendant of the land he had honestly purchased and paid for.

In her replication to the foregoing answer, the *feme* plaintiff offers to submit her accounts of the administration of her her husband's estate, when requested to do so by the Court. She alleges that the money received for the purchase of the said lot, was worthless and could not be used to pay debts; and admits that when she sold said property, she thought she had a right to do so, but says, that since said sale, she has been informed of her mistake. She also admits that she has had allotted to her, her dower; but contends, that in this proceding, she is representing the creditors of her deceased husband, and that her dower is not subject to their claims. She denies that the defendant Whitaker has any title to said lot, either as against her, or the creditors, or the other defendants, as she could not at the time of said sale, convey any title. She contends that the only question in this proceeding, is as to the title of the defendant to the land, she honestly attempted to sell him.

The other defendants are minors; and the only heirs at law of the testator, who answered formally by their guardian *ad litem.*

His Honor, after argument, granted the prayer of the plaintiff's petition, and gave judgment that the house and lot be sold.

From this judgment the defendant, Whitaker, appealed.

Fowle, for appellant.

Collins, with whom were *Smith & Strong*, contra, filed the following brief:

1. *Was title conveyed to Whitaker?* It is doubtful whether under the will, title was conveyed by the widow a devisee—— see will as set out in the statement of the case.

But, if under the will title was conveyed by the widow as *devisee*, it passed subjected to be divested on the insolvency of the estate becoming known. Rev. Code, chap. 46, sec. 61. Sale void. *Badger* v. *Jones*, 66 N. C. Rep., 305. Case almost identical.

As *dowress* the widow could convey no title before the assignment of dower. *Williamson* v. *Cox*, 2 Bat. Dig., 1175 (4); *Webb* v. *Boyle*, 63 N. C. Rep., 271.

2. *Could executor, who is also widow, after sale to Whitaker, dissent and take dower in other lands?*

The law as laid down in the Rev. Code and the following decisions all show that she can. Rev. Code, chap. 46, sec. 62. Saving of dower. *Mitchener* v. *Atkinson*, Phil. Eq., 23; *Ramsour* v. *Ramsour*, 63 N. C. Rep., 241—widow, executor and devisee; *Moore ex parte*, 92 page, 6th line from top, 64 N. C. Rep., 90; *Avery ex parte*, 64 N. C. Rep., 113—widow, guardian and devisee. *Hinton* v. *Whitehurst*, 71 N. C. Rep. 66—see opinion bottom of 67th page and *McAfee* v. *Bettis*, 72 N. C. Rep., 28.

As to widow being in any way estopped by her declarations that she had a right to sell, or by her deed to Whitaker, see *R. R. Co.* v. *Stratton*, 22 Eng. C. L. R., 219. Same principle laid down by our own Court in an old case and a recent one. *Alston* v. *Hamlin*, 2 Dev. & Bat. 115; *Devries* v. *Haywood*, 64 N. C. Rep., 83.

PEARSON, J. The well prepared brief of the counsel for the plaintiff leaves us but little labor.

The sale of land by a fiduciary on 4th April, 1865, for Confederate money, could scarcely be supported under any circumstances against the interests of the beneficiaries. Besides that, the will does not authorize the executrix to sell the land. The widow had the right to dissent from the will and take dower

and leave the debts of the estate a charge upon the lot in question. *Ransom* v. *Ransom*, 68 N. C. R., 231.

There should be an order for the sale of the land as prayed for to pay debts, and there should be an account with Whitaker reimbursing him the *value* of what he paid for the land and charging him with rents and profits. *Moore* v. *Shields* 78 N. C. Rep., 327.

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

PER CURIAM. Judgment affirmed.

J. D. NEAL *v.* JACK BELLAMY.

A, in consideration of the rent of a certain piece of land, verbally promised to pay B, the owner, two bales of cotton and to keep up the fences and the ditches cleaned out failing in this latter he was to pay as rent three bales of cotton; B agreed to furnish certain advances to A, which with the rent was to be paid before A could take in possession any of the crop: *Held*, that such agreement made A a cropper and not a tenant of B.

Held further, that the verbal promise of B. to O & Co., that he would be responsible for the advances furnished A, to a certain extent, was sufficient, and it was not such as required that it should be in writing.

(*Haywood* v. *Rogers*, at this term cited and approved.)

CIVIL ACTION for the delivery of certain cotton, claimed as rent, tried before *Watts*, *J.*, at the Spring Term, 1875, of the Superior Court of NASH county.

The following are the facts pertinent to the points raised and decided in this Court, as appear from the statement accompanying the record.

Early in the year 1872, the witness, John W. Davis, heard a statement of the bargain between the plaintiff, Neal, and one Isaac Taylor, the defendant's intestate, in regard to the culti-

vation of a certain piece of land belonging to the plaintiff, for the said year of 1872. The contract was a verbal one, and the terms thereof, as the witness understood, were as follows: Taylor had rented a certain portion of Neal's land, for two bales of cotton, Taylor agreeing to keep good fences around the cultivated land and to do the necessary ditching, including the keeping open and cleaned out the old ditches. If Taylor should fail to keep up good fences, and to clean out the ditches as agreed, Neal was to have three bales of cotton instead of two for the rent.

Neal had agreed to make advances to Taylor, to the amount of one bale of cotton, to assist him in making the crop. Taylor, the parties told the witness, agreed that Neal should have the crop, until the advancements and the rent cotton should be paid.

Davis, the witness, further stated, that in June, 1872, he was at Neal's house, when Taylor came in. Witness asked him, "How is your crop?" To this, Taylor replied, "I have no crop;" and when asked, "Why not, had he not been tending a crop?" he said, "Yes, but it was Mr. Neal's crop; I consider it belongs to Mr. Neal until the contract is complied with." He, Taylor, further stated, that Neal was to hold the crop until the rent and the advances had been paid.

Taylor did not do up the fences, nor clean out the ditches, nor do any work thereon.

W. H. Fisher, another witness for the plaintiff, testified, that Neal, the plaintiff, was building a house for him in December, 1871, and January, 1872; that during the time, Taylor came to the house where Neal was at work, and proposed to rent a piece of his land. Neal told him that he would rent him the land for that year (1872) for two bales of cotton, if he would clean out the ditches and keep up good fences around the land; but that if he did not do this, he should charge him three bales. To these terms Taylor agreed. The contract was not in writing.

Sometime after this, Taylor informed the witness that he

was in debt to Neal, one bale of cotton for supplies, which Neal had furnished him, and that these advances were to be paid out of the crop. This was several months after the contract had been made. This witness also corroborated the testimony of Davis in regard to what Taylor said about the ownership of the crop; and that he had heard Taylor speak of the contract and the crop in the same terms on several occasions. Taylor did not keep up good fences, nor clean out ditches; he did no work on them at all.

This witness further stated, that according to their verbal agreement, Neal was to hold the entire crop until he was satisfied; that Taylor was not to remove any part of the same, nor have any title thereto, until the said indebtedness had been paid.

The following additional facts were admitted on the trial below, viz:

That during the year 1872, Neal advanced to Taylor the sum of ten dollars and seventy cents, after the contract was made.

That after said coniract, in the presence and with the consent of the plaintiff, and upon the faith of the plaintiff's verbal promise to see the same paid out of the crop, Taylor contracted an account with H. S. Odom & Co. for supplies, with which to cultivate his crop, to an amount not to exceed the value of one bale of cotton; which said account was charged on the books of Odom & Co. to "J. Taylor—J. D. Neal, security." That the account amounts to the sum of $50.27, and has not yet been paid. That Odom & Co. now seek to hold the plaintiff responsible for said account; and that Taylor, a short time before his death, admitted that he was indebted to the plaintiff one bale of cotton for advances.

That Taylor died during the year 1872, after the crop was raised, but before it was gathered; and that the defendant qualified as administrator of his estate, took possession of the crop, and now refuses to deliver the same to the plaintiff, after demand.

That the sheriff of Nash county took into his possession four bales of cotton of the crop raised on the said land by Taylor during the year 1872, by virtue of the writ issued in this cause. That the sheriff re-delivered the said cotton to the defendant, upon his executing to him the bond required by law, with Thomas P. Braswell as surety. Since the commencement of this action, the defendant has paid the plaintiff two bales of cotton.

Upon the foregoing statement of facts, his Honor held:

(1.) That the agreement of Neal to answer for the debt of Taylor to H. E. Odom, &c., not being in writing, could not be enforced in law. To this ruling the plaintiff excepted.

(2.) That the terms of the contract between Neal and Taylor, constituted Taylor a tenant and not a cropper; and therefore the plaintiff could not recover, as no title to the crop vested in him by virtue of the agreement.

The plaintiff submitted to a non-suit and appealed.

It was agreed by the counsel for the plaintiff and the defendant, that if the Supreme Court be of opinion, that there is error in the ruling of his Honor, in regard to the effect of the contract, judgment may be entered against the defendant and his surety, Thomas P. Braswell, on the replevin bond, for the sum of $78.70, with interest from the 1st day of January, 1873, and for costs. And if his Honor be in error also in regard to the liability of Neal for the debt of Taylor, contracted with Odom & Co., that the said debt, amounting to $50.27, shall be included in said judgment, bearing interest from the time aforesaid—making the judgment against the defendant and in favor of the plaintiff, $128.97 and for costs.

And if the Court shall be of opinion, that the plaintiff is not entitled to maintain this action, judgment may be rendered against him and his surety for costs.

Bunn & Williams, for appellant, submitted the following:

I. The promise of plaintiff to Odom & Co., is not within the statute of frauds.

1. Because the statute can only be pleaded by guarantor *as defendant.* When the plea can be made, it must be *when action is brought to charge the promisor.* Only promisor can invoke application of the statute. The unwritten contract is not void. Here defendant is debtor's intestate. Brown on Statute of Frauds, sec. 135; Smith on Contracts, marg. p. 40.

2. Because plaintiff was to hold the crop to pay the debt. Where fund or property, out of which promisor is to pay, is in his hands, he becomes agent or trustee. Even when the fund is *to be received* by promisor from debtor, statute does not apply. *Stanley* v. *Hendricks*, 13 Ired., 86; Browne on Frauds, sections 177, 187, 206; *Emmerson* v. *Slaughter*, 22 Howard, 28; *Fullam* v. *Adams*, 37 Vermont, 391.

3. Because, whether Taylor was tenant or cropper, it was for benefit of plaintiff that advances be made to Taylor. Neal's promise was not collateral but original. He had *personal interest.* His object was to subserve pecuniary or business purpose of his own, *i. e.*,get his land cultivated. Parson's Contracts, vol. 3, part 2, chap. 5, pp. 24–25, (5th Ed.); Chitty Contracts, 202, 203; Roberts on Fraud, 232; *Nelson* v. *Boynton*, 3 Metcalf, 396; *Williams* v. *Leper*, 3 Burr., 1886.

II. The agreement made Taylor cropper. In whom the crop remains, depends *in all cases* upon the contract. The separation must be made by him who is to hold the crop, and the crop vests in holder. If occupier holds, he is tenant. If landlord holds, occupier is cropper. *Walston* v. *Bryan*, 64 N. C. Rep., 764.

Agreement to pay rent may be qualified by any stipulation showing who is to have title. Verbal agreement that landlord is to have lien, is strong evidence of cropper. Where crop is to remain landlord's, occupier not tenant. *State* v. *Burwell*, 63 N. C. Rep., 661; *Harriton* v. *Ricks*, 70 N. C. Rep., 7.

The word "rent" has no significance. *Denton* v. *Strickland*, 3 Jon., 61; Taylor's Landlord and Tenant. sections 18, 104, 109.

Description of premises necessary in tenancy. Taylor's Landlord and Tenant, 110; *Dingman* v. *Kelly*, 7 Ind., 717.

Moore & Gatling, contra.

PEARSON, C. J. The dividing line between a tenant and a cropper is indistinct, and in many cases hard to run.

In *Rogers* v. *Haywood*, at this term, we hold that when the *crop is to be the property of the owner of the land*, that fixes the character of cropper, and not of tenant, upon the man who is to do the work. According to that principle, the contract in our case was not an executed one, so as to make a term of years, and vest in Taylor an estate, and a right to bring ejectment, or an action for land and damages, under C. C. P., but was an executory contract, by which Neal employed Taylor to work the land, and was to allow him, as wages, all he could make over two bales of cotton, which the land was to draw, and one bale to pay for provisions, &c., furnished, and one bale to secure the necessary work upon the fencing and ditches. Taylor, it seems, was a poor man, and Neal intended to "keep the reins in his own hands." We think his Honor erred in holding that Taylor was a tenant, and not a cropper. This is the second ruling of his Honor, as set out in the case, but we dispose of it in the first instance, because it materially affects his ruling upon the other issue.

We have this case: Neal, at the request of Taylor, says to Odom & Co., "Taylor is working for me, the crop he makes is mine, but I am to allow him all that is over two bales, &c.," (as set out above). "I will see that you are paid out of his part of the crop, for any provisions you may furnish him, to enable him to make the crop." To this Odom & Co. assent, and furnish provisions in pursuance thereto. His Honor was of opinion that this is a promise to answer for the debt or default of an other, and must be in writing under the statute. We take a different view of the matter, and consider its legal effect to be, a verbal order by Taylor or Neal, to pay Odom &

Co. for the provisions that might be furnished, out of Taylor's part of the crop. This order is accepted by Neal, all of the parties being present, and it is afterwards acted on, Odom & Co. looking to Neal as the acceptor of a verbal order in their favor.

This was all fair and above board, and no statute was required to prevent fraud and perjury. Taylor, as a cropper, had no right to any part of the crop, until it was delivered to him by Neal, after deducting rent, &c., yet Taylor was obliged to have something to live on, while he was working for Neal. So the understanding between Neal, Taylor and Odom & Co., was exactly what might have been expected under the circumstances, which establish the relation of a cropper, and there was no more use for it to be in writing, than for any other verbal arrangement, which the interest and convenience of parties induce them to make, without taking the trouble to draw writings.

Error. Judgment reversed, and judgment for plaintiff according to agreement in the case sent as part of the record.

PER CURIAM. Judgment accordingly.

JAMES M. HOWELL *v.* DAVID C. REAMS, Adm'r. of JOHN P. REAMS, deceased.

A co-surety, who pays the bond debt for which the other surety is equally bound, shall be deemed a bond creditor, in the administration of the estate of the deceased co-surety.

When a plaintiff, a co-surety, discharged the bond debt, for the payment of which the defendant's intestate was equally bound, he becomes a bond creditor as to the assets of the intestate; and when pending an action for contribution, the administrator paid off the bonds voluntarily, of equal dignity with said surety debt, having previously paid an open account, he committed a *devastavit* to the extent of the plaintiff's claim for contribution, such claim being for a sum smaller than the bonds so preferred and the open account.

(*Hall* v. *Gully*, 4 Ired. 345; *Drake*, Adm'r. v. *Coltraine*, Adm'r., Busb. 300, cited and approved.)

This was a CIVIL ACTION, for contribution by one co-surety against the administrator of another co-surety, tried upon exceptions to the report of a referee, by his Honor, Judge *Watts*, at the Fall Term, 1874, of GRANVILLE Superior Court.

This suit was commenced by the plaintiff in 1868; at Fall Term, 1872, it was referred; and at the ensuing Spring Term, 1873, the report of the referee was filed, to which the plaintiff filed numerous exceptions. Upon the hearing, his Honor overruled the exceptions and gave judgment for the defendant. From this judgment, the plaintiff appealed.

All the facts pertinent to the points decided, together with the exceptions noticed, are fully set out in the opinion of the Court.

Edwards and *Batchelor*, for appellant.
No counsel *contra* in this Court.

BYNUM, J. In the year 1860, James Howell and John Reams, became the sureties of William Reams, on a bond payable to Thomas Raney, which bond was afterwards assigned

to one Harris. John Reams, the principal obliger, died in 1866, and in the same year letters of administration upon his estate, were granted to David Reams, the defendant. In 1867, an action was brought upon the bond and judgment was recovered against William Reams, the principal, and Howell one of the sureties, a *nol. pros.* having been entered as to the administrator of the other surety.

William Reams the principal in the bond and judgment, was then and still is, insolvent, and Howell the surety paid the judgment, and after demand made in 1868, instituted this action against the administrator of the co-surety, for contribution.

Prior to the beginning of this action, the said administrator paid open accounts against his intestate to the amount of $168; and pending this action, he paid a bond debt of $725 to J. M. Reams, and another of $625 to N. A. Reams. A reference was had to take an account of the administration of the defendant, and the foregoing facts appear from the report of the referee, and are not controverted by the defendant. Many exceptions to the report were taken by the plaintiff, but in our view of the case, it is only necessary to notice the 6th, 7th and 13th exceptions, which embrace, respectively, the payment of the open account and the two bonds before mentioned. The administration was prior to 1869, and is governed by the pre-existing law. It is clear, therefore, that the administrator committed a *devastavit* in paying the open accounts in preference to the bond debts, when the assets were insufficient to pay both classes of debts, provided the claim sued for in this action, has the dignity of a bond debt in the administration of the assets of the estate. It is equally clear that pending this action, the administrator defendant, had no right to make a voluntary payment of the two bonds, if the claim sued for is of equal dignity with the bonds. *Hall* v. *Gully*, 4 Ired. 345.

It is provided by the statute of 1828, sec. 4, ch. 110, Bat. Rev. "that when a surety, or his representative shall pay the debt of his deceased principal, the claim thus accruing shall

have such priority in the administration of the assets of the principal, as had the debt before its payment." In construing this statute, it was held by the Court to fall equally within its words and the evil which it was intended to remedy, whether the payment be made before or after the death of the principal. *Drake, Adm'r.* v. *Coltraine, adm'r.* 1 Busb. 300. So it is but a legitimate application of that construction of the statute, to hold as we do in this case, that the co-surety who pays the bond debt for which the other is equally bound, shall be deemed a bond creditor, in the administration of the estate of the deceased co-surety. The same bond which makes them the bond debtors of the obligee, by force of the statute, binds them mutually to contribution. In carrying out the beneficial purposes of the statute, there can be no reason why they should not occupy the same relation to each other, that they do to the principal, instead of becoming by the same act of payment, the bond creditors of the principal, and only the simple contract creditors of each other.

When the plaintiff discharged the bond debt for the payment of which he was jointly bound with the defendants' intestate, he became a bond creditor as to his assets; and when pending this action for contribution, the defendant paid off these two bonds, voluntarily, he committed a *devastavit* to the extent of the plaintiffs claim of contribution, as the claim is for a smaller sum than the bonds so preferred and the open account. The 6th, 7th and 13th exceptions of the plaintiff should have been allowed, and as their allowance will cover the amount sued for, it is unnecessary to notice the other exceptions.

It is referred to the Clerk of this Court to reform the report in accordance with this opinion, and judgment will be entered in favor of the plaintiff. Error.

PER CURIAM. Judgment reversed.

ADOLPHUS G. MOORE *v.* GILBERT J. GREEN.

A defendant, who has been brought into Court on criminal process, and dischared from arrest under the same on bail, is not privileged from being arrested on civil process immediately afterwards, during the sitting of the Court and before he leaves the Court room.

An order of arrest in a suit for libel, does not violate section 16 of our Bill of rights, and is legal.

(The case of *Dellinger* v. *Tweed*, 66 N. C. Rep. 206, cited, commented on, and approved.)

This was a MOTION by the defendant, to vacate an order of arrest granted in a CIVIL ACTION brought by plaintiff against defendant for libel, returnable to Spring Term of ALAMANCE Superior Court, and heard before *Kerr*, *J.*, at Chambers, during the Fall Term, 1874, of the Superior Court of Guilford county.

The defendant first moved his Honor to vacate his order for the arrest, and to discharge him from custody, on the ground that he was privileged from arrest.

The facts as found by his Honor, upon hearing this motion are as follows, to-wit:

On Monday of the Fall Term, 1874, of Guilford Superior Court, his Honor, upon the affidavit of the plaintiff, as prosecutor, issued a bench warrant, commanding the arrest of the defendant, and that he be brought before him at the Court House in Greensboro', on Wednesday of said term, to answer the criminal charge of libel, published in Guilford and also in Alamance counties. On Wednesday, the sheriff of Alamance, in obedience to the order, produced the defendant before his Honor in open Court, for an examination into the charge made against him. The defendant waived an examination as to the facts and submitted to be bound over to Court to answer, &c. His Honor ordered the defendant into the custody of the sheriff of Guilford, until he should enter into a recognizance in the sum of one thousand dollars, with good and sufficient

sureties, conditioned for his appearance at the next term o said Court, and in like manner, for his appearance at the Spring Term, 1875, of Alamance Superior Court.

Before the required recognizances were given, the Court took a recess, and upon the meeting again, the recognizances were given, and the defendant, by order of his Honor, was discharged. At the time, the defendant was in custody, in the bar of the Court.

As soon as the defendant was discharged, the sheriff of Guilford county sat down by him in the bar, and served upon him a summons in this civil action of the plaintiff, and also a copy of the order of arrest therein, made out and signed by the clerk of Guilford Superior Court; and under said warrant of arrest, which had been issued by his Honor, the presiding Judge, the sheriff held the defendant in custody.

The defendant moved to vacate the order of arrest and to be discharged therefrom, continuing in custody until Saturday night, at which time he gave bail. On the ensuing Monday the motion was heard by his Honor, and refused, whereupon the defendant appealed.

Scott & Caldwell, and *Merrimon, Fuller & Ashe*, for appellant.

Gilmer and *J. T. Morehead*, contra.

RODMAN, J. Two questions of some importance are presented by the record in this case:

1. Was the defendant privileged at the time of his arrest? The authorities which have been found on this point are very few, but they are very respectable and we consider them decisive. They establish a distinction between parties who are attending Court prosecuting civil actions and persons who have been brought into Court on criminal process and have been discharged from arrest under it.

In *Hare* v. *Hyde*, 16 Adol. and Ellis., *et, seq.* 304, (71 E. C.

L. Rep. 373,) the defendant Hyde had been tried for embezzlement and acquitted and discharged. Immediately afterwards and before leaving the Court room, and whilst the Court was still sitting, he was arrested on a *ca. sa.* On the hearing of a motion for his discharge, Lord CAMPBELL, C. J., said: "I am of opinion that the defendant had no privilege in respect of his having been tried and acquitted and ordered to be discharged. He was after that, in the same position as any other of the *circumstantes* in Court. The cases show that an acquitted prisoner has no privilege *redeundo;* and it follows that while remaining as a spectator, he has no privilege more than any one else." This rule must equally apply to a prisoner not acquitted but discharged from arrest on bail. There may not be any very strong reason for the distinction above stated. That which is suggested is, that parties in civil actions appear in Court voluntarily, and should be encouraged to appear, by immunity from arrest; whereas defendants in criminal actions appear involuntarily, and need not be encouraged. Perhaps another reason may be the probable difficulty of finding persons of the class of those who are most generally arrested for crime. But whatever the reason may be, as the rule is not apparently unreasonable or oppressive, we feel bound to abide by the law as we find it to have been heretofore declared.

In the case cited, as in the case before us, the defendant was arrested during the sitting and in the presence of the Court. It was held that the prisoner was not thereby necessarily entitled to his discharge; that the Court might, in some cases, order his discharge, and might treat the arrest as a contempt; but if that Court did not think proper so to treat it, no other Court would do so on the application of the prisoner. See also *Goodwyn* v. *London*, 1 Ad. & El., 378 (28 E. C. Rep., 106.)

2. It is contended that an arrest in an action for a libel, is in violation of section 16, of the Bill of Rights of this State, which says "there shall be no imprisonment for debt in this State, except in cases of fraud." The argument is this. The

moment a judgment shall be obtained, the claim for damages is converted into a debt; the person of the defendant is thereupon liberated, and his bail discharged. For what purpose then require bail, who are to be discharged at the first moment when their liability can be of any value? It is an oppression to the defendant and of no possible benefit to the plaintiff. *Dellinger* v. *Tweed*, 66 N. C. Rep., 206, is cited as the authority for the proposition that the claim for damages is converted into a debt within the meaning of the Constitution, by the recovery of judgment. Undoubtedly, for some purpose, it is. An action of debt may be maintained on it, and a *fi. fa.* may issue on it. But to construe the above cited clause of the Bill of Rights, as forbidding imprisonment for any cause of action which, by judgment would become a debt, would make its prohibition extend to all cases, as every cause of action becomes a debt in one sense when a judgment is recovered on it. Chitty, in his standard book on Pleading, divides all actions into two great classes: those which arise *ex contractu*, and those which arise *ex delicto*. No doubt the framers of the Constitution had this familiar classification in mind, and in forbidding imprisonment for debt, they referred rather to the cause of action as being *ex contractu*, than to the form it would assume upon a judgment. If they had meant to forbid imprisonment in every civil action, they would have said so. But by forbidding it for *debt*, they plainly imply that it may be allowed in actions, which are not for debt. In forbidding imprisonment for debt, as popularly understood, viz: for a cause of action arising *ex contractu*, they responded to the general public sentiment; but I know of no writer on the reform of law, who has recommended the abolition of punishishment for trespassers and wrong doers. Such a provision might be humane to the injuring, but it would not be so to the injured parties. It would withdraw from the State its power to impose a wholesome check on violence and wrong, and would tend to license disorders and law-breakings incompatible with the peace and welfare of society.

Dellinger v. *Tweed*, has no application to the present case. It is confined to a construction of the article of the Constitution respecting homesteads.

There is no error in the judgment below.

PER CURIAM. Judgment affirmed.

JOHN L. MOREHEAD *v.* M. L. WRISTON and R. D. JOHNSTON, Adm'r. of A. J. ORR.

If an incoming partner agrees with his co-partners, that the debts of the old firm shall be taken by the new, this, although binding between the partners, is, as regards strangers, *res inter alios acta*, and does not confer upon them any right to fix the old debts on the new partners.

In order to render an incoming partner liable to creditors of the old firm, there must be some agreement to that effect entered into between such incoming partner and the creditors, and founded on some sufficient consideration.

CIVIL ACTION, on a money demand, tried at the Spring Term, 1875, of the Superior Court of MECKLENBURG county, before his Honor, Judge *Schenck*.

The record states that "the plaintiff's counsel in this case having abandoned the allegations made against A. J. Orr, it is adjudged that the action be dismissed as to his estate, and that his administrator recover his costs, to be taxed by the Clerk."

The following is the case sent with the record as a statement of the facts by the counsel representing both plaintiff and defendant.

Upon the trial in the Court below, John A. Young, a witness for the plaintiff, testified:

That he was a member of the firm of Carson, Young & Grier, composed of R. C. Carson, John A. Young and Z. A.

Grier, and which firm was formed about the year 1847, for the purpose of manufacturing woolen goods at the Rock Island factory, in Mecklenburg county. That the firm continued the prosecution of said business until the winter of 1855 and 1856, when Carson died.

It required more capital to commence business with than they expected, so they borrowed more to commence with. At the death of Carson, the liabilities of the firm were about $68,000. The realty, including machinery, they estimated at about $24,000, and the assets outside of the realty and machinery, were regarded as sufficient to pay off the liabilities.

The notes sued on were given for money borrowed from Mrs. Young by Carson, Young & Grier, and was a partnership debt, to prosecute the business. That he, the witness, purchased Carson's interest in 1856, from his personal representatives, and Grier's interest soon thereafter. At the time of which purchases respectively, he agreed with them respectively, to pay the debts of Carson, Young & Grier. The defendant, Wriston, had been clerk and assistant book-keeper, and afterwards the book-keeper of the firm, and was familiar with the financial condition thereof. That he, the witness, and Wriston had an understanding that they would become partners before he purchased Carson and Grier's interest. It was further agreed between them, that the witness was to purchase all the property belonging to the late firm of Carson, Young & Grier, including the assets outside the realty; and was to assume the payment of the liabilities of said firm, and that the defendant, Wriston, was to come into the new firm of Young & Wriston upon these terms. That the within contract was only in regard to the realty and machinery. The defendant, Wriston, was to have one-third interest in the whole property, and they together, (Young & Wriston,) were to pay the debts of Carson, Young & Grier. That whenever the debts of Carson, Young & Grier were presented, they were paid as provided for, by Young & Wriston. That the debt sued on has not been paid, with the exception of the annual interest thereon, which was

regularly paid to July, 1859; the last payment of which was endorsed on the notes, in the handwriting of the defendant, Wriston, and that the payment of the interest of the notes were made to Mrs. Young, by the firm of Young & Wriston, after its formation.

The plaintiff here proposed to ask the witness whether, in pursuance of the understanding between him and Wriston, as testified to, if the firm of Young & Wriston paid off all, or the greater portion, or what portion of the debts of the late firm of Carson, Young & Grier? Question objected to by defendant; and the objection sustained by the Court. Plaintiff excepted. The written contract between the witness and Wriston, as to the realty and machinery, was here introduced and read.

On his cross-examination, this witness stated, that the defendant, Wriston, purchased one-third, and he, the witness, had two thirds interest in the firm property, as Young & Wriston. They, Young & Wriston, were to pay the debts of Carson, Young & Grier; as to the proportion of their respective responsibility, nothing was said.

The plaintiff was then called, and stated that he had applied to Wriston for the payment of these notes. That early in the war, the defendant, Wriston, offered to pay off these notes to the plaintiff in eight per cent. N. C. bonds, which proposition, the plaintiff declined to accept. In about three months thereafter, plaintiff again had an interview with Wriston, and agreed to receive the eight per cent. N. C. bonds in payment of the said notes, but was told that at that time he, Wriston, did not have this class of bonds, but that he had the six per cent. bonds with which he was ready to pay off the notes. Plaintiff refused to receive this class of bonds in discharge of the debt; whereupon Wriston informed him that, if he could, he would get the eight per cent. bonds and discharge these notes. This interview took place in the office of Young & Wriston, the Rock Island factory, in Charlotte. On his cross-examination,

the witness stated, that he had sued John A. Young, Grier's estate and Mrs. Young's estate, on these notes.

The defendant, Wriston, introduced in evidence his own deposition, in which he testified: that his contract was with Young, to pay to Young one-third of the debts of the firm of Carson, Young & Grier. That Young assumed the payment of the debts of Carson, Young & Grier; and that he assumed the payment to Young, to the extent of one-third thereof. That it was true, he had paid some of the debts of Carson, Young & Grier, but he considered such payments a discharge to the same extent of his indebtedness to the said Young. That he had more than paid his indebtedness to Young.

The plaintiff asked the Court to instruct the jury: 1. That if they are satisfied from the testimony of the owner of the notes, payable by Carson, Young & Grier to Mrs. Young, assented to the arrangement, as testified to by John A. Young, to the effect, that Young & Wriston agreed to pay the outstanding debts of Carson, Young & Grier, that such assent would be equivalent to a prior agreement; and in that respect, the agreement would in legal effect, be made to such owner of the notes.

2. That acceptance of payment of part of such debt, is evidence of such assent.

His Honor declined to give the instructions prayed for, and charged the jury substantially as follows: On the argument, the plaintiff contended, that undertaking to pay the debts was made with Carson, Young & Grier, of whom Morehead was one, and that the consideration of the undertaking was the property that Wriston got from Carson, Young & Grier; the defendants contended, that no contract was made with Morehead or any other creditor; and if the contract was made with Morehead, there was no valuable consideration to support it. The Court recited the whole evidence, and stated the positions taken by both plaintiff and defendant, and told the jury, that the first and second issues were questions of fact for them to decide. And as to the third issue, the Court charged, that the

property received by Wriston from Carson, Young & Grier, was not a sufficient consideration to support a contract with Morehead; but it was a sufficient consideration to support a contract with Young & Wriston.

To this charge, as well as the refusal to give instructions prayed, the plaintiff excepted, except as to that part relating to the first issue.

Upon the rendition of the verdict by the jury, as set forth, upon the following issues, to-wit:

1. Did the firm of Young & Wriston undertake to pay the debts of Carson, Young & Grier? The jury said "Yes."

2. If they did undertake to pay such debts, with whom was this undertaking made? Answer, "John A. Young."

3. If this undertaking was made at all, was it made for a valuable consideration? Answer, "It was made for a valuable consideration."

Plaintiff moved for judgment upon the facts as found above by the jury, and those admitted by the pleadings. This motion was overruled.

The plaintiff then moved for judgment, *non obstante verdicto*. Motion overruled; whereupon the plaintiff again moved, that the Court would grant a new trial of the several issues, on the ground of error in the instructions given, as well as in those refused. His Honor overruled this motion, and gave judgment for defendants. From this judgment plaintiff appealed.

Shipp & Bailey and *Wilson & Son*, for appellant, argued:

The case may be viewed in two aspects.

I. An incoming partner may be become liable for the debts of a previous firm, if he so agrees upon a proper consideration. Story on Partnership, sec's. 152, *et. seq.* and 368 *et. seq;* Collyer on Partnership, chap. 3, sec. 2, p. 497, *et. seq.* especially sec. 522, *ibid* sec. 916, p. 806, *et. seq; Ex parte Jackson*, 1 Ves. Jr., 131; *Ex parte Peele*, 6 Ves. Jr., 602; *Ex parte Clowes*, 2 Brown, ch. Rep. 595; *Oakley* v. *Pasheller*, 10

Bligh, 548, *Hart* v. *Alexander*, 2 M. & W. 484; 1 Parsons Con't. 189, 190; Hovendon on Frauds, 2 vol. 169.

Analogies if not direct authorities. *Hislop* v. *Hoover*, 68 N. C. Rep. 140; *Arnold* v. *Lyman*, 17 Mass. 400; *Winslow* v. ——, Phil. law, 565; *Schermerhorn* v. ——, 1 John's 139; *Weston* v. ——, 12 John's 276; *Ellwood* v. ——, 5 Wend. 235; *Cumberland* v. *Codlington*, 3 John's Chan. 229, at p. 254; *Earle* v. *Crane*, 6 Duer, 264; Note to *Piggott* v. *Thompson*, 3 B. &. P. 149.

(1.) Agreement not affected by Statute of Frauds. *Rice* v. *Carter*, 11 Ired. 298; *Cooper* v. *Chambers*, 4 Dev. 261; *Stanley* v. *Hendrix*, 13 Ired. 86; *Draughan* v. *Bunting*, 9 Ired. 10; *Ellwood* v. —— *supra.*

Whereas as in our case, while the promise is to pay the debt of another in form, it is such in form only. In substance, it is a promise from the incoming partner to pay the old firm a sum to be ascertained under the maxim *id certum est quod* by the extent of the indebtedness.

(2.) This defence should be pleaded where it exists. *Lyon* v. *Chrissman*, 2 D. & B. Eq. 268; *Barnes* v. *Teague*, 1 Jones Eq. 277.

The arrangement may take effect in two ways:

(1.) Novation: whereby the old debt is extinguished, and the new accepted in substitution. *Hart* v. *Alexander*, *supra.*

(2.) By creating a *quasi* suretyship whereby a retiring partner, or old firm becomes a *quasi* surety to the new firm. *Oakley* v. *Pashaller*, *supra.*

Or as STORY expresses it:

(1.) With extinguishment.

(2.) Without extinguishment. *Daniel* v. *Cross*, 3 Ves. Jr. 277.

Whether viewed in the light of one or the other of the foregoing distinctions, *quacunque via data* the defendant is liable either.

(a). Upon the principle in analogy to trusts executed for the benefit of creditors, or the like—of *presumed acceptance*—

which, while not seemingly countenanced in the English Courts, is, in ours, and may be regarded as a departure. *Moore* v. *McDuffey*, 3 Hawks, 578; *Ingram* v. *Kirkpatrick*, 6 Ired. Eq., 463; *Smith* v. *Turrentine*, 8 Ired. Eq., 185.

(b.) Or, because acceptance is presumed as *a matter of law*, from dealings between the creditors and the incoming partner, on the basis of the new arrangement, such as payment of interest, on the principle of *Exparte*, *Jackson*, *supra*.

(c). Or, upon the same evidence as a fact for the jury to draw the inference of acceptance from, as in *Hart* v. *Alexander*, *supra*.

The point as to the consideration seems to have been misconceived by his Honor. The consideration necessary to raise this equity, is one moving from the old to the incoming partner. That is found. Being found, no consideration is necessary, as between the incoming partner and the creditor. *Daniel* v. *Cross*, 3 Ves. Jr., 577.

Assent alone is necessary. This is proved by all the cases, as in none of them was any consideration proved as between the creditor and the incoming partner.

But if STORY's distinction, or the one we have submitted *supra* be correct, we submit that there is, *ex necessitate rei*, a consideration even as between them:

(1.) If old debt is extinguished, that is a consideration.

(2.) If not extinguished, and the old partners, or as termed retiring partners, or as a better term, the old firm become sureties, such a change in their relation to the creditor is a sufficient consideration.

II. (1.) May not this case be regarded in equity as the declaration of a trust? As if the partnership of effects had been conveyed to the persons comprising the new firm in trust to pay the debts of the old firm. *High* v. *Lack*, Phil. Eq., 175. Is it not that substantially?

We concede that while, as a general proposition, partnership property is a fund to pay partnership debts, we do not controvert the principle that the partnership debt is not an ac-

tual lien only *quasi* to be worked out through the equities of the partners themselves. So the firm may convey the property, and disappoint the *quasi* lien.

But it needs not the citation of authority to show that the sale must be to a *bona fide* purchaser to effect the legal result. And then such effect is given to it on the principle that between equal equities, the law shall prevail.

A sale imports, *proprio rigore*, an intent to divest the property from its presumptive liability to partnership debts. But can such an intention be gathered from the sale to defendant?

When such an intent is expressly negatived by the terms of the sale, and the new co-partnership—call it sale—even call it a sale for valuable consideration—when the purchaser buys, and agrees to take it and allow it to continue liable as before, *cum onere*, the equities are no longer equal—but that of the creditors subsisting and superior—and *qui prior est tempore* applies.

(2.) If a declaration of a trust, we submit that by every principle and analogy, the creditor is subrogated to the rights of the old partners. *Bank* v. *Jenkins*, 64 N. C. Rep., 719.

Analogies. Purchaser of notes given for purchase money under an executory contract of sale. *Hadley* v. *Nash*, 69 N. C. Rep., 162; *Blackmer* v. *Phillips*, 67 N. C. Rep., 340.

Surety who pays off a secured note. *York* v. *Landis*, 65 N. C. Rep., 535.

Assignee of note secured by mortgage. *Hyman* v. *Devereux*, 63 N. C. Rep., 624.

What is the true ground of this principle of subrogation? We submit that it is: When a debtor can enforce a right which, if enforced, would result beneficially to the creditor; and will not, or does not, the creditor is subrogated to such right, as it is against good conscience for a debtor, through caprice or fraud, to withhold from the creditor the benefit derivable from his right. And it is on this principle, that creditors are allowed (formerly by bill, now by supplementary pro-

ceedings) to subject the choses in action of their debtor, and this independent of any contracting link, as in our case.

Jones & Johnson, contra, submitted the following brief:

When property was assigned, and the assignee promised in consideration thereof to pay all the debts of a certain corporation, and there was no specification as to its creditors, nor of the amount of their dues, it was held that no such creditor could maintain an action against the assignee. *Dow* v. *Clark*, 7 Gray 198; *Fairley* v. *Denton*, 8 Barn & Cress 395; 2 Man. & Rye, 353; *Lavy* v. *Henry* (N. H.) Rep., (advance sheets.)

Where A is indebted to B, and places money or goods in the hands of C to be applied in payment of B's debt, and C promises A so to apply it, no cause of action arises to B against C until B has been notified of the arrangement and has assented thereto; and when B has so assented the prior objection of A, is discharged. *Carroway* v. *Cox*, Busb. Rep., 173; *Strayhorn* v. *Webb*, 2 Jones, 199; *Dixon* v. *Pace*, 63 N. C. Rep., 603; *White* v. *Hunt*, 64 N. C., 496; 1 Parsons on Contracts, 220, (title novation)—see particularly Lindley on Partnerships, pages 316 and 17 (marginal) and cases cited. *Lee* v. *Fontaine*, 10 Mass., 755. As to necessity of discharging the old firm and substituting the new one, *Kirmon* v. *Kirmon*, 2 Cr. and Meeson, 617; *Blews* v. *Myatt*, 5 Carr and Payne 397 (E. C. L. Rep., 24). Chitty on Contracts, 262; Lindley on Part., 362 (marginal.)

In our case there is no assent to the new arrangement on the part of the plaintiff alleged in the complaint, nor proved. On the contrary, he elects to repudiate the contracts of Young and Wriston, being his action against the old firm, and obtains a judgment against them and his indorser, which judgment is still in force.

It is settled law in England, *Metcalf on Contracts* 208, and in this State; no one can maintain an action before a promise unless the consideration moved from him, unless it be an action for money had and received to his use, that is, in cases where the third party, the defendant, has received money or property

which he has agreed to *apply* in satisfaction of plaintiff's debt, and this with plaintiff's assent. Of this character are all the cases in our Reports commencing with *Cox* v. *Carroway*—(note *supra.*) In our case the property was not received for the creditors, but was *purchased.* Our contract was not for the benefit of the creditors, but for that of the original debtors. 1 Smith's Leading Cases—Notes to *Lampleagh* v. *Brathwait*, 224.

There is no allegation of a demand on the part of the plaintiff before bringing this action, and no allegation that defendant was ever informed that he had these notes. This information being exclusively within the knowledge of the plaintiff, a request should have been made. Chitty on Contracts, 732.

There is no allegation of any promise to Morehead, the plaintiff in the complaint; therefore, no promise to him could be proved. There could be no complete determination of the matters in dispute without making Young a party.

When Morehead refused to substitute the firm of Young & Wriston as his debtors, and Wriston paid Young the amount of this debt due to Morehead, and is thus discharged.

As to motion for new trial:

If the Court is of opinion from cases cited in the 1st section of this brief, that plaintiff could recover upon the promise so stated in the complaint, then it will not award a new trial, although there was error in his Honor's charge.

Payment of interest, by the firm of Young & Wriston, is *prima facie* only in support of some agreement between the parties, and is no evidence of assent on the part of Morehead to the arrangement by which the new firm was to become his debtor in lieu of the old one. Lindley on Partnerships, 359.

Ratification and assent by Mrs. Young, the original creditor, would not give her indorser, Morehead, a cause of action unless he also assented.

Chitty, in his work on Bills, page 250, (marginal) says: "But even in those cases where a valid agreement has been

made that a bill or note shall be paid, it is effectual only between the original parties to it, and is not transferable in law, in equity, or in bankruptcy." "A guarantor is not to be treated as a party to the note guaranteed, whether the guaranty be upon the note or upon a separate paper. *Rhett* v. *Poe*, 2 How. (U. S.) 455; Story on Promissory Notes, sec. 484. A guaranty cannot be assigned; 2d McLean Rep., 103 (*Home* v. *Kimbol.*) Chitty on Contracts, 449, note 2. 2 Parsons on Contracts, 3.

Where the principal debtor has given a mortgage to the surety by way of indemnity the creditor acquires no right to resort to this bond until the principal debtor becomes insolvent, and until such insolvency the surety may discharge the indemnity. *Jones* v. *Quinnipiack*, 29 Conn., 25; 1 Hilliard on Mortgages, 246, sec. 47.

Carson, Young & Grier and also Young, are accessory parties.

READE, J. The briefs, on both sides, are very well prepared, and aid us very much.

The finding of the jury upon the issues is to the effect that when the defendant, Wriston, entered into the new partnership with Young, he agreed with Young that the new partnership should pay the debts of the old partnership of Carson, Young & Grier; and that this promise was made upon a sufficient consideration. There is no doubt, therefore, that the defendant, Wriston, is bound to Young to perform that agreement.

The plaintiff, who is a creditor of the old firm, insists that that agreement between Young and Wriston enured to his benefit, and that by force of it, he is entitled to collect his debt out of Wriston. And whether that is so, is the question before us.

The result of the authorities is well stated in Lindley on Partnership, p. 316, as follows:

"If an incoming partner chooses to make himself liable for

the debts incurred by the firm prior to his admission therein, there is nothing to prevent his so doing. But it must be borne in mind, that even if an incoming partner agrees with his co-partners, that the debts of the old shall be taken by the new firm, this, although binding between the partners, is, as regards strangers, *res inter alios acta*, and does not confer upon them any right to fix the old debts on the new partner. In order to render an incoming partner liable to the *creditors* of the old firm, there must be some agreement to that effect entered into between him and the creditors, and founded on some sufficient consideration. If there be any such agreement, the incoming partner will be bound by it; but his liabilities, in respect of the old debts, will attach by virtue of the *agreement*, and not by reason of his having become a partner."

It will be observed that the agreement must be between the new partner and the *creditor*, and upon a *consideration* moving from the *creditor*.

There is no pretense here that the original agreement was between the defendant and the plaintiff; but it is insisted that the fact that the new firm paid the interest to the plaintiff is sufficient. It seems, however, to be settled that that is evidence only of the agreement between the partners, and not between the new partner and the creditor. Lindley on Partnership, 359. But suppose it were evidence between the new partner and the creditor, still it would be void, for want of a consideration moving from the creditor. If there were evidence that the creditor had been induced to surrender his debt against the old firm, and to accept the new, that would alter the case. But there is no pretense of that here. Indeed, the plaintiff, so far from surrendering his debt, actually sued the old firm, and now has his judgment.

There is no error.

PER CURIAM. Judgment affirmed.

THOMAS M. LEE *v.* JOHN R. BEAMAN, Adm'r of JONAS PETERSON, deceaed.

In an action against an administrator to recover upon a former judgment against his intestate: IT WAS HELD,

(1.) That a demurrer to the answer of the defendaut, on the ground that it did not state what disposition, if any, had been made of the real estate of the intestate, is insufficient, where it is not alleged in the complaint, and did not appear that there was any real estate.

(2.) A demurrer to an answer "for that it does not state that the entire personal property of the intestate has been exhausted," must be overruled, where it is alleged in the answer that, "the Confederate money thus received, was the only assets remaining in the hands of the defendant, and that the same is worthless."

(3. That a demurrer upon the ground, "that the answer does not state by whom, nor to whom, nor in what amount refunding bonds were executed," must be overruled when the answer states, "that refunding bonds were taken from the next of kin according to law, with solvent sureties, and filed in the Olerk's office, and that these bonds had become insolvent by the results of the war."

(4.) That a demurrer, "because the answer does not state at what time the defendant received Confederate money for the property of his intestate," must be overruled, when the answer does state the date and terms of the sale, and that the money was paid when due.

This was a CIVIL ACTION, to recover a former judgment, tried before his Honor, Judge *Kerr*, at the Spring Term, 1875, of the Superior Court of SAMPSON county, upon the plaintiff demurrer to the defendant's answer.

The Court after inspection of the pleadings, and after argument, gave judgment sustaining the demurrer, and in favor of the plaintiff for the amount claimed in the complaint. From this judgment the defendant appealed.

The grounds of the plaintiff's demurer, with the necessary facts pertinent thereto are fully set out in the opinion of the Court.

W. S. & D. J. Devane and *Smith & Strong*, for appellant. *Merrimon, Fuller & Ashe* and *Kerr & Kerr*, contra.

READE, J. We are confined to the specific causes assigned for demurer. If they are sufficient, then the case would be sent back to the end that the defendant may amend his answer, or the plaintiff have judgment, as the case may be. If insufficient, then the answer stands as sufficient, and the defendant should have judgment unless the complaint be amended on leave.

I. The first cause assigned for demurrer, "that the answer does not state what disposition, if any, has been made of the real estate of the intestate," is insufficient; because it is not alleged in the complaint, nor does it appear that there was any real estate.

II. The second cause, "that the answer does not state that the entire personal property of the intestate has been exhausted." is insufficient; because the answer does state "that the Confederate currency thus received was the only assets of the estate remaining in the hands of the defendant," and that the same is "worthless."

III. The third cause, that the answer does not state "by whom, nor to whom, nor in what amount refunding bonds were executed," is insufficient; because the answer does state that refunding bonds were taken from the next of kin according to law with solvent sureties, and filed in the Clerk's office, and that the bonds had become insolvent by the results of the war.

IV. The fourth cause, that the answer does not state *at what time* the defendant received Confederate money for the property of the intestate which he had sold, is insufficient; because the answer does state that the sales were in January and April, 1863, on six months time, and that the money was duly paid, and that with it, he paid off all the debts against the estate, except the plaintiff's; and that he offered to pay that to the Clerk who refused to receive it under instructions.

So that the time is stated with sufficient accuracy. But if the time were not stated at all it would make no difference; because the answer, which is admitted by the demurrer, states that at the time it was received it was the only currency; and it was generally received in payment of well secured *anti*-war debts, and that he had reason to believe, and did believe, that he could pay all the debts of the estate with it. And that the defendant "has acted with proper care and his best skill in the management of the estate, and in all things acted in good faith."

There being no force in the causes specified for demurer; and it being admitted thereby that the defendant has acted with "proper care" and "in good faith," and "has nothing in hand," it follows that there must be judgment overruling the demurer, and for the defendants upon the merits; unless the complaint be amended upon leave.

To the end that the parties may proceed as they may be advised, and as they may have leave, the case is remanded.

There is error.

This will be certified. There will be judgment here for the defendant for costs.

PER CURIAM. Judgment sustaining the demurer, reversed.

JAS. W. WILLIAMS, surviving Adm'r. of ELIZABETH WILLIAMS *v.* MARY WILLIAMS, FRANCIS WILLIAMS and others.

Where an administrator sold certain slaves belonging to the estate of his intestate, upon the petition of the next of kin, in November, 1864, upon time, but allowed the purchasers the privilege of paying cash for the same, in bank bills at the sale; and the next of kin purchased the slaves so sold, and gave their notes with security for the purchase money, except one, who paid the amount of his bid in bank bills, which the administrator deposited in bank, and refused to pay over to the next of kin, because of a dispute as to who was entitled thereto; pending the decision of which dispute, the said bills became worthless, and the makers of the notes, given for the purchase of the said slaves, also became insolvent from the results of the war: *It was held*, that the administrator was guilty of no laches, in selling the slaves as he did, and was not liable to account for their value.

SPECIAL PROCEEDING, praying an account and settlement, commenced in the Probate Court of IREDELL county, and thence removed to the Superior Court and tried before *Mitchell, J.*, at Spring Term, 1874, of said Court.

The following are the substantial facts of the case, as agreed by counsel and sent to this Court:

The intestate died in February, 1864, and at February Term of Iredell Court of Pleas and Quarter Sessions, 1864, the plaintiff and one Theo. Williams were duly appointed her administrators, and soon thereafter sold off the perishable property; and at next Term of said Court, an order was obtained by the next of kin, to sell the slaves belonging to said estate, for distribution, and the plaintiff and his co-administrator were appointed commissioners by said order to make said sale, which they made on the 15th day of December, 1864. And the children and next of kin became the purchasers of all of said slaves. That all of these sales were made on a credit of six months, for notes and approved security, to be paid in North or South Carolina bank money, with the privilege of paying in such money at the time, if the purchasers preferred

to do so. One or two of the purchasers paid their purchases on the day of sale; but the others secured their bids according to terms of sale by giving notes, and giving each other as security. Of the purchasers at said sale was Richmond Speaks, then and now husband of Martha Speaks, and Anna Robeson; that Richmond Speaks gave his note, with said Anna Robeson security, and said Anna Robeson gave her note, with said Richmond Speaks as security. These parties, at that time, were all good, but by the results of the war, have all become insolvent; that soon after this sale, on the 15th December, 1864, Theo. Williams died and left plaintiff sole administrator of said estate; that the plaintiff, in the early part of 1865, and before the surrender, had collected on said sale notes to the sum of $1,325.00 in bank money of the States of North and South Carolina, and made a special deposit of the same a few days after he collected the same with C. A. Carlton, then cashier of the State Bank at Statesville; and that said money has remained in the possession of said Carlton from that time until taking of the acount in this case, when it was delivered to the Commissioner. That two of the children and next of kin of plaintiffs intestate, lived in the State of Illinois, to-wit: Mary Williams and Lender Williams. But not long after the sale of said slaves, a portion of the children and next of kin of plaintiffs intestate, living in this State, claimed that the said Elizabeth held said slaves in trust for them at her death, and notified the plaintiffs of the fact, and that they claimed the entire fund in his hands arising from said sale.

At Spring Term, 1873, of Iredell Superior Court, the case was referred to R. A. McLaughlin, as a commissioner, to take and state an account, and pass upon all questions of law and fact that arose in the case. And he made his report to Spring Term, 1874, the case having been continued at Fall Term, 1873, under former order; and was heard upon exceptions by by plaintiffs, defefendant, R. Speaks and wife.

The said commissioner found that there was no such equity and resulting trust as set up by a portion of the children, next

of kin, and parties to the proceeding, the whole interest in said fund.

The said commissioner further found that the $1,325.00 deposited with C. A. Carlton, was worth 25 cents in the dollar, soon after the surrender, and that they were now (not?) wholly worthless. And that the plaintiff had been guilty of negligence in not selling the same, and therefore, did not credit the plaintiff with this amount.

To the commissioner's finding and ruling with regard to this $1,325.00, plaintiff excepted, and the Court sustained the exceptions, and defendant, R. Speaks and wife excepted to the ruling of the Court. The notes of R. Speaks and Anna Roberson had not been collected, but were offered in evidence before said commissioner by the plaintiff, together with evidence tending to show that they were given at the date of the notes, and that they were now insolvent, and asked that they be allowed him in the settlement against the shares of said Speaks and Robeson. The commissioner allowed the note of said Speaks to set off his distributive share, being $139.82 more than his note, he allowed this amount in part satisfaction of the note of Anna Robeson and R. Speaks as security, her distributive share not being sufficient to discharge said note. And defendant, R. Speaks and wife excepted to this ruling of the commissioner. But the Court overruled this exception and found as a fact, from the testimony, that the slaves were bought by the husband, with the knowledge of the wife, Martha Speaks, and were used by the husband until emancipated, and ordered that the report be reformed in accordance with exceptions allowed, &c.

From the above ruling, the defendants, R. Speaks and wife, being dissatisfied, prayed an appeal to the Supreme Court. Appeal granted and notice waived.

Smith & Strong, with whom was *McCorkle & Bailey*, submitted:

1. The administrator soon after the sale, December 15, 1864,

received $1,375 in notes of North Carolina and South Carolina banks in part of the purchase money for shares sold, and deposited the money in a bank at Statesville, where it remained until required in taking the account in this case, and has become worthless, is liable for the loss. There was carelessness and negligence. *Sudderth* v. *McCombs*, 65 N. C. Rep. 186; *Whitford* v. *Foy*, 65 N. C. Rep. 265; *Atkinson* v. *Whitehead*, 66 N. C. Rep. 296.

2. The equitable chose in action of the wife cannot even, by the assignment of the husband, be taken from the former surviving heir, unless reduced into possession by the assignee during his life. *Arrington* v. *Yarboro*, 1 Jones' Eq. 73.

The chose in action of the wife becomes the husband's only when he reduces into possession and this is his voluntary act. It is not in the power of his creditors to coerce the application of his wife's choses in action to payment of his debts. More especially in this inadmissible since the Constitution secures all her property to her separate use.

Furches with whom was *Folk & Armfield*, contra, argued:

1. The bank money deposited with Carlton arose from the sale of shares, in December, 1864, and would have been lost to defendants by emancipation but for said sale. There is no negligence here. *Kerno* v. *Wallace*, 64 N. C. Rep. 187.

2. The terms of sale were for North and South Carolina bank money, and there was no negligence in plaintiffs receiving payment in that currency.

3. The plaintiff acted properly and prudently in making a special deposit of the money paid in. See *Hogans* v. *Huffsteller*, 65 N. C. Rep. 443; *Shipp* v. *Hetrick*, 63 N. C. Rep. 329.

4. As there was a dispute between the defendants as to who the fund belonged and as to how the same should be distributed. Plaintiff was guilty of no negligence in not paying the same out until that question was settled.

Again as to second exception:

1. The whole fund in dispute arose from the sale of slaves in

December, 1864, and would have been an entire loss to defendants but for said sale.

2. The terms of said sale, were at six months time for note and security payable in North Carolina and South Carolina bank money.

3. These slaves were all bought by the children and next of kin, who give their notes with each other as security, except one who paid the money down. These notes were *all good when taken, but all become insolvent by the results of the war.*

4. It thus appears that there is really nothing substantial in either of defendants' exceptions. The money deposited with Carlton is found to be worthless at this time, and the notes uncollected are on insolvent persons. And if defendants should sustain their exceptions still they would not be benefited. The appeal is a chase after a shadow, and not a substance. As plaintiff cannot be held responsible for losses to the estate without negligence.

5. The facts in the case show that these notes could not have been satisfied in any other way than that adopted by the learned commissioner.

6. But is not the distributive share, whatever it is, going to Richmond Speaks, the husband? Is he not entitled to receive the same? And has not the commissioner properly applied his share to the payment of *his notes*? And can his wife, if she is disposed, prevent his doing so? *Mordon* v. *Mordon*, 9 Ired. 304.

7. This is not a case involving the right of survivorship of the wife after the death of her husband—here both husband and wife "yet liveth."

READE, J. He was a lucky administrator, who, having no effects of his intestate in hand except slaves in November, 1864, was enabled to make any money out of them for the benefit of the estate, either by selling or keeping them.

In our case, the slaves were sold upon the petition of the next of kin, the only persons interested, with the concurrence

of the administrator, upon time, with the privilege to the purchaser to pay cash at the sale, in bank bills, instead of giving bond and security. All the slaves were bought by the next of kin, who gave their bonds with sureties, except one, who paid in bank bills. There was certainly nothing imprudent in this arrangement.

Before the sale bonds fell due, all the obligors were insolvent, by the events of the war; so that nothing remained except the bank bills, which were paid at the sale; and they were on special deposit in bank, and were worth twenty-five cents in the dollar. This was divisible among the next of kin; and, if it was the fault of the administrator that it was not divided, he is liable. But it seems not to have been his fault. The next of kin disputed among themselves, as to who was entitled to it, some claiming all and notified him not to distribute it. And so the administrator kept the money on deposit, without using it, for them and until they could settle their dispute. The administrator has not made a dollar for himself and has been guilty of no negligence by which others have lost. The bank bills having become worthless, and the sale notes insolvent and uncollectable, the proceeds of the sale of the slaves are a total loss, as the slaves would have been.

There is no error in the rulings upon the exceptions appealed from.

Let this be certified, &c.

PER CURIAM. Judgment affirmed.

ALFRED ROLAND and others *v.* JOSEPH THOMPSON and others.

T, a guardian, held a note against M for $6,000. In payment of this note, M conveyed to T 1,300 acres of land, and the note was credited with $6,000, the full value of the land. T afterwards conv yed 700 acres of the land to a trustee for the use and benefit of the children of the said M; and in an action brought by the said wards of T, to recover the 700 acres so conveyed in trust and without consideration: *It was held*, that as the land was conveyed to T in payment of the note belonging to his wards, his deed to the trustee in trust for M's children was fraudulent, and that the wards of T were entitled to recover the land.

CIVIL ACTION tried before *Kerr, J.* at Spring Term 1875, of the Superior Court of ROBESON county.

The facts necessary to an understanding of the case as decided in this Court are fully stated in the opinion of the Court, delivered by Chief Justice PEARSON.

Upon the trial below, judgment was rendered in favor of the plaintiffs; and thereupon the defendants appealed.

N. A. McLean, for the appellants.

W. McL. McKay, *Leitch*, *Strange* and *W. S. French*, contra.

PEARSON, C. J. Thompson as guardian of plaintiffs, held a note on Moore for upwards of $6,000. In payment of this note, Moore conveys to Thompson 1,300 acres of land, and Thompson enters upon the note a credit for $6,000 which was the full value of the land.

Thompson executes a deed to a trustee for 700 acres of the land for the use and benefit of the children of Moore. The action seeks to follow the fund in its converted form, and claims the 700 acres of land as having been bought and paid for with the money of plaintiffs.

Defendants say in reply to this equity, Moore executed the deed to Thompson, with an understanding that he was to convey the 700 acres to a trustee for Moore's children, which was

executed; rejoinder, the understanding being by parol was void, under the statute of frauds; and in the second place, as Thompson paid for the land with the money of the plaintiffs, it was in equity, their land and he had no right to make a deed of gift for a part of it to the defendants. *They paid nothing for the land*, and hold it subject to the equities by which it was bound in the hands of Thompson. They can take no benefit from the fact, that their father as a condition precedent to the payment of a debt, exacted a promise from Thompson to do a fraudulent act. Suffice it, the defendants have paid nothing for the land and the plaintiffs have paid its full value. No error.

PER CURIAM. Judgment affirmed.

ALFRED DOCKERY *v.* R. S. FRENCH, JOSEPH THOMPSON and T. J. MORRISEY.

A debtor may lawfully pay his debt to a trustee in depreciated currency under ordinary circumstances, if the trustee be willing to receive it. But if such debtor fraudulently colludes with a trustee, and obtains a release without consideration, or upon a consideration which he knows to be grossly inadequate, such release will not be permitted to avail him in a Court of Equity; the debt still exists for the benefit of the real creditors, the *cestui que trust*, who may enforce it against the debtor, and is entitled to the benefit of all securities attached to it.

The payment of a note due a guardian for the benefit of his wards, with Confederate money on the 6th day of February, 1864, which note was secured by a mortgage on land, was forbidden, at least from public policy, and was *prima facie* fraudulent, and only extinguished the debt to the amount of the value of the Confederate money.

(The cases of *Emmerson* v. *Mallett*, Phil. Eq. 234; *Sudderth* v. *McCombs*, 65 N. C. Rep. 186; and *Purser's* case, Ibid, cited and approved.)

SETTLE, J., did not sit on the argument of this case.

This was a CIVIL ACTION, to compel one of the defendants, a trustee, to convey the legal title to certain lands to the plain-

tiff, and also for an injunction, tried before *Kerr, J.*, at the Spring Term, 1875, of ROBESON Superior Court.

This case was before this Court at June Term, 1873, upon an appeal by defendants from an order, continuing the injunction against the sale of the premises until the hearing. See 69 N. C. Rep., 308. Subsequently by consent it was referred, when at Spring Term, 1875, the referee filed the following report, to-wit:

"Having been appointed at Fall Term, 1874, of Robeson Superior Court, referee to try the above entitled action, I proceeded therein on the 12 day of November, 1874, at the Court House in Lumberton in said county, all parties with the counsel, being present, and full argument of said counsel being heard,

I find the following facts:

The defendant, Thomas J. Morrisey, borrowed of the defendant, Joseph Thompson, as guardian of the minor heirs of Wm. Blount, on the 28th February, 1859, the sum of four thousand three hundred and sixty-three dollars and 56 cents of his wards' money; and gave his promissory note for that sum, payable at twelve months from that date, with interest to be compounded. On the — day of March following, the said Morrisey, for the purpose of securing the payment of the said promissory note with the interest thereon; and also for the further purpose of indemnifying the said Thompson, individually, against loss by means of his suretyship for the said Morrisey, upon a promissory note to the Bank of Fayetteville, for four thousand dollars, payable at ninety days from date of 9th March, 1859, executed a deed of trust to the defendant, R. S. French, for three thousand four hundred and forty acres of land in said county, adjacent to the town of Lumberton, and also for ten slaves.

In the said deed, it was provided, that said Morrisey should remain in the quiet occupation and possession of the said land and slaves until the 1st day of January, 1861; and then should the said debts, or either of them, in whole or in part, remain

due and unpaid, the said French, trustee, upon the request of the said Thompson, was to proceed to sell the said land and slaves, or so much as might be necessary and requisite for that purpose; and out of the proceeds of such sale, first retaining 5 per cent. commissions, to pay and discharge what should then remain due and unpaid on account of the said debts or either of them, and the balance to pay over to the said Morrisey. Thirty days notice of the time and place of said sale was to be given by advertisement at the Court House door, and other public places in the county. If the said Morrisey should pay the said debts, on or before the said 1st day of January, 1861, then the said deed was to be null and void, otherwise to remain in full force and effect.

In the fall of the year, 1863, the defendant Morrisey applied to the said Thompson, to know if he would receive payment of the note, due the said Thompson as guardian, in Confederate money, (having already paid off the note due the Bank of Fayetteville.) He was informed by Thompson, that he would receive payment in Confederate currency. The defendant Morrisey then borrowed of the plaintiff, Alfred Dockery, ten bales of cotton, to be returned in kind; took the cotton to Wilmington, sold it, and with the proceeds, paid off his note to Thompson, as guardian, on the 6th day of February, 1864. Thompson received the payment willingly, but without the knowledge or consent of his wards, or of the trustee, French. The principal and interest of the note, at the time of the payment, amounted to five thousand eight hundred and twenty dollars; and the value of the Confederate currency, paid in gold, was two hundred and seventy seven dollars and fourteen cents. Thompson thereupon surrendered the note, and the deed of trust by which it was secured, to the said Morrisey, and made the following indorsement on the deed of trust, viz: 'Received on this deed of trust all the claims and interest to which I am entitled, and declare this instrument to be null and void, so far as I am concerned. 6th February, 1864. (Signed) Joseph Thompson.'

Thompson did not collect the money when it was due, because it was well secured and was not required for the use of his wards. Morrisey remained in possession of the land and slaves, until the slaves were emancipated by the results of the war.

On the 30th day of November, 1870, he sold and conveyed to the plaintiff, Alfred Dockery, three thousand and thirty-nine (3,039) acres of the said land—the same described in the exhibit, marked "B," attached to the complaint. The plaintiff, Dockery, did not request nor demand a conveyance of the said land from the trustee, French, until a short time before the commencement of this action. The consideration for the said land, agreed upon between Morrisey and Dockery, was ten thousand dollars, ($10,000,) and was paid and settled as follows: The ten bales of cotton which Morrisey owed Dockery, (Morrisey being unable to return it in kind,) was valued at twenty cents per pound and counted as cash; the balance of the purchase money, except two thousand dollars, was paid in cash. For the two thousand dollars, Dockery gave his promissory note, upon which five hundred dollars have been paid, and the balance is still due. Ten thousand dollars was a fair valuation of the said land at the time of the sale to Dockery. At the time of the sale, Dockery was shown by Morrissey the the note and deed of trust, with the receipt endorsed thereon. He also sought information respecting the title to the land, of an attorney familiar with Morrisey's business affairs, and was informed by said attorney, that there were no judgments against Morrissey which bound the land; but there was a possibility of trouble concerning it, from the wards of Thompson, owing to the fact, that they had not settled with said guardian, and that the settlement between Morrisey and their guardian, was made in Confederate money and late in the war —in 1864. Dockery thought no trouble could arise from that source, and so bought the land, with notice of said transaction in every particular.

At the time of the payment of the note and taking up the

mortgage by Morrissey, Confederate money was generally received by prudent business men in Robeson county in payment of *ante* war debts. But there was no evidence, that any person acting as guardian in Robeson county, as late as February, 1864, took Confederate money in payment of well secured *ante* war debts and released the securities.

At that time, Joseph Thompson was a man of large property, and had the general reputation of being a prudent business man. Thompson's guardian bond, on the 6th day of February, 1864, was good for ten thousand dollars. It is not good for that amount now.

"My conclusions of law upon the foregoing facts are, that the payment of T. J. Morrisey of the principal and interest of the note to Joseph Thompson, in Confederate currency, on the 6th day of February, A. D. 1864, and its acceptance by Thompson, was a payment and discharge of said debt; and that the said Morrisey, having paid the debt due the Bank of Fayetteville, upon which the said Thompson was his surety, was entitled to a re-conveyance of the mortgaged premises from the trustee, Robert S. French; and that the plaintiff, Alfred Dockery, having purchased Morrisey's equity of redemption, in the three thousand and thirty-nine acres mentioned in the complaint, is entitled to a conveyance of the legal title for the same from the trustee, French."

The defendants filed the following exceptions to the above report of the referee, in this:

(1.) That the payment by T. J. Morrisey of the principal and interest of the note to Joseph Thompson, in Confederate currency, on the 6th day of February, A. D. 1864, and its acceptance by Thompson, was a payment and discharge of said debt.

(2.) That the said Morrissey, having paid the debt due the Bank of Fayetteville, upon which the said Thompson was his surety, was entitled to a re-conveyance of the mortgaged premises, from the trustee, Robert S. French; and that the plaintiff, Alfred Dockery, having purchased Morrisey's equity

of redemption in the three thousand and thirty-nine acres, mentioned in the complaint, is entitled to a conveyance of the legal title for the same from the trustee, French.

(3.) That the referee failed to give his conclusion of law, on the prayer of the defendants in their answer, that they were entitled to a sale of the land to satisfy the debt remaining unpaid and still due; and that the payment in Confederate money was only a payment *pro tanto.*

Upon the hearing in the Court below, his Honor overruled the exceptions filed by the defendants; confirmed the report of the referee and gave judgment for the plaintiff.

From this judgment, the defendants appealed.

RODMAN, J. As Dockery purchased the land with full notice of all the circumstances attending the alleged payment by Morrissey, we are at liberty to consider him as standing in the shoes of Morrissey. It is properly conceded also, that the payment by Morrissey extinguished the debt to the value of the Confederate money on 6th February, 1864. So that the only question is, did it extinguish and satisfy the surplus of the debt beyond such value. A creditor in his own right, may receive payment in what he pleases, or may voluntarily release his debt. But it is otherwise with a trustee who is bound to protect the interests of his *cestui que trust.*

It has been long settled, in this Court at least, that if, during the war, a trustee in good faith, and exercising a prudent discretion, received payment of a trust debt in Confederate money, he incurred no liability thereby, notwithstanding the money was depreciated at the time, and afterwards became lost. On like grounds the debtor who made such payment, was discharged. If a trustee acting *mala fide*, or with gross imprudence, received payment in such money, he was liable to his *cestui que trust*, for any loss thereby sustained. But it would not necessarily, and in all cases follow, that the debtor still continued liable. This would depend upon his own *bona fides.* It may be admitted that a debtor may lawfully pay his debt to

a trustee in depreciated money, under ordinary circumstances, if the trustee be willing to receive it. There may be circumstances, making such payment at the time an advantage, or at least not injurious, to the *cestui que trust*, and the debtor is not bound to inquire, whether it be so in fact or not. But it is clear, that if the debtor fraudulently colludes with the trustee, and obtains a release without consideration, or upon a consideration which he must know to be grossly inadequate, such a release will not be permitted to avail him in a court of equity: the debt will still exist for the benefit of the real creditor, the *cestui que trust*, who may enforce it against the debtor, and is entitled to the benefit of all the securities attached to it. The fraudulent release of a trust debt, is analogous to a fraudulent sale of trust property, upon which the *cestui que trust* has his election, either to go against the trustee for the price, or to follow the property in the hands of the purchaser. The equity of this principle is so apparent, and the principle itself of such familiar application, that it seems unnecessary to cite any authorities to establish, or illustrate it. Nevertheless we refer to Story, Eq. Jur. sec's. 422, 423, 580, 581, 1256 to 1259, and the cases in this Court, cited by the counsel for the defendant. Is this a case in which that doctrine will apply? In *Emerson* v. *Mallett*, Phil. Eq. 234, it was suggested that the receipt of Confederate money by a collecting officer, after 1863, was unauthorized, the depreciation being then so great, as of itself, to amount to notice from the party interested, that it should not be received. The position of a guardian who is under no requirement to collect, is very different from that of a collecting officer, who is ordered to collect. In *Sudderth* v. *McCombs*, 65 N. C. Rep. 186, it was held that a guardian who early in 1865 received Confederate money in payment of solvent notes, was apparently inexcusable. In *Purser* v. *Simpson*, 65 N. C. Rep. 297, it is said, that no fiduciary should have collected well secured notes, in Confederate money, after the 4th of July, 1863. At the date of the payment under consideration, $6,820.00 in Confederate

money was worth in gold only $277.14. The actual value of the money we must assume was known to both Morrisey and Thompson. The debt of Morrisey was amply secured upon land, the most stable of all property. No occasion of the wards required its collection. The counsel for the defendant do not impute any actual fraud either to Morrisey, or Thompson. But we are of opinion that under such circumstances, there is a legal intendment of fraud, which there is no evidence to rebut. There are some things which from public policy, and for the protection of *cestui que trusts*, must be assumed to be *prima facie*, fraudulent, or at least forbidden, and in that sense fraudulent: and we are of opinion that the payment which we have been discussing, comes clearly within that principle.

As the wards of Thompson are not parties to this action, no judgment for a sale of the land under the deed in trust can be made.

PER CURIAM. Judgment below reversed, and the action of plaintiff dismissed.

A. A. McKETHAN v. ALEX. MURCHISON and JOHN McKAY.

Where A, one of the creditors of B, by contract with other creditors of B, purchased at an execution sale B's land, to be held in trust for the payment of their respective debts, and A, having received payment of his debt from the sale of said land, sold the same to C, who again sold it to D: *Held*, that, in an action by F, one of the creditors of B, to enforce against D the said contract and trust, A and D were necessary parties.

(*Kelly* v. *Bryan*, 6 Ired, Eq. 283; *Day* v. *Howard*, at this term; and *Edwards* v. *The University*, 1 Dev. & Bat. Eq. 325, cited and approved.)

This was a CIVIL ACTION, tried before *Buxton, J.*, at Fall Term, 1874, RICHMOND Superior Court.

This action was commenced by summons on the 14th of December, 1871, for the purpose of enforcing an alleged equity in favor of the plaintiff, in respect to a large tract of land in Richmond county, the legal title to which, once held by the defendant Murchison, was sold by the United States Marshal, under an execution issuing from the Federal Court against Murchison in favor of one of his creditors and was bought by the defendant, John W. McKay.

The land referred to was included in an entry made by one John McKeller on the 1st day of January, 1853, and for which he obtained a grant from the State for 10,572 acres on the 29th of December, 1855. A junior entry including the same land was made by one Walter F. Leake on the 10th January, 1853, with notice of the prior entry of McKeller, and Leak obtained a grant from the State for 7,050 acres, dated 15th of December, 1853.

At June Term, 1856, of Cumberland County Court, (being appearance term) judgment by confession dated 7th June, 1856, was rendered in favor of one Thos. S. Lutterloh against McKeller for $2,000 and cost, in case No. 220 on the appearance docket. On the same day and at the the same term there were two similar judgments rendered in favor of the firm of D. & W. McLaurin, against McKeller: one for $800 and costs, and the other for $750 and cost, in cases No. 221 and 222 on the appearance docket. Executions were issued on these three judgments and were levied on the interest of McKeller in 5,894½ acres of land in Cumberland county, and return made to September Term, 1856, of a sale of defendant's interest in the land levied on to Thos. S. Lutterloh for $2,567.47, of which $1,447.98 was applied to Lutterloh's execution, he receipting for that amount thereon, and the balance $1,119.49 was applied to the two executions in favor of D. &. W. McLaurin, leaving a balance due on all three of the executions.

At September Term, 1856, another judgment was rendered against McKeller, being a judgment by default final upon an acknowledgment of service in No. 135, and Alexander Murch-

son for $1,755.28 of which sum $1,744.00 is principal money. Executions subsequently issued upon all of these judgments to the Sheriff of Richmond county and was levied on McKeller's interest in the 10,572 acres of land aforesaid, also on some other land claimed by him in Richmond county. The execution in favor of Thos. S. Lutterloh and the two in favor of D. & W. McLaurin were levied September 26th, 1856, and the execution in favor of A. A. McKethan and Alexander Murchison was levied October 17th, 1856. Under these levies a sale was made by the Sheriff of Richmond county on the 16th day of March 1858, Thos. S. Lutterloh becoming the purchaser of the 10,572 acres at $300, and of the residue of the land for $56, making in all $356, of which $8.90 was applied to the payment of the sheriffs commissioners and of the balance $195.55 was applied to the payment of Lutterloh's execution, he receipting for the same and $151.55 was applied to the execution in favor of D. & W. McLaurin, and none was applied to the payment of the execution in favor of McKethan & Murchison. A previous sale had been advertised to take place in December, 1856, under the foregoing levies, but the sale was returned "postponed on account of stress of weather."

The sheriff of Richmond county executed to Thos. S. Lutterloh a deed for the 10,572 of land, dated 16th March, 1857, the consideration of which was $300. Thos. S. Lutterloh executed a deed for the said land to Alexander Murchison, dated December 7th, 1859, the consideration of which deed was $100.

Walter F. Leak executed a deed for the 7,050 acres of land to Alexander Murchison, dated 21st of March, 1861, the consideration of which was $705.

The interest of Alexander Murchison in this Richmond county land was levied on and sold by the United States Marshal under an execution issuing from the United States Circuit Court, at Raleigh, upon a judgment in favor of Evander McNair for $2,000, and at the sale, the defendant, John W. McKay, bought the land on March 9th, 1869, for $525.

The United States Marshal, Samuel T. Carrow, executed a deed to John W. McKay, dated 6th December, 1871.

After commencement of this action John W. McKay and wife executed a deed for this land to Dr. W. J. Hawkins, on the 20th January, 1872.

The foregoing is an abstract of the legal title. The equity claimed is based upon an alleged contract between the judgment creditors of McKeller, to wit: Thomas S. Lutterloh, D. & W. McLaurin, A. A. McKethan and Alexander Murchison, that Lutterloh should buy the Richmond county lands of McKeller and hold the same for the joint benefit of himself and the other creditors. That Lutterloh did so buy them and hold them until he had satisfied his his own debts and that of D. W. McLaurin, and then passed the title to Murchison without consideration, for the purpose of securing the debt of McKethan & Murchison; that a trust was thereby created in Murchison, in respect to said land in behalf of himself and the plaintiff, which still continued, as their joint judgment against McKeller was still unpaid. And that when John W. McKay bought the land at execution sale made by the United States Marshal, under an execution against Murchison, he took the legal title *cum onere*, and stood in the place of Murchison and was affected by the trust.

The defendants, who filed separate answers, deny the equity alleged by the plaintiff. Murchison denied that he was a party to any such agreement, and alleged that he bought for himself from Lutterloh, without notice of any outstanding equity in the plaintiff, and for a valuable consideration, and that in addition to Lutterloh's title, he had bought the title of Walter F. Leake and taken a deed from him.

John W. McKay answered, alleging that he had bought the land at execution sale, without knowledge of plaintiff's claim or equity thereto, and had sold the same to Dr. W. J. Hawkins, before the commencement of this action, and prior to notice of the plaintiff's claim or equity thereto, if there was any equity, and had passed the title in January, 1872.

Before the jury was empannelled, the defendants moved to dismiss the action for want of jurisdiction, because in the prayer for judgment partition was sought, and the Probate Court was the proper Court to make partition.

The plaintiff resisted the motion on the ground that partition was not the relief sought, that the plaintiff desired that his rights might be ascertained and adjudged with the ultimate view of partition, should he be entitled thereto, which, if necessary, he would seek in the proper Court.

The motion was overruled and the defendants reserved leave to except.

Fourteen issues were submitted to the jury, and the defendants propounded a fifteenth, in these words: "Was the arrangement between Thos. S. Lutterloh, D. & W. McLaurin, A. A. McKethan and John McKeller, made for the purpose of hindering other creditors?" The issue was excluded by the Court on the ground that it did not arise upon the pleadings, and the defendants reserved leave to except.

The witnesses were numerous, their examination protracted, and their evidence conflicting. No objection was taken to the admissibility of evidence or the charge of his Honor.

The following are the issues submitted to the jury, and the responses thereto:

1. Did Thos. S. Lutterloh purchase the land in dispute at sheriff's sale, for himself and the other creditors of John McKeller, viz: D. & W. McLaurin, Alexander Murchison and A. A. McKethan?

Answer. Yes.

2. Did Alexander Murchison agree to or sanction the purchase by Lutterloh for himself and the other creditors?

Answer. Yes.

3. Did Alexander Murchison purchase the land from T. S. Lutterloh, for value and without notice?

Answer. For value, with notice.

4. Did Alexander Murchison receive a conveyance for the

land in dispute, without consideration and for the purpose of holding the same for the use of himself and the plaintiff?

Answer. Received conveyance for consideration for the purpose of holding it for himself.

5. Was the deed from Dr. John W. McKay to Dr. W. J. Hawkins, executed before the commencement of this action?

Answer. No.

6. Did Walter L. Leak, at the time of making his entry of the land in dispute, have notice of the prior entry of John McKeller?

Answer. Yes.

7. Did John W. McKay, at the time of his purchase at marshal's sale, have actual notice of plaintiff's equity?

Answer. No.

8. Did John W. McKay contract, in writing, to sell the land in dispute to Dr. W. J. Hawkins, assignor, before notice of plaintiff's equity?

Answer. Yes.

9. Did plaintiff offer to pay to Dr. John W. McKay one-half of the sum paid to Walter F. Leak, and did the said McKay refuse said offer and decline to state the amount paid to said Leak?

Answer. Yes.

10. Did Alexander Murchison purchase from W. F. Leak for the purpose of perfecting his own title?

Answer. Yes.

11. Did Alexander Murchison have notice of the trust in Thos. S. Lutterloh for the benefit of plaintiff and others, when he received the deed from him.

Answer. He did previous to receiving the deed.

12. Was the alleged agreement referred to in the complaint, under which the plaintiff seeks to charge the defendants, in writing, and signed by the parties to be charged therewith?

Answer. No.

13. Was there ever any agreement in writing between these

parties or any of them, that the land should be held in trust, as alleged?

Answer. No.

14. Was the purchase money paid before the execution of the deed from John W. McKay to Dr. W. J. Hawkins?

Answer. No.

Upon the finding of the jury upon the issues, the plaintiff moved the Court for judgment:

1. That the defendants be declared trustees for the use of the plaintiff.

2. For a decree selling the land to pay the debt due plaintiff.

The defendants moved the Court for judgment that they go without day and recover costs.

His Honor overruled the motion of the plaintiff, and dismissed the action.

From this judgment, the plaintiff appealed.

Steele & Walker and *Ray*, for the appellant.

W. McL. McKay, *Pemberton*, *Neill McKay* and *Smith & Strong*, contra.

Pearson, C. J. We were inclined at the hearing, after the well considered and able argument of Mr. Ray, to overrule his Honor, and to hold that upon the findings of the jury on the issues submitted, there was error in the judgment dismissing the action, and that judgment should have been entered for the plaintiff, at least for the amount of his debt and interest, if not, for a ratable part of the fund in the hands of McKay. This larger equity being put on the ground, that Lutterloh bought the land and took a deed for the use of himself and of McLaurin, and Murchison, and McKethan, creditors of McKellar, under an agreement that he would act as agent for them, this created an *express* trust, that is, one by consent of parties, as distinguished from a *constructive* trust, that is, one made by a Court of equity, whereby a person against his

consent, is *converted* into a trustee by reason of fraud, bad faith and the like.

The objection that this trust, created by agreement, was void, because not evidenced by writing, is met by the case, *Hargan* v. *King*, and that class of cases. Let it be noticed, that this class differs from the class of cases where the *maker of a deed*, absolute upon its face, seeks to convert it into a deed to secure the payment of a debt, to-wit, a mortgage, on the ground that the deed was obtained by fraud, accident, mistake or oppression, of which class, *Staton* v. *Jones* and *Kelley* v. *Bryan*, 6 Ired. Eq., 283, are the leading authorities. And it differs from the class of cases, in which it is held, that "an agreement to sell or convey land or any interest therein, unless there be some note or memorandum thereof in writing, &c., shall be void." The cases under this class, are such as reject the doctrine of part performance, and are too tedious to mention.

The learned Judge held, the agreement "that Lutterloh would buy the land for himself and McLaurin, (they having priority to the amount of their debts,) and for the defendant and Murchison, was void, because not reduced to writing, and did not attach itself as a trust to the land in the hands of Lutterloh. There is error. His Honor did not advert to the distinction settled by the class of cases represented by *Hargan* v. *King*, "between an agreement *relating to land*," and a agreement to *sell* or *convey* land.

Assuming that a trust attached to the land in the hands of Lutterloh, and assuming also that the debts of Lutterloh and McLaurin were satisfied, and that they had relinquished all for their interest in the trust fund, as is alleged in the complaint (Note: This fact is not found by the jury.) Then it follows upon plain principles of equity, that Murchison who purchased the land of Lutterloh for value, but with notice. (3d issue, held it subject to the trust of McKethan; it also follows, upon plain principles of equity, that as Murchison had become trustee, his purchase of the title of Leak, was for the benefit of the trust fund and operated by way of extinguishment; it also fol.

lows, upon plain principles of equity, that McKay being a purchaser at execution sale, took the place of Murchison and acquired no more than what he could rightfully convey; in other words, stood in the place of a purchaser with notice. It also follows upon plain principles of equity, that the plaintiff has his election to charge McKay with his proportionate part of the trust fund, into which the land has been converted, or to follow the land itself in the hands of Hawkins, who had notice of the trust in favor of plaintiff before he paid the price and took a deed for the land, and was not obliged to go on with an executory contract made (as we will suppose) before he was put on inquiry in respect to the incumbrances upon the title of McKay.

The other two positions taken by his Honor in support of the judgment are not tenable.

1. *Mutual promises* constitute a valuable consideration; this is settled.

Besides this McKethan performed his promise by assigning the execution in favor of himself and Murchison to Lutterloh, to be made available, if necessary, to satisfy his bid for the land.

2. It is "*a stale demand*," that is as we understand his Honor to mean, a demand barred by the statute of limitations or by the principles of the common law.

At what time Murchison bought the land of Lutterloh is not set out in the case—it was after March, 1857. For that was the date of Lutterloh's purchase, which created the trust. Suppose this act of Murchison in buying the land, and taking an absolute deed from Lutterloh, was a disavowal of his relation to McKethan as tenant in common, and amounted to an "actual ouster" so as to put the Statute of Limitations in motion, as to which a good deal could be said. See *Day* v. *Howard*, at this term.

The time in which an equity, raised by the Court in regard to land can be barred in analogy to the statute of Limitations, is seven years. *Edwards* v. *University*, 1 Dev. & Bat. Eq. 325. Counting out 1861 to 1870. the statute is no bar. The doctrine of "*stale demands*," which the courts have in the ab-

sence of legislation felt called upon to administer, was never resorted to in England under twenty years, and in this State ten years.

We do not feel at liberty to express any decided opinion upon the matters of law above set out, so as to exclude further argument and discussion, because we consider the objection for want of parties well taken, *ore tenus* and in this Court for the first time. Lutterloh is a necessary party, because he was the original trustee, and ought to be heard, and concluded in respect to his *selling* the trust fund to Murchison, and in respect to the alleged satisfaction of his debt and his relinquishment of all further claim to the trust fund, which as it turns up is much in excess of an amount sufficient to pay the *debts* of the respective parties, to the agreement under which Lutterloh took the legal title. The question is presented after the satisfaction of the debts of Lutterloh and McLaurin and of Murchison and McKethan, the trust fund being in excess, how is it to be disposed of? Clearly Lutterloh is concerned in this question, and clearly McLaurin is also concerned in it.

We also think that Hawkins is a necessary party, for if the plaintiff gets judgment, and MKay fails to pay, then the plaintiff may follow the land having his election to take the trust fund in its converted state that is the $7000 in the hands of McKay, or to hold on to the land in its unconverted state, which would bear on Hawkins.

Our conclusion is, that in order to have a judgment binding upon all persons concerned and settling all matters of controversy in respect to the many transactions in regard to this land, the case be remanded to the end that all proper parties be made. The plaintiff will pay the cost of this Court. In the Court below he will have the benefit of the issues found by the jury, that verdict stands as between the present parties. New issues will only be submitted upon allegation of the new parties, who may be brought in as plaintiffs or defendants, as they are advised.

Per Curiam. Case remanded to make parties.

STATE *v.* SIRREE HAYWOOD.

For an informality in drawing or empanneling grand jurors, a plea on the arraignment of the defendant for trial, and not a motion to quash, is the proper practice.

Section 229, Code of Civil Procedure, prescribing how the jury lists of the several counties shall be annually prepared by the County Commissioners, is *directory* only, and not *mandatory*. And the objection that the jury list, from which the grand jury was drawn, did not contain the names of all the persons in the county qualified to sit as jurors, was properly overruled in the Court below.

(*State* v. *McEntire*, 2 Car. L. Repos. 28; *Seaborn's case*, 4 Dev. 305, cited and approved.)

CRIMINAL ACTION, for betting at a public gaming table, tried at the Spring Term, 1875, of the Superior Court of WAKE county, before his Honor Judge *Watts*.

The defendant, upon hearing the indictment read, moved to quash the same, because it was not found and presented by a grand jury, duly and regularly selected, summoned, drawn and sworn according to law; whereupon the following facts alleged by the defendant, as the ground for quashing the said indictment, are admitted by the Solicitor.

1. The jury list, from which the jurors for the term at which said bill was found, were selected, did not contain the names of any persons qualified to act as jurors resident in three of the townships of said county, to-wit: Raleigh, Wake Forest and Swift Creek.

2. The County Commissioners made out the said jury list, at their session of September, 1874, on which were 450 names for 14 townships of Wake county; after the *venire* in this case was returned to Court, the said County Commissioners added to the jury list, 212 names of jurors, as the lawful jurors, in the said three omitted townships.

3. The completed and revised lists of the jurors for the whole county for the year 1873, in September of that year, had been prepared by the previous Board of County Commissioners, and was in the custody of the Board which selected said jurors.

His Honor, after argument, refused the motion to quash, and required the defendant to plead, which was done by his entering the plea of "not guilty."

The jury returned a verdict of guilty. Judgment and appeal by defendant.

Fowle and *Battle & Son*, for defendant.
Attorney General Hargrove and *Harris*, for the State.

BYNUM, J. The regular way of raising the question here made, would have been, not by a motion to quash, but by plea on the arraignment for trial. Such is the course indicated as the most proper in the *State* v. *McEntire*, 2 Car. L. Rep., 28; and afterwards approved in the *State* v. *Seaborn*, 4 Dev., 305. But as the facts are stated and agreed upon, the question will be considered as if raised by plea and demurrer thereto.

The facts are, that the jury list, from which the grand jury finding the indictment was drawn, contained the names of 451 qualified jurors, but did not contain the names of 241 others, who were also qualified and ought regularly to have been on the list, but were omitted therefrom by the County Commissioners in preparing and revising the jury list, from some cause not appearing, and not alleged to have been intentional or corrupt.

Was the indictment well found, is the question. There is no allegation that any of the jurors comprising the grand jury, were not properly qualified jurors, and were not properly on the list drawn from, or that they were not, in every other respect, regularly drawn and empanelled in the manner prescribed by law. Nor is there any suggestion that the de

fendant has been prejudiced by the omission objected to by him. Indeed, it might be a question, whether the State was not more prejudiced than the defendant, inasmuch as the more fully a county is represented by the grand jury, the less chance there will be that criminals will escape notice. This case is an illustration; for the record shows that when the motion to quash was overruled, the defendant was put upon his trial, and upon the plea of not guilty, was convicted. And now, in this Court, he relies only upon the technical objection as to the regularity of the finding of the grand jury.

The law, C. C. P., sec. 225, prescribes in detail and with much particularity how the jury list of the county shall be annually prepared and revised by the Board of County Commissioners. It is highly conducive to the fair and impartial administration of justice, that these details should be strictly observed and followed, and any intentional non-observance of them is the subject of censure, if not of punishment. But it is well settled that they are only rules and regulations which are *directory* only, and have never been held to be *mandatory*, where the persons summoned are qualified jurors in other respects. It is clear from the statute itself that these rules are not mandatory, as they are nowhere declared to be, and no penalty is affixed for a violation of them. So far from regarding as fatal an omission to follow strictly these regulations so prescribed, the statute, C. C. P., sec. 229, expressly provides that irregularities of the kind shall not vitiate. "In all cases where the county commissioners of any county may have revised the jury list or corrected the same, or drawn a jury at a time or in a manner different in from that prescribed by law, shall be valid as if drawn at the proper time and in the proper manner: Provided, said action has been in all other respects conformable to law. This proviso does not embrace our case. If a person not on the jury list should be summoned, or one not qualified as a juror, such irregularity could not be "conformable to law," and would fall within the proviso, and if

objected to in apt time and manner, would probably be fatal to the indictment found.

The whole doctrine upon this subject is so fully discussed in *State* v. *Seaborn*, 4 Dev. 805, that it is unnecessary to do more than refer to it.

There is no error.

PER CURIAM. Judgment affirmed.

WILLIAM SLEDGE *v.* JOHN A. REID, Sheriff, &c.

Consequential damage to be recoverable in an action of tort, must be the proximate consequence of the act complained of, and not the secondary result thereof:

Hence, in an action by A against B, for wrongfully taking and converting his mule, A can recover the value of the mule at the time of such conversion; but he cannot recover for the loss of a part of his crop, following the loss of the mule, as such loss is too remote and uncertain.

(*Ashe* v. *De Rossett*, 5 Jones, 299; and *Boyle* v. *Reeder*, 1 Ired. 607, cited and approved.)

CIVIL ACTION, in the nature of Trover, tried before *Moore*, *J.* and a jury, at the December (Special) Term, 1873, of HALIFAX Superior Court.

The plaintiff demanded the value of a mule, which he alleged the defendant had wrongfully taken from his possession in April, 1871, and converted to his own use; and also additional and specific damages, resulting from such taking and conversion.

The conversion was admitted; and the jury, in response to an issue submitted as to the value of the mule at that time, assessed its value at $75; for which the plaintiff had judgment; and from which the defendant did not appeal.

The plaintiff further claimed, and introduced evidence to prove additional, specific damages arising from the loss of his mule, in this; that he was a farmer in 1871; that he owned two mules, and had pitched a two horse crop, and had worked therein until the 18th day of April, 1871, when the defendant took and wrongfully converted one of them, the mule in controversy. That in consequence thereof, he was compelled to reduce his crop one half, and to discharge one of his hands.

The plaintiff further testified, that the net proceeds of his farming that year, with his single mule, amounted to about $125; and that he had owned for two years the mule taken by defendant.

Upon these facts, his Honor charged the jury that in trover the general rule is, that the value of the property at the time of conversion, with interest thereon, measures the damages. But, as Parsons in his law of contracts, vol. 3, page 198, (5th Ed.,) remarks, "there are some exceptions to this rule; and if it can be shown that the plaintiff suffered by the wrong doing of the defendant, a specific injury, or by the failure of a specific purpose, for which he had bought the property or the like, the principle of compensation would require that this should be taken into consideration." Here, it appears in evidence, that the plaintiff owned two mules, and had pitched a two horse crop for the year, 1871; that he had hired labor and actually worked to that end from 1st January to the 18th day of April, when one of them, the mule in controversy, was taken by defendant, whereby he was compelled to reduce his crop to a one horse crop. It further appeared, that his net profit from the labor of his remaining mule was $125. The Court further charged, that the jury could allow the plaintiff damages for the specific loss, if any, incurred by the necessity of shortening his crop. To this part of his Honor's charge the defendant excepted.

In addition to the value of the mule, $75, the jury assessed the plaintiff's specific damages at $65, by reason of his being

compelled, by the wrongful act of the defendant, to shorten his crop.

Motion for a new trial, for misdirection of the jury; motion overruled. Judgment and appeal by defendant.

Batchelor and *Day*, for appellant.
W. Clark, contra.

BYNUM, J. Consequential damage, to be recoverable, in an action of tort, must be the proximate consequence of the act complained of, and not the secondary result thereof. The rule is plain; the difficulty, if any, is in its application. The dividing line between proximate and remote damage, is sometimes so indistinct as to leave a field of doubtful and disputed ground. No difficulty of that sort arises here, and the case affords an apt illustration of the rule.

The proximate damage to the plaintiff from the tort of the defendant, was the loss of the mule; a shortening of the crop was the secondary consequence resulting from the first damage. He is allowed to recover for the first, but not for the second, because it is too remote and uncertain. The loss of the crop, though following the loss of the mule, was neither a necessary or natural consequence. The plaintiff might buy or hire another and finish his crop; and because he preferred to throw out a part of the crop, he is not thereby enabled to claim damage for the loss as an immediate and necessary consequence of the tort.

Suppose the Court should apply a principle of equity and undertake to place the plaintiff as near as may be to his condition as it was before the tort? As far as the Court could go to that end would be to allow him the cost of the hire of another animal until his crop was made, and then to pay him for the one he had lost. That, we think, should be the rule of damages in this case. Anything beyond this would be too remote and conjectural, and would lead the Courts into a boundless field of investigation.

If the action was for damage for a breach of contract, the rule would be to give such damage, as being incidental to the breach as a natural consequence thereof, may be reasonably presumed to have been within the contemplation of the parties. *Ashe* v. *DeRossett*, 5 Jones, 299. In our case the defendant was an officer of the law, armed with a legal precept, and acted in the supposed discharge of his duty. He contemplated no wrongful injury to the plaintiff, and in no view can be held liable for more than the immediate and natural consequences of his mistake as to the ownership of the property converted by him.

In an action of covenant for not furnishing machinery for a steam mill, at a stipulated time, the plaintiff cannot recover in damages the estimated value of the *profits* he might have made, if the covenant had been complied with, because they are too vague and uncertain to form any criterion of damages. *McBoyle* v. *Ruder*, 1 Ired., 607. Such has been the uniform course of the decisions in this State. We think they are founded upon the soundest principles and sustained by the weight of authority. 2 Kent's Com. 480, in notes; Sedgwick on Dam., 67; *Hadly* v. *Baxendate*, 9 Exch. 341; *Blanchard* v. *Eley*, 21 Wend. 342, 30 Iowa, 176.

The objection that the action abated by the death of the defendant, is untenable. Bat. Rev., chap. 45, sec. 113. C. C. P., sec. 64.

His Honor's instructions to the jury were erroneous.

PER CURIAM. *Venire de novo.*

R. D. WHITLEY, Guardian, &c., and others *v.* A. A. ALEXANDER, Adm'r., &c., and others.

An administrator, whose wife was the only heir and next of kin of the intestate, took into possession in October, 1861, all the property of the intestate, and used it as his own, including a number of slaves, employed by the administrator in cultivating his land; which property was more than sufficient to pay the debts of the intestate, and some of which the administrator sold and paid off before 1863, a large amount of the intestate's indebtedness including debts of simple contract, and before notice of two of the debts sued on; and who administered the same *bona fides: Held*, that as the debts the administrator had notice of, was small in comparison with the estate, he might reasonably expected to have paid them from the income of the estate of the intestate, without making the sacrifice which would have resulted from a sale of the slaves after 1861, and that the administrator was not, under the circumstances, liable for the value of the slaves.

Nor was the administrator, under such circumstances, liable for the value of three mules taken by the Confederate authorities, one of which was paid for with Confederate money, which, the administrator being unable to use, he invested in Confederate bonds and lost.

An administrator, who finds a raw commodity on hand, (tobacco for instance,) may lawfully, without a fraudulent intent, put it in a condition in which it is usual to sell it, or in which, under the circumstances, it can be best sold. And the administrator was justified, on account of the perishable nature of the tobacco, in selling it for Confederate money, the then only currency.

Where the administrator rightfully and *bona fide* receives Confederate money, in the administration of his intestate's estate, which cannot be used in the payment of debts, and the money not being by him in any manner converted, he ought not to be charged with value thereof.

Where an administrator had certain railroad stock belonging to his intestate, assigned to himself personally and for his own benefit: *Held*, to be a conversion of such stock, for which the admistrator was responsible.

When an administrator has paid debts of lower, before those of higher dignity, the estate being at the time solvent, or when any creditor has refused to receive payment in Confederate money, which was afterwards used in payment of the debts of the estate, or become worth-

less without the fault of the administrator: *Held*, that such payment should be allowed to the administrator in all suits, &c., without regard to the dignity of the debts thus paid, as compared with those sued for.

If an intestate owe simple contract debts which are due, and he is also indebted by a contingent security, such as a bond to save harmless, or other bond, under which it depends upon a contingency whether any debt will ever arise, and no breach of the condition has taken place, the administrator may pay the simple contract debt.

A judgment *quando* amounts to an admission that the administrator had no assets at its date; and an order of reference subsequently made, should confine the account to the assets received by the administrator since the date of the judgment.

This was a CIVIL ACTION on a guardian bond, tried before his Honor, Jude *Schenck*, at Spring Term, 1875, of MECKLENBURG Superior Court, on exceptions by plaintiffs and defendants to the report of the Clerk, to whom it had been referred to take certain accounts.

The statement of the case for this Court, made up by the counsel of the parties in the Court below, is so complicated, that, to a proper understanding of the questions intended to be raised and presented for the decision of this Court, it is deemed best to publish the same without alteration or abridgement; and that too, although the record sets out many facts not pertinent to the points decided.

The statement is substantially as follows:

In the Superior Court for the county of Mecklenburg four suits were instituted by the hereinafter mentioned plaintiffs, against the defendant A. A. Alexander, administrator of the estate of R. B. Monteith, hereinafter named upon the following causes of action as hereinafter set forth.

I. At Fall Term, 1870, a summons was issued and served upon A. A. Alexander, W. S. M. Davidson and Nathaniel Alexander, at the instance of F. M. Parks and wife Sarah A., Mattie J. Alexander and infants John McAlexander, A. W. Alexander, Laura R. Alexander, who sue by their guardian,

J. B. Kernes; in which case a complaint was filed setting forth the following cause of action, to-wit: That one John McAlexander, died intestate, in the year 1856, and leaving among others as his next of kin who were infants at that time, Mattie J. Alexander, John McAlexander, Albert Alexander and Laura Alexander; that at the January Term, 1861, of the Court of Common Pleas and Quarter Sessions for said county, one B. W. Alexander entered in as guardian for said minor children, and gave bond as required by law in the sum of twenty thousand dollars, with R. B. Monteith, the intestate of the defendant, A. A. Alexander, as surety. That by virtue of his appointment as guardian, the said B. W. Alexander took charge of the estate of his said wards; that said B. W. Alexander died in the year 1865, without having made a settlement of his guardian estate, that at October Term, 1866, one James D. Kerns qualified as guardian of the three minor children of the said John McAlexander, to wit: John McLaura R. and A. W. Alexander; the plaintiff Sarah having intermarried with one T. M. Parks; that in 1866, a suit was instituted by the guardian of the infants aforesaid, and Parks and wife against the personal representation of the said B. W. Alexander, when it was adjudged that the said B. W. Alexander was indebted to his wards in the following sums respectively:

T. A. Alexander,	$2,090.43
W. J. Alexander,	2,837.81
J. M. Alexander,	3,788.06
A. W. Alexander,	3,852.59
L. Alexander,	3,865.60
Making a total indebtedness of	$16,434.49

And this suit is brought upon the guardian bond of the said B. W. Alexander, upon which Monteith, the intestate of the defendant, A. A. Alexander, is surety to recover the same.

II. The second suit was brought in the name of T. M. Parks and wife Sarah Ann, Mattie J. Alexander of full age, and John McAlexander, A. W. Alexander and Laura A. Alex-

ander, who sue by their guardian, J. D. Kernes, against A. A. Alexander, W. S. M. Davidson and Nathaniel Alexander infants. The cause of action is as follows:

After setting out the fact in the complaint of the death of John McAlexander and the appointment of B. W. Alexander, the guardian of his infant children, the death of B. W. Alexander, the appointment of an administrator upon his estate, the appointment of T. D. Kernes as guardian of the three minor children as aforesaid, the complaint alleges that in the settlement of Kernes, guardian with the personal representatives of said B. W. Alexander, the said Kernes as guardian, took from said personal representative a note upon R. B. Monteith as principal in the sum of $1,272.79, and that Kernes instituted a suit in Mecklenburg Superior Court in the name of the personal representative of B. W. Alexander against A. A. Alexander, administrator of R. B. Monteith, and on the 22nd of November, 1869, recovered a judgment *quando* against him for said sum with interest and costs, and this suit is brought to recover this amount upon the administration bond of said A. A. Alexander.

III. The third suit was brought by Moses A. White, guardian of the minor children of J. H. Johnston against A. A. Alexander, administrator of R. B. Monteith upon the following cause of action, to-wit: Upon a promissory note given by R. B. Monteith to said Johnston, guardian, in the sum of $480.00 upon which there was a payment of $150.00.

IV. The fourth suit is brought upon the guardian bond of B. W. Alexander as guardian of Harriett McCoy upon the relation of Albert McCay and R. D. Whitley, guardians of said Harriett McCay against S. P. Alexander, administrator of B. W. Alexander, and A. A. Alexander, administrator of R. B. Monteith, the said Monteith being the surety to said B. W. Alexander, to recover the sum of four thousand dollars, the amount of said bond.

That this case was referred to E. A. Osborne, Clerk, to take an account of the administration of R. B. Monteith by

A. A. Alexander, administrator, and it was agreed by the counsel engaged that all the testimony and the report of the Clerk should apply to the four cases aforesaid. That in accordance with said agreement such testimony was taken relative to the points made in all four of the cases, and a report made by the Clerk and returned to the Court fixing the administration with assets. That when the case came on for hearing before his Honor, Judge Schenck, upon exceptions filed thereto, his Honor filed his decree, finding the facts and the law relative thereto: That upon filing said decision the counsel for the defendant proposed certain issues of fact which they deemed necessary for a decision of all the matters arising in the four cases aforesaid. Four of which said issues his Honor did pass upon; the others of which he declined so to do. There was evidence taken in the case pertinent to the issues not found by his Honor, as will appear by the depositions on file in this cause; that the said issues of fact which the counsel for the defendant requested his Honor to find together with those not found, have been filed in this cause, and compose a part of the record in this case.

Upon the foregoing case being tendered to the plaintiff's counsel as an addition to the case heretofore filed in the Supreme Court, they agree to accept the same with the modification and addition following, which is agreed to by the defendant's counsel, to-wit:

Subsequently to the reference to the Clerk to take the account referred to, by an order of the Court, it was referred to the Clerk to report the facts which report was made by the Clerk and exceptions filed thereto by the counsel for the defendants, when the cause came on for hearing before SCHENCK, Judge, defendant's counsel made a motion to set aside the report of the Clerk finding the facts, whereupon his Honor proceeded to find the facts himself to which plaintiff excepted. By leave of Court plaintiffs filed exception No. 4. This additional fact is agreed upon by the counsel as a part of the case. That at the time Alexander administered on the estate

of Monteith, he regarded the estate as solvent, and as Alexder's wife was the only heir at law, and next of kin to Monteith, he kept the property together, thinking he could make the money out of it to pay the debt of Monteith's estate, and he kept the property there until the close of the war.

The following is the report of the Clerk, viz:

This cause having been referred to the undersigned to report the facts, I find as follows: A. A. Alexander administered on the estate of R. B. Monteith, at October Term of the County Court, 1861, and gave bond with defendant, W. S. M. Davidson and N. S. Alexander for forty thousand dollars. The property of the estate consisted of a large quantity of lands, embracing eleven plantations of various sizes and value, sixteen negro slaves, valued at from $500 to $1,500 each; twenty thousand pounds of leaf tobacco, valued at $2,400; eleven mules, worth $1,600; twenty-five shares of railroad stock valued at $1,440; fifteen bushels corn, valued at $22.50, and various other items of property as set forth in the report heretofore filed in this action, amounting in all to $37,504.34, principal, and $15,077.30 interest, $52.581,64. Of this amount the administrator only returned to the Court a report of $3,161.32 (principal) worth of assets since the action began, which was mainly the proceeds of a sale made soon after the death of Monteith. All the other property was taken into the possession of the administrator, whose wife was the only heir and next of kin to said deceased, and used by him as his own property. The tobacco was manufactured and sold with some of Alexander's own tobacco. The greater portion of the corn and forage was used for the mules and negroes, and they were kept and worked on the farms. Some of the mules, one or two, were taken by Confederate authorities, some by raiders, and perhaps one sold in the sale of assets before mentioned. In fact, all the property not sold as above stated, was taken in the possession of defendant, and used as his own property. In the mean time, the administrator paid off a great many debts, amounting in the

aggregate to very much more than the sum of assets reported by him, say $10,000 or $15,000. All the negroes were set free, and the administrator sold all the lands under an order of the Court, in order to raise more funds to pay the numerous claims that were presented against the estate, and the proceeds also were applied to the payment of such debts; until finally, according to his vouchers filed, he has paid out in all $9,883.62 principal money. The Clerk in his account, has charged the administrator with the estimated value of the slaves, stock and all unsold personal property, allowed him full commissions on all assets and payments, and the result shows the administrator still liable for a balance of $27,549.72. The defendant was charged interest on all money and assets from the time he received them, and allowed interest on all his disbursements from the time made. The eleven mules are not charged in the sale list, nor were they sold at the sale. The vouchers named in exception VI, were rejected by the Clerk on the ground that there were debts of higher dignity unpaid outstanding against the estate. The Confederate bonds and money, (Exception VII,) were not the proceeds of any lawful sale of the estate, but only such as arose from the private arrangement and management of the estate as Alexander's own property. The testimony before the Clerk is all on file in the case. The railroad stock referred to in exception, was subscribed for in the name of intestate, and stood on the books in his name, and were changed to the name of defendant after his, Montieth's death. The defendant's return shows a voucher from the treasurer for $550, in full of the balance on the subscription for the 22 shares from M. L. Wriston, treasurer, and has received credit therefor in his account.

Respectfully submitted,

E. A. OSBORNE,
Clerk Superior Court.

To this report both plaintiffs and defendants excepted.

The plaintiffs except to the report of the Clerk and for cause of exception show:

1. That it appears from the testimony that the defendant received the hire and profits of the slaves belonging to his intestate from the date of his administration in October, 1861, up to their emancipation, yet the clerk does not debit him with value of such hires.

GUION, VANCE & DOWD,
Attorneys for plaintiffs.

Defendants except to the report of the clerk under the reference to him by the Court to ascertain and report the facts as proved by the testimony on file in the foregoing particulars:

1st. That said report is vague and uncertain.

2d. That it fails to report the facts as to the third exception of the defendants in this,

I. That it appears in testimony on file that the estate of defendant's intestate was regarded as solvent up to the close of the war.

II. That it is in evidence that defendant had no knowledge of the extent of the liabilities of his intestate until after the war, and particularly as to liability of his intestate as surety to B. W. Alexander, or the extent thereof until some time after the cease of the war, to-wit, in 1866.

III. That said B. W. Alexander was reputed solvent till the time of his death as shown by the testimony on file.

IV. That it is in evidence that the defendant kept the negroes and other personal property on the land of his intestate, believing the intestate to be entirely solvent and not knowing of the extent of the liabilities of his intestate.

3rd. That as to the 4th exception the referee has failed to report the fact shown in testimony that three of the mules of which defendant is charged in the clerk's former report were impressed by the Confederate authorities; for two of which he received nothing, and the third was paid for in Confederate

money, that the defendant is charged with eleven mules, when the testimony shows he had only ten.

4th. That as to the fifth exception of defendant as to the charge of A. T. & O. R. R. stock the testimony shows that said stock was subscribed for by defendant's intestate and was paid for by defendant after the death of his intestate, and it is further in evidence that said subscription of stock was of no value, which facts are not reported by the referee.

5th. That as to exception 6th the referee has failed to report the fact that at the time the vouchers for disbursements by the defendant as administrator which he has rejected were paid, when defendant believed the estate to be solvent, and when he did not know of any liabilities of his intestate as sureties for others as appears in evidence, nor does he report the evidence as to the nature of the dignity of the debts paid or those outstanding against the estate.

6th. That the referee has failed to report the facts as shown in evidence on file as to defendant's receipts and investments in Confederate money.

7th. That he has failed to show the testimony as to the 9th exception of the defendant wherein he is charged with the value of the wheat, corn, oats and tobacco as set forth in the evidence.

And defendant's counsel request the Court to pass upon the following issues of fact, which they deem material to a correct decision of the several causes to which the report, exceptions and testimony on file are applicable:

I. What were the alleged causes of action in the case of Parks and wife against the defendant?

II. At what time did the defendant, Alexander, receive notice of the liability of his intestate as surety upon the guardian bond of B. W. Alexander, guardian of Junius W. Alexander's children? Answer: In 1866.

III. What were the alleged causes of action in the case of M. A. White, guardian against the defendant, Alexander?

IV. When did the defendant, Alexander, receive notice of

the existence of the debt of M. A. White, guardian? Answer: In 1862.

V. When did the defendant, Alexander, receive notice of the existence of the debt due B. W. Alexander, guardian, by his intestate? Answer: In 1862.

VI. During what years were the debts paid for which the rejected vouchers were taken?

VII. Were the Confederate securities purchased with the proceeds of other property than the tobacco sold in 1863? If so, the proceeds of what property and to what amount?

VIII. Could the leaf tobacco have been sold to advantage in this locality at any time after defendant Alexander qualified as administrator? Answer: It could have been sold for good money.

IX. Was there any means of transportation for this tobacco to the nearest tobacco market? Answer: There was, to the market in Charlotte where tobacco was bought and sold.

X. What was the condition of the tobacco at the time Alexander qualified as administrator? Answer: It was in leaf.

XI. Was it necessary to purchase supplies and machinery for the purpose of manufacturing the tobacco, and did the defendant Alexander mingle this tobacco with any other tobacco than used for wrappers? Answer: It could have been sold for good money without wrappers, but the defendant in good faith manufactured it and made it more valuable, but sold it for Confederate money after he had notice that some of the creditors would not receive it, and without consulting the others whether they would have received it or not.

The above papers was filed after the decree of the Court was rendered and filed.

After argument, his Honor made the following decree, to wit:

(The defendants withdraw exceptions one and 2.) As to exception 3;

The Court finds that the defendants' intestate, Monteith, died in 186—, and that the defendant, Alexander, administered on

his estate in October, 1861, taking the personal property, including the slaves, into possession. That the intestate's estate was amply sufficient to pay his own debts; and that the debt in this case was contracted as surety for B. W. Alexander. That the defendant, Alexander's wife, was sole heir and next of kin to said intestate.

That B. W. Alexander's estate was amply sufficient to pay all his debts in 1861; and was only rendered insolvent by the results of the war.

That the defendant had no notice of his intestate's liability for this debt until 1866, and after the slaves had been emancipated.

That the defendant, Alexander, as administrator, held on to the said slaves in good faith, supposing that they would not be required to be sold for the purpose of paying the debts of the intestate; and that the said slaves were emancipated before he had notice of B. W. Alexander's insolvency and the consequent liability of his intestate estate. The Court, therefore, sustained the (3d) exception.

But as the defendant had the use of the negroes, (as the Court finds,) from 1861 to the time of their emancipation, the Court holds that he is responsible for the net value of their hires, that is, their yearly value, subject to be set off for taking care of them, Doctor's bills, and other necessary expenses.

Exception No. 1 of the plaintiffs is therefore sustained; and the Clerk is directed to reform the report accordingly.

As to exception 4 of defendant;

The Court finds that there were eleven mules on hand at the death of the intestate, Monteith, and that the administrator took them into his possession; that two of these mules were impressed in 1862 or 1863, and one in the latter part of the year 1863; that those mules would have sold for good money in 1861 and 1862, for $——.

That the defendant had notice of individual debts of the intestate, Monteith, to the amount of several thousand dollars

in 1861 and 1862; and that the defendant, as administrator, did not sell but one half of said mules.

The Court further finds, that to pay these individual debts, it was necessary to sell the loose and perishable property; and therefore, the Court holds the defendant responsible for the value of the ten mules and the price of the one sold, and directs the report to be modified accordingly.

As to exception 5 of defendant,

The Court finds that the intestate had subscribed for twenty-two (22) shares of stock, and that the defendant, as administrator, paid for eleven (11) of them in 1862; the other eleven (11) were paid for by the intestate. The Court therefore holds that the defendant is chargeable with the value of the eleven shares in 1861; and the interest and the value of the eleven shares in 1862, when he paid for them with a credit of the $566, which he paid for them, deducted. That the other four shares mentioned, the intestate bought and gave his note for, which the defendant discharged as administrator. The Court also holds that he is chargeable with the value of these shares in 1861.

As to exception 6 of defendants:

The Court finds that these vouchers were paid on debts of less dignity than the plaintiffs'; and the testimony does not show that he paid them without notice of plaintiffs' debt, which was of higher dignity. The exception is therefore overruled.

As to exception 7 of defendants;

The Court finds that there was a lot of tobacco on hand, amounting to about 20,000 pounds, which the defendant had manufactured—mixing it with some of his own, which he used for wrappers; that a portion of this, about 5,000 pounds or 6,000 pounds, was sold at private sale in 1862, by defendant, and as far as possible, used in the payment of debts for which he has credit.

That in the latter part of 1862, the defendant tendered Confederate money to several of the creditors of the intestate, and they refused to receive the same; that notwithstanding this

notice of its depreciation, the defendant in February, 1863, sold the balance of the tobacco at private sale for Confederate money, which become worthless on his hands, and he bonded it, as he swears, in Confederate bonds.

The Court therefore declined to sustain the 7th exception, as the credit therein claimed, is the proceeds of the tobacco sold in 1863.

Exceptions 8, 9 and 10 were withdrawn.

It is ordered by the Court, that the report be re-committed to the Clerk to be modified according to the above rulings.

From the above rulings of his Honor, and his refusal to submit certain issues to the jury, as hereinbefore stated, the defendants appealed.

Wilson & Son and *Jones & Johnston*, for appellants.
Burringer and *Vance & Dowd* and *Shipp & Bailey*, contra.

RODMAN, J. After some discussion, it was agreed by counsel that there was no material difference between the facts as found by the referee, and by the Judge on review. It is therefore unnecessary to consider whether the Judge had the right to review the finding of facts by the referee.

The case has been complicated by the agreement of the parties, by which several actions to which different defences are made, and rules somewhat different may apply, are united in one record. We will consider the exceptions to the report as to the assets in the hands of the defendant, A. A. Alexander, as administrator of Montieth, and the parties will be able, when they move for judgment in their respective cases, to apply so much of this opinion as relates to the particular case of each. If, on the motions for judgment, new questions shall occur not presented to us on these appeals, they must be decided in the Court below, to which the case will be remanded for further proceedings.

In order that our observations on the several exceptions may be intelligible, it is necessary to describe as briefly as possible,

the several actions against the defendant, A. A. Alexander, as administrator of Montieth, in which the account before us was taken. There are four suits :

I. *F. M. Parks and others, plaintiffs*, v. *A. A. Alexander, as administrator of Monteith and others, defendants.* Brought on bond given in January, 1861, by B. W. Alexander as guardian of certain minors, to which Monteith was surety. The indebtedness of the guardian to his wards has been determined in an action against the administrator of the guardian at $16,434.49.

II. *Parks and wife and others, plaintiffs*, v. *A. A. Alexander and others, defendants.* Brought on bond given by A. A. Alexander, as administrator of Monteith; the breach alleged, being the non-payment of a note for $1,272.79, given by Monteith, to ——.

III. *White, guardian of minor children of Johnson, plaintiff*, v. *A. A. Alexander, administrator of Monteith*, on note of Monteith for $480, (subject to a credit) given to Johnson.

IV. *On relation of McKay and Whitly, guardians of Harriet McKay, plaintiffs*, v. *A. A. Alexander, as administrator of Monteith.* This action is brought on a guardian bond given by B. W. Alexander, to which Monteith was a surety.

I. *Should the administrator be charged with the value of the slaves of his intestate?* The defendant, A. A. Alexander, administered on the estate of Monteith in October, 1861. The estate was large, consisting of eleven plantations, sixteen slaves, twenty-five shares of railroad stock, valued at $1,440, twenty thousand pounds of leaf tobacco, eleven mules, and other articles of personal property. The wife of the administrator was the only heir and next of kin of the intestate. The administrator took possession of all the property and used it as his own. He employed the slaves in cultivating the lands until their emancipation. He sold a part or the whole of the unnamed personal property, and paid off a large amount of debts of the intestate, some of which were debts by simple contract;

these payments were made before 1863, and before notice of debts No. 1 and No. 4, above mentioned, but with notice of debts No. 2 and No. 3. B. W. Alexander died in 1865. He was solvent in 1861, and so continued until after the war, when he became insolvent. It does not appear that A. A. Alexander ever advertised for the creditors of Monteith to present their claims.

These are the main circumstances affecting his liability for the value of the slaves. His *bona fides* in the administration of the estate is not questioned, and indeed it could not well be, as his wife was entitled to all of it that could be saved after the payment of the debts. His interest in a prudent management of it lay on the same side with his duty as administrator, and every reasonable inference in his favor must be drawn from this union. The debts which he had notice of were small, compared with the estate. He might reasonably have expected to pay them from the income of the estate, without making the sacrifice which would have resulted from a sale of the negroes at any time after the close of 1861; for we know as matter of history, that after that time the price of slaves, at least in most parts of the country, depreciated even more rapidly than Confederate money did. Moreover, a sale could only have been made for Confederate money, which the only two unpaid creditors of whose debts he had notice refused to receive. Under these circumstances, we are of opinion that he is not liable for the value of the slaves. As the thing turned out, it might have been better to have sold them even for Confederate money, provided that the money had been invested in gold, or land, or other property that could have been saved. But this is evidently a false mode of reasoning. It expects a prescript of distant and uncertain events. No greater degree of foresight and prudence can be required of an administrator than was used by the slave owners of the State in general; yet probably not one in a thousand of these sold his slaves during the war.

II. The administrator is charged with the profits of the

slaves until their emancipation, and as there is no exception, either to this charge or to the manner of ascertaining the amount of it, we need say nothing on that subject.

III. *The mules.* Three of these it seems were taken by the Confederate army. It was admitted that one of them was paid for in Confederate money, which was either kept on hand or invested in Confederate bonds, and in either way, lost. For the same reasons which have governed us with respect to the slaves, we hold that the administrator was not in default in keeping these mules at work on the farms. He is liable for the value of the eight, of whom no account is given. But he is not liable for the three taken from him by irresistible force.

IV. *The twenty thousands pounds of tobacco.* It is agreed that by manufacturing this, using his individual tobacco for wrappers, the administrator converted it; and also upon the doctrine of confusion of goods, that his individual tobacco so used, become his property as administrator, and liable to the creditors of his intestate. No doubt in the case of a trespasser, such use of the tobacco would have been a conversion. But an administrator who finds a raw commodity on hand, may lawfully put it into the condition in which it is usual to sell it, or in which, under the circumstances, it can be best sold. Thus he may gin the seed cotton, shell the corn, or thrash the wheat, &c. The doctrine of confusion of goods does not apply. There was here no fraudulent intent, and no injury to the goods of the intestate, which although they could not be separated in fact, yet were easily separable in value.

We are of opinion, also, that on account of the perishable nature of tobacco, the administrator was not required to keep it in specie, but was justified in selling it for Confederate money, which was then the only currency.

V. *Confederate money.* The only sources indicated in the report of the referee, or by the Judge, from which the sum found on hand in this money was received, are the impressed mules, the tobacco, and the sale of unnamed articles soon after administering. If more was received it would seem to have

been paid out on debts. As the receipt was justifiable on these receivers, and no use could be made of the money in paying debts, by reason of the refusal of two of the creditors to receive it, and the contingent character of the two other debts which, in fact, were not known to the administrator to exist, and as the money was not converted by him to his own use, he ought not to be charged with it.

VI. *As to the shares of railroad stock.* As the administrator had these assigned to himself personally for his own benefit, and not for that of the estate, he converted them, and is liable for their value at the time of the conversion in the state in which they were, that is, to say subject to the payment of the unpaid balance of the subscription.

VII. *Rejected vouchers.* The administrator offered to the referee evidence of the payment by him of a considerable number and amount of debts owing by his intestate, which the referee rejected, on the ground that they were simple contract debts, and were paid after notice of debts of higher dignity. The amount of the vouchers so rejected is not anywhere stated, nor the dates of payment. It is agreed, however, that the payments were made before the close of 1863, and that the specialty debts of which the administrator had notice, were those numbered two and three above, being on the notes of Monteith for $1,272.79, and for $180.00. It does not appear whether or not the payments relied on were made in Confederate money, although from their dates, we must assume that they were. It is admitted that the creditors in these debts refused to receive Confederate money in payment. It does not appear, however, when it was tendered to them, or even whether it was before or after the payment of the simple contract debts. Perhaps it is not material. The act of 1869–'70, chap. 150, enacts in substance, that when an administrator has paid debts of lower, before those of higher dignity, the estate being at the time solvent; or when any creditor has refused to accept payment in Confederate currency, which was afterwards used in payment of the debts of the es-

tate, or became worthless without fault in the administrator; such payments shall be allowed to the administrator in all suits, &c., without regard to the dignity of the debts thus paid, as compared with that sued for. The learned counsel for the defendant did not cite this act, perhaps because it merely expressed a rule, which was a principle of equity before its enactment. However that may be, we consider that the act applies. The administrator had Confederate money legitimately received, and the creditors in question refused to receive it, as they had a right to do. How were those creditors ignored, by the administrator applying it to pay other debts inferior to theirs? The estate was relieved to the extent of the payment, and the security of the specialty creditors not diminished. Under ordinary circumstances the payment would have been a *devastavit*. But the circumstances during the war were extional, and justice can only be done by applying to them the broad principles of equity.

These creditors, by refusing to receive payment in the only existing currency, took their chances that the estate would withstand the accidents of the war. The administrator, although he was bound to fidelity and diligence, did not become their insurer, and we think he is entitled to credit for the payments in question, as against these creditors.

The question as to whether he is entitled to credit against the creditors Nos. 1 and 2, (that is as to the creditors upon the guardian bonds of B. W. Alexander to which Montieth was a surety,) stand upon a different footing. It is said that the administrator had no notice of these debts until 1866. It is uncertain whether this means that he did not know that Montieth was a surety for B. W. Alexander, or that he did not know that a breach of the bond had been committed. As he did not advertise for creditors, we are bound to assume that he had notice of the liability, and perhaps also we would be bound to assume that he had notice of the breach of the bond, if one had been committed. It does not appear, however, when Al-

exander committed a *devastavit* as guardian. He was solvent until after 1865, and his indebtedness was not discovered until 1866, when a demand was made, and he failed to account and pay. It might be a difficult question, supposing a *devastavit* or misappropriation of the ward's funds to have taken place before 1863, whether it would be a breach of the bond, within the reason of the question we are considering, until his failure to pay, after a lawful demand. But we are under no necessity to consider that, because there is no allegation of any breach before 1866. It is well settled, that if an intestate owe simple contract debts which are due, and be also indebted by a contingent security, such as a bond to save harmless, or other bond under which it depends upon a contingency whether any debt will ever arise, and no breach of the condition has taken place, the administrator may pay the simple contract debts. 2 Williams Executors, 920; *Delamoth* v. *Lanier*, 2 C. L. R., 413; *Collins* v. *Crouch*, 13 Q. B., 542.

VIII. *Judgment quando.*

It was agreed in the argument, that on one of the debts now sued on, the plaintiff had taken judgment *quando*, against the administrator. Probably that fact appears somewhere in the voluminous and unconnected record in this case. It was properly admitted by Mr. Bailey, that such a judgment amounts to an admission that the administrator has no assets at its date. The orders of reference are general, to take an account of the administration of the estate of Montieth, without confining the account to the assets received by the administrator since the date of the judgment *quando*, as it should regularly have been. If the order was entered in its present form by mistake and inadvertence, as the case is still pending in the Court in which the order was made, (the appeal to this Court being essentially interlocutory,) it is within the power of that Court to amend it. We need say nothing more on this point.

In concluding this opinion, we feel bound to say that we have seldom seen a record worse made up. It is unnecessarily

voluminous, full of repititions, the statements are vague, and want of precision both as to facts and dates. There are no marginal references, to aid us in examining it.

PER CURIAM. The case is remanded to be proceeded in, &c. Each party will pay the costs of his appeal.

R. D. WHITLEY, Guardian, and others *v.* A. A. ALEXANDER, Administrator, and others.

(For the Syllabus, see the preceding case.)

CIVIL ACTION against the administrator of a surety on a guardian bond, tried on exceptions to the report of the Clerk, to whom it had been referred, by his Honor, Judge *Schenck*, at Spring Term, 1875, of MECKLENBURG Superior Court.

The facts in this case are like those in the preceding case between the same parties. From the ruling of his Honor, the defendants appealed.

Wilson & Son and *Jones & Johnston*, for appellants.
Barringer, *Vance & Dowd* and *Shipp & Bailey*, contra.

RODMAN, J. The questions presented in both of these appeals are the same, and the decision on the other appeal will apply to the present. A judgment may be drawn in conformity with the opinion in that appeal.

PER CURIAM. Judgment accordingly.

HENRY C. WALL, JOHN C. GAY and another *v.* HENRY FAIRLEY, MARGARET McEACHIN and others.

Where certain heirs are made defendants, who claim no interest whatever in the land sued for, and in the complaint no relief is prayed against them, it is a good ground of demurrer, and the suit as to them should be dismissed with costs.

In a suit by purchasers at an execution sale, against the heirs of the judgment debtor, to recover certain land sold, but claimed by such heirs, it is not necessary to make the administrator of the judgment a party defendant. A judgment against the administrator, does not fix him with assets, but only ascertains the amount of the debt.

When plaintiffs have interest to a certain extent in common, and seek the same relief, they are at liberty to join in a suit against common defendants, or they may sue separately. Such joinder is no good ground for demurrer.

The purchaser of certain land at an execution sale, which the judgment debtor had procured to be purchased with his own money, and conveyed without consideration to two of his children, can follow the fund in the hands of such voluntary (and in law, fraudulent) donees.

CIVIL ACTION for the recovery of real property, tried upon amended complaint and demurrer before *Buxton, J.*, at the Spring Term, 1875, of the Superior Court of RICHMOND county.

This case was before the Court at January Term, 1874, (see 70 N. C. Rep. 537,) upon an appeal by the defendants from an order of the Court below permitting the plaintiffs to amend their complaint. To the amended complaint the defendants demurred. His Honor overruled the demurrer and the defendants again appealed.

The grounds of the appellants' demurrer, together with all the material facts in the case, are stated in the opinion of the Court.

J. D. Shaw, with whom were *F. McNeill* and *W. McL. McKay*, submitted:

1. The executors claim as purchasers at sheriff's sale and

also by judgment. Gay claims by virtue of his judgment against John Fairly. There is no privity. Their claims are separate and distinct, hence they are improperly joined. *Berry* v. *Ashworth*, 72 N. C. Rep. 496.

2. The executors' remedy, as purchasers, the title of John Fairley failing, is against the personal representatives of John Fairley, under act of 1807. Bat. Rev., chap. 44, sec. 26. *Frost* v. *Reynolds*, 4 Ired. Eq. 494; *Laws* v. *Thompson*, 4 Jones 105.

3. It is admitted that John Fairley had no interest that could be sold under the act of 1812, but it is insisted under the cases of *Schoffner* v. *Fogleman*, 1 Winst. Eq. 16; *Taylor* v. *Gooch*, 4 Jones 436 that the purchasers at sheriff's sale ought to be substituted to the rights of John Fairly to the amount of their bid, to the extent of holding the land as a security for the money which they paid. This might be so, if an honest trust—one not infected with fraud—one that could be enforced between the parties, had existed between John Fairley and the defendants. Such was not the case. John Fairley could have had no relief in equity against the defendants. He had no equity. Neither can the purchasers, who only acquired rights of John Fairley and nothing more. *Floyd* v. *Williams*, 1 Ired. 509; *Laws* v. *Thompson*, 4 Jones 105 in point.

The plaintiffs have mistaken their remedy. They should in the first instance have gone into equity, not on the notion of a trust, but because by a fraudulent contrivance, the estate of John Fairley had been put in the hands of the defendants. *Rhem* v. *Tull*, 13 Ired. 62; *Page* v. *Goodman*, 8 Ired. Eq. 20; *Parris* v. *Thompson*, 1 Jones 58; *Gentry* v. *Harper*, 2 Jones Eq. 177; *Gowing* v. *Rich*, 1 Ired. Eq. 559; *Frest* v. *Reynolds* 4 Ired. Eq. 494; *Tally* v. *Reid*, 72 N. C. Rep.

Leitch, contra.

RODMAN, J. The case made by the amended complaint and admitted by the demurrer is substantially this:

At Fall Term, 1869, the two plaintiffs who are the executors

of Mial Wall recovered a judgment against John Fairley for $357.00 with interest and costs. At the same Term, Gay, the other plaintiff, recovered judgment against the said John Fairley for $863.78 with interest and costs. Both of these judgments were duly docketed, and executions issued under which the sheriff sold a certain piece of land as the property of the defendant, John Fairley, which was bought by the said plaintiffs for $1,000 which sum was credited *pro rata* on their several executions, leaving some part of each unpaid. The sheriff made a deed to the plaintiffs for the land.

It was afterwards discovered that John Fairley had no estate in the land. On the 27th December, 1869, Fairley, being then embarrassed by debts, had procured one Shortridge to convey the land to two of his children, Margaret McEachin and Henry Fairly, who are defendants in this action, and paid to Shortridge $4,000 for such conveyance. John Fairley afterwards died, and one Kerchner became his administrator. The other heirs of John Fairley are also made defendants to the action.

These other heirs are improperly made defendants and the action must be dismissed as to them. They claim no interest in the land in controversy, and no relief is prayed against them.

2. Another ground of demurer is that the administrator of John Fairly is not a party. We notice that he is named as one of the defendants in the amended complaint, but it does not appear that he was ever served with a summons, or ever appeared to the action. The question as to the necessity of making him a party is thus fairly presented.

As John Fairly died July, 1869, the only effect of a judgment against his administrator would be to ascertain the debt. But as the debts are admitted for the present purpose by the demurrer, there is no occasion for the administrator to be a party for that purpose.

Certainly every debt of a testator is payable primarily out of his personal assets, and as the law formerly stood, unless it appeared that there were no assets, the administrator would

have been a necessary party in order to ascertain that fact by an account, and to apply any that might be found on hand, to the payment of the debts. But as the law now stands a judgment against an administrator does not fix him with assets. An account of assets can be taken in the first instance in the Probate Court only. And notwithstanding a judgment here, it would be competent for the defendants on making it appear that the administrator has personal assets applicable to the plaintiffs debts, to have an account in the Probate Court, and to have the assets properly applied to his debts.

There is no necessity that the administrator should be a party on this ground, and this cause of demurrer is overruled.

3. A third ground of demurrer is that the executors of Mial Wall and Gay are improperly joined as plaintiffs. We are of opinion that although the plaintiffs might have sued severally, yet as their interests are to a certain extent common, and they seek a common relief, they were at liberty to join. The joinder does not prejudice the defendants, and the complaint is not multifarious.

4. The principal question raised by the demurrer, is whether the plaintiffs are entitled to the relief demanded, or to any relief within the scope of their demand. If John Fairley had taken the deed from Shortridge to himself the land would immediately have become liable to the lien of the plaintiff's judgments. That the title never vested in him, prevented a valid sale of the land under execution. The purchasers at execution sale, admittedly acquired nothing. But it does not follow that they, as well as all other creditors of John Fairley, cannot follow the funds of the debtor in the hands of his voluntary, and therefore, in law, fraudulent donees. It is settled that in the case of a fraudulent donation, such as this appears on the complaint to have been, they can. *Rhem* v. *Tull*, 13 Ire. 57.

This is as much as it is necessary to say on this part of the case, as perhaps the defendants may answer over as they will

have a right to do, and the facts may finally be found materially different from what they are stated in the complaint.

The demurrer is overruled except so much of it as assigns as cause that the heirs of John Fairley, other than Margaret McEachin and Hervy Fairley are made parties. In this respect it is sustained. As the defendants are entitled to answer over in the Superior Court, we can give here no other judgment than to overrule the demurrer, except as aforesaid, and to remand the case. Demurrer overruled, except as to so much as assigns as cause of demurrer that the heirs of John Fairley other than Margaret McEachin and Henry Fairly are improperly made parties to this action,—that portion of the demurrer which assigns this as a cause is sustained. Case remanded to be proceeded in, &c. The heirs of John Fairley who are declared to have been improperly made parties will recover cost of plaintiffs. The plaintiffs will recover their costs in this Court of the other defendants.

Let this opinion be certified.

PER CURIAM. Judgment accordingly.

THE N. C. GOLD AMALGAMATING COMPANY *v.* THE N. C. ORE DRESSING COMPANY.

A party who purchases land must in general look to his vendor alone for a title; and in the absence of a warranty and of fraud, the doctrine of *caveat emptor* applies between the vendor and vendee. *Therefore*, where A, a corporation, purchased from B, land sold under a mortgage, and on the same day mortgaged the land to C: *Held*, that the fact that D. claimed title to the land, and had brought an action to assert that title, was not sufficient ground for an injunction against C, restraining the sale of the land under his mortgage, although A, at the time of purchasing the land, was ignorant of the claims.

PETITION for an *Injunction*, tried before *Cloud, J.*, at Chambers, in STANLY county, on the 15th April, 1875.

All the facts necessary to an understanding of the case, as decided in this Court, are stated in the opinion of the Court. From the ruling of his Honor, refusing an injunction, the plaintiff appealed.

Blackmer, *Henderson* and *W. W. Fleming*, for the appellant.

McCorkle & Bailey, contra.

RODMAN, J. The record in this case is very voluminous, but as far as it is material to the decision of the single question presented to us, it may be reduced within a very small compass. The complaint states: on July 10th, 1874, the plaintiff purchased certain lands called Gold Hill, at a sale under a mortgage, made in favor of Roberts, Holmes and others, and also purchased the same property from Amos Howes. By whom the mortgage to Roberts and others was made, is not stated. On the same day and as part of the same transaction, the plaintiff made several mortgages on the said land, and one of them was to the defendant, Coit, to secure to him a debt of $27,690, which the plaintiff acknowledged itself to owe him. This mortgage is not made part of the complaint, although it is referred to, nor is it set out in the record. We are unable, therefore, to say whether or not it contained a power of sale. As it is complained that Coit threatens to sell, and no want of power by reason of the omission of such a power in the instrument is mentioned, we assume that it did. The only reason assigned why Coit should be restrained from selling under his mortgage is, that at the time of the purchase of the land and execution of the mortgage, a corporation called the N. C. Ore Dressing Co., had, or pretended to have, a title to, or claim upon, the lands, of which title and claim the plaintiff was ignorant; and that Company has since brought an action in assertion of their title, which is still pending. The plaintiff says that by reason of this claim, it has been embarrassed and disabled from paying its debt to Coit. But the complaint no-

where alleges any misrepresentations by Coit as to the title which the plaintiff purchased, or any duty on his part to inform the plaintiff of any defects in such title, or any facts out of which such a duty might arise. The mere fact that plaintiff purchased a doubtful title, is all that appears to be relied on to support the prayer for an injunction restraining Coit from selling under his mortgage, and this is the only relief sought in the action. It is admitted that the debt secured to Coit is due and unpaid.

We regret that the plaintiff was not represented by counsel in this Court. When a record is voluminous and stuffed with verbiage, and immaterial matters as this is, it is always to be feared that a Court which is compelled to undertake an examination of the rights of the parties as presented by it in the absence of counsel, may fail to discover something material to the case of the party. We have examined the record in the present case, and have failed to discover any ground for the relief prayed for, other than what is stated. The answers of the defendants do not contradict the complaint in any respect material to the present question. They admit the principal facts, but aver that the plaintiff, at the time of his purchase had knowledge of the claim or of some claim by the Ore Dressing Company. Putting this denial out of view, and looking at the complaint alone, we see no equitable ground for the injunction prayed for. A party who purchases land must in general look to his vendor alone for a title. In the absence of a warranty and of fraud, the doctrine of *caveat emptor* applies even as between the vendor and vendee; and it will certainly require a special case to bring in a third party, who was (so far as appears) a stranger to the sale, as a warrantor of the title. That seems to be the attempt here, without the statement of any special circumstances to except the case from the general rule. No connection is set forth between Coit and the vendors under the mortgage to Roberts and others. If such a connection existed which could be made a ground of equitable relief, it is the fault of the plaintiff that he did not

set it forth. By the plaintiff's mortgage to Coit, the plaintiff undertook and agreed that he owned the property mortgaged, and in the absence of fraud and special circumstances to control such undertaking, he is estopped to deny it, at least so as to affect Coit's rights under the mortgage. The mere ignorance of the plaintiff of an adverse claim or title to the property, even if Coit was aware of it, would not be a fraud which, as between Coit and the plaintiff, would relieve the plaintiff from this estoppel. This view of the case renders it unnecessary for us to consider either the question of fact, as to the ignorance of the plaintiff of the claims of the North Carolina Ore Dressing Company, or any legal consequences which might result if the question was determined in either way.

It also makes it unnecessary to consider the effect of the agreement between the North Carolina Ore Dressing Company and Coit, by which that Company agreed to discontinue as to him, its action against the North Carolina Amalgamating Company and other defendants, of which Coit was one. Of course the judgment in the present case concludes only the special matter decided on. It will not determine the interest which a purchaser at the sale under the mortgage to Coit will require; nor any rights between the two litigant corporations. Those rights, for aught that appears, are, or may be put, in issue, and fairly decided in the action by the *Ore Dressing Company* v. *the Amalgamating Company*. At all events, they are not in issue in this action.

Since writing the foregoing opinion, we have been furnished with a brief by plaintiff's counsel. They put the plaintiff's claim to an injunction, upon the doctrine that a Court will interfere to prevent the waste or destruction of property pending a litigation respecting it. There is no question as to the doctrine. But the first observation is, that an application for an injunction should have been made in the original action of the *Ore Dressing Co.* v. *The Amalgamating Co.*, as being merely subsidiary to the relief sought in that action. This idea might have been appropriate before, but as the point was

not taken by the defendants, we preferred putting our decision on the merits of the plaintiffs case as presented in his complaint. For the same reason we pass it over now.

We do not see how a sale of the land by Court under his mortgage, will tend to waste or destroy the property. His vendee, as respects his title, will stand in no better or other condition, as between him and the plaintiff, than Coit does. He will not, merely by his purchase, gain possession of the estate in controversy. The purchase will create no *new* cloud over the title of the plaintiff. If any exists, it was created by the plaintiff when it made the mortgage to Coit, and no equity has been shown to defeat Coit's right to sell under it. What title a purchaser at the sale will get, we repeat, we are not called on to say.

Judgment refusing the injunction affirmed, and case remanded to be proceeded in, &c. Let this opinion be certified.

PER CURIAM. Judgment accordingly.

R. L. SMITH and W. M. SMITH *v.* ANNIE NEAL and others.

A devised as follows: "I give to my two grandsons, M and R, one hundred acres of land, including where I now live," &c., "and that my daughter P live where I now live for the space of ten years; and at the end of that time, the land and premises to belong to my two grandsons, or the heirs of I:" *Held*, that after the expiration of ten years from the death of the testator, M and R, the children of I, who was dead, were entitled to the land.

This was a CIVIL ACTION in the nature of *Ejectment*, tried before *Schenck, J.* at Spring Term, 1875, of RUTHERFORD Superior Court.

The plaintiffs claimed the land in controversy as devisees under the will of William Smith. It was agreed that the right of the plaintiffs to recover depended upon the construc-

tion of the will, and that the Court should decide as to the construction.

It was in evidence that William Smith's real estate consisted of the tract of land on which he lived, containing about three hundred and fifty-three acres. The testator lived near the center of the tract. James T. Smith lived in the northern part of the tract and that Jeremiah W. Smith, the father of the plaintiffs lived in an unenclosed field, in the Southeast corner of the tract. Jeremiah Smith "was leader of the crop" in the lifetime of the testator, but the land was worked by all the family together. Polly Smith took possession of the house in which Jeremiah W. Smith lived, and remained in possession ten years, after which this action was brought.

The clause of the will, under which the plaintiffs claim reads as follows:

"I give to my two grand-sons, Matthew and Richard Smith one hundred acres of land including where I now live, joining the land I have given to my son J. S. Smith; and that my daughter Polly Smith live where Jeremiah W. Smith now lives for the space of ten years, and at the end of that time the land and premises to belong to my two grand-sons or the heirs of J. W. Smith.

The Court being of the opinion that the plaintiffs were entitled to recover, an issue as to damages was submitted to a jury and a verdict rendered, assessing the damages at three hundred dollars. And the Court thereupon gave judgment for the plaintiffs, from which judgment the defendants appealed.

Shipp & Bailey, for the appellants.
J. F. Hoke and *Battle & Son*, contra.

SETTLE, J. William Smith intended to dispose of his whole estate by will.

There is nothing in the will or in the circumstances of the estate to induce us to change the general rule.

The judgment of the Superior Court is affirmed.

PER CURIAM. Judgment affirmed.

DAVID L. ROYSTER, Ex'r., *v.* J. J. JOHNSON.

In stating an account between an executor and the surviving partner of the testator, *it is not error* to charge the surviving partner with the value of a note, due the testator of the plaintiff individually, if such note arose from, or grew out of the business of the co-partnership.

Under the law of this State, a surviving partner is entitled to reasonable compensation for his services in settling up the partnership business.

(The case of *Boyd* v. *Hawkins*, 3 Dev. Eq. cited and approved.)

CIVIL ACTION, for an account, tried before *Henry, J.*, at January (Special) Term, 1875, WAKE Superior Court.

The facts necessary to an understanding of the case, as decided in this Court, are as follows:

In the month of January, 1873, the testator of the plaintiff, J. J. Overby and the defendant entered into a co-partnership, for the purpose of dealing in groceries, liquors, &c. The testator of the plaintiff died during the existence of the partnership, and this action was brought for an account and settlement of the partnership business. The case was referred for the purpose of taking an account, and upon the coming in of the report of the referee, the defendant filed the following exceptions thereto:

I. That he is charged with a note of seven hundred and fifty dollars, which is due the plaintiff's testator as an individual, and has nothing to do with the co-partnership business, it not being a debt due to or from the firm.

II. Because the defendant is charged in the settlement of the co-partnership business, with a note due the plaintiff's testator as an individual, and not as a member of the firm, of two hundred dollars, which note was due the 31st December, 1873, while this action for an account of co-partnership business, was commenced in August, 1873.

III. Because the defendant is not allowed commissions or any compensation for settling the co-partnership business.

The Court overruled the exceptions, and the defendant appealed.

W. H. Pace, for the appellant.
Busbee & Busbee and *A. M. Lewis*, contra.

SETTLE, J. This case comes before us upon three exceptions by the defendant, to the report of the referee.

The first and second are untenable.

1. Because they grow out of the business of the partnership.

2. Because they were admitted by the defendant, before the referee, to be proper charges against him.

The third exception is well founded.

The English doctrine, that executors, trustees, surviving partners, &c., are not entitled to commissions or compensation for their services, is not suited to this country.

It is suggested in *Boyd* v. *Hawkins*, 2 Dev. Eq., where the cases on this subject are cited and commented upon, by Chief Justice RUFFIN, as a reason for the English doctrine, that persons acting in such fiduciary characters are not, in England, practically at any trouble or expense about their trusts, because they manage the whole business through attorneys, &c.

But it is entirely different here.

And following the suggestion of Chief Justice RUFFIN, and the tendency of legislation in this State, providing compensation for executors, administrators, &c., we see no reason why a surviving partner should not be allowed reasonable compensation for his services, in winding up the affairs of the partnership.

In so far as this exception was overruled, there was error.

PER CURIAM. Judgment accordingly.

ELI BRUMBLE *v* W. J. BROWN, Ex'r. of REUBEN KING.

An order of the Judge of the Superior Court re-referring a report to the referee, directing him "to reform his report in accordance with the decision of the Supreme Court, and that his amended report, so reformed, be the judgment of the Court," is erroneous for the reason, that it deprives the parties of the right to except to the report for any errors which might be therein contained; and also because it allows the referee to determine what the judment of the Court shall be.

The measure of damages against a collecting agent, is the amount which he collected, or which he might have collected and did not, and the same is lost by his negligence. For simply failing to return an insolvent debt, the damage is nominal.

CIVIL ACTION against a collecting officer, tried on exception to the report of a referee, at Spring Term, 1875, of the Supe[s] rior Court of ROBESON county, *Kerr*, *J.* presiding.

The facts of this case are fully stated in the report of the same, when it was before this Court at June Term, 1874, and when the case was remanded for further proceedings. See 71 N. C. Rep. 513.

On the last trial in the Court below, the record of January (Special) Term, 1873, was so amended as to show, that the reference to W. S. Norment was by consent. Also the order made at Fall Term, 1874, referring the case to Platt D. Walker, Esq., was vacated; and the cause was heard upon the former report of Norment, the referee and the exceptions thereto, as allowed or modified by the opinion and judgment of this Court the said June Term, 1874.

On the trial below, the defendant asked that the Court would submit the following issue, to be passed upon by a jury, to-wit: What amount, if any, the testator of the defendant, Reuben King, could by due diligence have collected of the claims placed in his hands by the plaintiff, Eli Brumble? This issue, the Court refused to submit the jury.

After argument, his Honor ordered, that W. S. Norment, the former referee, reform his report in accordance with the decision of the Supreme Court, rendered in this cause at June Term, 1874; and that his amended report so reformed, be the judgment of this Court. From this judgment, the defendant appealed.

Leitch and *A. A. McLean*, for appellants.
W. S. French, contra.

READE, J. The order referring the matter to Norment "to reform his report in accordance with the decision of the Supreme Court; and that his amended report so reformed, be the judgment of the Court," was erroneous, because it deprived the parties of the right to except to the report for any errors which might be therein; and because it allows the referee to determine what the judgment of the Court should be. No doubt his Honor puts his order in that form because he supposed that the corrections to be made were mere matters of *calculation*, in regard to which the referee could not err under the opinion of the Supreme Court, to which he meant implicit deference. But in this it seems he was in error; as well he might have been, from the confusion in which the case was involved.

We learn from the record and from the argument at this Bar, that there has been no investigation as to the solvency of the debts put into the hands of the defendant's intestate for collection. There certainly ought to be an enquiry upon that subject. And the inquiry may be embraced in the order of reference; as it is too late for the parties to insist upon a jury trial as a *matter of right*. The measure of damages against the collecting agent will be the amount which he collected; or which he might have collected and did not, and the same is lost by his negligence. For simply failing *to return* an insolvent note the damage is nominal.

As to the burden of proof the authorities are conflicting;

and, unless the parties choose to risk the substance for the shadow, it may not arise. And therefore we prefer not to decide it, unless it be directly presented.

There is error. This will be certified.

PER CURIAM. Judgment accordingly.

D. D. McBRYDE and others *v.* JOHN D. PATTERSON.

In a petition for partition, A *et al.* v. B, and B pleads "sole seizure," under a deed from C, who being made a party to the suit, alleges fraud on the part of B in procuring the deed, and prays to have the same cancelled: *it was error* in the Probate Court to dismiss the proceedings at the cost of the plaintiff. And on the appeal of the plaintiff to the Superior Court, *it was the duty* of the presiding Judge to have eliminated from the transcript and decided the point of law raised by the plea of sole seizure; as it *was also his duty* to have had the issue of fraud in procuring the deed submitted to, and passed upon, by a jury. After this, if necessary, the Court could have issued a *procedendo* to the probate Court.

This was a SPECIAL PPROCEEDING, originally commenced in the Probate Court and carried upon appeal to the Superior Court of ROBESON county, where it was heard before *Kerr, J.*, at Spring Term, 1875.

The defendant moved to dismiss the proceeding. The Court overruled the motion, and thereupon the defendant appealed.

All the facts necessary to an understanding of the case, as decided in this Court, are stated in the opinion of Chief Justice PEARSON.

Leitch, for the appellant, argued:

After a delay of three terms an appellant is not entitled to a *certiorari*. See *Erwin* v. *Erwin*, 3 Dev., 528.

No error appearing in the transcript, the judgment of the Clerk of the Superior Court should be affirmed. See *Harding* v. *Murray*, 68 N. C. Rep., 534; *Williams* v. *Council*, 65 N. C. Rep., 10; *Utley* v. *Troy*, 70 N. C. Rep., 303; *Brumble* v. *Brown*, 71 N. C. Rep., 513.

The transcript shows that W. A. Dick was Clerk of the Superior Court when the case was tried, and that W. E. Thompson is now Clerk of the Superior Court, and there being no suggestion that the record of the proceedings at the trial is not properly and correctly certified, it is impossible for the present Clerk of the Superior Court to certify "the motions made by either party plaintiffs and defendant, and also to show the rulings of *all* questions of law presented to him" (his predecessor.) It not being the practice of the Court to record minutely each motion and ruling made, especially when there is a ruling disposing of the whole case. The Clerk therefore can certify nothing done by his predecessor that the record does not stand.

The duty of showing a full and clear statement of the issues of fact joined in the pleadings, does not devolve on the Clerk of the Superior Court. See Rules of Practice No. 3, adopted by the Supreme Court, June Term, 1871.

This action should have been dismissed upon motion:

I. For the reason that it appears from the complaint of plaintiffs, that there are parties interested in the land who have not been made parties to these proceedings. See *Whitted* v. *Nash*, 66 N. C. Rep., 590:

II. For the reason that the plaintiffs have failed to show with sufficient certainty who are the proper parties, what interest they claim, or how, or to whom the lands of Robert Hughes descended:

III. For the reason that the defendant excepting to the sufficiency in form of the deeds to A. S. McKay, under whom the plaintiffs claim, and the plaintiffs not having made property deeds nor furnished copies to show that they were sufficient to pass an estate. The decision of the Clerk of the Su-

perior Court to have been affirmed. The Clerk of the Superior Court is not the custodian of these deeds and cannot certify them to the Judge of the Superior Court:

IV. For the reason that the Clerk of the Superior Court has no jurisdiction to pass upon the validity or invalidity of a deed impeached for fraud:

V. This action should be dismissed upon the ground of multifariousness, one claim being a decision upon the validity of a deed sought to be impeached for fraud, a matter of which the Superior Court in term time has exclusive original jurisdiction. The other claim, the right to have partition of land, claimed by the plaintiffs to be owned by them as tenants in common with the defendant, a matter of which the Clerk of the Superior Court has exclusive original jurisdiction. See *Heilig* v. *Foard*, 64 N. C. Rep., 710.

Defendant's motion to dismiss puts him in the same position as if he had demurred. See *Miller* v. *Barnes*, 65 N. C. Rep., 67.

N. A. McLean, *W. McL. McKay*, *Walker* and *Strange*, contra.

PEARSON, C. J. Under the "old mode of procedure," in a petition for partition, if the defendant pleaded "sole seizure" the proceeding was stayed by the Court. The plaintiff directed to bring an action of ejectment to try the title, and the defendant required to confess an "actual ouster" for the purpose of enabling the plaintiff to bring the action, as a tenant in common could not maintain ejectment against his co-tenant unless there had been "an actual ouster."

That practice is excluded by the Code of Civil Procedure, for it in effect requires, or at least strongly recommends all matters of controversy growing out of the same transaction, or concerning the same subject between all parties having an interest therein, to be disposed of in *one action*. This mode of procedure answers a good purpose in the general, by saving costs and preventing the necessity of resorting to more

than *one court;* but in particular cases (of which the one now under consideration furnishes a noticeable instance,) it produces so much confusion and complication as to almost put it out of the power of any one Court to deal with the case.

This was a special proceeding before the Judge of Probate by petition for partition of land. The defendant denied the relation of tenant-in-common, and alleged that he was in possession of the whole tract in severalty, and had a good title in fee simple, under one Carolina Gordon. The pleadings were thereupon amended, other parties plaintiffs were made, and "Carolina Gordon" was made a party defendant; she answers, alleging that the defendant, Patterson had procured her to execute the deed under which he claims title to the whole tract of land in severalty by fraud, and prays to have it cancelled.

We have by the pleadings (stripped of verbiage and of *equivocal admissions* and *general denials*, to which "attorneys at law," in drafting complaints and answers are never justified in resorting. A petition for partition, and a plea, "sole seizure"; this raised a question of title to land, which the Judge of Probate had no right to decide and then a claim on the part of Carolina Gordon to have her deed cancelled, appealing to a jurisdiction heretofore exercised by Courts of equity exclusively, which, of course, the Judge of Probate could not assume.

Thus embarrassed by questions raised by the pleadings, which he had no power to decide, the Judge of Probate concluded to "cut the knot," and "dismissed the whole proceeding at the cost of the plaintiff." Upon appeal, all of the proceedings before the Judge of Probate were duly certified to the Superior Court, and the case was thereby put in that Court, to be disposed of agreeable to law.

We concur with his Honor in the opinion that the Judge of Probate erred in giving judgment that the case be dismissed at plaintiff's cost.

True, he had no right to decide upon the question of title,

raised by the plea of "sole seizure," put in by the defendant Patterson, or upon the question of equity to have her deed cancelled, raised by the defendant Carolina Gordon; but the case was properly instituted before him, in the first instance, by the petition for partition, and the questions of legal and equitable ground of relief raised by the subsequent pleadings, which questions he had no power to dispose of, did not authorize a judgment dismissing the case.

These questions of right to have partition, sole seizure, equity of cancellation, raised by the pleading in the original and in the amended complaint and answer, are presented with so many "*variations*" as to swell the record to an appalling volume, for it had accumulated like a ball of snow which boys roll over and over until it becomes too big for them to roll over again. Whereupon the Judge of Probate enters judgment, "dismissing the case at plaintiffs' cost, and plaintiffs appeal.

As before said, we concur with his Honor in the opinion that the Judge of Probate erred in dismissing the case, but we think his Honor likewise erred in ordering the case to be remanded. *Cui bono?* To roll the ball over again, would only add another layer of snow.

As the case and a full transcript of everything that had been done in the Court of the Judge of Probate, *was in the Superior Court* by the appeal, that is, the appeal had substantially, and ought to have been allowed the effect of the writ of *pone* or of *tolt*, mentioned in Blackstone, vol. 3d, by which, cases that the inferior Courts by reason of pleas, &c., put in after the action was instituted, could not deal with, were required to be "sent up" or "put" in the higher Court.

By this analogy, for we are groping in the dark, as the Code of Civil Procedure does not provide for the case, we are of opinion, that the appeal had the effect of *putting* the case in the Superior Court, and it was the duty of his Honor to have eliminated from the transcript, and decided the point of law, made by the answer of Patterson on the plea of "sole seizure,"

about which, after much procrastination on both sides, the facts are admitted by the pleadings, to-wit: Robert Hughes owned the land in controversy, and acquired it by purchase; he was a bastard, and died without leaving wife or children or mother, but leaving him surviving a sister, who was also a bastard, that is, Carolina Gordon, and three or four other brothers and sisters who are legitimate children of his mother; from whom the plaintiffs derive title.

The plea of "sole seizure" is put on the construction of the rules of descent, Bat. Rev., chap. 36, rule II, making the point of law, is the bastard sister of a bastard brother, entitled to land purchased by him, to the *exclusion* of brothers and sisters born in lawful wedlock? That is a question of law, which his Honor ought to have decided, and one which the Judge of Probate had no right to decide, as it involved a question of title to real estate, which, under the old mode of procedure, could only have been disposed of in an action of ejectment, and in regard to which, under C. C. P., the Judge of Probate had no jurisdiction. It was likewise, supposing the plaintiffs had an interest, the duty of his Honor to have disposed of the question of fraud in the procurement of the execution of the deed of Carolina Gordon, by having an issue of fact tried by a jury. After this, the Superior Court would have been in a condition to issue a writ of *procedendo* to the Judge of the Court of Probate, if the result of the subsequent proceedings made it necessary to order partition to be made.

This opinion will be certified.

The plaintiff McBride and the defendant Patterson are to pay the cost of this Court equally.

PER CURIAM. Judgment accordingly.

WILLIAM WILLIS and BARTRAM ROBESON, Assignees, *v.* WILLIAM H. WHITE.

A, placed in the hands of B, a sheriff and the defendant, a note on C for collection, which note he afterwards, and while it was in B's hands, assigned, for a valuable consideration, to the plaintiffs, D and E. In an action by the assignees, D and E, against B, to recover the amount collected from C, on the note payable to A: *It was held*, that the evidence of B, offered to prove that when he took the note on C to collect, A was indebted to one F, deceased, upon whose estate B was administrator, and that it was the understanding, that the proceeds of the collection from C, was to be applied to the payment of A's indebtedness to F, B's intestate, was admissible, and that its rejection by his Honor upon the trial in the Court below, entitled B, the defendant, to a new trial.

This was a CIVIL ACTION to recover the value of a promissory note, tried before *Kerr, J.* at Spring Term, 1875, BLADEN Superior Court.

It was in evidence that John S. Willis, the assignor of the plaintiffs, on the 2nd day of October, 1866, placed in the hands of the defendant for collection a note on one F. Broadwell for three hundred dollars, which note was payable to Willis, on the 1st September, 1861. The defendant who was sheriff of Bladen county gave the following receipt:

"Received, Bladen county, N. C. 2nd October 1866, of John S. Willis one note endorsed by himself to me on F. Broadwell for three hundred dollars, payable on the first day of September, 1861, which note I am to collect and account to him for or return to him if not collected.

(Signed) W. H. WHITE, Sheriff.

The defendant as agent for Willis instituted suit and recovered a judgment upon the note for the sum of $576.30, being the amount due on the note, on the 11th December, 1871, which sum was at that time paid to the defendant's attorney. It was also in evidence that the plaintiffs paid to Willis the

full value of the note, which was at the time of its assignment in the hands of the defendant, for collection. Evidence was also introduced tending to show that the defendant had knowledge of the assignment, and that a demand for payment was made and the same refused before the institution of this action.

The defendant was introduced as a witness and testified, that he had never received but two hundred and fifty dollars of the money collected by his attorney on the Broadwell claim; and that the plaintiff forbade the said attorney to pay the money so collected to the defendant.

The plaintiffs denied that they had forbid the attorney to pay over the money to the defendant, and testified that the defendant did not disclose to them that any part of the money had been collected, until they themselves ascertained the fact some three years afterward.

The defendant testified that as administrator of George M. White, deceased, he held claims against John S. Willis, and that it was for the purpose of securing the payment of these claims that he became the agent of Willis. This evidence was objected to by the plaintiffs on the ground that the defendant showed no settlement of the estate of his intestate, and upon the further ground that he failed to show that the notes due to the estate of his intestate belonged to the defendant individually. The Court sustained the objection and the defendant excepted.

It was further in evidence that John S. Willis had never agreed with the defendant to allow the claims due to him as administrator, to be retained from the money to be collected from the Broadwell note. That at the time Willis placed the note in the hands of the defendant for collection, the estate of the defendant's intestate was indebted to him in an amount nearly or quite equal to the amount, to which he was indebted to said estate. He had several times requested a settlement with the defendant, and the same had been refused.

His Honor instructed the jury that it was the duty of the

defendant, acting as the agent of the plaintiffs, to have disclosed to them the time when the money had been collected and to have paid the same over to them promptly. That the claims in the hands of the defendant belonged to the estate of George M. White, there being no evidence that there had ever been a settlement of the estate of George M. White, and an assignment of said claims to the defendant as his individual property could not avail the defendant as a good set off in this action.

His Honor further instructed the jury, that in considering their verdict they should allow the plaintiff interest on the amount received by the defendant from the time it was received and not from the time of the demand upon the defendant." To this charge of his Honor the defendant excepted.

The jury rendered a verdict in favor of the plaintiffs for $469.00, the amount due to the plaintiff after deducting $20 attorney's fee and $100 paid by defendant to the order of J. S. Willis. Thereupon the defendant moved for a new trial; motion was overruled, and the defendant appealed.

W. McL. McKay and *R. H. & C. C. Lyon*, for appellant
A. A. McLean, contra.

BYNUM, J. His Honor erred in excluding the proposed testimony of the defendant. It was clearly competent for him to show that when he gave the receipt for the note, it was agreed between him and Willis, as the consideration and reason of his undertaking, that he should first apply the money collected to the discharge of certain notes he held for collection on the said John S. Willis. The proposed evidence was not at all inconsistent with the terms of the receipt given, but merely explanatory thereof. If the proposed testimony had been received and was true, it was immaterial whether the claims he held belonged to the defendant individually or not. They were in his hands for collection, and as he collected the money due upon the Willis note it discharged these claims

against him in the hands of the defendant. In this view of the case, the complaint should have been framed so as to have an account taken. But how the fact is as to the agreement has not been determined.

Error.

PER CURIAM. Judgment reversed, and *venire de novo.*

WM. A. ROGERS, Ex'r of JOHN DRAKE, Deceased, v. ROBERT McKENZIE and JOHN McNAIR.

A and B rent from C all the turpentine boxes on a certain piece of land from the 1st January, 1861, to the 1st January, 1865, the rent to be paid on the 1st June in each year. C died in March, 1863; in November, 1861, A paid C $140, and in the same year paid taxes on the land for C, to the amount of $156.44. In an action by D, the executor of C, against A and B to recover the rent due the testator: *It was held*, that only one year's rent was due the estate of C; and that A and B, having paid the $140 and the taxes after such rent was due, were entitled to have the same credited thereon.

CIVIL ACTION, commenced in February, 1868, as an action of *Covenant*, and tried before his Honor Judge *Kerr*, at Spring Term, 1875, of the Superior Court of ROBESON county, upon exceptions to the report of the referee.

At Fall Term, 1874, the cause was, by consent, referred to Nat. McLean, who at the ensuing Spring Term, 1875, reported:

That the defendant, McKenzie had been dead for more than two terms, and that the suit had abated as to him.

The other defendant, McNair, offered evidence tending to prove that he was surety only; such was not proved to the satisfaction of the referee, who declined to report it as an established fact.

The plaintiff proved the execution of the following writing, upon which the suit was brought.

"We, or either of us, promise to pay to John Drake, or order, for all the boxes that will be on the land known as the "Drake land," betwixt the creek and Back Swamp, six dollars and fifty cents a thousand per year; all on the other side of the said Back Swamp, five dollars a thousand per year. It is understood that the above lands are rented for four years, for turpentine purposes only; further understood, the rent is to be paid on the 1st day of June of each year, beginning on the 1st day of January, 1861, ending January 1st, 1865.

ROBERT McKENZIE, [SEAL.]
March 19th, 1861. JOHN McNAIR, [SEAL.]"

The defendant's counsel moved to non-suit the plaintiff, on the ground that the action should have been debt and not covenant. Motion overruled.

The testator of the plaintiff, John Drake, died 23d March, 1863. There was due the executor on the 22d March, 1875, $1,597.53, of which sum $892.70 principal money, being the rent for the years 1861 and 1862, and until 23d March, 1863. The defendant, McKenzie, paid to the testator, Drake, $140 on the 18th November, 1861, and he paid Drake's taxes for the years 1861 and 1862, amounting to $156.46, but when, it did not appear. McKenzie also paid to the heirs of Amanda Nash and Mrs. McCormick, on the 10th November, 1864, $900, the rent for the years 1862–'63 and '64, in Confederate money.

It appeared in evidence, without objection, that McKenzie hired from the testator, the said Drake, five negro men during the year 1861, at the price of $200 each. It also appeared that McKenzie operated the boxes only one year, to wit, 1861.

There were 37,000 boxes between the Creek and Buck Swamp at $6.50 a thousand, amounting to $240.50; and 32,000 boxes on the other side of said swamp, at $5 per thousand, amounting to $160 per year.

It is therefore adjudged that the plaintiff recover of the defendant the sum of $1,597.53 and costs.

To the foregoing report, at the same term, the defendant, McNair, excepted in this :

(1.) In ruling that covenant and not debt was the proper remedy for an executor to collect arrears of rent due his testator in his lifetime.

(2.) In charging the defendant any rents after the first day of June, 1862; for that no rent fell due after that time, and before the death of the testator.

(3.) For charging the defendant with the rent for more than one year, inasmuch as the facts reported show that the turpentine trees were only used one year.

(4.) In finding $892.70, principal money, was due from the defendant, without reporting any facts from which the Court can see that, that or any other amount, or what amount, according to the contract reported, was due or owing.

(5.) In failing to credit the defendant with the sum of $140, paid on the 18th November, 1861; and the further sum of $156.46, paid by the defendant in liquidation of the taxes of the plaintiff's testator, for the years 1860 and 1861

(6.) Assuming that covenant was the proper action, in reporting the plaintiff's measure of damages to be the rent contracted to be paid for the use of the turpentine trees during the time they worked, inasmuch as they had not deteriorated in value, as they would have done if they had been worked, and the measure of damages would be less by the amount of the deterioration in value, that the amount contracted to be paid annually as rent.

(7.) In reporting facts about matters immaterial to the question at issue, to wit; that the defendant, McKenzie, paid to the heirs of John Drake, on the 10th November, 1864, $900, the rent for the years 186-'63-'64, in Confederate money; and that the said McKenzie hired from the said Drake five negro men during the year 1861, at the price of $200 each.

Upon the hearing of the report and the exceptions filed, his Honor overruled the first exception, and sustained the second,

ordering the report to be reformed, so as to strike out of the account the rent after June 1st, 1872. The referee being in Court, was allowed to amend his report, by stating that he arrived at the amount of rent, by finding that the 37,000 boxes between the creek and Black swamp, at $5.50 per thousand amounting to $240.50 *per annum;* and 32,000 boxes on the other side of said swamp, at $5 per thousand, amounting to $160 *per annum*—making for all $400.50 *per annum.*

It appearing to the Court, by the referee's finding of facts, that the covenant was entered into January 1st, 1861; that the testator died March 23d, 1873; and as the rent was only due and payable on the 1st day of June in each year, that no rent had accrued to the testator from and after June 1st, 1862, leaving the plaintiff entitled to recover against the defendant, McNair, (McKenzie having died since the commencement of this action,) as breaches of his covenant during the life of John Drake, the rent from January 1st, 1861, to June 1st, 1862,—one year and five months, at $400 *per annum.*

It is therefore considered and adjudged by the Court, that the plaintiff do recover of the defendant, McNair, one thousand and three dollars and eighty cents, ($1,003,80,) with interest on $567.00 from the first day of April, 1875, till paid and for the costs of this action; and that the referee, Nat. McLean, be allowed $60, one half to be paid by each of the parties plaintiff and defendant.

Leitch, for appellant.
N. A. McLean and *WMcL. McKay*, contra.

BYNUM, J. As the plaintiff filed no exceptions to the report of the referee, and did not appeal from the judgment of his Honor, allowing the second exception of the defendant, we are to consider the other exceptions of the defendant which were overruled in the Court below, and which are brought to this Court for review, by his appeal.

We are of opinion that his Honor erred in not allowing the fifth exception, to-wit, a credit upon the rent for the $140.00 paid on the 18th November, 1861, and the sum of $156.44 for taxes on the land, paid for the years 1860–'61. He is entitled to credit for the $140, because at the time of that payment the first year's rent was due, and it does not appear that any other debt was due from the defendant to the plaintiff at that time. For, although the referee finds that in 1861, the defendant hired several negro men from the plaintiff at the price of $200 each, it does not appear that any part of the hire was due at the date of this payment, or that it was not paid when it fell due. The law will therefore apply this payment to the debt which was certainly due, and not to a claim which does not appear to have been due, or to have been unsettled.

The defendant is also entitled to credit on the rent for the sum of $156.44 taxes on the land, paid by him, because it may fairly be presumed that the tax was paid to prevent the sale of the land for the tax and to secure the benefit of his lease. As the taxes were paid for the ease and benefit of the plaintiff's testator, his assent thereto will be presumed. The date of this payment is not found, but as the defendant did not lease until 1861, the date of this credit will be fixed at the time, the taxes for 1861 were due and creditable, to be ascertained by the Clerk.

The Clerk of this Court will reform the report in accordance with this opinion, and judgment will be rendered for the sum due after reforming the report.

The plaintiff will pay the cost of this Court.

PER CURIAM. Judgment accordingly.

NICHOLAS H. CHAVASSE and JOSEPH T. JONES *v.* ARMSTEAD JONES, T. N. JONES and wife, and H. T. JONES.

In an action by the plaintiffs, mortgagors, to restrain the defendants from selling the mortgaged premises, and in which the following facts were found by the Court: that the interest, secured to be paid by t e mortgage, was usurious, and the contract, on that account, was void as to all interest, leaving only the principal money due and payable thereon; and that upon the payment by the plaintiffs of such principal, at the time contracted for, they were entitled to a re-conveyance of the mortgaged premises; and it being further found as a fact by the Court that the plaintiffs had made several payments on said principal: *It was held*, that his Honor committed no error in the Court below in ordering an account to be taken to ascertain the amount of the payments made by the plaintiffs; and that the p aintiffs, upon a given time, should pay one-third of the amount r ported to be due on the debt owing the defendants, upon which payment the injunction before granted should be continued; and in case of the failure of the plaintiffs to pay the said one-third at the time appointed, the injunction s ould be dissolved, and the defendants have liberty to sell the mortgage premises, should they so elect to do.

MOTION by defendants, to vacate a restraining order granted at Chambers, heard by his Honor, Judge *Watts*, at the Spring Term, 1875, of the Superior Court of GRANVILLE county.

The following are the facts signed by the counsel for both plaintiffs and defendants and sent up to this Court as a statement of the case and part of the records:

The action was commenced by summons, issued by the plaintiffs, 29th December, 1874, and returnable to Spring Term, 1875. On the 30th of said December, upon application of the plaintiffs, and without notice to the defendants, Judge WATTS, who hearing the complaint and affidavits of the plaintiffs, made an order in the cause, restraining and enjoining the defendants, their agents, attorneys, &c., from further proceeding with the sale of the property mentioned in the complaint, until the further order of the Court. At Spring Term, 1875, of said Court—the same being the appearance term—the de-

fendants, having filed their answer, moved to vacate the said order of injunction, of which notice the plaintiffs had due notice.

Upon the hearing of the motion to vacate said order, the defendants read their answer, and the affidavits and exhibits annexed thereto and prayed to be taken as a part thereof,—and which, not being material to an understanding of the point at this time decided in this Court, need not be set out; and the plaintiffs read their complaint, together with the several affidavits and exhibits thereto annexed.

The plaintiffs admitted, that the allegation in article 5 of their complaint, alleging a payment of three hundred and fifty dollars, February 2d, 1874, was an error; the said sum of three hundred and fifty dollars being included in and helping to make up the payment of five hundred hundred dollars for January 31st, 1874, also mentioned in the said article of their complaint. It was also admitted by both parties, that the aggregate payments which the plaintiffs had made towards the purchase money, was, exclusive of interest, —— dollars; and if this was not applied to the cash payment, and to the principal money specified in the notes mentioned in article 4 of the complaint, the residue of the amount of said cash payment, and the principal money specified in said notes, would amount to —— dollars.

The defendants insisted that said order of injunction ought to be vacated, upon the following grounds, to wit:

(1.) That the action of the plaintiffs is for equitable relief, and that all the facts alleged in their complaint, upon which their equity rests, are sufficiently denied by the answer and disposed of by the evidence.

(2.) That the plaintiffs are mortgagors, seeking to redeem after default and forfeiture. That according to their own showing in their complaint, there was, at and before the commencement of their action, a considerable amount of the purchase or mortgage money due; yet they have not paid the same, nor brought the same into Court, nor offered to do so.

(3.) That it appears from the evidence, that the lands secured by the mortgage were, long before the commencement of this action, transferred to W. W. Jones, administrator *de bonis non* of P. E. A. Jones, deceased, and that this fact was known to plaintiffs before the commencement of this action, as appeared by their letter to said W. W. Jones; and that said lands are and ever since have been held by him, and yet the said W. W. Jones has not been made a party and is not a party to this action.

(4.) That it appears by the evidence that the estate of the said P. E. A. Jones is considerably indebted, and that the plaintiffs are in possession of the mortgaged premises and have been committing waste therein, thus impairing the value of the same as a security for the mortgage money; and that the said W. W. Jones, administrator, ought not to be prejudiced and hindered and delayed in settling up the estate of his said intestate, by being restrained from carrying into effect the power of sale contained in said mortgage.

(5.) That it appears by the evidence that the plaintiffs are unable to pay the residue of the purchase or mortgage money, or any part thereof, without a sale of the mortgaged property and that the said W. W. Jones, to whom the said mortgaged lands were transferred, and the defendants are solvent and responsible and amply able to make good to the plaintiffs the surplus proceeds of the sale, if any, or if any wrongful payment or appropriation of any part of said proceeds, or any damage to the plaintiffs by reason of any misconduct in conducting the sale.

The plaintiffs opposed the motion to vacate said order of injunction, and insisted that the four bonds mentioned in article 14 of their complaint, were executed to secure a further interest of eight per cent. upon the deferred payments for the property specified in said instrument, in article 1 of said complaint mentioned, in addition to the six per cent. provided for in the bonds for said deferred payments; and that the same is included in the bonds mentioned in the said mortgage; that

such interest being usurious, the contract is therefore void as to the entire interest and no interest is recoverable thereon; that if it was necessary, in order to ascertain the sum over due, it should be referred to the Clerk to report, so as to give the plaintiff an opportunity to pay it, and prevent a sale of the mortgaged premises. But that as it was conceded that the aggregate sum of ——— dollars had been paid, and it was a mere matter of substraction to ascertain the true amount, no reference was necessary; and that the plaintiffs were now ready to pay the rateable part of the purchase money, ascertained upon this basis of calculation.

The defendants insisted that the said four bonds or notes mentioned in article 14 of the complaint, were not executed to cover usurious interest, but for a part of the price which was demanded, and which the plaintiffs agreed to pay for the property, upon the terms of the sale at the time it was sold to them, as set out and explained in article 2 of the answer. That this was one of the issues of fact joined between the parties, which they were entitled to have tried by a jury, at the proper time for a trial of the same; that the presiding Judge had no right at any time, without the intervention of a jury and without the consent of the defendants, to try of himself and find the issues joined between the parties, and thereupon to render judgment, finally determining the rights of the parties in the action, and referring it to the Clerk to take an account of what was due on account of the purchase money, with instructiohs not to charge or allow any interest whatever on the principal; and least of all, had the Judge a right to do so at the appearance term, upon the hearing of a motion merely to vacate an injunction.

The defendants further insisted that, even if the contract of sale, in a proper trial of the issues of fact, was found to be usurious in the manner as alleged in the complaint, yet the said W. W. Jones became the *bona fides* purchaser for value, and holder of the said mortgage bonds, and ought not to be affected by such usury; and further, that inasmhch as the plain-

tiffs are the actors, and seeking equitable relief against said contract, the Court proceeding upon the principles of equity, ought not in any event to grant such relief to the plaintiffs, except upon the terms of their paying what is really and *bona fide* due, deducting the usurious interest only.

No application was made by the defendants, for a jury to ascertain any fact in the case, or to the judge to make and submit such issues.

His Honor, hearing the pleadings, affidavits, exhibits, &c., and the arguments of counsel, found the fact to be, that there was usury in the execution of the original bonds for the purchase money; and that such usurious interest was incorporated in the bonds secured by the mortgage; and that such bonds, were as to such usurious interest, and all interest, void, and rendered judgment as follows:

"It appearing to the Court, upon the evidence, that interest at the rate of six *per centum per annum* was stipulated to be paid upon the four several notes given by the plaintiffs for the deferred payments, each in the sum of $2,833.25, and is so expressed on their face, and that the plaintiffs executed at the same date, four other notes to secure a further interest of eight *per centum* thereupon, such interest being payable at one, two, three and four years, and that such interest is usurious, and the contract is thereby void as to the entire interest, and that the same is included in the notes described in the mortgage, and no interest is recoverable thereon.

The Court doth declare and adjudge, that only the principal money, to-wit: $11,333, is legally due under said contract upon the payment whereof, the plaintiffs are entitled to a reconveyance of the mortgaged lands. And it further appearing, that divers payments have been made by the plaintiffs towards such residue of the purchase money, the amount whereof should be ascertained: *It is ordered* and *adjudged*, that it be referred to B. H. Cozart, Clerk of this Court, to ascertain and report the amount of such payments, and the residue remain-

ing unpaid of said purchase money, upon the basis of this judgment and the principle herein declared.

And it is further declared, that upon the coming in of said report, and its confirmation, the plaintiffs pay into Court, within twenty days thereafter, one-third of the sum for the use of the holder of said notes; and upon such payment, the injunction to be continued until the further orders of the Court. And if the plaintiffs fail to make such payment, the injunction be dissolved and the defendants be at liberty to proceed to sell under said mortgage for such residue according to the provisions of said mortgage. And the cause is retained for further proceedings."

From this judgment, the defendants appealed:

Lanier and *Batchelor* for the appellants, submitted.

1. W. W. Jones, who was and is the legal holder of the notes secured by the mortgage is a necessary party to this action, and this fact was known to the plaintiff before action was brought. *Hyman* v. *Devereux*, 63 N. C. Rep. 624, 1 Dan. ch. pr. top page 313, marginal 306.

2. The notes were assigned to W. W. Jones for value and *bona fide*, without any notice of any illegality in the consideration. He is not therefore affected by the usury, if there was usury. *Coar* v. *Spicer*, 65 N. C. Rep. 401.

3. Under the usury law in Revised Code, the original contract is rendered void by usury. Under Battle's Revisal, chapter 114, the contract is not void. The interest only cannot be recovered. *Coar* v. *Spicer*, Ibid.

4. This is a common, not a special injunction, and will be dissolved on denial of the plaintiff's equity by the answer or even where it is made doubtful. N. C. Law Repository, 110.

5. The transaction was not usurious unless there was a completed contract of sale for seventeen thousand dollars cash, so that the plaintiffs owed the seventeen thousand dollars, and the other party was entitled then to receive the same, and the small notes were taken not for an addition to the price but for for-

bearing and giving day of payment of the $17,000 as a debt then due. Chitty on contracts, 778, 779; 2 Parsons on Notes and Bills, 406, 407; *Beete* v. *Bedgood*, 14 E. C. L. 80; Tyler on Usury, 92, 93, 95, cases cited, 114; *Cutter* v. *Wight*, 22 N. Y. Reports, 472; *Williams* v. *Reynold*, 10 Maryland, 57; *Tonsey* v. *Robinson*, 1 Metcalf (Kentucky), 663; *Stephens* v. *Davis*, 3rd Metcalf, (Mass.) 211; in *Mitchell* v. *Guffeth*, 22 Missouri at page 517; *Beete* v. *Bedgood*, 14 E. C. L. 80, is referred to and applied.

6. If the transaction was a *bona fide* sale of the land and not a pretence to avoid the law of usury, the contract is not usurious and could not be usurious unless there was a loan of money or forbearance of a debt then due. See authorities above cited.

7. If the contract should be found to be usurious yet inasmuch as the defendants are not seeking and do not need to seek assistance from the Court to recover interest having a mortgage with power of sale, but the plaintiffs are equitable actors seeking relief against the contract the Court will not give them, except upon the terms of paying the legal principal and interest, deducting only the usurious excess. 1 Story's Equity Jurisprudence, sec. 301; *Ballingar* v. *Edwards*, 4 Iredell's Equity, 449. "And if the plaintiff do not make such offer in his bill the defendant may demur to it and the bill will be dismissed." Ib. 1 Story's Equity, sec. 301.

8. Battle's Revisal, ch. 114, applies only to cases where the obligee is compelled to come into the Court asking affirmative relief. It gives no relief to an obligor who himself becomes an actor in a proceeding seeking relief against usury. Battle's Revisal, ch. 114.

9. On bill in equity to redeem by mortgagor the plaintiffs must bring into Court or offer to do so, the amount due. *Irwin* v. *Davidson*, 3 Iredell's Equity, 311. (See page 321, middle.)

10. Mortgagor, who has not paid amount admitted to be due nor brought it into Court, cannot enjoin execution for the

money nor a recovery in ejectment. *Cunningham* v. *Davis*, Ired. Eq., 5.

N. B. The defendant having a mortgage and power of sale, stands in an analogous situation to a man having a judgment and execution for the mortgage money.

11. The Judge, *at the appearance term*, upon a mere motion to vacate an *ex parte* order of injunction, finds and adjudges thereon all the issues of law and fact, raised by the pleadings, without the consent of the defendant or the intervention of a jury. He leaves nothing to be decided but the amount of payments made by plaintiff, as to which there is a compulsory reference to the clerk. Thus practically deciding the whole case and settling all the rights of the parties *at the appearance term*. To show that the judgment was intended to conclude the rights of the parties, it gives the plaintiffs a time within which to redeem, which it would be error in the Court to do, until there was first a final finding upon the issues relative to the amount due, or in anywise affecting that question, and an ascertainment of the same, and a final adjudication as to the amount due.

12. This action is in the nature of a bill in equity by the mortgagor to redeem, after default and forfeiture. In such a case the Court, if it allows the plaintiff to redeem, fixes a time in which he shall redeem and never enlarges the time. 1 Smith Chancery Practice, 547.

The result of the judgment, if it stands, is equivalent to an enlargement of the time for redemption, if it is not a final judgment, because if it is not a final judgment, then there must be another time fixed for redemption, which is equivalent to an extension of the time, contrary to the rule and practice of a court of equity.

13. The rule of a Court of Equity that the mortgagor should bring into Court the amount of mortgage money admitted to be due, or offer to do so, (and it is the plaintiff's business if he admits anything to be due, to state what is the amount of it,) applies with greater force to our case, because it appears by

the affidavit of W. W. Jones, page —, of the record, that the estate of his father owed about $6,000 ; and if the amount admitted to be due were paid into Court, the same could be applied to the payment of debts of intestate, and to that extent the execution of his trust as administrator expedited.

Smith & Strong and *Attorney General Hargrove*, contra, argued :

I. The original contract executed by the parties provides expressly that the notes to be given for the deferred payments shall bear six per cent. interest from date, and these notes were executed at the same time and outside of the written contract and four more notes taken, which represent eight per cent. additional on the interest bearing principal to the dates at which the respective time payments become due. The only consideration for these last notes must be the *time* given and the forbearance because the *value* and price of the land are fixed in the original contract.

II. Our statute (Battle's Revisal, ch. 114,) is unlike the English Statute, since it declares in positive terms that " the legal rate of interest upon all sums of money where interest is allowed, shall be six per cent. per annum for such time as interest may accrue *and no more*," and it then authorizes a higher rate, not exceeding eight per cent. "for the loan of money," and thus conclusively shows that it was intended to limit the rate of interest in cases where money was not loaned, but where upon some other transaction interest was to be taken, and this interest is restricted, whether there be an express agreement or not, to a rate not exceeding six per cent. Our statute is thus much more comprehensive and embraces all *interest bearing securities* whether for money loaned, or for other consideration.

III. The contract of purchase is a single transaction, and the plaintiffs having made partial payment have a right to have

them applied to the legal debt existing against them, instead of the usurious interest charged, and much of this usurious eight per cent. interest is consolidated with the gross sums stipulated to be paid at future dates as secured in the mortgage.

IV. The evidence shows that the plaintiffs were strangers, just arrived in the United States, and confided the preparation of the various papers to the defendant's brother, and were ignorant of the rate of interest allowed by law, and supposed eight per cent. was authorized by law.

V. The reasons given for putting the transaction in the shape it originally wore, are very unreasonable and unsatisfactory. Why take two sets of notes, one for the deferred payments, bearing interest from date, and the other for the *additional* 8 per cent, and have these latter notes outside of the security afforded by the provision for retaining title until full payment was made, unless it was to cover up the transaction and conceal its true objects? It was quite as easy to re write the contract, or to correct it in the matter of interest, as it was to draw up four new notes to cover the increased interest.

VI. The evidence shows that the land sold for nearly or quite double its real value, and that the plaintiffs confided entirely as to the value of the bond to the representations of the sender and association whose agency was used in affecting the sale, and thus was the sender enabled to charge the enormous interest stipulated to be paid.

VII. The plaintiffs offered to pay in, what upon their statement was due, and the Judge was fully warranted in sustaining the injunction as to the residue claimed until the final hearing and disposition of the case upon the proofs.

VIII. It is true where a party had to seek the aid of a Court of Equity in enforcing a discovery of usury, it was given only on the terms that the applicant pay the debt and legal interest. This doctrine is not applicable to the present law, since the statute compels a discovery in aid of the defence of usury, and no conditions can be imposed in enforcing that obligation. The defence now stands upon independent ground,

and the plaintiffs are entitled to the discovery in relief of themselves from the entire interest.

IX. Supposing, however, that the matter is left in reasonable doubt, as the plaintiffs may lose everything by a sale, and the defendants have, upon their showing, ample security for the residue of the purchase money, the Court will, to prevent irreparable mischief, prevent the sacrifice and retain control of the property until the matters in controversy can be fully settled upon the hearing.

X. And more imperative is that obligation in the face of the defendants' claim to sell and pay the whole of the debts mentioned in the *mortgage*, in which are included large amounts of interest, put them upon the interest as to time, but which are to be immediately collected without abatement, if a sale takes place. The very claims of defendant is itself strong proof of the character of the transaction, which has culminated in such a mortgage and with such provisions.

XI. The plaintiffs submit that whatever sum may be due, and which the Court may require them to pay, they have a right, on such payment, to have the sale enjoined and the mortgagee restrained from enforcing as hard and harsh a bargain as defendants insist on.

The payments made are set out in the answer at page 24, and besides the first cash payment are in the aggregate $40.22, a total of $9,688.66, having, if applied to the principal only, a residue of $7,311.33.

RODMAN, J. The only question presented to this Court is upon the appeal of defendants from the interlocutory order of the Judge enjoining the sale of the land by the defendant, J. T. Jones, on compliance by the plaintiffs with certain conditions expressed in the order. We have carefully read and considered the whole record. It appears to us that it might prejudice a future trial of the matters in issue between the parties if we should undertake to discuss the probability of the dis-

puted facts with the view of giving a reason for the conclusion we have come to. For that reason we refrain from doing so. It is impossible also to discuss any of the questions of law which were made at the bar, without assuming some certain state of facts. These will properly come up for consideration upon the hearing in the Court below.

We see no error in the order appealed from. But as the time allowed by that order for the payment of the required sum by the plaintiffs, has already expired, the plaintiffs are allowed twenty days from a service on them of a copy of the order of this Court within which to make the payment. Unless the counsel for the parties can agree upon the amount required to be paid by the order of the Judge below, it will be referred to the Clerk of this Court to ascertain it, and the amount to be paid will be inserted in the order. In all other respects the order of the Judge below is affirmed. The plaintiffs will recover costs in this Court.

Judgment below modified, as above stated, and otherwise affirmed. Let this opinion be certified. The Clerk will issue a copy of the order in this case to be served on the plaintiffs and returned to the Superior Court of Granville.

PER CURIAM. Judgment accordingly.

ALFRED ROWLAND and wife and others *v.* JOSEPH THOMPSON and BERRY GODWIN.

A Court of Equity, as the guardian of infants, not only has the power, but should, in the exercise of its discretion, authorize and confirm a private sale of the land of infants: *Therefore*, where T, a guardian, in accordance with the order of the Court, exposed to sale at public outcry the land of his wards, and there was no sale for want of a bid at a fair price, and the same land was subsequently sold privately, upon terms approved by the Court: *It was held*,

(1.) That G, the purchaser at such private sale, acquired a good title to the land.

(2.) That where the notes given for the purchase of the land were paid in Confederate money, in April, 1863, the purchaser was only entitled to credit as against the wards, for the value of the Confederate currency.

(3.) That the sale will not be set aside, and a trust declared in favor of the wards, subject to a lien in favor of the defendant for the repayment of the purchase money actually paid.

A payment by a debtor, in Confederate money in April, 1863, of notes due a guardian, one and two years before the notes fell due, can be considered only a payment of the value of the Confederate money at the time of payment; as against the wards, the real creditors.

This was a CIVIL ACTION, tried before *Kerr, J.* at the Spring Term, 1875, of ROBESON Superior Court.

This action was brought by the *feme* plaintiffs, who were the minor children of William Blount, deceased, and his heirs at law, and their husbands, and Alfred Roland as guardian of Penelope Blount, one of the minor children, a *feme* sole against Joseph Thompson, the guardian of said minor children and the defendant Berry Godwin for the purpose:

1. Of cancelling a deed made by R. S. French, Clerk and Master in Equity, in accordance with an order of the Court of Equity of Robeson county, which order the plaintiffs insist was not authorized by law;

2. To have the defendant Berry Godwin declared a trustee of the lands conveyed by said deed, for the benefit of the

plaintiffs and to take an account of the rents and profits of the same.

3. To have the said lands sold and the proceeds of the sale paid to the plaintiffs after paying to defendant Godwin the sum of one thousand two hundred and eighty-eight dollars and eighty-eight cents, the value of the Confederate money paid by him for said land, and for further relief.

The defendant, Thompson, filed no answer to the complaint.

All the facts necessary to an understanding of the case are stated in the report of Du Brutz Cutlar, to whom it was referred. The report is substantially as follows:

William Blount died intestate in the year 1857, leaving a large real and personal estate. Charity Blount, his widow, and the defendant Joseph Thompson, were appointed administrators upon his estate and entered upon their duties before the commencement of this action. Afterwards and before the commencement of this action the said Joseph Thompson was appointed by the proper Court, guardian of the minor children of William Blount, who were Winnifred, and the plaintiffs Susan R. Amanda M. and Penelope T. Blount, Winnifred having arrived at full age and intermarried with one William H. Graham, had jointly with her husband a full settlement with her guardian. Susan R., intermarried with Alfred Roland, the plaintiff. Amanda M. intermarried with Thomas A. Norment the plaintiff.

On the 13th of February, 1872, Joseph Thompson was removed from the guardianship of the said named Penelope, by an order of the Probate Court of Robeson county, and on the 13th day of the same month Alfred Rowland was appointed her guardian by the said Court.

Joseph Thompson, as guardian of the said Susan R. Amanda M. and Penelope S., and Charity Blount filed a petition at the Fall Term, 1857, of the Court of Equity of Robeson county to sell the land belonging to William Blount's estate. An order of said Court was obtained directing the Clerk and Master to sell the said land upon a credit of twelve months,

after due advertisement according to law and report to the next term. The Clerk and Master made report to the Spring Term, 1858, of a sale made by him, which sale was set aside and a resale ordered by the Court upon the terms that twelve months credit was to be given, and that he take bond with approved security from the purchaser and that he report to the next term. At the Fall Term, 1858, of the Court the Clerk and Master made report again, whereupon the Court made the following order :

In this case it appearing to the Court by the report of the Clerk and Master that the lands mentioned in the petition have several times been offered for sale at public auction on the terms mentioned in the order of sale, and no person appearing who was willing to bid such sum as the Clerk and Master deems a full and fair price for the said lands, and Berry Godwin having proposed in writing to give for the said lands in the petition mentioned, estimated to contain four thousand three hundred and seven acres, and whether the same contain the said quantity or less, the price of eighteen thousand dollars upon the following terms: At twelve months from the first day of January, 1859, without interest, and then at five equal annual instalments from the 1st day of January, 1860, which proposal of the said Berry Godwin, has been submitted to and approved by the Clerk and Master, *it is therefore ordered, adjudged* and *decreed*, that the Clerk and Master accept the said proposal, and that on the said Berry Godwin executing bonds with good and sufficient security, to be approved by Joseph Thompson as guardian, for said sums, payable at the time and in the proportion above mentioned, the Clerk and Master execute to him a deed conveying to him the said lands in fee simple, and that he be allowed two hundred dollars for his said sale and deed. It is further ordered that the Clerk and Master deliver to Joseph Thompson, guardian, all the moneys and bonds which he has received of the said Berry Godwin, one-third to be held by the said Joseph Thompson in trust for the said Charity Blount for life, paying her the in-

terest thereof annually, remainder to Winnifred Blount, Susan Blount, Amanda Blount and Penelope Blount, his wards, and that said Joseph Thompson hold the residue of said money and bonds in trust for his said wards, and that the said Clerk and Master take said Joseph Thompson's receipt.

The said Berry Godwin tendered to the Clerk and Master a note for eight thousand dollars, signed by C. B. Sanders and endorsed by said Godwin, which was received as cash, and in addition to the Sanders note paid a sum of money in cash, which together with the said note and interest thereon, in the aggregate amounted to $9,328, and for the residue of the purchase money gave his three notes, endorsed by Simon Godwin and Hinnant Faulk, as follows: One for twenty-six hundred and seventy-two dollars, due January 1st, 1863, and two for three thousand dollars each, due respectively January 1st, 1864, and January 1st, 1865. Said notes and cash were approved and accepted by said Joseph Thompson, turned over to him and his receipt for the same taken. At the time the Clerk and Master made title to Berry Godwin by deed dated 1st November, 1858, the Sanders note was paid. The three remaining notes, constituting the balance of the purchase money, were paid and taken up by the said Godwin in Confederate currency, on the 18th of April, 1863, except the sum of six hundred dollars, for which he gave his due bill, and paid the same in July, 1863. The principal and interest of said three notes on the 18th day of April, 1863, amounted to eleven thousand and six hundred dollars. The money was paid at the request of Thompson, who desired it to be paid, as he said, for the reason that he had a good opportunity of investing it. At the time of said payment Thompson was regarded generally as a prudent business man, and at that time Confederate money was generally received by prudent business men in Robeson county in payment of *ante* war debts. There was no evidence that any person in Robeson county, acting as guardian, received Confederate currency in payment of well secured *ante* war debts before due, and released securities, as

late as April, 1863. The value of eleven thousand dollars Confederate currency, paid on the 18th day of April, 1863, was three thousand six hundred and sixty-six dollars and sixty-six cents.

On the 25th day of November, 1872, divers actions were pending in the Superior Court of Robeson county, in which the plaintiffs in this action were plaintiffs and the defendant Joseph Thompson, and the sureties on his guardian bond, and others, were defendants, which actions are particularly specified in the compromise hereinafter mentioned. On the 25th day of November, 1872, the plaintiffs and the defendant Thompson, by their respective attorneys, who were thereunto specially authorized and empowered by the parties, entered into a written compromise of the said actions, a copy of which is hereto annexed. In the first, second and third actions in the compromise, the plaintiffs in this action sought to have from the defendant Thompson a settlement of his account as guardian of the plaintiffs, Susan, Amanda and Penelope, including his transactions with the defendant Godwin and his liability to them for the price of the land, sold under a decree of the Court of Equity and bought by Godwin as aforesaid, and to recover from him and his sureties whatever amount might be found due on taking the account. The seven hundred acres of the Willis P. Moore land, mentioned in the compromise, in article 6th, had been conveyed by Moore to the defendant Thompson, by deed dated 6th September, 1866, and by said Thompson conveyed to Needham J. Thompson in trust for Willis P. Moore's wife and children by deed dated 24th April, 1867. These conveyances were known to the plaintiffs at the time of making said compromise. The fourth action mentioned in said compromise was brought to set aside the conveyance to Needham J. Thompson and have a trust in said land declared in favor of the plaintiffs, on the ground that it had been purchased by the defendant Thompson, their guardian, with their money, and that Needham J. Thompson and

his *cestuis que trusts* were not purchasers for value and therefore stood in the shoes of their grantor, Joseph Thompson.

At the hearing it was admitted by the plaintiffs, and upon such admission I find the fact, that all the terms of the compromise were fully executed and performed by the defendant Thompson before the commencement of this action, with the exception hereinafter stated. Thompson had paid to the persons all the money therein agreed to be paid, had surrendered to the plaintiffs all the notes, bonds and all other credits held by him as guardian, had submitted to proper decrees in the said pending actions, with the exceptions hereinafter mentioned, and had put the plaintiffs in possession of all the lands mentioned in said compromise, except the seven hundred acres before mentioned.

The exceptions above mentioned, being the only points in which the plaintiffs contended that the said compromise had not been fully performed by Thompson, are as follows:

1. That no proper deed had been executed by defendant Thompson to plaintiffs for the seven hundred acres of the Willis P. Moore land.

2. That no decree had been made in the fourth action in the said compromise mentioned, that the seven hundred acres of land should be held by the defendant Thompson as guardian of and in trust for the plaintiffs, Susan, Amanda and Penelope.

Upon these points I find the following facts:

1. That defendant Thompson tendered to the plaintiffs, Alfred Rowland and Thomas A. Norment, a quit claim deed from himself to the plaintiffs, Susan, Amanda and Penelope, for the seven hundred acres of the Willis P. Moore land, which the said Rowland and Norment declined to accept in the absence of their attorney, and until their attorney should see it and advise that it was their duty to accept it, and that it was drawn in accordance with the compromise. The deed was accordingly left with Rowland for that purpose, and afterwards the plaintiffs' attorney, upon examinatiun of said deed, advised that it was not drawn in accordance with the require-

ments of the compromise, and it was returned to Joseph Thompson and no other deed was ever executed or tendered by Thompson. Said deed was drawn by Thompson's attorney without consultation or advice of the plaintiffs' attorney.

2. That no such decree as above mentioned was entered in the fourth action mentioned in the compromise.

Upon the foregoing facts I declare the following conclusions of law:

1. The defendant Thompson having filed no answer, the plaintiffs are entitled to judgment against him for want of an answer, that an account be taken to ascertain what is due from him to the plaintiffs, by reason of the matters stated in the complaint.

2. As to the first defence set up in the answer of the defendant Godwin, that the payments made by him in Confederate money, to the defendant Thompson, on the 18th day of April, 1863, were in law a satisfaction and extinguishment of the debt owed by him for the purchase of the land of the plaintiffs, that the plaintiffs have no right of action against the said Godwin, and that this action should be dismissed as to him, at the cost of the plaintiffs.

3. The conclusion of law last declared being decisive of the action as against the defendant, Godwin, I do not deem it important to declare any conclusion of law upon the facts stated in relation to the second defense set up in the answer of the defendant Godwin.

The following is a copy of the compromise hereinbefore referred to:

It is agreed between Alfred Rowland and wife, and Thomas A. Norment and wife, and Alfred Rowland as guardian of Penelope Blount, and David Townsend and wife, on the one side, and Joseph Thompson, guardian of Susan, wife of Alfred Rowland and Amanda, wife of Thomas Norment and for Penelope Blount, and the said Joseph Thompson trustee for Charity, wife of David Townsend, that the actions now pending in the county of Robeson:

1. Between Alfred Rowland and wife, against Joseph Thompson, for an account.

2. Thomas Norment and wife, against Joseph Thompson and others, on his guardian bond.

3. Penelope Blount, by her guardian Alfred Rowland, against Joseph Thompson, guardian and others, on his guardian bond.

4. Alfred Rowland and wife, Thomas Norment and wife, and Penelope Blount, by her guardian against Joseph Thompson, Needham J. Thompson and Willis P. Moore and wife, and others.

5. The same parties against Joseph Thompson and W. B. Thompson.

6. The same parties against Joseph Thompson and Moore T. Sealy.

7. David Townsend and wife, against Joseph Thompson, trustee, for wife of said David Townsend.

8. David Townsend against Joseph Thompson, guardian for Susan, Amanda and Penelope Blount.

(1.) That the said Joseph Thompson is indebted to Susan, wife of Alfred Rowland, in the sum of one thousand dollars.

(2.) To Amanda, wife of Thomas Norment, in the sum of one thousand dollars.

(3.) To Penelope Blount, in the sum of one thousand dollars.

(4.) To David Townsend and wife in full satisfaction of all claims against said Joseph Thompson as guardian and as trustee for the wife of the said David Townsend, in the sum of twenty-five hundred dollars.

(5.) That Joseph Thompson shall pay of the costs incurred and to be incurred in said actions, the sum of two hundred dollars to John W. Ellis as Commissioner for stating the account in the said actions of Alfred Rowland and wife against said Joseph Thompson, guardian.

(6.) That one undivided third of the tract of land known as the Shelby Bay land, the tract of land known as the Moore T. Seely tract, which was conveyed by Moore T. Seeley and wife

to Joseph Thompson, containing five hundred acres, and the tract of land known as the William B. Thompson land, which was conveyed by R. McMillan, sheriff, to said Joseph Thompson, containing about seven hundred acres, and the Willis P. Moore land, which was conveyed by Willis P. Moore to said Joseph Thompson, containing seven hundred acres (and it is expressly agreed that that tract heretofore conveyed by said Joseph Thompson to William H. Graham, is expressly excluded) shall be declared, adjudged and decreed to be held by Joseph Thompson, as guardian for said Susan, Amanda and Penelope, children of William Blount, deceased.

(7.) That he will surrender to his said wards all the notes, bonds of individuals, and Cumberland county and State bonds, and all other credits which were held by him as guardian of said Susan, Amanda, and Penelope.

(8.) That he will execute and deliver quit-claim deeds of conveyance to the said tracts of land, hereinbefore mentioned, as he may be directed by the decree of the Court, or as he may be requested by the counsel and attorney at law of the said Susan, Amanda and Penelope.

(9.) That he will request R. S. French, trustee, in a deed from Thomas J. Morrisey to said French to secure Joseph Thompson for certain money loaned to said Morrisey by said Thompson as guardian aforesaid, to sell the said tract of land in said deed mentioned.

(10.) The said Alfred Rowland and wife, Thomas Norment and wife and Alfred Rowland, guardian for Penelope Blount, will pay all other costs incurred or to be incurred in said actions except the sum of two hundred dollars, to be paid by said Joseph Thompson as aforesaid.

(11.) The said Thomas Norment and wife will pay an account held by Pope and McLeod, amounting to about four hundred and fifty dollars, against said Joseph Thompson as guardian.

(12.) When this compromise is fully effected according to the foregoing terms, and the said Joseph Thompson has fully

paid and discharged the said sums respectively, the said Joseph Thompson and his sureties, upon the bond given by him as guardian as aforesaid, and said Joseph Thompson as trustee, shall be discharged and released from all obligations incurred by them as sureties on said guardian bond.

(13.) This compromise shall in no way operate to discharge or release Thomas J. Morrisey or Berry Godwin from any obligation they may be under to said Susan, Amanda or Penelope, the children of said William Blount.

(Signed) R. S. FRENCH,
Attorney for JOSEPH THOMPSON.

(Signed) ROBERT STRANGE,
for plaintiffs in above named cases.

It was admitted by the plaintiffs, for the purposes of this suit only, that the compromise had been performed in full except as to the following particulars:

1. That Joseph Thompson had not executed nor tendered a proper deed for the seven hundred acres of the Willis P. Moore land.

2. That no decree has been made declaring or decreeing that Joseph Thompson holds said land as guardian of the *feme* plaintiffs, in accordance with article six, of the compromise.

The plaintiffs further admit that the $5,500 mentioned in the compromise, had been paid to the parties therein named, as directed therein, and that the notes, bonds of individuals, Cumberland county and State bonds, have been assigned and delivered, but no other credits have been so transferred.

The plaintiffs further admitted that the money was paid and the three notes given for the land, and that the Confederate money was paid and the three notes taken up as alleged by defendant, but they do not admit that it was paid at the time stated.

For the purposes of this suit the defendants withdrew the allegation "that the plaintiffs, in a settlement with defendant

Thompson as their guardian, knowingly received from him the securities, in which the money so paid, was invested by him. Defendants further admitted the release of dower alleged in the complaint."

To the report of the referee, the plaintiffs filed the following exceptions:

1. Plaintiffs except to the second conclusion of law, to-wit, hat the payments made by Berry Godwin, in Confederate money, to the defendant, Thompson, on the 18th day of April, A. D. 1863, and in July, 1863, as stated by him, were in law a satisfaction and extinguishment of the debt owed by him for the purchase of the lands, and that the plaintiffs had no right of action against said Godwin, and that this action should be dismissed as to him at the cost of the plaintiff.

2. That he has failed to report any conclusion of law touching the irregularities of the sale of the plaintiffs' land, and has failed to report that the same was unauthorized by law, and conveyed no title to the defendant, Godwin, and insists that the facts found by the referee entitles the plaintiffs to the relief prayed for in the complaint.

The case coming on to be heard, his Honor overruled the exceptions of the plaintiff and confirmed the report of the referee.

From this judgment the plaintiffs appealed.

W. McL. McKay, *Leitch*, *Strange* and *W. F. French*, for the appellants.

N. A. McLean, contra.

PEARSON, C. J. 1. The position taken by the plaintiffs that the deed of the Clerk and Master is void because the Court had no power to order it to be executed, and consequently that the plaintiffs are entitled to judgment for the land and mesne profits, cannot be sustained.

It is most usual for sales made by the order of a Court of Equity to be public sales, but the Court, as the guardian of

infants, has full power in regard to the mode of sale, and under special circumstances not only has power, but should, in the exercise of its discretion, authorize and confirm what is called a private sale; that is, a sale without advertisement and public outcry.

The question, has a Court of Equity power to order the sale of the land of an infant to be made either at public or private sale, is not an open one; it is settled. See the cases in Battle's Digest.

We will add, assuming that it was for the interest of the wards that the land should be sold, and this matter was adjudicated by the order that the Clerk and Master sell at public sale, we think his Honor used a prudent discretion, after no sufficient bid could be obtained at public outcry, in accepting the bid of defendant Goodwin and in making an order confirming the *private* sale.

The usual modes of selling by order of Court or by executors and administrators is after advertisement and public outcry or vendue, i. e., auction, as the traders term it; but if an executor or administrator sells a horse to A at private sale, he acquires title against the world. For the executor or administrator had the title and the power to sell. The only difference is, that if it be a public sale, the executor or administrator is only chargeable with the price obtained. If it be a private sale, the executor or administrator is chargeable with the full value. The statutes which require advertisement and a public sale being considered directory only, and not affecting the substance.

2. The position taken by the plaintiffs, that "the deed to Godwin, by reason of a departure from the terms of the order, will be treated as a lien only for the sums he has actually paid, leaving the equitable estate in the plaintiffs, subject to re-payment to Goodwin of the money paid by him, with interest, charging him in account with the rents and profits which he has realized from the land," cannot be sustained.

There was no material variance between the terms of the order and the mode in which the sale was completed. The $8,000 bond of Sanders endorsed by Godwin, and the cash paid was a fair equivalent for the first two instalments, and it is admitted this amount has been accounted for, so there was no loss to the fund in that respect, and the three notes taken for the balance were in strict accordance with the order.

3. The position taken by the plaintiffs, that these three notes have never been paid by Godwin except to the amount of the value of the Confederate notes received by Thompson, has force in it. As respects the first note which was due at the time of payment, we can see no reason why that shall not be treated as satisfied in full. It was due, the creditor had a right then and there to demand payment, and if refused, to enforce payment by action. So it is the ordinary case of a creditor who accepts Confederate notes in satisfaction of the debt.

But as respects the other two notes, the matter involves different considerations not being due for one and two years, the debtor had no right then and there to pay them, and the creditor had no right then and there to demand payment and could not have enforced payment by action, so the payment was a voluntary one, and however it might be, as against Thompson who accepted the Confederate notes at par; as against the wards, who were the real creditors, the debtor cannot in conscience insist upon its being a payment, except to the amount of the value of the Confederate notes at the time he handed them over to the guardian, and has no right to require that he should be credited except for the value of the notes which he parted with. It is certain he has not paid for the land. Suppose he had not handed the Confederate notes to the guardian he would have been bound for the full amount of his two bonds, and we think he is getting off on fair terms if he is now permitted to pay the price of the land and keep it, taking credit for the value of the Confederate notes, and rendering no account for the rents and profits received by him, before the land was paid for in full.

4. The fact that the plaintiffs, by a compromise among other things took from their guardian the Confederate bonds, into which he had converted the Confederate treasury notes, which he had received of Godwin after these Confederate bonds had become wholly worthless and not worth the paper on which printed, does not affect the equity of the plaintiffs. It is admitted that by the compromise the plaintiffs took no benefit by reason of the two bonds now under consideration, and by way of greater caution it is expressed that the compromise shall in no wise discharge their claim on Godwin for the part of his three notes remaining unsatisfied.

There will be a reference to the Clerk of this Court to fix the value of the Confederate treasury notes paid on the two last notes of Godwin, and the plaintiffs may then move for judgment. In stating the account the Clerk will charge Godwin with simple interest only; as against their guardian, the wards are entitled to compound interest, and if the notes had been held by the guardian, Godwin would have been liable for compound interest. Bat. Rev. ch. 63, sec. 29.

The guardian did not hold the notes but accepted Confederate treasury notes in payment and surrendered the notes to Godwin. After that, Godwin was not a debtor of the infants or their guardian, by bond or note. But the infants had an equity to follow the land in his hands for the unpaid balance of the price.

We see no ground under the statute to allow this equity to draw compound interest. The infants must be content with simple interest as against Godwin and look to their guardian for compensation in that respect.

Error.

PER CURIAM. Judgment accordingly.

GREGORY, GALLOWAY & CO. *v.* J. J. HERRING.

In an action brought against A to recover the value of a horse sold by the plaintiff to B, the son of A, it was in evidence that the plaintiff had sold the horse to B, who lived upon and cultivated a portion of the defendant's land, and that on one occasion defendant was seen riding with B in a buggy drawn by the horse sold by the plaintiff to B. There was no evidence as to B being under full age, nor connecting A with the transaction. Upon a demurrer to the evidence: *It was held*, that plaintiff was not entitled to recover.

CIVIL ACTION, originally commenced in a Magistrate's Court and carried upon appeal to the Superior Court of LENOIR county, where it was tried before *Seymour*, *J.*, and a jury, at Spring Term, 1875.

The action was brought by the plaintiffs to recover one hundred and thirty dollars, a balance due on the price of a horse sold by them to one Joshua Herring, a son of the defendant.

A. J. Galloway, one of the plaintiffs, testified: I sold a horse, the property of the plaintiffs, to Joshua Herring in the fall of 1873. He wanted time to pay for the horse. Joshua is a son of the defendant. The price of the horse was $135. Joshua paid $5 on the day of the sale. I did not know he was under twenty one years of age. I did not know he was acting as his father's agent. I charged the price of the horse to Joshua. He was to pay in cotton in two weeks. In about two weeks he brought cotton to town, but sold it to other parties, and did not pay for the horse.

Council S. Wooten, a witness for the plaintiffs, testified: I live near the defendant. Joshua was living with the defendant and has carried on a farm on his father's land. I went out with Joshua at his request to look at his crop. He had nothing separate from his father. He worked the same land. I saw Joshua driving the horse. He called a part of the crop his; that was on his father's land.

J. H. Jolly, a witness for the plaintiffs, testsfied, that defendant had said on two or three occasions that the beast was a likely beast and well worth the money; his son Joshua had promised to pay for it, and if it had lived it would have been paid for. Defendant said Joshua had bought the beast. At the time of the conversation Joshua was not doing much for his father.

John Parker testified, that Joshua employed him on defendant's plantation in the spring of 1873, to ditch, and the old man, the defendant, gave directions as to how the ditch should be cut.

J. H. Hardy testified: He sold timber in the fall of 1873 to Joshua. After the purchase the defendant came with Joshua for the timber, and said Joshua had made a good bargain. Joshua said he was buying the timber for tenant houses. Defendant's team hauled the timber.

J. S. Wooten testified: I saw the defendant and his son Joshua driving the horse in controversy in a buggy at La Grange, not long after the sale of the horse by the plaintiffs. Joshua has lived with his father all the while. I saw Joshua sell corn at La Grange in the winter of 1874. Joshua worked on defendant's plantation for some years past, until 1875. I have heard Joshua making contracts with hands to work on the defendant's plantation. I think I saw Joshua selling seed cotton in the winter of 1873.

The defendant demurred to the evidence and insisted that there was no evidence of a previous authorization or a subsequent ratification of the purchase by Joshua as the agent of defendant.

His Honor instructed the jury that it was for them to say from the evidence whether or not the defendant authorized or ratified the sale.

The jury rendered a verdict in favor of the plaintiffs, and his Honor gave judgment accordingly. From this judgment the defendant appealed.

Smith & Strong, for the appellant.
No counsel in this Court *contra*.

SETTLE, J. This action was brought to recover the price of a horse sold by the plaintiffs to a son of the defendant. The plaintiffs introduced several witnesses who testified to the many facts set forth in the record, and the defendant demurred to the evidence.

We are, therefore, called upon to decide whether or not there was any evidence which tended to prove that the defendant authorized his son to purchase the horse, or that he afterwards ratified the same.

Several witnesses proved that the son lived with the father, but no one testified positively that the son was under twenty-one years of age. The only allusion to his age is made by Galloway, one of the plaintiffs, who says he did not know that the son was under twenty-one years of age and did not know that he was acting as his father's agent; that he charged the price of the horse to the son, who was to pay it in cotton in two weeks. For aught that appears upon the record, the son was of full age. But assuming that he was not; there is nothing in the evidence which connects the defendant with the transaction in the remotest degree, either before or after the sale of the horse to the son.

We will not repeat the evidence, as it will be set forth in full by the reporter. The strongest circumstance proven against the defendant was that he was seen, on one occasion, riding with his son while driving the horse, but surely that cannot be construed into a ratification of the purchase.

If fathers are to be held responsible for the acts of their sons who pass for adults, on such evidence as is here presented, they will have but little protection against the whims of young America and the chicanery of old speculators. "Whether there be any evidence is for the Judge; whether sufficient evidence is for the jury."

We are of opinion that there was no evidence in this case,

not even a scintilla, which tended to establish the responsibility of the defendant. The authorities on this subject have been recently collected and discussed in the opinion of this Court, and the dissenting opinion of Justice BYNUM in the case of *Witkowsky & Rintels* v. *Wasson*, 71 N. C. Rep., 459. A further discussion of it is unnecessary.

Let the judgment of the Superior Court be reversed and judgment entered here for the defendant.

PER CURIAM. Judgment reversed.

THE NAVASSA GUANO COMPANY OF WILMINGTON *v.* WILLIAM H. WILLARD.

Where an action was instituted, and judgment obtained against A B & Co., upon a bill of exchange, and C, who was a secret partner in the firm was not joined as defendant, and the plaintiff afterwards, and more than three years after the cause of action accrued, discovered that C was a partner, and instituted an action against him: *Held*, that the action was barred by the statute of limitations.

CIVIL ACTION, to recover the value of a bill of exchange, tried before *McKay*, *J.*, at Spring Term, 1875, ORANGE Superior Court.

All facts necessary to an understanding of the case, as decided, are stated in the opinion of the Court.

There was a verdict and judgment in favor of the plaintiff, and thereupon the defendant appealed.

PEARSON, C. J. It is not necessary for this Court to decide the questions of evidence, made on the trial, or the question of jurisdiction made by the answer, for assuming, as found by the jury, the fact to be that the defendant was a partner in the firm of "Morris & Son," we are of opinion that the action was

barred by the statute of limitations, which is relied upon as a defence.

The statute of limitations began to run at the date of the payment, which was more than three years before the commencement of this action, and is a bar unless the plaintiff can repel it, which the plaintiff attempts to do, by taking the position that this is not an original action, but a proceeding under C. C. P., sec. 318.

Upon its face, this is an original action against one who has been discovered to have been a member of the firm as a *secret partner.*

If it be an original action, the Statute Limitation is a bar. Taking this to be a proceeding under C. C. P. sec. 318, which we do (on the assumption that the counsel of plaintiff must have known that an original action could not have been brought in the county of Orange, and that it was barred by the statute of limitations) we are of opinion that the plaintiff does not repel the bar of the statute by force of the provisions of C. C. P. 818, and the other sections bearing upon the subject; for the case does not come under any of the provisions of C. C. P.

Sec. 318, provides that "when a judgment shall be recovered against one or more of several persons jointly indebted upon a contract by proceeding as provided in sec. 87, &c."

Sec. 87 provides, "when the action is against two or more defendants, and the summons is served on one or more of them, but not on all of them the plaintiff may proceed as follows," &c.

Our case does not come under this section, for it applies to actions brought against joint contractors or partners. The original action was not brought against Willard as a joint contractor or a partner, although he is named in the summons; the complaint in this action sets out, "the summons in the first action was not served on W. H. Willard, because at that time plaintiff was not informed that he was a member of the firm, as now alleged; and information to this effect has come

to the plaintiff within the last twelve months," and the *complaint in the first action* avers "that the firm of R. F. Morris & Son consists of R. F. Morris and demands judgment against R. F. Morris, and the firm of R. F. Morris & Son" makes no allegation that Willard was a partner, and demands no judgment against property in which he had any interest. So the case must be reviewed as if Willard had not been named in the summons, and the question is, does the C. C. P. take from him the benefit of the statute limitation, it being afterwards discovered that he was a partner of Morris?

Sec. 318, refers to sec. 87. That section only applies to an action against two or more defendants and the summons is not served on all; here it is admitted the action was not against Willard. The case then does not fall under the general words of this section—it does not fall under paragraph 1 of the section that contemplates an action against two or more defendants as jointly indebted. The summons not served on one, and authorizes judgment against him, "so far only that it may be enforced against the joint property of all." This does not cover our case—paragraphs 2 and 3 have no bearing, and the matter turns upon paragraph 4.

This was intended to prevent a partner, who was not served with the summons from defeating an action against him on the ground that judgment had already been taken against his co-partner, and so the cause of action was merged in the judgment, and authorizes an action against him separately, provided the first judgment remains unsatisfied. This is our case; Willard does not rely upon a merger of the cause of action by the judgment against Morris, and puts himself on the ground that being now sued separately, the action is barred by the statute of limitations, and that he is not to be prejudiced by what had been done between the plaintiff and Morris; for he was not a party to the "*res gestæ*," and being now called into Court for the first time, claims the protection of the statute against a State demand.

Feeling the force of this position the counsel for plaintiff

fell back on sec. 322. This does not serve his purpose, for it is apparent by perusal of sections 319, 320, 321 and 322, that these sections provide only for cases where a *judgment debtor* dies, and his administrator, heirs or devises, are to be charged.

Error. Judgment reversed. Judgment for defendant to go without day and recover costs.

PER CURIAM. Judgment reversed.

C. J. GREEN *v.* THE NORTH CAROLINA RAILROAD COMPANY.

Where the statute of limitations is relied upon as a defence, it must be pleaded. The objection cannot be taken by demurrer.

In an action to recover the value of certain wood sold by the plaintiff to the defendant, the wood at the time of the sale standing upon the land of the plaintiff, it was in evidence that the wood was sold by the cord: *Held*, that the plaintiff was entitled to recover, and that no memorandum of the contract in writing was necessary, because, when cut and corded, the wood became personal property.

(*Lippard* v. *Troutman*, 72 N. C. Rep. 551; *Mizzell* v. *Burnett*, 4 Jones 249, cited and approved.)

CIVIL ACTION, tried before *Henry, J.*, at January (Special) Term, 1875, WAKE Superior Court.

The plaintiff alleged that during the years 1863–'64–'65, and previous to the 1st of May, 1866, at the request of the defendant he delivered for the use of the defendant twenty-four hundred cords of pine wood, standing in the woods, which defendant cut and carried away. Defendant agreed to pay whatever the wood was worth, and that it was worth fifty cents per cord. Defendant has paid nothing for the wood, and demand of payment has been made.

The defendant demurred to the complaint, and the Court

sustained the demurrer. From the judgment of his Honor sustaining the demurrer, the plaintiff appealed.

All other facts necessary to an understanding of the case, are stated in the opinion of the Court.

Battle & Son, for the appellant.
Smith & Strong and *Batchelor*, contra.

SETTLE, J. The defendant assigns two causes of demurrer to the plaintiff's complaint:

1st. "That it appears upon the face of the complaint that the cause of action on which the plaintiff brings his said action, did not accrue to plaintiff within three years next preceding the commencement of said action."

The contract under which the defendant took the wood from the land of the plaintiff was made as early as 1863. The statute of limitations did not commence to run against such contracts until the 1st day of January, 1870, and this action was commenced on the 31st day of December, 1870. So the action is in time by one day.

But the defendant relies upon the act of 1866–'67, chap. 18, to take this case out of the general rule established by the act of the same session, chap. 17, which suspended the statute of limitations until January, 1870.

This Court had occasion at the last term to consider this question, when it was held that the provision of chap. 17, suspending the statute of limitations, applied to all suits in equity, as well as to actions at law, where the suit or cause of action is founded on any contract or obligation entered into prior to the first day of May, 1865; and that the Courts were open after that date, and up to the 1st day of January, 1870, *only* for such suits and causes of action as are founded on contracts or obligations entered into since the 1st day of May, 1865. *State ex rel Lippard* v. *Troutman*, 72 N. C., 551. So this action was commenced within the time limited by statute, but

had it been otherwise the objection could not have been taken by demurrer.

The only pleading on the part of the defendant is either by demurrer or answer, and the causes for which he may demur to the complaint are specified in Bat. Rev., chap. 17, sec. 95, and the statute of limitations is not amongst them, but by reference to section 16 of the same chapter, we find "the objection that the action was not commenced within the time limited can only be taken by answer."

2. "That the contract on which the plaintiff brings his action is a contract to purchase real property, and that no memorandum thereof was put in writing and signed by the defendant, nor by any one by him thereto lawfully authorized."

It is conceded that an executory contract to sell growing trees is within the statute of frauds. *Mizell* v. *Burnett*, 4 Jones, 249, and that a specific performance of the same cannot be enforced against the party to be charged therewith, unless the same or some note or memorandum thereof be made in writing and signed, as required by statute.

In other words, the defendant here could not have enforced the specific performance of this contract, on the one hand, nor on the other, could the plaintiff have recovered damages, had the defendant failed to take the trees and comply with the contract.

But as the contract has been complied with, to the extent that the defendant has got the plaintiff's wood, we see no reason why the plaintiff should not recover the value of the wood.

The contract amounted to a license to the defendant, from the plaintiff, to enter his land and cut and cord wood. As soon as the wood was cut, it became personal property, and it matters not whether the plaintiff himself cut and corded the wood he sold to the defendant, or whether, under the contract, he used the labor of the defendant to cut and cord it.

It will be observed that the wood was sold by the cord, thereby leaving something else to be done besides the cutting

or severing from the realty, before the exact rights of the parties, under the contract, became ascertained and fixed.

The judgment of the Superior Court is reversed, the demurrer overruled, and the case remanded to the Superior Court to be proceeded in according to law.

PER CURIAM. Judgment reversed.

STATE *v.* THE RICHMOND & DANVILLE RAIL ROAD COMPANY, A. S. BUFORD and W. H. GREEN.

An indictment under the Act 1874–'75, Chap. CLIX, against the Richmond & Danville Railroad Company, (changing the gauge of railroads,) cannot be sustained, because that act impairs the obligation of the contract between the State and the defendant Railroad Company, as assignee of the North Carolina Railroad Company.

BYNUM, J., dissenting.

This was an INDICTMENT under the act of 1874–'75, for changing the gauge of the North Carolina Railroad, tried before *Watts, J.*, at June Term, 1875, of WAKE Superior Court.

The jury returned the following special verdict:

1. That the North Carolina Railroad Company was formed and organized by virtue of an act of the General Assembly of North Carolina, entitled "An act to incorporate the North Carolina Railroad Company," ratified the 27th day of January, 1849, and other subsequent acts amendatory thereof.

2. That said company did soon thereafter construct its railroad from Charlotte to Neuse river, and operate the same with steam power. That the track of the said railroad so constructed was of the uniform gauge and width of four feet, eight inches and one half of an inch, throughout its entire length and has so remained until the day hereinafter mentioned.

3. That the Richmond & Danville Railroad Company, a

corporation formed, organized and existing under the laws of the State of Virginia, came into the possession on the 11th day of September, 1871, of the tract, road bed, engines, locomotives, coaches, &c., belonging to the said North Carolina Railroad Company, and of its rights, franchises and other property of the said company, under a contract of lease entered into between said corporations.

4. That the Richmond & Danville Railroad Company claimed by said contract to have the right to change the gauge of the said North Carolina Railroad tract, and being about to do so, were enjoined from so doing in an action wherein the State of North Carolina was plaintiff and the said railroad companies were defendants, which said suit was ultimately determined at January Term, 1875, of the Supreme Court of North Carolina, the record of which is to be considered as a part of this verdict.

5. That the North Carolina Railroad Company is a corporation existing by virtue of the laws of North Carolina, with a President and Board of Directors, but that the officers of said corporation had nothing to do with the change of the gauge of the North Carolina Railroad Company and had no control over the management of running trains over said road.

6. That Algernon S. Buford is the President of the said Richmond & Danville Railroad Company, and William H. Green is an officer of said company.

7. That said A. S. Buford, President as aforesaid, and William H. Green, officer as aforesaid, acting by and through (the order) of said Richmond & Danville Railroad Company as aforesaid, did on the 1st day of June, 1875, cause the gauge of the said North Carolina Railroad, situated, lying and being in the county of Wake, and being of the length of thirty miles in said county, to be widened and changed from four feet, eight inches and the half of one inch, to five feet, and the gauge of the said track has since remained of the width of five feet.

8. That the gauge of the North Carolina Railroad, throughout the whole extent from Charlotte to Goldsboro', on the

Neuse river, has been changed by the Richmond & Danville Railroad Company from four feet, eight inches and the half of one inch, to five feet, a part of the gauge of said railroad, between Charlotte and Greensboro', having been changed by the Richmond & Danville Railroad Company, prior to the act of March the 4th, 1875.

If the Court shall be of opinion upon this statement of facts that the law is with the State, then and in that case we find the defendants guilty, otherwise we find the defendants not guilty."

By agreement of counsel the record of the action entitled *State of North Carolina* v. *The Richmond & Danville Railroad Company*, and the papers in said action and all acts of the General Assembly incorporating railroad companies, and other acts amendatory thereof was to be used in this court as a part of the case, without being attached hereto as exhibits.

His Honor being of the opinion that the facts found by the jury would not warrant a conviction gave judgment accordingly, whereupon the State appealed.

Attorney General Hargrove, for the State.

Merrimon, Fuller & Ashe, Strong, Fowle and *Badger* for the defendant.

RODMAN, J. It must be assumed in considering this case, that the matters decided in the case of the State against the same company which is now a defendant, 72 N. C. Rep. 634 are the settled law of this State, and admit of no question.

Two things were decided in that case :

1. That the lease of its road, &c., by the North Carolina Railroad Company to the Richmond and Danville Railroad Company was lawful and valid.

2. That the lessees by virtue of the lease, had up to the passage of the Act of 1874–'75 a right to change the gauge of the North Carolina road.

With respect to the lease thus declared to be lawful, it must

be observed that the State of North Carolina owned at its date, and still owns two-thirds of the capital stock of the Company which made the lease, and the Governor by and with the advice and consent of his counsel had power to appoint a proportionate number of the Directors of the Company, who are removable in like manner. (Sec's. 36 and 43 of charter ratified 27th January, 1849.) In short, the State as a stockholder, through its lawfully appointed officers, had the supreme control over every act and contract of the Company, and the lease could not have been made without the express consent of the State. The lease expressly stipulated that the gauge might be changed, and the power to change it, must be considered an inducement to the Richmond and Danville Railroad Company to take the lease.

The lease also contains the following provision: "And the said party of the first part (the North Carolina Railroad Company) for the consideration aforesaid, for itself, its successors and assigns, doth covenant with, and oblige itself unto the said party of the second part, its successors and assigns, that its stockholders and directors will not do any thing, or take any action as such stockholders and directors, that may or can interfere in any way whatsoever with the free use and operation and convenience of said railroad, and other property so hired, let, "farmed out" and delivered, by the said party of the second part, according to the terms and intent of these presents." Notwithstanding this, the State through its Attorney General, shortly after the execution of the lease, commenced a suit against the Richmond and Danville Railroad Company, praying among other things, for an injunction against a change of gauge intended to be made by that Company as lessees. This suit pended for over eighteen months, and soon after it was decided as above set forth, and after the Richmond and Danville Company had begun to change the gauge, as it was held it had a right to do: and as it had a right to have done long before; and after the Company had completed the change over a large part of the road: the General

Assembly enacted the Act of 1874–'75, ch. 159, which (what ever may be its construction upon the language used) intended to prevent any further change, and to prohibit it, as well as a continuance of the change made just before, by penalties and punishments of unusual severity. It is contended for the defendants, that this legislation is a violation by the State of the contract made with the North Carolina Railroad Company in its charter, the rights and powers under which are held by the defendant Company as a lawful assignee for value: and also of the contract made by the State as the governing power in the North Carolina Railroad Company with the defendant Company.

It is also suggested that it appears from the records of the United States Courts within this State, that ever since the making of said lease, the State through its creditors, to whom its stock in the North Carolina Railroad Company was pledged, has claimed and received its share of the rent payable under the lease. As this fact, (if it be one,) does not appear in the special verdict, it cannot be permitted to weigh with us.

Whether the act in question is open to the objection that it impairs the obligation of either of these contracts, is the important question presented to us. In considering it this Court disclaims any power to avoid an act of the Legislature upon an idea of protecting the honor or good faith of the State against any violations real or supposed of either by that body, except so far as that duty is expressly enjoined upon it by the higher law of the Constitution, which its members have sworn to support.

It is seen that the proposition of the defendants is that the act violates:

1. The charter to the North Carolina Company, of whose rights and powers the defendant Company is the lawful assignee; and

2. The contract of lease made by the North Carolina Company and by the State, as its chief stockholder and governing power, under the laws of the State, to the defendant Company.

These two propositions, though supported mainly by the same arguments, require to be noted, are not identical, for some observations which are applicable to the second proposition are not applicable to the first.

It is too late to question that a charter to a railroad company is a contract between the State and the company, which the State cannot violate. When a corporation has franchises and powers which it may lawfully assign, (as the North Carolina Railroad Company had,) the assignee takes the place of the assignor, and is equally entitled to the protection of the law. The defendant Company, at the passage of the act, held an admitted right to change the gauge as it thought proper. The act prohibited the use of that right and *apparently* impaired the obligation of the charter. The burden is upon those who defend the act to find some recognized principle of law and reason on which it can be supported.

The counsel for the State have undertaken to find this principle in the general police power of the State, and we agree with them that it is to be found there if anywhere, for a right to regulate internal traffic over railroads and navigable waters is but a part of the police power of the State, and is subject to the same limitations and restrictions as that power is. Admittedly, this power is very extensive, and I am not aware that any jurist has yet undertaken to circumscribe and define its limits by any continuous line. All that the Courts have done or can as yet attempt to do, is to make a dot here and there by the decision of a particular case as being within or without the line and leave it to our successors to connect them by a well defined line when they are able to do so. The nearest approach to an attempt of this sort which I have seen is in chapter 16 of Cooley on Constitutional Limitations, and especially on pages 572 and 577. The learned author cites probably all the cases having any direct bearing on the subject of discussion. From these we conclude that the Legislature has power to impose all such regulations on railroad companies in the use of their roads as may be reasonably proper for the

safety, and perhaps the comfort and convenience of passengers and of all others entitled to use the road, and for the protection from injury of the inhabitants and property of the country through which the roads pass. A railroad company, like all other owners of property, is subject to the maxim, "*Sic utere tuo ut alienum non laedas.*" Within that limit it has the same control over its property that an individual has, to use it as it may suit its ideas of its interest. A railroad company, although created in part for the advantage of the public, is not a public corporation in the sense that a county is. It is created also for private benefit, and in respect to those purposes it is a private corporation and its charter is a contract.

The rights of owners of adjoining coal mines are similar in some respects to those of railroad companies whose roads connect. On this subject see the valuable case of *Smith* v. *Kewrick*, 7 Man. Gr. and Scott. 515, (62 E. C. L. R.)

This police power, however extensive, must have reasonable limits. In some places it is said to extend to everything "necessary for the welfare and prosperity of the State." But that would be to remove all limits. Such loose and ill considered expressions mean nothing definite. The limit of the power is the nature of the purpose to be accomplished, having due regard to conflicting rights. A State cannot violate its contract under a pretended exercise of its police power. The act must be *bona fide* intended to relieve some evil within the reach of that power, and strictly applicable to that end. Among the instances held not to be embraced in it are these. In *Pengrief* v. *Washburn*, 1 Aiken 268, the legislature undertook to say that certain persons might go toll free over a road authorized by its charter to take toll generally. *Miller* v. *New York & Erie Railroad Company*, 21 Bart. 513, where the act required the company to make the preparation for a street to cross its track at its own expense. *Bailey* v. *Philadelphia &c., Railroad Company*, 4 Harr. 389, and *Washington Bridge Co.* v. *The State*, 18 Conn. 53, where statutes infringing the chartered powers of certain bridge companies were held void.

In *State* v. *Jersey City*, 5 Dutch. 170, it was held that the Legislature had no right to regulate the speed of railway carriages except in the streets of cities, the necessity extending no further.

The act of 1874'-75, (chap. 159, p. 185,) does not appear to us to present the features of a police regulation. A gauge of five feet does not hazard the safety or convenience of persons using the road, or living along it. The act does not profess to be made for any of the purposes embraced within the police power. The purpose avowed is to compel an uniform gauge of 4 feet 8½ inches on the North Carolina Railroad and on certain other railroads connecting with it, which at that time had that gauge. It may be a wise and convenient policy to require an uniformity of gauge on all the railroads in the State, and it may be convenient to the roads connecting with the North Carolina road, that its lessees should be prevented from changing its gauge from one uniform with theirs, to a different one. But if the lessees of the North Carolina road had a right to change its gauge according to their ideas of their own interests, (as in view of the decision of this Court at the last term, must be admitted), no newly adopted policy of uniformity, or regard for the interests of other roads, will authorize the State to deprive the lessees of this right, *except by virtue of its power of eminent domain, and upon compensation.* Much less had the State the power to compel the lessees to restore to its former gauge, that portion of the road which, at some expense, it had changed before the act was passed.

This conclusion is strengthened by an anticipation of the consequences of a different one.

If the Legislature can now lawfully establish the gauge of the North Carolina Railroad at 4 feet 8½ inches, it can equally establish it at a greater or less width, and can at any time hereafter compel or forbid a change. On the same principle it may at pleasure require or forbid the company to alter its route once adopted, in any particular, its station houses once located, and its rates of fare and freight. In short it may regulate in every

detail the economic management of the road. Such a power would be practically despotic, and might be indirectly but effectually used to destroy the value of the charter and compel its surrender. The claim is new in principle, and no authority, or at least no direct authority can be found to support it.

We are asked to distinguish this case from the *State* v. *Matthews*, 3 Jones, 451. I may not be able to show the distinction to the satisfaction of others. But I think there is a solid one. For whatever reasons, the State had adopted a policy against the issue of Bank bills under $3, before it chartered the Bank of Fayetteville, this policy was apparent to all on its legislation. Prior to that charter, no Bank, then existing, was allowed to issue bills under that denomination. The omission of such a prohibition in the charter of that Bank was apparently an accident. The case was evidently covered (independently of any contract excluding it) by the general police power of the State, and no injury was done to the Bank in relieving the people from the ill consequences of the accident.

The above remarks it will be seen, apply particularly to the act of 1874–'75, in respect to its bearing on the rights created by the charter to the N. C. R. R. Co., and our conclusion on that will dispose of this case. It will not be inappropriate however briefly to consider the act in reference to the provisions of the lease made by that Company, in which the State as a stockholder had the controlling power, assuming for that purpose that in the absence of such lease, the act would be a legitimate exercise of the police power. A State may undoubtedly contract away some portion of its sovereign rights, as this State was held to have done, its right to tax, in the charters of the Raleigh & Gaston Railroad Company, and of the Wilmington & Weldon Railroad Company. Whether a State can abridge its police power, or any other of its sovereign rights, by a contract made by it, not in the exercise of its legislative power, but through its authorized officers as the controlling or only stockholder in an incorporated trading company, is a question which I have never seen discussed.

We do not propose to express any opinion on this question. But it certainly seems contrary to the ordinary principles of justice, that a State, through its authorized officers, should in one capacity make a contract conferring certain rights, (to change the gauge,) and therein expressly contract to do nothing to hinder the use of that right; and immediately afterwards, in its sovereign capacity as legislator, enact a law to make any use of that right highly penal. The State appears in the attitude of receiving with one hand rent from its tenant, and with the other expelling him from the possession.

If the contract had been procured from the officers of the State by fraud or corruption, it could undoubtedly be avoided on that ground. But so far as appears, there is no allegation of that sort. No legal proceedings to avoid the lease have been had on any such ground.

It is unnecessary also to consider the criticisms of the counsel for the defendants upon the language of the act which is admitted by the counsel for the State to be very loose and uncertain.

PER CURIAM. Judgment below affirmed.

BYNUM, J. (*Dissenting.*) Deep solicitude for the public welfare and a conviction of impending mischief to the whole State, from the threatened alteration of the North Carolina road, by the alien corporation into whose hands it had fallen must have caused the passage of the Act to prevent that change with a unanimity almost unexampled in legislation. It was the act of the whole people, in the exercise of their corporate sovereignty. Nothing short of the clearest convictions can justify the Court in thwarting the public will so expressed, by declaring their act to be void and of no effect. In doing so, this Court I think, reverses its own decisions, destroys their value as safeguards for the conduct of the citizen, and introduces confusion where order, certainty and consistency should be found.

If the *State* v. *Matthews*, 3 Jones, 451, is good law, (and it is not questioned) ingenuity has failed to distinguish it in principle from this case. It would be better to overrule that case, expressly, than vainly endeavor to distinguish it. That decision cannot stand with this. There, the charter of the Bank of Fayetteville, authorized it to issue and discount bills without any provision in the charter, as to their denomination. Afterwards the Legislature passed a general act making it indictable for any person or corporation to receive or pass any bill of a bank, of a less denomination than three dollars. Mathews, an officer of the bank, was indicted under this statute for passing a bill of the bank of a denomination less than $3; and he relied upon the defence, that he was protected by the charter of the bank, as a contract with the State which was protected by the Constitution of the United States, forbidding the passage of any law impairing the obligation of contracts. The defendant was convicted, and in affirming the judgment this Court said: "Is the authority to issue small notes conferred by the charter, a part of the essence of the contract, with the intention to put it beyond all future control of legislation? or is it conferred as a mere incident, with the intention that it should be subject to such limitation as it might at any time thereafter be deemed expedient to make for the regulation of the currency of the State? This is a mere question of construction, and a plain statement seems sufficient to dispose of it. With the exception of the powers surrendered to the United States, each State is absolutely sovereign. With the exception of the restraints imposed by the Constitution of the State and the bill of rights, all legislative power is vested in the General Assembly. It is consequently, unreasonable to suppose that the General Assembly, admitting it has the power, would alien or surrender, and make subject to any individual or corporation a portion of its sovereignty, and thereby disqualify itself from doing that for which these ample powers are conferred on it. As is said in *McRae* v. *The W. & R. R. Co.*, 2 Ired. 189, "we should hesitate long before

bringing our minds to the conclusion, that it was the intention of the Legislature to take from itself, the power of doing that for which all governments are organized, promoting the general welfare, by adopting such measures as a new state of things might make necessary for the benefit of the public; in other words, it is unreasonable to suppose an intention to surrender the means by which it may thereafter be able to effect the purpose for which it was erected and formed into a government." It follows, that to establish a contract on the part of the Legislature, to relinquish any of its powers, plain and unambiguous words must be used."

The reasoning of the Court is unanswerable. If the reserved powers of the sovereign can be successfully interposed for the public good in the case of a small bank of limited circulation, how much more can it be when the commerce and general welfare of the whole State is involved? The bank charter was as much a contract with the State as a railroad charter; yea, more so, because a bank charter is strictly a private act, whereas a railroad charter is *quasi* a public act. The bank was authorized to issue bills of any denomination; so the railroad company was authorized to lay a track of any gauge. The bank officer, after the prohibitory act, passed the forbidden bills and was indicted and punished. The officers of the railroad, after being prohibited, changed the gauge, and by the law go unpunished. The bank perpetrated a small and temporary mischief; the railroad a mischief co-extensive with the State and of indefinite duration. Every reason of policy and public good which applied to the bank applies with tenfold force in this case.

But *Matthews'* case is fully sustained by *Privett* v. *Whitaker*, decided at the present term of this Court. There, the plaintiff being the owner of a lot in the town of Goldsboro, began the erection of a wooden building thereon and had made some progress in the work. Afterwards the corporation passed an ordinance forbidding the construction of wooden buildings within a district of the town, which embraced this

lot. The town authorities, in pursuance of this ordinance, entered upon the lot and by force stopped the workmen engaged on the building from further proceeding with the work. This Court sustained the ordinance and justified the act of the town authorities. Here the owner of the lot held it by a contract certainly of as high obligation as that of the railroad company, to wit, by the grant of the State. Yet in the face of this grant the Court held, that under the power vested in the corporation by the Legislature, the town could prevent him from beginning or completing such a building upon his own land. What higher or more arbitrary exercise of sovereignty can be found than this, apparently in the face of the express grant and contract of the State? In delivering the opinion of the Court, RODMAN, J., places the right upon the power of the State to abate nuisance. But it must be observed that the town ordinance did not declare such a structure to be a nuisance, but simply forbade the erection, without designing any reason or naming any grievance to be apprehended therefrom. It is immaterial by what name you call a prohibited act, or whether it has any name, nuisance or other, or by what name you call the power of preventing or abating it—whether the right of eminent domain or the police power—it is, nevertheless, an unquestionable sovereign power, residing in the State, to do, or forbid the doing, those things which the exigencies and welfare of society demand. Whether the emergency requires the intervention of this power must, from the nature of things and the organization of our form of government, rest in the sound discretion of the legislative body. In *Privett's* case, the corporation forbid the completion of a house begun; in this case the State forbid the widening of the gauge. Can the individual be restrained by penalties and even force, and the corporation go free? Both parties made their contract and hold their property, subject to the paramount right of the sovereign so to regulate its use and enjoyments as will be most conducive to the comfort, good order and general welfare of the body politic. Rights of property, just as our

social rights, are subject to such limitations in their enjoyment as the governing power may think necessary or expedient. Of the perfect right of the Legislature to exercise this power, no question can be made. Nor can it be at all affected by that clause in the Constitution of the United States which forbids the passage of laws impairing the obligation of contracts. All contracts and all rights are subject to this power.

It is well settled, that regulations of this character, though they may disturb the enjoyment of individual or corporate rights, are not unconstitutional, though no compensation is made for the disturbance. They do not appropriate private property for public use—there is no pretence of such appropriation in our case—but only regulate its use and enjoyment by the owner. If he suffer injury, it is either *damnum absque injuria*, or in the theory of the law, he is compensated for it, by sharing in the general benefits which the regulations are intended and calculated to secure. Every one owns his property subject to this restriction, to-wit, that it must be so used as not to injure others, and that the sovereign may, by police regulations, so restrain and direct the use, that it shall not prove pernicious to his neighbors or the citizens generally. 1 Dillon on Cor. Sec. 93, and cases cited.

It is true, that the Legislature cannot make an unreasonable use of this power, and under the guise of exercising a police power, infringe individual or corporate rights, and it is equally true that the Courts, under the pretext that the Legislature has so acted, cannot nullify a statute. Good faith is to be imputed to the Legislature, and all its acts must be presumed to be founded upon a just consideration of the rights and the wellfare, both of the public and individuals. It can have no will and no interest opposed to the public good.

What is the history of this prosecution? Soon after the lease was made to the defendant road, the State of North Carolina instituted proceedings against the defendant road, alleging in the complaint that the lessee had resolved to change the gauge of that portion of the road lying between Greensboro'

and Charlotte, and asking for an injunction to prevent that change The defendant answered, confessing the purpose to make the alleged change, claiming the right to do so under the lease, and that it was necessary and convenient to make that change, *so as to make the track correspond with the connecting lines of road north of Greensboro' and south of Charlotte.* So it is manifest that at that time the defendant road did not, and could not, in pursuance of its declared purpose of conforming the gauge to other gauges, contemplate a change of gauge east of Greensboro', which would produce a disconformity with that of all the railroads of the State east of Greensboro'. It is then clear, both from the reason of the thing and the intention of the defendant, as declared in the answer, that the change of gauge east of Greensboro', is an after thought and a device. This view is confirmed by the fact, that the change of gauge for which the defendants stand indicted, was not begun until near four months after the change between Greensboro' and Charlotte, and four months subsequent to the passage of the statute forbidding it. Not the slightest weight, then, can be attached to the suggestion that the statute was captious, and if observed would have stopped the work of change of gauge in the midst, causing great damage to the road, without providing compensation. This defence is utterly refuted by the special verdict, which finds as a fact, that the change between Greensboro' and Charlotte was completed before the passage of the act; and I feel warranted by the facts, in saying that when the statute was passed, the railroad company did not contemplate any other or further change, than what had then been made. Nor in determining the validity of the act, can the slightest weight be given to the severity of the penalty inflicted for a violation of the law. With that, this tribunal has no concern. Nor yet can this Court pay any regard to suggestions, that the directors of the North Carolina Railroad, representing the stock and interests of the State, concurred in the lease, with the powers therein contained, to change the gauge. If the fact were so, the di-

rectors could only represent the State, as a private stockholder, and their assent to the lease could have no possible effect in determining the constitutionality of the statute, or the police powers of the State as a sovereign. Nor, again, can the decision of the Court at the last time, *State* v. *R. & D. R. R. Co.*, 72 N. C. Rep., 634, be invoked in behalf the defendants. The only question raised and decided there was, that as the law stood at the time that action was instituted, the defendant company, by virtue of the charter, had the right to change the gauge. We have assumed the validity of that decision, throughout this discussion. The very question raised by the special verdict and argued here is, whether the subsequent legislation in a constitutional sense, was a violation of the contract between the State and the Company, or was a legitimate exercise of the police power of the State. The criticism upon the preamble to the statute forbidding the change of gauge, that it is for the benefit of certain other roads, at the expense of the defendants' road, cannot assist the argument.

The recital in the preamble, sets forth the most urgent reason for the act, to wit, that there may no longer be any doubt as to the policy of the State as to the gauge of the roads, and that the proposed change would seriously affect all the railroads of the State, and thus through them the commercial and other interests of the people. No array of public inconveniences, could more loudly call for quick and decisive action by the legislative body, entrusted with the public welfare.

The question before the Court does not call upon us to ascertain and accurately define the limits of the police power of the State, or how far the police power or the right of eminent domain, may extend in derogation of essential or non-essential parts of a contract. It is perfectly well settled, however, that the right of the States to exercise both powers, does not impair the obligation of contracts within the meaning of the prohibition of the Constitution of the United States. It is also well settled that all property is held and all contracts are made, subject to this power. The State is the exclusive judge

both of the necessity and the extent of the exercise of either power. 2 Dillon, sec. 455, 6 How., 507, 13 How., 71. And in the exercise of the general police power of the State, or of taxation, private property may be taken for the public use without compensation therefor. Sedg. on Stat. and Const., laws 1853–'54–'55. Suppose the Legislature, to prevent injury to live stock, should, by statute, direct the North Carolina Railroad Company to enclose the road by a fence and to keep it in repair. It is well settled that such a statute can be enforced, however costly to the corporation as a police regulation. So the State can, in like manner, forbid such corporations to erect wooden depots and shops in towns along the line, or even cause the removal of such, already constructed upon their own property. 42 Bt. 339, 66 Penn., 164, 26 Wis., 145. These are but illustrations of the proposition that all contracts are made, subject to the paramount authority of the State, to control their enjoyment, so as to subserve the general welfare, the purpose for which society is organized.

I think judgment should have been given against the defendants upon the special verdict.

THOS. PHILLIPS and wife *v.* A. B. THOMPSON and wife and others.

A and B conveyed certain land to C. D., by deed, containing the following limitation: "to have and to hold all and singular the aforesaid land and premises, and we do for ourselves, our heirs, executors and administrators, warrant and forever defend against the lawful claim or claims of all persons whatsoever, unto the said C. D., to him, his heirs and assigns forever." C. D. died, and the bargainors instituted an action to recover the land, alleging that only a life estate passed under the deed: *Held*, that the deed conveyed the fee simple.

(*Armfield* v. *Walker*, 5 Ired. 580; *Phillips* v. *Davis*, 69 N. C. Rep. 117, cited and approved.)

CIVIL ACTION in the nature of *Ejectment*, tried before *Seymour*, *J.*, at Spring Term, 1875, of WAYNE Superior Court.

All the facts necessary to an understanding of the case as decided are stated in the opinion of the Court.

There was a judgment in favor of the plaintiffs and thereupon the defendants appealed.

Faircloth & Grainger, for appellants.
D. M. Carter, contra.

SETTLE, J. In 1858 the plaintiffs conveyed to one Council Best the land in controversy for the consideration of eighteen hundred dollars, (the receipt of which is acknowledged in the deed), which the plaintiffs admit was the full value of the land at that time; and they further admit that they intended to convey the fee simple by the said deed.

In fact no money was paid, but Best gave his note for the said amount, which was accepted as a payment by the plaintiffs. It is further admitted that in 1868 Best received his discharge from the District Court of the United States as a bankrupt and that subsequently to his discharge, he destroyed the old note, and gave others for the sum due, payable as the first had been, and that he died in 1873, insolvent.

The plaintiffs now contend that their deed conveyed only a life estate to the said Council Best, and they rely upon the following words in the deed to establish that position: "To have and to hold all and singular the aforesaid land and premises, and we do for ourselves, our heirs, executors and administrators warrant and forever defend against the lawful claim or claims of any and all persons whatsoever unto him the said Council Best to him his heirs or assigns forever."

We concede that a life estate is not enlarged into a fee, either by a warranty in fee or by a covenant for quiet enjoyment to the grantee and his heirs, for the warranty ceases when the estate to which it is annexed is determined.

But we think this deed, though very awkwardly drawn, carries out the original intention of the parties, and conveys the fee. It will be observed there is no separation between the

habendum, and what is said to be the warranty clause, of this deed, but they are blended together in one sentence, or rather the *habendum* is cumbered with unmeaning words, which we are asked to construe into a warranty. If we strike from a single sentence words which make no sense, either by themselves or in connection with others, or rather if we permit them to remain dormant, we have a perfect *habendum* in fee.

This Court, following the well established rule that the construction of deeds should be favorable and as near the minds and apparent intents of the parties as the rules of law will admit, has sanctioned the transposition of words in a sentence, has in at least two cases, given to words no better arranged than they are in this deed, the effect of a conveyance in fee. *Armfield* v. *Walker*, 5 Ired. 580; *Phillips* v. *Davis*, 69 N. C. Rep. 117.

This is all that need be said for the decision of this case, but we may add that we are inclined to think, upon consideration of the whole matter, that if the deed had been so imperfect as to convey only a life estate to Council Best, when it was the intention of all parties that a fee should be conveyed, it would be a proper case for reforming the instrument.

It is hard that the plaintiffs should lose their money, but it is the result of their own action, since they saw fit to accept the note of Best in payment of the purchase money and to waive all other security.

They could have reserved the title, or have taken a mortgage to secure the purchase money, but as they did neither, this Court is unable to assist them without reviving the old equity of the vendor's lien, which is not recognized in this State. But as to the hardship of the case; the defendants offered to prove that they claimed under purchasers at an execution sale, and that they had paid full value for the land. This they were not permitted to do.

And in view of what we have already said, it is immaterial how that was, except as furnishing a suggestion that when a

hardship must rest somewhere it perhaps had as well be upon those who have by their conduct created it.

The judgment of the Superior Court is reversed.

Let judgment be entered here for the defendants.

PER CURIAM. Judgment reversed.

THE PEOPLE OF NORTH CAROLINA on the relation of ROBERT NORFLEET *v.* H. L. STATON, Jr.

Where A was appointed Clerk of the Superior Court for the county of E, by the *de facto* Judge presiding in that judicial district; in an action brought against A to oust him from the office, by the appointee of one who had been declared Judge *de jure: Held*, that the appointment of A was valid, and the appointee of the Judge *de jure* was not entitled to the office.

(*Ellis* v. *Deaf and Dumb Asylum*, 68 N. C. Rep. 423, and many other cases cited and approved.)

PEARSON, C. J., and RODMAN, J., dissenting.

CIVIL ACTION in the nature of *quo warranto* tried before *Moore, J.* at Spring Term, 1875, EDGECOMBE Superior Court upon the following,

CASE AGREED:

1. The General Assembly by an act ratified —— 1874, directed that an election should be held on the 1st Thursday in August, 1874, for a Judge of the Second Judicial District.

2. Said election was held accordingly, and Lewis Hilliard, Esq., of the county of Pitt, having received a majority of the votes cast was declared duly elected, and was commissioned Judge, by his Excellency the Governor, August 26th, 1874, and took the oath prescribed by law.

3. At the same time an election was held in regular course for a Clerk of the Superior Court of Edgecombe county, the term of the then incumbent having expired, and one W. H. Duggan was elected to said office, who on the first Monday in September following asked the Board of Commissioners of said county, then in regular session, for further time to file his bond and qualify as Clerk, and the said Board granted him until the 14th day of September for that purpose.

4. On the said 14th day of September, the said Duggan failed to give bond as required by law, when said Board of Commissioners declared said office vacant and notified both said Hilliard and Hon. W. A. Moore of said vacancy.

5. On the 15th day of September, 1874, said Hilliard appointed W. A. Duggan to fill said vacancy, who on the 1st day of October, 1874, notified said Hilliard that he should be unable to give bond, and on the same day of October, 1874, said Hilliard appointed H. L. Staton, Jr., Clerk of said Court. On the 5th day of October said Staton was duly qualified as Clerk, before the Board of Commissioners for said county, and entered on the duties of said office and has continued therein ever since.

6. On the said 5th day of October, the relator Robert Norfleet, appeared before said Board after the reception of the bond of said Staton, but before his qualification, and presented an appointment, made and dated Sept. 17th, 1874, from Hon. William A. Moore, who was appointed by the Governor to fill the vacancy occasioned by the resignation of Hon. E. W. Jones in 1871, the term of office of the said Jones expiring in 1878, and offered to qualify as Clerk, tendering a good and sufficient bond, but said Board declined to qualify him and induct him into said office.

7. On the 7th day of September, 1874, being the day appointed for the holding of Hertford Superior Court, the first of the Courts of that district, said Hilliard proceeded to the court-house of that county in the town of Winton, and took the seat usually occupied by the presiding Judge. Shortly

thereafter, and before said Hilliard had said or done anything, said Moore came in and demanded of him the seat as Judge, which demand Hilliard refused, stating that he claimed to be the Judge, whereupon the said Moore declared the Court open for the transaction of business and directed the Sheriff, Isaac Pipkin, Esq., to make proclamation. This the Sheriff declined to do."

The case agreed sets out many other facts, not pertinent to the case as decided in this Court, and the same are therefore omitted. All other facts necessary to an understanding of the case as decided are stated in the opinion of the Court.

Upon the case agreed the Court gave judgment ousting the defendant, and in favor of the relator, and thereupon the defendant appealed.

Smith & Strong, *Howard & Perry* and *John L. Bridgers, Jr.*, for appellant.

Fowle and *Johnston*, contra.

READE, J. By reason of the failure of the person elected by the people, to qualify, there was a vacancy in the office of Superior Court Clerk for Edgecombe county for the term of four years. The Constitution provides that the Judge of the Superior Court should fill such vacancy.

Judge Moore had been the Judge for several years; but, in the opinion of the General Assembly, his term had expired; and an act was passed ordering an election by the people for Judge; and under that act Judge Hilliard was elected and qualified and took possession of the office, and held it, exercising all the duties and business of the office until he was ousted under a decision of this Court declaring the act under which he was elected, unconstitutional. So that it is now clear, that for all the time from his election, qualification and induction into office until he was ousted under the decision of this Court, Judge Hilliard was not the rightful Judge, but he was the Judge in fact.

While Judge Hilliard was the acting Judge, it was notified to him by the County Commissioners that there was a vacancy in the Clerkship; and he filled the vacancy by the appointment of the defendant. The Commissioners also notified Judge Moore of the vacancy, and he appointed the relator. The defendant exercised the duties of the office until Judge Hilliard was ousted, without interruption. When Judge Moore resumed the office his appointee, the relator, claimed the clerkship, and Judge Moore decided in his favor and the defendant appealed.

The question is, what was the force and effect of the appointment of the defendant by Judge Hilliard? Was the appointment valid for any purpose, or for any time? If it was, then was it for the whole vacant term? Or only for such time as Judge Hilliard should be in? Or only until he, the defendant, could be ousted by direct proceedings against him? Probably the whole inquiry can be covered by the question: Is the appointee of a *de facto officer* a rightful officer? Or is he only an officer *de facto* like his appointor? The burden of the very full argument for the relator, was to show that while the defendant was an officer, and his acts valid as to the public and third persons, yet, in a direct proceeding against him, as this is, he cannot set up his wrongful appointment in support of his claim to the office. This is unquestionably true, supported by all the authorities, if we admit that the defendant is a *de facto* officer. But that is the very question in dispute. Why is the defendant a *de facto* and not a *de jure* officer? When the defendant is asked "by what authority do you hold the office?" he answers, by the appointment of the Judge of the Superior Court. And when it is replied, but that Judge was only a Judge *de facto;* the defendant rejoins, that may be so; but all his necessary official acts were valid as to the public and third persons; my appointment was a necessary official act, and therefore, valid; and I became not a wrongful usurper, not merely a *de facto,* but a rightful officer; just as

rightful as any judgment which he rendered or any act which he did.

I scarcely think it necessary to cite authorities to show the distinction between mere usurpers and officers *de facto* and *de jure*. A usurper is one who takes possession without any authority. His acts are utterly void unless he continues to act for so long a time or under such circumstances as to afford a presumption of his right to act. And then his acts are valid as to the public and third persons. But he has no defence in a direct proceeding against himself. A *de facto* officer is one who goes in under *color* of authority—as Judge Hilliard in this case, who went in under an election by the people, which was held by a valid act of Assembly—or who exercises the duties of the office so long or under such circumstances as to raise a presumption of his right; in which cases his necessary official acts are valid as to the public and third persons, but he may be ousted by a direct proceeding. A *de jure* officer is one who is regularly and lawfully elected or appointed and inducted into office and exercises the duties as his right. All his necessary official acts are valid and he cannot be ousted.

The only difference between an officer *de facto* and an officer *de jure* is, that the former may be ousted in a direct proceeding against him, while the latter cannot be. So far as the public and third persons are concerned, there is no difference whatever. The acts of one have precisely the same force and effect as the acts of the other.

The decisions in our own Court may be found in *Burke* v. *Elliott*, 4 Ire., 355; *Gilliam* v. *Riddick*, *Ib.* 368; *Commissioners, &c.*, v. *McDaniel*, 7 Jones, 107; *Swindle* v. *Warden*, *Ib.* 575; *Keeler* v. *Newbern*, Phil. Rep., 505; *Culver* v. *Eggers*, 63 N. C. Rep., 630; *Ellis* v. *Deaf and Dumb Asylum*, 68 N. C. Rep., 423. And in *State* v. *Carroll*, lately decided in Connecticut and reported in 12 American Law Register, 165, in an elaborate opinion by BUTLER, Chief Justice, the English and American cases are reviewed and satisfactory definitions given of mere usurpers, whose acts amount to nothing, and of

de facto and *de jure* officers, whose acts are alike good so far as the public and third persons are concerned. And we think it may now be considered as settled by our own decisions and by the English and American cases and by the text writers, that there is no difference between the acts of *de facto* and *de jure* officers so far as the public and third persons are concerned. Indeed, we understand that to be admitted in this case to be the rule. But it is insisted that there is this exception: that while *de facto* officers—such as Hilliard was—might appoint an officer, such as the defendant, yet his appointee could not be more than he was, a *de facto* officer.

If there is or ought to be any such exception, surely it would be found in some case or writer upon the subject, and yet we have not been referred to any, and our own diligent researches have found none. We find but two cases bearing on it, and their weight is against the exception. In *Rex* v. *Lisle*, in 1738, Goldwire took possession of the office of mayor and nominated Lisle as a burgess. And in *quo warranto* v. *Lisle*, the Court said there were two questions: "The first was whether Goldwire was mayor *de facto* at the time he made the appointment? The second was whether, if he was, his appointment of Lisle was good?" Now if the Court had decided that Goldwire was mayor *de facto*, and that his appointee, Lisle, was not valid, or only valid as a *de facto* appointment, then it would have supported the exception. But the Court decided that Goldwire was a mere usurper and not even a mayor *de facto*. And then they decided that Lisle was not a burgess, because his nomination was not by a *de facto* mayor. It is true the Court does not say expressly that the appointment would have been good if the mayor had been a *de facto* officer; but is not that a fair inference? And the Court said further: "Suppose Goldwire was a mayor *de facto*, yet the appointment was not good, because it was not *necessary* to the preservation of the corporation." Is not that the same as to say that if Goldwire had been mayor *de facto* and the appointment of Lisle had been necessary, then the appointment was

good? So in our case, if Hilliard was Judge *de facto*, and the appointment of a clerk was necessary, as clearly it was, then the appointment of the defendant was good. In *Ellis* v. *Deaf and Dumb Asylum*, the *de facto* Board removed Ellis and appointed another as steward, and this Court said, "We hold that acts of this *de facto* Board, in the discharge of the ordinary duties of the Board, are to have the same force and effect as if made by a regular legal Board." 68 N. C. Rep., 423. That is decisive of this case.

It is respectful to notice some of the objections to our views:

1. It is said that the doctrine that the acts of *de facto* officers are valid, is founded in public convenience, and that when the reason ceases the rule ought to cease. And that while it would be a great public inconvenience to declare void all the judgments in civil and criminal cases which Judge HILLIARD has rendered, and all the other official acts which he did; yet it would be no inconvenience to the public to oust the defendant as clerk and put in the relator. The public convenience can be as well subserved by the relator as by the defendant.

To that there are two objections. In the first place, the authority is, that the Judge should fill the vacancy. That means that he should fill it full for the whole time and not for a part. In the second place, if the doctrine be true that the appointee of a *de facto* officer is good only so long as the appointor shall be in office, then all the appointments which the defendant has made as Clerk must go out with him:—all the magistrates, guardians, administrators, &c., which he has appointed must go out. I may add a third objection: The convenience of the public is not the only reason given for the rule, but the convenience of the public *and* "*third persons.*" The appointees are the "third persons" whose convenience and rights are to be respected. If the defendant in a suit against his debtor had recovered a judgment for $1,000 before Judge HILLIARD, it would be no inconvenience to *the public* if that judgment should be vacated; but it would interfere with the defendant's rights; and therefore it must stand. And so, when the defendant was

induced to accept an office for the public and to take oaths, execute bonds with sureties, incur penalties and obligations and perform labor and incur expenses his rights must be respected.

2. In the second place it is objected that it is contrary to fundamental principles that a *de facto* officer, Judge HILLIARD, should have the power to appoint an officer *de jure*; that any but a rightful officer should appoint a rightful officer, that a stream should rise higher than its source;—"who drives fat oxen must himself be fat."

The error is in supposing that HILLIARD makes the appointment. It is the "Judge of the Superior Court" whoever he may be, and however he happens to be Judge, and whether rightfully or not. He who is in the office clothed with its *insignia*, has the *power* of the *office*. And it cannot be maintained that HILLIARD had the power to appoint the defendant for only so long a time as HILLIARD should act as Judge, and that when HILLIARD went out the defendant went with him; for HILLIARD could make the appointment only according to his authority, and the Constitution is express that "he shall appoint to fill the vacancy until an election can be regularly held." And there is certainly no authority for HILLIARD's filling the vacancy in part and MOORE in part.

Why should the necessary official acts of *de facto* officers when operating upon a *person* be of less validity than when operating upon a thing? Why is not his appointing to office of the same force and effect as his judgment for money? If he performs the marriage ceremony, is it void? Of course not. At every term of this Court we license a number to practice law; if it should turn out that we are only justices *de facto*, are the license void?

We are of the opinion that the defendant is rightfully in office until the next regular election.

There is error. This will be certified, &c.

PEARSON, C. J., and SETTLE, J., dissent.

B. M. PRIVETT *v.* J. B. WHITAKER, Sen., and others.

One may be entitled to compensation for the destruction of a house which was lawfully erected, but there can be no vested right to prolong a nuisance after it has been declared such. Therefore, where A had begun to erect a house in the town of G., and shortly afterwards an ordinance was passed by the proper authorities of the town declaring it a nuisance to erect buildings of a certain character in certain portions of the town, and the provisions of the ordinance included A's house, in an action by A against B, the mayor of the town of G., to recover damages for preventing A from erecting the house: *Held*, that the defendant was not liable.

This was a CIVIL ACTION, to recover damages, tried before *Seymour*, *J.*, at Special Term, 1875, WAYNE Superior Court.

The facts were agreed upon by the parties to the actions, and his Honor gave judgment for the defendant. The facts necessary to an understanding of the case, as decided, are stated in the opinion of the Court.

From the judgment of his Honor the plaintiff appealed.

Smith & Strong, for the appellant.
Faircloth & Grainger, contra.

RODMAN, J. The material facts of this case are as follows:

On 27th June, 1872, the plaintiff began to erect a wooden building in a certain locality in the town of Goldsboro. At that time, there was no by-law of the town forbidding the erection of wooden buildings in that particular part of the town, or declaring such buildings nuisances, although there was to certain other parts of the town.

On the next day (28th June) the commissioners adopted an ordinance forbidding the erection of wooden buildings within certain limits, which embraced the land of the plaintiff, under a penalty of forfeiting $20 for every week for which the building was allowed to continue.

After the passage of this ordinance, the defendant Whitaker, who was Mayor of the town, directed the police officers to prevent the further erection of plaintiff's building, which they did by going on his land and keeping his workmen therefrom. The other defendants had no other connexion with the trespass, than that they were commissioners of the town, and concurred in adopting the ordinance of 28th June.

Afterwards, viz., on 27th January, 1873, (Private Acts 1872–'73, chap. 3, 376,) an act was passed authorizing the corporation of Goldsboro to prevent the erection of wooden buildings in such parts of said town as they might think proper; and also to pull down such buildings then existing in certain parts of the town, on making compensation to the owners.

This act cannot affect the present case.

We were not referred to any prior acts respecting the town of Goldsboro. Whatever, for other purposes, may be the character of acts incorporating towns, as public or private, we consider that they are private, so far that a Court is not bound to take judicial notice of their provisions. In fact it would be impracticable to do so.

We assume therefore that Goldsboro was an incorporated town, and that the corporate authority possessed the powers conferred on such bodies by Revised Code, chap. 3, one of which is to pass laws to abate and prevent nuisances, (sec. 15.)

It will be convenient, before considering the defence of the Mayor, to dispose of the case as to his co-defendants, the commissioners. We think it clear that their bare concurrence by their votes in favor of the ordinance above referred to, did not amount to a participation in the alleged trespass. The terms of the ordinance make this too clear to require any discussion.

Now as to the Mayor. His official right to abate or prevent a public nuisance, must be admitted as a general proposition. For the purpose of the present discussion, public nuisances may be divided into four classes:

1. Those which are necessarily and obviously such, as a

fence or building obstructing a highway. These may be abated by the officer who has charge of the highway, either by, or without authority from a Court, and also in like manner, by any individual who is specially injured thereby.

2. Those which are nuisances or not, according to circumstances; such as a stable in a town (*Dargan* v. *Waddell*, 9 Ire. 244) powder or other explosive or easily ignitable substance, stored in a town, &c. Probably this class could not be lawfully abated except under process of law; or at least until the subject of complaint had been found to be a nuisance by some Court, or other competent authority.

3. Those which originally were not nuisances, but afterwards by a change of circumstance become so. Such are mill ponds, powder works, tallow and glue factories, and the like, which if remote from habitations are not considered nuisances, on account of the necessity for them. But from the natural growth of population, and the extension of habitations into their vicinity, they are liable to become such, and when they do, these cannot be abated without an adjudication on their charter at the suit of the sovereign; but at his instance, they may be abated after any length of innocent or even noxious enjoyment. No length of time will legalize a nuisance. *Bell* v. *Blount*, 4 Hawks, 384; *Eason* v. *Jerkins*, 2 Dev. Eq. 38; *Attorney General* v. *Lea*, 3 Ire. Eq. 301; *Wilder* v. *Strickland*, 2 Jones, Eq., 386.

Where the erection of a nuisance is enjoined upon a mere threat, or intention to erect it, the party enjoined has no right to any compensation on account of being forbidden to make an unlawful and injurious use of his property.

The same maxim applies when an action will, whenever completed, evidently come within the first class. The party is entitled to no compensation for his loss in consequence of having done or contemplated an unlawful and injurious act. No question of compensation can arise upon the second class of cases, because the party can always so order his business

that it will not be a nuisance. I do not know of any case which holds that a party is entitled to compensation upon the abatement of a nuisance of the third class. There may be cases in which he would be, and intimations to that effect may be found in the cases cited from our own reports. The general rule however is to the contrary, for the erection in this class of cases, becomes a nuisance in the natural course of things, which might, or ought to have been foreseen by the party.

4. The fourth class, under which the present case comes, is where the erection was not originally a nuisance, and does not become so either by mismanagement or in the foreseeable course of events, but which being originally lawful, becomes a nuisance by force of the ordinance of the corporate authorities of a town, which although authorized and presumably just, is yet arbitrary, in the sense, that its enactment depends upon the opinion and discretion of the corporate authorities. I do not know of any authority on the point, but this case is obviously different, as to the right to compensation upon an abatement, from any case falling within the preceding classes. The right of the corporate authority seems to fall, not so much within the common law power to abate a nuisance, as within the power of eminent domain, by which a State takes private property, when the public convenience requires it. This discussion has arisen so naturally out of the facts of this case, that it was almost impossible to avoid it. But no decision on the question of the plaintiffs' right to compensation, is necessary in this case, because this action is not against the town which adopted the damaging ordinance, but against the individual whose official duty it became to enforce it. The trespass of the Mayor consisted in enforcing the ordinance, not by abating anything existing, but by prohibiting the finishing of a building which had been declared a nuisance by competent authority. One may have a right to compensation for the destruction of what he has put up, which was lawful when it was put up; but there can be no such thing as a vested right to prolong and aggravate a nuisance, after it has been

declared such. The addition to the erection of plaintiff after June 28th, was a nuisance which the Mayor would have been justified in abating, and *a fortiori*, which he was justified in preventing.

PER CURIAM. Judgment affirmed.

H. C. HEDGES *v.* THE WILMINGTON & WELDON RAILROAD COMPANY.

Where in an action against a railroad company to recover damages sustained by the plaintiff by reason of the failure of the defendant to keep its track in repair, it was in evidence that the cars of the defendant ran off the track between A and B, which points were twenty-five miles apart: *Held*, that evidence was admissible to show that the witness had passed over the same road two days before the plaintiff received the injury, and that at some point on the road witness had felt a severe jar, and that on the day the cars ran off witness was in the cars and predicted that at a point ahead the passengers would feel a severe jar, and that the prediction was verified, although the point at which the jar occurred was not shown to be the point at which the cars ran off.

CIVIL ACTION to recover damages, tried before *Seymour*, *J.*, and a jury at Fall Term, 1874, of the Superior Court of WILSON county.

The action was brought to recover damages sustained by the plaintiff by reason of injuries received on account of the alleged negligence of the defendant in allowing its road to be in a bad condition and in negligently running its cars, &c.

The facts pertinent to the case as decided in this Court, are set out in the statement agreed upon by counsel and sent up as a record, which are substantially as follows:

The depositions of the plaintiff and other witnesses were offered in evidence in his behalf, and it was agreed that his

Honor should pass upon the competency of certain interrogatories and answers which were objected to by the defendant, on the ground that the interrogatories were leading and the answers not competent. His Honor overruled the objection and the following interrogatories and answers were admitted in evidence, after exception by the defendant.

Deposition of the plaintiff: Interrogatory 6th. Were you a passenger on the express passenger train of the defendant any time in the Spring or Winter of 1873; if so, state when?

Answer. I was on their passenger train about the 25th of March, 1873.

Interrogatory 6th. Had you purchased a ticket entitling you to ride on said train, or had you paid your fare?

Answer. I purchased a ticket from Savannah through to Baltimore on said defendant's road.

Interrogatory 7th. Did the said train, or any car or cars thereof run off the track on said occasion?

Answer. I know there was two cars of said train I was on, on the occasion referred to, ran off the track.

Interrogatory 8th. Were you thereby injured, and if yes, state how and to what extent?

Answer. I was by said accident severely bruised about the head and neck and had my head cut, and also had my arm and leg bruised.

Interrogatory 9th. If you were injured and put to any expense thereby, state all about the same and how it was incurred?

Answer. I was injured very seriously and was taken from where the accident occurred to Richmond, Va., where I was forced to lay over under the care and treatment of a physician at Richmond, Va. Two physicians treated me. I do not recollect now all I paid for medical attention. I paid one physician, for merely examining me, five dollars, and paid another, and paid for my board while I was detained there a week before I could travel. I also paid for medicines, the amount I do not remember. My friend, Mr. Bogges, who was travelling with me, was also a physician, had previously

dressed my wounds and laid over with me at Richmond, also all the nursing and attention for me, for which he has not yet charged.

Interrogatory 10th. State what you know about the condition of the Wilmington and Weldon Railroad at the time you were last a passenger on it; if that was the time of the casualty aforesaid?

Answer. I have not been on it since the accident. I know but little about the condition of the road. I know it was very rough.

Interrogatory 11th. Have you received any medical attention, in consequence of the hurts inflicted on you in the manner and at the time hereinbefore referred to; and if so, who were your medical attendants?

Answer. I was examined by Dr. Ramsay at Clark's Bay, West Virginia, and sent to the country with my friend Mr. Bogges, who treated me there.

Deposition of Albert Bogges. Interrogatory 1st. Were you a passenger on the passenger train, with the plaintiff, H. C. Hedges, on the Wilmington and Weldon Railroad, in the Spring of 1873?

Answer. I was such passenger about the 26th day of March, 1873. It was on the 26th day; I know from my memorandum book.

Interrogatory 2d. Did the train run off the track on that occasion, and did the plaintiff receive any injury thereby, and if so, state what you know about any and all the same?

Answer. On that occasion three cars of the train ran off the track, the car in which the said H. C. Hedges and I were in, and two others. Hedges was very badly bruised on the face, neck and head, one arm and one leg. The accident, I was told, was near Wilson. I am not acquainted with the county.

The deposition of one Montcastle, a boarding house keeper in Richmond, was offered in evidence in which the witness, in reply to the interrogatory, "State what you know about the condition of plaintiff on the 26th of March, 1873, if you

saw him then?" answered "he came to my house that day; his condition was that of a man very badly bruised about the face and neck and hands and extending down upon the breast and side. He was quite sick for about two days. I considered him (the plaintiff) very badly bruised and injured." The defendant objected to this evidence on the ground that witness was not qualified to give and could not give his opinion. The objection was overruled by the Court, and the defendant excepted.

It was in evidence that the accident occurred between Wilson and Rocky Mount, and that these places are twenty-five miles apart.

One Warren was introduced as a witness for the plaintiff, and testified that he was a passenger on defendant's road on the 24th March, 1873, from Wilson to Rocky Mount; the road was rough in places, and at one place he felt a severe jar; he could not say the road was rough or that he felt the jar at or near the place of the accident. The plaintiff proposed to ask the witness if he did not predict on his return, a day or two afterwards, that at a certain point on the road ahead of them, they would feel a severe jar, and that in point of fact a severe jar was felt at the place named, as he had predicted.

The defendant objected; the objection was overruled, and the defendant excepted. The witness then stated that he had predicted that at some point on the road, ahead of them, they would feel a severe jar, and that in point of fact a severe jar was felt at some point as he had predicted.

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

Moore & Gatling, for the appellant.
Smith & Strong, contra.

READE, J. The case was not argued before us for the defendant. But after the case had been argued for the plaintiff and decided by the Court, we permitted Mr. Moore, at his re-

quest, to put in a brief for the defendant. Upon examining his brief, we find that the only point which he presents was not argued by the plaintiff's counsel, and was not supposed by us to have been made below; or to appear in the record. If Mr. Moore's brief had changed our views, we should have felt obliged to continue the case until next term, so as to allow the plaintiff's counsel to be re-heard, which shows the propriety of the rule, to have the whole case opened at the hearing; and the impropriety of relaxing it, as we did in this case, except for special and urgent reasons.

We understand the brief of Mr. Moore to abandon all the exceptions except the objection to the competency of the testimony of the witness Warren. We think the objection is founded in a misapprehension of the testimony.

The objection assumes that the plaintiff travelled over the defendant's road 160 miles in length, and was injured by the cars running off the track at some "undesignated point." And that Warren "was asked the question, if he did not predict, while traveling on the road a day or two after the accident, that at a certain point on the road a severe jar would be felt; and that his prediction was verified?" And then it is insisted, that the fact that the track was out of repair at one point is no evidence that the accident occurred at that point, or that the road was out of repair at any other point; or at the particular undefined point where the accident did occur; and therefore did not tend to prove negligence on the part of the defendant. But the facts are, that the accident occurred between Wilson and Rocky Mount, two depots twenty-five miles apart, on the 26th of March. And the testimony of Warren was, that two days before, 24th March, he travelled on the road from Wilson to Rocky Mount, and that the road was rough in places, and that at one place a *severe jar* was felt; and that a day or two afterwards, which must have been 25th or 26th March, the day before, or the very day of the accident, he travelled back from Rocky Mount to Wilson, and on the route he spoke of the severe jar, and predicted that they would feel

it again, and so they did. So we have it that the accident occurred between these two points; and that for two or three days just before the accident, the road was out of order, rough in several places, and badly out of order at one place; and is not that some evidence tending to show that the accident occurred at some one of those bad points, and that the defendant was negligent in not repairing them. All this is so plain that the plaintiff's counsel supposed, and so did we, that the objection to Warren's testimony was, that he was permitted to speak of what he said on the cars in the way of predicting the "severe jar" which they would feel.

We do not think that there is any force in any of the defendant's exceptions.

There is no error.

PER CURIAM. Judgment affirmed.

J. F. KING *v.* J. E. WINANTS.

The judgment of this Court in *King* v. *Winants*, 71 N. C. Rep. 469, affirmed.

PETITION, to re-hear this case, which was decided in this Court at June Term, 1874.

The facts, pertinent to the case, as decided, are fully set out in 71 N. C. Rep., 468, and it is deemed unnecessary to report them again.

Smith & Strong, for the petitioner.
Batchelor & Son, contra.

BYNUM, J. When a case, which has been once decided by this Court, is again brought before it for a re-hearing, in the

manner prescribed by law, it is the unquestionable duty of the Court, not only to re examine the grounds of the former decision, but to carefully consider any new and additional argument or authority which may be presented with the view of changing the judgment of the Court. This duty we have attempted to discharge, but the result is that we have been unable to discover any error in the former decision, and that we must, therefore, adhere to and affirm it.

In the re-argument, Mr. Smith submits the true test for determining whether the action can be maintained, to be this: If the plaintiffs' demand, though connected with an illegal transaction, can be enforced, without aid from the illegal transaction, it will be upheld; and in support of this position, he cites *Simpson* v. *Bloss*, 2 E. C. L. R., 3 and 6. The rule is not disputed, but the difficulty is in its application. The burden of so presenting his demand that it may be enforced without opening the illegal transaction, certainly rests upon the plaintiff, and the rule laid down by Mr. Smith will be found easier in theory than in the practical application of it. The Courts will not be swift to seek a way of enforcing a demand which springs out of a nefarious transaction, upon subtle distinctions.

But this Court in the opinion delivered, 71 N. C, 469, fully considered the case, in the view presented by the learned counsel, but held that he had not brought his case within the rule he laid down, for that the rights of the parties to this action, could not be determined without opening and developing the entire transaction. His premises, therefore, having failed, his conclusions must go with them. That the demand here cannot be enforced without the aid of the illegal contract, is clear from many recent decisions in cases analogous to this. Where a board of auditors of the town of O., were authorized to receive proposals for the collection of town taxes, and to award the collection to the person offering the most favorable terms, the plaintiff and defendant, both made proposals. At the time of doing so, they made an agreement that if either

obtained the award, he would share the profits equally with the other. The defendant obtained the award and made certain profits. It was held that the agreement was against public policy, and that the plaintiff was not entitled to recover the stipulated share of the profits. *Atchison* v *Malton*, 43 N. Y., 147.

Again: Where several parties entered into an unlawful agreement to bid for certain work, and did put in a bid, but before it was awarded, another who was a higher bidder, purchased the bid for $400, giving his note therefor. It was afterwards agreed, that one of the parties to the illegal partnership, should collect the note, and that each of the partners should receive $100 of the proceeds. One of the parties was not paid, and brought his action for his share of the money collected. It was held that the partnership being illegal, he could not enforce any of its unexecuted provisions, one of which was to divide the $400. *Woodworth* v. *Bennett*, 43 N. Y., 273. There, the express agreement made for the collection of the note and the division of the note and the division of the money, could not be enforced, because it was a promise to carry out the unperformed provisions of the contract of partnership. So where two or more persons conspired to do an unlawful act, and a draft was given in furtherance of the agreement, it was held that the agreement being against public policy, the draft was tainted with the illegality, and could not be recovered upon. *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa., 173.

These cases are but in affirmance of *Blythe* v. *Lovingood*, 2 Ired. 20, and the prior case of *Holman* v. *Johnson*, Cowper 343, cited and fully commented upon in the opinion of this Court, as delivered by Justice READE.

The whole doctrine may be summed up in this proposition, viz: The taint of illegality extends to and vitiates every subsequent transaction growing out of and in furtherance of the original illegal transaction. We do not propose to go further in the discussion, and have said this much only in answer to the argument submitted on the re-hearing. The soundness of

our decision rests upon the opinion of the Court as delivered heretofore.

We again call the attention of the profession to what was said by the Court in the case of *Watson* v. *Dodd*, 72 N. C. Reports.

The former judgment of this Court is affirmed.

PER CURIAM. Judgment affirmed.

STATE OF NORTH CAROLINA on the relation of JOSEPH COTTON and wife *v.* WILLIAM FENNER, RICHARD H. SMITH and BENJAMIN F. GARY.

In an action against a guardian and the sureties upon his guardian bond, it was in evidence: that the ward, the feme plaintiff, having married, her husband demanded of the guardian a settlement of his account as guardian. Afterwards, in a conversation concerning the same, the guardian stated to the male plaintiff, that the feme plaintiff, his ward, was largely indebted to him, at the time showing to the male plaintiff the book in which his guardian account was kept, and representing that the account therein was correct. The guardian then proposed to the male plaintiff that if he and his wife, the ward, would give him a receipt in full of all demands against him as guardian, he would give the plaintiffs a receipt for the alleged balance due. The proposition was accepted and the respective receipts given, the plaintiffs never having examined the account. Subsequently the plaintiffs discovered that the guardian had credited himself in the account with large sums paid in Confederate money, making no deduction on account of the depreciation of the same: *Held*, that the plaintiffs were entitled to an account.

This was a CIVIL ACTION for an account tried before *Henry*, *J.*, at December (Special) Term, 1874, HALIFAX Superior Court.

The following are the facts in the case as disclosed by the statement signed by the counsel and sent up as a part of the record:

The defendant, Fenner, was appointed by the late County Court of Halifax county, at the February Term, 1861, the guardian of the *feme* plaintiff, Ann B. and her brother James S. Paul, and executed his bond as such guardian, with the defendants, Smith and Gary, as sureties thereto, payable to the State of North Carolina, in the penal sum of thirty thousand dollars. Immediately thereafter the defendant, Fenner, as guardian, entered upon the discharge of his duties, and besides negroes and other property of his wards, he received at different times as the property of the *feme* plaintiff, sixteen hundred and eighteen dollars and thirty-two cents, which belongs to the capital of the estate of his said ward, as follows:

From the sale of the land belonging to the estate of C. A. Paul	$ 732 50
From the sale of land belonging to Ann Paul	450 50
Of Richard H. Smith, administrator of C. A. Paul,	253 38
Of Richard H. Smith, administrator, &c.	65 87
From sale of boy Fred, sold Nov. 1st, 1863, for Confederate money, $1,025, scaled,	
Making	$1,618 32

On the 19th day of June, 1867, the plaintiff, Ann B., intermarried with the plaintiff Joseph Cotton, and arrived at full age on the —— day of April, 1869. After the intermarriage of the plaintiffs, the plaintiff Joseph, demanded of the defendant Fenner, a settlement of his accounts as guardian, and the payment to him of such balance as might be due to his said ward. In the latter part of the year 1869, or early in 1870, the plaintiff Joseph, went to the store of the defendant Fenner, where he met the defendant Smith, and a conversation arose as to the settlement of the guardian account. Smith left, saying that the plaintiff Joseph, and the defendant Fenner, could settle without his aid. Fenner then stated that according to his guardian book, in which the guardian account of the *feme* plaintiff was kept, and which was then written

out in full, it appeared that his ward was indebted to him, as her guardian, over fifteen hundred dollars, and proposed to the plaintiff Joseph, that he, Fenner, would give up the whole of this sum to plaintiffs, and give them a receipt in full therefor, if plaintiffs would give him their receipt in full settlement of his guardian account. At the same time Fenner handed to the plaintiff the book in which he then said his guardian account was stated, and told the plaintiff Joseph, that he could take the book and examine the account with his wife, at their leisure, but that they would find it correct. The said Joseph took the book and held it in his hands a short while when he returned it to the defendant without having examined it at all, and agreed to accept the proposition of the defendant Fenner. Thereupon the receipt was written and signed by the plaintiff Joseph, and was taken home by him for the signature of the *feme* plaintiff. It was signed by her and delivered to the defendant Fenner, about a week afterwards.

There was no order of any Court of competent jurisdiction obtained by the defendant as guardian of the *feme* plaintiff, allowing him to expend any portion of the principal of her estate, for her support and education.

In the account as contained in the defendant Fenner's book, the guardian had credited himself with large sums, paid for his ward in Confederate Treasury Notes when they were at a discount from twenty to fifty for one. If these payments had been scaled at their value when they were made, there would have been a balance due his ward.

The defendant Fenner, testified that the sums of money above mentioned as belonging to the estate of his ward were well invested. In addition to said money his ward owned a considerable number of slaves. During the war and especially the latter years of the war the cost of supporting the expensive negroes was largely in excess of the ward's income. He made efforts to put them out to the lowest bidder, but that on more than one occasion the sums offered for certain families of said slaves were so large that he kept them at home, built houses

for them and supported them. In order to do so he was compelled to call in and use the principal money of his ward's estate, having no other source from which to draw the necessary funds. That by this means he supported the said families at about one half the price it would have cost if they had been put out to the lowest bidder. That in supporting these families he had expended of his own means the amount of the balance against his ward, and that this balance was in Confederate money.

The plaintiff Joseph, was twenty-two years old at the time of his marriage, and was raised in the immediate neighborhood of the defendants Fenner and Smith, both of whom were old men, and the latter a man of great influence in the neighborhood. The plaintiffs never examined the guardian account and only became aware of the alleged errors which were made in the statement thereof, from report of the settlement of the defendant Fenner with his other ward and a report that upon a proper settlement of said accounts, the defendant would be largely indebted to his said ward.

The defendant Fenner, made no return to Court after the year 1862, of his account as guardian of the *feme* plaintiff. It appeared from his guardian book, that on the 1st day of January, 1864, he was indebted to his ward over eleven hundred dollars, and that on the 1st day of January, 1865, his said ward was indebted to him over fifteen hundred dollars, which was caused by crediting to the guardian large payments in Confederate money, many of which were made when it was at a depreciation of fifty to one. At the trial the plaintiffs submitted to the jury the following issue, which was accepted by the defendants, to-wit: "Are the plaintiffs entitled to an account of the guardianship of the defendant Fenner?"

His Honor charged the jury that if the plaintiffs desired to avoid the effect of their receipt on the ground of fraud, misrepresentation or mistake, it would be necessary for them to prove the same to the satisfaction of the jury; that as much as the ward did not herself settle with the guardian, but did

so through her husband, a person of full age, and at least of ordinary intelligence, and this too after the lapse of nearly a year after attaining her majority, the law did not cast a presumption of fraud or undue influence upon the settlement, and the doctrine of *Lee* v. *Pierce* did not apply, especially if the jury believed that the defendant Fenner, gave to the plaintiff Joseph, reasonable and fair opportunity to examine the accounts and vouchers.

After the argument had closed and the Judge had charged the jury, the plaintiffs asked his Honor to instruct the jury as follows: There being a capital sum of $1,618.32, confessed a payment of any less sum would not discharge the liability: Here then was actually nothing paid, only a release from an imaginary debt which the defendant himself had conjured up." His Honor declined the instruction.

There was a verdict in favor of the defendant, the jury finding the issue in the negative.

Thereupon the plaintiffs moved for judgment, *non obstante veredicto* against the defendants for $1,618.32, the principal of the wards estate with interest thereon from the time of marriage, which motion was overruled by the Court.

The plaintiffs then moved for a judgment *non obstante veredicto* for $1,183.00, the amount of the proceeds of the sale of the land, with interest from the time of the marriage. The motion was overruled by the Court.

The plaintiffs then moved for a new trial on account of error in the charge of his Honor in refusing to charge as requested. The Court overruled the motion and thereupon the plaintiffs appealed.

Clarke and *Batchelor*, for the appellants.

Moore & Gatling and *T. N. Hill*, contra.

SETTLE, J. There is a voluminous record in this case, which will convince any one who will read it *that* the plaintiffs are entitled to an account from the defendants.

PER CURIAM. Judgment accordingly.

NOEL J. FALKNER *v.* SAMUEL R. HUNT and others.

Where, upon the hearing of a Bill in Equity under our former system, this Court sends down issues to be tried by a jury, and the jury finds the issues in favor of the plaintiff, and afterwards A, assignee of the defendants, upon affidavit moves the Court for a new trial, the motion will not be granted where the affidavit of A is contradicted by two affidavits of the plaintiff, although the matter alleged in the affidavit of A be sufficient ground for a new trial.

Where A and B entered into an agreement by the terms of which B was to buy a tract of land of C, on which was a mill seat and mill, and they were to build the mill anew, A was to do the work and B to furnish the materlal and money, and out of the profits they were to pay for the land and reimburse B for his outlay, and pay the plaintiff for his work, and afterwards they were to share the profits or losses equally as partners, and in pursuance of the agreement the land was bought and the mill built, and became profitable, and B received the profits, reimbursed himself and paid for the land: *Held*, That A was entitled to an account as a partner, and that it was not necessary that the contract should be in writing.

This was a BILL IN EQUITY, under our former system, and was heard upon appeal in this Court at January Term, 1873, when upon the hearing the following issues of fact were sent to the Superior Court of Franklin county to be tried:

1. Whether said Hunt purchased said land in pursuance and execution of said contract entered into between him and said Falkner before the said purchase, that said Hunt should purchase the same and he and said Falkner should erect a mill and carry on the milling business on said land, or whether it was after said Hunt purchased said land that he entered into a contract with said Falkner in relation to building a mill and carrying on the milling business on the said land?

2. Whether it was agreed between said Hunt and said Falkner in their contract relating to building said mill and carrying on the milling business on said land, that first deducting the ordinary expenses out of the profits of said mill, after

paying, out of the residue of said profits, for said land and the work in building the said mill, and the timber and irons used in building the same, then upon the completion of said payment, whenever it might happen, the whole of said land and the said mill should be held by said Hunt and said Falkner as equal partners ?

3. Or whether it was agreed between the said Hunt and the said Falkner in their contract relating to building said mill and carrying on the milling business on said land, that if at the end of four years, when the last payment for said land fell due, the said mill had made enough to pay for the cost of the mill and land, with interest thereon, for the cost of building, for the timber and irons and other fixtures, the miller's wages, and for every other expense in building and conducting the mill up to that time, then said Falkner might come in as a partner; but if at the end of four years it failed to do so, then said Falkner should have a fair price for his labor and services, and should have no further connection with the business.

4. Whether it was agreed between said Hunt and said Falkner in their contract relating to building said mill and carrying on the milling business on said land, that said Falkner should in any event be a partner in said mill and the whole of said land, or only in said mill and mill seat and the appurtenance thereto, and so much of said land as should be needed for the purposes of building and operating said mill and carrying on said milling business ?

5. If the terms of the said contract between the said Hunt and the said Falkner relative to said land and mill and milling business were not as above said, then what were the terms and conditions of the said contract ?

The case, so far as decided in this Court at January Term, 1873, is fully reported in 68 N. C. Rep., 475.

The issues were found in favor of the plaintiff and returned to this Court. All other facts necessary to an understanding of the case as decided, are stated in the opinion of the Court at this term.

Lanier, *Fowle* and *Snow*, for the appellants.
Busbee & Busbee, *Batchelor* and *Hargrove*, contra.

READE, J. This was a bill in equity under the old system to set up and settle a partnership, the plaintiff alleging that he and the defendant Hunt, had entered into an agreement, by the terms of which Hunt was to buy for them a tract of land of the defendant Young, on which was a mill-seat and mill; and they were to build the mill anew, the plaintiff doing the work and the defendant Hunt furnishing the materials and money, and out of the profits they were to pay for the land, and reimburse Hunt for his outlays, and pay the plaintiff for his work; and then they were to share the profits or losses equally as partners; that the land was bought, mill built, was profitable. Hunt received the profits, reimbursed himself, paid all but a small balance for the land to Young, plaintiff has not been paid, and prays that the partnership may be declared, and the defendant Hunt compelled to account; and that the land and mill be sold, and out of the proceeds the balance to Young be paid, and that Young who still holds the title, may be compelled to make title, &c.

The answer of Hunt denies the partnership, and states the contract to have been that plaintiff and himself agreed to build the mill, and if in four years the profits paid off every thing, then the plaintiff might come in as a partner, otherwise he was to be paid a fair price for his labor, and there his connection with it was to end; that the profits had never been sufficient to pay out; and therefore the plaintiff is not a partner. As for the land, Hunt says that he bought it for himself without any agreement with the plaintiff, and prior to the agreement to build the mill, and he relies upon the statute making void parol contracts for the sale, &c., of land.

The cause was set for hearing and heard, and his Honor below found the facts to be as stated in the bill, and directed an account, &c., from which the defendant Hunt appealed.

In this Court, because we preferred not to try the facts, we directed issues to be tried by a jury in Franklin county, and the jury found all the issues for the plaintiff, as his Honor had done, and the issues are returned to this Court.

And now at this term, George B. Harris, who says he is the assignee of Hunt and the real party in interest, moves for a new trial for causes set forth in his affidavit filed. If the causes set forth were sufficient if true, still we could not grant a new trial, for the reason that his affidavit is plainly contradicted by two affidavits filed by the plaintiff, so that we have to refuse the motion for the reason that the causes assigned do not exist.

We are satisfied with the finding of the issues by the jury, (which will be set out by the Reporter) and with the finding of the facts by his Honor below; and also with his ruling, that the statute of frauds did not apply. And his judgment is in all things approved.

This will be certified, to the end that there may be an account of the partnership and of the balance due Young for the land, and a sale of the land, and if need be, an account of the funds in the hands of the receiver, and such further proceedings as may be necessary, and according to the course and practice of the Court.

There is no error. This will be certified.

PER CURIAM. Judgment affirmed.

WILLIAM W. PURVIS and wife *v.* WIL' IAM H. CARSTAPHAN.

Where a wife joins her husband in a conveyance of her separate property to secure a debt of the husband, the relation which she sustains to the transaction is that of surety.

A surety is entitled to the benefit of all the securities which the creditor acquires from the principal debtor, and if the creditor perverts or misapplies such securities to the prejudice of the surety, he thereby discharges the surety *pro tanto*. Therefore, where a feme covert joined her husband in a conveyance of her separate estate to secure the payment of advances which the defendant, a merchant, had agreed to make, to enable the husband to carry on a farm, and the mortgage alse conveyed the crops to be made, and all the stock, tools, &c., to secure the sum of $1,500, and the husband received the $1,500, and the additional sum of $1,100, and the crops were delivered to the defendant, who sold them, and by the direction of the husband, without the knowledge of the wife, applied the proceeds of the crop to the payment of the additional sum of $1,100: *It was held*, That as against the husband the application was valid, but as against the wife, a surety, it was a perversion of the security, and operated as a discharge of the liability of the land.

MOTION to dissolve an *Injunction*, heard before *Moore J*, at Spring Term, 1875, MARTIN Superior Court.

The plaintiffs had executed to the defendant a mortgage, a copy of which is hereto annexed. The debts to be secured were those of the husband; the land mortgaged was the property of the wife.

The plaintiff William, traded with the defendant Carstaphan, to an amount greater than fifteen hundred dollars, and the other creditors secured in the mortgage had been paid in full; and delivered to the defendant Carstaphan, all of the cotton raised on the mortgaged lands, to an amount greater than the $1,500 and the $224.83, but the plaintiff is still indebted to him in about the sum of $1,100. The plaintiff William, directed Carstaphan to apply the proceeds of the sale to the amount called the $1,100 debt. The plaintiff William, and his wife lived upon the mortgaged premises, and he managed and controlled the entire crop.

There was no evidence that the plaintiff Martha, knew the extent of the purchases of her husband from the defendant or of the manner in which the proceeds from the sale of the cotton was to be directed to be applied.

The defendant Carstaphan, had advertised the lands mortgaged for sale, and the plaintiffs had obtained an order restraining the sale.

At the hearing, his Honor being of opinion that while the mortgage would only secure Carstaphan against a second mortgage only to the extent of the sums of $1,500, and $24.83 yet as against the plaintiffs, it was a security for whatever amount the plaintiff William, might owe the defendant, contracted for the purposes mentioned in the mortgage, although the land mortgaged was the property of the wife, and more than $1,500 had been advanced to the plaintiff William.

From this ruling of his Honor, the plaintiffs appealed.

The following is a copy of the mortgage:

STATE OF NORTH CAROLINA, }
County of Martin. }

This indenture made and entered into this the twenty second day of February, one thousand eight hundred and seventy-three, by and between William W. Purvis and wife, Martha E. Purvis, of the first part, of the above mentioned county and State, and William H. Carstaphan, of the State of North Carolina and county of Martin, and B. Weisenfield, Bernard Stern, J. Friedenwaller and David Weisenfield, trading under the name, firm and style of Wiesenfield, Stern & Co., of the city of Baltimore and State of Maryland, parties of the second part, witnesseth: That the said William W. Purvis and wife, Martha E. Purvis, for and in consideration of the sum of five dollars, to them in hand paid by the parties of the second part, and for the further considerations which will appear and be set forth hereafter in this deed, have bargained and sold, and by these presents do bargain, sell, alien and convey unto William H. Carstaphan, B. Weisenfield, Bernard Stern, J. Fried-

enwald and David Weisenfield, of said city of Baltimore, trading under the name, firm and style of Weisenfield, Stern & Co., the following real and personal property, lying and being in the State of North Carolina and county of Martin, and bounded, described and identified as follows, viz: A tract of land containing four hundred and eighty-four acres, adjoining the lands of McG. Taylor and that of the heirs of Joshua Taylor and others, it being the piece upon which William W. Purvis and his wife, Martha E. Purvis, now reside, four mules, two horses, one mare, all of the farming utensils to the said Purvis belonging, one gin and gin house, and all of the crops of every kind and description that may be planted or any where raised by the said William W. Purvis during the year eighteen hundred and seventy-three: To have and to hold the said four hundred and eighty-four acres of land, four mules, two horses, one mare, the farming utensils of every description, gin and gin house, and crops of every description raised by the said William W. Purvis during the year eighteen hundred and seventy-three, unto them, the said William H. Carstaphan and B. Weisenfield, Bernard Stern, J. Friedwald and David Weisenfield of the firm of Weisenfield, Stern & Co., their heirs and assigns forever, in fee simple and absolutely; and the said parties of the first part doth now and will forever warrant and defend unto the parties of the second part, the title herein granted to said disposed of property against the claims of any and all persons whatsoever.

Provided and nevertheless, that the conditions on which the above deed is made are as follows, viz: That it is the desire and intention of the said William W. Purvis to engage in farming during the year eighteen hundred and seventy-three on his plantation in said county, and which he is unable to do without aid in the way of money and supplies; which money and supplies the said William H. Carstaphan and B. Weisenfield, Bernard Stern, J. Friedwald and David Weisenfield, of the firm of Weisenfield, Stern & Co., agree to furnish, if necessary to the amount of three thousand dollars, in proportion

as follows, that is to say, William H. Carstaphan, supplies and money to the amount of fifteen hundred dollars, and Weisenfield, Stern & Co., money, or its equivalent, if desired, to the amount of fifteen hundred dollars to the said William W. Purvis to assist him in his farming operations.

Now, therefore, if the said William W. Purvis shall, on or before the first day of January, eighteen hundred and seventy-four, pay to the said Weisenfield, Stern & Co., either in cotton or money, whatever sum they may advance at eight per cent. interest on the same and five per cent. commissions on such sum and in all respects hold them harmless from any loss, and also pay William H. Carstaphan the sum of two hundred and twenty-four dollars and eighty-three cents, and whatever further sums he may advance either in money or goods, and likewise save him, the said William H. Carstaphan in everything harmless from any and all losses, then the above deed and every part thereof shall be void, otherwise it shall remain in full force and effect, and it shall be lawful for and the duty of the said William H. Carstaphan, and the members composing the firm of Weisenfield, Stern & Co., to advertise for the term of thirty days all the property herein conveyed (saving and excepting the crop) at five public places and expose the same at public sale for cash before the court house door in Williamston, and after having paid themselves any and all sums that may be due after the sums realized by the sale of the crop have been exhausted and the expenses attending the sale and this instrument, shall pay over to the said William W. Purvis, his heirs and assigns the balance remaining, and the said William H. Carstaphan or any member of the said firm of Weisenfield, Stern & Co., as it now exists shall have the power to sign and make title to the property thus disposed of. As witness their hands and seals the year and date above written. Interlineation, if any, before signing.

(Signed,) W. W. PURVIS,
MARTHA E. PURVIS.

Moore, with whom was *Gilliam*, for the appellants, argued:

The debt being the husband's, and the land mortgaged to secure it being the wife's—the wife's estate is considered only as a surety. *Huntington* v. *Huntington*, L. Cases in Equity, p. 577, 3rd American Edition; American notes by Hare and Wallace, pp. 591, 594 and the following cases there cited: *Hawley* v. *Bradford*, 9 Paige 200; *Fitch* v. *Cotheal*, 2 Sanford, chap. 29; *Ayres* v. *Hustead*, 25 Conn. 504; *Johns* v. *Reardon*, 11 Maryland 465; *Sheidle* v. *Weishlee*, 4 Harris 134; *Knight* v. *Whitehead*, 20 Miss. 245.

This equity is not rebutted by a reservation of the right of redemption, or the surplus arising from a sale under mortgage to the husband; same page, 592, top of 2nd column, and page 583, near bottom. *Week* v. *Haas*, 3 W. & S., 520, 523; *Duffy* v. *Insurance Co.*, 8 Id. 413.

Being invested with the character of surety, she is entitled to the equities of a surety and will be discharged by any act on the part of creditor of a nature to impair her recourse for indemnity. Same page, 592, 1st paragraph, 2nd column; *Loomer* v. *Wheelwright*, 3 Sandford, chap. 135, and other cases there cited.

Mortgage not good beyond the amount specified, which here is $1,500 to Weisenfield, Stern & Co., $1,500 to Carstaphan, $1,500 which has been paid. Kent's Commentaries and cases there cited, *Pettilorne* v. *Griswold*, 4 Conn. 158; *Stroughton* v. *Rusco*, 5 Conn. 442; *St. Andrews Church* v. *Tomkins*, 7 Johns. Ch. Rep. 14.

See also *Marsh* v. *Lea*, L. C. in Eq., p. 610 and 611; *The Bank of Utica* v. *Finch*, 3 Barbour, Ch. Rep. 293.

Here the cotton mortgaged was delivered and was sufficient to pay the debt. The wife had a right to be indemnified from this cotton if her land were subjected to payment. The holding of the cotton and its proceeds discharges the surety, and it could not be applied to any other debt without discharging the surety except with her assent. *Pain* v. *Packard*, *King* v.

Baldwin, American Leading Cases, notes to page 345, 4th Edition.

The mortgage is only good for $3,000,—$1,500 to Carstaphan.

It is true bonds, deeds, &c., are taken most strongly against those making them, but this rule is not resorted to until other rules of construction fail, but when there is a condition, that is to be taken most favorable to the obligors or grantors. *Bennehan* v. *Webb, et. al.*, Ire. Vol. 6, p. 57; Greenleaf's Cruise on Real Property, Vol. 2, p. 694, 2d Edition, quoting Bac. Max. Reg. 3, p. 14; 2nd Kent's Commentaries, page 556 and 557, other authorities.

Smith & Strong, contra, argued:

1. The mortgage secures all the advances made and partly indemnifies defendant against loss in making them. The limitation is only of the defendant to make advances.

2. The mortgage, though valid as against subsequent mortgages only for the sum mentioned, is effectual as between parties as well in securing them in excess of the sum. Bat. Rev., chap. 65, sec. 19, p. 566.

3. The cotton received was rightfully applied in the payment of the advances in excess of the $1,500, and this by Purvis' express sanction. *Jenkins & Co.* v. *Beal*, 70 N. C. Rep., 440; 2 Spencer's Eq. Juris.

4. The surplus reserve, after discharging the costs, to the husband, confers on him the right to make the application, and makes him an agent of both.

5. The advances were for both, and used in making the cotton, and may be regarded as expenses going to be first paid, and the residue only subject to the provisions of the mortgage. Just as hands may be hired and paid out of the crop, so may other necessary expenses incurred thereby, since without this no crop could have been made to become available as payment of the secured debt.

6. The mortgagor making either debts to the mortgagee,

cannot redeem without paying both. 4 Kent Com., p. 175; 2 Story Eq. Juris., sec. 1,034, 35.

The wife cannot claim against creditor. Cool. Law of Mortgage, 485.

READE, J. Where a wife joins her husband in a conveyance of her separate property to secure a debt of the husband, the relation which she sustains to the transaction is that of surety.

A surety is entitled to the benefit of all the securities which the creditor acquires from the principal debtor. And if the creditor prevents or misapplies such securities, to the prejudice of the surety, he thereby discharges the surety, *pro tanto.*

It follows that if the defendant creditor acquired any security from the husband plaintiff, and perverted or misapplied it, either of his own will, or with the concurrence of the principal debtor, it releases the surety wife, *pro tanto.*

These positions are well supported by the authorities cited in the plaintiff's brief.

It is necessary now to enquire whether the creditor did misapply, to the prejudice of the surety, any security which he had from the principal debtor. And this depends upon the proper construction of the mortgage.

The mortgage recites that the plaintiff husband, desired to engage in farming; and, to enable him to do so, the defendant had agreed to furnish him with money and supplies to the amount of $1,500, if necessary. And the husband and wife mortgaged not only the crops to be made, but the stock, tools, machines, &c., and the farm itself, which farm was the property of the wife to secure whatever sum the defendant might advance, and to save him harmless, &c. The defendant advanced $1,500 and $1,100 more. And the question is, whether the mortgage covers the $1,100, as well as the $1,500. We think it does not. Although the words "whatever sum" and "save harmless," are large; yet we think they are restrained by the sum specified, $1,500. The stipulation was, that the

defendant was to furnish $1,500, "*if necessary.*" If so large a sum was not necessary, then "whatever sum" might be necessary, less than that.

It is admitted that the creditor received from the debtor husband more of the crop, &c., produced on the farm than was necessary to pay off the $1,500; but by the consent of the husband, he applied it to the excess over the $1,500. While this appropriation was good as against the husband, yet as against the surety wife, it was a perversion, and operated as a discharge of the liability of her land.

There was error in dissolving the injunction.

Let this be certified.

PER CURIAM. Judgment accordingly.

JOHN W. SCOTT *v.* ELIAS BRYAN.

A promise to pay the debt of another is not binding on the party making the promise, unless the same be in writing.

To prove a disputed fact, the best evidence of which the nature of the case admits must be produced. The best evidence of a judgmeet is the record of the same, or a transcript thereof.

(*Britton* v. *Thrailkill*, 5 Jones 329, cited and approved.)

CIVIL ACTION, for the recovery of money only, tried before *Kerr*, *J.*, at Fall Term, 1874, CHATHAM Superior Court.

The action was referred by consent and heard by his Honor upon exceptions to the report of the referee, which was substantially as follows: I find that J. W. Scott was a merchant in the town of Haywood, in Chatham county, from 1855 to 1869, and the defendant was one of his customers during that period, and that the plaintiff sold goods to the defendant and his family, and charged them to the defendant,

and kept an account of what he sold, and also of what he received from the defendant, crediting the defendant with the money received from him and the services rendered by him.

The defendant produced an account against the plaintiff for a few articles alleged to have been sold to plaintiff, and also for the board of the brother of the plaintiff for two months. As to these demands each party pleaded the statute of limitations, and it was held that the statute barred both claims. I also find that the plaintiff had charged the defendant with an account of $228.83 against B. R. Bryant, who was a ward of the defendant. The defendant was the father of B. R. Bryant, and in the year 1866 as guardian of his said ward, assumed the payment of the account as stated by the defendant, but, as stated by the plaintiff, he assumed it individually, although the account was for goods sold prior to the 17th of April, 1861, I hold that it is not barred by the statute of limitations, as it became the debt of the defendant within the time beyond which the statute does not apply; the defendant having also assumed the payment of the same within three years from the date of said account. I have therefore charged the defendant with the items on the account of the plaintiff after the 17th day of April, 1861, with interest. I also charge him with the B. R. Bryan item of $228.83, with interest.

The report of the referee is voluminous and contains a great many facts not pertinent to the case as decided. The defendant excepted to the ruling of the referee, charging him with the item of $228.83, and also to the admission of the testimony of the plaintiff with regard to a counter-claim, all of which is fully stated in the opinion of the Court.

The exceptions were overruled and the defendant appealed.

B. I. Howze and *Tourgee & Gregory*, for the appellant.
John Manniny, contra.

RODMAN, J. The defendant suggested a diminution of the record, in that the record of a judgment recovered by Scott

against one Elliott, which is referred to in the case settled between the present parties, does not accompany the case, and moved for a *certiorari* to bring it up as a part of the case. This was opposed by the plaintiff, and we are of opinion that the writ should not be granted. The reasons for this opinion will sufficiently appear from our opinion on the second exception to the judgment of the Court below.

The first exception of the defendant is that the referee erroneously charged him with a certain debt of $228.83, which B. R. Bryan, a son of the defendant, had contracted with the plaintiff. The son, at the time of contracting the debt, was a minor and the defendant was his guardian. On a certain occasion the son had some cotton; whether it was the product of his own land or of the defendant's, does not appear and is not material. Plaintiff endeavored to get the son to consent to his taking the cotton in payment of the debt. This the son refused to do except with his father's consent. The father refused to consent, but said he would pay the account. It is immaterial whether he said he would pay it as guardian, that is, out of the son's property, or not. An unqualified promise to pay out of the son's property would be as binding as a promise to pay individually, and would amount to the same thing. But whatever the form of the promise was, it had no legal force, as it was a promise to pay the debt of another, and was not in writing. *Britton* v. *Thrailkill*, 5 Jones, 329.

In the present case the debt was originally, and continued to be, that of the son. The promise of an infant to pay an account for goods sold to him, (not being necessaries,) though voidable, is not void. 1 Pars. Cont. 295.

The promise of the father was superadded to the liability of the son. A father or guardian is under no legal liability to pay debts contracted without authority from him by his son or ward except under special circumstances which did not exist in this case. 1 Pars. Cont. 304; *Hunt* v. *Thompson*, 3 Scam. 180; *Varney* v. *Young*, 11 Vt. 258; *Kelly* v. *Davis*, 49 N. H. 187; *Robinson* v. *Weeks*, 56 Maine 102; *Shelton* v.

Springett, 11 C. B. 452, (73 E. C. L. R;) *Rolfe* v. *Abbott*, 6 E. & P. 286, (25 E. C. L. R.)

We concur in the judgment of his Honor on this exception. The defendant is not liable.

The second exception of defendant is set forth as follows: "That the referee erred in admitting the testimony of the plaintiff, as follows: The plaintiff proposed to prove that he and the defendant were co-partners. That as co-partners they were indebted to one George Harris, principal and interest, somewhere between $5,500 and $6,000. That plaintiff had a claim amounting, principal and interest, to $2,000 against one Elliott, and that in the settlement of the claim of Harris against Scott and Bryan, the claim of Scott against Elliott was taken in part payment. The said Harris was the bondsman of Elliott. The claim of $2,000 was due Scott individually from Elliott.

The defendant's counsel then asked if those two claims had been reduced to judgment. The plaintiff answered that the claim against Scott and Bryan had been reduced to judgment, and the other not. The defendant then objected to the proposed testimony as being incompetent without the production of the judgment. Objection overruled; testimony admitted. The plaintiff admits the case 626, *J. W. Scott* v. *W. P. Elliott*, was the claim he had on said Elliott, and that the papers filed in the judgment roll are the papers in the case. His Honor sustained this exception. From these rulings the plaintiff prayed an appeal."

The evidence objected to by the defendant, was that tending to prove the amount of the claim of Harris against the firm of Scott and Bryan, upon which the plaintiff alleged he had paid $2,000 of his separate money. The amount of this partnership debt seems to have been in dispute. If it was less than $2,000, evidently the plaintiff paid more than the partnership was liable to pay, and he was certainly not entitled to charge for any excess paid over and above the partnership debt. To prove a disputed fact the best evidence must be produced

which the nature of the case admits. A transcript of the judgment (not of the *judgment roll*) was evidently better evidence of the amount of the debt, than the recollection of the witness. We are at a loss to conjecture why the plaintiff should have persisted in leaving this question of fact open to doubt, when he might have produced conclusive evidence. If he was surprised and not then prepared with a certificate of the judgment, it must be supposed that the referee would have given him reasonable time to procure it, as it would have been the duty of the referee to do. His Honor sustained this exception, and we concur with him, that the evidence objected to was not competent.

We have had some difficulty as to the judgment that ought to be given. Ordinarily, when an exception to a report of an account is sustained, the judgment is that the report be reformed by omitting the charge or credit excepted to, and then the proper judgment is given upon the account as reformed. So, in general, if a charge or credit be excepted to, as being allowed without evidence, or without sufficient evidence, where the reviewing Court has power to pass on the weight of the evidence, and the exception be sustained, the report would be reformed as to that item, and judgment given on it as reformed. This would be on the assumption that the party had produced before the referee all the evidence which existed and which it was in his power to procure, as it was his duty to have done. And also on the policy of requiring parties to use due diligence in the prosecution of their claims in the proper time. In such a case, to send the question back to the referee to be passed on again upon additional evidence, is in effect to give a new trial of the question, and is attended with the like evils of delay and expenses which attend new trials on matters of fact once decided by a jury. A new trial of an issue before a jury would certainly not be granted where the party knowing of the better evidence, and being able to obtain it, had neglected to do so, and risked his case upon evidence held to be incompetent, and therefore rejected.

This case, however, is not exactly that. Here the referee received the incompetent evidence, which ruling, incorrect as it was, may have induced the party to content himself with it. Moreover, it seems not to be disputed, that there was a just claim to some amount, in favor of Harris against the firm of Scott & Bryant, and it would be a manifest injustice, if the plaintiff should lose credit entirely, for his payment of $2,000, merely because of the uncertainty whether as much as that, or more, was due to Harris.

For these reasons, we are of opinion that the plaintiff should have another opportunity of proving the fact in dispute, by competent evidence, if he can. This question was not passed on in the Court below, and indeed no final judgment was given there, as it ought to have been.

The rulings of the Judge below are sustained, and the case is remanded, in order that the account may be reformed as to the matter of the first exception, and that a new trial may be had as to the matter of the second exception.

The plaintiff will pay the costs of this Court.

PER CURIAM. Judgment accordingly.

GRIZZELLA A. MURPHY *v.* NEILL W. RAY, Adm'r. *de bonis non.*

It is not error in the Court below to reject evidenee where it does not appear that the evidence offered is material to the point in issue.

Where an Executor, Administrator, next of kin, &c., is examined as a witness in his own behalf concerning transactions with the deceased, the evidence of any person (the plaintiff) not otherwise rendered incompetent, is admissible to contradict or explain the evidence of such Administrator, &c.

The fact that a witness was at one time the agent of a party deceased, does not render his evidence incompetent, after the agency has ceased to exist.

CIVIL ACTION, upon a bond for maintenance, tried before *Buxton, J.*, at Spring Term, 1875, CUMBERLAND Superior Court.

The following is substantially the statement of the case sent up to this Court as a part of the record: The action was originally instituted in the name of Elizabeth Murphy as plaintiff, against the present defendant, who is the administrator *de bonis non* of Daniel B. Murphy. By leave of the Court, the summons and the pleadings were amended so as to make Grizzella A. Murphy, assignee of Elizabeth Murphy, party plaintiff, instead of Elizabeth Murphy, it appearing to the Court that Grizzella A. Murphy claimed to be the real party in interest under an assignment of the bond to her. After the rendition of the verdict by the jury upon the issues submitted, William J. Buchanan and Mary Ann Buchanan his wife, were allowed to join themselves as defendants in the action as heirs at law and the next of kin to Daniel B. Murphy, deceased.

It was in evidence that Mrs. Elizabeth Murphy, a widow lady in advanced life, was possessed of considerable estate in land and negroes, having two children, both of them grown, one being Daniel B. Murphy, the intestate of the defendant, and the other Mary Ann, wife of the defendant William J. Buchanan, entered into an arrangement with her children in the year 1850, by which the bulk of her property was to be divided between Daniel B. Murphy and W. J. Buchanan and

wife, and in consideration therefor she was to be supported by them. This arrangement was carried into effect on the 16th day of September, 1850, and on the same day Daniel B. Murphy executed a bond whereby he became bound in the penal sum of five thousand dollars, the condition of which bond was of the tenor following: "The condition of the above obligation is such that should the said Daniel B. Murphy provide for the comfortable maintenance of the said Elizabeth Murphy, and pay her the sum of fifty dollars annually during her natural life, should it be required, then the above obligation to be void, otherwise to remain in force and virtue." On the same day W. J. Buchanan and his wife executed a similar bond, and the parties executed the following articles of agreement:

"*Whereas*, Elizabeth Murphy, by deeds from Thomas Murphy and Daniel Murphy, husband of said Elizabeth, holds certain property consisting of lands and negroes, &c., to be allotted at her death to the heirs of her body, Daniel B. Murphy and Wm. J. Buchanan and wife, Mary Ann, as by reference to said deeds will more fully appear. The said Elizabeth Murphy, mother, having sole power and control in the premises, is willing to distribute in part according to said deeds, consenting to a division of the land and negroes, and reserving to herself the right and title in two negroes, named John and Anna, the heirs relinquishing all claim to said negroes, and to give bond in the sum of five thousand ($5,000.00) dollars each for the comfortable maintenance, to pay each fifty dollars annually, should it be required. And in view of carrying out said division, we have constituted and appointed Daniel McCormick, David McNeill and Joel Williams, as commissioners and bonds to each other to abide by the same, this the 16th September, 1850.

In witness we have hereunto set our hands and seals.

(Signed) ELIZABETH MURPHY, [SEAL.]
W. J. BUCHANAN, [SEAL.]
MARY ANN BUCHANAN, [SEAL.]
D. B. MURPHY, [SEAL.]"

These papers were drawn by one David McNeill, a neighboring magistrate, who was called on for that purpose, and who was one of the commissioners selected to make the division. On the same day the division was completed, and the children of Elizabeth Murphy put in possession of the respective shares allotted to them.

Mrs. Elizabeth Murphy made her home with her son David B. Muphy, who was the husband of Grizzella A. Murphy, the present plaintiff, for some eight or ten years. She lived unhappily there. She was of a curious disposition and her son was reckless and intemperate and she was afraid of him. At the end of that time she left his house and went to live with her sister Mrs. Ray, and continued to reside there until the death of Daniel B. Murphy, which occurred in 1867. During the period she was at the house of Mrs. Ray she paid but little board, amounting in all to $30.00. She had but scant means. She received nothing from her son, and after the war she received nothing from the Buchanans, who removed to Texas where they reside. On the 27th of July, 1867, Mrs. Elizabeth Murphy returned to the house of Grizzella A. Murphy, the widow of her son Daniel B. Murphy, and continued to live there until her death which occurred on the 3rd of April, 1872. From the day she returned to the house of the plaintiff the the plaintiff had sole charge of her, and at her own cost maintained her, nursed her, and buried her. Neither the administrator of Daniel B. Murphy, nor the Buchanans contributed any thing to her support. Daniel B. Murphy died without children and Mary Ann Buchanan is his heir at law. The plaintiff is his widow and has had dower and a year's support allotted to her. Upon the death of Daniel B. Murphy one Alexander McKethan, on the 1st of July, 1867, took out letters of administration upon his estate, but was subsequently removed on 10th April, 1863, because of failure to enlarge his bond, it becoming necessary to sell real estate for assets, and Neill W. Ray, the present defendant, was appointed administrator *de bonis non.* McKethan is the brother of the plaintiff

Grizzella A. Murphy. In 1869, the second year after the return of Elizabeth Murphy to the house of the plaintiff, the same magistrate who drafted the two bonds and the articles of agreement, was again called on to draw other papers relating to her maintenance. He drafted these papers which were all executed on the 20th November, 1869, as follows;

1. A bond of the following tenor:

STATE OF NORTH CAROLINA, }
Cumberland County. }

Know all men by these presents that I, Grizzella A. Murphy, am firmly bound unto Elizabeth Murphy in the sum of two thousand dollars, current money, to the payment whereof well and truly to be made and done, I bind myself, my heirs and representatives. Signed and sealed with my seal, this 20th day of November, 1869.

The condition of the above obligation is such that should the said Grizzella A. Murphy provide for the comfortable maintenance of the said Elizabeth Murphy during her natural life and at her death provide a decent funeral, then the above obligation to be void, otherwise to remain in full force and virtue.

(Signed,) G. A. MURPHY, [Seal.]
JNO. W. McKETHAN, [Seal.]

Sealed and delivered in the presence of
D. MCNEILL,
R. R. ROBINSON.

2. An assignment under seal of the interest of Elizabeth Murphy in the two bonds for maintenance executed Sept. 16th, 1850, to Grizzella A. Murphy.

3. A power of attorney to Alex. McKethan to collect certain notes belonging to Mrs. Elizabeth Murphy, also to bring suit upon the two bonds aforesaid for the benefit of Grizzella A. Murphy.

Both the assignment and the power of attorney were signed by Elizabeth Murphy.

By virtue of the authority claimed under these documents this action was brought originally in the name of Elizabeth Murphy, McKethan acting as her agent. The suit is instituted on the bond for maintenance executed by Daniel B. Murphy.

The defence set up is that the instruments executed by Elizabeth Murphy on the 26th of Nov., 1869, are invalid:

1. Because of mental incapacity.

2. Because of fraud and undue influence exerted to procure their execution.

The following issues were submitted to the jury and the jury responded respectively as follows:

1. Was Mrs. Elizabeth Murphy of sound mind at the date of the assignment of the bonds to the plaintiff on the 26th of September, 1869? The jury found she was.

2. Did the plaintiff, Grizzella A. Murphy, procure the assignment to be made to her by Mrs. Elizabeth Murphy by the exercise of undue influence? The jury found she did not.

3. What was the value of the maintenance afforded by the plaintiff to Mrs. Elizabeth Murphy from 27th July, 1867, to the time this suit was brought, 5th May, that is for two years, nine months, and eight days? The jury responded $25 per month with interest from May 5, 1870.

4. What was the value of the maintenance from May 5, 1870, to the death of Mrs. Elizabeth, 3rd April, 1872, being one year, nine months and twenty-eight days, also the funeral expenses paid by Mrs. Grizzella A. Murphy? The jury found $30 per month, and funeral expenses $40.00.

The defendants thereupon moved for a new trial and upon the argument of the rule alleged error in admitting evidence, after objection taken, as follows:

1. One of the defendants' witnesses had testified that Mrs. Elizabeth Murphy had left her mother and gone to live with Mrs. Grizzella A. Murphy in 1867, and that when she left she carried with her a bag containing what the old lady said was

money, gold and silver. The bag was about eight inches in length and four inches in width, and was a good handfull to lift. To rebut this evidence the counsel for the plaintiff proposed to ask her whether Mrs. Elizabeth Murphy brought any gold or silver money with her when she come to plaintiff's house?

The defendant objected on the ground that the witness was a party in interest and the question related to a transaction between her and Elizabeth Murphy, now deceased, and was rendered incompetent by sec. 343, of C. C. P. His Honor overruled the objection and the defendant excepted. There were other exceptions to the admissibility of evidence, all of which are stated in the opinion of the Court.

The Court gave judgment for the plaintiff, according to the verdict, and thereupon the defendants, Buchanan and wife, appealed.

McRae, for the appellant.
Merrimon, Fuller & Ashe, contra.

BYNUM, J. This case is here by appeal from the rulings of his Honor, in the Court below, on questions of evidence.

1. Evidence had been given by the defendant that when Elizabeth Murphy, the deceased, assignor of the plaintiff, moved to her house, she brought with her a bag of gold and silver. To contradict this, the plaintiff was introduced in her own behalf and allowed to testify that Elizabeth did not bring any bag of gold or other coin, when she moved to her house. The defendant objected to this testimony on the ground that it was excluded by C. C. P., sec. 343. It is unnecessary to say how it would be, if the evidence had been material to the issue, but a sufficient answer to the objection is, that the evidence on both sides was wholly irrelevant and immaterial to the issues being tried. What the bag of gold had to do with the matter, does not appear.

2. The defendant introduced witnesses who testified to cruel acts of mistreatment and undue influence by the plaintiff to-

wards Elizabeth Murphy, the intestate. The plaintiff, under objection, was introduced to explain and contradict this testimony, and did contradict it. When the defendant thus opened the door, by his own evidence, the matter was set at large, and the plaintiff's rebutting and contradicting testimony became competent by the express provision of C. C. P., sec. 343.

3. McKethan was offered as a witness for the plaintiff, and objected to by the defendant, on the ground that he had been a former administrator on the estate of D. B. Murphy, deceased, and also had been the agent of Elizabeth Murphy. Even if these facts could have at any time affected his competency, they certainly do not affect it after these relations had ceased to exist, as was the case when he was offered.

4. At the request of the plaintiff's counsel, the Court in the charge to the jury, instructed them that the action was properly brought, that is, as we understand it, as to the parties to the action. The jury had nothing to do with that question, whether correct or incorrect in law, but the exception of the defendant, that the instruction influenced the verdict of the jury, is rather far-fetched. It is not seen how it could reasonably have had that effect, as the jury was empannelled to try certain written issues of fact.

PER CURIAM. Judgment affirmed.

STATE OF NORTH CAROLINA by the ATTORNEY GENERAL, T. L. HARGROVE, on the relation of T. F. LEE *v.* SIDNEY M. DUNN.

Chap. 106, Sec. 3, Bat. Rev. requiring a sheriff elect who has theretofore been sheriff, to produce his tax receipts from the proper officer, before again being inducted into the office, imposes no additional qualification upon the eligibility to office of such sheriff elect, other than those required by the Constitution, Article VI, Section 1, but only prescribes an assurance for the faithful discharge of the duties of the office. The General Assembly has authority to prescribe such assurances as the general welfare demands, and therefore the act is not unconstitutional.

Van Bokkelen v. *Canaday*, decided at this term, cited and approved.)

This was a CIVIL ACTION, tried before *Henry, J.*, at January (Special) Term, 1875, of WAKE Superior Court.

The relief demanded was that the defendant be ousted and ejected from the office of sheriff of the county of Wake, which office he, at the institution of this action, held by appointment of the county commissioners. The facts as settled by his Honor and sent up as a part of the record, are as follows:

It was admitted that the relator had been, before the election in August, (1874,) elected sheriff of Wake county, and had held the office for two years preceding. During this period he had collected large amounts of county and State taxes, and had failed to pay over the same to the proper officer as required by law, and was at the time of election, and has been ever since, largely in default of payment of county taxes collected by him by virtue of his office. That he had appeared before the Board of County Commissioners and demanded to be inducted into office and that the Board had required of him to tender his bonds and to exhibit his receipt for the taxes theretofore collected. He refused to do this, but demanded that he should first be declared elected, and stated that upon being duly declared elected, that he would tender and justify his said official bonds, but did not offer to exhibit any receipt

for the taxes collected by him, and admits that he has none such. Thereupon the Board of Commissioners declared the office vacant, and proceeded to elect the defendant, who gave the bonds and took the oaths required by law, and was inducted into office.

It appeared in evidence that there were cast for the relator, at House Creek Township, —— votes, and for the defendant ——— votes, and that when the voting commenced in the morning at that township, there were only four ballot boxes used, because poll-holders and judges of election could not be found to perform the required duties. One of these boxes was for ballots for Superintendent of Public Instruction, one for Solicitor, one for Congress and one for members of the General Assembly and county candidates. During the forenoon attention was called to the irregularity of allowing voters to deposit ballots containing the names of candidates for county officers and those of candidates for the General Assembly in the same box, and a fifth box was then provided, into which the ballots cast for members of the General Assembly were then put. All the ballots cast in the box when the alleged irregularity existed were counted, and of these the relator received —— votes, and the defendant —— votes.

It was insisted for the defendant, that the votes thus cast were illegal and void, and if all were not void, at least all those deposited in said box before the fifth box was obtained and opened were void, and requested the Court so to charge the jury. The Court declined so to charge, but instructed the jury that these votes should be counted unless there was fraud in the voting on the part of voters or judges of the election, and if there was no actual fraud the irregularity did not vitiate any of those ballots and they should all be counted. To this charge of his Honor the defendant excepted.

The following issues were submitted to the jury:

1. Was the relator elected sheriff?
2. Did he offer to tender bond and justify the same?

The jury found the first issue in the affirmative and the second in the negative.

Special instructions were asked for both by the relator and the defendant, but they are not pertinent to the case as decided in this Court, and are therefore omitted.

By consent of the parties, the question of law as to the right of the relator to be inducted into office, notwithstanding his defalcation as former sheriff, was reserved, and upon the argument the relator insisted that the act requiring one who had theretofore been sheriff to settle with and pay up to the officers entitled to receive the taxes from him before entering upon the duties of his said office, (Bat. Rev., sec. 3, chap. 106,) was in conflict with Art. VI of the Constitution and void, and upon the facts demanded judgment of *ouster* of the defendant in order that the relator might be inducted into the office.

The relator further insisted and assigned for error apparent on the face of the record that his Honor submitted to the jury the following issue to-wit: Did the relator offer to tender bond and justify the same, the said issue being uncertain and immaterial and so far as it affected the case, was affirmed by the relator in his complaint, and admitted by the defendant, in his answer.

The Court was of opinion that the act referred to was not void, and the relator was not entitled to be inducted into said office, unless he settled and paid up the taxes, as required by law, before such induction. The Court thereupon gave judgment for the defendant, and the relator appealed.

Batchelor, with whom was *Haywood*, *Badger*, *Devereux*, *Battle & Son*, and *Gatling*, argued:

I. When the Constitution itself has prescribed both the qualifications and disqualifications of voters, the Legislature cannot enact a law which prescribes a new and additional qualification, or which repeals any constitutional disqualifi-

cation. *McCafferty* v. *Guger*, Leading election cases, 44–59 Penn. Rep., 109.

II. When the Constitution has prescribed both the qualifications and disqualifications of office holders, the Legislature cannot enact a law, which prescribes a new and additional qualification, or which repeals any constitutional disqualification. See note to case above cited for authorities. Leading election cases 51.

III. *But with respect to voters*, it is clearly within the just and constitutional limits of the legislative power, to adopt any *reasonable* and *uniform* regulations in regard to the *mode* of exercising the right of voting, which will secure its enjoyment in a prompt, orderly and convenient manner.

a. But the Legislature cannot, under the pretext and color of *regulating, subvert or injuriously restrain*, the right itself.

b. For example: A statute requiring that, previous to an election, the qualifications of voters shall be proved and their names placed in a register, is not to be regarded as prescribing a *qualification*, in addition to those which, by the Constitution, entitled a citizen to vote, but only a *reasonable regulation of the mode of exercising the right of suffrage*, which it is competent for the Legislature to make. *Japen* v. *Foster*. Leading election cases, p. 51, 12 Pickering, 485.

c. But where the law under the pretence of *regulating*, prescribes rules for exercising the right, which invade it, fritter it away, or entirely destroy it, they are absolutely void and of no effect. *Page* v. *Allen*, leading cases on election, p. 62; note 58 Penn., St. Rex. 338. Case at this term in the matter of the city of Wilmington.

IV. *In respect to office holders*, it is clearly within the just and constitutional limits of the Legislative power, to adopt any *reasonable* and *uniform* regulations in regard to the manner of exercising the right of holding office, which secure from the *person about to enter* upon the duties of a public office, guarantees that he will be conscientious in the discharge of such duties, and faithful to the public obligations that he is

about to assume. *Commonwealth* v. *Jones*, Am. Law Reg., vol. 14, p. 374–378.

a. But the Legislature cannot, under the pretence and color of *regulating* the right of holding office, either *subvert*, or injuriously restrain the *right* itself.

b. For example, a statute requiring that previous to entering upon the discharge of the duties of a public trust, the officer elect shall enter into bond for the faithful and conscientious discharge of his public duties and obligations, which he is about to assume, is not to be regarded as prescribing a *qualification* for holding office, in addition to those ordained by the Constitution, but is only a *reasonable regulation of the mode of exercising the right of holding office*, by securing a guaranty that the officer will be conscientious in the discharge of his duty, and faithful to the public obligations he is about to assume.

c. But where the statute, under pretence of *regulating*, prescribes rules for exercising the right to hold office, which invade, suspend, fritter away, or destroy the right itself, it is absolutely void and of no effect.

V. These propositions, we think, cannot be disputed. We understand the defendant's counsel to admit them, and the solitary question in our case is: Whether Rev. Code, chap. 105, sec. 6, which enacts "that no person shall be eligible to the office of sheriff who theretofore has been sheriff, and has failed to account for the public funds;" and prohibits the county commissioners from permitting any such person to give bond, or enter upon the duties of sheriff, until he has produced before them his receipts for the public taxes, *is a reasonable regulation of the manner of exercising the constitutional right to hold office; to secure the faithful discharge of the duties of the office by the sheriff elect for the future*, or is it a law which invades the constitutional right to hold office, by prescribing a qualification for the office of sheriff, not ordained by the Constitution; and enforces this unconstitutional qualification by inflicting a punishment for a past offence, through

the intervention of a body of men which is not judicial, and by proceedings which are not due process of law; or, in other words, if the Court gives this enactment effect, does it not make the same a self executing penal statute, which tries without accusation, hears and determines without proof and opportunities for defence, and imposes punishment without notice to the culprit, of his condemnation.

Merrimon, Fuller & Ashe, with whom were *Smith & Strong* and *Pace*, contra, argued:

1st. The Constitution is in the VI, Art. 4 and 5, sections in accurate in language. Art. IV "except as *hereinafter* provided." See Art. II, sec. 9, Senators must be twenty-five years of age, citizens of the United States for two years, and residents of their districts one year.

Art. II. sec. 10, Representatives must reside in their counties twelve months immediately preceding their election.

By Art. III, sec. 2, Governor and Lieutenant Governor must be thirty years of age, five years citizen of the United States and two years citizen of the State.

2nd. In Art. IV, sec. 30, is a sheriff spoken of and there alone. He need not be a resident of the county for which he is elected, and there are no duties prescribed for him by the Constitution, nor is it provided (as it is in Art. II sec. 13, with regard to Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction and Attorney General) "that their duties shall be prescribed by law."

Where then does the General Assembly get the power to prescribe the duties of sheriff?

It is an *implied power*, and implication must be made for the good government of the State and the safety of the people, which is the supreme law. *McCulloch* v. *State of Maryland*, 4 Wheaton, 316. Story on the Constitution, p. 308, 309 and 310, sec's. 432, 433, 434. Cooly on Constitutional Limitation, p. 64 and 65. Especially is this so in the matter of the statute,

Bat. Rev. ch. 106, sec. 3, under the Art. IV, sec. 24, of the Constitution.

But it is for the appellant to show that the Legislature is restricted by the express provisions of the Constitution, or by necessary implication therefrom. *State* v. *Adair*, 66 N. C. Rep. 303. And this he must show beyond a reasonable doubt. *King* v. *W. & W. R. R. Co.*, 66 N. C. Rep. 227.

See *Johnson* v *Rankin, et. al.*, 70 N. C. Rep. 555, as to construction of act of 1846. Dwarris on Statutes, p. 185 top.

1st. It is a hoary statute, not passed for any such purpose as Mr. Badger suggested.

2nd. It shows that it was intended to provide additional and greater safe-guards for the public, and better guarantees for the faithful performance of duties of officers.

3rd. The fact that it has been in force so long demonstrates its usefulness by the best test to wit: The experience of generations. But the counsel argues that this statute superadds an *additional* qualification for office to that prescribed in the Constitution, and the stress of the latter part of Mr. Haywood's and the whole of Mr. Badger's argument was on that point.

Is it not so with the requiring of a bond? Where is the Constitutional authority to require any bond? So with additional oath to that prescribed. *McCulloch* v. *State Maryland*, which now is prescribed in the Constitution. *Rniso* v. *Farr*, 24 Ark. 169. So *Thomas* v. *Owens*, 4 Maryland Reports, p. 190, does not militate against but confirms the proposition I have attempted to maintain on the subject of implied power, p. 223. So with *Is.* v. *Dorsey*, 7 Porter's (Ala.) Reports, p. 358 and 360, expressly supports my position. So the case of *St. Joseph* and *Denver City R. R. Co.* v. *Buchanan Co.*, 39 Missouri, 485, and *State of Missouri ex. rel.* v. *Williams*, 316. But this construction of the Constitution has the sanction of cotemporaneous interpretation. Ordinances of the Convention ch. 10, p. 50, sec. 4, Acts of special session of 1868,

ch. 1, p. 3. See also ch. 8, p. 9; ch. 12, p. 15, sec. 10; ch. 13, sec. 1, p. 17; ch. 18, sec. 1, p. 19.

I have attempted to show, and have shown, by the record:

1. That the relator did not give the bond required by law, and did not offer to tender the same.

2. That having been theretofore sheriff of Wake county, he had not settled the State and County Taxes which he had collected, and did not produce to the Board of Commissioners the receipts of the proper officers therefor; and I have argued that having failed to do both, or either of these acts, he was not entitled to induction into office.

I have attempted to maintain this proposition?

First. That the Constitution having provided for the election of a sheriff without prescribing his duties, it confers upon the General Assembly, *by implication*, the right to prescribe the duties of the office, the mode and prerequisites of investiture, to regulate the manner in which he shall discharge the duties, and to declare the consequences of malfeasance or misfeasance. And I have admitted that the doctrine is subject to these restrictions:

1. There can be no implication against a constitutional inhibition; and

2. That the implied power must be for the legitimate purpose of promoting the general welfare; and on this point I refer your Honors, in addition to the references of yesterday, to Story on the Constitution, vol. i, secs. 432, 433 and 434, pp. 308, 309 and 310.

I then attempted to show that the Act of 1806, by fair, legitimate construction does *not* render the relator, and those in like case, ineligible to office generally, or even to the particular office; but on the contrary, recognizes his eligibility; and that instead of disqualifying him, it only declares that he shall not discharge the duties of the office *until* he has produced the receipts of the proper officers.

READE, J. We have decided at this term, in *Van Bokkelen* v.

Canaday, that it is not within the power of the Legislature to enlarge or abridge the qualifications of voters; and the same is evidently true as to officers. It is admitted that the same arguments and principles are applicable to each. If, therefore, the Act of the Legislature, and the Board of Commissioners acting under it, required of the relator any other qualification than the Constitution requires, it must be disregarded; and he must be inducted into office, whatever charges there may be against him; or, however well supported. If the people in their Constitution declare a defaulter eligible to office, and then elect a defaulter to office, it is not within the power of the Commissioners' Court, nor of this Court, to object. Our province is, strictly, to declare what the law is, and not what it ought to be. And this we say, as we so often have to say, to exclude a conclusion to the contrary. Nor do we mean by the illustration, to say that the relator is a defaulter.

The Constitution, Article VI, section 1, prescribes the qualition of voters to be as follows: "Every male person, &c., twenty-one years old or upwards, who shall have resided in this State twelve months next preceding the election, and thirty days in the county in which he offers to vote, shall be deemed an elector."

The fourth section is as follows:

"Every voter, except as hereinafter provided, shall be eligible to office," &c.

The exception above, is contained in the fifth section, as follows:

"The following classes of persons shall be disqualified for office: First, all persons who shall deny the being of Almighty God. Second, all persons who shall have been convicted of treason, perjury, or of any other infamous crime; or of corruption or malpractice in office; unless such person shall have been legally restored to citizenship."

So that every voter who does not deny the being of God, and has not been convicted of crime, is eligible to office in this State. And this comes so near including every man, that it

may be said, that almost every man is eligible to office; that is to say, is electable, if the people choose to elect. And this was the intention, to give the people the largest class out of which to choose.

Without burdening the case with what seems to have been a little sparring for some advantage between the relator and the Board, we may assume that the relator appeared before the Board of Commissioners after having been duly elected by the people; that he had all the qualifications of a voter; did not deny the being of God, and had not been convicted of crime; and was therefore eligible to office, and entitled to be inducted into the office of Sheriff, to which he had been elected.

Why then was he not let in? Why was the popular will defeated? It is of the first importance that the offices of the government should be filled by the proper persons; and the office of sheriff is very near to the people. And it is a grave offence to fill the office wrongfully.

The relator says that he stood before the Board a "proper man," and demanded to be inducted into office, offering to comply with every rightful requirement; and that the Board required of him qualifications which the Constitution does not require, and wrongfully refused to induct him into the office; and instead thereof inducted into the office the defendant, whom he had defeated at the polls.

On the other hand, the Board alleges that it admitted the relator's eligibility and his election, and his right to be inducted into the office, and offered to induct him requiring only such assurances for the discharge of the duties of the office as the Constitution and laws require; and that the defendant refused to give the assurances. And that such refusal "created a vacancy" which they proceeded to fill by the appointment of the defendant, who was eligible thereto, and gave all the required assurances; and was only a few votes behind the relator at the polls.

1. The first question is, did the Board require of the de-

fendant any "*qualification*" which the Constitution does not require?

All the difficulty in arriving at the proper solution of this question, grows out of not drawing the distinction between *eligibility* or *qualifications* for office; and *assurances* for the *faithful discharge* of the *duties* of the office. Such distinction is plain, as this will illustrate: Who is eligible to office? Answer: Almost every body. Is there not danger of abuses from making eligibility so common? Answer: No; because we require ample assurances to guard against abuses. What are those assurances? Answer: (1.) An oath which binds the conscience. (2.) A bond with sureties to answer in money; and. (3), if he has been in the office already, a receipt for moneys paid over as evidence of his integrity.

It has been stated already what are the qualifications for office; and that no others can be prescribed by the Legislature or required by the Board. And it is clear that the relator had all the necessary qualifications. And yet, he says that the Board refused to let him into the office, because he was a defaulter. And that thereby the Board sat in judgment on him and convicted him, which it had no power to do; for that the Constitution prescribes that one is disqualified for corruption or malpractice only "*after* he shall have been *convicted*;" which means convicted by due course of law. But this is a ghost of the relator's own raising. The Board admitted his eligibility, his qualifications; said not a word about his corruption or malpractice, and offered to induct him if he would give the required *assurances* for his *faithfulness.*

After prescribing who are eligible to office, the Constitution, in section 4, provides that every one, before entering upon the duties of office, shall take an oath to support the Constitution, and to be faithful in office. But this does not enter into *eligibility* for office. One must be eligible when elected; the oath is after election. It is simply an *assurance* which one is to give after election, and before entering into the office that he will be faithful to the government and to his office, which as-

surance is binding on his conscience. And this is the only assurance required of many officers, such as the Governor, members of the General Assembly, Judges, &c. And that is the only *assurance* which is required *in terms* by the Constitution.

But can it be supposed that every other assurance is prohibited? If so, then no bond can be required; and so the public funds, and all moneys in the hands of officials, are in jeopardy. This proposition is so monstrous that it was admitted for the relator that a bond and surety could be prescribed by the Legislature and demanded by the Board, although none is prescribed by the Constitution. But by what reasoning can it be maintained that a bond may be required? Only upon the ground that a bond is a reasonable and proper *assurance* for the public safety; a *regulation* which experience has shown to be necessary; reasonable in itself, and deprives no man of his rights, and is not intended, directly or indirectly, to abridge them. Cooley's Con. Lim, 1, 602. If that reasoning is sound, as unquestionably it is, then any other assurance which can be supported by the same reasoning may be required. And this brings us to the question directly in dispute:

2. Is the statute under which the Board acted, requiring the relator, who had been sheriff for the preceding term, to produce his receipt for taxes, &c., in violation of the Constitution, as requiring an additional *qualification*, or is it a *reasonable* and *proper regulation* of the office, and an assurance for integrity?

The Constitution creates, or rather recognizes the existence of, the office of sheriff. It does not prescribe the *duties* of the office. And yet, we cannot impute the folly of creating an office without any duties. And so we have to assume, either that the Constitution meant to recognize the office of sheriff already existing, with all its duties and regulations, or else, that the Legislature should prescribe its duties and regulations anew. Either aspect is fatal to the relator, and fully justifies the Board. At the time of the adoption of the Con-

stitution, and for a long time before, our statute law required a sheriff elected to a second term to exhibit a receipt for the settlement of the taxes, &c., before entering upon the duties of his second term. And so, at the end of each year, every sheriff had, and still has, to appear before the Board and produce his receipts for the past year and renew his bonds. And a failure to do so in any instance "creates a vacancy," (to use the language of the statute,) which the Board immediately proceeds to fill. And yet it was never before supposed that these regulations were elements of *eligibility* or *qualifications* for office. It is a prudent *business regulation* to hold an agent to short settlements and frequent exhibitions of his vouchers. And our experience and knowledge of human nature teach us that one who has been tried and found faithful may reasonably be trusted again, and on the contrary, one who has been tried and found wanting, ought no longer to be trusted. It is only by one's deportment in office that he acquires the reputation of a faithful or a faithless public servant. And such reputation is often the most satisfactory assurance that he will or will not be faithful if trusted again.

The relator says that the Board ought not to have refused him, because he had not been "convicted" by due course of law, and that the Board had no power to convict him.

If he had been convicted by due course of law, then that conviction would have put him out of the "*class*" of persons "*qualified*" for office, and the Board would have refused him for that reason. And it would have refused him even if subsequent to conviction he had paid over the taxes and taken a receipt and exhibited it to the Board. He would not, in that case, have stood before the Board a "proper man." But here the Board conceded that he was a proper man; that he had not been convicted; that he may have accounted for all moneys; that he might have the receipt in his pocket and they only asked him to produce it. And it is only from the relator himself that we learn that he had no receipt to produce. The Board produced against him no "conviction" for "corruption

or malpractice," nor any charge founded upon malicious rumor or a licentious press, but permitted him "to try himself," and he confessed himself to be a defaulter; that he had been faithless to his duties and the assurances which he had given for their performance. If, upon this exhibition the Board had permitted him to enter again upon the duties of the office which he had abused, it would have been an outrage, for which, probably, they would have been criminally liable.

As against the view which we have presented, decisions have been cited, such as the following: One was required by statute to swear that he had not fought a duel; when the Constitution had no such requirements. Another was required to swear that he had not been a rebel; when the Constitution had no such requirement: Held that the requirements could not be enforced because they embraced a class of persons not embraced by the Constitution, related to matters not pertaining to the offices, and were not intended to be, and were not, in fact, appropriate *assurances* for the faithful discharge of the duties of the offices. Such cases fall in the class embraced by Cooly in his book on Constitutional Limitations, sec. 602, as follows:

"All regulations of the elective franchise, however, must be uniform, reasonable and impartial. They must not have for their purpose directly or indirectly to deny or abridge the constitutional right of the citizen to vote, or unnecessarily to impede its exercise. If they do, they must be declared void." And what is true of the right to vote is also true of the right to hold office. It will be noted how the cases cited differ from our case. There, the requirements were entirely foreign to the office, unnecessarily and partially abridged the right to office, and were not intended to be, and were not in fact, fit *assurances* for *faithfulness*. The very reverse of which is true in our case in every particular.

The authorities cited may be found in the full briefs of

counsel. We have attentively considered them, and they are readily distinguishable from our case.

It is not necessary that we should decide whether *mandamus* or *quo warranto* is the proper remedy, as neither can avail the relator.

We are of the opinion that the relator is not, and that the defendant is, entitled to the office in controversy.

PER CURIAM. Judgment affirmed.

HENRY L. MYROVER *v.* ROBERT S. FRENCH, WILLIAM J. BROWN, Ex'r., and others.

F being indebted to M and K, executed a deed conveying certain land to K, in trust, to secure these debts, and delivered the deed to an attesting witness, and requested him to prove the same and have it recorded. The witness did so. At the time of the execution of the deed K was absent and had no knowledge thereof, and died shortly afterwards. B, the executor of K, brought an action against F to recover the debt due his testator, and obtained judgment. The land conveyed in the deed of trust was sold under execution and B became the purchaser. Afterwards B sold the land to P. In an action brought against B by M to enforce the trust: *It was held*, That there having been a sufficient delivery of the deed, the title to the land passed to K in trust, and that B acquired no interest in the land by his purchase at execution sale, and that P only acquired an interest in the debt of K to the extent of the purchase money paid for the land, and should be subrogated to the rights of K under the deed of trust to that extent.

(*Snider* v. *Sackenhour* 2 Ired. Eq. 360; *Ellington* v. *Currie*, 5 Ired. Eq. 21; *Thompson* v. *Parker*, 2 Jones Eq. 12; *Camp* v. *Cox*, 1 Dev. & Bat. 50; *McLean* v. *Nelson*, 1 Jones Eq. 396, cited and approved.)

CIVIL ACTION, in the nature of a Bill in Equity, tried before *Kerr, J.*, at Spring Term, 1875, of the Superior Court of ROBESON county.

The action was brought for the purpose of ascertaining the rights of the parties under a deed of trust and for an account of the rents and profits of certain lands thereon conveyed.

All the facts necessary to an understanding of the case, as decided, are stated in the opinion of the Court.

Judgment was rendered in favor of the defendants, and thereupon the plaintiffs appealed.

Hinsdale, and *W. McL. McKay*, for the appellant.
Leitch, contra.

BYNUM, J. Where a deed is prepared by the bargainor, signed and sealed by him, is attested at his request by witness, and without being delivered to or even seen by the bargainee, is, by the direction of the bargainee, proven in Court and registered, this amounts to a valid delivery. *Snider* v. *Sackenhour*, 2 Ired Eq., 360. *Ellington* v. *Currie*, 5 Ired. Eq., 21.

Here, French being in failing circumstances, and indebted to Myrover in the sum of $4,000, and to King, in the sum of $2,000, desired to secure the payment of these two debts, and to that end prepared, signed and sealed a deed for the land, had it attested and delivered it to one of the witnesses, whom he directed to prove and have it registered, which was accordingly done on the day of its execution. The deed was made to King, one of the creditors, and in trust for the equal benefit of himself and Myrover. At the time the deed was executed King was absent, and had no knowledge of it, was fatally injured, and in fact died within a few days thereafter. The case, therefore, falls literally within the decisions above cited, as to the delivery of the deed. The accceptance of the trust is presumed, where it is made for the benefit of the creditor and trustee, and more particularly does this presumption exist, where it appears, as it does here, that Mr. French was probably insolvent, and his land was the last plank in the wreck by which King could save his debt.

There having been a delivery of the deed, the title to the land passed immediately to King, affected with the trust, King died leaving a last will, of which the defendant Brown was made the sole executor. As such, Brown brought suit against French, upon the trust debt, and having recovered judgment, had the trust lands levied upon and sold under execution, purchased and took the sheriff's deed to himself for the benefit of the estate, and shortly thereafter sold and conveyed the land to the defendant Pane.

What interest did Brown acquire by his purchase? As French had only a resulting trust to himself, this equitable interest was not the subject of sale under execution. *Sprinkle* v. *Martin*, 66 N. C. Rep. 55. But regarding it as an equity of redemption even it could not be sold under execution for the mortgage debt. *Thompson* v. *Parker*, 2 Jones, Eq. 475, and *Shoffner* v. *Fegleman*, 1 Winst. Eq. 12. The object of the act of 1812 was to make mortgaged estates available to other creditors, and not to disturb the fiduciary relations between the mortgager and mortgagee. A Court of equity will not allow the mortgagee thus to purchase the equity of redemption and destroy that relation. *Camp* v. *Cox*, 1 Dev. and Bat. 52.

Then Brown who represented the mortgage debt, acquired no interest in the land by his purchase at his own execution sale, and his sale and deed to Pane could pass no interest. The title still remained in the heirs of King, upon whom it devolved upon his death. They held it as their ancestor did, subject to the trusts imposed upon it by French. The death of the trustee, leaving the trust unexecuted cannot affect the rights of the *cestui que* trust, for it is a settled principle of equity, that a trust shall not fail for the want of a trustee. Where one is needed to carry out the purposes of the trust, the Court will always appoint a trustee. Adams Eq. 36. *McLean* v. *Nelson*, 1 Jones Eq. 396. Although Brown and his grantee Pane, who can stand in no better condition by their purchase, acquired no interest in the land, legal or equitable,

yet they have acquired an interest in the King debt to the extent that the purchase money paid by them for the land, went in extinguishment of that debt. To that extent they will be considered in equity, as the purchasers and assignees of the King debt, and subrogated to the rights of King, under the deed of trust. The Court below will appoint a trustee in the place of King the former trustee, whose duty it will be to execute the trust according to its terms, by selling the land and appropriating its proceeds to the payment of the two secured debts, pro-rata until they are discharged. The defendants Brown and Paul, must account for the rents and profits of the land from the time they entered into the possession; the sum of which will constitute a part of the fund for the payment o the two debts and the costs of executing the trust.

The pleadings filed in the case have enabled us to ascertain and declare the rights of the parties, without recurring to the report of the referee, which is only noticed for the many errors it contains: For instance, it finds that Myrover had no debt against French, when the pleadings raise no such issue, but in legal effect admit the debt. It finds that the face of the Myrover note was "cancelled" and that that had the effect of destroying the debt and the liability of French as endorser thereon, which endorsement was not cancelled; whereas, such cancellation, of itself, does not have the effect of destroying the evidence of or the debt itself, much less the liability of the endorser.

It finds that Paul was a purchaser without notice, and therefore has a good title; whereas, Brown purchased at execution sale, and if he acquired any thing it was subject to all equities existing against it, and Paul claiming under Brown is no better off, and is affected with notice.

So it finds that there was no delivery of the deed of trust in fact, and therefore concludes that the deed was ineffectual to pass the title and void; whereas, there was a delivery and the estate passed to the trustee. It is unnecessary to pursue the matter further.

There was error. The judgment is reversed and the cause is remanded to the end that farther proceedings be had in accordance with this opinion.

PER CURIAM. Judgment reversed.

R. J. HOLMES and wife CAROLINE, and others *v.* THOMAS J. CROWELL and wife MARGARET.

In order to create an estoppel *in pais* it must appear:
1. That the defendant knew of his title.
2. That the plaintiff did not know, and relied upon the representations of the defendant.
3. That the plaintiff was deceived thereby.

This was a PETITION to sell lands for Partition, filed in the Probate Court of Stanly county, thence transferred to Stanly Superior Court, from which it was removed on the affidavit of defendant to the Superior Court of UNION County, and there tried before his Honor, *Judge Buxton*, and a jury, at Fall Term, 1874.

The following is the case, as substantially settled by the Judge presiding, the counsel for the parties litigant being unable to agree upon the facts.

The land sought to be divided was known as "The Thomas Hearne gold mine tract," and was situate in Stanly county.

The petition was originally filed before the Superior Court Clerk of Stanly county, and upon the coming in of the answer, denying the right of the plaintiffs and alleging sole seizure in the defendants, the cause was transferred to the Civil Issue Docket, to be tried at Term, and was subsequently, by order of the Court, on affidavit filed, removed for trial to Union Superior Court. Previous to the order of removal, upon application, the defendants were allowed to file an amended answer,

setting forth in detail the grounds of defence and of their title to the whole of the land. The plaintiffs rely upon the general replication.

On the trial below, an issue was proposed by the plaintiffs in these words:

"Are the plaintiffs and defendants tenants in common of the realty in the pleadings mentioned?"

The proposed issue was objected to by the defendant, as being too general—they having set out their title specifically. It was also objected to, on the ground that it was a compound of law and fact; and in lieu thereof, the defendants proposed six distinct issues, which, by direction of the Court, were submitted to the jury; and as the trial progressed, at the suggestion of the plaintiffs, two other issues were added. These eight issues were submitted in all, the first six at the instance of the defendants, and the remaining two as suggested and at the instance of the plaintiffs. The whole series, together with the finding of the jury on each, is hereinafter set forth at length. Upon the rendition of their verdict both plaintiffs and defendants claimed the judgment of the Court.

His Honor, after full argument and consideration, came to the conclusion that the finding by the jury of the *seventh* issue in the affirmative, was decisive of the case against the defendants; and that it was really immaterial after that finding, whether the defendant, Thomas J. Crowell, had paid for the whole of the land or not; or whether he was the owner of the whole or not, at the time the plaintiffs purchased at the sheriff's sale, or whether he intended to induce the plaintiffs to bid or not, or whether the plaintiffs were misled and deceived or not? Since, by that finding it was established that the defendant, Thomas, was present at the sale and directed and assented to the sale of one half of the land as the property of Thomas Stokes; so that now he has estopped *in pais* from claiming, as against the purchasers, more than one half of the property, although he was in fact the owner of the whole.

It was thereupon adjudged by the Court, that the plaintiffs

and the defendants were tenants in common of the realty mentioned in the pleadings—the plaintiffs being entitled to one-half, and the defendants to the other half—saving the life interest of Caroline Hearne, the widow of Thomas Hearne, in that part of the land of which she is in possession, and of which neither party seeks to deprive her. The decision of the Court being announced, the defendants after excepting thereto for error, next moved for a rule for a new trial and *venire de novo*, alleging error by the Court during the progress of the trial.

ABSTRACT OF TITLE.

Both parties claimed title under one John S. Pennington, who had acquired the legal estate by deed, pursuant to purchase at the Clerk and Master's sale in 1867, of the lands of Thomas Hearne, deceased, sold under a decree of the Court of Equity of Stanly county, for partition among the heirs.

Plaintiffs' Title: The plaintiffs read in evidence the record of a judgment, in a suit in the Superior Court of Law of Stanly county; *Thomas Stokes* v. *John S. Pennington*, wherein judgment was rendered at Spring Term, 1868, on the 2nd March, for $5,808.07. Execution issued and was levied on Pennington's interest in this land. *Ven. Ex.*, and return of sale thereunder, to Thomas Stokes as highest bidder, at the price of five dollars ($5,) on the 1st Monday in April, 1868; also a deedof Joseph Marshall, sheriff, to Thomas Stokes, dated 19th September, 1868, for one-half of said land. The plaintiffs next read in evidence, records of sundry judgments, &c., against Thomas Stokes, viz.:

1. In case of *Luke Blackmer and wife, Judith:* Judgment in a Justice's Court of Stanly county for $74.45; docketed in the Superior Court, 6th of April, 1870. Execution levied 30th May, 1871, on Stokes' interest in said land.

(2.) In case of *A. Miller*, to the use of *J. A. Miller* v. *Thomas Stokes*, judgment in Justice Court of said county, for $135.50; docketed in the Superior Court, 29th March, 1870.

Execution levied 30th May, 1871, on Stokes' interest in said land.

(3.) In case of Mauny, McAllister & McCanden, (the said Mauny being V. Mauny, one of the plaintiffs,) v. Thomas Stokes; judgment in the Superior Court of Stanly, at Fall Term, 1870, for $432; docketed 19th September, 1870. Execution levied 30th May, 1871, on Stokes' interest in said land also.

Record of sale to the plaintiffs, by the sheriff, on the 1st July, 1871, under the foregoing executions and levies; and deed of Joseph Marshall, sheriff, to the plaintiffs, dated 12th July, 1871, for the whole of said land, known as "the Thomas Hearne Gold Mine tract," for the sum of $1,600.

Defendants' Title: The defendants read in evidence a deed from Caroline Hearne, widow of Thomas Hearne, to John S. Pennington, dated 20th August, 1867, conveying to him for the consideration of $100, her entire interest as widow, to the dower land, excepting a life interest in the houses, barns and such farming land, as may not interfere with searching for gold. Upon which deed was an assignment endorsed, from John S. Pennington to defendant, Thomas J. Crowell, thus: "I assign over the within deed to T. J. Crowell, on the same day and date within written."

Also, a deed from said Caroline Hearne to Thomas J. Crowell, dated 6th July, 1872, conveying to him, in consideration of $100, her said dower interest with like reservation. This last deed, it was insisted by defendant, was intended to supplement the preceding deed and render effectual the assignment endorsed thereon; for the reason that Thomas J. Crowell had, through the agency of Pennington, paid the purchase money to the widow. There was evidence tending to show that such was the case.

The defendants next read in evidence, articles of agreement under seal, executed by John S. Pennington to defendant, Thomas J. Crowell, dated 1st February, 1868, wherein Pennington agrees to convey to Crowell one half of this land,

upon payment of one half of the purchase money to him, or to the Clerk and Master, so that each pays half of the purchase money.

Also, the defendants read a deed from said Pennington and wife to said Crowell, dated 21st March, 1868, upon the consideration of $600, conveying one half of said land, the 406 acres, bought of the Clerk and Master.

By these two instruments, last mentioned, it was insisted by the defendants, that Thomas J. Crowell had acquired the equitable title to one half of the land, and the legal title to other, from John S. Pennington, who had obtained the legal title to the whole from the Clerk and Master, under an arrangement between Pennington, Crowell and others, that the land should be bid off by Pennington, and owned by such of them as paid for it; and that Crowell had paid all the purchase money, and so was entitled to the whole interest in the land. There was evidence tending to prove these positions taken by the defendants.

A contrary view was presented by the plaintiffs, who controverted the payment of the entire purchase money by Crowell, and argued that the deed from Pennington to Crowell for one half of the land, was intended to carry out the articles of agreement; and that the other half interest remained in Pennington, and had been sold under execution and bought by Thomas Stokes, and then been sold under execution as Stokes' property, and been bought by the plaintiffs.

The defendants' exceptions to evidence:

The defendant Crowell, was examined on the part of the defence, and swore substantially to the facts set forth in his answer. He stated, in his testimony, that he had himself and through John S. Pennington, as his agent, and with his funds, paid the Clerk and Master in full, the purchase money for "the Thomas Hearne Gold Mine tract," which Pennington had bid off on joint account, under an agreement that the title was to be made to those who paid for it—Pennington acting as bidder and giving the note, upon which Crowell was secu-

rity. That after the note was paid by Crowell, he asked of the Clerk and Master a title for the land, and that Pennington directed the Clerk and Master to make a deed to Crowell; but he declined so to do, because Pennington had been reported to the Court as the purchaser, and was the proper person to receive the deed, which was accordingly made to him. That he, Crowell, had forbidden the sale, when the property was levied on and sold as the property of Pennington; that he had consulted S. J. Pennington, Esq., one of the plaintiffs, and an attorney residing at Albemarle, in regard to his title, and shown him his title papers, and had been advised by him, that he had a good title to the whole of the land. He, Crowell, denied that he had ever admitted that he claimed but half of the property, or that he had directed sheriff Marshall to sell half of it, as the property of Stokes, or that he had ever assented to such sale; but admitted, that at the sale made by sheriff Marshall, as the property of Stokes, under executions, when the plaintiffs purchased, that he had himself bid $1,500, for the purpose of quieting his title, as he wanted to make sale, but could not do so while Stokes' claim was out. That the plaintiffs had attempted to take forcible possession, and that he had successfully resisted them. This defendant also admitted, that he and Thomas Stokes and Monroe N. Lord, of Chicago, had entered into a contract respecting said lands, and that he and Stokes united this tract and a tract of Stokes' adjoining, in order to effect a sale of the whole.

Upon the cross-examination of this witness, Thomas J. Crowell, the defendant, the plaintiffs' counsel handed him a paper writing and asked him if that was a copy of the contract between him and Stokes and Lord, which he had furnished to V. Mauny, one of the plaintiffs? The witness replied, that he had given Mauny a copy of the contract, but that he could not say whether this was the paper or not. Whereupon, V. Mauny, one of the plaintiffs, was called to the witness stand, by the plaintiffs' counsel, and testified that Thomas J. Crowell, the defendant, handed to him this iden-

tical paper writing, and informed him that it was a true copy of the original contract entered into by Stokes, Crowell and Lord.

The plaintiffs' counsel then proposed to read it in evidence, informing the Court that they intended to rely on it, as an *estoppel in deed*, under the hand and seal of the defendant.

The defendants' counsel objected to the reception of the paper writing in evidence, upon the ground that it was only a copy, and that no notice had been given to produce the original.

The plaintiffs' counsel then proposed to read it in evidence, as a mere declaration of defendant, Crowell, to the effect, that he and Stokes were jointly interested in this particular land.

The counsel of the defendants renewed their objection, and opposed the reading of the paper for any purpose.

His Honor ruled that while the paper writing in question, could not have the effect in law, of an estoppel by deed, yet although a mere copy, it was rendered competent evidence by the testimony of Mauny, of any admissions made therein by defendant Crowell, which ought to go to the jury, along with the explanation he had given in his testimony. The copy was accordingly read, and the defendants excepted. The following is a synopsis of its contents.

It was a copy of a contract under seal, signed by Thomas Stokes, T. J. Crowell and M. N. Lord, on the 20th April, 1871, for the purpose of forming a joint stock company for mining purposes—the capital stock to be $29 000. This tract of 400 acres described as property of which Thomas Stokes and T. J. Crowell are joint owners, is put into the concern at a valuation of $15,000; also another tract adjoining, belonging to Thomas Stokes, or the mining part thereof, being the S. W. corner, is to be deeded or leased for ninety-nine years, reserving to Stokes a certain royalty; also another tract adjoining, jointly owned by Stokes and Lord, is put in at a valuation of $10,000. Lord is to put in $3,000 cash, and Crowell is to put in a steam engine at $1,000, the expressed purpose being

to consolidate said lands with a view of working the gold ores, and doing a general mining and mechanical business upon said property.

S. J. Pemberton, one of the plaintiffs, was offered as a witness for the plaintiffs, and was asked by their counsel to state a conversation he had with the defendant Crowell in reference to this land.

The defendants counsel objected on the ground that S. J. Pemberton was an attorney at law, and had been consulted professionally by Crowell, so that the conversation alluded to, came within the class of privilege communications, and was inadmissible. Upon his preliminary examination, Pemberton stated that he never had been employed by Crowell to investigate his title, nor did he consider him his client, nor had he ever received a fee from him about this matter. That between the 15th and 18th of April, 1871, Crowell submitted to him two documents, viz: the articles of agreement between Pennington and Crowell, dated 1st February, 1868, and the deed from Pennington and wife to Crowell, dated 21st March, 1868, and made his statement in regard thereto, and said that he wanted my legal opinion, and an abstract of his title for M. N. Lord. I gave him my opinion, but no abstract. Upon this statement of the case, the plaintiffs' counsel insisted they were entitled to the opinion that Pemberton gave to Crowell for said Lord. To this the defendants objected, but his Honor thought the evidence competent, especially as Crowell, when examined, had given his version, and admitted the evidence.

Pemberton then stated: "I told Crowell he had a good title to one-half of the land; I made no abstract." The defendant again excepted.

These were all the points made by defendants counsel; but inasmuch as they are desirous that certain portions of the evidence of plaintiffs, Pemberton, Blackmer and Mauny, should be set out and accompany the case, it is accordingly subjoined.

S. J. Pemberton, one of the plaintiffs testified that on the

day on which Stokes' property was sold by the sheriff, and previous to the sale, that Crowell agreed that one half of the Hearne property might be sold as Stokes' property; and that Luke Blackmer, one of the plaintiffs in the executions, and attorney for the rest, agreed that only one half should be sold as Stokes' property; and that Crowell was present at the sale, and directed sheriff Marshall to sell but one half; that the sheriff announced at the sale, that it was agreed by all parties that Stokes' interest was one half. When the sale was commenced, V. Mauney started the bid at $400. Crowell run it up to $1,500, and it was knocked down to Mauny at $1,600, Mauney bidding in behalf of the plaintiffs, to whom the sheriff's deed was made.

The sheriff's deed to us, was drawn by myself, and called for Stokes' interest, not specifying one-half. This was done at Blackmer's suggestion, in case Crowell's title should not be good for the other one-half.

It should be added, that Pemberton further stated, that he had no connection with this matter until the morning of the sale, after it was agreed all around that Stokes' interest was one-half; that Stokes owed him $1,000, not reduced to judgment, and he hoped thus to save the debt. That the plaintiffs had all agreed before the sale, that if Stokes interest could be sold for more than was due them, that he, Stokes, should have the surplus; and if they bought the property, and it could be so managed, by carrying out the Lord contract, or otherwise, to realize more than enough to pay them, that Stokes (who is now dead,) should have the benefit of it. That the witness, Pemberton, was Stokes general counsel, and not the counsel of Crowell.

Luke Blackmer, one of the plaintiffs testified: That the defendant, Crowell, was present at the execution sale of Stokes' property, and assented to, and directed the sheriff to sell one-half of "The Thomas Hearne gold mine tract," as Stokes' property.

On his cross-examination, Blackmer stated he was an attor-

ney at law; that he was aware of Crowell's title before the sale, and had been informed by Pemberton, that it was good for one-half of the property; that he himself had confidence in Stokes' title, and had told Crowell on the day of the sale, that his title was not good, and that unless he consented to a sale of one-half, as the property of Stokes, that the whole would be exposed to sale by the sheriff; that Crowell did so consent, and the sale took place that way. That he came from Salisbury for the purpose of attending the sale at Albemarle, to make the property sell for enough to pay off the executions. That the plaintiffs were not induced by anything Crowell said or did to bid for the property at the sheriff's sale. The only difference was, that if Crowell had not consented to the sale of one-half, this suit would have been brought for the whole of the land instead of one-half.

V. Mauney, one of the plaintiff's, testified: That he was present at the first execution sale, when the property was sold by the sheriff, as the property of John S. Pennington, when Crowell was present and forbid the sale, claiming the land as his individual property. On the day of the second sale, as Stokes' property, and before the sale, Crowell consented that half the land might be sold as Stokes' property, he himself, claiming but one-half. The sheriff announced, after Crowell had spoken to him, that it was agreed among the parties, that he should sell one-half thereof as Stokes' property. The witness remarked at the time, "Yes, whoever bought it, would get an undisputed title." He, the witness, bid $400, Crowell $500, and then he, Crowell, and the witness bid against each other, until he bid $1,500, and the witness $1,600, whereupon it was knocked off to him. The bid was for the benefit of the witness and the other plaintiffs.

Plaintiffs' exceptions to evidence, &c.

The plaintiffs, as a matter of precaution, in case the judgment in their favor should be reversed, and in order in that event, judgment may not be rendered for the other side, without further hearing, desire that their exceptions taken during

the trial, may be entered of record for the purpose of review. (These exceptions relate expressly to, and properly form part of the record in the succeeding case, being an appeal by the plaintiffs, the same parties defendants.

(1.) During the examination of the defendant, Crowell, he stated that he received a letter from Thomas Stokes, dated 24th December, 1870, which he held in his hand. The defendants' counsel requested that it might be read in the hearing of the jury, as it related to the land, and was written at a time when Stokes, under whom the plaintiff claimed title, claimed to be a part owner, by purchase of Pennington's interest, and sheriff's deed therefor, dated 19th September, 1870.

Plaintiffs objected; objection overruled, and letter read. It contained an admission that T. J. Crowell owned a three-fourths interest in this land.

(2.) During his examination, Crowell produced a statement of an account of payments made by him for the land in dispute, in the handwriting of J. S. Pennington, and written about the 1st of February, 1868. This statement showed the proportion which each of them, (Crowell and Pennington,) ought to have paid, and what Crowell actually paid. This statement was offered as corroboratory to the evidence of Crowell, that he had paid the money for the land to the Clerk and Master, previous to the deed of Pennington and wife to him, dated 21st of March, 1868.

To this plaintiffs objected; objection overruled and plaintiffs excepted.

(3.) At a subsequent period of the trial, the plaintiffs called to the attention of the Court an erasure made in the statement of account of payments, admitted in evidence, which erasure was made by abrasion of the paper and materially altered the sense of the writing. If it had not been made, the paper would show that Crowell was then indebted to Pennington in a considerable sum. Thereupon Crowell was re called and interrogated as to the erasure. He swore he never noticed

the erasure until it was called to his attention during the trial, and did not know how it occurred.

His Honor was asked to withdraw the statement from the consideration of the jury. This he declined to do, but informed the counsel that it was a proper subject for comment, and they might comment upon such erasure before the jury. Plaintiff again excepted.

(4.) H. C. Crowell, a son of the defendant, Thomas J., was examined on behalf of defendants. He was the subscribing witness to the articles of agreement of 1st February, 1868, executed by John S. Pennington to T. J. Crowell. He stated that he witnessed the execution of the paper writing of February 1st, 1868, by John S. Pennington; that it was done at his father's house. Here the counsel for the defendants proposed to give in evidence the conversation which occurred between Thomas J. Crowell and John S. Pennington, on that occasion. To this the plaintiffs objected, on the ground that the paper ought to speak for itself. His Honor admitted the evidence, and the plaintiffs again excepted. The witness then proceeded: That Pennington said to his father, that he, Crowell, had paid the money—the whole of it; and that he, Pennington, would make him the title; but that if Crowell would give him, Pennington, time to make the money, he would like to have an interest in the lands. To this Crowell replied, that he would give Pennington a showing, of course. Pennington wrote an agreement then and there, to convey one half.

(5.) The plaintiffs had exhibited in evidence the record of the suit in the Superior Court of Law of Stanly county, between Thomas Stokes as plaintiff and John S. Pennington as defendant. Judgment Spring Term, 1868, (2d March, 1868,) in favor of the plaintiffs for $5,008.07; the execution (*Fi. Fa.*) levied on Pennington's interest in this land now in controversy; and the *ven. ex.*, and the return of sale endorsed thereon, made to Thomas Stokes as highest bidder, on the first Monday in April, 1870, at the price of $5.00; also the deed

of Sheriff Marshall to Stokes, dated 19th September, 1870, with the usual recitals, for Pennington's interest in said land, being one-half.

The defendants proposed to contradict the return of Sheriff Marshall by the evidence of a witness, one Bennett Russell. To this the defendant objected, on the ground that such testimony was incompetent thus to contradict record evidence. His Honor held that the return of the sheriff was not conclusive, but mere *prima facie* evidence of the facts stated in the return. The Court overruled the objection, and the plaintiffs again excepted.

Russell being then admitted to testify, stated: That he was present at the sale of Pennington's interest in this land by the sheriff, and heard Crowell forbid the sale. The sheriff proceeded with the sale, and he, the witness Russell, bought the same at $5.00. He bid for himself and no one else, and was not aware that a deed had been made to Stokes. That he applied to the sheriff for a deed, but was informed that he was too late; that if he had applied six months sooner, he, the sheriff, would have made it to him. The witness did not pay the money, as he thought the title was no account. Plaintiff excepted.

Under the direction of his Honor, the case was submitted to the jury upon the following issues, to which are appended their several findings.

1st. Did John S. Pennington purchase the lands (in controversy,) at the Clerk and Master's sale, as agent of Crowell and others, with the understanding that the land should belong to Crowell until the other parties paid their respective parts? Answer, "Yes."

2nd. Was the land paid for by Crowell? Answer, "Yes."

3rd. Was the dower interest of Caroline Hearne, except the part reserved by her, purchased by Pennington for Crowell and paid for by Crowell's money? Answer, "Yes."

4. Was Thomas Stokes the purchaser at sheriff's sale, of the interest of J. S. Pennington? Answer, No.

5. Was it the intention of the defendant Crowell to induce plaintiffs to bid for the property, or interest of Stokes at sheriff's sale? Answer, No.

6. If so, were the plaintiffs thereby mislead and deceived to their prejudice? Answer, No.

7. Was the defendant present at the sheriff's sale on the 1st of July, 1871, and did he direct and assent to the sale of one-half of the Hearne land as Stokes' property. Answer, Yes.

8. Did the defendant on the 20th April, 1871, enter into an agreement in writing under seal, with Thomas Stokes and one Lord, in which the defendant Crowell and Stokes mutually agreed with each other that they were part owners? Answer, Yes, in order to effect the sale of the two mines.

There was judgment in favor of the plaintiffs and thereupon the defendants appealed.

The plaintiffs did not appeal from the judgment, but did appeal from the rulings of his Honor, excepted to and noted above. As the facts in the two appeals are stated substantially alike in the settlement of the cases, the appeal of the plaintiffs will not be reported at length.

W. J. Montgomery, for the appellants.
Battle & Son and *McCorkle & Bailey*, contra.

READE, J. When the defendant Crowell paid the Clerk and Master for the land in question, which was bid off by Pennington for himself and the defendant and others, under the agreement set forth, it invested the defendant with the *equitable* title; the legal title being in Pennington by reason of his having bid off the land and taken the deed to himself. And when Pennington made the defendant a deed to one half interest, and an obligation to convey the other half, it vested in the defendant the legal title to one half, and the equitable title to the other half. And when Pennington bought the widow's dower in said land for the defendant, and paid defendant's money for it, but took the deed to himself, and endorsed the

deed over to the defendant, it vested in the defendant the equitable interest in the widow's dower. So that, substantially, as we now administer equities, the absolute title to the whole land was in the defendant, he having the right to call upon Pennington for the legal title.

When, subsequently, the land was sold under an execution against Pennington, the purchaser Stokes got only the title which Pennington had—even supposing that Stokes was the purchaser, which the jury found he was not. And when the plaintiffs bought at execution sale Stokes' interest, they bought only what interest Stokes had, which we have seen was nothing substantial.

Admitting this to be so, still the plaintiffs say that when they bought at Stokes' sale the defendant was present, and represented to the plaintiffs that Stokes had an interest of one-half in said land, and consented to the sale of it; and therefore the defendant is *estopped* to deny the plaintiff's title to one half of the land, and that the plaintiffs are tenants in common with the defendants.

In order to create an *estoppel in pais* it must appear:

1. That the defendant knew of his title.

2. That plaintiffs did not know and relied upon the defendant's representations.

3. That the plaintiffs were deceived. And some add a fourth requisite, that the defendant *intended* to deceive. But it is not necessary to decide that in this case, as all the other requisites are wanting. First, the defendant did not *know* of his title. He knew he had paid for the land and that he *ought* to have the title; but he did not know the legal effect of his papers. And therefore he consulted the plaintiff Pemberton, who was a lawyer, and was advised by him that his title was only for one half. The plaintiff, Luke Blackmer, who is also a lawyer, after consultation with Pemberton, told the defendant that his title was for one half only.

Secondly: The plaintiffs did not rely on the defendant's declarations. On the contrary, Blackmer swears that "the

plaintiffs were not induced by any thing that Crowell said or did to bid for the property at the Sheriff's sale. The only difference was, that if Crowell had not consented to a sale of one half, this suit would have been brought for the whole."

From the testimony of Pemberton and Blackmer it clearly appears that they investigated the matter for themselves, and that the defendant put them in possession of the facts upon which he claimed title; and that he did claim it, and that it was only upon their assurance to him that his title was not good, that he consented to a sale of one half. It was not that they relied upon him, but it was he that relied upon them.

Thirdly. The plaintiffs were not deceived by the defendant. He acted with open fairness throughout. He had writings to show for it. He thought his writings sufficient. The plaintiff's lawyers thought they knew better. Finding a defect in the title at law, they overlooked the fact that equity would supply the defect. And they excited the defendant's fears, that if he did not consent to a sale of one-half he might lose all. *They* deceived *him*. And the fact stated by Pemberton in his testimony that after the defendant had consented to a sale of one-half, and the sheriff proclaimed that only half was sold, yet he, Pemberton, "drew the deed and called for Stokes' interest, not specifying one-half." "This was so done at Mr. Blackmer's instance in case Crowell's title should not be good for the other half," shows the spirit with which they were pursuing the defendant. And it shows that while they intended that the defendant should be estopped by the sale, yet the estoppel should not be mutual; but they would so draw the deed as to enable them to claim not only the half which they bought, but the other half which they did not buy.

The other matter set up by the plaintiffs as an estoppel, to wit, the written agreement between the defendant and Stokes and Lord, cannot avail them. It was not for the purpose of passing the title to Stokes, or to have him believe that it was, but to form a partnership for mining purposes in that and in certain lands which Stokes put in.

What we have said disposes of the case and makes it unnecessary that we should notice the other exceptions on either side, because taking the verdict upon the issues and the testimony of the plaintiffs themselves, it is clear that the plaintiffs have no substantial interest in the land, and that the defendants are sole seized.

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

PER CURIAM. Judgment reversed.

R. J. HOLMES and wife CAROLINE and others *v.* THOMAS J. CROWELL and wife MARGARET.

(Same *Syllabus* as in preceding case.)

The facts in this case are fully reported in the preceding case, and it is unnecessary to insert them again. There was judgment for the plaintiff, and the defendant appealed. The plaintiffs did not appeal from the judgment, but only from certain rulings of his Honor, fully stated in the defendant's appeal, *ante*.

Battle & Son, *McCorkle & Bailey*, for the appellant.
Montgomery, contra.

READE, J. The merits of this case are decided in the same case at this term on the appeal of the defendants, this being the plaintiffs' appeal.

We have considered the plaintiffs' exceptions, and we do not see any errors in the rulings of his Honor thereon, even if the subject matters of the exceptions related to the point upon which the case turns. The plaintiffs' failed to connect

themselves with the title of Pennington, whatever that was; the jury find that Stokes did not buy at the sheriff's sale, against Pennington. Stokes, therefore, had no title, legal or equitable. The only show of title which the plaintiffs have, is the alleged estoppel, when the defendant was present at the time when the land was sold as the property of Stokes, and consented thereto. But these exceptions have no connection with that transaction, but to antecedent matters. And so they are irrelevant, except the objection to the testimony of witness Russell, who said that he bought the land when the sheriff sold it as Pennington's sale, and that Stokes did not buy it.

This evidence was competent.

There is no error.

PER CURIAM. Judgment affirmed.

STATE *v.* JAMES W. BUCK,

B was indicted for failing to list his poll for taxation. The bill of indictment was found by the Grand Jury subsequent to the ratification of the act of the 18th of March, 1875, (chap. 200, Public Laws 1874'–'75,) upon a motion to quash the bill of indictment, on the ground that the Superior Court had no jurisdiction of the offence: *It was held*, that under the peculiar circumstances of the case the indictment must be quashed.

This was an INDICTMENT for failure to list the poll for taxation, tried before *Watts, J.*, and a jury at Spring Term, 1875, of WAKE Superior Court.

The defendant moved the Court to quash the bill, on the ground that the Superior Court had no jurisdiction of the offence since the passage of Chapter 200, public laws of 1874–'75. The motion was overruled and the defendant excepted.

The defendant was required to answer over, and having

pleaded not guilty, the case was tried and the jury rendered a verdict of guilty. Thereupon the Court gave judgment against the defendant, from which judgment an appeal was prayed and granted.

Fowle and *Battle & Son*, for the defendant.
Attorney General Hargrove and *Haywood*, for the State.

READE, J. It is manifest that when the Legislature made the failure to list taxables a misdemeanor, it was intended to make the offence cognizable before a Justice of the Peace; but, by reason that the punishment was limited to "thirty days," which might be more than "a month," we were obliged to hold that a Justice of the Peace could not take jurisdiction; but that the Superior Court had jurisdiction. The cost and inconvenience of this was soon seen to be a cruel hardship, and fell upon many thousands of very poor persons. To remedy which the Act 18th March, 1875, ch. 200, was passed; the title of which is, "An Act to divest the jurisdiction of the Superior Courts over misdemeanors in failing to list polls and property, and for other purposes."

It is plain that the purpose of this Act was to change the jurisdiction from the Superior Courts to Justices of the Peace. And the Act proceeds to amend the former Acts by substituting, "one month," for "thirty days." This Act was passed in March, 1875; and in the next month, April, this indictment was found in the Superior Court. This was in violation of the purpose of the Act; and, therefore, we ought not to sustain the indictment unless we are forced by inflexible rules to do so. Respect for the Legislature, and regard for the rights of the citizen, induce us to direct the indictment to be quashed, if we can.

The Constitution Art. 4, sec. 33, gives to Justices of the Peace exclusive original jurisdiction "where the punishment cannot exceed a fine of fifty dollars or imprisonment for one month." But this is to be "under such regulations as the

General Assembly shall prescribe." The General Assembly has prescribed regulations :

(1.) That the complaint must not be by collusion, and must be by the party injured.

(2.) It must be made within six months, and in writing, and under oath.

It has frequently been discussed, whether, when the Legislature fixes the punishment for any given offence within the limits of a fifty dollar fine or one month imprisonment, it thereby becomes cognizable before a Justice *to the exclusion* of the Superior Court? And we have held that it did not. If the punishment *is* so limited, and all the regulations are observed, and the Justice takes jurisdiction, then, doubtless, it is "exclusive." But though the punishment be limited, yet if any of the regulations are neglected, or if the regulations do not cover the case; then the jurisdiction of the Superior Court, which is general, remains in order that offences may not go unpunished. But here, we have an offence, the punishment of which is fixed within the Constitutional limits for a Justice of the Peace to inflict, and for the declared purpose of divesting the jurisdiction of the Superior Courts. Why then should the Superior Court take jurisdiction? It is true that the "regulations" for giving the Justice of the Peace jurisdiction had not been observed; but then it cannot be said that proper regulations were wanting, or that they had been neglected. The Act was ratified 18th March, and the indictment found 5th April. This was indecent haste, to say the least, to assume jurisdiction which had been expressly "divested."

It is however insisted for the State, that admitting that the act does "divest" the jurisdiction of the Superior Court and invests the Justice of the Peace with jurisdiction, yet that is *prospective*, and cannot affect the offence charged, which was committed before the passage of the Act; that at the time this offence was committed the punishment was $50 fine or thirty days imprisonment, and that thirty days were more than "a

month," (February,) and therefore, as decided in *State* v. *Upchurch*, a Justice had not jurisdiction. And so it is insisted that, notwithstanding the Act, a Justice has no jurisdiction of *this* offence, for the Act, by amending the former Acts by substituting "a month" for "thirty days" *increased* the punishment, which is *ex post facto*, "one month," January, for instance, being more than "thirty days." So that this case stands to be punished under the act in force at the time it was committed. But that cannot be, because amending that act operated as a repeal, at least as to the particular matter amended, and so the defendant cannot be punished with imprisonment under the old act at all, as is settled in *State* v. *Nutt*, Phil. R,, and *State* v. *Cross*, 4 Jones, 421. This is mentioned only to show that the defendant cannot be imprisoned under the old act, and not to show that he can be imprisoned under the new. It would seem that he cannot be imprisoned under either; not under the old, because it has been repealed; not under the new, because it increases the punishment. Dwavis on Statutes. So that the only punishment that can be inflicted is a fine of $50, and as that is the same in the new and the old acts, and within the jurisdiction of a Justice, there is no reason why he may not have jurisdiction.

The third section of the act provides *amnesty* for all persons charged of like offences against whom indictments were "pending;" but this indictment was not pending at that time, and therefore the defendant is not embraced. In another case against this defendant at this term, we have treated that matter more at large.

We do not say that if for any reason a Justice of the Peace does not take cognizance of the case, that the Superior Court may not, for offences ought not to go unpunished, but under the peculiar circumstances of the case as now before us, we think the indictment ought to be quashed.

This will be certified.

PER CURIAM. Judgment accordingly.

APPENDIX.

The following opinion of his Honor, Judge SCHENCK, in the case of the *State* v. *Ellwood*, should have been published with that case, *ante* page 189, but was accidentally omitted:

"The counsel for the prisoner have so earnestly persisted in their motion for a new trial and so confidently insisted that the Court erred in charging the jury that there was no evidence in this case to mitigate the killing of the deceased, that the Court out of respect to these gentlemen files the following opinion with the reasons on which it is founded.

The Supreme Court has frequently intimated the great difficulty which it had in "marking out the boundary line" between evidence which merely "raises a conjecture of a fact," "and evidence fit to go to a jury" to *prove* a fact, and if the Judge at *Nisi Prius* errs he has the consolation to know that he was dealing with a most subtle question, and the prisoner need not fear, because he has his right of appeal fully secured to him. The question at issue was discussed with all Judge Gaston's ability and accuracy in *Sutton* v. *Wade*, 2 Jones, and the rule laid down by him has been often cited and approved in the Supreme Court. It is this: "Where the law does not presume the existence of a fact there must be *proof direct* or *indirect* before the jury can rightfully find it. It cannot be doubted that what raises a possibility or conjecture of a fact can never amount to legal evidence of it."

In *Matthews* v. *Matthews*, 3 Jones 135, Judge BATTLE says: "The burden of proof was on the plaintiff and if his testimony raised a *bare conjecture* of the fact, then there was in effect no evidence of the fact." To the same effect is the rule laid down by Chief Justice PEARSON in *Haywood's* case, Phil. L. Rep. 378. He says, "this evidence may have been ground for conjecture by possibility that the gun went off accidently, but standing alone it was certainly not evidence fit to be left to the jury, on

which to find that such was the fact, as the *onus* of proof was on the prisoner." And in *Wittkowski* v. *Wasson*, 71 N. C. Rep. 456, RODMAN, J., in delivering the opinion of the Court says the evidence must be "such only as that from which a jury might reasonably infer the existence of the alleged fact," and it does seem that this case, not only is sustained by these authorities, but the Court might have adopted the forcible language of Judge BYNUM in his very learned dissenting opinion in the above case and charged "That there was no evidence to establish *accidental shooting* of the deceased but on the contrary it *disproved* this defence."

Let us apply these rules to this case. The prisoner rests his defence on the "fact" that the shooting of the deceased was accidental or in sport. The killing with a deadly weapon having been admitted by the prisoner the *onus* of proving the accident is on the prisoner. See *Haywood's* case *ut supra*. He must offer *proof* direct or indirect of this fact, "not testimony that will raise a bare conjecture" of an accident.

Three circumstances were relied on by the defendant's counsel in their argument to the jury as proving this fact:

1. "That the prisoner and the deceased boarded at the same house and were friendly, "that they seemed to be intimate," and "that they had been seen to play together as young men."

2. That after the homicide the prisoner "looked frightened" and after some time said, "I hate it, Lord have mercy on my soul."

3. That the character of the pistol was such that it might have gone off accidently."

The fact of the deceased and the prisoner being friends up to the morning of the homicide, is not a stronger case than *Haywood's* case where the prisoner had been drinking at the shop where the deceased lived the day before, and there was no evidence of quarrel or ill will between them. Nor is it stranger than *Shirley's* case, 64 N. C. Rep. 610, where the deceased was the wife of the prisoner. Yet the Supreme Court do not even mention this as a circumstance in these cases on

which they based their opinions. The same may be said in *Leak's* case, Phil. Law 450, where the deceased was an infant and poisoned by its nurse.

In *Haywood's* case the Chief Justice suggested, that if in connection with the relation "of a favorite child" the prisoner would also prove that the lock of the gun was out of repair, and would go off by a jar or sudden motion, and that at the *instant* it went off the prisoner made an exclamation of surprise or exhibited natural emotions of grief "it would form a chain of facts to go to the jury." But how different is this case. The pistol was not out of repair, would not go off at half cock and the prisoner did not "at the instant exhibit emotions of grief or surprise." He walked to and fro, looked at his victim and simply remarked, "I have killed this man." He did not even claim it was accidental or that it was unexpected or in sport. His mouth was opened by the law. Yet he did not suggest the defence now urged by his counsel.

In *Haywood's* case, the gun would not stand at half cock, and the "prisoner soon after the homicide said he had killed the deceased, but he did not know the gun was loaded." But in this case both these facts are wanting. How then can the judgment in this case be overruled and *Haywood's* case be sustained? But it was urged that the prisoner "looked frightened." Why alarmed with danger "unless he was conscious of guilt and feared its consequences?" That look imports danger, and danger does not follow innocence. The look should have been one of grief, or sorrow, or pity. Nor does the expression made after pacing forty steps, and when time was given for reflection, improve the prisoner's case. "I hate it; Lord have mercy on my soul." Why cry for mercy unless he was conscious of deserving punishment? It is the guilty, not the innocent, who sue for mercy. He did not excuse himself by alleging accident or saying it was done in sport or even express commiseration or pity for his victim, but says, "have mercy on me."

The third circumstance as to the character of the pistol

cannot avail, for it was a very common kind of pistol, nothing peculiar in it. It was, as far as the evidence shows, in good repair, and the discharge was made directly at the prisoner in the ordinary way. Nor was the circumstance relied on in *Shirley's* case, *ut supra*, present in this case, to wit: "That the range of the ball indicated accident." In this case the range was level, just as it would be if deliberately pointed at the deceased.

To sustain express malice even, the case was strong and full. The expression, "It was you, damn you, I'll shoot you," made an hour and a half before and the simultaneous examination of the pistol, showed the intent. For the reasons above stated, the Court declines to grant a new trial.

(Signed) D. SCHENCK, Judge, &c.

INDEX

DEEDS.

DEMURRER.

(1.) That a demurrer to the answer of the defendant, on the ground that it did not state what disposition, if any, had been made of the real estate of the intestate, is insufficient, where it is not alleged in the complaint, and did not appear that there was any real estate.

(2.) A demurrer to an answer "for that it does not state that the entire personal property of the intestate has been exhausted," must be overruled, where it is alleged in the answer that "the Confederate money thus received, was the only assets remaining in the hands of the defendant, and that the same is worthless."

(3.) That a demurrer upon the ground, "that the answer does not state by whom, nor to whom, nor in what amount refunding bonds were executed," must be overruled when the answer states, "that refunding bonds were taken from the next of kin according to law, with solvent sureties, and filed in the Clerk's office, and that these bonds had become insolvent by the results of the war."

(4.) That a demurrer, "because the answer does not state at what time the defendant received Confederate money for the property of his intestate," must be overruled, when the answer does state the date and terms of the sale, and that the money was paid when due. *Lee* v. *Beaman, Adm'r.*, 410.

2. Where certain heirs are made defendants, who claim no interest whatever in the land sued for, and in the complaint no relief is prayed against them, it is a good ground of demurrer, and the suit as to them should be dismissed with costs. *Wall, Gay et al* v. *Fairley et al*, 464.

See PRACTICE, CIVIL CASES, 1, 10, 11, 19.

See STATUTE OF LIMITATIONS, 6.

EATING HOUSE.

See INDICTMENT, 9.

ELECTIONS.

1. Cities and towns, like counties and townships, are parts and parcels of the State, organized for the convenience of local self-government; and the qualifications of voters are the same, to wit, citizenship, twenty-one years of age, twelve months residence in the State, and thirty days in the city or town. *VanBokkelen et al.* v. *Canaday et al.*, 198.

2. The General Assembly cannot in any way change the qualifications of voters in State, county, township, city or town elections. *Hence*, so much of the act amending the charter of the city of Wilmington, ratified on the 3d day of February, 1875, as requires a residence of ninety days instead of thirty, is unconstitutional and consequently void. *Ibid.*

3. The 8th section of the act amending the charter of the city of Wilmington, ratified the 3d day of February, providing for the registra-

amount collected from C, on the note payable to A: *It was held*, that the evidence of B, offered to prove that when he took the note on C to collect, A was indebted to one F, deceased, upon whose estate B was administrator, and that it was the understanding, that the proceeds of the collection from C, was to be applied to the payment of A's indebtedness to F, B's intestate, was admissible, and that its rejection by his Honor upon the trial in the Court below, entitled B, the defendant, to a new trial. *Willis* and *Robeson* v. *White*, 484.

11. Upon an indictment for burglary, the confessions of the prisoner voluntarily made, are competent evidence, even if made without the consent of counsel; but if the counsel, without objection, allow the State to introduce a part of a conversation in evidence, he has no right to exclude either a part, or the whole of such conversation afterwards. *State* v. *McDonald*, 346.

12. Where upon an indictment for burglary, it was in evidence that the prosecutor discovered in the morning between daylight and sunrise, that his house had been broken into; and the house was situated on a public street in the town of F, and a box and chair had been so arranged as to form steps, which enabled the party breaking to reach the window, &c.: *Held*, that there was evidence, from which, the jury might infer that the breaking and entry was done in the night time. *Ibid.*

13. Where in an action upon a bill of exchange, it was in evidence that the defendant, the payee, had written a letter to the plaintiff and holder of the bill, in which he said: "I have seen M, of the firm of P & M, the drawer of the bill, who says, that in a week or two the note you write me about, will be attended to; if not, please write me—do not bring suit; if they do not attend to it, I will make all satisfactory to you:" *Held*, that the letter contained no evidence that the defendant knew that this bill of exchange had not been presented at the time of writing the letter, and that therefore he was entitled to his discharge. *Lilly* v. *Petteway, et. al.*, 358.

14. In an action brought against A to recover the value of a horse sold by the plaintiff to B, the son of A, it was in evidence that the plaintiff had sold the horse to B, who lived upon and cultivated a portion of the defendant's land, and that on one occasion defendant was seen riding with B in a buggy drawn by the horse sold by the plaintiff to B. There was no evidence as to B being under full age, nor connecting A with the transaction. Upon a demurrer to the evidence: *It was held*, that plaintiff was not entitled to recover. *Gregory, Galloway & Co.*, v. *Herring*, 518.

15. To prove a disputed fact, the best evidence of which the nature of the case admits must be produced. The best evidence of a judgment is the record of the same, or a transcript thereof. *Scott* v. *Bryan*, 582.

EXECUTION.

EXECUTORS, ADMINISTRATORS, &c.

HABEAS CORPUS.

HOMESTEAD.

OFFICERS.

OUSTER.

PRACTICE, CIVIL CASES.

peal, and the rights and liabilities of the parties have been there declared, and the cause remanded to be proceeded in, in accordance with the opinion and decree of the Supreme Court: *It is error* for the Court below to set aside the order setting the cause for hearing, and to give the defendant leave to take additional testimony. *N. C. R. R. Co.* v. *Swepson et al.*, 316.

17. Although section 133, C. C. P., in terms, applies only to a Judge of the Superior Court, the spirit and equity of its provisions equally extend to this Court; and the same power resides here to relieve from a judgment taken against a party through "mistake, inadvertence, surprise or excusable neglect." And where it appears that the bond, on an appeal to the Supreme Court, was not filed in the time prescribed by law, through mistake and excusable neglect on the part of the appellant, the judgment rendered here will be vacated. *Wade* v. *City of Newbern*, 318.

18. Where A, one of the creditors of B, by contract with other creditors of B, purchased at an execution sale B's land, to be held in trust for the payment of their respective debts, and A, having received payment of his debt from the sale of said land, sold the same to C, who again sold it to D: *Held*, that in an action by F, one of the creditors of B, to enforce against D the said contract and trust, A and D were necessary parties. *McKethan* v. *Murchison and McKay*, 427.

19. An order of the Judge of the Superior Court re-referring a report to the referee, directing him "to reform his report in accordance with the decision of the Supreme Court, and that his amended report, so reformed, be the judgment of the Court," is erroneous, for the reason that it deprives the parties of the right to except to the report for any errors which might be therein contained; and also because it allows the referee to determine what the judgment of the Court shall be. *Brumble* v. *Brown, Ex'r.*, 476.

20. In a petition for partition, A *et al.* v. B, and B pleads "sole seizure," under a deed from C, who being made a party to the suit, alleges fraud on the part of B in procuring the deed, and prays to have the same cancelled: *It was error* in the Probate Court to dismiss the proceedings at the cost of the plaintiff. And on the appeal of the plaintiff to the Superior Court, *it was the duty* of the presiding Judge to have eliminated from the transcript and decided the point of law raised by the plea of sole seizure; as it *was also his duty* to have had the issue of fraud in procuring the deed, submitted to and passed upon by a jury. After this, if necessary, the Court could have issued a *procedendo* to the Probate Court. *McBryde* v. *Patterson*, 478.

21. Where plaintiffs have interests to a certain extent in common and seek the same relef they are at liberty to join in a suit against com-

PRACTICE, CRIMINAL CASES.

his or her individual receipt, or the receipt of the husband or guardian of his daughters. The respective shares of the children were to be received, used and enjoyed by them during their natural lives respectively, and upon the death of any one of them, all the property including the principal money of any bonds to which such child was entitled, was devised to the living issue of such child absolutely and forever. The testator left him surviving three children, B, C, and D; B is still living and has five children, C is still living and has two children. The testator contracted for the purchase of a tract of land, and since his death the executor paid for and obtained a title to the same, to be made directly to his children. In an action brought by B against the surviving children of the testator, and the children of the deceased children of the testator, and others entitled in remainder: *It was held:*

1. That the land referred to went to the devisees as real estate.

2. That the children of the testator took only a life estate in the land, and that the children of B who survives him take his share in remainder.

3. That as those who are to take in remainder are not yet ascertained, it was error to order a sale for the purpose of making partition. *Williams* v. *Hassell, Adm'r.*, 174.

5. A bequest to a wife of all the testator's property, after the payment of his just debts, "for the benefit of her and my children, and that she shall hold the same as my executrix and guardian for their mutual benefit: *Provided*, That the principal shall not be used, unless the interest fails to meet their reasonable parts," does not empower the wife to sell a part of the real estate left by said testator; and a sale of such portion by her will be set aside, and the purchaser reimbursed for what he paid, being at the same time charged with the rents and profits. *Wetherell and wife* v. *Gorman, et al.*, 380.

6. A devised as follows: "I give to my two grandsons, M and R, one hundred acres of land, including where I now live," &c., "and that my daughter P live where I now live for the space of ten years; and at the end of that time, the land and premises to belong to my two grandsons, or the heirs of I:" *Held*, that after the expiration of ten years from the death of the testator, M and R. the children of I, who was dead, were entitled to the land. *Smith and Smith* v. *Neal et al.*, 472.

WITNESS.

1. Under sec. 343, C. C. P., an obligor of a bond is not a competent witness to prove any transaction between himself and the obligee, when such obligee is dead at the time of trial, although he may have previously assigned the bond. *Woodhouse* v. *Simmons*, 30.