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NORTH CAROLINA REPORTS.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA,

JANUARY TERM, 1877

VOL. LXXVI.

BY

THOMAS S. KENAN.

RALEIGH:
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1877.

JUSTICES OF THE SUPREME COURT.

AT JANUARY TERM, 1877.

RICHMOND M. PEARSON, C. J.
EDWIN G. READE,
WILLIAM B. RODMAN,
WILLIAM P. BYNUM,
*WILLIAM T. FAIRCLOTH.

*Appointed by Gov. Brogden, November 18th, 1876, *vice* Thomas Settle, resigned.

JUDGES OF THE SUPERIOR COURTS.

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

*Appointed by Gov. Vance, January 31st, 1877, *vice* Samuel W. Watts, resigned.

JUDGES OF THE CRIMINAL COURTS.

OLIVER P. MEARES, Wilmington.
GEORGE V. STRONG, Raleigh.

Clerk of the Supreme Court:
WILLIAM H. BAGLEY.

ATTORNEY GENERAL:

THOMAS S. KENAN.

CASES REPORTED.

CASES CITED.

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

JANUARY TERM, 1877.

STATE v. JONAH BROOKS.

Rape -- Married Woman -- Consent obtained by fraud.

Carnal knowledge of a married woman, obtained by *fraud* in personating her husband, does not amount to rape; *Therefore*, Where B was indicted for an assault with intent to commit rape on a married woman, and the Court charged the jury, that, if he intended to have connection with her by *fraud* in personating her husband, he was guilty: *Held* to be error.

INDICTMENT, for an assault with intent to commit rape, tried before *Furches*, *J.*, at Fall Term, 1876, of UNION Superior Court.

During the argument, defendant's counsel asked the Court to charge the jury, that there was not sufficient evidence of intent to justify a verdict of guilty. This the Court refused to do, but left the question of intent to the jury.

The facts, upon which the instructions were asked, and the instructions given, are sufficiently stated in the opinion of this Court.

Verdict of guilty. Motion in arrest, and rule for new trial,

overruled and discharged. Judgment and appeal by defendant

Attorney General for the State.
Mr. John W. Hinsdale for defendant, submitted:

I. Assault with intent to commit rape is not committed unless *rape* would have been complete had the assault been successful 2 Arch. Crim. Pr. & Pl., 305; 8 Car. & P., 736; 2 Park. (N. Y), 174; 50 Barb., 128; *State* v. *Sam.*, 1 Winston, 300

II. Rape cannot be committed by fraud, unaccompanied by force, R. & Ry., 487 8 Car. & P., 265; Id., 286. These cases are cited with approval by Bishop, Wharton, Archbold, Russell and Chitty. 8 Cox, C. C., 223; 6 Ala., 765 1 Car. & P., 415; Id., 746; 4 Leigh (Va.), 648; 8 Eng. (Ark.), 360; 11 Ark., 289; 50 Barb., 144; 2 Swan. (Tenn.), 394; 30 Ala.. 54; 2 Bennett & Heard. L. C. C., 254; 1 Den. C. C., 89; Whart. Crim. Law, § 1,146.

FAIRCLOTH, J. The defendant was indicted and convicted of an assault with intent to commit rape on the person of P. Jane Williams.

The material facts are as follows: The defendant was living with the husband of the prosecutrix, and usually slept in one end of the house, and the prosecutrix and her husband in the other end; there being a partition wall and door between them, each room having an outer door. She had placed her bed on the floor in the month of August, and she and her husband were asleep upon it, the defendant having retired to sleep in his room. About 11 o'clock at night she "was awakened and found some one in the bed with her. He had pulled up her clothing and had his hand on her naked person, and was trying to get on her, and she pushed him off and turned over and awoke her husband and

whispered to him, that there was a man in the room. Her husband got up; the defendant by this time had gotten to the outer door."

His Honor charged the jury, among other things, "that, before they could find the defendant guilty, they must be satisfied that his intention was to ravish the prosecutrix, to have illicit connection with her by force and against her will, or that he intended to do so by committing a fraud upon her, by falsely personating her husband."

This is the only part of the case we find it necessary to consider, and we are of opinion, that the alternative part of this instruction is erroneous.

Rape is the carnal knowledge of any female of ten years or more, "by force and against her will," and an assault with intent to commit rape must be such as would amount to rape if the purpose had been accomplished. It is manifest that the defendant was endeavoring to have an improper connection with the prosecutrix, but this may be a very different thing from an intent to commit rape. His intention, however, is a question for the jury. His Honor should have instructed the jury to consider, whether the defendant's intention was to accomplish his purpose by force, if necessary; or by exciting and soliciting her consent without force; or by fraud in personating her husband; and that in the first view he was guilty, but in either of the others he was not guilty.

In the second view, if he intended to desist on the first intimation of resistance, he is not guilty, because there was no force against her will; and, in the third view, he is not guilty, because fraud is not force, except in that class of cases where the prisoner has been in some way instrumental in disabling the prosecutrix to make resistance.

This last view has not been heretofore decided in this State, but was decided in England, as above indicated, in *Rex* v. *Jackson*, *Russell & Ryan*, C. C., 486; and in a recent

case (1868) *The Queen* v. *Barrow*, 1 Crown Cases Reserved, 156. In the latter case, the woman and her husband were sleeping together in bed, she being waking and sleeping, when she was completely awakened by a man having connection with her, who she thought was her husband. As soon as she discovered it was not her husband, she pulled at him to awake him, and the prisoner jumped off the bed. The Court, after mature consideration, said: "We have carefully considered the facts as stated in the case. It does not appear that the woman, upon whom the offence was alleged to have been committed, was asleep or unconscious at the time when the act of connection commenced. It must be taken, therefore, that the act was done with the consent of the prosecutrix, though that consent was obtained by fraud. It falls, therefore, within the class of cases which decide, that when consent is obtained by fraud, the act done does not amount to rape."

The cases cited in 2 Leading Criminal Cases by Bennett & Heard are to the same conclusion, and such is our decision.

Females are protected by law from violence of this kind, by the just infliction of the severest penalty on offenders, and every good citizen will be vigilant in seeing that such laws are fully and fairly administered in all proper cases; but when there is no coercion in any form and tricks and deception are employed to accomplish the same end, then, as against these, females are protected only by such laws as protect the whole community against fraud and imposition.

There is error. Let this be certified, that further proceedings may be had according to law.

PER CURIAM. *Venire de novo.*

JOHN HARDY, Adm'r., v. THE CAROLINA CENTRAL RAILWAY COMPANY.

Negligence -- Liability of Master.

1. A master may be liable to a servant for injuries received in his service from the neligence of the master.
2. Also, for injuries received from the negligence of a fellow servant, if the master was negligent in selecting a bad one.
3. Also, for injuries received from bad machinery negligently selected by him.
4. He is not liable to a servant for injuries received from the negligence of a fellow servant in the same employment.

(*Ponton* v. *R. R. Co* 6 Jones 245 cited and approved.)

PETITION to rehear, by the defendant. (See 74 N. C. 734.)

The petition was heard at June Term, 1876, and the opinion delivered, but not heretofore reported.

Messrs. W. S. & D. J. Devane and *D. L. Russell*, for the plaintiff.

Messrs. R. Strange, Wright & Stedman and *Battle & Mordecai*, for the defendant.

READE, J. We rehear the case upon the ground, that the defendant's counsel, by reason of what he understood to be an intimation from the Court in his favor upon the question of the liability of a master to a servant for the negligence of a fellow servant, did not present his views as fully as he otherwise would have done. But we are surprised that the learned counsel did not discover from the opinion filed, that we stated *that* and all his other points, and referred to his full brief and stated that we had fully considered them; and that, conceding for the sake of the argument, all his

positions to be in his favor, yet, outside of them all, there was this against the defendant, that he had no servant at the break in the road whose duty it was to warn the train; that this was negligence which nothing could excuse; and upon that ground the defendant was liable.

The defendant's counsel now insists that we are mistaken in the facts, for that the defendant did have a servant, the section master, whose duty it was to be there and warn the train and that he neglected his duty, and that the injury to the plaintiff's intestate was the neglect of the section master, a fellow servant of the deceased, for which the master, the defendant, is not liable.

Let us see it we are mistaken. The answer of the defendant "denies that the intestate of the plaintiff was injured or killed by any wrongful act, neglect or default of the defendant, or of the section master, * * * or by any wrongful act or default of any of the servants, agents or employees of the defendant." After that denial, what matters it that the counsel alleges the contrary. The answer is conclusive against the defendant; only the plaintiff can controvert it. And when we look to the evidence it is just as positive—we mean the evidence on the part of the defendant. The General Superintendent testified that, "he did not think the section master was to blame after he had investigated the case. He kept him on the road afterwards." And again, when asked why he thought he was not to blame, he answered that he had been ordered to another place by the road master, "and that one man could not be at two places at one time." And again he said that if he had not been *ordered* away to another part of the road, still his *duty required* that he should have been at *another part* of the road, some ten miles distant. Now, it is not pretended that it was anybody's duty except the section master's to be at the place of accident and give the warning; and it is expressly proved by the defendant that he had been ordered some ten miles

away, and that it would have been his duty to be away, if he had not been ordered; and therefore it was not his duty or within his power to be at the place of the accident. Who ought to know whether he was to blame better than the General Superintendent? He says he was not to blame, and he keeps him in service. In what a dilemma does the counsel place his client! If it was the duty of the section master to be at the break and give the warning, and he neglected his duty and allowed an excursion train full of human beings to pitch into a gorge and cripple and kill, and the defendant kept him employed after he knew of his negligence, it makes the defendant a monster nuisance which ought to be abated by the force of public indignation.

It is not alleged or proved, that it was the duty of the section master to go over the whole of his section after every storm and before a train passes. It is simply said that it is his duty to go over his section after every storm, but how long after, is not said. The General Superintendent says expressly, it was not his duty to have gone over it before *this* train passed, although ten hours had elapsed, and that he was not to blame for not having done it. And just here is where we said in our opinion, at last term, the defendant's liability comes in. He thinks it enough to have a section master and hands enough to keep the road in order, taking his time for it. We say that there must be servants enough, not only for ordinary, but for extraordinary occasions, and that after every storm threatening the road, every foot of it must be examined before a train passes, and that it will not do to say that "one man cannot be in two places at one time," but there must be a man for every place, as need may be. Here, there was no servant at the place of danger and no one whose duty it was to be there. Upon this single ground we put our decision at last term and we see no reason to change it.

It is proper that I should say, that I did not at the last

term, as the defendant's counsel supposes, overlook his points or his authorities. I never do that. I examined carefully *Ponton's* case in 6 Jones Rep., the first case in our Court, and the English cases there cited. I also examined the Massachusetts case, and other American cases; and since the last argument I have still further examined later English and American cases; and I think it may be regarded as settled,

First. A master may be liable to a servant for injuries received in his service from the negligence of the master.

Second. A master is liable to a servant for injuries received from the negligence of a fellow servant, if the master was negligent in selecting a bad one.

Third. He is also liable where he negligently selects bad machinery, tools, &c.

Fourth. The master is not liable to a servant for injuries received from the negligence of a fellow servant in the same employment. Who is a *fellow servant*, and what is *the same employment*, are often questions of difficulty, and depend upon the circumstances of each case.

The decision at the last term will stand, and the defendant will pay the cost of the rehearing.

PER CURIAM. Judgment accordingly.

JOSEPH J. NANCE v. THE CAROLINA CENTRAL RAILWAY COMPANY.

Jurisdiction -- Justice of the Peace.

Justices of the Peace have no jurisdiction of actions founded in tort.

(Ch. 16, § 10, Bat. Rev. is improvidently brought forward from the Revised Code.)

(*Bullinger* v. *Marshall*, 70 N. C. 520; and *Heptinstall* v. *Rue*, 75 N. C. 78, cited and approved.)

CIVIL ACTION brought in a Justice's Court in the county of BLADEN, in which the plaintiff recovered of defendant company, the value of a cow which was killed by an employee of the company, while running an engine and cars on its road. The defendant appealed to the Superior Court of said county and the judgment of the Justice was affirmed at Chambers, on September 8th, 1875, by *McKoy, J.*

From the judgment of His Honor, the defendant appealed to the Supreme Court.

Messrs. Lyon & Lyon, and *T. H. Sutton*, for the plaintiff.
Mr. W. F. French, for the defendant.

BYNUM, J. There was some dispute between the counsel, whether a supplemental statement at the foot of the case as stated and signed by the counsel for plaintiff and defendant, was a part of the case for this Court. The supplemental statement is not signed by either counsel and, therefore, unless it had been agreed to be a part of the case, we can decide the case only on the signed statement and the record.

The action was instituted, doubtless, under the Rev. Code, ch. 17, § 7, which was improvidently brought forward in Bat. Rev. ch. 16, § 10, as the existing law, and thus misled the plaintiff. But, by the Const., Art. IV. § 33, Justices of

the Peace are excluded from all jurisdiction of actions founded in tort. This action belonging to that class, the Justice had no jurisdiction. *Bullinger* v. *Marshall*, 70 N. C. 520; *Heptinstall* v. *Rue*, 75 N. C. 78. It can be a matter of little consequence to the plaintiff, whether the appeal is dismissed for want of a case stated in due time, as is insisted upon by him, or whether the judgment is reversed upon the question of jurisdiction, as is insisted upon by the defendant. If not appealed from, even the judgment of the Justice was still a nullity and could not have been enforced against the defendant.

There is error.

PER CURIAM. *Venire de novo.*

STATE v. A. H. A. BELK.

Peace Officer — Assault on — Violation of Town Ordinance.

1. In an indictment charging a prisoner with an assault on a peace officer, the official character of the assailed need not be averred.
2. The violation of a Town ordinance, even in the presence of a policeman, does not necessarily give him a right to arrest the offender.
3. In such cases, if the policeman is not known to be an officer, resistance without the use of excessive violence is justifiable

(The practice in regard to Special Verdicts discussed and explained by Mr. Justice Rodman.)

(*State* v. *Will.* 1 D. & B., 121; *State* v. *Garrett*, 1 Winst. 144; *State* v. *Briggs*, 3 Ire., 357; *State* v. *Kirby*, 2 Ire., 201; *State* v. *Bryant*, 65 N. C., 327; *State* v. *Stalcup*, 2 Ire., 50, cited and approved.)

INDICTMENT, for assault and battery, tried at Fall Term, 1876, of UNION Superior Court, before *Furches J.*

The indictment was drawn in the usual form and charged the defendant with an assault on one Weill. There was evidence tending to show that Weill was a policeman in the town of Monroe, acting under its corporate authority; and that the defendant was violating the laws of the town at the time the difficulty occurred, and resisted the policeman who arrested him.

The Solicitor for the State contended, that any resistance on the part of the defendant, would be an assault on the officer; but the Court being of a different opinion, intimated that as the indictment did not set out the office or authority of Weill, the defendant and Weill should be put on an equal footing.

Upon this intimation, certain questions were submitted to the jury, and upon their findings in reply as in a special verdict, the substance of which is stated in the opinion, the Court gave judgment for the defendant and the Solicitor for the State appealed.

Attorney General, for the State.
No counsel for defendant.

RODMAN, J. The Judge seems to have thought that, because the indictment was in the usual form for an assault and battery and did not show that Weill (the person assaulted) was a police officer, and that he had arrested the defendant by virtue or under color of his office, the jury were not at liberty to consider those facts as bearing on the question of the defendant's guilt.

In this we think the Judge was mistaken. If there were any statute which made an assault on a policeman an offence of a different grade from one on an unofficial person, as an English statute did in respect to an assault on a privy counsellor when in the execution of his office (1 East, P. C., ch. VII, § 2) or which imposed a greater punishment for such an

assault, then, *in order to bring the offender within the statute*, it would be necessary to charge that the person assailed was a policeman. But there is no such statute. A Judge might consider an assault on a peace officer engaged in discharging his lawful duty, as deserving a severer punishment by reason of the official character of the assailed, just as he might consider an assault on a woman or on a feeble man, more heinous by reason of their weakness. But in all these cases the character of the offence and the form of the indictment are the same.

This is established by many precedents and there is none to the contrary. If an officer is killed in making an arrest, the indictment is in the usual form for murder, and does not state the official character of the deceased. And so, if the party arrested, resists without killing. 1 East, P. C., 294, ch. 6, § 2; *State* v. *Will*, 1 D. & B., 121; *State* v. *Garrett*, 1 Winst., 144; *State* v. *Briggs*, 3 Ire., 357.

It is true that the law applicable to the case of an assault upon a constable or other peace officer, while lawfully making an arrest, is not the same as that which applies, when the party assailed is an unofficial person acting without authority. But all the facts presenting the relations between the parties and calling for an application of the appropriate principles of law, may be brought out in evidence and submitted to the jury under proper instructions from the Court.

Instead of submitting the case to the jury on the general issue of not guilty and with instructions as to the law appropriate to the evidence, the Judge submitted certain questions to the jury and these, with their findings in reply, are regarded by the Judge and sent up to us, as a special verdict.

We think this practice is one not to be advised in criminal cases. It will be found inconvenient and moreover, it tends to impair the undoubted right of juries to find general verdicts, or at least to discourage its exercise.

A special verdict is properly in the form of a statement of facts, with a conclusion leaving it to the Court, to enter a verdict of guilty or not guilty, according to its judgment on the law. The answers of the jury in this case when put in that form would read thus, "Weill was a policeman in the town of Monroe. He arrested the defendant for violating an ordinance of the town and struck the defendant with a stick or other weapon. Afterwards the defendant violently shoved Weill." This is all that is found.

Upon this special verdict the Solicitor for the State moved the Judge for judgment against the defendant, which the Judge refused to give and ordered the defendant to be discharged, without however entering a verdict of acquittal, as in his view of the case he should have done, in order to protect the defendant from a second prosecution. From this order of discharge the Solicitor appealed to this Court.

Upon this scanty and evidently imperfect statement of the facts of the occurrence in the supposed special verdict, we are required to determine on the guilt of the defendant.

It is familiar law, that nothing can be added to a special verdict by inference. If it omits to set forth any fact essential to constitute the offence charged, it is defective and the defendant must be held acquitted. In like manner if it shows a defence, the defendant must be acquitted.

In considering this special verdict, it is seen to omit to find that the assault was committed in Union county and in the town to which the policeman's jurisdiction was limited. We pass this over, however, as the objection was not made.

No fact is stated from which it appears that the policeman had authority to arrest the defendant. A peace officer may arrest without warrant upon suspicion of felony and for a breach of the peace committed in his presence. And Mr. Chitty adds, "for some other misdemeanors." But these others we conceive are only those which some statute gives

a right to arrest for without warrant. 1 Chit. Cr. Law, 20, Bat. Rev. ch. 33, §§ 1-3.

The violation of a town ordinance, even in the presence of a policeman, does not necessarily give him a right to arrest the offender; and it does not appear here that the violation of the ordinance was in the officer's presence. It may have been long before the arrest.

It is true that if a person lawfully arrested, resists with violence to the officer, he is guilty of an assault, if he knows or is notified, that the officer is one. *State* v. *Kirby*, 2 Ire., 201; *State* v. *Bryant*, 65 N. C., 327.

But if the officer has no authority to make the arrest, or having the authority, is not known to be an officer and does not in some way notify the party that he is an officer and has authority, the party arrested may lawfully resist the arrest as if it were made by a private person. 1 East. P. C, pp. 309, 312, 314, *State* v. *Kirby* and *State* v. *Bryant*, ante.

In this case the policeman was not known to be an officer and did not notify the defendant that he was one. If, therefore, the defendant had resisted the arrest without the use of excessive violence, he would have been justified. But he did not resist and committed no assault, until after (how long after does not appear) the policeman had struck him with a stick or other weapon.

An officer who is resisted in making an arrest which he is authorized to make, is justified in using the force necessary to prevent an escape and to defend himself or others from injury, and for this purpose, he may tie the party or imprison him until the heat of his passion is over. 1 Chit. Cr. Law 34, 2 Hale P. C., 76-77; *State* v. *Stalcup*, 2 Ire., 50; *State* v. *Bryant*, 65 N. C., 327.

But if there is no attempt to escape and no forcible resistance, it is an excess of authority and a criminal offence, which may well be called an outrage, in the officer to inflict any blow or other violence upon his prisoner. The prisoner

is justified in using any force, not excessive, in defending himself from such an unauthorized assault.

We must understand the verdict as stating that the violent "shove" which the defendant in this case gave the officer, was in defence against the officer with the stick, and in that case it was justified.

We concur with the Judge that upon the facts found, the defendant was entitled to a judgment of acquittal and to his discharge.

There is no error except in omitting to enter a judgment of acquittal. Let this opinion be certified in order that it may be proceeded in according to law.

PER CURIAM. Judgment accordingly.

STATE v. ALFRED WHITE.

Jurisdiction -- Town Ordinances -- By whom executed.

1. The Superior Court has no original jurisdiction to try indictments for violation of town ordinances, and the Act of 1871, Chapter 195, does not confer jurisdiction.
2. Town authorities have the power to execute the police laws adopted for the government thereof.

(*State* v. *Threadgill* at this Term, and *State* v. *Brookshank*, 6 Ire., 73, cited and approved.)

INDICTMENT for misdemeanor tried at Spring Term, 1876, of HALIFAX Superior Court, before *Watts, J.*

The defendant was charged with selling spirtuous liquors on Sunday, in the town of Scotland Neck, in violation of an ordinance of said town. On the trial in the Court below, the defendant moved to quash the bill of indictment for

want of jurisdiction, which motion was allowed, and the State appealed.

Attorney General, for the State.
Mr. Thos. N. Hill, for the defendant.

BYNUM, J. This case is governed by the *State* v. *Threadgill*, decided at this term of the Court. It is there held, that the Superior Court has no original jurisdiction to indict for the violation of town ordinances, but that the town only, through its proper officers and machinery of government must execute its own police laws.

The indictment here is based upon a misconstruction of the Act of 1871, ch. 195. That Act consists of but two sections. The first section gives to the chief officers of cities and towns the jurisdiction and powers of Justices of the Peace, over crimes committed within their corporations. The second section makes any violation of any ordinance of such cities and towns, a misdemeanor, "subject to the provisions of this Act," What provisions? The only provisions are in the first section, which do no more than confer the jurisdiction of Justices of the Peace upon the chief officers of cities and towns. Manifestly then, the purpose of the second section of the Act, if it has any meaning at all, was to give to Mayors, &c., final jurisdiction to hear and determine as misdemeanors, all violations of town ordinances where the offence and its punishment are cognizable by a Justice of the Peace. However that may be, most clearly no jurisdiction is conferred expressly or by fair implication, upon the Superior Courts. The Act itself creates no new offence. Selling spirituous liquors on the Sabbath, for which the defendant is indicted, is not an indictable offence either at common law or by statute. *State* v. *Brookshank*, 6 Ired., 73.

No error. This will be certified.

PER CURIAM. Judgment affirmed.

STATE v. JOHN H. THREADGILL.

Jurisdiction -- Violation of Municipal Laws.

1. In an indictment for misdemeanor for violating a town ordinance, which affixes a penalty of ten dollars fine or ten days imprisonment; *Held*, that the Superior Court has no jurisdiction.
2. An amended town charter of 1874, which recites that there was a charter of 1825, is no evidence of the powers granted in the first charter.

(*Town of Washington* v. *Hammond*, at this term.)

INDICTMENT for misdemeanor under ch. 111, § 31, Battle's Revisal, tried at Fall Term, 1875, of ANSON Superior Court, before *Buxton*, *J.*

The indictment charged defendant with selling spirituous liquors, in violation of an ordinance of the town of Wadesboro. The facts, necessary to an understanding of the case, are sufficiently stated in the opinion of this Court.

Verdict and judgment against the defendant; from which he appealed.

Attorney General, for the State.
Messrs. Dargan & Pemberton, for defendant.

BYNUM, J. The defendant is indicted in the Superior Court for the violation of an ordinance of the town of Wadesboro. The defendant insists that the Court has no jurisdiction of the offence charged, and that His Honor erred in his instructions to the jury.

I. The jurisdiction. The ordinance was passed in May, 1873, and prohibits the sale of spirituous liquors within the town in the quantity of a quart or less, without the license of the Mayor and the payment of twenty-five dollars, under a penalty of ten dollars or ten days imprisonment. The

State claims that the violation of this by-law is indictable in the Superior Courts by virtue of Bat. Rev., ch. 111, § 31, which section is thus worded: "Any person or persons violating any ordinance of any city or town of this State, shall be deemed guilty of a misdemeanor, and shall be subject to the provisions of this chapter."

Whether the Legislature meant by this act to confer upon the municipal corporations which created the offences, the jurisdiction to try the offenders, or upon the Superior Courts, is a question admitting of no doubt. The penalty for violating the ordinance is fixed within the limits of the Justice's jurisdiction, and by consequence the jurisdiction of the Superior Courts is expressly excluded by the Constitution, Art. IV. §§ 33–15. But it is insisted by the State, and His Honor so held the law to be, that when the Statute declared the violation of a town ordinance to be a misdemeanor, without limiting the punishment within a Justices jurisdiction, that the punishment of the offence was at the discretion of the Court, and the Superior Court therefore had exclusive jurisdiction. If this be so, it was superflous in the town to affix a penalty to the violation of the ordinance. The corporation has no jurisdiction and therefore cannot enforce it, and the Superior Court, because it has jurisdiction, cannot notice it! The jurisdiction cannot be concurrent, because they have not the same power of punishment. A plain principle governs the case. It is this: municipal laws must be executed by the municipality itself, unless some statute provides expressly otherwise. This is a limitation which rests upon municipal powers. The Legislature, in conferring corporate powers, have selected the depository of the powers which they intended should be exercised and, in doing so, have by implication prohibited its exercise by any other agency; Cooley, Const. Lim. 205. It would be manifestly unjust, to impose on the State and County the expense of administering the by-laws of corporations, enacted by themselves for

their own benefit, as distinct from that of the community at large.

II. The evidence. The defendant denied the existence of the corporation, or if it existed, he denied that there was conferred upon it the power to enact the ordinance in question. The ordinance was passed in May, 1873. The State was unable to produce the original town charter, but to establish its existence, offered in evidence what purported to be an amended charter of the town, ratified in 1874, and subsequent to the ordinance. This amended charter recites that the original charter was granted in 1825. Admitting that this was evidence of the existence of a charter, prior to the ordinance, it was not evidence, as His Honor held it to be, of the power contained in the lost charter to make this ordinance. Municipal corporations can exercise no powers but such as are expressly conferred, or are essential to the declared purposes of the corporation. Dillon on Mun. Corp. § 55.

The State having failed to show that the original act of incorporation authorized the enactment of this ordinance, failed to make out the case, and His Honor should have so instructed the jury. The Legislature never intended to make the violation of a void ordinance, an indictable misdemeanor.

Other points were presented, but it is unnecessary to review them. See *Town of Washington v. Hammond*, decided at this term. There is error.

PER CURIAM. *Venire de novo.*

STATE v. ALLEN CARTER.

Indictment--Murder.

Words, however grievous, are not sufficient provocation to reduce the crime of murder to manslaughter.

State v. *Tackett*, 1 Hawks, 210; *State* v. Hill, 4 D. & B. 491; *State* v. *Barfield*, 8 Ire. 344, and *State* v. *Howell*, 9 Ire. 485, cited and approved.

This was an INDICTMENT against Allen Carter for the murder of Bushrod W. Lilly, removed from Stanly county, and tried before *Furches*, *J.*, at Fall Term, 1876, of RICHMOND Superior Court.

The State proved, among other things, that about three months before the homicide, the prisoner said, in the absence of the deceased, that he would kill him for talking about him; that on the occasion of the homicide, the prisoner came to the house of the deceased, and after the usual salutations, said, "I understand you accuse my boys of killing a hog." The deceased replied that he did, and "gave his reasons." Thereupon prisoner stated that if he thought the deceased believed it, he would kill him and raised his gun and shot at him. The deceased then remarked, "Your gun had no load in it," when the prisoner drew his bowie knife, which resembled those "the soldiers had made at the commencement of the war—home-made," and ran towards the deceased, who retreated. The prisoner pursued him and caught, stabbed and killed him. The State also proved that there was a bullet hole in the door of a barn, near which the deceased was standing, when the gun was fired at him. The defendant introduced no testimony.

In the argument, the prisoner's counsel insisted, "that he had legal provocation to commit the act, and therefore should

be acquitted entirely, and that, at most, it could not be more than manslaughter."

The State took the position that there was no legal provocation and that the crime was murder, and so asked the Court to charge.

His Honor then charged the jury as follows: "It is for you to determine whether the prisoner killed B. W. Lilly or not; and if he did, in what manner and under what circumstances, so as to enable you to determine whether he is guilty or not, and if guilty, of what offence. To determine that, you will find the facts from the evidence, and apply them to the law as given you by the Court. That if it appeared from the evidence that the prisoner killed Lilly with a deadly weapon, and nothing further appearing, the law would presume malice and he would be guilty of murder. That when such killing was shown, it then devolved upon the prisoner to show the facts and circumstances to excuse him for such killing, or to mitigate or reduce it to manslaughter; unless such facts and circumstances of excuse or mitigation appeared from the testimony introduced by the State. That if the description of the knife, used by the prisoner in committing the homicide, was true, it was a deadly weapon.

Therefore to excuse the prisoner for such killing and entitle him to a verdict of not guilty, it must appear that he did it in self-defence and to prevent the deceased from killing him, or from doing him some great bodily harm. To extenuate and reduce it to manslaughter, it must appear that the prisoner and the deceased were in an affray, or that the deceased had committed an assault upon the prisoner, before he inflicted the mortal wound upon the deceased; that words alone, however grievous, would not excuse, nor would they extenuate and reduce the crime to manslaughter. That if the testimony of the two Lillys, the only witnesses of the transaction, was a true photograph of the transaction, it was

a case of murder. Though, the jury are the triers of the facts, and in doing this, they should not only take into consideration what the witnesses said, but their characters, their demeanor upon the stand, their opportunity to know the truth of what they said, and their ability to understand and remember them correctly; and that they must be satisfied of the prisoner's guilt beyond a reasonable doubt."

The prisoner's exceptions to the charge are sufficiently stated in the opinion of this Court.

Verdict of guilty. Rule for new trial, rule discharged. Motion in arrest, overruled. Judgment. Appeal by defendant.

Attorney General for the State.
No counsel for defendant.

READE, J. There was evidence tending to show, that the deceased had, a considerable time before the homicide, been talking about the sons of the prisoner; charging that they killed a hog, (whether it amounted to a charge of larceny does not appear,) and that the prisoner, in the absence of the deceased, had said that he would kill him if he did not quit talking about it. If that testimony was true, then there was *express* malice; and it would be a clear case of murder. But leave out that feature of the case, and then the facts are, that the prisoner went near the house of the deceased and asked the deceased, whether he had said that his sons had killed the hog? And upon the deceased admitting that he had, the prisoner shot at him with his gun. Failing to hit him, the prisoner ran at him and after him, (the deceased fleeing,) until he caught him and stabbed him several times with a knife, and killed him. The only provocation given the prisoner was the admission of the deceased, that he had said, that the prisoner's sons had killed the hog. The only question necessary to consider is, whether that

provocation was sufficient to mitigate the homicide to manslaughter?

1. The rule is, that words are not, but blows are, a sufficient provocation to lessen the crime of homicide to manslaughter. *State v. Tackett*, 1 Hawks 210. *State v. Hill*, 4 Dev. & Bat. 491. *State v. Barfield*, 8 Ire. 344. *State v. Howell*, 9 Ire. 485. His Honor held that the provocation did not mitigate the killing to manslaugter. And in this he is sustained by all of the authorities.

2. The prisoner objected that His Honor did not advert to the distinction "between those weapons which are generally used as means of offence, without any positive deadly purpose and those always used with an intent to kill." Whatever force there may be in that distinction, it is not in favor of the prisoner, but is against him; for the weapons which he used were, first a loaded gun which he discharged at the deceased, and secondly, a home-made bowie-knife, such as the soldiers had made when they were going to the war. The peculiar office of both of these weapons is *to kill.*

3. Again the prisoner objected, that His Honor did not advert to the exception to the rule, that malice is implied from the use of a deadly weapon, "involved in the *manner* in which the weapon is used and the blow given."

There is nothing in such exception in favor of the prisoner; for the *manner* of using the gun was, to discharge it at the deceased in carrying distance; and the *manner* of using the knife was, to strike with all his force, stabbing the deceased repeatedly and one time driving the knife clear through the body.

There is no error in the record to sustain the motion in arrest of judgment.

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

PER CURIAM. Judgment affirmed.

STEPHEN H. THREADGILL v. JOHN J. McLENDON.

Contract -- Agricultural Supplies -- Promise to pay debt of another.

1. Where A furnished supplies to a cropper of B, upon a promise by B, to pay for the same, and afterwards B took into his possession cotton belonging to the cropper and sufficient to pay A's account, and thereafter promised to pay the same; *Held*, that B is liable to A upon the latter promise.
2. In such case the latter promise was not made by B as surety for the cropper, but for himself, because the fund out of which the debt was to be paid was in his hand.

(*Stanley* v. *Hendricks* 13 Ire. 86; *Hall* v. *Robinson*, 8 Ire. 56, and *Draughan* v. *Bunting*, 9 Ire. 10, cited, distinguished and approved.

CIVIL ACTION, tried at Fall Term, 1876, of ANSON Superior Court, before *Furches, J.*

The action was commenced before a Justice of the Peace, and brought by appeal to the Superior Court.

The plaintiff declared upon a store account of $56.09, which was charged to the defendant, and $100, which was charged to one Treadaway who was a cropper of the defendant. The debt was contracted for supplies and fertilizers. It was admitted that the goods charged in both bills were received by Treadaway.

There was evidence tending to show, that defendant directed plaintiff to let Treadaway have such goods as he wanted, and he would see that plaintiff was paid for them; and that the plaintiff by reason of this, let Treadaway have credit at his store; that the defendant, with the consent of Treadaway, took into his possession a quantity of cotton belonging to said Treadaway, for the purpose of selling the same, and paying the plaintiff's account; that after he had so received the cotton, he again promised to pay the plaintiff; that the defendant by virtue of a written agreement,

had furnished his cropper with provisions, to an amount greater than the cropper's part of the crop was worth, and took the cotton to re-imburse himself. There was other conflicting testimony introduced by both parties.

His Honor charged the jury, that in considering the evidence as to the account of $56.09 for fertilizers, if they should find that plaintiff sold to defendant, and delivered the fertilizers to the defendant or Treadaway as his agent, the plaintiff was entitled to recover. And in considering the other account, if they should find that the defendant received cotton enough to pay himself, and to leave a balance, and that having so received the cotton, promised the plaintiff to pay Treadaway's account, the plaintiff would be entitled to recover, to an amount sufficient to pay said account; otherwise the defendant would not be liable.

The jury rendered a verdict in favor of the plaintiff for $151.95 and interest. Rule for a new trial. Rule discharged. Judgment. Appeal by the defendant.

Messrs. Battle and Mordecai, for the plaintiff, cited, *Watkons* v. *Perkins*, 1 Ld. Raymond 222; 3 Par. Con. 21, note (o) and *Ibid* 25-27; *Stanly* v. *Hendricks*, 13 Ire. 86, latter part of opinion.

Messrs. Platt D. Walker and *J. N. Staples* for the defendant, cited *Draughan* v. *Bunting*, 9 Ire. 10; *Chitty on Contracts*, 10th Amer. Ed. p. 555, et seq; *Stanly* v. *Hendricks*, 13 Ire. 86; *Hicks* v. *Critcher*, Phil. Law 353; *Haughton* v *Newberry*, 69 N. C. 456, and *Thomas* v. *Campbell*, 74 N. C. 787.

PEARSON C. J. The facts in the case do not put the defendant in a very favorable light. The defendant had a lien on the crop and was bound to furnish his cropper with necessary supplies. To induce the plaintiff to furnish his cropper with the goods necessary to enable him to carry on the

farming operations, the defendant promises the plaintiff, that if he would furnish the goods, he would see that they were paid for. Accordingly, the plaintiff let the defendant's cropper have the goods. At the end of the year, defendant took into his possession the cotton made by his cropper, which was more than enough to pay the account of defendant for the provisions he had let his cropper have and also the plaintiff's account for the goods he had furnished. Thereupon the defendant promised that he would pay the plaintiff, but afterwards on the pretext that the cotton was not enough to pay his own account and that of the plaintiff also, which pretext the jury find to be untrue, he refuses to pay the plaintiff, and as a defence to the action, relies upon a statute passed to *prevent fraud.*

His Honor, it may be, attached more importance to the fact—that the guano was charged on the books of the plaintiff to the defendant, and the goods furnished were charged to the cropper—than it deserved; that considering the fact, that the defendant was bound to furnish his cropper with necessary supplies and had a lien upon the crop, it ought to have been left to the jury, to say, whether the credit was not in the first instance given to the defendant and the entries on the book made simply to discriminate, what was for farm purposes, and what, for the personal use of the cropper and his family.

Assuming however, that the defendant was merely the surety of his cropper, and that the original promise fell within the operation of the statute of frauds, we concur fully with His Honor in the conclusion, that the defendant was bound by his direct promise to pay, after he had taken the cotton crop into possession, and had in his hands the means, out of which to pay the plaintiff's account—cotton being a cash article and convertible at pleasure into money.

The purpose of the statute, was to protect sureties, by requiring the promise to be in writing as a guaranty of its

being well considered; and it is settled, that a new consid eration does not take the promise out of the operation of the statute, *Stanly* v. *Hendricks*, 13 Ire. 86. But it is also settled, that when the surety receives money out of which it is his duty to pay the debt, although his first promise cannot be inferred, the receipt of the money raises another promise by implication, upon which he is liable to an action "for money paid to his use," as in *Hall* v. *Robinson*, 8 Ire. 56; or for money "had and received for the use of the plaintiff," as in *Draughan* v. *Bunting*, 9 Ire. 10.

An attempt was made to distinguish our case, on the ground, that defendant had received cotton and not money. Two replies may be made; cotton being a cash article, after a reasonable time, the defendant in furtherance of justice, will be presumed to have converted it into money; but the more conclusive reply is: this action is not brought upon an implied promise, as in the cases cited, but is brought upon a direct *express promise* to pay the plaintiff the amount of his account. This promise the defendant makes, not as the surety of his cropper, but for himself, by reason of his having in his hands, the fund out of which it ought in justice to be paid. So it is stronger than the two cases referred to.

No error.

PER CURIAM. Judgment affirmed.

JOHN C. HEYER v. NED BEATTY.

Sufficiency of Answer--Proceeding under Landlord and Tenant Act.

1. An answer which sets out "that no allegation of the complaint is true" is insufficient. It is necessary that the defendant shall separately answer *each allegation* of the complaint, by a general denial either of the whole allegation (not the whole complaint) or by a specific denial of some selected and specific part of the allegation.
2. In a proceeding before a Justice of the Peace under the Landlord and Tenant Act, (Laws 1868-'69, ch. 156,) a defendant who does not deny having entered as the tenant of the plaintiff, is estopped from setting up a superior title existing at the date of the lease or subsequently acquired from a third person.

(*Calloway* v. *Hamby*, 65 N C. 631; *Turner* v *Lowe*, 66 N. C. 413; *Flack* v. *Dawson*, 69 N. C. 42; *Abbott* v. *Cromartie*, 72 N. C. 292 and *Forsythe* v *Bullock*, 74 N. C. 135, cited, distinguished and approved.)

MOTION to dismiss the action, heard before *Henry, J.* at a special term of the Superior Court of NEW HANOVER county, December, 1875.

This was a proceeding under the act of 1868-'69, ch. 156, commonly known as the "Landlord and Tenant Act" before a Justice of the Peace. The plaintiff made oath that the defendant entered into the premises of a certain lot in Wilmington as the tenant of the plaintiff, that the term of the defendant had expired, that plaintiff had demanded possession of the premises, which defendant had refused and continued to hold over.

The defendant answered, 1st. That no allegation of the complaint is true. 2nd. That the plaintiff ought not to have or maintain his action against the defendant because the premises, mentioned in the complaint, at the time when the rent for which said action is brought, is alleged to be due, were and are now the land and freehold of the defendant;

nor was the plaintiff then nor is he now entitled to the possession thereof. And the defendant further answers that the title to the said premises was at the time aforesaid and is now in the said defendant and will come in question on the trial of this action. Upon the trial before the Justice the defendant demanded a jury, who returned for their verdict, "that the defendant was not the tenant of the plaintiff,' whereupon the Justice dismissed the proceedings and the plaintiff appealed to the Superior Court. In that Court the defendant moved to dismiss the action for want of jurisdiction in the Justice's Court.

Motion allowed. Appeal by plaintiff.

Messrs. W. S. & D. J. Devane, for plaintiff.

Messrs. A. T. & J. London and *Busbee & Busbee*, for defendant.

RODMAN, J. (After stating the facts as above.)

If the Justice had no jurisdiction, the action was properly dismissed, because the appellate Court should have given such judgment as the Court below should have given.

The ground on which it is argued that the Justice had no jurisdiction, is, that the title to the land was put in controversy by the pleadings.

By Art. IV. § 33, of the Constitution, a Justice at the date of these proceedings had jurisdiction only of actions, "wherein the title to real estate shall not be in controversy."

To the same effect is sec. 14, of ch. 63, Bat. Rev. Section 16, of said chapter, is as follows: "In every action brought in a Court of a Justice of the Peace, where the title to real estate comes in controversy, the defendant may, either with or without other matter of defence, set forth in his answer, any matter showing that such title will come in question."

Section 17: If it appears on the trial that the title to real estate is in controversy, the Justice shall dismiss the action and render judgment against the plaintiff for costs.

By section 24, of the Landlord and Tenant Act, the provisions of the above cited sections are applicable to actions under that Act. So that, the only question presented in this case is: Was the title to the land put in controversy by the pleadings?

This is to be decided on the pleadings alone and of course is unaffected by the finding of the jury before the Justice.

Our Code (§ 100) says, "The answer of the defendant must contain, 1st. A general or specific denial of *each* material allegation of the complaint controverted by the defendant, &c."

In *Flack* v. *Dawson*, 69 N. C. 42, the first defence in the answer was, "that no allegation in the complaint is true," which is almost in the identical words of the first defence in the answer in the present case. The Court held that such a mode of denial was insufficient and might be stricken out. Mr. Pomeroy, in his valuable work on Remedies, expresses a different opinion. On p. 655, § 611, he says: "It is very plain that in the former case, (that is when the defendant desires to put the whole complaint in issue,) the general denial, in its brief and comprehensive form, is as efficacious as a particular traverse of each averment separately." He considers the general denial, as the substitute under the Code, for the plea of the general issue under the former system.

It may be difficult to define satisfactorily the exact meaning of the words used in the section of the Code cited and we will not attempt it. But we conceive, that one principal object of the new system, was to abolish or restrict the use of the general issue; to require of plaintiffs, as far as it was practicable, a statement of the *facts as they were*, and not according to their *legal effect;* and thus both to enable and

to *require* defendants to specify the particular facts which they intended to controvert. To permit a denial of the facts of the complaint *en masse*, would be to lose this object and to allow and extend, at least where the answer is not under oath, the abuse of the general issue, which formerly existed. It would seem also to ignore the requirement that the denial shall be of *each* material *allegation*. This requirement is met nominally and in form only, by the form of general denial approved by Mr. Pomeroy. The requirement seems to demand that the defendant should separately answer *each* material *allegation*, by a general denial either of the whole allegation, (not the whole complaint,) or by a specific denial of some selected and specific part of the allegation.

It is useless, however, to pursue this discussion: Because if the form of general denial used by the defendant is proper and sufficient, it offers a material issue, and presents a defence, full and complete in itself, of which the Justice had jurisdiction. And if, as we think, it did not comply with the Code and was insufficient in form, the plaintiff might have had it stricken out and, so far as this first defence is concerned, have demanded judgment.

If the defendant was not the tenant of the plaintiff, which was the substance of the issue intended to be offered, it was immaterial in the case before the Justice, whether the defendant owned the land or not. If he was, and had entered as the tenant of the plaintiff, or after entry, had become such tenant, he was estopped from asserting his title until he had restored the possession to the plaintiff. *Abbott* v. *Cromartie*, 72 N. C., 292.

The matter pleaded in the second defence was therefore immaterial and, whether true or not, could not affect the judgment. It did not legally put the title in controversy, as it did not offer a material issue.

If this had been the only defence, it would have been defective and insufficient, and the plaintiff would have been entitled to judgment on the pleadings.

The cases of *Calloway* v. *Hamby*, 65 N. C., 631, *Turner* v. *Lowe*, 66 N. C., 413, and *Forsythe* v. *Bullock*, 74 N. C. 135, are plainly distinguishable from the present. In those cases the defendant was technically and at law, the tenant of the plaintiff. The defence in each case was, that in equity he was not the tenant and had not entered as such, or that the landlord had equitably released to him, thus extinguishing the tenancy by his own act. In none of those cases, did the tenant, *while admitting his entry as tenant*, attempt to set up a superior title against the landlord, existing at the date of the lease or acquired from a third party subsequently, as the second defence in this case does.

In *Turner* v. *Lowe*, it is said, that the rule forbidding a tenant to dispute the title of his landlord is unimpaired.

We are of opinion that upon the answer, the Justice had jurisdiction, and of course the Superior Court had on appeal.

It will be seen that in our observations on the first defence, we have assumed for the sake of the argument, that the pleadings before a Justice must be as formal as in a Superior Court. Of course this is not strictly true, C. C. P. § 505, Rule 5. As it is evident that the defendant intended to deny the tenancy, we think he ought to be allowed to amend his first defence, if he shall move to do so, by denying separately and generally, or specifically as he may desire, each material allegation of the complaint which he intends to controvert. If he does not amend, his first defence may be stricken out, and his second defence may be held insufficient, and the plaintiff will be entitled to judgment.

The case is remanded to be proceeded in according to this opinion. Plaintiff will recover costs in this Court.

PER CURIAM. Judgment reversed.

TOWN OF WASHINGTON v. JOHN H. HAMMOND.

Jurisdiction--Conflict of Municipal and State Law.

1. The Act of the General Assembly, (Laws 1871-'72, ch. 195,) establishing Special Courts in cities and towns, is constitutional
2. The uperior Courts have exclusive jurisdiction of misdemeanors, where the punishment is not limited to a fine not exceeding fifty dollars, or imprisonment not exceeding one month.
3. Municipal ordinances and by-laws must be in harmony with the general laws of the State, and whenever they come in conflict with such general laws, must give way. *Therefore*, where an act is a criminal offence indictable in the Superior Courts, an ordinance of a city or town, making such act a criminal offence punishable by fine or imprisonment, is void.

(*State* v. *Threadgill*, at this term, *Town of Edenton* v. *Wool*, 65 N. C. 379 and *State* v. *Pender*, 66 N. C. 313, cited and approved.)

CRIMINAL ACTION, tried at Fall Term 1876 of BEAUFORT Superior Court, before *Moore*, *J.*

This was an appeal by the defendant from the judgment of the Intendant of Police of the Town of Washington, sentencing him to jail for violation of an ordinance, of which the following is a copy: "No. 21. All persons are prohibited from injuring or damaging the pumps, bridges or any other public property. Any violation of this ordinance shall subject the offender to a fine of not more than twenty dollars, or imprisonment of not more than one month." The Market House was the property alleged to have been injured by defendant.

The defendant moved to dismiss the action: 1. Because the Act of 1871-'72, ch. 195, conferring criminal jurisdiction upon chief officers of cities and towns, is unconstitutional, in that the jurisdiction of Justices of the Peace is exclusive. 2. Because the said Act delegates power to enact criminal law.

His Honor sustained the motion and dismissed the case, and held the Act to be unconstitutional. From this ruling, the plaintiff appealed.

Mr. D. M. Carter, for plaintiff.
Mr. Geo. H. Brown, Jr. for defendant.

BYNUM, J. The Constitution provides that the judicial power of the State shall be vested in a Court for the trial of Impeachments, a Supreme Court, Superior Courts, Courts of Justices of the Peace and *Special Courts*. Art. IV. § 4. It also declares that the General Assembly shall provide for the establishment of *Special Courts* for the trial of misdemeanors, in cities and towns, where they may be necessary. Art IV. § 19. Here then is an express power to create Special Courts for the trial of misdemeanors, in cities and towns, where they may be necessary; and the General Assembly is constituted the judge of the necessity, and when deemed to be necessary, is clothed with the power and duty of creating them. Accordingly, the Legislature of 1871–'2, by an Act, ch. 195, § 1, (see Pat. Rev. ch. 111, § 30,) did exercise the power by constituting the chief officers of all the incorporated cities and towns of the State, the officers to hold such Special Courts in their respective municipalities, and conferred upon them jurisdiction over misdemeanors committed within their corporations, to-wit: that of Justices of the Peace. Under the Constitution, both before and since it has been amended, these Special Courts can exercise no civil jurisdiction at all, and no criminal jurisdiction except over misdemeanors. It was not necessary for the Act creating, to designate them by name, as *Special Courts*, if the powers and duties imparted to them constituted them such. His Honor, therefore, erred in holding that the Act so establishing these Courts, is unconstitutional and void. *Town of Edenton* v. *Wool et al.*, 65 N. C. 379. *State* v. *Pender*, 66 N. C. 313.

But the question occurs: Has the Intendant of the town final jurisdiction in this case? The charge is, that the defendant wilfully injured the "Market House" of the town, in violation of "Ordinance No. 21," declaring the offender liable to a fine of twenty dollars or imprisonment of not more than a month. The general criminal law of the State, long prior to the ordinance, had made the *same act and offence*, a misdemeanor. Bat. Rev. ch. 32. § § 23–29. As under the general law, all misdemeanors are punishable by fine and imprisonment at the discretion of the Superior Court, so by the Constitution, the jurisdiction over such offences appertains exclusively to the Superior Courts, unless some statute has limited the punishment to a fine not exceeding fifty dollars or imprisonment not exceeding one month. Art. IV. § 15. (Amended Const. Art. IV. § 25.) We are unaware of any statute which has so limited the punishment of this offence. It does not then fall within the jurisdiction of a Justice of the Peace, and by consequence is not within the jurisdiction of the Intendant of the town. The jurisdiction of the Superior Courts remains exclusive, unless the next position of the prosecution is true. It is next contended, however, that "Ordinance No. 21," creates an offence which is made a misdemeanor by statute. Bat. Rev. ch. 3, § 31. It is in these words: "Any person violating any ordinance of any city or town of this State, shall be guilty of a misdemeanor." It is insisted that the ordinance having prescribed a punishment for the offence, which brings it within a Justice's jurisdiction, the Intendant thereby acquires jurisdiction. This Court will be slow to ascribe to this loose statute, the effect of divesting, by implication merely, the original and exclusive jurisdiction of the Superior Courts, over the offence charged in this action. Both the ordinance and the general law make the same offence a misdemeanor. The offender cannot be tried and punished under both laws, for that would be to

punish twice for the same offence, and besides, the punishment by the ordinance is limited, and by the general law it is not limited, so the jurisdictions are not concurrent. But the evil would be much greater if they could thus be made concurrent. For example, bribery, perjury, counterfeiting, cheating by false tokens, &c., are misdemeanors. Suppose a town ordinance, declaring these to be misdemeanors, should limit their punishment to fifty dollars fine or a month's imprisonment! It would follow, that the Intendant and Justices of the Peace would thus gain exclusive original jurisdiction, for the Superior Courts have no original jurisdiction when punishments are thus limited. No such construction can be given to the statute, which will strip the Superior Courts of their jurisdiction and unfix the criminal law, and subject it to the caprices and fickleness of town ordinances.

The true principle is that municipal by-laws and ordinances must be in harmony with the general laws of the State, and whenever they come in conflict with the general laws, the by-laws and ordinances must give way. The question does not arise, in our case, whether the State may not expressly confer upon a municipal corporation the power to pass local laws which shall exclude the general laws of the State on particular and enumerated subjects. By-laws and State laws may stand together, if not inconsistent, and possibly the same Act may constitute an offence both against the State and municipal law, and both may be punished if the by-law is strictly a police regulation only. Cooley on Const. Lim. 199.

In our case, the "Ordinance No. 21" comes in conflict with the general law, both as to the offence and the established jurisdiction of the Superior Court, and must go down before it. See *State v. Threadgill, at this term.*

It is clear, beyond doubt, that as the Act of 1871–'72, has established Special Courts in cities and towns, as is author-

ized by the Constitution as it was, and as it is now amended, (Art. IV. §. 25) the General Assembly has the power to vest in these Courts, original and final jurisdiction over all misdemeanors whatever. Whether it would not be a most beneficial and economical jurisdiction, if extended to the Mayors of the principal and most populous cities and towns of the State, thus relieving the Superior Courts of a mass of business, which in some counties has engrossed the whole time of the regular terms of the Courts and been the subject of much complaint, is an inquiry which we cannot pursue. Some of the difficulties of construing the present Act, establishing these Special Courts, have been necessarily noticed in the course of this opinion. It is loosely worded and fails clearly to establish these Courts and to define the extent of their jurisdiction and powers and mode of procedure.

We are of opinion that the Intendant had no jurisdiction. There is no error. This will be certified.

PER CURIAM. Judgment affirmed.

STATE v. ANDY WINCROFT.

Indictment -- Burglary -- Challenge to Jurors -- Wife's Separate Property -- Verdict.

1. The statutory requirement that a tales juror shall be a freeholder, does not apply to the original panel.
2. The finding of the Court below, as to whether a challenged juror has paid his taxes, is final and cannot be reviewed in this Court.
3. The dower or homestead interest of a wife in the real estate of her husband is a mere *right* which may never vest; not an *estate; Therefore*, in an indictment for burglary for breaking into A's house, it is proper to charge that the house is the property of A alone.
4. While a husband and wife live together, the husband has a special property as bailee in the wife's separate personal estate, which is in common use by them. *Therefore*, in an indictment for burglary where a certain quilt, proved to have been stolen, was the separate property of A's wife and was charged in the indictment as the property of A; *Held*, not to be error.
5. The verdict of a jury must be recorded substantially as rendered.

(*Baker* v. *Jordan*, 73 N. C. 145, cited and approved.)

INDICTMENT for burglary, tried at Fall Term, 1876, of ROBESON Superior Court, before *McKoy, J.*

The material facts in the case together with the causes assigned for a new trial and arrest of judgment are sufficiently stated by Mr. Justice Rodman in delivering the opinion of this Court.

Under the instructions of His Honor in the Court below, the jury rendered a verdict of guilty. Judgment. Appeal by defendant.

Attorney General, for the State.
Mr. W. McL. McKay, for the defendant.

RODMAN, J. The prisoner and one Matthews were indicted for burglary. The prisoner was tried separately. The in-

dictment contained two counts; the first for breaking, &c., the house of Joseph G. Baxley with intent to steal his goods; the second for breaking, &c., into the house of said Baxley with intent to steal, and with actually stealing a bed-quilt and certain other articles therein, the property of said Joseph. The jury found a general verdict of guilty.

The prisoner moved for a new trial. We have considered with the care due to the importance of the case to the prisoner, every ground assigned by his counsel, either for a new trial or in arrest of judgment. We concur with the Judge below in his opinion on all of them. Most of the points taken for the prisoner are so obviously untenable, that they were not pressed in this Court, and we consider any full discussion of them useless.

The grounds assigned for a new trial are briefly these:

1. That a juror on the original panel was not a freeholder.

The statute does not make that qualification requisite for the original panel. It speaks only of tales jurors

2. A juror was challenged because he had not paid his taxes. He swore that he believed he had, and the Judge overruled the challenge. The decision of the Judge upon the fact, was final and cannot be reviewed here.

The prisoner then moved in arrest of judgment, and assigned for cause:

1. That Baxley had a wife, and that the property in the house entered, was in him and her jointly or in common, by reason of her rights to dower and homestead therein and should have been so charged. If there was anything in this at all, it would properly be a ground for a new trial, for a variance and failure of proof. But a wife has no *estate* in her husband's land during his life. Her interest is a mere right which may never vest. The wife of Baxley had no property in the house and it was properly described as his.

2. The quilt which was the only article proved to have been stolen from the dwelling, was the separate property of

the wife, having been owned by her at her marriage. There was no evidence that any goods, the property of the husband, had been stolen by the defendant. There was therefore a variance between the allegation and the proof, which entitled the defendant to an acquittal. If there was an error in this respect, it was ground for a new trial, and not properly for an arrest of judgment. We think there was no variance, and that the property was well laid in the husband. As the marriage was after 1868, the quilt was the separate property of the wife. On an indictment for burglary with the intent to steal the goods of Joseph G. Baxley, the intent must be proved as laid. 6 Chit. Cr. L., 948; 1 Ibid. 213; Whart. Am. Cr. L., § 818. But it is also settled, that goods in the possession of a bailee, may be laid as his property. Wharton Am. Cr. L., § 1824; 21 Maine, 586; 22 Ibid, 171; R. & R. 136; 4 C. & P., 391; 8 Texas, 115; 1 Leach, 356.

And it is said, if stolen goods are stolen from a thief, the goods may be alleged to belong either to the true owner or to the first thief. Wharton, § 1825; *Ward* v. *The People*, 3 Hill, 396.

Notwithstanding the wife has a separate general property in her goods, yet while husband and wife live together, he must be deemed to have a special property as bailee, at least in such goods as are in the house and in common use by them. They are in his possession and control against all the world but his wife, and he might separately maintain an action against a trespasser. Her consent to his receiving the income and profits of her separate property, and of course to its use, is presumed until such consent be revoked. Bat. Rev. ch. 69, § 29. *Baker* v. *Jordan*, 73 N. C. 145. He is the person primarily to defend and protect the possession, and larceny is a violation of the possession. Without this special property, under the circumstances supposed, the husband cannot exercise his acknowledged rights or discharge his duties.

3. For a variance between the day of committing the offence alleged in the bill, and that proved.

It is familiar learning that this variance is immaterial.

4. That the Clerk recorded the verdict not in the words of the jury, but in the form given in a form book.

While the verdict must be recorded substantially as given, it is the duty of the Judge to see it put in proper form. In this case the verdict as recorded was read to the jury and assented to as their verdict.

No error.

PER CURIAM. Judgment affirmed.

STATE v. JAMES MATTHEWS.

Indictment--Burglary--Wife's Separate Property.

While a husband and wife live together, the husband has a special property as bailee in the wife's separate personal property which is in common use by them; *Therefore*, in an indictment for burglary, where certain goods alleged to have been stolen, were the separate property of A's wife, and were charged in the indictment as the property of A; *Held* not to be error.

(*State* v. *Wincroft*, ante, cited and approved.)

INDICTMENT for Burglary, tried at Spring Term, 1876, of ROBESON Superior Court, before *McKoy, J.*

The bill of indictment charged the defendant and Andy Wincroft with breaking and entering into the dwelling house of Joseph G. Baxley, with intent to commit a felony. The defendants were tried separately, and the facts in this case are substantially the same as in the preceding case.

Under the charge of the Court below, the jury rendered a verdict of guilty. Judgment. Appeal by defendant.

Attorney General, for the State.
Mr. W. McL. McKay, for the defendant.

RODMAN, J. The prisoner after conviction moved for a new trial for the following reasons:

1. That the indictment charged the felony to have been committed on 1 January, 1875, when the evidence showed it to have been committed on 4 December, 1875.

It is familiar learning that this variance is immaterial.

2. That the indictment charged that the house was the property of J. G. Baxley, and that the bed-quilt and one pair of pants and one shirt were of the goods and chattels of said Joseph G. Baxley, when the evidence was that the bed-quilt and shirt were the property of his wife, and were her's before her marriage in 1875.

As the evidence is not set out, it is impossible to say whether it proved the articles to have belonged to the husband or to the wife. And if the pants were proved to have been stolen, and they were the property of the husband, it would sustain the indictment. If all the articles had been the separate property of the wife, inasmuch as the husband and wife were living together in the house, and in the common use of the articles, they were properly alleged to be the property of the husband. *State* v. *Wincroft*, at this term.

These exceptions are clearly untenable. The exception taken to the instructions of the Judge is too general and does not specify any error. The Judge gave substantially the instructions prayed for. We see no positive error in those which he gave, although they appear to us meagre, and not likely to have been of much service to the jury. We would probably do an injustice to the Judge, if we as-

sumed that what is sent up to us, is a full report of his charge.

We have carefully examined the record and see no error in it.

There is no error. Let this opinion be certified.

PER CURIAM. Judgment affirmed.

IRVIN BEAMAN v. CALVIN SIMMONS.

Executory Contract--Implied Promise.

Upon the cancellation of an executory contract concerning the sale of land, the law implies a promise on the part of the bargainor, to repay such amounts as may have been paid to him as part of the purchase money.

(*McMillan* v. *Edwards*, 75 N. C. 81; *Triplett* v. *Witherspoon*, 74 N. C. 475, cited and approved.)

ACTION for money had and received, tried in a Justice's Court of WAYNE County, where judgment was given for plaintiff for $113.35. The defendant appealed to the Superior Court of said County, and the case was tried at Fall Term, 1876, before *Seymour, J.*

After the witnesses for plaintiff were examined—the substance of whose testimony is stated in the opinion of this Court—His Honor intimated an opinion, that plaintiff according to his own showing, was not entitled to recover. Whereupon plaintiff submitted to judgment of nonsuit and appealed.

Mr. H. R. Kornegay, for plaintiff.

Messrs. Smith & Strong, for defendant.

FAIRCLOTH, J. The defendant contracted orally, to sell a tract of land to the plaintiff, and subsequently agreed that one Hicks might come into the trade equally with the plaintiff. On the next day the three parties met together, and the defendant made a conditional deed to Hicks for the land and the plaintiff paid in cash $100 of the purchase price, and he and Hicks gave their notes to the defendant for the balance of the purchase money and took possession of the land. Subsequently a doubt was suggested, as to the validity of defendant's title, and the parties met and mutually agreed to cancel the trade; when Hicks gave up his deed which was never registered, and the defendant tore off his name and gave up their notes, and took possession of the land, and agreed to pay the plaintiff back his $100, and some amount for taxes which plaintiff had paid at defendant's request.

Upon these facts His Honor was of opinion, that the plaintiff could not recover, but we see no reason why he should not.

The contract was executory, and the mutual agreement to cancel it, was as binding as the original contract. No title had vested in Hicks except conditionally, because the deed was not registered, *McMillan* v. *Edwards*, 75 N. C. 81, *Triplett* v. *Witherspoon*, 74 N. C. 475; and he therefore had a right to surrender the deed, which was simply evidence of the agreement as it then stood; and the plaintiff had a right to surrender his possession and any equity he may have had; both of these acts being done with consent of the bargainor.

As soon as these mutual acts were done, the law implied a promise on defendant's part, to pay to the plaintiff the $100 which had been paid by him, and at this point the plaintiff had a right to recover. He also had a right to recover on the express promise of the defendant to pay back the money. The mutual promise to cancel, avoiding litigation in regard to defendant's title, the surrender of posses-

session and the inconvenience to which the plaintiff had been subjected, were ample considerations for the express promise of the defendant to pay the money to the plaintiff.

There is error. Let this be certified &c.

PER CURIAM. *Venire de novo.*

JULIA WEST v. R. J. WEST.

Damages -- Warranty.

1. The measure of damages in an action for breach of a covenant for quiet enjoyment, is the amount of the purchase money. When nothing is paid as the price of the land, the damages are nominal.
2. *Therefore*, where A purchased land from B and borrowed part of the purchase money from C who took a deed with general warranty from B in trust to secure the payment of the sum loaned A; and thereafter A paid the same to C and took from him a deed with general warranty; and afterwards A is evicted by title paramount and brings an action against C for damages. *Held* that A is entitled to recover only nominal damages.

(*Faircloth* v. *Isler*, 75 N. C. 551; *Williams* v. *Beeman*, 2 Dev., 483; *Markland* v. *Crump*, 1 D. & B. 94, and *Grist* v. *Hodges*, 3 Dev. 198, cited and approved.)

CIVIL ACTION, for damages tried at Fall Term, 1876, of ROWAN Superior Court, before *Cloud*, *J.*

The plaintiff alleged that in October, 1870, she purchased a house and lot in Salisbury of the defendant and took from him a deed with full covenants of warranty; that afterwards one Delane, claiming title thereto, brought an action and

evicted her by title paramount; that by reason thereof she was damaged to the amount of $700.

The defendant denied that Delane had any title to the premises before or since the execution of his deed to plaintiff; and the evidence tended to show that prior to July, 1869, the plaintiff negotiated with one Henry Cox for the purchase of said premises at the price of $700, which was paid by plaintiff; that to make up said amount plaintiff borrowed $200 of defendant, and it was agreed that Cox should execute the deed to defendant to secure the $200, and upon payment of the same the defendant should make a quit claim deed to plaintiff. On the 10th of October, 1870, said sum was paid and a deed executed in pursuance of said agreement; that covenants of general warranty were inadvertently inserted in the deed (a printed form being used) contrary to an express understanding of the parties; that the only object of the defendant was to pass the legal title on payment of the money. Under the instructions of the Court, the jury rendered a verdict in favor of plaintiff for $700 and interest.

Rule for new trial. Rule discharged. Judgment. Appeal by defendant.

Mr. J. M. McCorkle, for the plaintiff.
Mr. W. H Bailey, for the defendant.

PEARSON, C. J. Let it be granted that the plaintiff was evicted by title paramount, still she was not entitled to recover upon the warranty, or at most she was only entitled to nominal damages. Her remedy as assignee of the estate was against Cox, to whom she paid the money.

The evidence tended to show this state of facts: plaintiff bought the house and lot from Cox and paid him the price $700. To make up this amount she borrowed of the defendant $200. Cox thereupon makes the deed to the defendant

with general warranty, who held the title in trust to secure the payment of the $200 and was then to convey to the plaintiff. The $200 was paid by the plaintiff, and the defendant executed to her a deed for the house and lot. This deed contains a general warranty instead of a special warranty against the acts of the defendant.

When a mortgagee re-conveys on payment of the money, he is only required to make a special warranty. *Faircloth* v. *Isler*, 75 N. C., 551.

The defendant held the title as security for the $200 that he had lent the plaintiff to enable her to pay for the land; so, when he made the deed to plaintiff, he occupied the relation of mortgagee, and was only bound to make a special warranty. It is manifest that the insertion of a general warranty was outside of what the plaintiff had a right to require, and was put there by the ignorance of the draftsman, or probably as is suggested in the answer, because the parties used a *printed form* of deed and did not advert to the distinction.

Under these circumstances, the defendant had a plain equity to have the deed reformed; and it is difficult to conceive how the plaintiff could have the face to attempt to hold him liable for a defect in the title with which he had no concern, he having received no part of the price paid by her and being in no wise benefitted by the transaction, save perhaps the interest of the money which he had lent to her.

If the aid of equity be not invoked to reform the deed, the plaintiff upon well settled principles, is only entitled to recover nominal damage for breach of the covenant of quiet enjoyment. Under the old warranty, treated as a covenant real, the tenant or vouchee, on writ of *warrantia chartæ* in case of eviction by title paramount, recovered "other land of equal value." In analogy to this principle, when the warranty, (after the action of ejectment took the place of the real actions) was treated as a personal covenant of quiet en-

joyment sounding in damages, the measure of damages was fixed to be the amount of the purchase money; taking that to be the value of the land at the date of the conveyance, agreed on by the parties. *Williams* v. *Beeman*, 2 Dev., 483; *Markland* v. *Crump*, 1 D. & B., 94; *Grist* v. *Hodges*, 3 Dev., 198.

Taking this to be the rule; if nothing was paid as the price of the land, the damage for breach of covenant of quiet enjoyment, would be nominal.

Suppose a father makes a deed to his son with general warranty for a tract of land, setting out "one dollar in hand paid," or setting out that the deed is made for "natural love," and the son is evicted by title paramount, the idea that the son could recover the value of the land, in an action against the father, would be of "the first impression."

The son as assignee of the estate to which the covenant was annexed, could recover upon the warranty in the deed to his father, but he could not in an action against his father recover more than nominal damage, even if he could recover that; he had paid nothing to his father for the land.

In our case, the plaintiff had paid nothing to the defendant for the land; the suggestion that she had paid him the interest on the $200 lent, is of no weight; upon that idea the measure of the plaintiff's damage should be the interest on $200.

We are not called on to decide this point, but it seems to us that the interest was not paid as a part of the price, but for the use of the $200.

Error.

PER CURIAM. *Venire de novo.*

* WILLIAM T. FAIRCLOTH v. S. W. ISLER and B. M. ISLER.

Supreme Court — Orders — Rules.

1. Where no specific time is designated for compliance with an order of this Court, it will always, before any ulterior proceedings are allowed, fix a time certain, at or upon which the order shall be obeyed.
2. It is contrary to the rules and course of this Court, without a special order, to issue a certificate of any opinion or judgment in term time.

CIVIL ACTION for specific performance of a contract, (see 75 N. C., 551,) in which the defendants appeal from an order made at Fall Term, 1876, of WAYNE Superior Court, by *Seymour, J.*

The order of His Honor was made on its appearing that plaintiff had deposited in the office of the Clerk, for the use of defendants, the purchase money for the premises in suit; and it required the defendants to execute deeds, to be approved of by the Clerk, to the plaintiff; and that thereupon the Clerk should pay over the purchase money to the defendants. When the plaintiff applied for the order to compel defendants to deliver the deeds, the defendant S. W. Isler filed an affidavit in regard to certain dates, which are sufficiently stated in the opinion of this Court, and insisted that the plaintiff had not complied with the judgment of the Supreme Court within a reasonable time. Appeal by defendants.

Messrs. Smith & Strong and *H. F. Grainger*, for plaintiff.
Mr. S. W. Isler, for defendants.

BYNUM, J. At the June Term, 1876, this Court modified and affirmed the judgment of the Court below in this case,

* Faircloth J. did not sit at the hearing of this case.

75 N. C., 551. By that judgment the execution and delivery of the deeds of the defendants and the payment of the purchase money by the plaintiff were to be concurrent acts. The judgment of this Court was regularly certified to the Court below, on the 31st of August, 1876. No deeds were executed or tendered by the defendants, subsequent to or in pursuance of this certified judgment of the Supreme Court. The plaintiff thereupon, on the 9th of October, 1876, paid the purchase money into the office of the Clerk of the Court, to the use of the defendants, on their compliance with the order of the Court, and they had due notice thereof.

The deeds not yet having been executed, the plaintiff at Fall Term, 1876, moved the Court below to order the defendants to execute the deeds pursuant to the judgment of the Supreme Court. The Court accordingly ordered the defendants to execute the deeds on or before the 11th of November, 1876, and that the plaintiff, at the same time, should pay them the purchase money, then in the office for their use, being the same bid for the land and the accrued interest. From this order the defendants appealed.

They now contend here, that the purchase money was not paid within a reasonable time after the judgment and order of this Court, and by consequence, that the sale and purchase of the land should be annulled and cancelled. We know of no authority for such a contention. The sale has been confirmed by the solemn adjudication of this Court, and it will never allow its judgments to be evaded or made of no effect in this way. It will always, before any ulterior proceedings are allowed, fix a time certain, at or upon which, the order of the Court shall be obeyed. That is precisely what was done by His Honor in the Court below. It was the fault of the defendants, of which they can take no advantage, that the money has not been received by them, for by the order of this Court, the money was to be paid on the due execution of the deeds. The defendants held back, and they still

refuse to make the deeds. They will not entitle themselves to the money until they perform their part of the order.

But the defendants insist that prior to the 31st of August, and prior to the adjournment of the Supreme Court, they procured from the Clerk of that Court, a certified copy of its opinion rendered in the case, and in pursuance of it, executed and tendered the deeds, which the plaintiff declined to receive. The Clerk of this Court however inadvertently certified the said opinion, as it is against the rules and course of the Court, without a special order, to issue a certificate either of its opinion or judgment in term time. The plaintiff in courtesy to the defendants, might have acted on this certificate, but it would have been at his own risk. He was under no legal obligation to do so until it was regularly certified. For all the proceedings of the Court are *in fieri*, subject to be amended, modified or annulled, until the expiration of the term, at which period, in legal contemplation, all the judgments of the Court are delivered.

There is no error.

PER CURIAM. Judgment affirmed.

*BARBARA M ISLER v. D. A. MURPHY, Executor of J. T. H. Murphy.

Special Proceedings -- Practice.

1. A special proceeding by a creditor against an administrator or executor for an account, must be by summons and complaint in the first instance. Any other creditor coming in, need not file a complaint unless his claim is denied, but such claim must be verified unless it is a judgment or some writing signed by the deceased.
2. Where in such proceeding the plaintiff filed memoranda of the evidences of debt but no complaint, and the defendant answered and thereupon the plaintiff replied: *Held*, that the pleadings were irregular and the Court below committed no error in remanding the cause to the Clerk in order that the plaintiff might file a complaint.

APPEAL, from an order made at Fall Term, 1876, of WAYNE Superior Court, by *Seymour J.*

The following is a copy of the order: "This action is remanded to the Clerk of this Court, for the plaintiff B. M. Isler and the defendant D. A. Murphy, Executor of J. T. H. Murphy, to file the complaint and other pleadings herein, required by the statute in such cases. And upon the filing of said pleadings, said Clerk will proceed with the case according to law."

The summons had been regularly issued, and memoranda of evidences of debt were filed instead of a complaint. The defendant answered and the plaintiff replied. Appeal by the plaintiff.

Mr. S. W. Isler, for the plaintiff.

A replication containing a concise statement of the cause of action is a complaint, C. C. P. sec. 93.

Mr. H. F. Grainger, for the defendant.

* Faircloth J. having been of counsel in the Court below, did not sit on the hearing of this case.

READE, J. The statute, Bat. Rev. ch. 45, § 73, allows "any creditor of a deceased person, to prosecute a special proceeding in his own name and in behalf of himself and all other creditors of the deceased, without naming them, against the personal representative of the deceased, to compel him to an account, &c."

This was intended to be a proceeding under that statute. But it is objected that it is so inartistic that it will not answer the purpose for which it was intended. And we have to inquire, how that is.

The 74th section of said statute provides, that "The said action shall be governed by the rules of practice prescribed for special proceedings &c." so we have to inquire what are the rules of practice in special proceedings.

C C. P. § 418 provides that in a special proceeding, "If all the parties in interest join in the proceeding and ask the same relief, the commencement of the suit shall be by petition setting forth the facts entitling the petitioners to relief, and the nature of the relief demanded."

That is what is called an exparte proceeding, and no summons is necessary; and the petition takes the place of a complaint. But, C. C. P. § 421 provides, that "When special proceedings are had against adverse parties, they shall be commenced as is prescribed for civil actions."

The proceeding in this case is not exparte, but is adverse. The first thing necessary is a summons. That we have. The next thing necessary is a complaint. That we have not. But it is insisted for the plaintiff, that we have what is equivalent to a complaint—that is to say, we have *memoranda* of the evidences of his claims against the defendants. Not a word is said as to why he files them; or whether they are due and unpaid; or what he demands of the defendant in regard thereto. It is true that if the defendant is a shrewd man he might suspect what the plaintiff is after; but the least that is expected of any one is, that, in a decent

and respectful manner, he should ask for what he wants. And the statutes quoted above expressly require that he shall set forth in his petition, if the proceeding be exparte, or in his complaint, if it be adverse, "the facts entitling him to relief, and the nature of the relief demanded."

It is evident, therefore, that we have no complaint; nor any thing that will answer in the place of one.

But the defendant comes in and answers, and denies that the plaintiff's claims are just and owing, and the plaintiff replies that they are just and owing. And then the plaintiff insists that his replication is a complaint. Both the profession and the courts have been indulgent, probably too indulgent, in allowing departures from plain forms; but to allow this would be a burlesque upon practice and pleading.

The court was indulgent to the plaintiff in this case. He simply ordered the case to be remanded to the Probate Court that a complaint might be put in. But the plaintiff refused, and appealed.

It may be proper to say further, that in a proceeding such as this is, to call an administrator or executor to an account, the leading creditor, as the plaintiff in this case is, must issue his summons and file his complaint; that properly constitutes the case in court. And then, under ch. 45, § 79, Bat. Rev. any other creditor may come in and file his claim, and need not file a formal complaint, unless the defendant deny the claim; and then such creditor must file a complaint. But even such creditor must, when he files his claim, swear to it, unless it be a judgment or some writing signed by the deceased.

The point decided is, that a special proceeding by a creditor against an administrator or an executor for an account must be by summons and complaint in the first instance and

that other creditors coming in, need not file complaints unless their claims are denied and then they must.

There is no error.

PER CURIAM. Judgment affirmed.

STATE v. ROBERT EPPS.

Criminal Trials -- Presence of Prisoner.

In criminal trials nothing shall be done to the prejudice of the defendant without his presence; though the rule *may* be relaxed in trials for misdemeanors, by the consent of the defendant.

INDICTMENT for larceny, tried at Fall Term, 1876, of EDGECOMBE Superior Court, before *Moore, J.*

The jury, under the instructions of the Court, rendered a verdict of guilty, which was received by the Clerk during the recess of the Court, in the absence of the prisoner and without any instructions from the Court; whereupon the counsel for the prisoner moved in arrest of judgment, which motion was allowed by the Court, and the Solicitor for the State appealed.

Attorney General, for the State.

No counsel for defendant, in this Court.

READE, J. The *rule* is, that in a criminal trial, nothing shall be done to the prejudice of the defendant, without his presence.

The exception is, that in a criminal trial for a *misdemeanor*, the rule may be relaxed, by the consent of the defendant.

An instance of such exception has been, where the Court takes a recess, the jury may render its verdict to the Clerk, it having been agreed before the recess by the defendant in the presence of the Court, that so it might be and the Court having so instructed the Clerk.

But even this exception, or the like, ought to be sparingly exercised; because it best comports with decency and order, that everything should be done in open Court, in the presence of the defendant and before the public.

In the case before us, the verdict was rendered to the Clerk during the recess of the Court, without instruction from the Court, and in the absence of the defendant and without his consent.

It was clearly the right ot the defendant to have the verdict set aside upon his motion. And it was within the power of the Court to set it aside *mero motu.*

Tnere is no error. Let this be certified, &c.

PER CURIAM. Judgment affirmed.

FLORA McALLISTER v. THOMAS W. DEVANE.

Ejectment -- Lappage -- Practice.

1. In a case of lappage, where the party having the junior grant is not in the actual possession of the *locus in quo*, it is not error for the Judge to withdraw the case from the jury and decide it himself.
2. But if the claimant under the senior grant is driven to show actual possession, an issue of fact is raised which must be submitted to the jury.
3. Where one in possession under a claim of title accepts a release of the right of another having an adverse claim, he does not come into possession under the release, and it works no estoppel.
4. The only effect of a conveyance to A of easements to which his land is servient is to extinguish the dominant rights.

CIVIL ACTION for recovery of land, tried at January Term, 1876, of CUMBERLAND Superior Court, before *Buxton, J.*

Plaintiff claimed title and possession of three tracts of land situated on Lock's Creek, Cumberland county, containing 200, 33 and 50 acres respectively. Defendant disclaimed as to all outside of certain lines, within which were included, as plaintiff claimed, parts of each of the said three tracts. Defendant denied plaintiff's right as to residue. Plaintiff read in evidence grants to Alexander McAllister for the said three tracts as follows: a grant for the 200 acre tract dated September 29, 1753; the location of this was disputed, but the jury located it as plaintiff claimed, and that is not the subject of the decision: a grant for the 33 acre tract dated March 2, 1775, date of survey March 11, 1774; the location of this was also disputed, but on the trial the Court assumed it to be located as plaintiff insisted: a grant for the 50 acre tract about the location of which there was no dispute.

Plaintiff claimed that these grants covered the premises in controversy, which was a mill-pond and a few adjacent acres of land.

Plaintiff read in evidence the will of Alexander McAllister, who died in 1796. He devised to his son Hector the said three tracts and also one-half the saw-mill on Lock's Creek.

Plaintiff read in evidence the will of Hector McAllister, who died in 1810. He devised to his wife Isabel the 200 acre tract "that I live on:" the 50 acre tract and the 33 acre tract except the mill seat and as much as it overflows of the 50 acres.

He also devised to his executors "the aforesaid mill seat and what it overflows, to be sold if my executors see fit, that is to say my part of said mill seat, being one-half."

Plaintiff read in evidence a deed to herself from Isabel, devisee of Hector McAllister, dated January 8, 1858, for the said three tracts of land.

Defendant read in evidence a deed from the executors of Hector McAllister to Thomas Murphy, dated April 30, 1811, conveying among other property, "Also the one-half of a mill seat on Lock's Creek with so much of the land of Hector McAllister's estate as the water raised by the mill may cover, with free privilege of making and enjoying a lumber yard and road from saw-mill to the main road, with a further privilege to dig earth for the purpose of making or repairing said mill-dam off of any of the land devised by Hector McAllister to his successors, to have and to hold the above-mentioned premises, &c., &c."

Defendant read in evidence a certified copy of an abstract of a grant to Malcom Blue for 70 acres, dated 29 Feb., 1775, registered in Cumberland county, Feb. 10, 1876. Also a certified copy of a survey with plot attached for 70 acres for Malcom Blue dated 28 June, 1775, the calls of which correspond with the calls of the above grant. This grant was located without dispute and laps upon the 200 acre tract and the 33 acre tract.

Plaintiff objected to this grant that the date was an impossible one, and that the survey bore date subsequent to the grant, and subsequent to the survey of the grant of the 33 acre tract. His Honor held that the grants operated in the order of their dates, and that to Blue of 29 February, 1775, took effect from and after the last day of February, 1775. Plaintiff excepted.

Defendant read in evidence a deed from Malcom Blue covering the 70 acre grant, dated 19 Oct., 1784, the *habendum* of which was as follows: "To have and to hold the said seventy acres of land, hereditaments, premises hereby granted with the appurtenances and every part and parcel thereof unto the said Thomas Murphy his heirs or assigns, &c."

This, His Honor ruled, conveyed title in fee and plaintiff excepted.

Defendant then connected himself with the title of Thomas Murphy. Located as claimed by the plaintiff, the 200 acre tract lapped on the 33 acre tract, and the 70 acre tract lapped on both the 200 acre and the 33 acre tracts.

The evidence as to possession was, that for 70 years and upwards the plaintiff, and those under whom she claimed resided in a family mansion on the 200 acre tract. The appurtenances to this residence were on the lappage of the 33 acre tract and the 200 acre tract. But these were all outside of the lappage of the 70 acre tract.

There was evidence that Mrs. Isabel McAllister had a tenant who for many years lived on the lappage of the 70 acre tract and the 200 acre tract. The mill-dam and the pond were in part on the 33 acre tract where it lapped on the 70 acre tract. There was also a blacksmith shop near the dam built by Thomas Murphy, which has long since disappeared. Mrs. Isabel McAllister claimed title to the ground where the mill was situated. It was in evidence that the mill-dam was very old; that there are signs still visible of a burnt mill, which, according to tradition old Al-

exander McAllister and Thomas Murphy had in partnership. There was a new mill and race some 50 yards distant from the old ones which Thomas Murphy built in 1815. This has ever since been in the possession of defendant and those under whom he claims.

Plaintiff was in possession of so much of the 50 acre tract as was not covered by the mill-pond.

At the southern end of the 70 acre tract is situated the old Murphy mansion built by Thomas Murphy 70 years ago, and occupied by the Murphy family ever since.

At the northern end of the same tract which is lapped by the 33 acres, is situated the mill and appurtenances alluded to as built in 1815 and occupied by the Murphys ever since.

The plaintiff's counsel asked for the following special instructions: among others,

That His Honor should charge the jury that the effect of the deed from the executors of Hector McAllister to Thomas Murphy was an estoppel on Thomas Murphy so as to estop him and all claiming under him from denying that Hector McAllister was the owner of one-half of the mill seat it purported to convey. This was refused and plaintiff excepted. His Honor charged that the case involved to some extent the law relating to lappage of grants. In cases of lappage, 1st. If neither grantee is in actual possession the law adjudges the constructive possession in the older grantee. 2nd. If both grantees are in possession under their grants, but neither are seated on the lappage, the law adjudges the possession in the lappage in the older grantee. 3rd. If the younger grantee is in actual possession of the lappage, then the constructive possession of the older grantee is ousted; and he would have to sue to recover possession.

That the jury need not take the 50 acre tract into account. That tract is conceded to be located and to belong to

plaintiff, and the only interference with it is occasioned by the overflow of water which was fully authorized by the will of Hector McAllister and the deed of his executors to Thomas Murphy, under whom defendant claims.

Neither is it important for the jury to concern themselves about the location of the 33 acre tract. Supposing that tract to be located as claimed by plaintiff, so as to cover the mill property, yet the 70 acre grant, admitted to be located, with which the defendant connected himself, was older than the 33 acre grant and lapped upon it so as to cover the mill property also upon this lappage.

Thomas Murphy had built the present mill, which had been in the Murphy family down to the defendant, a period of 50 or 60 years, as proved by plaintiff's own witnesses. Besides this, the will of Hector McAllister authorized his executors to sell his interest in the mill seat, stated to be a one-half interest, and the executors had sold it to Thomas Murphy. After all this it was out of the question for plaintiff to set up claim to the mill, and in reference to the 33 acres, the defendant was no trespasser. So the jury may confine their attention to the 200 acre tract claimed by plaintiff. Its location is a matter of dispute and the jury must decide. * * In rendering their verdict therefore, it will be the simplest way for the jury to say how they locate the 200 acre tract.

Plaintiff excepted. The jury rendered a verdict, locating the 200 acre tract as claimed by plaintiff and awarding him six pence damages.

Rule for new trial. Rule discharged. Judgment for plaintiff, from which plaintiff appealed.

Messrs. B. Fuller and *Merrimon, Fuller & Ashe*, for plaintiff.
Messrs. McRae and *Broadfoot* and *Guthrie*, for defendant.

PEARSON, C. J. His Honor put the case upon the true

point, and in that way reduced it to very narrow limits. We also commended the counsel of the plaintiff for abandoning several points taken in the excitement of the trial in the Court below, which upon reflection he became satisfied were untenable; a course of that kind, if pursued by the members of the bar in all cases would greatly relieve the members of this Court—indeed it has almost become a necessity by reason of the voluminous records that are sent up.

The "locus in quo" is a mill and a few acres of land appurtenant thereto. It is agreed that the 70 acre tract under which the defendant derives title, covers it, and it is assumed according to the view taken of the case by His Honor, that the 33 acre tract under which the plaintiff derives title covers it also—so as to make a case of "lappage" as it is termed in the books.

No exception is taken to the correctness of the rules laid down by His Honor in respect to the doctrine of lappage; but plaintiff's counsel excepts,

1. Because His Honor withdrew the case from the jury and decided it himself. This was right provided there was nothing which called for the action of a jury. That is the question. The 70 acre grant is older than the 33 acre grant, and in case of a lap, the law considers the party having the better title to be in possession; unless the party having the junior grant be in the actual possession So without any inquiry as to the actual possession on the side of the defendant, it is sufficient for him to rely upon possession in law, incident to his title, and it is for the plaintiff to show how the title of defendant has been divested, and how it has been passed over to his side.

There was no evidence fit to be left to a jury of a possession by any one on plaintiff's side, since 1815, about which time the old mill was burnt, and there was no evidence of any adverse possession before that time by the McAllisters; they only claimed one-half of the mill and its appurtenances as tenants in common with defendant's side.

Had the defendant been driven to the necessity of showing *actual* possession on his side, although the evidence was plenary that actual possession had been held by the defendant's side from the date of the building of the new mill and "hitherto up to the commencement of the action," still that would have been an issue of fact which His Honor ought to have submitted to the jury with instructions that if they believe the witnesses the defendant had proved, &c., and if they did not believe the witnesses then the defendant had failed to prove an *actual* possession The reply is, the *laboring oar was on the plaintiff.*

2. The deed executed by the side of plaintiff, and accepted by the side of defendant, to-wit; the deed of the executors of McAllister, created an estoppel upon the side of the defendant and having accepted title under the plaintiff, the title of the defendant cannot be set up in opposition thereto.

The reply is, at the date of the execution of this deed the defendant's side was in possession under the elder and better title and accepted this deed as a release of a right operating by way of extinguishment of any claim of the plaintiff's side to the one-half of the mill and its appurtenances which was not intended, and could not have the legal effect of impairing the title of the defendant, but was made in aid thereof and by way of removing all clouds. When one in possession under a claim of title accepts a release of the right of one having an adverse claim he does not *come into possession* under the release, and it works no estoppel, but is looked upon in its legal effect as what is called a "quit claim deed."

3. The deed of the executors of McAllister only conveys the mill and certain easements to which the land is servient, to-wit; the short road from the mill to the Raleigh road, and the privilege of taking dirt to repair the dam; reply, the defendant stood in no need of this deed in regard to the land, and in taking it simply extinguished the plaintiff's

dominant right to these easements under which his land was servient by the original agreement, to build the mill on equal shares.

No error.

PER CURIAM. Judgment affirmed.

STATE v. NOAH TAYLOR.

Indictment -- Trial -- Continuation of Term.

1. In a trial for murder, where the jury fail to agree and the Judge continued the term of the court, from Saturday of the second week to the following Monday, when a verdict was rendered; *Held*, not to be error.

2. The provisions of ch. 33, § 108, of Battle's Revisal, are not in conflict with Article IV. sec. 12 of the Constitution.

(*State* v. *Adair*, 66 N. C. 298; *State* v. *Cunningham*, 72 N C. 469, cited and approved.)

INDICTMENT, for murder tried at Fall Term, 1876, of BEAUFORT Superior Court, before *Moore, J.*

The trial commenced on Wednesday of the second week of the term, and between eleven and twelve o'clock on Saturday night following, the jury having failed to agree, His Honor continued the term until Monday morning at ten o'clock of the following week, and on that day, the jury rendered a verdict of guilty and were discharged without the consent of the prisoner. The counsel for the prisoner moved his discharge, upon the ground that the term of the court had expired by limitation, and that His Honor had no power under the Constitution to continue it.

The motion was not allowed, and there was judgment and appeal by prisoner.

Attorney General, for the State.
Mr. Geo. H. Brown, Jr., for the defendant.

FAIRCLOTH, J. The defendant was indicted for murder and put on his trial on the second Wednesday of the term, and the jury failed to agree at the close of the week. His Honor thereupon continued the Court and kept the jury together until the following Monday, when a verdict of guilty was rendered and judgment pronounced. The defendant made a motion to arrest the judgment, on the gound that His Honor had no authority to continue the Court and jury after the end of the second week, which motion was disallowed.

He insists that Art. IV. § 12, of the Constitution, by implication restricts the power of the Legislature to authorize the Judge below, on the trial of a capital case, to continue the Court after the end of the two weeks, as it attempted to do by an Act, C. C. P. § 397, Bat. Rev. ch. 33. § 108.

This precise question was considered in *State* v. *Adair*, 66 N. C. 298, and, for the reasons there given, it was held that there was no such restriction in the Constitution.

He further insists, if there is no restriction as above claimed, there is no authority for the Legislature to authorize an extension of the Court beyond the two weeks. It would seem, that, if there is no constitutional restriction, the Legislature undoubtedly has the power to authorize the continuance of a Court, to meet the ends of justice in the trial of a capital felony.

In addition to what is said in *Adair's* case above, the Act of 1830, Rev. Code, ch. 31, § 16, enacted to meet the diffi-

culty experienced in *Spier's* case, giving the Court power, on the trial of a capital case, to continue from day to day after the expiration of the term to finish the trial &c. was in force at the adoption of the Constitution and is not repealed or restricted therein. This Act not being digested or brought forward in Battle's Revisal, is not repealed. *State* v. *Cunningham*, 72 *N. C.* 469.

There is no error. Let this be certified to the Court below, that further proceedings may be had according to law.

PER CURIAM. Judgment affirmed.

SIMEON GRAYBEAL v. DRURY POWERS.

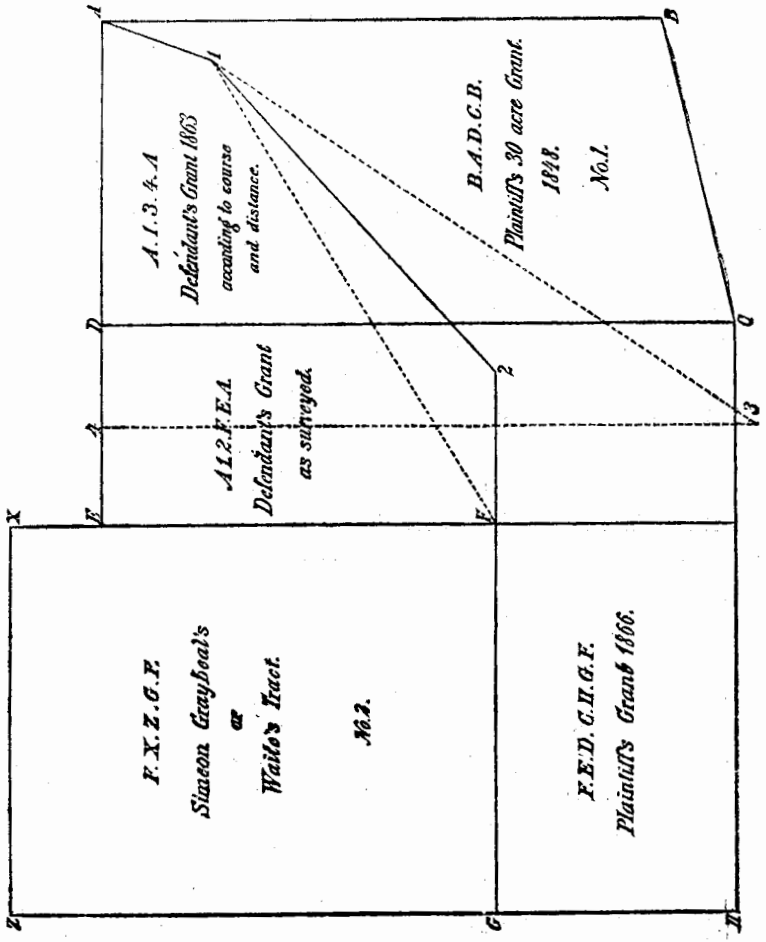
Ejectment -- Boundary -- Evidence.

1. A call for the line of another tract of land is "a natural boundary" and controls course and distance.
2. Such a call excludes the question, whether marked lines and corners not called for can control course and distance.
3. In running the call, the line must be run straight so as to strike the line called for, making as small a departure as may be from the course and distance called for in the grant.
4. Where there are two lines answering the call, the jury in determining which is meant, may consider the circumstance, that lines were run by the surveyor and corners made at the time of the survey, leading to one of them.
5. Marked line trees and corners not called for, may control an obvious *mistake* in regard to course, but distances must be run unless controlled by a natural boundary.
6. The terms of a written instrument cannot be varied by parol evidence; the only exception is made in questions of boundary where there being no natural boundary called for, parol evidence corroborated by natural evidence of trees marked at the time, although not called for, is allowed to correct or explain a mistake in the courses of a grant.

(*Clarke* v. *Wagner*, 74 N. C. 791, cited and approved.)

GRAYBEAL *v.* POWERS.

CIVIL ACTION, for the recovery of land tried at Fall Term, 1875, of ASHE Superior Court, before *Furches, J.*



Plaintiff claimed title to the tract F E D C H G F under a grant issued to him in 1866, which covered the land in dispute. He also read in evidence a grant located as B A D C B issued to him in 1848, lying east of the *locus in quo*,

the western line of which C D, it was in evidence was a plainly marked line. He also read a deed to him, dated April 6, 1863, for the tract located as F X Z G F, known as the Waite tract, and also as the Simeon Graybeal place. Defendant read in evidence a grant dated 13 July, 1863, survey being made 18 April, 1863, "beginning on a chestnut oak, Simeon Graybeal's corner, thence South 8° West 30 poles to a chestnut sapling, thence South 33° West 100 poles to a stake in Simeon Graybeal's line, thence East 47 poles to a stake in Powers line, thence with said line to the beginning." The beginning was agreed to be at A. Run by course and distance this grant would be located at A 1. 3. 4. A.

The defendant introduced evidence showing that the lines A 1. 2. F were marked lines; that the surveyor ran these lines, marking trees and corners when he made the survey in which defendant's grant was obtained: and that the line the surveyor ran to in the call for Simeon Graybeal's line was the line F X. Plaintiff claimed that the proper location of defendant's grant was by course and distance as viz: A 1. 3. 4. A. Defendant insisted that the proper location was A 1. 2. F E A.

The former location would not cover the *locus in quo*: the latter would. The Court charged the jury that the plaintiff having shown a grant from the State to himself which was admitted to cover the land in dispute, he had made out a *prima facie* case, and would be entitled to recover unless defendant's grant also covered the land in dispute. That defendant also having shown a grant from the State to himself of an older date than plaintiff's it would defeat the plaintiff's title and right to recover if it covered the land in dispute; that they were to find all the facts from the evidence. That although the defendant did survey the line A 1. 2. F for the purpose of taking out the grant, if he undertook to change it, and to take out a grant according to the

mathematical calls as indicated by A 1. 3. 4. A, then that would be the true boundary of this grant and would not cover the land in dispute, and the plaintiff would be entitled to recover. But if they should find that defendant never abandoned the line actually surveyed; and they should further find that the lines A 1. 2. F were the lines so actually surveyed, and that Simeon Graybeal's line of the Waite place was the line they ran to, and that the grant was taken out upon the survey, then that would be the line of the defendant's grant and it would cover the land in dispute and the plaintiff would not be entitled to recover although the mathematical call of the grant did not run with these lines.

Plaintiff excepted. Verdict for the defendant. Rule for new trial. Rule discharged. Judgment for defendant, and plaintiff appealed.

Mr. M. L. McCorkle, for plaintiff
Messrs. R. F. Armfield and *G. N. Folk*, for defendant.

PEARSON, C. J. A call for the line of another tract of land is "a natural boundary" and controls course and distance, on the ground that there can be no mistake in respect to the intention to go to the line of the other tract, whereas in respect to course and distance there may be a mistake, in entering upon the field notes or in transferring the entry to the description set out in the grant.

In our case, there is a natural boundary, "Simeon Graybeal's line," but it so happens that Simeon Graybeal owned two tracts, one a 30 acre tract, which I will call tract No. 1, and another tract which I will call tract No. 2, lying west of tract No. 1, and distant from it some 30 or 40 poles. It is evident from the plat, that "the Simeon Graybeal's line" called for, is either the north and south line bounding tract No. 1 on the west and marked C D, or it is the north and

south line bounding tract No. 2 on the east and marked F E.

Which of these two lines is the one that is called for, is "the governing fact in the location of the defendant's grant and ought to have been distinctly left to the jury with instructions to consider all the evidence and the surroundings of the case, including the marked lines and corners, &c."

His Honor and the counsel, carried away by the question as to whether marked lines and corners *not called for* can control corners and distances, fell into the same error as in *Clarke* v. *Wagner*, 74 N. C. 791, and failed to take notice of the principle which excludes that question, whenever a natural boundary is called for, on the ground that a natural boundary called for in the grant provided it be identified controls the location and overrides everything else; so that "course and distance" and "marked lines and corners" not called for, so as to be made natural boundaries, are evidence to be considered by the jury, in identifying the natural boundary.

There, the case turned upon the fact whether Island No. 1, or Island No. 2, was "The Island" called for; here the case turned upon whether the north and south line bounding tract No. 1, on the west, or the north and south line bounding tract No. 2, on the east, was "the Simeon Graybeal's line" called for. It is proper to state that *Clarke* v. *Wagner*, which is on all fours with this case, was not published at the time of the trial.

For this error there will be a new trial, on which His Honor will instruct the jury that if they find the north and south line bounding tract No. 1 on the west, to-wit, C. D, to be the "Simeon Graybeal's line" called for, then as the next call is "North 140 to a stake in Simeon Graybeal's line," the defendant's grant did not cover the land in dispute, and they should find for plaintiff, and need not trouble them-

selves to fix the points at which the call struck Graybeal's line.

But if they should find the north and south line bounding tract No. 2 on the east, to-wit, F E, to be "the Simeon Graybeal's line" called for, then the line of defendant's grant starting at 1 must be run straight, so as to strike that line, making as small a departure as may be from the course and distance called for in the grant, and not deviating from course or distance in order to conform to the lines surveyed and marked as stated by the witnesses, because, these lines not being called for as a part of the description, the circumstance that they have been surveyed and marked can only be allowed weight in determining the fact as to which of the two lines was the Simeon Graybeal line called for in the grant.

Marked line trees and corners not called for have been allowed to control an obvious mistake in regard to course; for instance, a mere slip of the pen in writing north instead of south and the like, but you must in the language of surveyors "go by the distance," unless it be controlled by a call for a natural boundary, whether it fall short of, or go beyond a tree, marked as a common tree, but which is not called for. To allow the terms of a written instrument to be varied by parol evidence is a proposition for which no lawyer will contend. The only exception is made by our Courts in questions of boundary when there being no natural boundary called for, parol evidence corroborated by natural evidence of trees marked at the time, although not called for, is allowed to correct or explain a mistake in the courses of the grant; to allow it in this instance would be not to correct a mistake, but to supersede a line fixed by the rules of law, by putting in its place a line marked by one of the parties, but which, for some reason best known to himself, he chose not to have set out in the grant.

The case does not set out with precision the *locus in quo*

and it does not appear whether the possession of the defendant included the small slip between the line, as run and marked by the defendant, and the straight line from 1 to F. This we presume is a matter of but little importance except as it may affect the costs.

Error.

PER CURIAM. *Venire de novo.*

H. A. LONDON, JR., and the Commissioners of Pittsboro v. AARON G. HEADEN.

Penalty for refusing to accept office -- Constitutionality of Statute -- Justice's Court -- Practice therein.

1. The provisions of Chapter 111, § 25, Battle's Revisal, prescribing a a penalty of $25 against any person who is duly elected or appointed Town Constable and who refuses to qualify, &c., are not in conflict with Art. I., § 17, of the Constitution.
2. The facts found on a trial in a Justice's Court where the judgment is for $25 or less, are conclusive upon an appeal to the Superior Court.
3. In such case the Justice should not include in the record sent up a statement of the evidence, unless there were exceptions to its admission in his Court.
4. In an action in a Justice's Court for a penalty, it is sufficient if the warrant states the amount due and how claimed.

(*Duffy* v. *Averitt*, 5 Ire. 455; *State* v. *McEntyre*, 3 Ire. 171, cited, distinguished and approved.)

CIVIL ACTION, commenced in a Justice's Court in the County of CHATHAM and heard at Chambers on the 15th of June, 1876, before *Kerr*, *J.*

LONDON *v.* HEADEN.

This action was brought before a Justice of the Peace, to recover the penalty of $25 given by Bat. Rev. Ch. 111, § 25, against every person duly elected or appointed Town Constable, &c., who after being duly notified, shall neglect or refuse to qualify and perform the duties of his office or appointment.

The Justice gave judgment against the defendant who appealed to the Superior Court, where the Judge reversed the judgment of the Justice, and gave judgment for the defendant for costs, from which, the plaintiff appealed to this Court.

Messrs. Busbee & Busbee, for the plaintiff.
Mr. J. H. Headen, for the defendant

RODMAN, J. (After stating the facts as above.) The Constitution Art. IV. § 33, says, that the party against whom judgment shall be rendered by any Justice of the Peace, may appeal to the Superior Court, from the same. "But if the judgment shall be for $25 or less, then the case shall be heard in the appellate Court, only upon matters of law."

The effect of this clause of the Constitution, has not so far as I remember, been commented on by this Court. What I shall say about it, is not intended to apply to any cases except such as are similar in pleadings and proceedings to the present.

In this case, the only plea of the defendant was a general denial of each and every allegation in the warrant. We will assume that this was sufficient to put in issue each material allegation.

When upon such an answer the Justice finds for the plaintiff, he must be understood as finding that each material allegation of the complaint is true. This finding of facts is made by the section of the Constitution cited, conclusive up-

on the Superior Court on appeal, and the jurisdiction of that Court is confined to adjudging whether the facts so established entitle the plaintiff to judgment or not.

In this case the Justice sends up with the statement of his proceedings, a statement of the evidence introduced before him. The statute prescribing his duties (Bat. Rev. ch. 63. § 57,) requires him to file with the Clerk of the appellate Court, "the papers, proceedings and judgment in the case." This does not seem to include a statement of the evidence, unless there was an exception by one party or the other, by reason of the admission or rejection of evidence, in which case his decision upon it would be part of the proceedings, and therefore would be properly sent up. We do not therefore consider his statement of the evidence, as adding to the effect of his general finding of the facts for the plaintiff, although, if it appeared from such statement that there was no evidence to support his finding on any material allegation, it would be different.

We have then but two questions to consider: 1. Do the facts alleged in the warrant bring the case within Ch. 111, § 25 of Bat. Rev.?

Upon the authority of *Duffy* v. *Averitt* 5 Ire. 465. which was an action by warrant to recover penalties for not working on a public road, we think that the material facts are sufficiently alleged, and there is in this warrant, what was wanting in the warrant in that case, a reference to the statute by which the penalty is given. It is sufficient if the warrant states the sum due, and how claimed. We think the above observations meet all the objections taken in the defendant's grounds of appeal, and repeated on the argument here, except;

2. That the Act giving the penalty is unconstitutional.

For this proposition the defendant relies on Art. I, § 17, of the State Constitution, which is to the following effect: "No person ought to be taken, imprisoned or disseized of his

freehold, liberties or privileges, or in any manner deprived of his life, *liberty or property, but by the law of the land.*"

It is admitted that an Act of Assembly which violates any constitutional right of the citizen, is not the law of the land; and personal liberty is a constitutional right. Const. Art. I, § 1, Declaration of Rights. But the meaning of general expressions, such as "liberty" is qualified by the doctrines of the common law which our forefathers brought to Carolina with them, and which as modified to suit our institutions, have ever since been held a part of the law of this State.

It is a doctrine of the common law, that every citizen, in peace, as well as in war, owes his services to the State when they are demanded. This right stands on at least as high a necessity as the right of eminent domain, by which a man's property may be taken for public use against his consent. The English authorities to this effect, are numerous. The city of London enacted a by-law that any freeman of the city who should be elected Sheriff, and who failed or refused to give a bond and serve as such, should forfeit £400, unless he had a reasonable excuse. Vanacker was elected and refused to serve, and was imprisoned for the penalty. The by-law was held valid. *City of London* v. *Vanacker*, 1 Ld. Raym. 496. The same point was adjudged in *Rex* v. *Larwood*, 1 Salk. 168, and the reason is assigned "That the King hath an interest in every subject and a right to his service, and no man can be exempt from the office of Sheriff, but by Act of Parliament, or letters patent." Comyn's Dig. Offices B. (B. 1.)

Mr. Dillon thinks the principle of these decisions applicable in the United States, although all of the reasoning in them does not apply, and although he knows of no American decision on the question. 1 Dill. Mun. Corp. § 162.

In *State* v. *McEntyre*, 3 Ire. 171–5, RUFFIN, C. J., says: "Now, the Court has no doubt that it is competent to the

Legislature to require any person, appointed to office in any manner prescribed by law, to serve therein under pain of indictment, or any other penalty." The decision in that case, was that the refusal to serve was not indictable, because no statute had made it so.

The duty claimed of the citizen in this case is precisely like that of working on or being overseer of a public road, of serving as a juror, attending as a witness, assisting a peace officer in suppressing a riot, &c., &c. In all these cases, a statute imposes a penalty for a failure to serve, and the right of the Legislature to do it, has never been questioned, and has been many times silently assumed as the undoubted law.

It must often happen, that the performance of the duties of certain offices, especially those connected with the preservation of the public peace, and the collection of taxes, such as sheriff, constable, tax collector and the like, will be so disagreeable, dangerous or unpopular, that no fit man will willingly undertake them for the compensation attached to the office. But the public welfare absolutely requires that they shall be performed, and by fit men. Hence it may become necessary to resort to a sort of civil conscription to fill them. No citizen can be injured by being required to perform a public duty to which all are liable, and no one, however great his abilities or fortune, should consider himself degraded by being required to perform the duties of any office useful or necessary to the public welfare.

> Honor and shame from no position rise,
> Act well your part; *there*, all the honor lies.

It is seen in Vanacker's case that by the by-law of the corporation which imposed the penalty, he was allowed to defend himself by "any reasonable excuse." Our statute contains no such provision.

Nevertheless, it cannot be doubted that the defendant in the present case might have defended himself by any *legal* excuse; that is, by a plea of any matter which legally disqualified him from performing the duties of the office. For example, that he was ineligible, as not being a member of the corporation, or that he already was filling some public office, the duties of which were incompatible with those of Town Constable, &c., &c. But it is clear that such defence could only be made by an answer in avoidance. The defendant sets up no excuse or defence in avoidance whatever, but contents himself with a denial of the plaintiff's allegations It is unnecessary therefore for us to inquire whether old age, or physical debility (which have been suggested in this case), would constitute a defence, if pleaded and proved. Perhaps they would not. It is said that a woman may be a constable, or an overseer of the poor, and may fill any office the duties of which may be performed by deputy, and that her sex is no excuse for declining such offices. Comyn's Dig. Officers B. (B. 2.) *Rex* v. *Stubbs*, 2 T. R. 495.

Such is the law of England. How it may be in North Carolina we are not called on to say.

Judgment reversed, and judgment here that plaintiff recover $25 and costs.

PER CURIAM. Judgment accordingly.

STATE on relation of DENNIS COX, Executor of Thomas Cox, v. J. A. BLAIR, Administrator of B. B. Bulla, and others.

Clerk of Superior Court -- Breach of Official Bond.

1. A Clerk of the Superior Court, appointed to sell real estate in a proceeding for partition, acts in his official capacity, even though he is not designated as *Clerk*, in the order of appointment And,
2. The loss of money collected by him, in pursuance thereof, by being stolen from a safe in which it was deposited, is an official default and breach of bond, for which his sureties are liable.

(*State* ex rel. *McNeil* v. *Morrison*, 63 N. C., 508; *Commissioners of Bladen* v. *Clark*, 73 N. C., 255; and *Havens* v. *Lathene*, 75 N. C., 505, cited and approved.)

CIVIL ACTION, for breach of official bond, tried at Spring Term, 1876, of RANDOLPH Superior Court, before *Kerr, J.*

The complaint, filed against Blair as administrator of Bulla, deceased, late Clerk of the Superior Court of said County, and the other defendants, (sureties on the official bond of said Bulla,) demanding payment of the sum of $242.17 balance due, alleges:

That Bulla was elected and qualified as Clerk in 1868 and executed a bond with the other defendants as sureties. That in 1871, one E. B. McCain brought an action against the plaintiff's testator, praying that a certain house and lot in the town of Asheboro, might be sold, and the proceeds divided between them, to the end, that they might have partition of the same. That in July 1871, said Bulla, under a decree of the Court, sold said property for $505. That said sale was reported to Court and confirmed. That he collected the purchase money in full in January, 1872. That Cox died in July, 1871, and Bulla died in July 1872. That in April, 1874, the Court decreed that the money arising from said sale be paid to the parties entitled. That a

demand was made on defendant Blair and on the present Clerk of the Court, the successor of Bulla, for payment of the money, before the commencement of this action.

Defendants demurred and assigned as cause: That it did not appear from the complaint that Bulla was ordered as *Clerk of the Court* to sell the land; nor that he sold the same, or collected the money as *Clerk*; nor that he, as such, was ever ordered to pay the money to the parties; nor that Bulla as *Clerk* had ever broken the conditions of his bond, so as to render his sureties liable.

The demurrer was overruled and thereupon the defendant Blair, Administrator, answered over, alleging, that the identical money which had been collected by his intestate from the purchase of said land, was deposited in a safe. That the safe was broken open and this money stolen, together with other monies and valuable papers, belonging to suitors in said Court, and that this occurred without the laches of his intestate and notwithstanding his great prudence and care.

The other defendants filed no answer.

The evidence sustained the material allegations of the complaint and His Honor held, that there was a breach of the official bond and that defendants were liable. Defendants excepted. The jury rendered a verdict for the plaintiff. Judgment, and appeal by defendants.

Messrs. Tourgee and *E. G. Haywood*, for plaintiff.

Messrs. Mendenhall & Staples and *Smith & Strong*, for defendant.

BYNUM, J. In proceedings for partition the Court may authorize any officer thereof, or any other competent person, to be designated in the decree of sale, to make the sale. *Bat. Rev.* ch. 84, § 15.

It is most usual to appoint the Clerk of the Court for that purpose, because his responsibility is secured by his oath and his bond; and because as an officer of the Court, he is under its immediate control. Hence, nothing to the contrary clearly appearing, where the Clerk is appointed to that duty, it is the presumption that he is appointed in his official capacity, whether he is designated in the order as Clerk or not. *State ex rel McNeill* v. *Morrison*, 63 N. C. 508.

The Clerk here having made the sale and collected the money in pursuance of an order of the Court, held it in his official character.

This is the only question raised by the pleadings, though it was insisted in the argument that the other tenant in common was a necessary party to the action. We do not think so. The statute declares that all persons having an interest in the subject of the action and in obtaining the relief demanded, *may* be joined as plaintiffs. C. C. P., § 60. Here, the fund is fixed in amount and the plaintiff's share is a matter of mere clerical computation. No account is necessary to be taken between the tenants and each may sue for his specific part, as well as if it was a specific legacy. There is a clear distinction between this case and that of a distributee of an estate. There, before a judgment can be rendered, it is generally necessary to take an account of the administration and of the respective liabilities of the distributees for advancements, &c., before it can be ascertained what may be due. The Courts in such cases hold that all the distributees of the estate are necessary parties to the proceeding, to avoid a multiplicity of suits and to adjust and determine the rights of all in the same action. In our case, the amount due to each tenant is ascertained and their rights of action are several.

It was further objected that the decree of 1874, directing the fund to be paid to the parties entitled, was made without notice to the defendants and was void as to them. This

order was not necessary to the plaintiff's right of action; but what is that to the defendants? They owe the money, and can have no voice in adjusting the rights of the partitioners between themselves.

It is again insisted for the sureties on the official bond of the Clerk, that according to the pleadings, the Clerk was in no default, as he had to the time of his death performed all the orders of the Court, and if there was any default, it was on the part of the administrator of Bulla, for which he must be answerable on his administration bond. But the fact is overlooked by the counsel, that the defendants jointly demurred to the complaint and assigned as one cause, that the plaintiff did not set forth a sufficient cause of action. The demurrer was overruled, and *the sureties did not appeal and did not put in an answer.* The plaintiff was therefore entitled to judgment against them. At the next term of the Court, the administrator, Blair, did answer, and the utmost that the sureties of Bulla can ask, is, that we should treat Blair's answer as their answer. Treating it thus, the answer admits the collection of the money by Bulla and alleges that it was stolen from Bulla, without his default. Here then, is the admission of the Clerk's default in office, for it has been expressly held by this Court, that the loss of the money in the manner alleged, is an official default and breach of his bond, for which the sureties are liable. *Havens* v. *Lathene*, 75 N. C., 505; *Commissioners of Bladen* v. *Clarke*, 73 N. C., 255.

So, *quacunque via data*, whether upon the demurrer or the admissions in the answer, the plaintiff was entitled to judgment.

There is no error.

PER CURIAM. Judgment affirmed.

K. H. WORTHY Administrator of John Morrison v. I. H. CADDELL and others.

Fraud -- Execution Sale -- Bona fide Purchaser for Value.

1. One who claims against a prior donee or creditor as a purchaser for value, must prove a fair consideration, not up to the full value, but a price paid which does not cause surprise or warrant a suspicion of fraud or contrivance on the part of the purchaser.

2. Where A procures his land to be sold under execution with intent to defraud his creditors, and B purchases it at a grossly inadequate price without knowledge of the fraudulent contrivance of A, he is not a *bona fide* purchaser for valuable consideration.

(*Fullenwider* v. *Roberts*, 4 D & B, 278; *Rhem* v. *Tull*, 13 Ire. 57; and *Lassiter* v. *Davis*, 64 N. C. 498, cited, distinguished and approved.)

CIVIL ACTION, tried at Fall Term, 1876, of HARNETT Superior Court, before *Furches, J.*

This was a proceeding to sell land for assets commenced in the Probate Court of Moore County, and transferred to the Superior Court to try issues involving the title to the land. Upon affidavit of the defendant Caddell, the case was removed to the County of Harnett.

Worthy was appointed administrator of Morrison on the 13th of March, 1871, and after exhausting the personal estate in the payment of debts, filed a petition against the heirs-at-law of his intestate, (to which Caddell was made a party defendant) to sell the land in September following, in which it was alleged that the defendant Caddell claimed the land, under a pretended or fraudulent deed. This, the defendant denied; and alleged that he was the *bona fide* owner in fee of the 2,200 acre tract, and asked to be allowed to defend his title.

The plaintiff introduced one W. K. Nunnery, Dep. U. S. Marshal, who testified, that he sold the land in dispute, under execution against Morrison and others; that previous to the sale, he suggested to Morrison, that the other defendants

in the execution had personal property; that Morrison said he did not wish to trouble them, but wanted his land sold and requested the witness to levy; that on the day of this conversation, "the defendant Caddell, at his own suggestion wrote the advertisements, stating that he wanted them written correctly, and that the land in dispute, 2,200 acres, was worth from three to four dollars per acre."

The defendant testified in his own behalf in reply, and among other things, stated, "that he did write the advertisements, but wrote them at the instance of Nunnery, Deputy Marshal."

There was other testimony relating to conversations between Morrison and others in the absence of defendant; and also evidence tending to show the intimate, confidential relations which existed between Morrison and the defendant.

The defendant became the purchaser at execution sale, in the sum of fifty dollars, and obtained a deed for the land, which the plaintiff contended passed no title. His Honor reserved his opinion touching the validity of the deed, and submitted the following issue to the jury; "Did the defendant purchase the lands in controversy in fraud of the creditors of John Morrison?" To which the jury responded: "Yes."

Upon the question of law reserved, the Court was of opinion with the plaintiff, and adjudged, that a writ of *procedendo* be issued to the Probate Judge of Moore County &c.

Rule for a new trial. Rule discharged. Judgment for the plaintiff, from which the defendant appealed.

Messrs. John Manning and *Neill McKay* for the plaintiff.

Messrs. T. C. Fuller, W. A. Guthrie and *J. D. McIver* for the defendant.

PEARSON, C J. This is a proceeding to subject the land

mentioned in the pleadings to the payment of the debts of one Morrison, a deceased debtor, on the ground that Morrison procured his land to be sold under *fi. fas* against him with an intent to defraud his creditors. The defendant faintly traverses the allegation of fraud on the part of Morrison, and takes the ground that he is a *bona fide* purchaser for valuable consideration.

Two issues are presented by the pleadings; 1. Did Morrison procure his land to be sold under execution, with an intent to defraud his creditors? 2. Is the defendant a *bona fide* purchaser for valuable consideration?

As a preliminary objection, the counsel of defendant took the position, that the proceeding does not come within the operation of the statute under which it is instituted, and relied upon *Rhem* v. *Tull*, 13 Ire. 57. That case does not apply. There, the debtor never had the title, and his fraud was in causing the vendor to convey to his two sons. So 13th Eliz. could not be made to fit the case; for if the deed was void as to creditors, the title was still in the vendor. Here, the debtor had the title, and if the conveyance to the defendant be void as to creditors, it leaves the title in the debtor.

After a long trial, and the introduction of much evidence, a part of which is set out in the statement of the case, ("the other evidence touching the *bona fides* of the sales is not stated, as there was no exception to it,") His Honor submitted the following issue to the jury: "Did the defendant purchase the land in controversy in fraud of the creditors of John Morrison?" which issue the jury find in favor of plaintiff.

This issue is in substance, the second issue referred to above—no notice is taken of the first issue—from which it is to be inferred, that the evidence was so convincing in regard to the fraudulent intent of Morrison, as to force the defendant to yield it.

That issue being yielded by the defendant, it follows that all of the testimony relevant to it, and not relevant to the second issue, or competent as against the defendant, ought to have been withdrawn also; for instance, all of the testimony of the conversations of Morrison, in the absence of the defendant. But that was not done, and the jury were no doubt influenced by this testimony, to the prejudice of the defendant. For this he has a right to complain, unless upon the other evidence, the case was dead against him as a matter of law, so that, the Court ought to have charged. that upon the other evidence, the verdict should be against the defendant.

Put out of consideration all of the evidence except what the witness, Nunnery swore; "defendant, at his own, (Caddell's) suggestion, wrote the advertisements of sale, stating that he wanted them written correctly, that the land contained 2,200 acres, and was worth from three to four dollars per acre," and the fact that defendant bought the land for $50. We think upon this evidence, His Honor ought to have charged the jury, that assuming the fraudulent intent of Morrison, the defendant did not bring himself within the meaning of "a purchaser for valuable consideration," so as to escape from the taint of Morrison's fraud.

A donee, that is, one who takes without valuable consideration, must yield to the claims of creditors, on the idea, that the donor, being a debtor, was guilty of fraud, unless as provided by our statute, he retains property enough to pay his debts; and this, whether he knows of the fraudulent intent of the donor or not. But a purchaser for valuable consideration, is not required to yield to the claims of creditors, unless he had notice of the fraudulent intent of his vendor. *Lassiter* v. *Davis*, 64 N. C. 498.

From the manner in which the case is before us, the defendant has a right to assume, that he is not fixed with notice of Morrison's fraudulent intent, and may rest upon hi

title. That is so, provided he is a purchaser for valuable consideration.

The leading case upon the subject "what is a valuable consideration," *Fullenwider* v. *Roberts*, 4 Dev. & Bat. 278, covered only the meaning of the words, "purchaser for valuable consideration," in the statute 27th Eliz., as to subsequent purchasers, but the discussion in the opinion is extended to 13th Eliz., as to creditors. From that fountain we may drink. By it we learn, that in order to protect himself against the claim of a prior donee, or of a creditor, the party assuming to be a purchaser for valuable consideration, must prove a fair consideration, not up to the full value, but a price paid which would not cause surprise, or make any one exclaim, 'he got the land for nothing, there must have been some fraud or contrivance about it."

Suppose Morrison, with intent to defraud his creditors, had gone to Caddell and said, "you can have my land, (2,200 acres, worth say $5,000,) for $50," and defendant had said, "agreed, here is your money." Would any one say Caddell is a purchaser for valuable consideration? But in our case Morrison contrives it more cunningly. He procures a sale of his land to be made under execution, with an intent to defraud his creditors. That is admitted. And at the sale the defendant bids off the land, for not exceeding one-half of its value. Is he a purchaser for valuable consideration, within either 13th or 27th Elizabeth? We think not.

Suppose defendant, when he bid off the land for $50, really did not know, or have reason to believe that it was all a contrivance of Morrison to defraud his creditors, when he was afterwards informed of the fact, could he with a good conscience hold on to his bargain, and by attempting to do so, does he not convict himself of participation in the fraud of Morrison?

After a perusal of this very complicated case, we are satisfied that justice has been done, and do not feel called on to

disturb the verdict and judgment, for the error of His Honor in not withdrawing from the jury, testimony, which although competent and material upon the first issue, was incompetent, but not at all material upon the second issue.

No error. Judgment affirmed and modified by requiring plaintiff to pay back the $50 paid by defendant.

PER CURIAM. Judgment affirmed.

S. A. SHARPE v. FANNIE WILLIAMS and ALICE MARCH.

Judgment -- Execution Sale -- Purchaser -- Fraud.

1. Before the adoption of the Code of Civil Procedure, the levy of a senior execution on land did not prevent a levy and sale under a junior execution and a purchaser at such sale obtained a good title. The Code has constituted a docketed judgment a *lien* on the real property of the judgment debtor, and a purchaser at a sale under a junior docketed judgment acquires the estate subject to the lien of any prior docketed judgment.
2. A judgment obtained before the adoption of the Code, if docketed within a reasonable time thereafter, acquired a lien upon the real estate of the judgment debtor. Such judgments were not *prejudiced* by the adoption of the Code.
3. The "minimum" price at a sale for taxes under the U. S. Revenue Laws, is the least price which, in the opinion of the Collector, the property ought fairly to bring.
4. Where A, with intent to defraud his creditors, furnished money to his daughters (being indebted to them at the time) with which to purchase his land at execution sale, they not being parties to his fraudulent purpose and not buying for his use, and the daughters purchased the land for a fair value; *Held*, that the daughters obtained a good title.

Hervey v. *Edmunds*, 68 N. C., 243; *Woodley* v. *Gilliam*, 64 N. C., 649; *Isler* v. *Golgrove*, 75 N. C., 334; *Worthy* v. *Caddell* at this term, cited distinguished and approved.)

SHARPE *v.* WILLIAMS.

CIVIL ACTION for the recovery of Real Estate, tried at Fall Term, 1875, of CABARRUS Superior Court, before *Schenck, J.*

The suit was brought in the Superior Court of Davie county to recover the possession of two tracts of land, and certain lots in the town of Mocksville Upon affidavit of the plaintiff the cause was removed to Rowan county, and thence upon affidavit of the defendant, to Cabarrus county.

The facts as stated in the opinion of this Court, and those found by the jury upon issues submitted, are deemed sufficient to an understanding of the points decided

Findings of the Jury:

1. The judgments were had and made to defraud the creditors of W. B. March.

2. The defendants were not parties to this fraudulent purpose.

3. W. B. March furnished the defendants (his daughters) with the money to buy the lands sold by the Collector for taxes, with intent to defraud his creditors.

4. The defendants were not parties to this fraudulent purpose.

5. There was no agreement between W. B March and his daughters, that they should buy the lands for his, March's use, and to defraud his creditors.

His Honor was of the opinion, under the ruling in *Dobson* v. *Erwin* 1 D & B., 569, that the sale was absolutely void and passed no title to defendants, and adjudged that plaintiff recover possession of the lands, damages and costs. Appeal by defendants.

Messrs Wilson & Son, R F. Armfield, V. H Bailey and *W. J. Montgomery* for the plaintiff, submitted:

1. The judgments in the State Courts were not transferred as the law required, nor revived so as to render them capable

of a transfer. *Brem* v. *Jamison*, 70 N. C., 563; *Halyburton* v. *Greenlee*, 72 N. C., 316; *C. C. P.*, § 403 *et seq.*

2. The Collector's deed void, under the provisions of the *Internal Revenue Law*, § 30.

3. As the jury found that the bid was paid with the money of W. B. March, the sale was void. *Dobson* v. *Erwin*, 1 D. & B, 569.

Mr. J. M. McCorkle, for the defendants, submitted:

1. There is nothing in the Code requiring judgments to be docketed where levies have been made. Docketing under the Code creates the lien—here it is had already. It is more than a lien. *Bat Rev* ch. 17, § 254.

2. Levy and *ven. ex* placed property *in custodia legis*, and if execution issue on dormant judgment, debtor alone can take advantage of it. *Boyd* v. *Murray*, Phil. Eq., 238; *Mardre* v. *Felton*, 1 Phil Law, 279.

3. Validity of sale not to depend on March's intention alone. The fraud must enter into and affect the contract. *Lassiter* v. *Davis*, 64 N. C., 418; *Rose* v. *Coble*, Phil. Law, 517; *Stone* v. *Marshall*, 7 Jones, 300.

RODMAN, J. This was an action to recover several pieces of land, one of which was a certain lot in Mocksville.

The whole property belonged to William B. March. The plaintiff claims title under a purchase at a sale under execution against said March in September, 1869. The judgment was recovered in the Superior Court of Davie county in April, 1869, and was duly docketed in that county.

By his purchase the plaintiff obtained all the legal estate which said March had in the lands at the docketing of the judgment. The question to be determined is, did March have any estate at that date? The defendants say he did not, on several grounds:

1st. At Spring Term, 1853, of Davie Superior Court, one Foster recovered a judgment against said March. At the

same term one Welch also recovered judgment against March. No execution appears to have issued upon either of these judgments until June, 1868, when executions did issue which were levied on all the lands in controversy; and in 1871 the lands were sold under writs of *venditioni exponas* issued on those judgments, and purchased by defendants, who received deeds from the sheriff

It is clear that the mere levy of these executions in June, 1868, did not divest the estate of March, so as to invalidate the sale at which plaintiff purchased in September, 1869. Neither did the sale under executions in 1871 have effect by relation to invalidate such sale. That the judgments were dormant when executions issued on them was immaterial, as no one can take advantage of that irregularity except the defendant in the execution. *Hervey* v. *Edmunds*, 68 N. C. 243.

But it was settled law until the change made by the adoption of the Code of Civil Procedure in August, 1868, that the levy of a senior execution on land did not prevent a levy and sale under a junior execution, and that although the plaintiff in the senior execution might be entitled to the proceeds of the sale, the purchaser at the sale under the junior execution got a good title to the estate of the defendant. *Woodley* v. *Gilliam*, 64 N. C. 649.

The Code altered this with regard to docketed judgments and made them a *lien* on the real property of the defendants, and not merely a right to preference in payment from the proceeds of the sale of such property. So that on a sale under a junior docketed judgment, the purchaser acquired the estate subject to the lien of any prior docketed judgment, which must be satisfied in full before his estate was free from its incumbrance.

In *Isler* v. *Colgrove*, 75 N. C. 334, it was held, that where a judgment creditor docketed his judgment, with a reference upon the judgment docket to the lien acquired by a levy,

and continued by subsequent writs of *venditioni exponas*, to the date of docketing, such a judgment was a lien prior to a judgment docketed before that was, but docketed after the levy, the lien of which had been continued as above stated. This conclusion was necessary, because if Foy's judgment had been considered a prior lien on the land, Isler would have lost the priority which he had acquired by his levy and which was preserved to him by the Constitution. Art. IV., § 25.

Isler had docketed his judgment in a reasonable time after the enactment of the Code, and before any sale was made under the Foy judgment, so that purchasers under that judgment had notice of the prior lien.

In the present case, the judgments in favor of Foster and Welch were not docketed in a reasonable time, nor before the sale at which the plaintiff purchased, so that he had no notice of their existence, and they have never yet been docketed. We cannot, therefore, give any effect to the sale under them, to divest by relation back the estate of March, and thus defeat the sale at which the plaintiff purchased.

2nd. The defendants further claim to defeat the plaintiff's title by reason of a purchase by them on the 8th of April, 1871, at a sale under executions issued upon two judgments obtained by Fannie Williams and Alice March against W. B. March, at Spring Term, 1868, of Davie Superior Court. Levies were made on these judgments in October, 1868. They were never docketed as judgments are required to be by the Code which became law in August, 1868, in order to give a lien on real property.

If the plaintiffs in these judgments had caused them to be docketed in a reasonable time, and before the sale under the execution at which the plaintiff in this case bought, then the plaintiff would have bought with notice of them, and the case would have resembled that of *Isler* v. *Colgrove*. But they did not perform the condition, viz.; docketing

their judgments, which the law imposes as precedent to making judgments a lien on real property. They are not *prejudiced* by the changes made by the Code. Their executions and levies retained all the force and effect which they had by the law before the Code. Perhaps they would have been entitled to the proceeds of the sale under which the plaintiffs purchased. But as their judgments were not docketed, they had no *additional* force by reason of the Code, and the sale notwithstanding these judgments and liens, passed the estate of W. B. March to the purchaser, unencumbered by these judgments. Most of the remarks made respecting the judgments of Foster and Welch, are applicable also to these.

As, for these reasons, we are of opinion that these judgments do not affect the plaintiff's title, it is unnecessary to notice the allegation that the judgments in favor of the defendants were fraudulent.

3rd. The defendants alleged that the estate of W. B. March had been divested out of him before the purchase by plaintiff in September, 1869, by a sale by a Collector of United States Internal Revenue on the 6th of January, 1869. As far as appears to us upon the record, this defence applies only to one lot in the town of Mocksville known as the Jesse Hendrix lot, &c. (which appears to have been sold on 6th February, 1869) and to some other piece of land which is not described with any certainty. We cannot say therefore whether this other piece of land described in the deed referred to, but not exhibited, covers all the other lands described in the complaint or not. Our opinion to this extent must be uncertain.

We suppose that the deed referred to, but the contents of which are not stated, does not, along with that exhibited, cover all the lands described in the complaint, but leaves certain pieces to which the defence now under consideration does not apply. If we are mistaken in this it is the fault of

the parties in presenting their case, and it can be corrected.

We proceed then to consider the validity of the sale by the Collector of United States Internal Revenue on the 6th of February, 1869.

Any difficulties which the question might in itself present, are increased by the uncertain and even contradictory manner in which the facts are stated in the record.

It appears however, that taxes to the amount of $3,580, were assessed against W. B. March and Hampton, under the Act of Congress for collecting Internal Revenue. This tax not being paid, the Collector offered for sale a certain lot the property of W. B. March, being one of the pieces of land demanded in the complaint, and perhaps also other pieces of land, described in the complaint, of which no description is furnished in the case, and it appears from the deed filed as part of the case, that one Peebles became the purchaser of this lot. Notwithstanding this, it seems to be assumed throughout the case, that the defendants, who are the daughters of W. B March, were the purchasers, and we must suppose that there was evidence that Peebles purchased for them. Only one objection is taken to the regularity of the Collector's sale, viz: That the Collector ought to have fixed the amount of the taxes owing ($3,580,) as the minimum price of all the property, whereas he offered it at a minimum price of $354. It seems from the deed to Peebles, that the minimum price of the Hendrix lot was $18. We do not understand the Act of Congress as requiring the Collector to regard the amount of taxes due, as the minimum price. Where several articles are sold separately, such a rule would be impracticable, and even absurd. What is meant by the minimum, is what the Collector thinks is the least price which the property ought fairly to bring, which shall be at least equal to certain costs mentioned in the Act.

The plaintiff however, seeks to impeach the title claimed under this sale, upon the ground that W. B. March with in-

tent to defraud his creditors, furnished the money to his daughters to buy the property with. The jury, in response to an issue submitted to them, find that he did so furnish the money. But they further find, that the defendants were not parties to his fraudulent purpose, and did not buy for his use. It is also stated in the case, that at the time of this sale, W. B. March was indebted to the defendants, in what amount is not stated, but we understand the case as meaning in at least as large a sum as the purchase money, which in the case of the Hendrix lot was $30. This being so, there is no evidence to support the finding of the jury as to March's intent, nor could his intent, if it were as found, affect the defendants, who purchased *bona fide* and for value.

It is said in *Worthy* v. *Caddell*, at this term, that the proper inquiries in such cases are, *First:* Did the defendant in the execution *procure* his property to be levied on and sold with intent to defraud his creditors?

Second: Did the purchaser, purchase for value, and without notice of the fraudulent intent?

It may be doubted if mere notice of the fraudulent intent, would invalidate the purchase of one who did nothing in aid of the intent, and who purchased for value, in its legal sense in such cases. That question however need not be discussed, as it does not arise here.

We are of opinion that upon the facts stated in the case, the estate of W. B. March in the property sold at the Collector's sale, passed to the purchasers at that sale, and that as to that property, the plaintiff could acquire no title by his subsequent purchase under execution. There is error.

PER CURIAM. *Venire de novo.*

*HENRY R KORNEGAY, Administrator of Richard B Hatch and others, v. JOHN D. SPICER.

Mortgage -- Power of Sale.

1. A mortgagee with a power of sale is a trustee, first, to secure the payment of the mortgage debt, and second, for the mortgagor as to the excess.
2. This power is to be watched with great jealousy, and when there is any unfairness, such as complicated accounts, &c., or any suggestion of oppression, such as usury, &c., the mortgagee will be enjoined from selling until the balance due is ascertained and all equities between the parties declared.

(*Whitehead* v. *Hellen* at this term, cited and approved.)

APPEAL, from a Decretal Order made on the 26th of February, 1876, at Chambers, by *McKoy, J.*

In January, 1874, the intestate of plaintiff executed a mortgage deed to the defendant, conveying certain lands in Duplin and Wayne counties to secure the payment of a note for $1,815.00, with a power to sell the land in default of payment. It was alleged that the note was usurious, but denied in the defendant's answer.

The defendant and the plaintiff's intestate joined in a deed to one Flowers, conveying that part of the land situated in Wayne county in consideration of $2,500. The defendant admitted that $1,470 of this sum was received by him on the mortgage debt. The defendant and said intestate subsequently entered into a written agreement that the Duplin county lands should be conveyed to intestate on payment of $3,530; but if said sum was not paid by a certain time, the defendant should have the power to sell for cash at public

* Faircloth J. having been of counsel in the Court below, did not sit on the hearing of this case.

sale. The said intestate failed to pay, and defendant sold the said lands on November 27, 1874, when one Griswold became the purchaser at $1,225. It was alleged in the answer that Griswold was a "judgment creditor," and that the defendant expected to get the title from Griswold by paying his debt, which he afterwards did; he making a deed to Griswold who reconveyed to defendant. There were other facts relating to various dealings between the parties, the statement of which is deemed unnecessary.

The plaintiff demanded an order that the defendant be perpetually enjoined and restrained from selling or conveying the lands in Duplin county, and that he be declared a trustee for the plaintiffs, who are the widow and heirs at law of Richard B. Hatch. An injunction was granted by His Honor, and the defendant upon notice given, moved to dissolve the same, which motion was not allowed, and the injunction was continued to the hearing. Defendant appealed.

Messrs. Smith & Strong, for the plaintiff, cited *Hunt* v. *Bass*, 2 Dev. Eq., 292; *Brothers* v. *Brothers*, 7 Ire. Eq., 150; *Patton* v. *Thompson*, 2 Jones Eq., 285; *Shearin* v. *Hunter*, 72 N. C., 493; *Elliot* v. *Pool*, 3 Jones Eq., 17; *Miller* v. *Washburn*, 3 Ire. Eq., 161; *Monroe* v. *McIntyre*, 6 Ire. Eq., 65; *Allen* v. *Pearce*, 6 Jones Eq., 309.

Mr. D. L. Russell, for the defendant.

PEARSON, C. J. The principles involved in this case, are discussed and in the main settled by *Whitehead* v. *Hellen* decided at this term.

1. A mortgagee with a power of sale, is a trustee, in the first place to secure the payment of the debt secured by the mortgage, and in the second place for the mortgagor, as to the excess. The idea of allowing the mortgagee to foreclose the equity of redemption, by a sale made by himself, instead of a decree for forelosure and a sale made under the order of

the Court, was yielded to, after great hesitation, on the ground that in a plain case, when the mortgage debt was agreed on and nothing was to be done except to sell the land, it would be a useless expense to force the parties to come into equity, when there were no equities to be adjusted, and the mortgagor might be reasonably assumed to have agreed to let a sale be made after he should be in default. But this power of sale has always been watched with great jealousy and when there was any unfairness, as for instance, if there was any complication in accounts, showing what was the balance due and the mortgagee failed to demand payment of an ascertained balance, or when there was a suggestion of oppression—usury and the like—the Court would enjoin the mortgagee from selling, until the balance due was found and all other equities between the parties, duly declared. Or if a sale had been made, the Court would require the mortgagee to account for the fund, and show that all things had been done with perfect fairness and after the mortgagor had been notified of the balance due and had been allowed reasonable time to raise the money. Coot on Mortgages, 124.

In this case the accounts were very greatly complicated by the many dealings of the parties; in fact, there is no telling from the statement of the answer, how the balance, if any, stood, and there is pregnant evidence of gross usury and oppression practiced upon a necessitous man; so the plaintiff has a plain equity to hold the defendant to account and treat him as still holding the land as trustee.

2. The defendant in legal contemplation did not *sell* under the power in his deed. Griswold bought the land for him at a sale purporting to be made under the power (what price was paid by Griswold does not appear) and all that is known of the matter, is, that Griswold bid in the land for Spicer, and Spicer to induce him to do so agreed to pay off a debt, which he held against Hatch, and afterwards Spicer

executes a deed for the land to Griswold, who thereupon executes a deed to Spicer. Under this deed made by "a man of straw," Spicer sets up an absolute title, and claims to have acquired the equity of redemption of Hatch, and to have been fully freed from all confidence and trust reposed in him!

3. The case does not stop here. Spicer after thus fortifying himself behind the deed of his creature, Griswold, at the earnest instance of his victim, Hatch, without rendering any account or showing what he was out of pocket, which by his own showing did not exceed the sum of $2,000, agrees to sell the land to Hatch at the price of $3,500, secured by the title of the land, with a power of sale in the event that said sum was not paid at the day, and is now about to sell under the power, although the representatives of Hatch have required him to come to an account, and offer to pay any balance that may be found, if any, to be due to him, upon their many "actings and dealings."

We think no plainer case could be presented for the interference of a Court of Equity to prevent gross oppression and a violation of trust.

There is no error in the decretal order continuing the injunction until the hearing.

PER CURIAM. Judgment affirmed.

WILLIAM WHITEHEAD v. JOHN F. HELLEN.

Mortgage -- Power of Sale -- Purchase by Mortgagee.

A mortgagee who purchases at a sale made by himself under a power of sale in the mortgage deed, does not acquire an absolute estate. Such a sale does not alter the relation existing between the parties.

(See *Kornegay* v. *Spicer* at this term.)

CIVIL ACTION for the recovery of land, tried at Fall Term, 1876, of PITT Superior Court, before *Moore, J.*

The defendant executed a mortgage deed to J. W. May, conveying the land in controversy. May assigned the note secured by the mortgage to the plaintiff, Whitehead. The plaintiff sold the land under a power contained in the deed and without a decree of foreclosure, and one Bernard bought as the agent of plaintiff. The plaintiff executed a deed to Bernard and Bernard reconveyed to plaintiff. The defendant insisted that the sale was void and passed no title, and asked to be allowed a day in Court to redeem said land. Judgment was rendered in favor of the plaintiff and the defendant appealed.

Mr. D. M. Carter, for the plaintiff.
No counsel for the defendant.

PEARSON, C. J. If the action had been by the mortgagee against the mortgagor, simply to get possession of the land, the defendant could not have resisted a recovery.

But the action is by an alleged purchaser claiming an absolute estate, under a sale made by the mortgagee by virtue of a power of sale conferred in the mortgage deed. The pleadings present the important question: Can an equity of redemption be foreclosed in this shorthand way? In other

words, can the mortgagee, under a power of sale, buy the land of himself?

To make a valid sale there must be two parties, a vendor and a vendee; a man cannot sell to himself.

Suppose a mortgagee under a power of sale offers the land for sale and bids it in; he acts for the benefit of the trust fund confided to him, and the matter stands as before. The debtor's "equity of redemption" stands as before, because he has done nothing to release or to extinguish it. Indeed, Courts of Equity look with jealousy upon all dealings between trustees and their *cestuis que trust;* and if this mortgagor had by deed released his equity of redemption, we should have required the plaintiff to take the burden of proof and satisfy us that the man, whom he had in his power, manacled and fettered by a mortgage and a peremptory power of sale, had, without undue influence and for fair consideration, executed a release of his right to redeem the land.

In our case, so far from a release by the defendant of his equity of redemption, he avers that he is still entitled to it, and prays that the land may be sold by a Commissioner of the Court, unless he is able to pay off the mortgage debt at a time to be fixed by the Court.

This prayer is a reasonable one, provided the deed of the plaintiff to Bernard and the deed of Bernard to plaintiff, have not by the forms of legal conveyances, shut the door to all inquiry into the matter.

"Once a mortgage, always a mortgage," is a maxim in equity, and our question is, how has the defendant lost his equity of redemption? what price has he been paid for it?

The plaintiff's right hand says to his left hand, "I will sell you Hellen's equity of redemption for $950, to be credited on the mortgage notes." "Agreed," says the left hand, "I will hold the balance of the debt over him."

If Hellen had by deed surrendered his equity, in consideration of a release of the debt by plaintiff, the Court

would have held the plaintiff to proof of fairness. Here it is admitted that Hellen did not concur in the transaction; what has become of his equity of redemption?

Courts endeavor to take hold of the substance and not the shadow, and will not allow the administration of justice to be evaded by forms, deeds or "men of straw." By way of illustration, in our case, the plaintiff feeling oppressed by the absurdity of a man's buying at his own sale, gets one Bernard to buy the land for him. He and May, the original mortgagee, convey to Bernard and he conveys to plaintiff. Bernard is "a man of straw."

But the plaintiff says, "I am no man of straw, I paid money for this mortgage debt, and bought the land at public sale." "True," say the Court, "but did you thereby relieve yourself from the equity of redemption? 'Once a mortgage always a mortgage' is a trite maxim of Courts of Equity. By your purchase of the notes secured by the mortgage, you acquired all of the rights of May, and put yourself in his place—he could not have bought at his own sale—and it follows that you could not buy at a sale, which was made by you, and of which you had the entire control."

Mr. Carter relied on a supposed analogy between this case and that of a sale by a Sheriff under execution and a sale by a trustee under a deed in trust for creditors. The analogy does not hold. The Sheriff is an independent party selected by law to make the sale; the trustee is an independent party selected by the debtor and his creditors to make the sale; neither the Sheriff nor the trustee can buy at his own sale, and the right of creditors to buy, rests on the ground that the sale is not made by them, and they have no contro over its management. Whereas in our case, the plaintiff had, without the concurrence of the defendant, acquired an exclusive right to conduct the sale—it was in effect made by him, and May was his servant to all intents and purposes, and the plaintiff was filling the character, both of vendor

and vendee, with the advantage of selling for cash and having the two mortgage notes as a margin to bid on.

We have come to the conclusion that the alleged sale does not confer upon the plaintiff an absolute estate, discharged of the defendant's equity of redemption, with the more readiness, because the plaintiff does not thereby lose his debt and the land can be sold under a decree of foreclosure with greater fairness and more regard to the rights and equities involved. And whoever may become the purchaser, will have the assurance of getting a good title under a decree which will be binding upon all parties.

The question whether the power of sale conferred by this mortgage deed is not inoperative and void for vagueness and uncertainty, in this—the sale is to be made "in the manner prescribed by law," whereas in this State there is no law which prescribes the manner of making sales under a power of sale in a mortgage deed, and this power if valid, would authorize a sale, public or private, for cash or on credit, with or without advertisement, and without making a demand on the mortgagor to pay or be foreclosed by a sale, is one of much importance, but need not be decided in this case.

There is error. Judgment reversed, and case remanded to the end that the proper orders may be made, and the land be sold under a decree, unless the mortgage debt be paid.

PER CURIAM. Judgment accordingly.

*TRUSTEES OF THE UNIVERSITY v. THE NORTH CAROLINA RAIL ROAD COMPANY.

Statute -- Conflict of, with Constitution.

1. The provisions of Ch. 236, Laws 1874–'5, which enacts "that all dividends heretofore declared or which shall hereafter be declared by any corporation, company or association, whether chartered or not, which shall not be recovered or claimed by suit by the parties entitled thereto for five years after the same were or shall be declared, shall be paid by the corporations, &c., to the Trustees of the University," are in conflict with article IX, § 6, of the Constitution.
2. The word "dividend" as used in that section of the Constitution is synonymous with "distributive shares" and is used as a convertible term meaning the same thing, viz: "dividends or distributive shares of the estates of deceased persons."

(*University* v. *Maultsby* 8 Ire. Eq. 257, cited and approved.)

CIVIL ACTION, tried at Fall Term, 1876, of ALAMANCE Superior Court, before *Kerr*, *J.*

The plaintiffs alleged, that they were entitled to all the dividends declared by any corporation chartered under the laws of this State, which have not been recovered or claimed by the parties entitled thereto, for five years after said dividends were declared, by virtue of the provisions of Chapter 236, Laws 1874–'5; that the defendant company had, at divers times, declared dividends to its stockholders, which dividends have remained unpaid for more than five years, for the reason, that they have not been received or claimed by the parties entitled thereto; and demanded judgment for an account of the dividends declared and unclaimed as aforesaid, to the end that the amount ascertained might be paid to the plaintiffs.

*Faircloth J. being a Stockholder in defendant Company did not sit at the hearing of this case.

The defendant demurred to the complaint and assigned as cause:

1. That according to the true intent and meaning of Art. IX, § 6, of the Constitution, a cause of action may be given for dividends or distributive shares of the estates of deceased persons, but not against the defendant.

2. That the Act of Assembly referred to in the complaint is unconstitutional and inoperative, so far as it purports to give to plaintiffs a right to claim dividends declared to stockholders

3. That the defendant company has the right to declare dividends, and the stockholders to receive the same when they see fit, and it is beyond the power of the Legislature to invade this private right by an enactment.

His Honor sustained the demurrer and dismissed the action. Judgment in favor of defendant for costs. Appeal by plaintiffs.

Messrs. Battle & Mordecai, for plaintiffs.
Messrs. Dillard & Gilmer, for defendant.

BYNUM, J. The Constitution of the State, Art. IX, § 6, declares "that all the property which has heretofore accrued to the State, or shall hereafter accrue from escheats, unclaimed dividends, or distributive shares of the estates of deceased persons, shall be appropriated to the use of the University."

Purporting to carry into effect this constitutional provision, the Legislature, by an Act ratified the 22nd of March, 1875, enacted: "That all dividends heretofore declared, or which shall hereafter be declared, by any corporation, company or association, whether chartered or not, which shall not be recovered or claimed by suit, by the parties entitled thereto, for five years after the same were or shall be declared," shall be paid by the corporations, &c., to the Trus-

tees of the University of North Carolina; and they are authorized to sue for and collect the dividends and hold them without liability for profit or interest; and if no claim is preferred within ten years, then to hold the same absolutely.

The question presented is, whether the provisions of the Act are warranted by Art. IX, § 6, of the Constitution, which we have cited. We do not think they are. "Dividends" is a word of very general and indefinite meaning. It has, in law, no particular and technical signification. As it is used in the Constitution we think it is synonymous with "distributive shares," and used as a convertible term, meaning the same thing, to-wit, "dividends or distributive shares of the estates of deceased persons." It is true, the punctuation of a comma after the word "dividends," as the section is presented, would seem to favor the plaintiff's construction, but when, by disregarding this punctuation a construction is given to the Constitution, which makes it consistent with its other parts, and those great rights it is intended to secure the Courts cannot hesitate to adopt that course. Cooley, 171. Unless the word "dividend" is restricted by its context to a particular subject, it will apply to and embrace many other estates and interests, with as much propriety as those of corporations and companies, but which were certainly not supposed to fall within its scope and operation; as for example, the dividends of a bankrupt's estate, and dividends to be paid by the more to the less valuable shares in proceedings in partition. Rat. Rev., ch. 84, § 5. Such a general and questionable application of the term, we think, was not designed by the framers of the Constitution.

It has been heretofore decided that the University is a public institution and body politic, founded by the State on the public funds and for a general public charity; and that an administrator is an officer appointed by the State, in the exercise of a political trust, to take charge of dead men's es-

tates; and that getting his office and the possession of the assets from public authority, he must execute the office and account for and deposit the property, under the direction of the law. It is therefore held to be competent for the Legislature to enact, that an administrator should, after a reasonable time, pay an unclaimed surplus of the estate, either to the University or other person charged by law with the keeping the same, for the benefit of creditors and next of kin. It is merely changing the fund from one agency of the State to another without changing the trust. *University* v. *Maultsby*, 8 Ire. Eq. 257.

But assuming that the State may, in analogy to the power it originally possessed in England, dispose of the surplus of a deceased person's estate, after the payment of his debts, by first transferring the custody and use of it to the University, and finally the absolute property, we know of no principle or authority which extends that doctrine to the estates of living persons or existing private corporations. A dividend declared by and due from a private corporation is a debt due to the share holder and is recoverable as such. If A owes a debt to B, and the Legislature should enact, that if B fails to recover or sue for it within five years, the debt shall be taken from B and given to C, it will scarcely be denied that this would be confiscation and prohibited by the § 17, Art. 1, of the Constitution. The contention of the plaintiff is not against an administrator for a surplus of a dead man's estate unclaimed in his hands, but it is against a corporation, to recover a debt which that corporation owes to a living man, the owner of the dividend, who sees fit not to pursue his debtor for the present. But if the legislative Act is based upon the presumption, that the owner of the dividend has died, leaving no claimant to his property, it does not help the plaintiff's case, for in that event, the debt or dividend must devolve upon a legal representative and be disposed of in the due course of administration, first to

creditors, and then to the next of kin. In *Williamson* v. *Leland*, 2 Pet. 657, the Court said: "We know of no case in which a legislative Act to transfer the property from A to B without his consent, has ever been held a constitutional exercise of the legislative power in any State in the Union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced." *Ferrett* v. *Taylor*, 9 Cranch, 43. Cooley on Const. Lim. 165-'6.

The counsel for the plaintiff endeavored to support their case, by drawing an analogy between the operation of the statute of limitations and the Act under which they claim. The analogy fails them. The statute of limitations bars the remedy only, and the debtor retains the possession of his property. But the Act under review, not only bars the creditor of his right of recovery, but takes from him his property, transfers it to another and enables that other to recover and own it. The creditor not only loses his property, but by the magic of this Act and without consideration received, it is vested absolutely in another—it matters not whether that other is the State or its appointee.

But again: the defendant is a chartered corporation, founded by individuals on their own funds and for their own emolument. The government of the corporation is fixed by the charter and is unalterable except by its own consent. Its property also is as secure as that of the individual citizen. Whatever advantages it has obtained by the grant of the State, they are exclusive to the corporation. *University* v. *Maultsby*, 8 Ire. Eq. 257. All contracts between the corporation itself and the Stockholders, which are made pursuant to the charter, are equally inviolable. So whether we consider the corporation as a trustee for the dividend holder, as was insisted by the plaintiff, or as a debtor to the share holder for the dividend declared, both relations between the parties are the result of contract, and the State is

inhibited from stepping between the corporation and its Stockholders and changing or modifying these contract relations between them, or between the State and the corporation, without their concurrence. 4 Wheat. 518; 6 How. 310; 3 How. 133. Cooley on Const. Lim. 126–'7.

What claims, if any, the defendant corporation may have upon the unclaimed dividends of its Stockholders, depends upon the provisions of its charter and its by-laws. However that may be, forfeitures of rights and property cannot be adjudged by legislative act; and confiscations, without a judicial hearing, after due notice to the party to be affected, would be void, as not being by due process of law. In the case before us, the owners of the unclaimed dividends are not parties to the action, and parties cannot, even by their misconduct, so forfeit their rights, that they may be taken from them without judicial proceedings in which the forfeiture shall be declared in due form. Cooley on Const. Lim. 363. So, whether we view the Act of the Legislature in the light of the Constitution of the United States as impairing the obligation of a contract, or in the light of our State Constitution, as conflicting with the provision which declares, that no person shall be disseized or deprived of his property but by the law of the land, or whether it be considered in the light of plain and obvious principles of common right and common reason, we cannot find sufficient support to authorize the Court to declare it to be a valid and subsisting law. It was based upon a misapprehension of the proper construction of Art. IX. § 6, of the Constitution.

There is no error.

PER CURIAM. Judgment affirmed.

JOSEPH H. SKINNER v. CAROLINE WOOD and others.

Will -- Construction of -- Power of Executor to Sell Land.

1. Where A dies leaving a last will and testament, appointing B and C his Executors, "with discretionary powers to settle my estate as they judge best for the interests of my heirs at law;" *Held*, That the Executors have no power to sell the lands of the testator.
2. To confer a power to sell land under a will, plain and express words are necessary; or the power must be implied by the imposition of duties on the Executor, which cannot be performed except by a sale.

CIVIL ACTION tried at Fall Term, 1876, of CHOWAN Superior Court, before *Eure, J.*

The only question presented by the case agreed, for the decision of this court, is, whether the will of John Skinner gave to his Executors the power to sell the land in dispute. The opinion delivered by Mr. Justice Rodman contains a sufficient statement of the facts.

His Honor in the court below was of opinion that the Executors had the power to sell the land; and it appearing that the sale was made in good faith and that the amount was a fair price, he gave judgment for the defendants, and the plaintive appealed.

Messrs. Smith & Strong, for the plaintiff.
Messrs. Gilliam & Pruden, for the defendant.

RODMAN, J. 1. This action is by Joseph H. Skinner to recover a piece of land. The defendants are C. M. Wood, W. C. Wood and Lavinia Skinner. The complaint alleges that the plaintiff and the said Lavinia are the heirs of John Skinner, deceased, and own the land by inheritance from him, and that the defendants Wood (not including Lavinia) are in possession and wrongfully withhold it from plaintiff;

No reason is stated why Lavinia is not made a party plaintiff or why she is made a defendant. As she is not in possession, no judgment can be recovered against her in this action. As it appears by the complaint that the plaintiff is entitled to half of the land only, his recovery, if he be entitled to recover at all, must be limited to that estate. If it appeared, as it does not, that Lavinia had conveyed her moiety to the other defendants, the plaintiff could not recover without proof of an actual ouster.

Upon the complaint alone, without reference to any defence, the plaintiff is entitled to recover a moiety of the land sued for.

2. The defendant Lavinia does not answer, and as no judgment was asked against her, there was no need for her to do so.

The other defendants answer and present new matter in defence. It is unnecessary to state it, inasmuch as by presumption of law it is denied, (C. C. P. § 127,) and there is no evidence in support of it except what appears in the case agreed, which we must take as stating all the facts capable of proof, bearing on the controversy between the parties. Perhaps if it had appeared that at the execution of the will, the testator had been possessed of personal property greatly exceeding his debts in value, an argument might have been drawn from that fact, that the testator did not anticipate as possible, a necessity for the sale of his land and therefore did not intend to give such a power to his executors. If on the contrary, it had appeared that his personal property was manifestly inadequate to the payment of his debts, it would have furnished an argument in favor of his having intended to give such a power. As the condition of the testator's estate in respect to his debts does not appear in the case agreed, we are unable to put ourselves in his place as to the circumstances or to draw any conclusion as to his intent in his will, except from the mere words of the will.

3. From the case agreed, it appears that John Skinner, the ancestor of the plaintiff, died in December, 1860, leaving a will of which the following is a copy:

"1, John Skinner, of Athol, Chowan County, State of North Carolina, nominate, constitute and appoint William Wood and John Skinner of Perquimans as my executors, with discretionary powers to settle my estate as he shall judge best for the interests of my heirs at law."

The will is dated 27 November, 1860.

The executors qualified, and believing *bona fide* that they were empowered to sell the land of their testator, and that it was for the benefit of his heirs to do so, they did sell to Edward Wood, (whom the defendants Wood represent) in November, 1863. The testator was indebted to said Edward Wood by a bond for $15,000, and the executors took in payment for the land the said bond and $15,000 in Confederate bonds and currency. It is admitted that the price was not inadequate at the time of the sale and that all parties acted in good faith, and also that Edward Wood after his purchase expended some considerable sum of money in repairing the buildings on the land and in other improvements.

Thus, it is seen, that the simple question presented, is, did the will give to the Executors a power to sell the land? And this question we must determine upon the mere words of the will, without the aid of any extrinsic circumstances capable of affecting their construction.

We are of opinion that it did not. Ordinarily the estate and control of executors are confined to the personal property of the testator. To extend it to his land, he must give them an estate in the land or a power to dispose of it. Clearly no estate in the land is given by this will. A power over the land—for example, to sell it—must be given by plain and express words, or it may be implied by the imposition of duties on the executors which cannot be performed

except by a sale; for example, to pay the debts of the testator with his lands or to divide the proceeds among his heirs, &c. In the present case there are no words expressly giving to the executors a power to sell. And no duties are imposed which the testator must have known would require the executors to sell in order to perform them; as in the examples given above. The words of the will give to the executors a fuller control over the personal estate, than their mere nomination as executors would have given them. They are empowered to deal with it at their discretion, provided their discretion is honestly exercised. The words are satisfied by construing them as limited to this effect. There is nothing in them requiring us to extend their meaning so as to embrace a power to sell land, which is a power beyond those usual to executors; and in the absence of a reason for so extending them, we would not be justified in doing so If words taken in a limited sense, as confined to certain usual objects, or to giving certain usual powers, have a meaning which may reasonably fulfil the intention, there is no ground for interpreting them as extending to other less usual objects or powers, unless a reason for doing so can be found in the circumstances of the party using them, at the time they are used.

Of course this opinion is confined to the single point presented on the record. The liability of the heirs of the testator for the debt, the right of the executors or of the creditor to compel a sale of the land through the Courts and the right of the purchaser to be indemnified for his improvements to the extent to which they have increased the value of the land, are questions not presented and which we have not taken into consideration.

The judgment below is reversed, and the plaintiff will have judgment in this Court, to recover one half the land described in the complaint, with costs against the defendants

Wood. The defendant Lavinia will recover her costs of the plaintiff.

PER CURIAM. Judgment reversed.

BENEDICT, HALL & CO. v. HENRY G. HALL.

Notary Public -- Affidavit for Order of Arrest.

1. A non-resident Notary Public has no authority to take an affidavit to be used in the Courts of this State. (Bat. Rev. ch. 76.)
2. But where an order of arrest was made upon such affidavit, and a counter affidavit was filed by the defendant, and a supplemental one by the plaintiff which was *duly* verified; *Held*, That the Judge below erred in vacating the order.

(*Clark* v. *Clark*, 64 N. C. 150, cited and approved.)

MOTION to vacate an Order of Arrest obtained in an action brought in CUMBERLAND Superior Court, heard at Chambers on the 26th of December, 1876, before *Buxton, J.*

The plaintiff firm, doing business in the city of New York, sold a bill of goods to the defendant to a considerable amount and claimed that there was still due the sum of $1,741.76.

It was alleged that the defendant represented himself as having a surplus of assets over liabilities amounting to $18,350, by means of which he obtained a false and fictitious business credit. The plaintiffs, in their demand for judgment, asked that defendant be adjudged guilty of fraud in contracting said debt, and also in removing and disposing of his property with intent to defraud his creditors. The defendant in his answer stated, among other things, that he was entitled to further credits upon said debt; that the representations made as to his assets were true at the time

they were made and he denied having disposed of his property with intent to defraud the plaintiffs or any of his creditors.

Upon affidavit of plaintiffs the defendant was arrested and filed a counter affidavit, and thereupon the plaintiffs replied with a supplemental one. The Clerk vacated the order as being improvidently granted, on the ground; 1. "Because H. L. Smith, a Notary Public of the State of New York, before whom the affidavit of plaintiff was made, was not authorized by the laws of this State to take affidavits to be used in the Courts of this State; 2. Because the affidavit does not comply with the provisions of the C. C. P. relating to verification of pleadings, it being sworn 'to the best of the knowledge, information and belief' of the affiant, instead of being sworn to as prescribed in section 117 of the Code."

From this ruling the plaintiffs appealed to the Judge of the District, who affirmed the order of the Clerk. Appeal by plaintiffs.

Messrs. Merrimon, Fuller & Ashe, and *W. A. Guthrie*, for the plaintiffs.

Messrs J. C. McRae and *J. W. Hinsdale*, for the defendant.

RODMAN, J. We agree with the Probate Judge and with the Judge of the Superior Court, that the affidavit on which the order of arrest was made was defective in the two particulars pointed out by the Probate Judge.

A Notary Public is recognized by the universal law of civilized and commercial nations. But his powers are confined to the authentication of commercial papers and to the protesting of bills of exchange and the like.

The Act, Bat. Rev. ch. 76, is evidently confined to Notaries Public in North Carolina, and a Notary Public resident out

of the State has no authority to take affidavits to be used in the Courts of this State.

If the defendant had moved to vacate the order of arrest for these defects, without filing counter affidavits, we think that his motion should have been allowed.

But he filed counter affidavits and thus opened the door to the plaintiff to file affidavits supplemental to his original one, which were duly verified. The case was thus brought within the decision in *Clark* v. *Clark*, 64 N. C. 150.

The Judge was therefore in error in vacating the order of arrest for the reasons assigned by him. We have considered those reasons only.

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

Let this opinion be certified.

PER CURIAM. Judgment reversed.

GEORGE W. SWEPSON v. JOSIAH TURNER.

Officers of State -- Salaries exempt from attachment.

The salaries of the officers and the pay of the employees of the State are not subject to any judicial process at the instance of creditors.

CIVIL ACTION, tried at June Term, 1876, of WAKE Superior Court, before *Watts, J.*

The plaintiff recovered a judgment against the defendant for $1,368. An execution was issued and returned *nulla bona*. Thereupon a Supplemental Proceeding was instituted and the judgment debtor ordered to appear before E. R.

Stamps, Esq., who had been appointed Referee by the Court. On the 25th of November, 1876, the Referee reported that the amount due the defendant by the State for services rendered as Public Printer was about $500 and that several hundred dollars additional would be due on the 17th day of December, 1876, at which time the contract, entered into between the State and defendant, would expire. Upon the return of the report, His Honor made an order appointing G. Rosenthal, Receiver of the funds mentioned therein, and on the 9th of January, 1877, the defendant moved to vacate said order, which motion was overruled and the defendant appealed to this Court

Messrs. Merrimon, Fuller & Ashe, for plaintiff.

Messrs. Moore & Gatling and *Badger & Devereux*, for defendant.

READE, J. The salaries of the officers and the pay of the employees of the government, are to enable them to serve the government. And their expectations or their rights against the government for payment for services rendered or to be rendered, are not subject to any judicial process at the instance of their creditors. This is so from public policy, else it might be in the power of creditors to embarrass the government. This is so manifest and so well supported by authorities that it is unnecessary to elaborate it. *Buchanan* v. *Alexander*, 4 How. U. S. R. 20. *Bliss* v. *Lawrence*, 58 N. Y. 445. *Bank of Tennessee* v. *Debrell*, 3 Sneed, 379. *Buckly* v. *Eckert*, 3 Penn. 368.

There is error. This will be certified.

PER CURIAM. Judgment reversed.

STATE v. RUFUS HOVIS.

Indictment -- Removing fence, &c.

Where A claimed title to a cultivated field in possession of B and removed the fence therefrom; *Held*, to be indictable. (Bat. Rev. ch. 32, § 93.)

(*State* v. *Graves* 74 N. C. 396, and *Simpson* v. *Summey*, *Ibid*, 551, cited and approved.)

INDICTMENT under the Statute (Bat. Rev. ch. 32, § 93,) for removing a fence surrounding a cultivated field, tried at Fall Term, 1876, of LINCOLN Superior Court, before *Schenck*, *J.*

It appeared that the prosecutor owned a store near Ore Bank in Lincoln County and a small parcel of land adjoining, which he had in cultivation. He was in possession in 1875 and continued therein until April 1876, when the defendant pulled down the fence and hauled away the rails. It further appeared that about six years before this occurrence, the defendant fenced and cultivated said land, under a lease for 99 years, which lease was not registered.

Under the instructions of His Honor, the jury rendered a verdict of guilty. Judgment. Appeal by defendant.

Attorney General, for the State.
No counsel, for the defendant.

FAIRCLOTH, J. It was decided in *State* v. *Graves*, 74 N. C. 396, that rails made into a fence are real property and that removing them would not be a forcible trespass on personalty nor larceny at common law. This principle however does not affect the present case, as the offence charged is embraced by the express terms of § 93, ch. 32, Battle's Revisal.

The prosecutor was in the actual quiet possession of the fence around his field in cultivation and had been for more than a year when the defendant pulled it down. This possession could not be disturbed by any adverse claimant in this "short hand" way, because it would, in most cases, lead to some other and more serious breach of the peace and good order of society.

If the defendant has a better title than the prosecutor to the premises or to the possession thereof, he can assert it by due course of law, but he cannot do so by violating the criminal law of the State. No error is assigned by the defendant and we see none upon the record. In such cases the judgment must be affirmed. *Swepson* v. *Summey* 74 N. C. 551. There is no error.

Let this be certified, to the end that further proceedings may be had according to law.

PER CURIAM. Judgment affirmed.

STATE v. C. D. BUTNER.

Charge to Jury -- Manner of.

In a charge to a jury, where there is no allegation that the emphasis, tone or manner of the Judge impressed his words with any other than their recognized signification; *Held*, not to be error.

INDICTMENT, for Fornication and Adultery, tried at Fall Term, 1876, of YADKIN Superior Court, before *Kerr, J.*

The facts in the case and the exception to His Honor's charge to the jury, are sufficiently stated in the opinion of

this Court. There was a verdict of guilty and judgment, from which the defendant appealed.

Attorney General, for the State.
Mr. J. M. McCorkle, for defendant.

READE, J. The defendant and a woman were indicted for fornication and adultery; and there was evidence, that in a playful scuffle between them, in the presence of the defendant's wife and others, the woman fell or was pulled into the lap of the defendant. And the Solicitor for the State insisted in his argument to the jury, that such familiarity was evidence of guilt; and indeed, that the impropriety was so great, that if it had been in refined society and the female had had a proper "avenger," it would have put the defendant's life in jeopardy. To this the defendant's counsel replied, that while that might be so in high life, yet such acts of familiarity were common in that section among plain people, such as the defendants were, and that they were regarded as "innocent sport." That is what we understand the counsel said, substantially.

After reciting what the counsel on both sides had said as above, His Honor said to the jury, "It is for you, gentlemen of the jury, to say if such acts are usual here."

The defendant insists that thereby His Honor intimated to the jury his opinion upon the facts, in violation of the statute of 1796.

Now we can conceive how, by emphasis, tone and manner, His Honor might have expressed his indignation and horror at what was said by the defendant's counsel and his strong sympathy with what was said by the Solicitor, by the language which he used, just as well as if he had said, "It is for you to say, gentlemen of the jury, whether it is possible for such acts of familiarity to be usual among any virtuous

people, and whether they are not the clearest proof of the guilt of the defendant."

But there is no allegation that there was anything in His Honor's emphasis, tone or manner to impress upon his words any other than their recognized signification. And it is certainly not our duty or our pleasure, by a strained construction of his language, to put His Honor in fault.

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

PER CURIAM. Judgment affirmed.

STATE v. AUSTIN WILSON.

Indictment -- Larceny -- Evidence.

Where on a trial for larceny, it was in evidence that the prosecutor had money, that the defendant knew he had it, that they were drinking together and were on the road together at night, that the prosecutor was drunk and unconscious and the defendant had an opportunity of handling his person, and that the defendant had no money on that night but had some the following day; *Held*, that the evidence was sufficient to warrant the jury in returning a verdict of guilty

INDICTMENT for Larceny, tried at Fall Term, 1876, of ALEXANDER Superior Court, before *Buxton, J.*

The facts are stated by Mr. Justice Reade in delivering the opinion of this Court. Verdict of guilty. Judgment. Appeal by defendant.

Attorney General, for the State.
Mr. M. L. McCorkle, for the defendant.

READE, J. The prosecutor was going home from Court on Wednesday evening "in a drinking condition" with $35,00

in his pocket-book in different sized bills; was riding on a mule and was joined by the defendant on foot. They stopped at a house on the way and it was proposed that they should buy liquor to drink. Defendant said he had no money. Prosecutor took out his pocket-book, untied it, took out a quarter, handed it to the defendant to pay for the liquor and tied his pocket-book up again. After drinking until the prosecutor was drunk, they left the house and went on the road together. After going some distance, the prosecutor's consciousness, which he had lost, returned to him and he found that he was down and the defendant was on his mule; and feeling in his pocket for his pocket-book, he found it was gone. He told the defendant of the loss, and the defendant went back to the house to hunt for it. The next day defendant returned to the court house, got drunk and showed "a wad of bills of money" and said he had "a plenty."

The question is, whether there was *any* evidence to go to the jury, either that the money was stolen at all, or that the defendant was the thief.

These are the points; (1.) the prosecutor had the money in the house. (2.) The defendant knew he had it. (3.) They left the house in the night time, together, and continued together, until the money was missing. (4.) The prosecutor was unconscious, and the defendant had an opportunity of handling his person, the prosecutor having got down from his mule. (5.) The defendant had no money that night and had a "wad" of it next day. We think this was evidence from which the jury might have reasonably found that the defendant was guilty.

No error.

PER CURIAM. Judgment affirmed.

McNEELY & WALTON v. J. A. HAYNES & Co.

Arrest -- Liability of Partners.

A defendant cannot be arrested under C. C. P. § 149. (sub. sec. 4) unless *he* has been guilty of fraud in contracting the debt for which the action is brought. *Therefore*, when *one* partner in a firm obtains credit by false representations, the *other* partner is not liable to arrest.

MOTION to vacate an Order of Arrest, made at Fall Term 1876, of ROWAN Superior Court, before *Cloud, J.*

No statement of the facts is necessary to an understanding of the opinion. His Honor allowed the motion to vacate, and the plaintiff appealed.

Mr. Jas. C. Kerr, for the plaintiffs.
Mr. J. M. McCorkle, for the defendants.

BYNUM, J. The defendants, J. A. and Calvin Haynes were partners in a mercantile business carried on in the county of Yadkin, where they both lived.

The plaintiffs were doing business in the town of Salisbury. Calvin Haynes purchased of the plaintiffs a bill of goods, as he at the time alleged, for the defendant firm and obtained credit therefor by false pretences and representations.

The plaintiffs thereupon instituted an action against both J. A. and Calvin Haynes, upon which J. A. Haynes only was arrested, Calvin having escaped.

In a civil action, the defendant cannot be arrested, unless *he* has been guilty of a fraud in contracting the debt. C. C. P. § 149, sub. section 4. As it appears from the case, J. A. Haynes was not present when the goods were purchased by Calvin, had no knowledge of it and in no wise connived at

or assented to it; nor does it appear that the goods were sent to or received by him. His affidavit negatives every allegation of fraud on his part and the counter-affidavit of the plaintiff does not contradict it.

His Honor did not err in vacating the order of arrest as to the defendant J. A. Haynes.

PER CURIAM. Judgment affirmed.

COMMISSIONERS OF UNION COUNTY v. THE CAROLINA CENTRAL RAILWAY COMPANY.

Township Trustees -- Assessment of Taxes.

Where the Board of Trustees of a Township meet the County Commissioners in joint session, at the request of the party interested, and assess property for taxation and make a verbal report of the same to the Commissioners: *Held*, that the assessment was properly made.

APPEAL from an Order confirming the decision of the Board of Commissioners of UNION County, made at Fall Term, 1876, of the Superior Court of said county, by *Buxton, J.*

The question presented for the decision of this Court is sufficiently stated in its opinion.

Messrs. Merrimon, Fuller & Ashe, for the plaintiff.
Mr. Robert Strange, for the defendant.

FAIRCLOTH, J. The defendant having failed to list its property, as required by law, for taxation, through its Attorney requested the several Township Boards, through which the road passed, and the Board of Commissioners to

convene in joint session to hear said Attorney, and after doing so, the Township Boards made their assessments in presence of the Board of Commissioners, which assessments was at once entered on the records of the said Board of Commissioners. The defendant appealed, on the ground that the Township Boards made their reports to the Commissioners *verbally* and not in *writing*. His Honor overruled the objection, and in effect, as we understand it, decided that the assessments were properly made or at least were sufficient.

Under the circumstances we see no objection to the decision of His Honor, and it is affirmed, and the plaintiff will recover costs in this Court.

PER CURIAM. Judgment affirmed.

JAMES S. HILL and wife and others v. JOHN M. BROWER.

False Representations -- Contract.

1. Where representations are made by one party to a contract, which may be reasonably relied on by the other, and those representations are false and fraudulent and cause injury to the party relying on them, he is entitled to relief.
2. Where the quantity of land represented is the inducement to the purchase, and there is fraud in the sale, it vitiates the whole contract and is sufficient ground for setting aside the sale.
3. The maxim of *caveat emptor* does not apply in cases where there is actual fraud.

(*Wilcoxon* v. *Calloway*, 67 N. C. 463, and *Walsh* v. *Hall*, 66 N. C. 233, cited and approved.)

This was a PROCEEDING for the sale of land, for the purpose of reinvesting the fund arising therefrom, heard at Fall Term, 1876, of SURRY Superior Court, before *Cloud*, *J.*

The plaintiffs originally filed an *ex parte* petition for the sale of certain lands in Surry County, and Edwin H. Banner was appointed a Commissioner to make the sale, which was accordingly done, and the defendant became the purchaser in the sum of $8,000. The defendant paid the amount of the purchase money, except the sum of $2,500, which he declined to pay, for the reason, as he alleged, that the Commissioner had fraudulently deceived him as to the number of acres contained in the tract, and insisted in consequence thereof that he had paid enough. This action was then instituted to secure the balance of the purchase money.

His Honor in the Court below ordered a reference to ascertain what abatement should be made in the price of the land sold to the defendant, from which order the plaintiffs appealed.

Mr. J. F. Graves, for the plaintiffs.
Mr. J. A. Gilmer, for the defendant.

BYNUM, J. The tract of land purchased by the defendant contained 486 acres, whereas he believed it contained upwards of 700 acres. It is found by the Court trying the facts as a jury, that the quantity of land supposed was a material inducement to the purchase, and that the defendant was deceived into the purchase by the false and fraudulent representations of Banner, who was appointed by the Court, Commissioner to make the sale, and did sell the land to the defendant. When representations are made by one party to a contract, which may be reasonably relied on by the other, and those representations are false and fraudulent and cause injury and loss to the party relying on them, he is entitled to relief

The maxim of *caveat emptor* does not apply in cases where there is actual fraud. The representations of Banner, and his exhibit of the map and plat of the land, and his calcula-

tions of the quantity, not only caused the defendant to make no survey, but put to sleep any further inquiry as to the quantity of land. An actual survey was thus prevented by the artifice and contrivance of the other party. This reasonably accounts for the apparent laches of the defendant in not sooner discovering the fraud. *Wilcoxon* v. *Calloway*, 67 N. C. 463. *Walsh* v. *Hall*, 66 N. C. 233.

Banner, the Commissioner, was the officer appointed by the Court to make the sale under its direction, and when the frauds of its officer in executing its orders are brought to its notice, the Court will give redress to the party injured.

Where the quantity of land represented, is the inducement to the purchase, and fraud in the sale is alleged and found, it is not a proper ground for an abatement of the price, but it vitiates the whole contract and is a sufficient ground for rescinding and setting aside the sale *in toto*. To this, we are informed by his counsel, the plaintiff assents. Unless therefore, the defendant elects to complete his purchase upon the terms of his contract with Banner, the contract of sale will be rescinded and set aside and a resale ordered. It is alleged that valuable improvements have been put upon the premises by the defendant. If the land sells for so much, he is entitled to the repayment, with interest, of the purchase money paid and also to the value of his improvements put upon the land; with the qualification however, that the improvements must be estimated according to the enhanced value conferred upon the land thereby. The defendant must account for rents and profits. A reference and account will be had. There is error. Judgment reversed and case remanded to be proceeded with in accordance with this opinion.

PER CURIAM. Judgment reversed.

CALVIN VESTAL v. W. J. SLOAN and wife.

Trusts and Trustees -- Account.

Where A, by arrangement between them, bought B's land at execution sale and took the title to himself agreeing that he would reconvey to B upon payment of the amount of his bid and also a certain debt due to A as guardian; and afterwards B makes a payment to A and is induced by misrepresentation and fraud on the part of A, to take A's bond to make title to the land to B's wife on payment of $500; *Held*, that the relation of trustee and *cestui que trust* was established by the original agreement and the latter bargain was void, and that B was entitled to an account to ascertain what balance if any was due to A.

(*Lee* v. *Pearce* 68 N. C. 76; *Whitehead* v. *Hellen* and *Kornegay* v. *Spicer* at this term, cited and approved.)

CIVIL ACTION, tried at Fall Term, 1876, of CHATHAM Superior Court, before *Cloud, J.*

The plaintiff claimed certain lands in the county of Chatham, formerly owned by the defendant. The Sheriff sold the same by virtue of sundry executions against the defendant and the plaintiff became the purchaser in the sum of $200, and upon payment of the money, obtained a deed from the Sheriff.

Subsequently, and at the request of the defendant, the plaintiff executed a bond to make title to the land to Mrs. Sloan on payment of $500; but the defendant insisted that this arrangement was brought about by fraud, practiced upon him by the plaintiff. The plaintiff was guardian of the minor heirs of one Watson and as such guardian held a judgment against the defendant. There was evidence tending to show that the parties had agreed that one Williams should bid off the land at the sale for the defendant, and that while the sale was progressing, the defendant stopped Williams from bidding, because the plaintiff suggested

to him that the claim due "the Watson heirs" might be more advantageously compromised by the plaintiff; and that he would buy the land and reconvey to defendant upon payment of his bid, and such sum as he would have to pay the Watson heirs. The plaintiff bought at the said sum of $200 and thereafter compromised the claim of said heirs at $400.

It further appeared that the plaintiff with the consent of the defendant sold a portion of the land to J. A. Williams for $500, and that afterwards the defendant paid the plaintiff $100 in cash; that a short time after said payment, the plaintiff threatened to turn the defendants out of possession and thereupon the said bond to Mrs. Sloan was taken up and two notes of $250 each were executed by defendants to plaintiff, who surrendered to Sloan certain receipts he held against him as Constable. Subsequently the title bond and notes were respectively surrendered, and the plaintiff took possession of that portion of the land known as the "Aaron Johnson" tract, and demanded that defendant should pay $650 for the balance of the land, which the defendant declined to do, but tendered to plaintiff the amount of interest due on the $600.

The evidence for the plaintiff was in conflict with that of the defendant in regard to what was said on the occasion of the sale; the plaintiff, as guardian of the said heirs, had paid to one of them about $900 and to the other $700 and that the receipts he held against defendant as Constable amounted to about $400. There was also conflicting evidence as to the sale to J. A. Williams and the amount of the notes of Mrs. Sloan.

The material issues submitted to and found by the jury under the charge of the Court were as follows:

1. That plaintiff did agree with defendant on the day of Sheriff's sale, that upon payment of $600 he would convey the land in controversy to Sloan.

2. That Sloan paid plaintiff $600 and tendered $110 interest.

3. That defendants did execute the notes of 28th Nov., 1872, for the purchase of said land and accepted the bond to make title, by reason of fraud, duress and misrepresentation on the part of plaintiff.

4. That the annual value of the land in dispute was $40.

Verdict for the defendants. Rule for new trial. Rule discharged. Judgment. Appeal by plaintiff.

Mr. John Manning, for the plaintiff.

Messrs. L. C. Edwards, *J. B. Batchelor* and *J. H. Headen*, for the defendants.

PEARSON, C. J. This case involves the principles in respect to dealings between trustee and *cestui que trust*, which are decided and discussed in *Lee* v. *Pearce*, 68 N. C. 76 and in *Whitehead* v. *Hellen* and *Kornegay* v. *Spicer*, at this term. A reference to the three casesnamed is all that is necessary. A statement of the facts of this case will show the application.

At the sale, plaintiff agreed to buy the land for Sloan and hold the title in trust to secure the amount of his bid, and also the amount due to his wards. The whole amount is fixed at $600.

This constituted the relation of trustee and *cestui que trust*. By a sale of a part of the land, the defendant paid to plaintiff $500, and he also paid $100. So that, he had redeemed his land except a balance for interest.

In this condition of things the plaintiff says to defendant: "I am not bound in law to comply with my agreement because it is not in writing and I demand possession," whereupon the defendant agrees to give up his equity of redemption and to accept the bond of plaintiff to make title to his wife on payment of the sum of $500. Why this extra payment is required is not explained unless it can be referred to the

fact that plaintiff handed up to the defendant his receipts as constable for claims to the amount of some $300 or $400.

Afterwards the plaintiff takes possession of another part of the land (Aaron Johnson tract) and finally concludes to "gobble up" the rest, but is induced to let the defendant have three months further time in which to redeem, provided at the end of that time, if the money was not paid, the defendant and his wife would quietly surrender the possession.

Can a more flagrant case of fraud and oppression be imagined?

The extension of time for turning out the defendant has no legal effect; the plaintiff had paid nothing for the defendant's right to redeem and the terms of this extension of time, as well as the refusal to accept the interest which was tendered and the manner of the refusal, all show that the plaintiff was oppressively exercising the power which he supposed he had over a necessitous man, who was in "his clutches."

There will be an order for an account to show the balance due on the original $600; to-wit: the interest at 6 per cent in arrear, after deducting the rents and profits of the Aaron Johnson tract while the plaintiff has been in possession, and a decree that upon payment of such balance, the plaintiff convey the land, excepting the part sold to Williams, to the defendant Sloan. If the rents and profits of the Aaron Johnson tract while the plaintiff has been in possession be in excess of the interest in arrear, the plaintiff will pay that amount to Sloan.

There will also be an order that Sloan return to the plaintiff (or account therefor) the constable's receipts, but this is no charge on the land. Mrs. Sloan will not be noticed in the decree. She is merely a volunteer, has paid nothing, and

was simply the object of her husband's bounty, in all probability to put the land out of the reach of creditors.

No error.

PER CURIAM. Judgment affirmed.

ALBERT FOSTER v. THOMAS S. PENRY.

Landlord and Tenant -- Jurisdiction.

1. Where A rented land from B without any agreement as to the rent to be paid; *Held*, that A was a tenant and entitled to the whole crop until a division.

2. In an action by B to recover the rent, when neither the sum demanded nor the amount ascertained to be due, exceeds two hundred dollars; *Held*, that the Superior Court has no jurisdiction.

CIVIL ACTION tried at Fall Term, 1876, of DAVIE Superior Court before *Kerr, J.* The plaintiff claimed certain crops, as due him from the defendant, for rent of a plantation for the year 1874. There was evidence tending to show that defendant rented the plantation of plaintiff and that he was to pay rent in kind, and that one-third of the crop was the customary rent. The jury however upon this issue being submitted found that the defendant did not agree to pay one-third of the crop in kind; and there was no evidence that the defendant agreed to pay money rent. The jury found as a further fact, that the value of the rent of the land for 1874 was $177.75; this sum being ascertained by calculating the value of the corn, wheat, &c., raised thereon, during said year.

His Honor thereupon gave judgment in favor of the plaintiff for the value of the rent and costs of action, from which the defendant appealed.

Mr. T. J. Wilson, for the plaintiff.

Messrs. Watson & Glenn, and *J. M. McCorkle*, for the defendant.

FAIRCLOTH, J. This action is governed by the Act of 1868–'9, ch. 156, and was brought before a division of the crop, for one-third part of the crop raised on the land of the plaintiff during the year 1874.

Upon the issues submitted, the jury find that the defendant rented land from the plaintiff and that he did not agree to pay the plaintiff one-third of the crop in kind, and it appears from the case agreed, that there was no evidence that he agreed to pay any stipulated money rent, nor does it appear that he agreed to pay any money rent at all.

In this condition of the case, the plaintiff could not recover on the idea that he had title to the whole crop, because his agreement was not in writing, as required by § 13 and it was not an agreement to pay a money rent as required by § 14; besides, when nothing appears except that there was a renting, as is the case here, the land for the term belongs to the tenant, and the title of the whole crop is in the defendant as tenant until division under the Act of 1868–'9. The plaintiff was, after verdict, allowed to amend his complaint, by demanding compensation for the use and occupation of his premises.

Without stopping to consider whether, under § 132 and other liberal provisions of C. C. P., the plaintiff can so amend his complaint as substantially to change an action *ex delicto* into an action *ex contractu*, we are of opinion that the plaintiff cannot recover in this action even as amended, because neither the sum demanded nor the amount ascer-

tained to be due exceeds $200, and the matter is therefore within a magistrate's jurisdiction.

Assuming that the relation of Landlord and Tenant existed between the parties, the plaintiff was entitled to partition of the crop, which would require a different kind of proceeding from the present.

The defendant will recover his costs in this Court.

There is error. Let this be certified.

PER CURIAM. Judgment reversed.

FRANK H. DARBY v. THE CITY OF WILMINGTON.

Statute -- Construction of.

1. Although a statute may be unconstitutional in part and constitutional in part, yet where only one object is aimed at and the same is unconstitutional and all the provisions are contributory to it and would not have been enacted but for the main object, the whole statute is void.
2. *Therefore*, where the plaintiff acted as registrar of voters preliminary to an election held under Ch. 43, Private Laws 1874–'5, "An Act to amend the Charter of the City of Wilmington," which Act is unconstitutional, he cannot recover the value of his services in an action against the city.

(*Van Bokkelen* v. *Cumberland*, 73 N. C. 198, cited and approved.)

CIVIL ACTION tried at Chambers on the 18th of October, 1875, before *McKoy, J.*

The plaintiff was one of the Registrars of voters at the election which was authorized to be held in defendant city, under § 8, Ch. 43, Private Laws 1874–'5, and performed the duties required. He brought this action in a Justice's Court for

compensation allowed by § 9, of said Act and the Justice dismissed the action on the ground that said Act was wholly unconstitutional. The plaintiff appealed to the Judge of the District who reversed the decision of the Justice of the Peace and gave judgment that the plaintiff recover the sum of twenty-five dollars and costs. Defendant appealed.

Mr. E. G. Haywood, for the plaintiff.

The plaintiff has the right to be paid for his services, notwithstanding some parts of the Act of 1874–'5, are unconstitutional. *Van Bokkelen* v. *Canaday*, 73 N. C. 198. Yet so much thereof as provides for the payment of such officers as the plaintiff is valid and binding upon the city. *Cooley on Const. Lim.*, pp. 177–181–211; *People* v. *Bradley*, 64 Barb (N. Y.) 229; *Nelson* v. *Milford*, 7 Pick. 18; *Bancroft* v. *Linfield*, 18 Pick. 568, and *Guilford* v. *Supervisors*, 13 N. Y. 143.

Mr. D. L. Russell, for the defendant.

READE, J. By an Act of the General Assembly, ratified February 3, 1875, entitled "An Act to amend the charter of the city of Wilmington," it was enacted that the city should be divided into three wards, &c., and that there should be an election for Aldermen; and that preliminary thereto, there should be a registration of those who were to vote at said election and the plaintiff was one of the Registrars named in the Act and he performed all the duties of Registrar required of him by said Act and the election was held. That was the scope of the Act Its only object was to provide for and to accomplish said election.

In the case of *Van Bokkelen* v. *Canaday*, 73 N. C., 198, this Court decided that the said Act and the election held under it were unconstitutional and void.

The plaintiff brings this action to recover the value of his services, not against the State which ordered him to per-

form them, but against the city which repudiated them and never authorized them and never had any benefit from them.

The position taken by the plaintiff is that all of an Act is not necessarily unconstitutional because a portion of it is; and that while the Legislature had no power to lay off the city into wards and to order an election for Aldermen, yet it had the power to order a registration of voters for the election, and to appoint the plaintiff Registrar, and therefore he is entitled to compensation for the services which he rendered.

It is true that a statute may be unconstitutional in part and constitutional in part, where it relates to different subjects, or even where it relates to but one subject if its parts can be separated and the object accomplished without the objectionable features; but where only one object is aimed at and the main object is unconstitutional and all the provisions are contributory to it and would not have been enacted but for the main object, then the whole is void. Cooly, in his Const. Lim., 178-9, states the distinction very clearly, as follows: "Where a part of a statute is unconstitutional, that part does not authorize the Courts to declare the remainder void also, unless all the provisions are connected in subject matter depending on each other, operating together for the same purpose; or otherwise so connected together in meaning, that it cannot be presumed that the Legislature would have passed the one without the other."

Now as already stated, the election was void; the registration was connected with and only necessary to the election and would not have been ordered but for the election, therefore the registration was void Indeed, it was expressly decided, that even if the election had been otherwise valid, yet the registration was invalid

The conclusion is, that inasmuch as the defendant never employed the plaintiff to render the services and never re-

ceived any benefit from them and inasmuch as the services were in furtherance of an unlawful object, the plaintiff is not entitled to recover of the defendant.

Whether he is entitled to recover of the State, is not before us.

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

PER CURIAM. Judgment reversed.

COMMISSIONERS OF ALAMANCE v. J. A. BLAIR, Admr. of B. B. Bulla

Liability of Administrator -- Amendments to Pleadings.

1. An administrator is not liable *as such*, for money received by him upon a claim which had been placed in the hands of his intestate for collection.
2. Amendments to pleadings which further justice, speed the trial of controversies or prevent unnecessary circuity of action and unnecessary expense, should be liberally allowed on proper terms.

CIVIL ACTION, tried at Fall Term, 1876, of RANDOLPH Superior Court, before *Kerr, J.*

His Honor, by consent of the parties, found the facts to be as follows: In 1864 or 1865, the County of Randolph became indebted to sundry citizens of Alamance County, including the Sheriff, Jailor and Clerk of the Superior Court, in the sum of $441.85 for costs and jail fees, incurred by the removal of the case of State v. Modlin and others (who were charged with burglary) from Randolph to Alamance for trial. At Spring Term, 1866, of the Superior Court of Alamance, a *nolle pros.* was entered and the case dismissed. Subsequent-

ly a bill of costs in favor of said officers and others, amounting in all to $549.48, was sent to B. B. Bulla, at that time Clerk of the Superior Court of Randolph. Upon presentation to the proper authorities of said County, an order was made for the payment thereof. This order was afterwards approved by the Board of County Commissioners in December, 1868.

The amount due as aforesaid was paid by Alamance County to the parties entitled.

Bulla died in July, 1872, and Blair was appointed administrator. No part of said amount was ever paid to Bulla, as Clerk aforesaid or otherwise.

In 1874, and before this action was brought, the Sheriff of Randolph paid to Blair the administrator of Bulla, the amount due upon said order and was credited with the same in his settlement with the County. A demand was made upon Blair as administrator to pay said amount.

Upon the foregoing facts, His Honor held that this action could not be maintained.

The plaintiffs' counsel then moved for judgment against Blair individually, which motion was overruled. Judgment in favor of defendant for costs Appeal by plaintiffs.

Messrs. Scott & Caldwell, for plaintiffs.

Messrs. Mendenhall & Staples, and *J. A. Gilmer*, for defendant.

RODMAN, J. It is conceded by both parties, that upon the facts found by the Judge, the plaintiffs were not entitled to the judgment demanded in their complaint, which was against Blair as administrator of Bulla. Bulla never received the money and was never indebted to the plaintiffs. We may assume for the present purpose, that upon the facts found, the plaintiffs were entitled to judgment against Blair individually. The plaintiffs without moving to amend their com-

plaint so as to make it conform to the proof moved the Court for a judgment against Blair individually which the Court refused and dismissed the action.

We think that under §§ 128, 129, 132 and 135 of C. C. P., the Court might have allowed the amendment suggested, either upon motion by the plaintiffs or *ex suo motu*. The allegation in the complaint that the money was received by Bulla in his life time was a mistake, as the defendant necessarily knew, and it does not appear to us, that it could have misled or prejudiced him in his defence. But we cannot say that the allegation was immaterial. In fact it was material. If true, the plaintiffs would have been entitled to judgment against the defendant, to be levied *de bonis testatoris*. But the allegation was supported by no evidence. We think that under the sections cited, the allowance of the amendment was discretionary with the Judge under the circumstances of this case and that his refusal to allow it can not be reviewed here.

This Court has often expressed its opinion, that amendments which further justice, speed the trial of controversies or prevent unnecessary circuity of action and unnecessary expense ought to be liberally allowed on proper terms. Such is undoubtedly the spirit of the Code, as is shown by the sections above cited But in most cases, it must remain with the Judges of the Superior Courts alone to give effect to it.

Of course, the dismissal of the present action will be without prejudice to one against Blair personally.

PER CURIAM. Judgment affirmed.

JOHNSON, CLARK & CO. v. C. H. BERNHEIM.

Partnership -- General and Special.

1. In a general partnership, the dealings of each partner with third persons, in any manner legitimate to the business, are binding on the partnership.
2. In a special partnership, the power of each partner, in regard to dealings with third persons who have notice of the terms, is special. If however the terms are violated and the transaction enures to the benefit of the partnership, the partnership is liable.

CIVIL ACTION tried at Fall Term, 1876, of CABARRUS Superior Court, before *Schenck, J.*

The action was brought by the plaintiffs against the defendant as one of the firm of Bernheim & Waring, for goods sold and delivered to Waring, the other member of the firm.

The points raised and decided in this Court upon the facts in the case and the objections to the charge of His Honor in the Court below, are so fully stated in the opinion delivered by Mr. Justice Reade, as to render any further statement unnecessary. Verdict for defendant. Judgment. Appeal by plaintiffs.

Messrs. Shipp & Bailey and *R. Barringer*, for the plaintiffs.
Mr. W. J. Montgomery, for the defendant.

READE, J. A & B are general partners to do some given business; the partnership is, by operation of law, a power to each to bind the partnership in any manner legitimate to the business. If one partner go to a third person to buy an article on time for the partnership, the other partner cannot prevent it by writing to the third person not to sell to him on time; or if one party attempt to buy for cash, the other

has no right to require that it shall be on time. And what is true in regard to buying, is true in regard to selling. What either partner does with a third person is binding on the partnership. It is otherwise where the partnership is not general, but is upon special terms, as that purchases and sales must be with and for cash. There the power to each is special, in regard to all dealings with third persons at least who have notice of the terms. But even in that case if the terms are violated, as if a partner buy on time when he ought to buy for cash and the thing bought come into the partnership and the partnership take the benefit, the partnership must pay for it.

Apply these principles to the case before us, and it will be seen that the case has not been tried according to law.

The issues submitted to the jury do not cover the case The plaintiffs' allegation was that the goods were sold to the *partnership* of Bernheim & Waring The first issue was, were they sold and delivered to Waring, one of the partners? The jury answer "no." But that does not negative the fact that they were sold and delivered to the *partnership*. The second issue was, did the defendant Bernheim, as the partner of Waring, notify the plaintiffs before credit was given to Waring, not to sell to Waring except for cash? The jury answer "yes." But that does not find whether the terms of the partnership were general or special; or if special, whether the goods, although bought contrary to the terms, did not go into the use of the partnership. So, the issues decide nothing. The issue which the plaintiffs offered and which His Honor refused, covered the whole ground. Is the defendant Bernheim indebted to the plaintiffs on account of the partnership of Bernhiem & Waring? If so, how much?

There was error also in His Honor's charge. The plaintiffs asked him to charge that even if the terms were to buy for cash only, yet if there was a departure from the terms

with the consent of Bernheim, then he would be liable. His Honor refused, because the pleadings did not raise the issue and because there was no evidence.

The pleadings did raise the issue. The complaint alleged the liability of the partnership and the answer denied it. That made the issue. It was not necessary that the complaint should allege whether the partnership was liable upon the general agreement, or upon the ratification of a departure from a special agreement. That was a matter of proof. And then His Honor says there was no proof. But there was, for the case states that the plaintiffs read in evidence several letters from defendant Bernheim, tending to show his knowledge of the delivery of the goods to Waring and his, Bernheim's, recognition of the debt.

Error.

PER CURIAM. *Venire de novo.*

JESSE YATES v. ROBERT YATES and wife.

Possession of Land -- Evidence -- Expert -- Handwriting.

1. Possession of land retained by a grantor not indebted, is evidence either that he did not execute the alleged deed inconsistent with such possession, or that if he did, it was upon a secret trust for himself.
2. When the fact of possession of land is competent evidence, any acts or declarations of the possessor are also competent as characterizing his possession.
3. One who has been in business as a Clerk and also been Clerk of Court and Sheriff, and who testifies that he has been frequently called on to examine signatures, is a competent witness as an expert in the matter of handwriting
4. Where on the trial below such witness was permitted to compare the signature of a subscribing witness to an alleged deed, with the signature of such subscribing witness to a deposition admitted to be genuine, and thereupon testified that the signature to the deed was not genuine. *Held*, not to be error.

(*Kirby* v. *Masten*, 70 N. C. 540; *Horton* v. *Green*, 64 N. C. 64; *State* v. *Cheek*, 13 Ire. 114; *State* v *Jacobs*, 6 Jones, 284; *Outlaw* v. *Hurdle*, 1 Jones, 150, cited and approved.)

CIVIL ACTION, to recover possession of real estate, commenced in Wilkes County and removed on affidavit of defendants to Alexander County, thence by consent to WATAUGA County and tried at Fall Term, 1876, of the Superior Court of said County before *Buxton*, *J.*

Both parties claimed under their father John Yates, who had been in possession of the land in controversy about fifty years before his death which occurred on the 6th day of February, 1875.

The plaintiff read in evidence a deed from John Yates and wife Elizabeth to himself, dated June 5, 1848, with David Yates and John Eller as subscribing witnesses. This deed was admitted to probate, Feb. 22, 1875, upon proof of

handwriting of both of said witnesses and also of John Yates, but that of his wife Elizabeth was not proved, the signing by her appearing to have been done by making a cross-mark.

The Probate Judge recited in his certificate, that both the grantors and witness David were dead and that witness Eller was a non-resident. There was no privy examination of the feme grantor.

The plaintiff also read in evidence the deposition of said Eller, taken during the progress of the cause and signed by him, in which he stated that he witnessed the execution of said deed at the instance of the grantors. Eller died before the trial of the cause.

The defence was, that the deed under which the plaintiff claimed was fraudulent, that John Yates died in possession of the land and by last will and testament devised the same to his wife by a second marriage, Fannie M. Yates, for life, remainder to her two daughters in fee, and that defendants obtained possession from the devisees under a contract of purchase which was completed since the institution of this action, by their executing to the feme defendant a deed in fee simple, and that she, feme defendant, is now the rightful owner of said land.

Exceptions:

1. The defendants read in evidence an authenticated copy of the last will and testament of John Yates, dated August 1st, 1853, and of the codicil annexed, dated July 23, 1860, devising said land to Fannie M. Yates for life, remainder to his two daughters, Angelina and Elizabeth. Plaintiff excepted.

2. The deed from the said devisees to defendant was read in evidence. This was objected to by the plaintiff for the reason (among others) that the deed had not been properly proved. Objection overruled.

3. There was evidence tending to show that the plaintiff and John Yates had had a conversation about the title to

the land, which was objected to on the part of the defendants on the ground that the testimony involved a declaration of the plaintiff on a different occasion and that he was not entitled to the benefit of it. Overruled.

4. Fannie Yates, a witness for defendants, was asked on cross-examination, "Did you tell Rufus Eller that you had made your husband swear, six months before his death, that he had never made a deed to Jesse Yates?" Ans. "I cannot recollect making any such remark." And on re-direct examination, the following was allowed by His Honor: "Did you make your husband swear that he never made a deed to Jesse Yates?" Ans. "I did not." Plaintiff excepted.

5. The defendants read in evidence a deed from John Yates to David Yates, dated December 24, 1855, conveying fifteen acres of land. The plaintiff objected because the date was subsequent to that of the deed under which plaintiff claimed and that therefore his right could not be affected by it; but the defendants insisted that the evidence tended to show that the deed of June 5th, 1848, was not genuine: "1. Because John Yates, the maker of the deed to David Yates, was in possession at the date thereof claiming ownership, which was inconsistent with the idea that he had disposed of the land. 2. Because David Yates, the grantee, is one of the subscribing witnesses to the deed of 1848, which was inconsistent with the idea that he really witnessed a previous conveyance of the land by John Yates."

6. J. E. Pearce was introduced by defendants and testified that he did not think the signature of David Yates as one of the subscribing witnesses to said deed, was genuine. Defendants' counsel then handed to witness a bond from said Yates to witness, who testified that he saw said Yates sign the bond, the defendants insisting that this was done to corroborate the statement of witness that he had seen David

Yates write his name, and not for the purpose of comparing handwritings. Plaintiff excepted.

7. J. P. Matthewson was then introduced by defendant, as an expert in the matter of handwriting. The witness stated that he had been in business as a clerk and store keeper for a considerable time; that he had been Clerk of the Court and Sheriff of the County, and had been frequently called on to examine signatures of persons, and from his means of observation could form an opinion satisfactory to himself, as to whether two pieces of writing were by the same person. Plaintiff excepted.

8. After examining the signature of John Eller to a deposition admitted to be genuine, and his signature as witness to deed of 1848, the witness stated that in his opinion the latter signature was not genuine. Plaintiff excepted.

9. Thomas Welch a Justice of the Peace testified for defendant, to the effect that John Yates made a statement to him which he reduced to writing. Yates swore to it and signed it on October 9th, 1871. The substance of the affidavit was, that he understood his son Jesse claimed to have a deed for the land, and he wanted to swear it was not so, or if he had a deed it was a forgery. The plaintiff objected to the reading of the affidavit on the ground, that it was an ex parte statement made by John Yates in the absence of the plaintiff. Objection overruled.

Under the instructions of the Court, the jury rendered a verdict for the defendants. Rule for new trial. Rule discharged. Judgment. Appeal by plaintiff.

Messrs. R. F. Armfield, G.N. Folk and *Scott & Caldwell*, for plaintiff.

Messrs. T.J. Wilson and *H. Bingham*, for defendants.

RODMAN, J. It is unnecessary to repeat here the facts on which the several exceptions of the plaintiff are founded, as

they will be found by reference to the case sent up from the Superior Court.

We proceed to consider the exceptions in their order:

First exception: Because of the admission in evidence of the will of John Yates, disposing of the land in controversy.

It is admitted that no act or declaration of John Yates, could divest or disparage any estate previously conveyed by him to the plaintiff. But the will, and the other acts and declarations of John Yates hereafter spoken of, were not allowed as evidence for such purpose.

The plaintiff claimed title under an alleged deed from John Yates dated on 5 June, 1848, and proved on 22 February, 1875, after his death which took place on 6 February, 1875. As both parties claimed under John Yates, the plaintiff as his grantee, and the defendants under his devisees, there was no controversy as to his title.

It was in evidence that before and at the date of the alleged deed to the plaintiff, John Yates was in possession of the land in controversy and so continued (with the exception of a piece which he sold to his son David) up to his death, a period of over twenty-five years, without having ever surrendered the possession to the plaintiff.

It is a presumption that a person in possession of land holds for himself as tenant in fee. 1 Greenl. Ev. § 109. This presumption however is one of fact only, and may be rebutted by proof of declarations of the tenant in disparagement of his right; as for example, that he holds under some other person.

The purpose for which the will of John Yates and other acts and declarations by him, while in possession and after the alleged deed to the plaintiff, were allowed in evidence, and that to which they were restricted by the Judge, was to corroborate this presumption and to exclude any supposition that he held possession as tenant of the plaintiff or by his license, and to satisfy the jury that he held claiming ad-

versely to the plaintiff, and all others. It must be admitted that evidence of the unchanged and continued possession of the supposed grantor was competent evidence to impeach the supposed deed. Ever since *Twine's* case (1 Smith L. C.) it has been held in a great number of cases, that possession retained by an indebted grantor, inconsistent with the terms of the deed, was evidence of a secret trust for the benefit of the grantor, and that therefore the deed was fraudulent as to his creditors. Upon the same principle, possession retained by a grantor not indebted, is evidence, either that he did not execute the alleged deed inconsistent with such possession, or that, if he did, it was upon a trust for himself. The reason in each class of cases is, that it is unusual and therefore improbable, that a vendee for value, who must be presumed to know who is in possession, will permit his vendor to remain in the enjoyment of the property, without the payment of rent, or at least without some incontestable acknowledgment of his title.

This doctrine is so fully adopted in our law, that a possession by one who entered as a tenant, for twenty years after the termination of the tenancy or after the last payment of rent, bars any action by the landlord for the recovery of the land. C. C. P., § 26. It has long been the settled law, that if a person enters upon land not as a tenant, but without any right or title at all, an adverse possession for twenty years will create the presumption of a deed from the true owner, if not under a disability.

If the fact of possession is competent evidence, any acts or declarations of the possessor must also be competent as characterizing his possession. This has been very often held in cases where the question was, whether a prior deed from the possessor had been made in fraud of his creditors. The cases on this point are numerous. I cite the most recent in this Court. *Kirby* v. *Masten*, 70 N. C. 540. The cases also are very numerous where declarations of a person in posses-

sion have been admitted for other purposes. In most of them the declarations have been against his interest, as being in disparagement of his title.

Greenleaf says: "Possession is *prima facie* evidence of seisin in fee simple; and the declaration of the possessor that he is tenant of another, it is said, makes most strongly against his own interest, and therefore is admissible. But no reason is perceived, why every declaration accompanying the act of possession, whether in disparagement of the claimant's title, or otherwise qualifying his possession, if made in good faith, should not be received as part of the *res gestæ;* leaving its effect to be governed by other rules of evidence." 1 Greenl. Ev. § 109.

I have not been able to find any case which covers the present. But as the declarations tended merely to confirm the presumption arising from the possession and to rebut any suspicion that it was not adverse, we think they were competent. The worst that can be said about them is that they were unnecessary.

This exception is overruled.

Second exception: The deed from the widow and daughters of John Yates, made to the defendants after his death, was immaterial.

It was unnecessary for the defendant to show title in himself. But it is manifest that, whether it had been properly proved or not, its admission could not prejudice the plaintiff. This exception is overruled.

Third exception: This exception, although not so stated, would seem necessarily to have been taken by defendant, as it was to the admission of evidence offered by the plaintiff. Hence it need not be noticed.

Fourth exception: We see no error in the Judge's ruling. The question was intended to enable the witness to contradict evidence previously given tending to affect her credit. Exception overruled.

Fifth exception: The reasons given for overruling the first exception apply also to this. The Judge however, gave as one of his reasons for admitting the deed, that it was not only the declaration of John Yates, but also of David Yates, one of the witnesses to the plaintiff's deed, and being subsequent to the plaintiff's deed, was inconsistent with his attestation. We do not concur with His Honor in this reason, for there is no presumption that a witness has notice of the contents of a writing which he attests. His Honor's conclusion however, was supported by the first reason given by him. Exception overruled.

Sixth exception: The testimony of the witness was certainly competent in the limited application which His Honor allowed to it, viz: as corroborating the statement of the witness that he had seen David write, by exhibiting the writing. The question of the comparison of hand-writings is not presented.

Seventh exception: We concur with the Judge that Matthewson was competent as an expert in hand-writing to testify as to his opinion. An expert in any art or science is one who has skill in it. Greenl. Ev. § 440. There are various grades of experts, and the highest degree of skill is not necessary. A physician who has never specially studied the diseases of horses, and never saw a case of glanders, may give his opinion whether a mule had that disease. *Horton* v. *Green*, 64 N. C. 64. Merchants and others who habitually receive and pass the notes of a bank are experts. *State* v. *Cheek*, 13 Ire. 114; *State* v. *Jacobs*, 6 Jones, 284. Exception overruled.

Eighth exception: The witness was allowed to compare the signature of John Eller as subscribing witness to the alleged deed from John Yates to the plaintiff, with the signature of said Eller to a deposition introduced by the plaintiff in evidence on the trial. This was permissible under the decision in *Outlaw* v. *Hurdle*, 1 Jones, 150. The general practice

seems to be more liberal than what was approved in that case. Greenleaf says: "Where other writings admitted to be genuine are already in the case. Here the comparison may be made by the jury, with or without the aid of experts." Greenl. Ev. §§ 578–576, note 4. *Chandler* v. *Le Baron*, 45 Me. 534. In the famous Howland will case, 4 Am. L. Rev. 625, experts and the jury were allowed to compare not only the signatures of the alleged testatrix to papers in evidence as bearing directly on the issue, but also her signatures to papers put in evidence only for the purpose of comparison, and the signatures of many other persons not parties to the action to papers having no connection with the subject of it. This case however is not cited as an authority. This exception is overruled.

Ninth exception: The remarks made on the first exception apply to this. The exception is overruled.

There is no error in the proceedings below.

PER CURIAM. Judgment affirmed.

H. C. WALL and T. C. LEAK, Executors, and others v. JAS. A. COVINGTON Administrator and ANN C. LEAK Executrix

Practice -- Taxation of Costs -- Fees of Referees.

No part of the costs of an action can be taxed against the party recovering judgment.

Therefore, when the plaintiffs recovered judgment in the Court below and it was ordered that an allowance be made to the Clerk for stating an account, one half to be paid by the plaintiffs and the other half by the defendants; *Held*, to be error.

CIVIL ACTION, on an Administrator's Bond, tried at Fall Term, 1876, of RICHMOND Superior Court, before *Furches*, *J*

The facts are substantially as follows: One John P. Covington died in Richmond County in 1857, leaving the plaintiffs Virginia Covington, (now Stewart,) H. B. Covington and John P. Covington (a minor) his heirs at law and distributees. Soon after his death, the defendant James A. Covington was appointed and qualified as his administrator and executed a bond with one John W. Leak (testator of the other defendant) as surety.

This suit was brought on said bond by Wall and Leak Executors of one Mial Wall, (who was the former guardian of the children of said John P. Covington deceased) and the other plaintiffs above named.

An order was made in the case, directing D. Stewart the Clerk of said Court to state an account, which was subsequently returned and confirmed and judgment entered accordingly in favor of the plaintiffs. It was further ordered that said Clerk be allowed $250 for stating said account, one half to be paid by defendants and the other half by plaintiffs. The plaintiffs insisted that they were not chargeable with any part of the costs, and that said allowance should therefore be taxed against defendants. His Honor ruled otherwise and the plaintiffs appealed.

Mr. John D. Shaw, for plaintiffs.
Mr. John N. Staples, for defendants.

BYNUM, J. Upon the trial of the case, judgment was entered in favor of the plaintiffs and against the defendants for the debt and the costs of the action. It was further ordered by the Court, that D. Stewart, the Clerk, be allowed $250 for taking and stating the account, one half to be paid by the defendants and the other half by the plaintiffs.

There is error. The Clerk, as Clerk, is entitled to no fees or allowance for taking and stating an account by order of

the Court. Bat. Rev. ch. 105, § 28. If the account was taken by him as *referee*, under C. C. P. § 245, as we think it was, then the fees therefor are fixed and determined by C. C. P. § 285. They then become a part of the costs, and are to be inserted in the judgment. C. C. P. § 283. The party prevailing in the action is entitled, as a matter of law, to recover full costs of the other party, unless in cases otherwise provided for.

This case does not fall within any of the statutory exceptions, but is governed by the provisions of C. C. P. § 287, and further explained and confirmed by C. C. P. §§ 276, 277 and 343. (*v.*)

The plaintiffs, therefore, having recovered judgment, no part of the costs can be taxed against them, but they are to be taxed against the defendants and include the fees of referees.

Error.

PER CURIAM. Judgment reversed.

THOMAS H. SATTERTHWAITE and others v. THE BOARD OF COMMISSIONERS OF BEAUFORT COUNTY.

County Commissioners -- Necessary Expenses of County -- Parties.

1. The Board of Commissioners of a county are entrusted with the duty and power of deciding what are necessary county expenses.
2. Repairing and building bridges are a part of the necessary expenses of a county.
3. When an Act authorizing the erection of a private toll-bridge "prohibits the establishment of *any other toll-bridge* or any ferry, within three miles, &c.," it is necessary that the owner of such toll-bridge shall be made a party to an action involving the right of the county to establish a *free* bridge within the prohibited distance, before the determination of the action

(*Brodnax* v. *Groom*, 64 N. C. 244, cited and approved.)

This was a CONTROVERSY submitted without action under the Code of Civil Procedure and heard on the 17th of October, 1876, at Chambers, before *Moore, J.*

Upon application of citizens of Washington and Chocowinity Townships in Beaufort county, the defendant Board of Commissioners declared that a free bridge across Pamlico river at the town of Washington, was a public necessity and a proper charge of said county. It was thereupon ordered that bonds be issued to the amount of $7,000, and appropriated for the construction of said bridge. But it appearing that a toll-bridge already in existence could be bought at a less price than a new one could be built, that the same was in good repair, and that it was advisable to buy, the defendants ordered the bonds to be deposited with the County Treasurer, in trust to pay for the bridge when the said Townships shall pay to said Treasurer the sum of $3,000, to be applied to the same purpose.

This proceeding was then had to obtain an adjudication as to the power of the defendants in the premises, and to test the legality of said bonds.

His Honor sustained the action of the defendants and the plaintiffs appealed.

Messrs. Sparrow & Son, for plaintiffs.
Mr. G. H. Brown, Jr., for defendants.

PEARSON, C. J. "Who is to decide what are the necessary expenses of a County? The County Commissioners, to whom is confided the trust of regulating all County matters. Repairing and building bridges is a part of the necessary expenses of a County, as much so as keeping the roads in order or making new roads, &c." *Broadnax* v. *Groom*, 64 N. C. 244, where the matter is fully discussed.

The defendants say, that acting as "the Board of Commissioners," they were satisfied that it had become a necessary expense of the County to provide a free bridge across the river at Washington so as to relieve the community from the burden of paying toll every time any one crossed the river (over the bridge now there) to or from the city; and every time any one transported, by way of the toll-bridge, merchandise, provisions or anything to or from the city.

The Board of Commissioners further say, that endeavoring to perform this duty they were satisfied that the "toll-bridge" could be bought for a sum "much less than a bridge can be built for and that the toll bridge is well built and is in good repair."

Conceding that the Board of Commissioners have power to build a new bridge it is manifest that they have power to buy a bridge already built, for the result is the same. In either way a County bridge is provided for the use of the public, which is the purpose to be accomplished.

It is said in behalf of the plaintiffs that the allegation that the toll-bridge can be bought for less than another bridge can be built for, is on the assumption that in order to build another bridge the Board would be obliged to buy the franchise of the owner of the toll-bridge and this would require more than the cost of a bridge.

In this view it is necessary to put a construction upon the Act of 1866, amending the charter of the toll-bridge, which "prohibits the establishment of *any other toll bridge*, or any ferry within three miles, &c."

Does this prohibition extend to the erection of a *free* bridge by the County, so as to cripple the County for all time to come and take from it a power, the exercise of which has become necessary in the progress of things? We will not enter upon this question of construction in the absence of the owner of the toll-bridge, who has a right to be heard before it is determined.

The case will be remanded on payment of costs by plaintiffs, to the end that the owner of the toll-bridge may be made a party defendant and the point be distinctly presented by the pleadings; otherwise, judgment in the Court below affirmed and the proceedings dismissed.

PER CURIAM. Judgment accordingly.

STATE v. THOMAS STYLES.

Jurisdiction -- Overseer of Western Turnpike Road -- Neglect of Duty.

The Courts of Justices of the Peace have exclusive original jurisdiction (under § 4, ch. 81, Laws 1868–'9) of the offence of neglect of duty by overseers of the Western Turnpike Road.

INDICTMENT for Misdemeanor, tried at Fall Term, 1876, of JACKSON Superior Court, before *Cannon, J*

The defendant was overseer of a public road and charged with neglect of duty. Laws 1868–'9, ch. 81, § 4. Upon the trial in the Court below the defendant moved to quash the bill of indictment upon the ground that the Superior Court had no jurisdiction, because the Act of Assembly fixed the punishment at a fine of ten dollars.

His Honor allowed the motion and discharged the defendant. From this judgment the Solicitor for the State appealed.

Attorney General, for the State.

Messrs. G. S. Ferguson and *J. C. L. Gudger*, for the defendant.

FAIRCLOTH, J. In pursuance of an Act, 1868–'9, ch. 81, the defendant was appointed overseer of a portion of the Western Turnpike Road, and was indicted in the Superior Court for neglecting to keep his part of said road in repair.

The 4th section declares that any such overseer who shall neglect for six continuous days to keep his allotment in a good and passable condition, shall be deemed guilty of a misdemeanor, and on conviction pay a fine of ten dollars.

Article IV, § 33 of the Constitution declares, "The several Justices of the Peace shall have exclusive original jurisdic-

tion under such regulations as the General Assembly shall prescribe * * * of all criminal matters arising within their counties, where the punishment cannot exceed a fine of fifty dollars or imprisonment for one month." According to these provisions it seems clear that a Justice of the Peace has exclusive original jurisdiction of this offence and the question is not affected by some subsequent Acts of Assembly intended to divest the jurisdiction of the Superior Court in certain cases.

His Honor quashed the bill of indictment for want of jurisdiction and we concur in his action.

There is no error. Let this be certified to the end, &c.

PER CURIAM. Judgment affirmed.

ROBERT MAYNARD v. MATTHEW P. MOORE.

Ejectment -- Execution Sale -- Evidence -- Practice -- Deed -- Covenants.

1. In an action for the recovery of real estate, where the plaintiff claims under a purchase at execution sale, evidence that a levy was made by the Sheriff under a *fi. fa.* after its return day, is competent.
2. The entry by a Sheriff upon a *ven. ex.* of "J. G. Moore, $120," coupled with the fact that afterwards a deed was made to A as assignee of Moore, and with other evidence tending to show that there was a sale and that Moore was the purchaser, and that thereafter the defendant in the *ven. ex.* acknowledged under his hand and seal that a sale had been made, constitutes a sufficient return.
3. In such case it is immaterial that the *ven. ex.* varied from the judgment in being for a less amount.
4. A Sheriff who makes a sale under execution and the purchase money is not paid, is not obliged to re-sell immediately, but may give the purchaser time in which to pay the purchase money, if neither party to the execution objects or complains.
5. A levy on land endorsed by a Sheriff upon a *fi. fa.* which he retained in his hands until after its return day, is invalid.
6. In an action to recover real estate, where the defendant sets up legal defences and also an equitable counter claim it is proper to postpone the consideration of the latter until the former are disposed of.
7. A grantee who accepts a deed poll containing covenants or conditions to be performed by him as the consideration of the same, becomes bound for their performance although he does not execute the deed as a party. The assignee of such grantee is likewise bound.

(*McKee* v. *Lineberger*, 69 N. C. 217; *McKeithan* v. *Terry*, 64 N. C. 25; *Barden* v. *McKinne*, 4 Hawks, 279; *Brooks* v. *Ratcliff*, 11 Ire. 321, cited and approved.)

CIVIL ACTION, for the recovery of possession of real estate tried at Fall Term, 1875, of ALAMANCE Superior Court, before *Kerr*, *J.*

The facts are sufficiently stated by Mr. Justice Rodman in delivering the opinion of this Court. (See case of same title, 70 N. C. 546.)

Messrs. E. S. Parker and *J. E. Boyd*, for plaintiff.

Messrs. J. W. Graham and *J. A. Graham*, for defendant, cited, *Lanier* v. *Stone*, 1 Hawks, 329; *Barden* v. *McKinne*, 4 Hawks, 279; *Clarke* v. *Diggs*, 6 Ire. 159; *Taylor* v. *Gooch*, 3 Jones, 467; *Duncan* v. *Duncan*, 3 Ire. 317; *Lyerly* v. *Wheeler*, 11 Ire. 288, *Lambert* v. *Kinnery*, 74 N. C. 348; *Beavan* v. *Speed*, *Ibid*, 544; *Andrews* v. *Pritchett*, 72 N. C. 135; *Cohn* v. *Chapman*, Phil. Eq. 92.

RODMAN, J. This case is somewhat complicated of itself, but it has been made more so by a style of pleading which states what is properly evidence, instead of stating facts.

It is our duty however to disentangle the mass and to extract from it as well as we can, the claims of the parties, and from the facts which are proved or admitted, to ascertain their rights

1. The plaintiff claims title to and the right to the possession of a certain piece of land. The defendant denies this right. *Here is a joint issue.* The plaintiff proves in support of his title the following facts; At September Term, 1861 of the County Court of Alamance, Holt recovered a judgment against the present defendant for $150 and costs. On this judgment a *fi. fa.* issued returnable to December Term, 1861, of said County Court. On the 5th March, 1862, (it being after the return day of the execution,) the Sheriff of Alamance, having the execution in his hands, endorsed on it a levy on said lands and returned it to said Court.

The defendant objected to this evidence and on its being admitted, excepted. At the risk of breaking the thread of narration, we are obliged to pause here to pass on this exception. Clearly the evidence was *competent*, and the defendant on reflection would have seen that it was. If it is not allowed to one who claims under a purchase at execution sale, to introduce the record of the judgment and of any execution issued thereon, he can never prove his title. The

objection which the defendant probably had in his mind was as to the *effect* of the evidence; an objection which was premature at that stage of the trial, whatever might be its weight at the due time.

In his zeal to exclude everything which might possibly go towards making out a case for the plaintiff, he overlooked the difference between the competency and the effect of evidence and exposed himself to a judgment for costs.

We return now to the narration which we left, to consider the defendant's exception to the evidence.

No other execution issued upon the judgment until after 7th June, 1869, when the plaintiff docketed his judgment in the Superior Court of Alamance. On this docketed judgment a *venditioni exponas* issued under which, on the 4th September, 1869, the Sheriff sold the land and J. G. Moore became the purchaser at $120.

Before returning the execution the Sheriff endorsed on it "J. G. Moore $120," and "no sale for want of compliance."

Afterwards the Sheriff, by consent of J. G. Moore and on payment by the plaintiff or by J. G. Moore of a sum greater than $120 and equal to the judgment debt to Holt, executed a deed for the land to the plaintiff.

Before considering the effect of this sale in passing the title, if it was regular, it is necessary to pause again and consider the objections which were made to its regularity.

1. It is said that the entry "J. G. Moore, $120," does not amount to a return that a sale was made to Moore. We are of opinion that coupled with the fact that a deed was afterwards made to the plaintiff as assignee of Moore, and with the other facts in evidence tending to show that there was a sale and that J. G. Moore became the purchaser, and with the fact that the defendant afterwards under his hand and seal acknowledged that a sale had been made, and by implication authorized a deed to be made to the purchaser, the return is sufficient, at least as between the present parties, to show the fact of sale. *Maynard* v. *Moore*, 70 N. C. 546.

2. Neither can it be material that the execution varied from the judgment in being for a less amount. Such variance is expressly cured by the Act, R. C. ch. 44, § 13 (Bat. Rev. ch. 43, § 12) which ought to be familiar to the profession.

3. It is contended that the entry "no sale for want of compliance," coupled with the fact that the purchaser did not pay his bid for some time afterwards, invalidated the sale.

If a purchaser at Sheriff's sale fails to pay his bid, the Sheriff may resell immediately, or he may apply for a rule of Court to compel payment, or he may at his own peril as to the plaintiff indulge the purchaser. *McKee* v. *Lineberger*, 69 N. C. 217.

Most certainly he is not obliged to make an immediate re-sale, but may give the purchaser time, if neither party to the execution objects or complains. In this case Holt acquiesced and the defendant ratified the delay by his deed of 2nd January, 1871.

We return now to consider the effect of the sale on 4th September, 1869, considering it as a regular sale. Unquestionably its effect *prima facie* was to pass the title to the plaintiff.

For this purpose it needs no support from the *fi. fa.* returnable to December Term, 1861, or from the levy on it, which so far as the present question is concerned may be disregarded.

The first issue must therefore be decided for the plaintiff, subject to the decision of the second.

II. The defendant says that J. G. Moore purchased the land subject to the homestead right of the defendant, and that his assignee (the plaintiff) holds subject to the same right.

We suppose it will be conceded that the plaintiff's title so far as it depends on the purchase by J. G. Moore on the

4th September, 1869, was subject to the defendant's homestead right *unless* the plaintiff Holt had acquired a specific lien on the land by virtue of his *fi. fa.* returnable to December Term, 1861, and the levy endorsed thereon on 5th March, 1862. It was held in *McKeithan* v. *Terry*, 64 N. C. 25, that a specific lien acquired by virtue of a levy before the adoption of the Constitution was paramount to the homestead given by that statute. But ever since the case of *Barden* v. *McKinne*, 4 Hawks, 279, it has been considered that the entry of a levy on land made by a Sheriff on a *fi. fa.* which he retained in his hands after the return day, was not valid. The plaintiff in this case is unable to connect the execution under which he purchased, with the execution returnable to December Term, 1861, so as to establish any lien in his favor prior to the docketing of his judgment on 7th June, 1869, at which time the homestead right was in existence.

The plaintiff did not acquire by the purchase of J. G. Moore, any estate paramount to the homestead of the defendant. As the assignee of such purchaser he acquired a title to any excess over the homestead, and perhaps to the reversionary estate after the expiration of the defendant's homestead. The Act forbidding the sale of such reversionary estates had not been passed when the purchase in question was made. That Act was ratified 25th March, 1870. (Bat. Rev. ch. 55, § 26.) Upon the question whether the reversionary interest passed or not, it is unnecessary to express any opinion.

III. The plaintiff then says that the defendant released his homestead estate to J. G. Moore by his deed of 2nd January, 1871, and that he (the plaintiff) as assignee of J. G. Moore, is entitled to the benefit of such release. *This makes the third issue.* The alleged release is in these words:

"STATE OF NORTH CAROLINA, }
Alamance County. }

MR. J. G. MOORE;

You will make the following arrangement for me, and I will pay you fifty dollars for the trouble you may be at in arranging the matter, and the loss you may have sustained in not getting the land *when you first bid it off*. Agree to pay Col. Jere. Holt the amount of his debt with eight per cent. interest *on or before the first day of January*, 1872. I hereby agree to sign any and all papers necessary to complete the above trade, *and hereby relinquish all right to a homestead until the said debt to Col. Jere. Holt is paid off, and your account of fifty dollars is paid.* Jan. 2, 1871."

"M. P. MOORE, [Seal.]"

"Witness: W. V. MONTGOMERY."

That this deed was effectual to release any previous irregularities in the sale we have said before herein. That it was also effectual to release the defendant's homestead to J. G. Moore, and to estop the defendant from setting up any claim at law to a homestead against J. G. Moore, we conceive to be too clear to admit of a dispute. Its terms are plain; no fraud is imputed in procuring its execution; it appears from the deed that the defendant knew of his right; and it was upon a valuable consideration, which is all that we can say at present upon the consideration, reserving an inquiry into the nature and extent of it for a future stage of this opinion. It does not appear that the defendant had any wife or child to be entitled to an interest in his homestead or to object to his releasing it. We think it is clear too, that J. G. Moore had a right to assign his bid for the land to the plaintiff and it is quite immaterial whether the defendant knew of or consented to such assignment or not. We think also that J. G. Moore *might* assign his interest as purchaser with the benefit and burden of the defendant's deed of January 2nd,

1871. The objection to this assignment, because the defendant did not have notice of it, borders on the frivolous. *Brooks* v. *Ratcliff*, 11 Ire. 321. Cannot a purchaser at execution sale deal with his own, without consulting the defendant in the execution? We are also of opinion that in the absence of any thing to the contrary, it will be presumed that J. G. Moore *did* assign to the plaintiff the benefit of the defendant's release of his homestead. When the plaintiff by agreement with J. G. Moore undertook to perform, and did, at least in part, perform the conditions of that deed by paying the debt to Holt, it would be unreasonable to suppose that the parties did not intend that he should have the benefit of which such payment was in part the price. If there could be any doubt on this question, J. G. Moore is the only person who could contest the plaintiff's right and he does not appear to do so.

The issue therefore must be determined for the plaintiff.

Our opinion on these issues disposes of the *legal* claim of the plaintiff and of the *legal* defences of the defendant, and upon the *legal* title to the land the plaintiff is entitled to a judgment in his favor.

IV. The defendant however says by way of equitable counter claim, that he ratified the Sheriff's sale and released his homestead to J. G. Moore on certain conditions, covenants or trusts, viz; that upon defendant's payment to Moore of the Holt debt, which J. G. Moore was to pay, and fifty dollars, J. G. Moore would re-convey to him the land purchased; that the plaintiff as assignee of J. G. Moore had actual notice of the covenants or trusts which Moore had assumed; and that whether he had notice or not, yet as he claims the benefit of the release of the homestead of which the performance of the covenants or trusts was the consideration, he is bound to their performance, and cannot be allowed to take benefit from one part of the deed and repudiate the other.

It will be seen that this defence is purely equitable, and pre-supposes a determination of the legal title in favor of the plaintiff. Under our former system of procedure, it would have been asserted in a Court of Equity after such determination in a Court of law and execution on the judgment at law would have been stayed until the equitable defence could be passed on. Although it is now set up, and is to be tried in the same action with the question as to the legal title, yet we think it would have been competent for the Judge of the Superior Court, and perhaps more convenient, to postpone the hearing of it until after the legal title had been determined. The determination of the legal title in the plaintiff, is in fact a necessary preliminary to the consideration of this defence.

This the Judge seems in fact to have done, although perhaps without having in his mind at the time a clear idea of the nature of the defence or an intention to postpone it. For it will be seen by any one who chooses to examine the obscure record in this case, that the defence is not stated in the pleadings with any distinctness; neither does the Judge directly or positively decide on it, although by rejecting the evidence about a horse alleged to have been given by the defendant in part payment of his debt to J. G. Moore, *upon another ground*, the Judge seems to imply that such defence existed and was considered by him, for if no such defence had been set up, there would have been no debt to which the alleged payment would be applicable. We proceed now to consider the merits of this defence.

It is a settled principle of law that a grantee who accepts a deed poll containing covenants or conditions to be performed by him as the consideration of the grant, becomes bound for their performance although he does not execute the deed as a party; *Staines* v. *Morris*, 1 Ves. and B. 14; *Finley* v. *Simpson*, 4 Zab. (N. J.) 311, where a learned counsel has collected probably all the authorities on the question up to that date.

In the present case it is clear from the terms of defendant's deed of 2nd January, 1871, that on the payment by defendant of a certain sum, J. G. Moore covenanted that defendant should then have a homestead in the land.

As however J. G. Moore had acquired, or it was contemplated that he would acquire, through the Sheriff's deed and defendant's release of his homestead, a full legal title to the land, it was necessary that on payment by defendant, J. G. Moore should convey to defendant either a *homestead estate or the whole estate* which J. G. Moore acquired as aforesaid. The extent of this covenant is the only question in the case which admits of any doubt. As it was not decided in the Court below it is not before us for decision and we will not decide it. Neither is it necessary to say whether the question is one to be decided by the Judge as one of law, *from the deed alone*, or by the jury under the instructions of the Judge as a mixed question of fact and law, that is, *upon the terms of the deed in connection with the circumstances dehors*.

We agree with the defendant that the plaintiff is bound to the performance of the implied covenants just as J. G. Moore was. He either took the assignment of J. G. Moore's bid with notice of the covenants whatever they may be held to be, or else by bringing this action for the land denying the homestead, he has elected to take the benefit of the release in the deed, and thereby assumed a liability to the covenants of J. G. Moore on the performance of which the release was conditioned.

V. The defendant says he has paid the plaintiff part of the sum which by said deed he was to pay before claiming his homestead, and is willing and ready to pay the residue. To ascertain how much he has paid it will be necessary to take an account which can be done by a reference.

The parties undertook to take this account before a jury upon the trial of other issues, and before the defendant's right to an account had been determined. This was prema-

ture and impracticable. The Judge should have reserved the taking of the account until after all the other issues between the parties had been decided. It is not positively necessary therefore to consider the competency of the evidence offered touching the payment to the plaintiff in a horse. The Judge excluded the evidence as not tending to prove the fact alleged. As the same question may arise upon a reference it may be well enough to say that we think the evidence offered was competent. Of course we express no opinion on its weight. The chief difficulty of this case does not arise from any doubtful facts or uncertain law, but from the necessity of extricating the material facts and the claims of the parties from a confusion produced by a disregard of the established rules of pleading on the part of both parties, and to a failure to preserve equitable rights and to determine the several issues in their due and logical sequence.

The judgment of the Court below so far as it adjudges the legal title to the land to be in the plaintiff is affirmed. Execution will be restrained until the equitable defence of the defendant shall be determined, and until the order of the Judge of the Superior Court. The plaintiff will recover costs in this Court.

PER CURIAM. Judgment accordingly.

S. S. ALSOP and wife v. W. E. BOWERS, Adm'r (with will annexed) and others.

Will -- Abatement of Legacies.

Where a testator by will gave to certain persons pecuniary legacies out of an ascertained fund, and gave the residue of the fund to another and it became necessary to apply a portion of the fund to the payment of debts; *Held*, that all the legacies should abate ratably.

SPECIAL PROCEEDING commenced in the Probate Court of HALIFAX County, and heard on appeal on the 18th day of November, 1876, at Chambers, before *Watts, J.*

The case involved the construction of that part of the will of Margaret A. Dunn, contained in the 1st, 5th and 7th clauses thereof, which are as follows:

1. "I give and bequeath my real and personal estate as follows; of the bonds due (by sundry parties and the funds in the Savings Bank at Warrenton, N. C., I give to my nephew's children, Mary Powell, $300, Wiley Powell, $300; to my niece's children, Eugene Allen, $200, Ivy Allen, $200; and the residue of said funds after paying above amounts, I give to my niece Martha Burnett, (Martha Alsop, the feme plaintiff.)

5. "I direct my executor to sell the cattle (&c., &c.,) and the residue of my property at Vine Hill in Nash County, and to divide the proceeds of the sale among my step-children, W. O. and Frank Dunn.

7. "The above requests having been complied with, I give to my step-children, William, Martha and Frank Dunn, any interest or property that I have or may have in their father, Benjamin Dunn's estate, after deducting therefrom and paying all debts and money due by me."

The fund provided for in the 7th clause was insufficient to pay the debts, there remaining unpaid after its exhaustion, about $800. The fund in the Savings Bank amounted to about $2,100.

The plaintiffs insisted that the unpaid debts should be discharged by a ratable contribution from all the legatees, and that the legacies bequeathed in the 1st and 5th clauses should abate ratably.

The defendants Powell and Allen insisted that the legacies bequeathed to them in the 1st clause should be paid in full notwithstanding the fact that the residue to plaintiff might be affected by debts.

His Honor held, that all the legacies in the 1st and 5th clauses of said will should abate ratably until a fund sufficient to pay the debts be raised and that the defendants (legatees) divide ratably with the plaintiff Martha the fund provided in the 1st clause, reduced by its proper assessment to pay debts, in the same proportion as if there had been no abatement.

From this judgment the defendants appealed.

Mr. Walter Clark, for the plaintiffs.
Messrs. Moore & Gatling and *C. A. Cook*, for the defendants.

PEARSON, C. J. The general rule is, a residuary legacy is to be taken for the payment of debts in the first instance; then general or pecuniary legacies; then specific legacies. When there are several legacies in the same class the abatement is *pro rata*

It was conceded on the argument that the legacy of Martha Burnett is not a "residuary legacy" in the sense in which these words are used by the books. But it was insisted that as she took the residue of a fund after the payment of certain amounts to Powell and others, the legacy bears a close

analogy to a residuary legacy and is to be taken for the payment of debts in the first instance, and has no claim upon the pecuniary legacies for abatement *pro rata*.

We do not think the analogy applies. The reason for subjecting a residuary legacy to the payment of debts in the first instance, is, because in most wills there is an express provision for the payment of debts and until that is done, the subject of the legacy is not ascertained. The words commonly used, are "after the payment of my debts and the legacies hereby given I bequeath the residue of my estate, &c" Where there is no express provision to that effect, the Courts supply it by implication. As to the legacies set out in the will, the word "residue" covers them. As to the payment of his debts the reasoning is; the testator knew that his debts had to be paid before his legacies, *ergo*, subjecting this legacy to the payment of all other legacies, of necessity subjects it to the payment of his debts in the first instance. This reasoning does not apply to a specific legacy of an ascertained fund minus the payment out of it of certain sums to be paid to her grand nephews and nieces, for there is nothing to imply that it was the intention to add also 'minus the payment of my debts" an unexpected event.

We are satisfied that it was the intention of the testatrix to divide this fund between her niece and grand nephews and nieces according to a ratio fixed in her mind, without reference to the payment of her debts. And there is nothing to support the inference that she intended to have this ratio of division altered by the contingency of debts. It follows that there must be a ratable abatement of what she gives to her niece and what she gives to her grand nephews and nieces, upon the principle, "equality is equity."

The counsel for the defendant, in our opinion, failed to distinguish this case from *Everitt* v. *Lane*, 2 Ire. Eq. 548. There the testator gives a negro by name to A and a negro

by name to B, and directs these negros by name to be sold, and gives the "balance" of his negros to C; *Held* this is not a residuary legacy, but all are specific legacies and must abate ratably.

In our case, as the legacies to the defendants are pecuniary, according to the general rule, they would be liable to debts in the first instance, but for the fact that these legacies are demonstrative, that is to be paid out of a certain fund, which brings them up to the dignity of the specific legacy to the plaintiff and thus calls for an abatement *pro rata.*

No error.

PER CURIAM. Judgment affirmed.

AMOS WADE v. DAVID M. CARTER.

Evidence -- Explanation of paper writing.

The rule that a written contract cannot be contradicted, added to or taken from by parol evidence, does not apply to every writing; *Therefore,* when the defendant as attorney for the plaintiff had given A a written assignment of a judgment in favor of the plaintiff for an expressed consideration; *Held,* That parol evidence was admissible to show the circumstances under which the assignment was made and the actual consideration received by the defendant.

(*Brown* v. *Brooks,* 7 Jones, 93; *Wilson* v. *Derr,* 69 N. C. 137, and *McCall* v. *Gillespie,* 6 Jones, 533, cited and approved.)

CIVIL ACTION, tried at Fall Term, 1876, of CRAVEN Superior Court, before *Seymour, J.*

The plaintiff alleged that the defendant was indebted to him in the sum of $298, and to establish his claim, relied on

an instrument of writing, of which the following is a copy: "For and in consideration of the sum of $298 I hereby transfer and assign to N. Beckwith a certain judgment obtained by A. Wade plaintiff against B. A. Ensley (and others) in the County Court of Craven at March Term, 1861, and authorize said Beckwith to settle with the trustees of B. A. Ensley therefor. The amount of said judgment at its date was $5,156, of which $4,700 was principal money, the same being the amount of a debt specified in a certain deed of trust from B. A. Ensley to E. H Sanderson and D. B. Gibbs, dated February 18, 1861, among the first-class of creditors." Signed A. Wade, by D M. Carter, his attorney, and dated March 8, 1873.

There was evidence tending to show that plaintiff had a suit against Mrs. Ensley for a house in the city of Newbern and also held a judgment against her husband; that plaintiff employed defendant to get a release from her of said house and authorized him to release said judgment; that the money paid by Beckwith was not in consideration of the assignment, but was money arising from the trust fund and belonged to all the creditors, the plaintiff being one of them; that upon the release of said judgment and payment of the money by Beckwith, he (Beckwith) transferred to Mrs. Ensley, his interest in the real estate bought by him at a sale by her trustees; that said judgment was worthless except about $30 its *pro rata* share in said trust fund. The Court charged the jury, that if they believed from the evidence that the money was paid to defendant for the purchase of the judgment of Wade, the plaintiff would be entitled to a verdict. That if Beckwith paid to defendant the money belonging to the trust fund, they should find for the defendant. That in making up their minds upon that subject they would consider the assignment, signed by defendant, but that that assignment was not conclusive. The plaintiff ex-

cepted. The jury rendered a verdict for the defendant. Judgment. Appeal by plaintiff.

Messrs. Green & Stevenson, for the plaintiff.
Mr. A. G. Hubbard, for the defendant.

READE, J. It is settled, that a written contract cannot be contradicted, added to, or taken from, by parol evidence, offered by either of the parties thereto. But observe, that this doctrine applies to written *contracts* and not to *every writing*. As for instance, a receipt for money, which contains no evidence of a contract between the parties, is liable to be explained or altered by parol evidence; but it is otherwise where it is relied on as evidence of a *contract*. *Brown* v. *Brooks*, 7 Jones, 93. *Wilson* v. *Derr*, 69 N. C. 137. And other exceptions are numerous. As where there is a latent ambiguity in a written contract even, it may be explained by parol. *McCall* v. *Gillispie*, 6 Jones, 533.

In the case before us the plaintiff relies upon a writing which the defendant executed, not to him, but in his name, to one Beckwith, as follows: "For and in consideration of two hundred and ninety-eight dollars, I hereby transfer and assign to N. Beckwith, a certain judgment obtained by "A. Wade the plaintiff against" &c. (describing the judgment,) signed, A. Wade, by D. M. Carter, his Attorney." And the plaintiff insists, that that is a written contract between the defendant Carter and himself, that Carter had received from Beckwith $298 for him, and promised to pay the same to him.

Now, is that so? It says not a word about Carter's receiving any money. It says: "For and in consideration of $298, I transfer" &c. But whether the consideration had been paid theretofore, or was paid then, or was to be paid thereafter, is not stated. And further, no matter when or how it had been or was to be paid, it is not stated that it

had been or was to be paid to the defendant Carter; and it may just as well be *inferred* that it was paid to the plaintiff as to the defendant. It purports to speak the language of the plaintiff; "A Wade, by D. M. Carter, Attorney." And so much was the plaintiff oppressed by the insufficiency of the writing, that he did not rely on it to prove that the defendant received the money; but he introduced Beckwith as a witness, to prove that the defendant received the money. Now, why did he do that, if the writing itself showed it? Why did he introduce parol evidence to explain or add to the writing?

But the defendant, in order to make his defence full and clear, proposed to show that he never received any money for the plaintiff for the assignment of said judgment. But that the plaintiff had a suit against one Mrs. Ensly for a lot of land and that the plaintiff authorized him, the defendant, to transfer the judgment to Mrs. Ensly if she would give up the lot of land to the plaintiff, which she did. And that the defendant, instead of transferring the judgment to Mrs. Ensly, transferred it to said Beckwith, under some arrangement as we suppose from what is obscurely stated between Mrs. Ensly and Beckwith. And that the $298 which Beckwith paid to him at that time, was not for the transfer of the judgment nor was it for the plaintiff; but it was money which Beckwith owed certain trustees for property which he bought at the trust sale, in which the plaintiff and others were interested. That the plaintiff's share of that money was about $30, which sum he would owe the plaintiff but for the fact that the plaintiff owed him as much as that for professional services. That is what the defendant offered to show by parol evidence. His Honor allowed the evidence, and the jury found for the defendant.

There is no error.

PER CURIAM. Judgment affirmed.

F. T WARLICK v. PETER WHITE and wife, and others.

Evidence -- Character -- Legitimacy.

1. The mother of a child, her husband the alleged father being dead, is a competent witness upon the question of legitimacy.
2. When the point in issue is the legitimacy of a child, evidence offered to prove the bad character of the mother for chastity during the life time of the husband and before the birth of the child, is incompetent. But evidence offered to show her bad character for truth is competent.
3. In the trial of an action involving the legitimacy of a child, who is alleged to be of mixed blood, it is not improper to exhibit such child to the jury.

(*State* v. *Woodruff*, 67 N. C. 89, cited and approved.)

CIVIL ACTION, tried at Fall Term, 1876, of CATAWBA Superior Court, before *Buxton, J.*

The case substantially states the following: F. T. Warlick the beneficial plaintiff claimed title to an undivided half of a tract of land which formerly belonged to Joseph Carpenter, deceased. Plaintiff claimed as assignee of Mrs. Catharine Eaton, the sister and only heir-at-law of said Carpenter. The defendant's wife, Naomi White, before her marriage to said White, was the widow of said Carpenter and claimed title to an undivided half of said land under the will of her former husband. The defendant and his wife were in possession of the whole tract, Naomi claiming one-half in her own right and the other in right of her daughter Sarah J. Carpenter, who it was alleged was the sole heir of said Joseph Carpenter. Sarah was born shortly after the death of said Joseph, her father, and is a minor and one of the defendants in this action. Her legitimacy was a matter of controversy between the parties. Upon this point the decision of this Court is based, and the opinion delivered by Mr. Justice Rodman contains a sufficient statement of the facts.

Under the instructions of His Honor in the Court below the jury found the said Sarah was the child of Joseph Carpenter. Verdict for defendants and judgment in accordance therewith. Appeal by plaintiff.

Messrs. J. F. Hoke and *M. L. McCorkle*, for plaintiff.
Messrs. Folk & Armfield, for defendant.

RODMAN, J. 1. The plaintiff having introduced evidence tending to prove that Sarah, one of the defendants was illegitimate and not the heir of Joseph Carpenter, the defendant, Naomi, the mother of Sarah, was allowed to testify that she had been faithful to the said Joseph during his life and that no person but him could have been the father of the child. To this evidence the plaintiff excepted. As the disqualification of interest does not now exist, we see no ground for the exception. It would be hard upon the defendant Naomi, if her evidence could not be heard on such a point.

2. By way of impeaching the evidence of the defendant Naomi, the plaintiff offered a witness to prove her general character. The defendant objected to the witness being allowed to speak of any reports growing out of the matter in controversy. The plaintiff then proposed to ask the witness "what was the general character of Naomi White in 1864 and 1865," (July, 1865, was the date of the birth of the child Sarah, whose legitimacy was in dispute.) The Judge excluded the question in the form proposed, but allowed the plaintiff to inquire into the general character of Naomi previous to the birth of the child and as to her character since that time, except as it might be affected by that event. The plaintiff excepted.

It does not appear from the question, whether it was intended to apply to her character for truth or for chastity. In its form it covers both. As Naomi was a witness, we think her general character for truth might be inquired into, as of

the time when she testified. If the witness should say that her reputation was bad in that respect at the time of her testifying, it would be open to the defendants to prove by cross-examination or otherwise that her reputation had been made bad by reason of the charges made by the plaintiff, or by Lawson Carpenter or others, respecting the legitimacy of the child and that it was good before. If that appeared, it is reasonable to suppose that the evidence would have no weight with the jury because it would tend to establish the fact in controversy (the illegitimacy of the child) by a reputation based on the presumption of such illegitimacy. We cannot say however that the general reputation of the witness for truth at the time of her testifying could be excluded. It would be for the jury to say what weight it should have under all the circumstances. A different rule would apply as to the reputation of the defendant Naomi for chastity. It is clear that a reputation for want of chastity, acquired (if such was acquired at all) after the death of Joseph Carpenter, would not be competent upon the question of the legitimacy of her child begotten during his life time. And although it is not so clear we think that such a reputation existing during his life time, would not be competent for the purpose of disproving legitimacy.

When the husband had access, the presumption of paternity is very strong, though not absolutely conclusive. It can only be met by proof that it was impossible that he could have been the father of the child, as in this case it is attempted to be, by proof of the color of the child. As the question covered the whole general character, or more properly general reputation of the witness, we think it was properly refused. The character of Naomi was in issue only by reason of her being a witness. There was nothing in the nature of the action to put her character in issue otherwise.

3. Joseph Carpenter and his wife, the defendant, Naomi were whites.

The plaintiff alleged and gave evidence tending to prove that the defendant Sarah was of mixed blood and therefore could not be the child of said Joseph. She was examined by experts who testified on the trial and differed in their opinions. The plaintiff then proposed to exhibit the said Sarah to the jury, for the purpose of aiding them by her appearance, in deciding whether she was of mixed blood or not. The plaintiff did not propose otherwise to examine her as a witness. The defendants objected and the Judge sustained the objection and refused to order the said Sarah to be placed on the witness stand, for the purpose proposed. The plaintiff excepted.

We think that the plaintiff was entitled to exhibit Sarah to the jury in the manner proposed. It is said that such an exhibition to be useful, must be such as would be indelicate and even indecent. Mr. Folk produced from Coke an instance where a woman, whose then pregnancy was in issue, was permitted by an inferior Court to expose herself to the jury and the Superior Court justly condemned it as indecent. We need not fear that any indecent or indelicate examination would be permitted by the Superior Courts of this State. No such thing was proposed, and we confine ourselves to holding, that what was proposed should have been allowed. No question arises as to the manner in which the attendance of the defendant for the purpose proposed might be enforced. It appears that she was present in Court under a subpœna. If however an infant who was a proper witness should neglect to obey a subpœna, a Court would have no difficulty in enforcing her attendance by a writ of *habeas corpus ad testificandum*, directed to the mother or other person having control of her person.

We proceed to consider the question as to whether the Court should have required the defendant Sarah to appear on the witness stand for the purpose proposed. In its exact

shape the question is a novel one and we know of no case like it.

On general principles it would seem that when the question is whether a certain object is black or white, the best evidence of the color would be the exhibition of the object to the jury. The eyes of the members of the jury must be presumed to be as good as those of medical men. Why should a jury be confined to hearing what other men think they have seen and not be allowed to see for themselves.

> "Aut agitur res in scenis, aut acta refertur.
> Segnius irritant animos demissa per aurem,
> Quam quæ sunt oculis subjecta fidelibus, et quæ
> Ipse sibi tradit spectator." *Hor. ad Pisones.*

Juries of view in proper cases are familiar. Maps and plans are exhibited to the jury when the land is not accessible, so are models of machines in patent cases, &c. Nor are direct authorities wanting. In *State* v. *Woodruff*, 67 N. C. 89, the question in the Court below being on the paternity of a child, the mother was examined as a witness and during her examination held the child in her arms in view of the jury and the Solicitor called the attention of the jury to its features, and in his address commented on the child's resemblance to the putative father. The Judge told the jury that they might take into consideration the appearance of the child and give it such weight, &c. The opinion of this Court was delivered by Boyden, J. whose experience as a member of the bar was probably greater than that of any other man in the State. After distinguishing the question from one as to the genuineness of hand-writing, he says: "But when the question is as to the identity of a party or his resemblance to other persons, the law has very properly adopted a different rule of common sense and common observation, and it allows all persons to testify to such identity or to such resemblance, who have had an opportunity of

seeing the persons if but for an instant." * * * "Then why should not the jury be permitted (when they have the opportunity) to see for themselves and draw their own conclusions from their observation, as well as to hear witnesses depose as to their observation made in the same way? It certainly has been the practice to admit such evidence on the trial of such cases * * * for more than forty years without objection."

In the *People* v. *Gardiner*, in the Supreme Court of N. Y. at General Term, 6 Parker's Crim. Cases, 155, it was held that the Court below did not err in permitting the District Attorney to show to witnesses in the presence of the jury, clothes found on the dead body of Mulock, whom it was alleged the prisoner murdered, and also a hat and gun found near the dead body, and a watch which Mulock had on his person when he disappeared and which was subsequently traced to the possession of the prisoner. On that trial the District Attorney was allowed also to show to the jury the skull of Mulock and to compare the fractures on it with the broken gun found beside his body in order to show how nicely parts of the gun-lock and sight on the gun fitted the indentations or fractures in the skull. The following authorities are cited in that case: *People* v. *Larned*, 3 Selden, 445; *Milhado* v. *Brooklyn City R. R. Co.*, 30 N. Y. 370; *People* v. *Kennedy*, 32 N. Y. 141, 5 Cush. 295; Burrill on Circumstantial Evidence, 2 Ed. §§ 135, 137, 259, 264, and Starkie on Ev. §§ 90, 91.

In the famous Tichborne case, my knowledge of which is confined to what is to be found in 8 American Law Review, 381 (April 1874,) a person claiming to be Sir Roger Tichborne brought suit to recover certain lands which were the acknowledged property of the said Sir Roger if he was living. On the trial he swore to his identity with Sir Roger Tichborne, and he was afterwards indicted for perjury in so swearing. On the trial of the indictment, the only question

was as to the identity of the defendant with Sir Roger Tichborne. Evidence was given of certain marks on the person of the true Sir Roger, and as to their being found or not on the person of the defendant, who during the trial was at the bar of the Court and visible to the jury. One Brown, a witness for the defendant, stated that Sir Roger had a peculiar malformation of the thumb on the *right* hand. He was asked to look at the defendant's thumb. The defendant extended his *left* hand and the witness professed to recognize on it the peculiar malformation he had spoken of as being on the right hand of Sir Roger. It does not appear but that the defendant voluntarily exhibited his hand, but it can scarcely be doubted that if he had refused, he would either have been compelled to do so or the jury would have been instructed that they might draw conclusions unfavorable to him from his suppression of the evidence. If a person indicted for a crime should persist in wearing a mask, it can scarcely be doubted that a Court would order the mask to be removed so that a witness of the crime might be able to identify him with the criminal. In the same case it seems to have been conceded that either party might have called as witnesses the sisters of Arthur Orton (whom the prosecution alleged the defendant to be) merely for the purpose of permitting the jury to see whether they resembled the defendant or not. The counsel for the defendant constantly called the attention of the jury to the color of his hair, &c., and two locks of hair were exhibited to the jury for their examination and comparison, one of which had been taken from the head of Sir Roger and the other from the head of the defendant.

We think it unnecessary to pursue the discussion any further.

Error. The plaintiff is entitled to a new trial.

PER CURIAM. *Venire de novo.*

JAMES I. MOORE and others v. RICHARD D. JONES and others.

Mandamus -- County Commissioners -- Canvass of Votes.

A Board of County Commissioners in canvassing the votes cast in an election, have no right to go behind the returns sent up by the Judges of Election from the respective Townships of the County.

(READE, J. *Dissenting.*)

PETITION for a writ of *Mandamus* against the Commissioners of GRANVILLE County, heard at Chambers in Franklinton on the 29th day of November, 1876, before *Watts, J.*

The summons was issued on the 27th day of November, 1876, against Richard D. Jones, Charles B. Cole, Andrew Williams, Albert Wyche and Braxton Hunt, Commissioners, and James B Crews, John Morgan, James B. Hobgood and Elijah C. Montague.

In the complaint the plaintiffs alleged:

1. That an election was held on the 7th day of November, 1876, for the purpose of electing members of the General Assembly, County officers, &c. &c. and that the returns of the votes cast at the several precincts in said County were made out by the Judges of Election and forwarded to the County Commissioners.

2. That defendants (Commissioners) refused to count the votes returned by the Judges of Election of Henderson Township, on account of certain alleged irregularities in the registration of voters in said Township, and certified to the Sheriff the number of votes returned from the other Townships "as being the true count of the votes received by each candidate voted for at said election, at all the polling places in said County."

3. That at said election, the plaintiff James I. Moore and the defendant James B. Crews were candidates for the offic

of Sheriff and voted for by the people. And the plaintiffs Washington Bridgers, David Spencer and William K. Jenkins and the defendants James B. Hobgood, John C. Morgan and Elijah C. Montague were each candidates for the office of County Commissioner and voted for by the people.

4. That the vote of Henderson Township was thrown out for the purpose of defeating the plaintiffs.

5. That a proper addition and count of the votes of all the precincts would result in the election of the plaintiffs to said offices, and that they are entitled to qualify and hold the same.

The other allegations were to the effect that the parties claiming said offices had declared their intention to qualify, &c. And the plaintiffs insisted that the legal duty of defendants was not completed; that their duties were only ministerial; that they had no power to throw out and refuse to count the whole returns of the County or any part thereof; and that their action in the premises was illegal and void.

The plaintiffs therefore demanded judgment that the defendants be commanded to assemble and compare the polls from the various precincts in said County, including Henderson Township, and certify and proclaim the result, &c.

The defendants admitted that the vote of said Township was not counted and insisted that the election there held was illegal and that the returns were not properly made and certified to according to law.

They denied that the said votes were thrown out to defeat the election of plaintiffs; and alleged that a proper count of the votes of said County would not be favorable to the plaintiffs. And thereupon the defendants moved for an order to transfer the case to the Superior Court of said County, to the end that the issues of fact raised by the pleadings might be tried by a jury, which motion His Honor refused.

The plaintiffs then moved for a peremptory writ of *mandamus* to be directed to defendants, which motion was granted and the said writ was issued, "commanding them to assemble and meet together as the Board of Commissioners of the County of Granville aforesaid, at the Courthouse in Oxford in said County, and proceed to add the number of votes returned from the Township of Henderson in said County as returned to you by the Judges of Election of said Township for the different persons voted for to the count of votes as made to and proclaimed by you on the 14th day of November, 1876, from all the other Townships of said County except the Township of Henderson aforesaid. And the votes so counted and added with the votes returned from Henderson Township you will certify and have before me."

Upon return of the writ before His Honor at Oxford on the 28th day of December, 1876, it appearing that the same had not been obeyed, an order was issued against the defendants (except Braxton Hunt, who had been excused on account of illness) to show cause why they should not be attached for contempt, and thereupon the defendants appeared and filed answers, and upon considering the same the Court adjudged that Albert Wyche had purged himself of the contempt and as to him the rule was discharged, and defendants Jones, Cole and Williams were adjudged guilty of contempt, fined $250 each and sentenced to thirty days' imprisonment in the County jail.

While in the custody of the Sheriff the defendants filed a petition before Hon. E. G. Reade, one of the Justices of this Court, for a writ of habeas corpus, which was subsequently treated as a petition for a *certiorari* in the nature of an appeal by the defendants from the ruling of His Honor in the Court below.

Messrs. Merrimon, Fuller & Ashe and *T. B. Venable*, for plaintiffs.

Messrs. L. C. Edwards, J. B. Batchelor and *A. W. Tourgee,* for defendants.

PEARSON, C. J. This proceeding was commenced by a petition to His Honor, Justice Reade, for the writ of habeas corpus. After the matter was opened before him it was agreed on both sides to treat the petition as one for a writ of *certiorari* in the nature of an appeal. The *certiorari* was granted and thus the case is in this Court as upon appeal from the ruling of His Honor Judge Watts.

Judge Watts issued an alternative mandamus requiring the defendants the Commissioners of the County of Granville, to count the vote of the Township of Henderson in making out the vote for County officers, or show cause, &c. The Commissioners made return to His Honor that they had not counted the vote of Henderson Township for the reason that admitting the return of the Judges of Election for said Township was in due form, still the Commissioners were satisfied that no election had been held in said Township according to the requirements of the law and set out many irregularities and violations of law in respect thereto. His Honor held the return insufficient and issued a peremptory mandamus at Oxford, in the County of Granville. From this ruling the case now constituted before us is an appeal.

The question is, was it the duty of the County Commissioners merely to count the vote of the several Townships according to the returns made by the Judges of Election, or did the County Commissioners have power to go behind the returns and judge of the validity of the election as held in the respective Townships?

The statute provides, "Returns shall be made by the Judges of Election from all of the precincts to the County Commissioners, who shall proceed *to add the number of votes returned,* and the person having the greatest number of votes shall be deemed duly elected. Bat. Rev. ch. 52 § 21.

"To add the number of votes returned," is a ministerial act. This statute is so plain, that "he who runs may read."

How the Commissioners derived power to act judicially and go behind the return of the Judges of Election, we are at a loss to conceive.

In regard to members of the General Assembly, it is provided, "each House shall be the judge of the qualification and election of its members." But the person who presents the certificate of his election takes the seat subject to the future action of the body of which he is *prima facie* a member.

In regard to County Officers, it is provided, (C. C. P. ch. 17. § 366,) "an action may be brought by the Attorney General in the name of the people of the State, &c., when any person shall usurp or intrude into or unlawfully hold any public office."

It is clear that the Commissioners have nothing more to do than to add up the returns made by the Judges of Election in the several Townships; and thereupon the law declares the person having the greatest number of votes, "shall be deemed duly elected," subject to an investigation to be made by the Courts, in an action in the name of the Attorney General, &c. as to the validity of the election, &c.

It is said this action may be protracted until the term of office expires and the remedy will amount to nothing. That is so, but it is no ground to support the position that such is not the law or to authorize the Court to depart from it, whatever force it may be entitled to as a reason for changing the law, provided a better plan can be devised.

In direct analogy: a seat in a Convention, or in either House of the General Assembly, is contested, the person having the certificate of election is *prima facie* entitled and takes the seat; but it sometimes happens, owing to the complicity of the case or some other cause, that a conclusion is not arrived at before an adjournment *sine die*. Here there is

a wrong for which no adequate remedy is provided. It is "ours" to declare the law, not to make it.

It is apparent that the defendants in assuming a right to go behind the return of the Judges of Election appointed for Henderson Township and to decide upon the validity of the election in that Township, acted without authority and against the law.

There is no error in the ruling of His Honor, and it is now here ordered by this Court, that the defendants Jones, Cole, Williams, Hunt and Wyche, the Board of Commissioners for the County of Granville, forthwith add the return made by the Judges of Election for the Township of Henderson, to the vote for the officers of the County and certify the election accordingly; and upon failure to do so immediately on the service of a copy of this judgment, each of them so refusing will be attached for contempt and held in close custody, that is in jail, until this order be obeyed and a return of perfect obedience be made to the Judge of the District.

The Clerk will issue a copy of this judgment together with an order of arrest and close imprisonment of the members of the Board who refuse obedience.

The irregularity of His Honor's having required the Commissioners of Granville County to appear before him at Franklinton, was not urged by the defendants as a ground of demurrer and was waived, or was cured by the fact that His Honor went to the town of Oxford to receive the return. This is adverted to, lest it might grow into precedent, that a Judge may issue a writ of mandamus in any County within his District and require County officers to answer to the writ wheresoever he may choose to consider "his chambers" to be within the counties comprised in his District.

PER CURIAM. Judgment accordingly.

JAMES I MOORE and others v. RICHARD D. JONES and others.

Mandamus -- Canvass of Votes -- Restraining Order.

When a mandamus is granted to compel a re-canvass of election returns by a Board of County Commissioners, *Held*, not to be error to grant at the same time an order restraining the persons declared elected upon the first canvass from exercising the duties of their offices.

APPEAL from a Restraining Order made at Chambers in Franklinton on the 14th day of December, 1876, by *Watts, J.*

The defendant Commissioners declared the defendant James B. Crews elected Sheriff of Granville County at an election held on the 7th day of November, 1876, and the defendants James B. Hobgood, John Morgan and Elijah C. Montague, each elected to the office of County Commissioner at said election.

Upon application of the plaintiffs an order was issued restraining and enjoining said defendants declared elected as aforesaid, from qualifying or in any way attempting to hold said offices, or to perform any of the duties incident thereto.

The facts stated in the preceding case are applicable to this. Defendants appealed.

Messrs. Merrimon, Fuller & Ashe and *T. B. Venable*, for plaintiffs.

Messrs. L. C. Edwards and *J. B Batchelor* for defendants.

PEARSON, C. J. The decision in respect to the "Board of Commissioners," leaves but little that need be said in respect to these defendants.

The Board of Commissioners certified that these persons were elected. This certificate was superseded by the writ

of mandamus, "*per se*," from the nature of the thing, the one being a mere sequence of the other; that is, the certificate owed its vitality to the action of the Board, which the mandamus vacated, and of course was vacated with it.

It follows, that if these parties had presumed to exercise the duties of their offices, after notice of the writ of mandamus, they would have been in contempt for a defiance of what has been termed "the grand prerogative writ" of mandamus.

This being so, the fact that they are included in the summons and that the complaint asks for a restraining order and injunction, and the fact that such orders were made, were mere matters of supererogation and could do no harm.

We are of opinion that there is no error in the ruling of His Honor, of which the defendants have a right to complain.

PER CURIAM. Judgment affirmed.

JAMES I. MOORE and others v. RICHARD D. JONES and others.

Restraining order -- Bond.

Upon the granting of an order restraining certain persons from exercising the duties of certain county offices to which they had been declared elected by the Board of County Commissioners; *Held*, not to be error to require from the plaintiffs a bond for costs, damages, &c.

APPEAL from an Order made at Chambers in Franklinton on the 14th day of December, 1876, by *Watts, J.*

Upon granting the restraining order as stated in the preceding case His Honor also required the plaintiffs to execute

a bond for costs, damages, &c. to the defendants, from which the plaintiffs appealed.

Messrs. Merrimon, Fuller & Ashe and *T. B. Venable*, for plaintiffs.

Messrs. L. C. Edwards and *J. B. Batchelor*, for defendants.

PEARSON, C. J. Inasmuch as the plaintiffs were advised to include Crews and the other persons, who held the certificate of election made by the "Board of Commissioners" in the summons, and to ask for a restraining order and injunction, they have no ground to complain of the order requiring them to give bond, which His Honor, after he found that the proceeding would be protracted for some time, thought it to be his duty to make.

No error.

PER CURIAM. Judgment affirmed.

J. W. HEPTINSTALL v. E. B. PERRY and others.

Homestead -- Assessment.

Under Bat. Rev. ch. 55, § 20, the application for a re-assessment of a homestead by the Township Board of Trustees must be made before the sale of the excess by the Sheriff.

CIVIL ACTION tried at Fall Term, 1875, of HALIFAX Superior Court, before *Watts, J.*

The plaintiff recovered a judgment against the defendants, execution issued thereon and the homestead of the

judgment debtor was laid off. About six months after the sale of the excess by the Sheriff, the plaintiff becoming dissatisfied requested a re-appraisement and re-allotment of said homestead, and to that end applied for a peremptory *mandamus* to be directed to the Township Board of Trustees, the other defendants, which His Honor refused and the plaintiff appealed.

Messrs. Moore & Gatling and *E. Conigland*, for the plaintiff.
No counsel for the defendants.

READE, J. The statute is so plain as to leave no room for construction.

The application for re-assessment and allotment of homestead must be before the sale of the excess by the Sheriff. Bat. Rev. ch. 55, § 20.

No error.

PER CURIAM. Judgment affirmed.

L. T. PARKS v. O. C. SILER and others.

Partition -- Tenant by the curtesy.

The Courts have no power to order a sale of land for partition, when one of the defendants interested therein is tenant by the curtesy and objects to the sale.

SPECIAL PROCEEDING commenced before the Clerk of the Superior Court of RANDOLPH County, and heard at Fall Term, 1876, of said Court, before *Kerr, J.*

William Rains died in Randolph County in 1864. He devised his lands by will to his wife Milly for life, remainder to America and Caroline, his daughters.

America married the defendant, O. C. Siler. The children by this marriage were the other defendants, N. J. Siler, W. Siler, Martha Siler (now Brooks) and Mary Siler, a minor. America (Mrs. Siler) died in 1867. One half of the lands descended to her children, subject to the life estate of O. C. Siler. Caroline married H. B. Allen and died in 1874 without children, and thereupon the other half of the lands descended to the said children of America Siler, who were the nieces and nephews of said Caroline. Milly Rains, the wife of the devisor, died in 1876.

The plaintiff insisted that each of the said children was entitled to one fourth of the whole tract of land, as tenants in common (subject to the life estate of defendant, O. C. Siler, in one-half thereof). N. J. Siler and W. Siler sold their interest in said lands to the plaintiff, who then claimed to be the owner of one-half of the land and filed a petition praying that the land be sold and the proceeds divided among the parties entitled.

The defendants in their answer deny the necessity of a sale for partition and allege that actual partition can be had without serious injury to the parties interested and pray the Court for an order for partition by metes and bounds.

On motion of the defendants, His Honor dismissed the proceeding, on the ground that O. C. Siler was entitled to a life estate as tenant by the curtesy in an undivided half of said lands.

Mr. J. A. Gilmer, for the plaintiff, cited *Ledbetter* v. *Gash*, 8 Ire. 462; *Hassell* v. *Mizell*, 6 Ire. Eq. 392; *Gash* v. *Ledbetter*, 6 Ire. Eq. 183; *Holmes* v. *Holmes*, 2 Jones Eq. 344, and *McEachern* v. *Gilchrist*, 75 N. C. 196.

No counsel for the defendants.

PEARSON, C. J. The petition was for the sale of land for the purpose of partition. The defendants object to a *sale* for partition, on the ground that the defendant Siler is tenant by the curtesy in one undivided moiety of the land; but do not object to an *actual partition* so that each moiety may be held in severalty.

His Honor was of opinion that the plaintiff had no right to an order of sale and dismissed the proceeding. We concur in this opinion. At the common law "coparceners" might compel partition by original writ, when the parceners were seized of the land and the one was a good "tenant to the *præcipe*"; but if a freehold estate intervened as an estate by curtesy or other life estate, the writ did not lie because there could be no tenant of the *præcipe* In the case of dower a partition could be made subject to the widow's right, her dower being first assigned by metes and bounds and the partition had with respect thereto.

Joint tenants and tenants in common could not compel partition except by statute which authorizes the Court to compel partition in like manner as between coparceners.

It was afterwards provided by statute that the Court might order *a sale* for the purpose of partition, instead of an actual partition, when the interest of the parties would be promoted thereby. And it is provided that a widow entitled to dower may join in the application and receive her third in money or a corresponding part absolutely, in lieu of a life estate. This leaves the election to the widow, whether to enjoy her dower specifically by metes and bounds as a home or to take compensation in money.

In regard to a tenant by the curtesy or to one entitled to a homestead, there is no statutory provision for the plain reason that it was presumed that persons entitled to these estates would prefer to have "a house and home," and would not elect to take compensation in money. For instance, one entitled to a life estate as tenant by the curtesy or as a home-

stead could hardly be supposed to be willing to let his estate be sold and take compensation in its money value. Leave your house and home and take the interest on $1,000 during life, is a proposition that would be rejected by every tenant by the curtesy and by every person entitled to a homestead.

The question is, can the Court compel them to agree to a sale? The Court had no such power at common law and there is no statute which confers it.

There is no error.

PER CURIAM. Judgment affirmed.

STATE v. SAMUEL RICE.

Indictment -- Master and Servant.

1. The provisions of Bat. Rev. ch. 70, § 1, are confined to the enticing of servants by indenture or by contract in writing.
2. It is no offence at common law to entice an infant from the service of his parent.

INDICTMENT for Misdemeanor, tried at Fall Term, 1876, of ROWAN Superior Court, before *Cloud, J.*

The counsel for the defendant in the Court below moved to quash the bill of indictment, on the ground that the recitals therein did not constitute an indictable offence, either at common law or by statute. His Honor allowed the motion and the Solicitor for the State appealed.

Mr. W. H. Bailey and *Attorney General*, for the State.

No counsel for the defendant.

RODMAN, J. We think the Judge was right in quashing the indictment in this case.

The first count alleges that the defendant enticed Cornelius Correll, a servant of Alexander Correll, from the service of his master, &c. against the form of the statute, &c.

The statute referred to is chapter 70 of Battle's Revisal, and is evidently confined to servants by indenture or by contract in writing. No such contract is stated in this count, and for that reason it was defective.

All the other counts substantially charge that the defendant enticed the said Cornelius an infant from the service of his father the said Alexander, &c., and conclude at common law.

The learned counsel who represented the Attorney General in this case admitted that he knew of no authority by which the acts charged in these counts were criminal at the common law and we know of none.

There is no error.

PER CURIAM. Judgment affirmed.

STATE v. GUS GRAHAM.

Jurisdiction -- Indictment.

The Superior Courts have exclusive jurisdiction of the offence of larceny of growing crops. (Bat. Rev. ch. 32 § 20.)

(*State* v. *Cherry*, 72 N. C. 123, cited and approved.)

INDICTMENT for stealing corn growing and remaining ungathered in a certain field, tried at Fall Term, 1876, of ANSON Superior Court, before *Furches, J.*

The counsel for defendant in the Court below moved to dismiss the case upon the ground that the Superior Court had no jurisdiction of the offence charged in the bill of indictment. His Honor overruled the motion and the defendant appealed.

Attorney General, for the State
No counsel for the defendant

BYNUM, J. The very question of jurisdiction here raised, has been expressly decided by this Court so late as the January Term, 1875. *State* v. *Cherry*, 72 N. C. 123. It was there held that the Superior Court has jurisdiction of the offence.

It is to be noted, that although this case has been here twice before, by appeal of the defendant, (74 N. C. 646 and 75 N. C. 256), yet this question of jurisdiction has not been raised by him before. Such a practice, to say the least, is not encouraged by the Court. It is to be further noted, that the question of jurisdiction was not made until after it had been unmistakably decided. We cannot however suppose that the counsel of the defendant, with a knowledge of that decision, advised the appeal now before us. It must have been inadvertently overlooked.

No error.

PER CURIAM. Judgment affirmed.

STATE v. F. M. FURGUSON.

Indictment -- Constable -- Neglect of duty.

1. A constable who neglects or refuses to execute criminal process lawfully issued and placed in his hands, is indictable under § 107, ch. 32, Bat Rev.
2. A constable is a ministerial officer and cannot inquire into the basis or regularity of criminal process issued by a judicial officer, when there is jurisdiction and the process is not otherwise void.

(*Welch* v. *Scott*, 5 Ire. 72, cited and approved.)

INDICTMENT for Misdemeanor under the statute (Bat. Rev. ch. 32, § 107,) tried at Fall Term, 1876, of YANCEY Superior Court, before *Henry. J.*

Upon affidavit before a Justice, a Peace Warrant was issued and placed in the hands of defendant, a Constable, directing him to execute it upon one Austin. About eight days thereafter the defendant met Austin and informed him that he had a Peace Warrant against him, and thereupon one Edney being present replied that he would stand his (Austin's) security. Austin ran away and defendant returned the warrant more than a year after it was issued.

The Court instructed the jury that no arrest had been made according to law and that it was the duty of the defendant to have taken the party charged before the Justice without delay.

Verdict of guilty. Judgment. Appeal by defendant.

Atttorney General, for the State.
Mr. W. H. Malone, for the defendant.

FAIRCLOTH, J. Any officer in the State required to take an oath of office who shall wilfully omit, neglect or refuse to discharge any of the duties of his office, shall be guilty of a

misdemeanor. Bat. Rev. ch. 32, § 107. This statute embraces the offence with which the defendant was charged and convicted, to-wit; neglecting and refusing as Constable to execute a Peace Warrant issued and delivered to him by a Justice of the Peace within his own county.

The defence insisted on is that as it does not appear that the warrant was issued on oath nor on view of the Justice it is void and the officer was not bound to execute it.

An officer acting under void process is a trespasser and must take notice of its character at his own peril. All persons must take notice whether those under whose authority they act could grant such authority.

A Constable need not obey a warrant for a matter not within the jurisdiction of the magistrate but when there is jurisdiction and the warrant is not otherwise void, he as a ministerial officer is obliged to execute it and of course must be justified by it. He cannot inquire upon what evidence the judicial officer proceeded nor into the regularity of his decision. *Welch* v. *Scott*, 5 Ire. 72. A magistrate should not issue a warrant except on oath or *super visum*, and if he does and innocent parties are arrested, he would be liable in damages to such parties; but these are considerations for the Justice and not for the Constable. In this case there is no doubt about the jurisdiction of the Justice.

There is no error. Let this be certified to the end that further proceedings may be had according to law.

PER CURIAM. Judgment affirmed.

M. CLEMENTS v. THE STATE OF NORTH CAROLINA.

Statute -- Repeal of -- Claim Against the State.

The repeal of a statute under which a contract has been made between the plaintiff and the State, in no way affects the plaintiff's rights under the contract.

(*Bledsoe* v. *The State*, 64 N. C. 392, cited and approved.)

CLAIM against THE STATE heard at January Term, 1877, of the Supreme Court, under Art. IV, § 9 of the Constitution.

The plaintiff and the defendant entered into the following contract upon which this action is founded: 'This agreement between the Commissioners appointed by the General Assembly, &c., under the Act to provide for the erection of a Penitentiary, passed April 12th, 1869, acting in behalf of the State, and Michael Clements, witnesseth, that said Clements in consideration of the several sums to be paid by the State at the times and in the manner provided by the conditions for that purpose, and the bid of said Clements hereto attached, hereby covenants and agrees to furnish all materials, all the convicts that can be used at sixty cents per day and all the other labor required in constructing the cell doors and frames, locks and lock bars complete, and setting the same for the erection of a Penitentiary, * * * all to be done * * * under the supervisions of W. J. Hicks, Assistant Architect or such other Architect, * * * the written certificate of said Architect to be evidence of the sufficiency of said material and work, and the bid annexed to be the basis of all estimates," &c., &c. Signed on 19th of May, 1870, by Alfred Dockery, G. Wm. Welker, J. R. Harrison, Alfred Howe and A. L. Lougee, Commissioners on the part of the State, and by the plaintiff.

The plaintiff alleged that his bid was $60 for furnishing each cell door &c. complete and that the State accepted the bid through its said agents, and agreed to pay for such labor and material at the contract price aforesaid. That he bought a large quantity of iron, made sub-contracts and otherwise went to great expense to enable him to complete the work as agreed upon, and has at all times been ready to comply with his part of the contract, but by reason of the failure and refusal of defendant to comply with said contract, he has been damaged to the amount of $30,000.

The defendant in answering the complaint insisted that the said contract was rescinded by the Legislature, and the alleged expense incurred by the plaintiff was needlessly and improvidently incurred and that he ought not to be relieved of any liability resulting therefrom.

The defendant further insisted that one of the inducements to make the said contract was that convict labor should be used at the price stipulated, it being considered that the same was high enough to offset the extravagant price of the cell doors, and that since the rescission of the contract the defendant has made better doors &c. with convict labor, than the sample door sent by plaintiff, which door was never accepted by the defendant but expressly rejected, and plaintiff notified that the same was subject to his order.

The defendant further insisted that this subject had been fully considered at two different sessions of the General Assembly, and defendant's agents had acted in accordance with the explicit enactment of that body in rescinding and ignoring the said contract for the reasons above set forth, and that in consequence of said enactment it is not within the spirit of the Constitution for this Honorable Court to hear and make recommendations to the Legislative branch of the government in regard to this claim.

Depositions of sundry parties were filed with the record, but the Court upon consideration directed the issues stated in its opinion to be submitted to a jury.

Messrs. Merrimon, Fuller & Ashe, for the plaintiff.
Attorney General, for the State.

READE, J. In *Bledsoe* v. *The State*, 64 N. C. 392, we declared what we understood to be the practice in cases of this kind—to ascertain the facts by reference to our Clerk or to have issues for a jury. And when sufficiently informed of the facts we would declare the law.

We are of opinion that the repeal of the statute under which the contract with the plaintiff is alleged to have been made, in no way affects the plaintiffs rights. And that it was not contemplated by the alleged contract that the plaintiff was to do the work *here* instead of at his works in Ohio; or that convicts were to be sent to Ohio to do the work; but that they were to be employed upon such work only as was necessarily to be done here, as fitting and hanging the doors and the like.

There will be issues for a jury.

1. Whether the contract was made as alleged.

2. Whether the plaintiff complied or was ready and offered and was able to comply with his part of the contract.

3. Whether the State failed to comply with its part of the contract. If so,

4. What damage did the plaintiff sustain by reason of the failure of the State to comply with its part of the contract.

The depositions on file, subject to all just exceptions will be read and other evidence heard. And the evidence and the finding of the jury and the rulings of His Honor, with all exceptions, will be certified to this Court.

PER CURIAM. Order accordingly.

N. J. FALKNER v. SAMUEL R. HUNT and others.

Pleading -- Discharge in Bankruptcy.

Where the Court below allowed a defendant to plead his discharge in bankruptcy at Fall Term, 1875, which discharge was granted May 21st, 1869; *Held* not to be error.

MOTION in the cause heard at Fall Term, 1876, of GRANVILLE Superior Court, before *Watts, J.*

The defendant Samuel R. Hunt was adjudged a bankrupt in 1868 and on the 21st May, 1869, obtained his discharge in bankruptcy. At Fall Term, 1875, of said Court he moved that he be allowed to plead his discharge, which motion was continued from term to term and heard at Fall Term, 1876. The plaintiff opposed the motion upon the ground that the same was not made in apt time and that the Court had no power after such a lapse of time to allow the motion. His Honor granted leave to file said plea from which order the plaintiff appealed.

Messrs. L. C. Edwards, J. B. Batchelor and *Busbee & Busbee*, for plaintiff.

Mr. D. G. Fowle, for defendants.

READE, J. His Honor certainly had the *power* to allow the plea of bankruptcy to be put in. And there is nothing to show, and it certainly is not to be presumed that he exercised an arbitrary or capricious *discretion*.

There is no error.

PER CURIAM. Judgment affirmed.

STATE v. L. A. PHIPPS.

Indictment -- Fornication and Adultery -- Witness.

In a trial for fornication and adultery, a former defendant as to whom a *nolle prosequi* has been entered is a competent witness against the other defendant.

(*State* v. *Rose*, Phil. 406, cited and approved.)

INDICTMENT against the defendant and Margaret Locklear for Fornication and Adultery, tried at Fall Term, 1876, of GUILFORD Superior Court, before *Kerr, J.*

On the trial of the case, the Solicitor for the State entered a *nol. pros.* as to Margaret Locklear and introduced her as a witness against the defendant who objected on the ground that she was incompetent. His Honor overruled the objection, and upon her evidence the jury rendered a verdict of guilty.

Rule for new trial. Rule discharged. Judgment. Appeal by defendant.

Attorney General and *Mr. J. T. Morehead*, for the State.
Messrs. Dillard & Gilmer, for the defendant.

FAIRCLOTH, J. The defendant and Margaret Locklear were indicted for fornication and adultery.

The Solicitor entered a *nolle prosequi* as to Locklear and introduced her as a witness against the defendant to prove the offence charged.

Was she a competent witness for that purpose is the question? She was not until the Act of 1866, Bat. Rev. ch. 43, § 14, abrogating the long settled rules of evidence, was passed which made her evidence admissible. *State* v. *Rose*, Phil. 406.

The Act of 1869–'70, ch. 177, repeals the above Act in its application to criminal matters and restored the common law rule of evidence; but a subsequent Act, 1871–'2, ch. 4, repeals the latter Act, and thus restores the competency of the witness.

The policy of legislation leading to this result is a matter for the consideration of the Legislature The Court can only declare the law as it finds it.

There is no error. Let this be certified to the end that the Superior Court may proceed according to law.

PER CURIAM. Judgment affirmed.

THORNTON BRADLEY v. JAMES JONES.

Practice -- Supreme Court -- Record.

When the record of a case brought up on appeal to this Court is imperfect, the case will be remanded to the Court below

CIVIL ACTION to recover possession of land, tried at Fall Term, 1876, of POLK Superior Court, before *Schenck, J.*

In consequence of an imperfect record there was no decision upon the merits and the case was rema..ded to the Court below.

Messrs. Smith & Strong, for plaintiff.
Messrs. M. H. Justice and *W. J. Montgomery*, for defendant.

READE, J. There is no complaint in the record. There is only an amended answer. There is no statement of the

case made out by the appellant and none by the appellee; nor is there any agreement that His Honor should make one. There is however a statement by His Honor that it was an action for two parcels of land, that the plaintiff offered in evidence a number of deeds, none of which are set out or appended, some of which were admitted as color of title only, one rejected because not properly proved and registered, that a number of witnesses were introduced as to possession and boundaries, and that he nonsuited the plaintiff. But why he nonsuited him is not stated.

There are no points stated or questions presented for the decision of this Court. It is possible that we might hit upon the matters in dispute, but we cannot jeopardize the rights of the parties upon such records.

The case is remanded, each party paying his own costs in this Court.

PER CURIAM. Judgment accordingly.

A. S. SCOTT v. R. S. HARRIS and others.

Contract -- Principal and Surety -- Agreement to Forbear.

1. If a creditor agree with his principal debtor in such manner that he is bound by the agreement to postpone the day of payment, the surety is thereby discharged from all liability.
2. In such case it is immaterial that the agreement for forbearance is usurious.

CIVIL ACTION tried at Fall Term, 1876, of CABARRUS Superior Court, before *Schenck, J.*

The plaintiff demanded payment of a note for $1,100 made payable to himself and signed by Julius Israel, principal, and R. S. Harris and D. G. Holbrooks, sureties. The note was dated Nov. 2, 1872, bearing interest thirty days after date at eight per cent. There was an endorsement on the note acknowledging the payment of interest to January 1st, 1874.

The defendants, sureties, resisted the payment of the amount upon the ground that the plaintiff and Israel, principal, had entered into a contract or agreement for a valuable consideration by which the plaintiff forebore the collection of the debt until January 1st, 1874; that they knew nothing of said agreement, but supposed the note had been paid at maturity; that Israel had become a bankrupt since said maturity and insisted that they were therefore discharged from liability.

The evidence in the case was conflicting and need not be stated as the material facts were found by the jury upon issues submitted and under the instructions of His Honor, which were fully set out in the record.

Findings of the Jury: 1. That the plaintiff agreed with the principal after maturity of note to forbear the collection of same until January 1st, 1874.

2. That the consideration of said agreement was $180.

3. That when said agreement was made with Israel, the plaintiff did not reserve his right to sue the sureties, defendants.

4. It was admitted by both parties that the defendants knew nothing of said agreement.

Thereupon His Honor gave judgment in favor of defendants for costs. Appeal by plaintiff.

Messrs. Wilson & Son and *R. Barringer*, for plaintiff
Mr. W. J. Montgomery, for defendants.

READE, J. There is sympathy for a child who in reaching too far for a flower falls over the brink and is lost, but a creditor who clutches eighteen per cent. from the principal debtor under a contract for indulgence until he goes into bankruptcy and then reaches farther to collect the principal money out of the sureties, deserves a fall.

As soon as a debt is due and payable, if the principal debtor does not pay it, the surety may pay it and immediately sue the principal for money paid to his use. If therefore the creditor agrees with the principal debtor in such manner as that he is bound by the agreement to postpone the day of payment, he puts it out of the power of the surety to pay the debt and sue the principal, and he thereby puts the surety in jeopardy. And the surety being no party to the new contract for indulgence is discharged from all liability.

The facts in this case show the propriety of that rule.

At the maturity of the bond the principal debtor offered to pay it; but the creditor offered to forbear the collection of the bond for twelve months if the debtor would pay him in advance one and a half per cent. a month for the whole time. And the debtor agreed to it and gave his separate note for the amount, to be paid in goods, some of which were paid. The sureties knew nothing of this and supposed the debt was paid until some time afterwards and before the time of forbearance had expired, when the principal debtor went into bankruptcy and they learned the debt had not been paid.

Admitting the rule to be as stated, still the plaintiff insists that the sureties are not discharged because his agreement with the principal debtor was not a valid contract, and therefore he was not bound by it, in this; that the exacting of one and a half per cent. a month was usurious and invalid. It is not for the creditor to say that. His conscience takes fright at a danger which may never approach

him. The debtor may plead usury or not at his pleasure, and unless and until he does so the note which was given for the usury is valid, and a part of it has been already paid in goods. The contract was sufficient to prevent the sureties from paying the debt and suing the principal. And that is the wrong of which they have the right to complain.

But again the plaintiff insists; that admitting that he did agree to forbear collecting the debt out of the principal debtor yet he reserved the right to collect it out of the sureties; and that, therefore, they were not delayed for *they* might have paid the debt and sued the principal, although *he* could not.

The jury have found that the plaintiff did not expressly reserve that right. And then the plaintiff as the last resort says that although he did not *expressly* reserve the right yet he reserved it "in his mind."

If such a pretence be not too puerile to notice at all, it is sufficient to say, that the contract with the principal debtor was what passed between them, and not what was "reserved in his own mind."

No error.

PER CURIAM. Judgment affirmed.

STATE v. RUFUS JOHNSTON.

Indictment -- Attempt to Commit Rape.

1. An indictment for an assault with intent to commit a rape (under Bat. Rev. ch. 32, § 5) is supported by proof of an assault with intent to unlawfully and carnally know and abuse a female child under ten years of age.
2. In such case, it is sufficient to show that the defendant attempted to do the act, *i. e.* to carnally know and abuse the child.

(*State* v. *Storkey*, 63 N. C. 7, cited and approved.)

INDICTMENT for Rape, tried at Fall Term, 1876, of MECKLENBURG Superior Court, before *Schenck, J.*

The case is so fully discussed by Mr. Justice Reade in delivering the opinion of this Court, that any further statement is deemed unnecessary.

Attorney General, for the State.

Mr. W. W. Flemming, for the defendant cited, *State* v. *Sam*, 1 Winst. 300; *State* v. *Burgess*, 74 N. C. 272; *State* v. *Farmer*, 4 Ire. 224, and East. 435.

READE, J. "Every person who is convicted in due course of law of ravishing and carnally knowing any female of the age of ten years or more, by force and against her will, or who is convicted in like manner of unlawfully and carnally knowing and abusing any female child under the age of ten years, shall suffer death." Laws 1868-'9, ch. 167, § 2.

"Every person convicted by due course of law of an assault with intent to commit a rape upon the body of any female shall be imprisoned in the State prison, not less than five nor more than fifteen years." Ibid. § 3.

The above sections which immediately follow each other in the original Act, are brought forward in Bat Rev. as sections 2 and 3 of ch. 32.

The indictment is for an assault with intent to commit a rape under the third section of the original Act, which is the fifth section of ch. 32, Bat. Rev. And the proof was that the female was under ten years of age, although the indictment says nothing about the age.

The defendant makes the point that he cannot be convicted, because a rape cannot be committed upon a female under ten years of age; that the unlawful carnal knowledge and abuse of a female is a *crime* but not the crime of *rape*.

Rape is the carnal knowledge of a female forcibly and against her will. 3. Inst. 60; 4. Black. Com. 210; 3. Chit. C. L. 810. This definition leaves out the elements of age altogether. And it seems to be left in some obscurity how and why that element came to be considered. Probably it was in this way; there were instances where children below the age of discretion were enticed to yield, without a full knowledge of the nature of the act and of the consequences; and therefore, it became necessary to fix an age under which it should be presumed, not that the act could not be consummated, but that consent could not be given. And so it came to be provided, that the consummation of the act upon a female under ten years of age, with or without her consent, shall be the same as if consummated upon a female over ten years of age without her consent or against her will. And the object of 18 Eliz. which enacts "that if any person shall unlawfully and carnally know and abuse any woman child under the age of ten years, every such unlawful and carnal knowledge and abuse shall be felony without benefit of clergy" was not to create a new offence distinct from rape, but it was to make such carnal knowlege and abuse, rape. The reason why the act does not call it rape in so many words, is, because of the seeming incongruity of calling an act rape

when it is by consent, whereas the established meaning of rape is "against her will." But still when Mr. Chitty gives his form for an indictment under the statute he heads it, "Indictment for rape of children within the age of consent," which shows that he regards the crime as rape. And so, this Court in *State* v. *Storkey*, 63 N. C. 7, says, "Our statute makes it *rape*, carnally to know and abuse a child under ten years of age even although she consents."

And since 18 Eliz. the definition of rape in Hale's Pleas of the Crown, 628, is "the carnal knowledge of any woman above the age of ten years against her will, and of a woman-child under the age of ten years with or against her will." So that now the definition of rape of a female over ten years of age is as it always has been, "carnal knowledge against her will." But since 18 Eliz. and under our statute, which is substantially a copy, rape of a female under ten years of age is simply carnal knowledge; or in other words, carnal knowledge of a female under ten years of age is *rape*.

This brings us to the immediate consideration of sections 2 and 3 of Act 1868-'9 quoted above. The indictment is under section 3 for an attempt to commit a rape. In order to convict the defendant, if the female had been over ten years of age, it would have been necessary to prove that the attempt was to do the act against her will; but the sufferer being under ten years of age, it was sufficient to show that he attempted to do the act; to carnally know and abuse the child, who was incapable of consenting.

The third section should be construed, as if it read as follows: If any person shall attempt to commit the rape specified in the second section, that is to say, to carnally know a female over ten years of age against her will, or to carnally know and abuse a female under ten years of age, with or against her will, he shall be punished, &c.

Our conclusion is, that a charge in an indictment under ch. 167, § 3, Acts of 1868-'9 (Bat. Rev. ch. 32 § 5) of an as-

sault with intent to commit a rape, which is the charge in the indictment before us, is supported by proof of an assault with intent to unlawfully and carnally know and abuse a female child under the age of ten years, which was the proof in the case before us. There is no error. This will be certified to the end, &c.

PER CURIAM. Judgment affirmed.

RICHMOND & DANVILLE RAILROAD COMPANY v. THE COMMISSIONERS OF ALAMANCE COUNTY.

Grant -- Construction of -- Taxation.

When a grant is for a particular purpose only, the conversion to another and different use is forbidden by a necessary implication.

So, where the law prescribes that "all the real estate held by the North Carolina Railroad Company for right of way, for station places of whatever kind and for workshop location, shall be exempt from taxation, &c;" *Held*, that such exemption covers only such real estate as is actually held and used for the purposes expressed.

PETITION to remit the tax assessed by defendants upon the real estate of plaintiffs, heard at Fall Term, 1876, of ALAMANCE Superior Court, before *Kerr, J.*

The plaintiff company in their petition alleged that they were the lessees of the North Carolina Railroad Company, and as such were entitled to all the rights and privileges granted in the charter of the last named company; that the Board of Trustees of Graham Township in said County had assessed and returned to the defendant Board of Commissioners certain lots and parcels of land belonging to plain-

tiffs as unlisted property liable for taxation; that said lots were situated at Company Shops, upon which were located the workshops of the Company, a hotel, dwellings for employees, stores &c. used by the plaintiffs in connection with their said Railroad.

The defendants refused to grant the petition and the plaintiffs appealed to the Superior Court.

Upon consideration of the case His Honor reversed the decision of the Board of Commissioners and adjudged that plaintiffs were entitled to the relief prayed for, from which ruling the defendants appealed.

Mr. J. E. Boyd, for plaintiffs.

Messrs. E. S. Parker and *Merrimon, Fuller & Ashe*, for defendants.

BYNUM, J. The case turns upon the construction of the fifth section of an Act for completing the North Carolina Railroad, ratified the 14th day of February, 1855. It is in these words, "All the real estate held by the Company for right of way, for station places of whatever kind, and for workshop location, shall be exempt from taxation until the dividends of profits of said Company shall exceed six per centum per annum." The dividends of profits have not yet exceeded that sum, and therefore no real estate held by the Company for the purposes described in the above recited section of the Act is now taxable. It remains only to ascertain what real estate falls within the intent and meaning of the Act. It is clear that all the real estate which the Company may own is not exempt, but such only as may be held by the Company *for* the right of way, *for* station places and *for* workshop location. Real estate held and used for other purposes is not exempted from taxation. The exemption is coupled with a condition and that condition equally attaches to each of the three purposes described in the Act. Land

held for the right of way is exempted for that use only; that held for station places must be applied to that purpose; and that held for workshop location can be applied to no other uses than for workshops; otherwise in each case the land so held becomes liable to taxation as other property. For example, take the right of way and *ab uno, disce omnes.* Suppose the Company should erect upon the right of way, hotels and stores, factories and private dwellings. This would be a plain violation of the contract between the State and the Company, for when the grant is for a particular purpose only, the conversion to another and different use is forbidden by a necessary implication and is followed by a forfeiture of the privilege granted. The purpose of the grant was to encourage and facilitate the construction of the road by exempting from the burden of taxation the instrumentalities necessary to build and operate it. Land was needed for right of way, for stations and for workshops. Hotels, stores and dwellings upon the right of way, at the stations and at the workshops would doubtless be convenient to the operation of the road and advantageous to the Company, its officers and agents and their families; and so would academies and churches. But no one can contend that such structures or any of them are necessary to the operation or were to the construction of the road. Such uses are not within the terms of the grant and we think not within its spirit. *Eld. ige* v. *Smith*, 34 Vt. 484. The workshop location embraced a considerable area of ground; the amount is not stated. Workshops upon an extensive scale were contemplated and indeed erected. The road was to be a grand trunk line from which other roads were to radiate in every direction and the shops were to be commensurate with the magnitude of the enterprise. All the location might in the progress of things be needed for workshops, and when so needed and used, would be exempt from taxation. The term "workshops" in reference to a great road like this, embraces foun-

daries, engine houses, depots, machine shops, necessary offices and all the usual appliances for the manufacture and repair of engines, cars and other stock required for the operation of the road. The ground covered by these buildings is exempt from taxation until the road pays the prescribed dividend. Subject to the right of taxation, the Company can make such disposition and use of the residue of the land as it deems best. Hotels, stores, dwellings or a town may be built. The town of Salem is built upon land, the fee simple of which is or was in a society known as the *Unitas Fratrum*, which leased the lots for a long time to such as would improve and occupy them. Upon this leasehold there is now a million's worth of buildings and a thrifty population of fifteen hundred people. If the claim of the Railroad Company is valid, that the whole ground purchased for the location of the shops is exempt from taxation, the larger portion of it not occupied or used for the workshops may in like manner be devoted to the building of a town, or to other commercial or manufacturing purposes convenient or useful to the Company, but wholly exempt from taxation.

Such is not the proper construction of the Act. The case states that lot No. 8, valued at $2,500, is a lot on which a store house was burned down and is now the one on which the depot is located.

A depot is a necessary part of the workshops, and this lot is exempt from taxation and must be struck out of the assessment. The other lots enumerated are the proper subjects of taxation. The judgment of the Superior Court is reversed except as to lot No. 8, and as to that the judgment is affirmed. The case is remanded to be proceeded with in accordance with this opinion.

PER CURIAM. Judgment accordingly.

STATE v. JAMES LAXTON.

Evidence -- General Reputation.

Where a defendant in a criminal action introduces evidence as to his good character, the right of reply of the State is limited to evidence of general reputation and does not extend to rumors in regard to a particular matter. *Therefore*, where upon a trial for rape the defendant introduced evidence as to character, and a witness for the State was permitted to testify that there was a general rumor in the neighborhood of his (defendant's) running after one certain white woman; *Held* to be error.

(*State* v. *Henry*, 5 Jones, 65; *State* v. *Johnson*, 1 Winst. 151; *Luther* v. *Skeen*, 8 Jones, 356, cited and approved.)

INDICTMENT for Rape, tried at Fall Term, 1876, of CALDWELL Superior Court, before *Buxton J.*

The only question decided by this Court was one of evidence which arose in consequence of the admission of testimony relating to the character of defendant.

The case states: "Among the witnesses called by the State to impeach the general character of the prisoner (which character the prisoner put in evidence by previously examining other witnesses) was one Edmund Tilley, who testified 'I am acquainted with the general character of prisoner before this occurrence; it was good for truth, honesty and hard work.' Question by the Solicitor—'What was his general character in other respects?' Ans.—'There has been a general rumor in the neighborhood of his running after one certain bad white woman.'" The counsel for the prisoner objected to both question and answer. Objection overruled.

Verdict of guilty. Judgment. Appeal by prisoner.

Attorney General, for the State.

Mr. G. N. Folk, for the prisoner.

FAIRCLOTH, J. The defendant was indicted for rape and after the evidence on the merits of the case was closed, he proved a good character and the Solicitor called a witness in reply, who also testified to the good character of the defendant "for truth, honesty and hard work." The Solicitor then asked his witness "what was his general character in other respects?" The witness answered, "there has been a general rumor in the neighborhood of his running after one certain bad white woman."

This question and answer were objected to by the prisoner, but were admitted by His Honor and allowed to go to the jury as evidence.

In all criminal trials the issue to be determined is made by the pleadings in the record, and the introduction into the case of evidence in regard to character necessarily raises a collateral question, calculated to some extent to divert attention from the real issue.

At an early period, however, the rule was established in capital felonies *in favorem vitæ*, on the presumption that a man of good character would not be likely to commit a heinous crime. But under this rule the witness was not allowed to give his individual opinion of the prisoner nor to speak of particular facts, but was limited to general character which is described by Erskine as the "slow spreading influence of opinion arising from the deportment of a man in society. As a man's deportment, good or bad, necessarily produces one circle without another and so extends itself till it unites in one general opinion, that general opinion is allowed to be given in evidence."

The above rule admitting general evidence of character as a part of the defence was so manifestly just and reasonable and appealed so strongly to the common sense of the country, that it was soon extended to all criminal proceedings in England and has ever been the law in this country.

At first however it was attempted to be applied *only* in doubtful cases, but this notion was soon exploded, because it was seen that if the evidence was not admitted in plain cases, it could avail the prisoner nothing in doubtful cases, as it was the duty of the jury in such cases to acquit without the aid of evidence of good character. *State* v. *Henry*, 5 Jones, 65.

The State has the right to rebut the defendant's evidence and when he has introduced evidence to prove a good character, the State may prove it bad, if it can, either by cross-examination or by other witnesses. The evidence is clearly admissible. *Rex* v. *Fannard*, Carrington & Payne 673; 2 Hawkins P. C. ch. 46. § 206.

This right of reply however is only co-extensive with the privilege of the defendant and is limited to evidence of general reputation. If it were extended to particular facts and the opinion of witnesses, it would multiply collateral questions and would lead in many instances to scandalous inquiries and to the embarrassment of the jury. This would be original evidence in reply.

In an action of slander in this State, the defendant was allowed to prove a "current report" in regard to a particular matter and this Court held that the evidence was inadmissible. *Luther* v. *Skeen*, 8 Jones, 356. And that case is decisive of the question now before us. And in strict adherence to this principle it was held by this Court, that where the defendant offered proof of the character he sustained at the time of the alleged offence, evidence could not be permitted in reply of his character at any subsequent period. *State* v. *Johnson*, Winst. 151.

There is error. Let this be certified to the end that the Court below may proceed according to law.

PER CURIAM. *Venire de novo.*

JACOB PARKER, Admr. (with will annexed) v. P. C. SHUFORD, Admr

Practice -- Statute of limitations.

1. To take a case out of the operation of the statute of limitations, the promise to pay or the acknowledgment of the debt must be made to the *creditor himself.*
2. A tender of depreciated currency will not prevent the operation of the statute.

(*Simonton* v. *Clark*, 65 N. C. 525; *Thompson* v. *Gilreath*, 3 Jones, 493; *Morehead* v. *Wriston*, 73 N. C. 398, cited and approved.)

CIVIL ACTION, tried at Fall Term, 1876, of IREDELL Superior Court, before *Buxton, J.*

This suit was commenced in the lifetime of John J. Shuford the intestate of defendant. The plaintiff alleged that his testator John Miller loaned to the firm of Clark, Shuford & Co., of which John J. Shuford was a member, the sum of $1,624 and took their note for the same, dated January 30th, 1858, and that thereafter (March 1, 1862,) upon settlement of the firm business, the intestate of defendant took possession of certain partnership effects under an agreement in writing with his partners that he was to pay certain debts, the claim of the testator of plaintiff being one of them, and that said John J. Shuford had repeatedly recognized the existence and validity of said debt and had promised to pay the same to said John Miller on 1st March, 1862.

The defendant denied that he ever promised to pay the debt as aforesaid, or that he was indebted to plaintiff. He alleged that said note which was executed by said firm was not under seal and that plaintiff did not commence the suit within three years from the time the cause of action arose

and that the same was barred by the statute of limitations.

Upon the evidence in the case issues were submitted to the jury and found as follows:

Findings of the Jury: 1. John J. Shuford executed the paper writing or agreement with his partner in March, 1862.

2. Intestate of defendant did not tender or cause to be tendered after March, 1862, money of any kind to plaintiff's testator to pay the debt sued for.

3. The dissolution of the partnership of Clark, Shuford & Co. did not take place in March, 1862, nor were the effects divided.

Thereupon the defendant moved for judgment for costs, which motion was allowed and the plaintiff appealed.

Messrs Scott & Caldwell, for plaintiff.

Messrs. R. F. Armfield and *M L McCorkle*, for defendant, cited *Morehead* v. *Wriston*, 73 N. C. 398; *Thompson* v. *Gilreath*, 3 Jones, 493; C. C. P. ch. 17, § 51, and *Simonton* v. *Clark*, 65 N. C. 525.

READE, J. To take a case out of the operation of the statute of limitation there must be an express promise to pay, or an acknowledgment of a subsisting debt from which a promise to pay may be implied.

The plaintiff does not controvert that principle, but he insists that there was an express promise here in this; that the defendant offered to pay the plaintiff in depreciated currency which the plaintiff refused to take.

It is expressly decided in *Simonton* v. *Clark*, 65 N. C. 525, that that is not sufficient.

The plaintiff further insists that when the defendant and others, partners, settled up their partnership the defendant agreed with his copartners that he would pay the plaintiff's claim and took effects of the partnership with which to pay it.

And that raises the question whether the promise to pay, or the acknowledgment of the subsisting debt must be to the *creditor himself*, or whether it is sufficient if made to a third person? We are of the opinion that it must be made to the *creditor* himself. *Thompson* v. *Gilreath*, 3 Jones, 493; *Morehead* v. *Wriston*, 73 N. C. 398.

Upon this point the decisions are not uniform; and Mr. Greenleaf says that an acknowledgment to a stranger is sufficient. The tendency of late decisions is probably that it must be to the creditor himself. In *Ringo* v. *Brooks*, 26 Ark. 540, the subject is very well treated and it is held that it must be to the creditor.

But the subject has been fully considered in this Court in the case cited above, *Thompson* v. *Gilreath*, 3 Jones, 493, and expressly decided that it must be to the creditor himself, and we willingly follow that case and refer to it for all that could be said here.

There is no error.

PER CURIAM. Judgment affirmed.

STATE v. W. R. BROWN.

Indictment -- Larceny -- Evidence -- Witness.

1. It is error for a Court to submit a question to the jury upon which there is no evidence.
2. A defendant in a criminal action, who introduces a witness in his behalf, does not vouch for his truthfulness and it is no evidence of the defendant's guilt if such witness swear falsely.
3. Facts brought out in a cross-examination of such witness for the purpose of impeaching him can have *that effect only* and cannot have the further effect of substantive evidence of the defendant's guilt.
4. It is the duty of a jury to reconcile conflicting testimony, if possible; *Therefore*, where in the Court below the evidence conflicted and His Honor in his charge assumed the falsity of the evidence of a witness for the defence and directed the jury to inquire only if such witness had sworn falsely; *Held*, to be error.

(*Luther* v. *Skeen*, 8 Jones, 356; *State* v. *Oscar*, 7 Jones, 305; *State* v. *Johnson*, 1 Winst. 238; *State* v. *Smith*, 2 Ire. 402, cited and approved.)

INDICTMENT for Larceny, tried at Fall Term, 1876, of BEAUFORT Superior Court, before *Moore, J.*

The defendant was charged with stealing seed cotton belonging to one Henry R. Woodard. It appeared from the evidence of Woodard and one Jackson, that the day after the cotton was lost, Woodard the prosecutor traced seed cotton along a private path leading from his house to that of defendant, up to 150 yards of defendant's house. That he then procured a search warrant and with an officer and several other persons, went to defendant's house and found him there.

The officer stated to defendant that he had a warrant and wished to search his house. He replied, "you can do so, I have no cotton here." Search was then made, but no cot- not found in house or loft.

They then went to defendant's barn and found in the loft thereof a pile of cotton covered with a bed quilt and secreted behind some fodder.

Lerena Young testified for defendant, that about the time the cotton was stolen, she was at defendant's house and while there was requested by defendant's wife to hide some cotton for her, so that her husband could not get it, and that she covered the cotton with a bed quilt and fodder.

On cross-examination she stated that the cotton secreted as aforesaid by her was in the loft of the house and not in the barn, and that she did not go to the barn at all. She did not hear the testimony of the other witnesses as they were separated.

His Honor in charging the jury said, "that when a defendant puts a witness on the stand it was a declaration on his part that the witness was a truthful one. That when a defendant attempts to manufacture or fabricate testimony it was evidence of guilt, and then called attention to the testimony of Lerena Young in connection with that of the other witnesses. She located the cotton in the house loft, while all the other witnesses testified that the cotton was found covered with a bed quilt and fodder in the barn, and that there was none in the house loft."

His Honor then said, "if upon consideration of the whole case the jury were satisfied that her testimony was false and that defendant knew it to be false, then it was a circumstance tending to establish the guilt of defendant, the weight of which was for the jury to consider and not for the Court." Defendant excepted. Verdict of guilty. Judgment. Appeal by defendant.

Attorney General, for the State.

Messrs. George H. Brown, Jr. and *J. E. Shepherd*, for the defendant.

BYNUM, J. His Honor charged the jury: "That where a defendant puts a witness on the stand it is a declaration upon his part that the witness is a truthful one; that when a defendant attempts to manufacture or fabricate testimony it is evidence of guilt." He then directs the attention of the jury to the discrepancy between the testimony of the prosecutor and that of Lerena Young, a witness for the defendant, and concludes his charge thus: "If upon consideration of the whole case the jury are satisfied that her testimony was false and that the defendant knew it to be false, then it was a circumstance tending to establish the guilt of the defendant, the weight of which was for the jury and not for the Court."

The proposition of law as thus laid down by His Honor cannot be admitted to be true without some qualification; but for the purposes of this case we will assume it to be true, and still the defendant is entitled to a *venire de novo* for the reason that the evidence in the case did not warrant such a charge. There was no evidence whatever that the testimony of Lerena Young was false within the knowledge and by the procurement of the defendant. It was therefore error in His Honor to submit to the jury a question upon which there was no evidence; and doubtless the verdict of the jury turned in some degree upon his instructions upon this point.

We might stop here as the defendant is clearly entitled to another trial for the error just assigned.

But we are of opinion that His Honor erred in another particular material to the rights of the defendant, which error may be repeated on the next trial, and it is therefore not improper to notice it here.

As we understand the charge, and as we think the jury understood it, clearly so in the first part of it, it assumes that where a defendant in a criminal action introduces a witness in his behalf he thereby vouches for his truthful-

ness, and if that witness swears falsely it is evidence of guilt upon the ground that such false testimony was given by the procurement of the party introducing the witness.

This proposition we think cannot be maintained, and least of all, where as in our case the alleged falsehood was brought out not by the defendant but upon the cross-examination of the witness by the State.

The rule of evidence as laid down by Greenleaf is this: "When a party offers a witness in proof of his cause he thereby in general represents him as worthy of belief. He is presumed to know the character of the witnesses he adduces; and having thus presented them to the Court, the law will not permit the party afterwards to impeach their general reputation for truth or to impugn their credibility by general evidence tending to show them to be unworthy of belief." 1 Greenl. Ev. 442. It is thus seen that the rule extends only so far as to forbid the party introducing the witness from impeaching his general character for truth. By introducing the witness the party represents him to be truthful but does not warrant him to be so, under the penalty that if he swears falsely it shall be evidence against the defendant upon the issue on trial. A party cannot foresee that his witness will swear falsely or prevent him from doing so. The only effect of such evidence is to discredit the witness. The true rule we take to be this, viz; facts brought out on cross-examination for the purpose of impeaching the testimony of the witness can have *that* effect only, and cannot have the further effect of *substantive* evidence of the guilt of the defendant.

It was therefore error to allow the facts so brought out on the cross-examination to go to the jury for a different purpose than that of impeaching the credibility of the witness. *Luther* v. *Skeen*, 8 Jones, 356; *State* v. *Oscar*, 7 Jones,

305. But in justice to the witness and in justice to the defendant also, the evidence should have been presented to the jury in another view, to-wit; they should have been told that it was their duty first to reconcile the testimony of the State and defendant if possible. If that could not be done, then they should ascertain which party, if either, had sworn falsely &c. Whereas the charge *assumes* the falsehood of the testimony and directs the jury to inquire only whether Lerena Young had sworn falsely &c. This witness testified on cross-examination that she hid the cotton in the loft of the dwelling house; the State's witnesses swore that they found the cotton hid in the barn loft. So far as the case shows it might well be that after Lerena Young hid the cotton, it was removed to the barn by the wife of the defendant, or even by the defendant himself. No motive of favoring the defendant could have influenced the witness to locate the cotton in the house, because finding the cotton in the dwelling house in the exclusive occupation of the defendant and wife, would have been evidence tending to establish the defendant's guilt, while finding it in a barn, not so immediately in the occupation of the defendant, is slighter evidence of guilt. *State* v. *Johnson*, 1 Winst., 238; *State* v. *Smith*, 2 Ire. 402.

The woman's testimony, if false, is more damaging to the defendant than if it were true, but seems to point more to the guilt of the wife and witness than to the guilt of the defendant.

At all events it is clear from the case, as stated to us, that the evidence of the woman did not favor the defendant and that she had no apparent motive to favor him."

It was therefore the more important that the jury should have been instructed to reconcile if possible this apparent conflict of testimony between the State and defendant without imputing corruption to the witness assailed. It does not appear to us indeed much to affect the merits of the case

whether the cotton was found in the house loft or the barn loft. But for the errors pointed out there must be a new trial.

PER CURIAM. *Venire de novo.*

WILEY E. JOHNSON v. WILLIAM F. HENDERSON.

Contract -- Negotiable Instrument -- Certificate of Deposit.

1. A certificate of deposit, when expressed in negotiable words, is negotiable and subject to the same rules that control other negotiable paper.
2. To constitute a negotiable instrument, the promise must be to pay *in money*; *Therefore*, where a certificate of deposit given to A and payable "in current funds," came to B by several endorsements; *Held*, in an action by B against an intermediate endorser, that B was not entitled to recover.
3. In such case B stands in the shoes of A, and his only remedy is against the person who issued the certificate.

CIVIL ACTION tried at Fall Term, 1876, of DAVIDSON Superior Court, before *Cloud, J.*

The action was brought on a Certificate of Deposit, the material part of which is as follows: "This is to certify that John F. Shoup has deposited in the Greensboro Mutual Life Insurance and Trust Company three hundred and fifty dollars which will be paid to him on ten days notice with interest, &c. in current funds on the return of this certificate." Dated at Greensboro, Dec. 17, 1861. Upon this certificate there were sundry endorsements as stated in the opinion of this Court.

His Honor was of opinion that the plaintiff could not recover and directed a non-suit, from which judgment the plaintiff appealed.

Mr. W. H. Bailey, for plaintiff.
Mr. J. M. McCorkle, for defendant.

BYNUM, J. This is an action brought upon a certificate of deposit, given by the Greensboro Mutual Life Insurance and Trust Company to one Shoup in 1861, which was by him endorsed to the defendant, and by the defendant to Douthit & Company, and by them was endorsed to the plaintiff. It certifies that Shoup had deposited with the Company three hundred and fifty dollars to be paid to him on ten days notice, "*in current funds*," on the return of the certificate.

It seems to be settled now, after many conflicting decisions, that certificates of deposit are negotiable, *when expressed in negotiable words*, and that the transfer of them is governed by the same rules which control other promissory notes, and that the liability of the endorser is the same as upon the endorsement of any other promissory note. But in order to make a certificate of deposit negotiable, it must have the same certainty as to parties, time and mode of payment, as bills and notes; and the same causes which would make bills and notes unnegotiable, will make a certificate of deposit unnegotiable. 2 Daniel on Negotiable Instruments, 604-6.

To constitute a bill of exchange or promissory note negotiable the promise must be to pay *in money*. And unless the instrument on its face affords every element to fix its value such a paper is only a special contract and not a negotiable bill or note. Accordingly it has been held in this State that where the instrument was a "promise to pay W. W. L. or order the sum of $1.400, in *bank stock* or lawful money of the United States," it was not negotiable, so as to enable the as-

signee to sue in his own name. *Alexander* v. *Oaks*, 2 D. & B. 513. The decision is put upon the ground that the promise was not to pay money absolutely, and bank stock was not regarded as cash. So a promise to pay "*in current notes* of the State of North Carolina," is insufficient to make the instrument negotiable. *Warren* v. *Brown*, 64 N. C. 381. So a bond to pay money *and* clothe a hired slave is not negotiable. *Sutton* v. *Carter*, 65 N. C. 123; *Knight* v. *Wil. & Man. R. R. Co.* 1 Jones, 357.

It is held in our sister States that notes payable in "current bank bills," in "office bank notes," in "current bank notes," in 'current funds," are not negotiable. *Mc Cormick* v. *Trotter*, 10 Sergt. & R. 94; *Wharton* v. *Morris*, 1 Dallas, 124; *Simpson* v. *Meneden*, 3 Cold. 429; *Little* v. *Phœnix Bank*, 2 Hill, 425; *Cornwell* v. *Pumphrey*, 9 Ind. 135; there are many decisions contradictory to these cited, but the weight of authority and the most approved writers on commercial law, sustain the decisions of this Court that the note should express simply that it is payable in *dollars* which have a certain and well fixed signification in law. 1 Dan'l. on Negotiable Instruments, 44–6, where the authorities on both sides are collected.

Had the certificate of deposit been made payable in "legal tender notes," it would probably be held to be negotiable, since Congress has declared and the Supreme Court of the United States held that Treasury notes shall be a legal tender in discharge of debts. But since that law and decision it has been held that a note payable in "currency," which is precisely our case, does not mean legal tender currency and is not negotiable. *Huse* v. *Hamblin*, 29 Iowa; 1 Daniel, 44.

The certificate of deposit therefore not being negotiable the endorsement of the defendant could communicate no title to his endorsee. Even if the position of the counsel of the plaintiff is conceded, to-wit; that the endorsement of the defendant on an unnegotiable instrument made him a guar-

antor, it cannot be pretended that the guaranty is *negotiable* when the certificate of deposit *is not*. The guaranty therefore could extend only to Douthit & Company and not to *their* endorsee, the plaintiff. There is high authority, it is true, that the endorsement of a non-negotiable note should be considered as a guaranty as otherwise it is meaningless. 2 Daniel Nego. Inst. 652–6. But it is unnecessary to consider the question here as for the reasons already given its benefits cannot extend to the plaintiff who is the assignee of the defendant's assignee.

The plaintiff the ultimate holder of the certificate stands in the shoes of Shoup the first holder and his only remedy is against the corporation which issued the certificate of deposit.

The view we have taken of the case renders it unnecessary to consider the other points raised and argued as to notice, demand and the statute of limitations.

There is no error.

PER CURIAM. Judgment affirmed.

STATE v. JOHN ALEXANDER.

Pardon -- Definition of "Conviction."

The term "Conviction" in Art. III, § 6, of the Constitution denotes a verdict of guilty rendered by a jury; *Therefore*, when the defendant, after verdict and judgment in the Court below, appealed to this Court and pending such appeal was pardoned by the Governor; *Held*, that such pardon is authorized by the Constitution and is valid.

(PEARSON, C. J *Dissenting.*)

(*State* v. *McIntire*, 1 Jones 1, cited, distinguished and approved.)

INDICTMENT for Larceny tried at Fall Term, 1876, of MECKLENBURG Superior Court, before *Schenck, J.*

There was a verdict of guilty in the Court below, and judgment that defendant be imprisoned in the Penitentiary for a term of five years at hard labor. From this judgment the defendant appealed. When the case was called for argument in this Court upon the merits, the defendant entered a plea of Pardon granted on 27th of December, 1876, by Curtis H. Brogden, the then Governor of the State.

The question as to whether the plea should be allowed during the pendency of the appeal was argued by the *Attorney General*, for the State, and *Messrs. Shipp & Bailey*, for the defendant.

READE, J. The pardoning power is a useful one. It answers about the same purpose in the administration of criminal matters that equity does in the administration of civil matters. Equity supplies that wherein the law by reason of its universality is deficient; and pardons supply that wherein the criminal law by reason of its universality is deficient. It is however capable of abuse. And the provision in our Constitution which allows its exercise only after trial and conviction is intended to prevent its abuse.

At common law the Crown exercised the power of pardon at any time. The consequence was that crimes were smothered. The facts were not brought to light. The person charged was not brought before the public and required to answer the charge and of course the public were dissatisfied. But under our Constitution and statute, the person charged must be brought before the public in a public trial and face his accusers and all the facts must appear and the jury must find him guilty and the Court must sentence him. If then he will ask for pardon, he cannot deceive the pardoning power. The public are in possession of the facts and can resist his application. Nor is the pardoning power any longer irresponsible to the public; because he has to report the facts and his reasons for exercising the power.

It is not denied that a pardon granted under these circumstances is valid, but the objection made is that these pre-requisites do not exist in this case, for although the defendant had been regularly charged, tried, found guilty by the jury and sentenced by the Court, thereby bringing his case within the constitutional provision, yet he took it out of the provision by appealing to the Supreme Court, which appeal vacated the sentence or judgment; and so there was no "*conviction*" remaining, and therefore the pardon is invalid as wanting a "conviction" to support it. And this brings us to the construction of the Constitution as to what is meant by "conviction." Does it mean the verdict of the jury, or the sentence of the Court, or the verdict and sentence both? The word is ordinarily used to denote the verdict of the jury, guilty. How did the jury find? Guilty; or, they convicted him. What did the Judge do? Sentenced him to be hanged. This is the language ordinarily used in such matters, both in conversation and in books, law and literary. It is never said that the jury sentenced him nor that the Judge convicted him.

In *State* v. *McIntire*, 1 Jones, 1, Chief Justice Pearson says: "The judgment is referred to in the pardon as subsisting, whereas in fact it was annulled by an appeal to the Supreme Court, and if that Court should decide there was error and direct a *venire de novo*, the conviction also would be annulled and the defendant stand as if there had been no trial."

There, manifestly the *verdict* is considered to be the *conviction*. See also 25 Grattan, 850, and 109 Mass. 130. But furthermore the Constitution itself unmistakably fixes what it means by conviction. "No person shall be convicted of any crime but by the unanimous verdict of a jury," &c. Art. I, § 13.

Nothing can be a conviction but the verdict of the jury. Take that to be so; still inasmuch as the Constitution in the same section in which it authorizes the Governor to pardon "after conviction," requires him to report to the General Assembly not only the *conviction* but the *sentence*, is it not intended that there shall be a sentence to report; else how can he report it? And if the appeal vacates the sentence, then there is no sentence to report; and so there is no sentence to support the pardon. Technically that would seem to be so, but it is a refinement merely. Suppose the defendant in his application for pardon should say; "I was convicted of murder and sentenced to be hanged; I appealed to the Supreme Court, but I abandon the appeal and pray for a pardon;" might not the Governor pardon him and in his report say that the applicant had been convicted of murder and sentenced to be hanged and appealed to the Supreme Court, but abandoned his appeal and prayed for pardon; and that he had pardoned him because he was satisfied that he was innocent? Would not that substantially comply with the Constitution to say that he had been convicted and that he had been sentenced, &c?

It is insisted that the object is not to pardon him while he is making defence, nor until he surrenders and begs for mercy. If that were true, still does he not surrender and beg for mercy when he abandons his appeal and prays for pardon? But it is not always true that the defendant ought to be expected to surrender and beg for *mercy*. There are cases where he has been improperly convicted and asks not for *mercy* but for *justice*.

The pardon has been shown us, and the Attorney General consents that the case may be considered as if the pardon were properly pleaded.

We therefore declare that the defendant is entitled to be discharged on payment of costs and upon the terms of the pardon.

PEARSON, C. J. *Dissenting*. The prisoner after verdict moved for a new trial for error in the instructions. This motion was not allowed and sentence was pronounced and the prisoner appealed.

After the appeal the prisoner was pardoned, and he now here in this Court pleads "his pardon" as a plea "since the last continuance," in bar of further action in the premises, and in his plea waives his exceptions to the charge of the Judge from which he had appealed and all other grounds of exception, and takes the position of one who "has nothing more to say than what has been already said" except his pardon.

In the due order of proceeding this Court can only decide the matters appealed from, and the pardon cannot be pleaded here, but after this Court has declared its opinion to be that there is no error in the ruling of the Court below, and judgment is moved for in that Court, and the conviction is established according to law by the judgment of the Court, the plea of pardon may be put in and from the ruling in respect to it an appeal to this Court may be taken by the State or by the prisoner.

To avoid circuity the Attorney General waives all objection to this irregularity and consents that the validity of the pardon may be decided by this Court in the present stage of the proceeding.

The question involves the construction of Art. III, § 6, of the Constitution; "The Governor shall have power to grant reprieves, commutations and pardons *after conviction* for all offences," &c. This turns upon the sense in which the word "conviction" is used.

You have a conviction of the truth of the Christian religion, that is, you are convinced of it. The jury has a conviction of the prisoner's guilt according to the evidence, and the prisoner is said to be convicted by the verdict. The Court has a conviction of the prisoner's guilt according to the verdict of the jury and according to the law of the case and pronounces sentence, and the prisoner is then fully convicted both according to the law and the facts. By the corruptibility of the meaning of words in our language a verdict of guilty signifies the conviction of the prisoner and the judgment of the Court also signifies the conviction of the prisoner. In this sense we say of prisoners confined in the Penitentiary, they are "convicts," that is they are under conviction by the sentence of the law.

The question is, do the words "after conviction" used in the Constitution mean after conviction by verdict or after conviction by verdict and the judgment of the Court? I have a conviction that the words are used in the latter sense. My conclusion is based on four grounds:

1. The same section of the Constitution provides; "The Governor shall annually communicate to the General Assembly each case of reprieve, commutation or pardon granted, stating the name of *each convict*, the crime for which he was convicted, *the sentence and its date*, the date of commutation, pardon or reprieve, and the reasons therefor."

This, as it seems to me, removes all ambiguity and makes it perfectly clear, that the words "after conviction," mean after conviction by judgment, for until there be judgment the Governor cannot communicate to the General Assembly "the sentence" from which his pardon relieved the party. It will be noted that this clause of the section goes much into detail, requiring the Governor to give the name of each convict, the crime, *the sentence*, its date, the date of the pardon and *the reasons therefor;* showing an intention to hedge in the power to grant pardons and to cut off any latitudinarian construction and to confine the power within rigid bounds

2. Another clause of the Constitution shows the sense in which the word "conviction" is used. Art. I. § 33; "Slavery and involuntary servitude otherwise than for crime, whereof the party shall have been *duly convicted*, shall be and are hereby forever prohibited." Manifestly these words mean a conviction by the sentence of the Court. True, a party may withdraw his appeal, submit to the judgment from which he had appealed, and after doing so apply for pardon; but to allow him to obtain a pardon pending the appeal while he is contesting the legality of his conviction is in my judgment "to put the cart before the horse" and to defeat the meaning of the Constitution.

3. There is a legislative construction of these words. Acts 1870–'71, Bat. Rev ch. 78, § 37. "Every application for pardon must be made to the Governor in writing, signed by the party convicted, or by some person in his behalf; and every such application shall contain the grounds and reasons upon which the Executive pardon is asked and shall be in every case accompanied by a certified copy of the indictment *and the verdict and judgment of the Court thereon.*"

So the application cannot be made until there is a judgment of the Court. By an appeal the judgment of the Court is vacated. No lawyer will dispute this; and the legal ef-

fect is the same as if there was no judgment. This statute cuts off all applications for pardon until there be judgment, thus putting a construction upon the words "after conviction" as used in the Constitution. Here too it will be noted that the statute evinces the same anxiety to prevent an abuse of the power of pardon as evinced by the Constitution.

4. By the common law the Crown had power to pardon at any time after an offence was committed; before trial, after trial and before judgment and after judgment. See *McIntire's case*, 1 Jones, 1.

Under the old Constitution § 9, "the power of granting pardons and reprieves, except when the prosecution shall be carried on by the General Assembly, or the law shall otherwise direct," is vested in the Governor.

Under this section the Governors claimed and exercised as ample powers of granting pardons as belonged to the Crown by the common law. When a pardon was granted *before* trial, every one felt that the demands of justice had not been fulfilled. So, when a pardon was granted *after* trial and *before* judgment, every one felt that the demands of justice had not been fulfilled. For the rascal could still go about and say "my guilt has not been established according to law so I am not a convicted felon. True, the jury said I was guilty, but it was because the Judge gave wrong instructions as to the law from which I appealed and thereby his sentence was vacated." Thus the fact of his guilt or of his innocence is not fixed but is left as an open question. The public mind is not satisfied for the demands of justice have not been met. This could only be when the prisoner, by his plea of "guilty" or by the verdict by which the facts were found against him followed up by a judgment of the Court, stood forth as a convicted person who could do nothing more

than beg for mercy. But when a person moves to set aside the verdict and have a new trial because the Judge erred in his charge or for some other error, rejection of evidence for instance, or moves in arrest of judgment and vacates the judgment by an appeal to the Supreme Court, his guilt is not established according to law, and should he be pardoned pending the appeal the public mind will not be satisfied and the demands of justice will not be met; in other words, until his guilt is established both according to the facts and the law. After the Judiciary has disposed of him and his guilt is established according to law he is allowed to appeal to the mercy of the Executive, but not before, for it would disturb the harmony of action should mercy tread upon the heels of justice by snatching away the party accused before his guilt is fully established.

These remarks are intended to show the evils which the new Constitution meant to remedy. That the evil of pardoning before trial is remedied, all admit. Why should the Constitution stop at a point half way and not also remedy the evil of pardoning after trial and before the guilt of the party is established by judgment and the demands of justice are fully met? I am not able to conceive of any reason for doing so and I am convinced from the wording of the entire section and the reason of the thing that such was not the intention.

The case cited from the Mass. Reports has no bearing for the Constitution of that State does not contain the explanatory and restricting clause set out in our Constitution.

The case cited from the Virginia Reports is distinguishable for in that State the jury fix the punishment and the Court does no more than to order the sentence imposed by the jury to be carried into effect.

I am of opinion that by our Constitution the Governor

has no power to pardon until the guilt of the person is definitely fixed by the judgment of the Court.

The plea of pardon should not be allowed.

PER CURIAM. Pardon allowed.

STATE v. E. S. TEETER.

(Same syllabus as in *State* v. *Alexander*, *ante* 231.)

PEARSON, C. J. *Dissenting.*

(*State* v. *Alexander ante*, cited and approved.)

INDICTMENT for Receiving Stolen Goods, tried at Spring Term, 1876, of CABARRUS Superior Court, before *Schenck, J.*

The jury rendered a verdict of guilty and the defendant was sentenced to imprisonment in the Penitentiary for a term of two years at hard labor. The defendant appealed, and during the pendency of the appeal, filed a plea of Pardon granted by Gov. Brogden on the 30th of October, 1876.

Attorney General, for the State.

Messrs. R. Barringer and *W. H. Bailey*, for defendant.

READE, J. The facts as to the pardon in this case are the same as in *State* v. *Alexander*, at this term, and the principles of law are the same and the decision the same.

PER CURIAM. We declare the defendant entitled to be discharged upon the payment of costs and upon the terms of the pardon.

STATE v. JAMES HEATON.

(Same syllabus as in *State* v. *Alexander*, *ante* 231.)

PEARSON, C. J. *Dissenting.*

(*State* v. *Alexander*, *ante*, cited and approved.)

INDICTMENT for Staying an Election, (Bat. Rev. ch. 32, § 39,) tried at Spring Term, 1876, of COLUMBUS Superior Court, before *McKoy, J.*

The Bill of Indictment was found in New Hanover, and the case was removed to Brunswick, thence to Columbus.

The jury rendered a verdict of guilty. Judgment that defendant be imprisoned in the common jail of Columbus County for three months.

There were no exceptions to the ruling of the Court. Defendant appealed from the judgment and during the pendency of the appeal filed a plea of Pardon granted on the 20th of December, 1876, by Curtis H. Brogden the then Governor of the State.

Attorney General, for the State.

Messrs. Badger & Devereux and *D. L. Russell*, for the defendant.

READE, J. The facts as to the pardon in this case are the same as in *State* v. *Alexander*, at this term, and the principles of law are the same and the decision is the same.

PER CURIAM: We declare the defendant entitled to be discharged upon payment of the costs of this Court upon the terms of the pardon.

STATE v. JAMES HEATON.

(Same syllabus as in *State* v. *Alexander*, *ante* 231)

PEARSON, C. J. *Dissenting.*

(*State* v. *Alexander*, *ante*, cited and approved.)

INDICTMENT for Riot against the defendant and twelve others, removed from New Hanover County and tried at Fall Term, 1876, of COLUMBUS Superior Court, before *McKoy, J*

The jury rendered a verdict of guilty and the Court gave judgment that the defendant be imprisoned in the Penitentiary at hard labor for a term of three years and pay a fine of five hundred dollars. The defendant appealed to this Court and during the pendency of the appeal filed a plea of Pardon granted by Gov. Brogden on the 20th of December, 1876.

Attorney General, for the State.

Messrs. Badger & Devereux and *D. L. Russell*, for the defendant.

READE, J. The facts as to the pardon in this case, are the same as in *State* v. *Alexander*, at this term and the principles of law are the same and the decision the same.

PER CURIAM. We declare that the defendant is entitled to be discharged on the payment of the costs of this Court, and upon compliance with such other terms as the pardon prescribes.

STATE v. PINK ROSS and SARAH ROSS.

Fornication and Adultery -- Marriage between Negro and White in Another State -- Domicil in Another State.

1. A marriage, solemnized in a State whose laws permit such marriage, between a negro and a white person domiciled in such State, is valid in this State.
2. The domicil of the husband becomes that also of the wife upon marriage.
3. In an indictment for fornication and adultery where the feme defendant (a white woman) left this State for the purpose of evading its laws in consummating a marriage with her co-defendant (a negro) but with no intent to return, and afterwards both of them came to this State to reside; *Held*, that the defendants were not guilty.

(READE and BYNUM, JJ. *Dissenting.*)

(*Hicks* v. *Skinner*, 71 N. C. 539; same case, 72 N. C. 1; *Williams* v *Oates*, 5 Ire. 535; cited, distinguished and approved.)

INDICTMENT for Fornication and Adultery, tried at August Special Term, 1876, of MECKLENBUG Superior Court, before *Schenck, J.*

The defendants are indicted for fornication and adultery in living and cohabiting together without being lawfully married. The cohabition is admitted. Their defence is that they were lawfully married. The facts as found by the special verdict are these: The defendant Pink Ross is a negro man, and the defendant Sarah a white woman. Pink Ross is a native of South Carolina and resided there until August, 1873. Sarah Ross was a resident and citizen of North Carolina up to the time of the marriage between herself and the other defendant. In May, 1873, the defendant Sarah Ross (then Sarah Spake) went to Spartanburg, South Carolina, for the purpose of marrying the other defendant, and with the intention of evading the laws of North Carolina prohibiting marriage between persons of color and white

persons. The defendants were married in South Carolina according to the laws of that State in May, 1873. They lived in that State until August, 1873, as man and wife when they moved to Charlotte, North Carolina.

The laws of South Carolina do not forbid marriage between white persons and persons of color. On this verdict the Judge held that the defendants were not guilty and the State appealed.

Attorney General, for the State.
Messrs. Shipp & Bailey, for the defendants.

RODMAN, J. (After stating the facts as above.) It will be observed that the verdict states that Sarah went to South Carolina with the intent to evade the law of North Carolina prohibiting the marriage of a negro with a white person. It does not say that she had an intent to return with her husband and live in this State. It is difficult to see how in going to South Carolina to marry a negro, without an intent to return with him to this State, she could evade or intend to evade the laws of this State. Our laws have no extra territorial operation, and do not attempt to prohibit the marriage in South Carolina of blacks and whites domiciled in that State. Such a case differs essentially from one in which both persons, being domiciled in North Carolina, leave the State for the purpose of contracting a marriage forbidden by its law, and with an intent to return to and reside in North Carolina after such marriage; and also from one in which the man alone leaves this State for that purpose and with that intent.

By the marriage of Sarah, the domicil of her husband became hers. And we must suppose that his domicil was *bona fide* in South Carolina until they removed to this State in August, 1873.

It does not appear that any change of domicil was thought of before that time. We must put out of view therefore the supposed intent to evade the law of North Carolina, as a conclusion of law unsupported by or repugnant to the facts found in the verdict, and consider the case as if both parties had been domiciled in South Carolina at the time of the marriage. It is clear that upon the marriage the domicil of the husband became that of the wife and for that purpose it would be immaterial whether the marriage took place in the State of the husband or in any other State. Story Confl. Laws, § § 194, 199. It was so held by this Court in *Hicks* v. *Skinner*, 71 N. C. 530; Ibid 72 N. C. 1. In *Warrender* v. *Warrender*, 9 Bligh's Rep. 89; 2 Clark & Finnelly, 488. A man domiciled in Scotland married an English woman in England, and it was held that the matrimonial domicil was Scotland. This view seems to have been overlooked as it is not alluded to in *Williams* v. *Oates*, 5 Ire. 535, which is therefore apparently opposed to our opinion on this point. But the judgment of the Court may be sustained on the ground that the marriage in question there was not shown to be valid in South Carolina.

The question thus presented is an important one. The State of North Carolina, with the general concurrence of its citizens of both races, has declared its conviction that marriages between them are immoral and opposed to public policy as tending to degrade them both. It has therefore declared such marriages void. It is needless to say that the members of this Court share that opinion. For that reason it becomes us to be careful not to be unduly influenced by it in ascertaining, not what the law of North Carolina is upon such marriages contracted within her limits—that is found in the Act of Assembly and is beyond doubt—but what the law of North Carolina is upon the question presented, and for that we must look beyond the statutes of the State.

If we are right in our conception of the question presented, to-wit; whether a marriage in South Carolina between a black man and a white woman *bona fide* domiciled there and valid by the law of that State, must be regarded as valid in this State when the parties afterwards migrate here? We think that the decided weight of English and American authority requires us to hold that the relation thus lawful in its inception continues to be lawful here.

We know of but two cases which appear to be to the contrary, which will be found in 10 La. An. 411, and 15 *Ibid*, 342. Mr. Bishop in noticing the first of these cases has thought it fit to speak of the people whose Court decided them in a tone not to have been expected from a philosophic jurist. *Telum imbelle.*

The general rule is admitted that a marriage between citizens of a foreign State contracted in that State and valid by its laws is valid everywhere where the parties might migrate, although not contracted with the rites required by the law of the country into which they come and between persons disqualified by such law from intermarrying. *Williams* v. *Oates*,5 Ire 535; *Brook* v. *Brook*, 9 H. L. 193; Story Confl. Laws, § § 81–113, *Dalrymple* v. *Dalrymple*, 2 Hagg. Consist. Rep. 416.

It is contended however by the Attorney General that there is an exception to this rule as well established as the rule itself, viz; that incestuous and polygamous marriages although lawful in the country in which they are contracted, will not be recognized in other States in which such marriages are deemed immoral and are prohibited. And it is further argued that a marriage between persons of different races is as unnatural and as revolting as an incestuous one, and is declared void by the law of North Carolina.

The exception certainly exists notwithstanding a *dictum* of a very great Judge to the contrary in *Williams* v. *Oates*, 5 Ire. 535.

Story (§ 113a) says, "The most prominent if not the only known exceptions to the rule are those marriages involving polygamy and incest; those positively prohibited by the public law of a country from motives of policy; and those celebrated in foreign countries by subjects entitling themselves under special circumstances to the benefit of the laws of their own country."

On examining the illustrations of these exceptions given by the author, it will be seen that they are considerably limited. Thus all Christian countries agree that marriages in the direct line and between the nearest collaterals, are incestuous, and that polygamy is unlawful, consequently such marriages will be held null everywhere, because they were null in the place of the contract. But beyond these few cases in which all States agree, there is a difference as to what marriages are incestuous, and in such cases the admitted international law leaves it to each State to say what is incestuous in respect to its own subjects. In England, a marriage with the sister of a deceased wife is held incestuous and between persons domiciled in England it will be held void wherever contracted. *Brook* v. *Brook*, 9 H. L. 193. But it does not follow that such a marriage contracted in a State where it was lawful, between subjects of that State, would be held void in England if the parties afterwards became domiciled there. There is no reason to think it would be. Story § 116, 116 a. Still stronger are the illustrations given in § § 95, 96.

However revolting to us and to all persons, who by reason of living in States where the two races are nearly equal in numbers have an experience of the consequences of matrimonial connexions between them, such a marriage may appear, such cannot be said to be the common sentiment of the civilized and Christian world. When Massachusetts held such a number of negroes as to make the validity of such marriages a question of practical importance her sentiments

and her legislation were such as ours are to-day. *Medway* v. *Needham*, 16 Mass. 157. Now since she has got rid of her negroes the question is of no practical importance to her. And as far as may be gathered from her statute book she considers such marriages unobjectionable. Most of the States of the Union and of the nations of Europe with whom the question is merely speculative take a similar view of it.

It is impossible to identify this case with that of an incestuous or polygamous marriage admitted to be such *jure gentium*. The law of nations is a part of the law of North Carolina. We are under obligations of comity to our sister States. We are compelled to say that this marriage being valid in the State where the parties were *bona fide* domiciled at the time of the contract must be regarded as subsisting after their immigration here.

The inconveniences which may arise from this view of the law are less than those which result from a different one. The children of such a marriage, if born in South Carolina, could migrate here and would be considered legitimate. The only evil which could be avoided by a contrary conclusion is that the people of this State might be spared the bad example of an unnatural and immoral but lawful cohabitation. The inconveniences on the other side are numerous, and are forcibly stated in *Scrimshire* v. *Scrimshire*, 2 Hagg. Consist. Rep. 417, and in Story, § 121. "And therefore all nations have consented or are presumed to consent, for the common benefit and advantage, that such marriages shall be good or not according to the law of the country where they are celebrated."

Upon this question above all others it is desirable (altering somewhat the language of Cicero with which Story concludes his great work) that there should not be one law in Maine and another in Texas, but that the same law shall prevail at least throughout the United States.

There is no error in the judgment below. Let this opinion be certified.

READE, J. *Dissenting.* No nation can make laws for another nation. Each is independent and makes its own laws. But by common consent of all nations, certain rules have been established for their intercourse, and these rules constitute the law of nations. And their observance is compelled by force if necessary. This is denominated public international law. Wheaton's International Law, § 77.

As distinguished from *public* international law for the conduct of nations *as nations*, there are private international laws for the conduct, not of nations as nations, but of the people of different nations, by which it is tacitly agreed that rights acquired, privileges enjoyed, and relations formed in one nation, shall be recognized in another nation. But it is expressly laid down that this is only by *comity*, and is never allowed where it contravenes a prohibitory enactment. Ibid, § 79.

No nation is bound to admit the laws and customs of another nation within its borders. It is independent in its Legislation and can by positive enactments refuse the operation of any law or custom of any other nation or people. I speak of the power and not of the *propriety*. If a nation should deny to the people of other nations just and reasonable privileges, it would find its punishment in having the same privileges denied to its citizens. And therefore comity, courtesy, is allowed to govern. A marriage formed in Scotland where nothing is required but the consent of the parties, we allow to be valid here, although it would be invalid if formed here; because it is a mere matter of form and we courteously recognize it. It inflicts no harm upon our people. But suppose Scotland were to allow children of ten years of age to marry, would we allow the marriage to be good here?

Probably we might allow it in the absence of a positive enactment; but we require our own people to be, the male sixteen and the female fourteen years of age; or else the marriage is void; and why may we not prohibit it in foreigners? We prohibit it among our own people, not out of caprice, but to prevent improvident marriages to the degradation and injury of the community. I give this illustration because France which has fixed ages for marriages as we have will not recognize a marriage celebrated elsewhere within the ages, although valid where celebrated. Wheat. § 93. The rule is thus laid down in Wheaton, § § 90–1. "A contract valid by the law of the place where it is made is generally speaking valid everywhere. The general comity and mutual convenience of nations have established the rule, that the law of that place governs in everything respecting the form, interpretation, obligation and effect of the contract wherever the authority, rights and interests of other States and their citizens are not thereby prejudiced. * * * * It cannot apply where it would injuriously conflict with the laws of another State relating to its police, its public health, its commerce, its revenue, and generally its sovereign authority and the rights and interests of its citizens."

In other words comity is secondary to the public good of any given nation, and subject to be contravened by its positive enactments. I timidly but very positively deny what a great Judge (Ruffin) has said, that a Turk with his many wives, or a Mormon, can have his rights which he has in his own country recognized here, because it is revolting to our people and against their best interests. Our law prohibits the intermarriage of whites and blacks and declares such marriages "void."

If such a marriage solemnized here between our own people is declared void, why should comity require the evil to be imported from another State? Why is not the relation severed the instant they set foot upon our soil? It is

answered that we would thereby bastardize the issue and disturb the rights of property. Not at all. That does not follow. If they have issue before they come here, the status of the issue may not be changed; and by separating them we prevent issue here. Nor need their rights of property be affected. However that is not before us. And at any rate the public good is paramount. And individuals who have formed relations which are obnoxious to our laws can find their comfort in staying away from us. We give to comity all the force of a constitutional provision when we allow it to annul a statute. Indeed we put it above the Constitution itself; as I believe one of the late amendments prohibits the intermarriage of white and colored. It is inherent in every nation to prohibit whatever is an evil to its society. And it must be its own judge of what is an evil. Self-preservation requires it. *State* v. *Reinhart and Love*, 63 N. C. 547.

That provision in the Constitution of the United States, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States" does not mean that a citizen of South Carolina removing here may bring with him his South Carolina privileges and immunities; but that when he comes here he may have the same privileges and immunities which our citizens have. Nothing more and nothing less. It is courteous for neighbors to visit and it is handsome to allow the visitor family privileges and even to give him the favorite seat; but if he bring his pet rattlesnake or his pet bear or spitz dog famous for hydrophobia, he must leave them outside the door. And if he bring small pox the door may be shut against him.

I am of the opinion that a prohibitory statute is paramount to what might otherwise be allowed as comity, and that the defendants are guilty.

PER CURIAM. Judgment affirmed.

STATE v. ISAAC KENNEDY and MAG KENNEDY.

Fornication and Adultery -- Marriage between Negro and White in Another State -- Domicil in this State.

A marriage, solemnized in a State whose laws permit such marriage, between a negro and a white person domiciled in this State and who leave it for the purpose of evading its laws and with intent to return, is not valid in this State.

(*Williams* v. *Oates*, 5 Ire. 535, cited and approved.)

INDICTMENT for Fornication and Adultery, tried at August Special Term, 1876, of MECKLENBURG Superior Court, before *Schenck, J.*

By consent the following special verdict was rendered; Isaac Kennedy is a negro man and Mag Kennedy a white woman. In 1868 they were citizens of this State. Subsequently they went to South Carolina to evade the law of this State prohibiting intermarriage of negroes and white persons, and were married according to the law of that State and immediately returned to this State. They did not intend to change their domicil from North Carolina, and have lived together as man and wife. The laws of South Carolina do not prohibit marriages between such persons.

Upon this state of facts His Honor held that the defendants were guilty as charged in the bill of indictment and the verdict was so entered. Judgment. Appeal by defendants.

Attorney General, for the State.
Messrs. Shipp & Bailey, for the defendants.

RODMAN, J. The defendants in this case were domiciled in North Carolina before and at the time of their marriage in South Carolina, to which State they went for the purpose

of evading the law of North Carolina which prohibited their marriage, and they immediately after the marriage returned to North Carolina where they have since continued to reside.

To quote from the opinion of Lord Cranworth in *Brook* v. *Brook*, 9 H. L. 193. "There can be no doubt of the power of every country to make laws regulating the marriage of its own subjects; to declare who may marry; how they shall marry; and the consequences of their marrying."

It is not necessary to say that a marriage contracted in another State between residents of this State, without the rites and ceremonies required in this State, will be void, even though the parties left this State for the purpose of evading those rites. *Dalrymple* v. *Dalrymple*, 2 Hagg. Consist. R. 416.

As to the formalities of the marriage the *lex loci* will govern. But when the law of North Carolina declares that all marriages between negroes and white persons shall be void, this is a personal incapacity which follows the parties wherever they go so long as they remain domiciled in North Carolina. And we conceive that it is immaterial whether they left the State with the intent to evade its law or not, if they had not *bona fide* acquired a domicil elsewhere at the time of the marriage. Story Confl. Laws, § 65. *Williams* v. *Oates*, 3 Ire. 535. In *Brook* v. *Brook*, above cited, Lord Campbell says, "It is quite obvious that no civilized State can allow its domiciled subjects or citizens by making a temporary visit to a foreign country, to enter into a contract to be performed in the place of domicil if the contract is forbidden by the law of the place of domicil, as contrary to religion, or to morality, or to any of its fundamental institutions." In that case an Englishman casually met in Denmark the sister of his deceased wife and married her there. As such marriages were prohibited between English subjects it was held void.

A law like this of ours would be very idle if it could be avoided by merely stepping over an imaginary line.

There are cases to the contrary of this conclusion decided by Courts for which we have great respect. They are cited and the whole question is learnedly and earnestly discussed by 1 Bishop Mar. and Div., § § 371, 389; *Medway* v. *Needham*, 16 Mass. 157; *Stevenson* v. *Gray*, 17 B. Mon. (Ky.) 193.

It seems to us however that when it is conceded as it is, that a State may by legislation extend her law prescribing incapacities for contracting marriage over her own citizens who contract marriage in other countries by whose law no such incapacities exist, as Massachusetts did after the decision in *Medway* v. *Needham*, the main question is conceded, and what remains is of little importance. Nothing remains but the question of legislative intent to be collected from the statute. About the intent in this case we have no doubt.

There is no error. Let this opinion be certified.

PER CURIAM. Judgment affirmed.

STATE v. THOMAS LONG.

Indictment -- Overseer of Road -- Incumbent of Office.

One who professes to be the incumbent of an office and performs the duties of the same is estopped from denying the legality of his appointment; *Therefore*, where in an indictment for failure to keep a public road in repair it was proven by *parol* evidence that the defendant professed to be overseer of the road and had in all respects acted as such; *Held*, to be unnecessary to show his appointment by the Court record.

(*State* v. *Cansler*, 75 N. C. 442, cited and approved.)

INDICTMENT against the defendant as Overseer of a Public Road, tried at Fall Term, 1876, of ALEXANDER Superior Court, before *Buxton*, *J.*

The bill charging that the defendant had neglected to keep the road over which he was overseer in good repair (Bat. Rev. ch. 32, § 41) was found at Spring Term, 1876, and it was in evidence that defendant for three or four years previous to January, 1876, had acted as overseer of this road, occasionally summoning hands to work on it, and that since that date some one else had acted as overseer.

The defendant denied that he was overseer and insisted that the State should produce the order of appointment of the Township Trustees. (Bat. Rev. ch. 104, § § 7-8.)

By consent the question of law was reserved and a verdict of guilty rendered.

His Honor being of opinion that there was no evidence of a *de jure* appointment of defendant as overseer and that the fact that he had acted *de facto* as such was not sufficient to render him liable in a criminal prosecution for mere nonfeasance, decided the point of law in favor of defendant, directed the verdict to be set aside and a verdict of not guilty to be entered. From which ruling the Solicitor for the State appealed.

Attorney General, for the State.
Mr. R. F. Armfield, for the defendant.

FAIRCLOTH, J. The defendant was indicted as an overseer of a public road for failing to keep it in repair and was convicted. The ground of appeal is that his appointment was proved by parol and not by the Court record The proof was that he had professed to be overseer for three or four years, had summoned the road hands and worked the road repeatedly, in other words had acted as overseer in all respects except that he failed to keep it in good order at all times.

It would be better to produce the record in such cases, but we think the defendant has concluded himself by his own acts.

He took the benefit of his office by not working as a hand, and its other emoluments if any there be.

We have held that a Justice of the Peace who assumed the duties of the office and received the fees belonging thereto, although he had not taken the oath of office, was indictable for misbehavior in office. *State* v. *Cansler*, 75 N. C. 442. And on the same principle we hold that the defendant is liable in the present case.

There is error. Let this be certified to the end that the Court below may proceed according to law.

PER CURIAM. Judgment reversed.

STATE v. CUMMINGS HOUSTON.

Evidence -- Confessions.

Where the defendant, a negro, was arrested in the night by a Deputy Sheriff and three other white men, the party being shortly after joined by other white men, and while on the way to the Magistrate, the defendant made certain confessions, "no threats or promises or violence" to him having been offered, such confessions are admissible in evidence.

INDICTMENT for Larceny tried at Fall Term, 1876, of GUILFORD Superior Court, before *Kerr, J.*

The confessions of the defendant were proved by the State as having been made under the following circumstances: The witness (a Deputy Sheriff) accompanied by three other persons, arrested the defendant near the city of Greensboro about 9 o'clock at night and carried him before a Justice of the Peace about a mile from the place of arrest. While on the way and after four other persons had joined them, the prisoner confessed that he took the goods alleged to have been stolen. "No threats, or promises, or violence" to defendant were offered. The persons present were white men, the defendant a black man. The counsel for the defendant insisted that the evidence was inadmissible because the confessions were not voluntary. The Court overruled the objection and the jury rendered a verdict of guilty. Judgment. Appeal by defendant.

Attorney General, for the State.

Mr. J. T. Morehead, for the defendant, cited *State* v. *Charity,* 2 Dev. 543; *State* v. *Matthews,* 66 N. C. 106; *State* v. *Whitfield,* 70 N. C. 356, and *State* v. *Dildy,* 72 N. C. 325.

READE, J. To make a man "the instrument of his own conviction," as Mr. Hawkins expresses it, is always repul-

sive. To pluck a secret from his own breast, to wing a shaft to slay him, although he may deserve to be slain, is cruel. It is only that sort of confession which comes of penitence and is voluntary which ought to be allowed to convict. And this sort of confession after it is allowed to convict ought to be allowed to mitigate punishment—because it is a virtue.

We can judge of the inducements to a confession in any given case only from circumstances. If there be threats of harm or promises of favor, inflictions of pain or demonstrations of violence, then the confession is attributed to such influences; but in the absence of all harmful influences we take the confession to be voluntary.

The facts that the defendant was a negro and that he was arrested in the night time by the officer and three white men who were joined on the way to the Magistrate, some mile distant, by at least four other white men, are calculated to excite some suspicion; but they are capable of explanation and they are explained by the testimony, that there were "no threats or promises or violence."

Understanding these terms to be used in the broad sense that no harmful influence was brought to bear upon the defendant we must regard his confessions as voluntary; and therefore admissible.

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

PER CURIAM. Judgment affirmed.

STATE v BOB YOUNG

Indictment -- Cheating by False Pretences -- Caveat Emptor.

1. In an indictment for cheating by false pretences where the defendant, for value obtained, delivered cotton to the prosecutrix falsely representing it to be of the grade of "good middling;" *Held*, that it is not an indictable offence, for
2. In such case the rule of *caveat emptor* applies.

(*State* v. *Phifer*, 65 N. C. 321; *State* v *Jones*, 70 N. C. 75, cited, distinguished and approved.)

INDICTMENT for cheating by False Tokens and Pretences, (Bat. Rev. ch. 32 § 67.) tried at Fall Term, 1876, of MECKLENBURG Superior Court, before *Schenck, J.*

The facts are that one Susan Galloway the prosecutrix leased a tract of land to defendant for one year. Defendant agreed to pay as rent four bales of "good middling" cotton. On the first of January, 1876, he sent two bales to prosecutrix and about a month thereafter in a settlement between the parties the prosecutrix took the defendant's note for $100 in lieu of the other two bales. The prosecutrix afterwards sold the cotton for $70. The defendant falsely represented the two bales as "good middling" cotton for the purpose of deceiving the prosecutrix and to obtain a credit on his contract, which credit he did obtain.

The jury rendered a verdict of guilty and the defendant moved in arrest of judgment; that "credit on an account" is not embraced by the statute as a thing to be obtained by false pretences.

The Court being of opinion with defendant allowed the motion and *Montgomery*, Solicitor for the State, appealed.

STATE v. YOUNG.

Attorney General, for the State.

Messrs. W. W. Flemming and *A. Burwell,* for the defendant.

FAIRCLOTH, J. In the cotton markets the terms "Middling, Good Middling, Ordinary, Good ordinary" and some others are well understood by buyers and sellers in the cotton regions. They signify distinct grades of cotton and sell at prices differing very materially. It is a common business to buy and sell cotton without inspection on the basis of these terms and when delivered, if the grade is higher or lower the price is varied accordingly. Reference to these terms here is not important except to show that the draftsman did not advert particularly to the use of these terms, as the bill of indictment charges that the defendant fraudulently represented the bales of cotton to be "good middling" and finally that he obtained a credit on his account at the price of "good cotton"

The defendant had agreed to pay the prosecutrix, as rent, four bales of "good middling" cotton for the year 1875, and the bill alleges that on the delivery of two bales he falsely represented them as such; whereas in fact they were of an inferior grade and these facts are ascertained by the special verdict. It also charges that he falsely and fraudulently packed said bales by having good cotton on the outside and inferior cotton in the interior of said bales and thereby deceived the prosecutrix. This charge is not established by the special verdict, nor does any evidence before us tend to show that it was true. In *State* v. *Phifer*, 65 N. C. 321, Reade, J. after an interesting review of the doctrine of cheating by false tokens, &c., states the rule to be, "that a false representation of a subsisting fact, calculated to deceive, which does deceive, and is intended to deceive, whether the

representation be in writing or in words or in acts, by which one man obtains value from another without compensation, is a false pretence indictable under our statute." The fact misrepresented was that the cotton was "good middling," but this was a matter of observation and the defect was as patent to the prosecutrix as any one else and therefore the doctrine of *caveat emptor* must apply. It may be that the prosecutrix considered it as represented, and knew no better until the cotton was tested in the market at a subsequent time. If the fact was found to be that the defendant had concealed dirt or inferior cotton, &c., within the bale and represented the whole to be good then a different question would be presented. This was the case in *State* v. *Jones*, 70 N. C. 75, where the defendant covered up dirt, chips, &c., in the barrel with good turpentine and represented the whole as good. There the defect was concealed, here it was open before the eyes of the prosecutrix.

No error. Let this be certified to the Superior Court that the matter may be disposed of according to law.

PER CURIAM. Judgment affirmed.

STATE v. ROBERT H. CAMPBELL.

Indictment -- Larceny -- Evidence.

1. Where on a trial for larceny there was a conflict of testimony as to whether the article alleged to be stolen was a "calf" skin or a "kip" skin; *Held*, that His Honor properly left the disputed question to the jury and their verdict settled the same. But
2. In an indictment for larceny when the article stolen is described as a "calf" skin and is proven on the trial to be a "kip" skin; *Held*, to be no variance between the allegation and the proof.

(*State* v. *Moore*, 11 Ire. 70; *Reeves* v. *Poindexter*, 8 Jones, 308; *Henderson* v. *Crouse*, 7 Jones, 623, cited and approved.)

INDICTMENT for Larceny, tried at Fall Term, 1876, of IREDELL Superior Court, before *Buxton, J.*

The bill of indictment charged the defendant with stealing "one dressed calf skin" and the evidence was that the article stolen was a "kip skin." The defendant insisted that the variance was fatal but the Court held otherwise. Verdict of guilty. Judgment. Appeal by defendant.

Attorney General, for the State
Mr. R. F. Armfield, for the defendant.

FAIRCLOTH, J. The defendant was indicted and convicted for stealing "one dressed calf skin." The felony was established but the defendant requested His Honor to instruct the jury that they could not find him guilty because the evidence showed that the article taken was a "kip skin" which request was refused. The prosecutor called it "a dressed calf skin ready for work taken from a calf from four to six months old." Another witness acquainted with the "tanning business" testified that a calf skin is from a veal six

ten weeks old, and that from ten weeks to twelve months old it is called a "kip skin," and that if the calf is not well grown it is sometimes called a "calf" although over ten weeks old. This was the material evidence on this point.

The description in an indictment must be in the common and ordinary acceptation of property and with certainty sufficient to enable the jury to say that the article proved to be stolen is the same, and to enable the Court to see that it is the subject of larceny and also to protect the defendant by pleading *autre fois convict* or *autre fois acquit* in the event of future prosecution for the same offence so that there may be no doubt of its identity; and the evidence must substantially correspond with the description in the indictment. There are reported cases in which an acquittal was had on distinctions too refined, as where it was charged that *a pair* of stockings were stolen and it was proved that the stockings were odd ones; and where the charge was a stolen duck and it was proved to be a drake. These nice distinctions which frequently defeated the ends of justice were wiped out by our statute, that no "criminal proceeding by indictment * * * shall be quashed nor the judgment thereon stayed by reason of any informality or refinement, if in the bill or proceeding sufficient matter appears to enable the Court to proceed to judgment." Bat. Rev. ch. 33, § 60. The description must still be in a plain and intelligible manner and must correspond to the different forms of existence in which the same article is found. In its raw or unmanufactured state it may be described by its ordinary name, but if it be worked up into some other form &c., when stolen it must be described by the name by which it is generally known. *State* v. *Moore*, 11 Ire. 70.

When there is no evidence to a material matter the Judge may say so, but where there is a conflict in the evidence it must be left to the jury to pass upon the credibility of the

witnesses and their means of knowledge &c. *Reeves* v. *Poindexter*, 8 Jones, 308. And when the testimony is affirmative and negative it must be left to the jury with instructions that the former is entitled to more weight than the latter. *Henderson* v. *Crouse*, 7 Jones, 623.

In the case before us there is a conflict of testimony partaking also of an affirmative and negative kind. It was properly left to the jury who have said by their verdict that the defendant was guilty in manner and form as charged in the bill, which is the same thing as saying it was a "calf skin" and not a "kip skin" and this settled the disputed question, and His Honor was right in refusing to instruct the jury to acquit on account of a variance between the allegation and the proof. This is sufficient for this case but we feel willing to go further and say we think the distinction insisted on is not a practical one and was of no importance to the defendant in the trial of his case on its merits. Besides we know of no rule of law by which the Court could say precisely when the "calf" ceases and the "kip" begins. This would require some knowledge of their different pedigrees, habits and family relations, which are matters not well defined in the law books.

There is no error. Let this be certified to the end that the Court below may proceed according to law.

PER CURIAM. Judgment affirmed.

P. ROLLINS and others v. HAM ROLLINS and R. M. HENRY.

Action to Recover Real Estate -- Parties -- Practice -- Appeal.

1. When in an action for the recovery of real estate, both the plaintiff and a third party claim to be the landlord of the defendant, the latter has a right upon affidavit to be let in as a party defendant to the action.
2. In such case if a judgment by default is taken against the tenant, no writ of possession can issue until the determination of the controversy between the plaintiff and the interpleading defendant.
3. If such application to be made a party is denied, the applicant is a "party aggrieved" for all the purposes of an appeal, under § 299, C. C. P.

(*Wise* v. *Wheeler*, 6 Ire. 196; *Harkey* v. *Houston*. 65 N. C. 137, cited and approved.)

CIVIL ACTION to recover possession of Real Estate tried at Fall Term, 1875, of BUNCOMBE Superior Court, before *Henry, J.*

The plaintiffs alleged that they were the owners of certain real estate in the County of Buncombe, known as the "Sulphur Spring lands."

The opinion of this Court delivered by Mr. Justice Bynum contains the material facts in the case and proceedings in the Court below.

His Honor gave judgment against the defendants for want of a bond and answer and adjudged that the plaintiff recover possession of the lands described in the complaint. Defendant Henry appealed.

Mr. J. H. Merrimon, for plaintiffs.

Messrs. J. G. Martin & Son and *Battle & Mordecai*, for defendants.

BYNUM, J. An action brought by the plaintiffs to recover of the defendant the possession of real estate. At the return term the defendant answered denying the plaintiff's title; and a third party, to-wit, R. M. Henry, filed an affidavit alleging that he was the owner of the land and that the defendant Rollins was in possession and holding as his tenant; wherefore he demanded to be let in to defend as landlord this and four other actions brought by the same plaintiffs against other parties for the same lands under the same claim of title. The plaintiffs opposed the motion and read affidavits to show that the defendant was *their* tenant and as such was estopped to deny their title. Counter affidavits were read by Henry to establish the contrary. The Court upon all the affidavits proceeded to find the facts and to declare as a matter of law thereupon that the defendant was the tenant of the plaintiffs and could not be heard to deny their title; wherefore he denied the motion of Henry to be allowed to defend as landlord and gave judgment and awarded a writ of possession against the tenant. Henry appealed to this Court. There is error. The case is somewhat novel. Two parties claim adversely to each other to be the landlord of the same tenant of the same premises at the same time; and it may be, that the acts of the tenant have been such that he is estopped from denying the title of either; as by taking a lease from one, attorning and paying rent to the other. Now it is perfectly well settled that even at common law the *landlord* has the *right* to defend either with or instead of the tenant. But the question is, when *two* claim to be landlord, the plaintiff and a third party, has the latter the right to defend? The answer is this; where a person claims in *opposition* to the title of the tenant in possession, he cannot be considered as landlord; but the term "landlord" for the purposes of the action extends to every person whose title is connected to and consistent with

the possession of the occupier and is divested or disturbed by any claim adverse to such possession. Adams on Eject. 228-31. *Oxendon* v. *Lawrence*, W. Bl. 1259. So that now it is considered as settled that the word *landlord* is extended to all persons claiming title consistent with the possession of the occupier; and that it is not necessary they should have previously exercised any act of ownership over the lands. All such persons have the right to defend as landlord and no other. The proper manner of asserting to the Court the right to appear and defend we think is by affidavit. It is for the purposes of the action, like an affidavit to continue or remove a cause; if sufficient cause appear on its face, it is conclusive of the right to defend. *Wise* v. *Wheeler*, 6 Ire. 196. In this case just cited it was decided by the Court that the liberty of defending as landlord was not a question addressed to the discretion of the Court but was a right which could not be denied. We are clearly of opinion that this right of defence is not affected by section 61 of the Code of Civil Procedure, for the case of *Wise* v. *Wheeler*, was decided in the face of Rev. Code ch. 31, §§ 46-8. If the allowance of the motion to defend, was not then discretionary with the Court, it cannot be so held now, under a system whose express purpose is to provide for the trial of all questions growing out of the action. Upon filing the affidavit, therefore, R. M. Henry should have been permitted to defend either with or without the tenant upon complying with the other statutory requirements. When the tenant failed to file the necessary bonds or to comply with all the rules preliminary to his right to answer, the law and practice were that the plaintiff was entitled to judgment by default against the tenant but no writ of possession could issue; but there was a stay of execution until a verdict was had in his action against the claimant. Adams' Eject. 239. *Jackson* v. *Stiles*, 4 Johns. 493; *Harkey* v. *Houston*, 65. N. C.

137. R. M. Henry also moved the Court to consolidate the five several actions; which motion was denied. When he is let in to defend as a party, the Court will on motion, as a matter of course, order to be consolidated into one, all actions for the same premises upon the same title. Not to do so would be gross oppression and against the entire spirit of our code. Even where several actions were instituted against the occupants of several premises but all depending upon the same title, Lord Kenyon ordered a stay of all the actions but one, to abide the event of that, saying it was a scandalous proceeding on the part of the claimant. 2 Selw. Prac 144. Adams Eject. 237. The point was taken in this Court that by C. C. P. § 298, no one but a *party* to the action can appeal, and that R. M. Henry not having been made a party had no right of appeal. That construction is too narrow and would work manifest injustice. Henry claimed a substantial right which involved a matter of law; when that was denied him by a judicial determination he fell within the provisions of C. C. P. § 299, and was a party aggrieved for all the purposes of an appeal.

PER CURIAM. *Venire de novo.*

P. ROLLINS and others v. HUGH BISHOP.

Action to Recover Real Estate -- Eviction of Tenant -- Practice.

If, in an action for the recovery of real estate in which a third person claiming as landlord of the defendant has been made a party defendant, judgment is taken against the tenant defendant and he is evicted, he is entitled to be restored to possession until the determination of the controversy between the plaintiff and the interpleading defendant.

CIVIL ACTION, to recover possession of Real Estate tried at Fall Term, 1875, of BUNCOMBE Superior Court, before *Henry, J.*

The facts in this case are the same as in the preceding case.

Mr. J. H. Merrimon, for plaintiffs.

Messrs. Battle & Mordecai and *J. G. Martin & Son*, for defendant.

BYNUM, J. *These four actions are instituted by the same plaintiffs for the same premises and under the same claim of title, as in the case of *P. Rollins et al* v. *Ham Rollins* and *R. M. Henry*, decided at the present term. The same questions are involved and the decision in that case is referred to as the decision of the Court in these actions. If the defendants or either of them have been evicted on judgments obtained in these actions they are entitled to restitution of possession until the determination of the issue made in them all between the plaintiffs and R. M. Henry who has

**Rollins* v. *Edward Sams*; *Rollins* v. *Bishop Johnson*; *Rollins* v. *James Bishop.*

applied and has the right to be made defendant either with or in the place of the tenants.

Error.

PER CURIAM. *Venire de novo.*

P. ROLLINS and others v. W. L. HENRY.

Landlord and Tenant Act -- Appeal from Justice's Court -- Practice.

Upon an appeal from a Justice's Court, in an action under the Landlord and Tenant Act, when a third person claiming as landlord of the defendant has been made a party defendant in the Superior Court, and the appeal is dismissed as to the tenant defendant, no writ of possession can issue from the Justice's Court, until the determination of the controversy between the plaintiff and interpleading defendant.

CIVIL ACTION to recover possession of Real Estate, tried at Fall term, 1875, of BUNCOMBE Superior Court, before *Henry, J.*

The facts in this case are the same as in the case of *Rollins* v. *Ham Rollins*, *ante*.

Mr. J. H. Merrimon, for plaintiff.

Messrs. Battle & Mordecai and *J. G. Martin & Son*, for defendant.

BYNUM, J. This proceeding was commenced before a Justice of the Peace under the Landlord and Tenant Act and was taken to the Superior Court by appeal of the defendant. At the Fall Term, 1875, of that Court the appea

was dismissed upon the motion of the defendant himself. The effect of the dismssal was to remit the case to the Justice's Court, to be there proceeded in under the judgment which had been appealed from. The Superior Court therefore had lost its jurisdiction, nevertheless at the same time that Court awarded a writ of possession to the plaintiffs against the defendant, from which judgement he appealed to this Court. There is error for which a *venire de novo* must be granted.

At the same term at which this appeal was dismissed, R. M. Henry filed an affidavit claiming the land in suit and alleging that this defendant was his tenant and asking to be made defendant as landlord in this and several other like cases. We have determined in the case of *Rollins* v. *Rollins* decided at the present term, that R. M. Henry had the right to appear and defend, and that no writ of possession against any of the tenants could be awarded and executed, pending the trial of the issues between the plaintiffs and R. M. Henry, even though judgment by default should be taken against the tenants. It follows that the Justice of the Peace cannot issue a writ of possession upon the judgment in this case unless the plaintiffs shall recover in the actions for the same land wherein the said R. M. Henry is allowed to be made a defendant. Adams on Eject. 239.

PER CURIAM. *Venire de novo.*

E. SLUDER v. W. W. ROLLINS and others.

Judgment -- Vacation of -- Inexcusable Neglect.

1. Where the defendants were in the town in which a court was in session, at which a judgment was rendered against them, and did not communicate the nature of their defense to their counsel or file an answer; *Held*, that they were guilty of inexcusable neglect and not entitled to have the judgment vacated under C. C. P. § 133.
2. In an application to vacate a judgment, the burden is on the applicant to show a proper ground.

(*Waddell* v. *Wood*, 64 N. C. 624, cited and approved.)

MOTION, to vacate a Judgment taken by default, made by the defendants and heard at Chambers in Asheville on the 29th day of December, 1876, before *Henry J.*

Upon the facts which sufficiently appear in the opinion, His Honor adjudged that the motion be allowed to the end that the defendants might file an answer and defend the action at the ensuing term of the Court.

From this judgment the plaintiff appealed.

Mr. J. H. Merrimon, for plaintiff.

No counsel for defendants.

RODMAN, J. This is an application under C. C. P. § 133, to vacate a judgment as taken by surpise, &c.

We are of opinion on the facts stated that the defendants are guilty of inexcusable neglect. One of the defendants (W. W. Rollins) was in the town where the Court was sitting, on the day when judgment was rendered and on the day before, and for aught that appears could have instructed his counsel as to the defence and could have verified an answer. Another defendant (P. Rollins) had been present

at the place where the Court sat, during a part of the term but was compelled by business to leave before the term closed. No reason is assigned why he did not communicate the nature of his defence to his counsel and verify an answer before he left.

It is stated that the defendants were advised that they had a meritorious defence.

But the nature of the defence is not stated, and it does not appear to have been communicated to the gentlemen who represented the defendants as their attorneys at that Court. The circumstances of cases of this class are so various that precedents can seldom be a certain guide. The case most nearly resembling this is *Waddell* v. *Wood*, 64 N. C. 624, where the defendant failed to attend Court expecting that his witness would attend. The witness failed to attend, the defendant's attorney was unable to obtain a continuance and a judgment was given against the defendant. The Court held that the defendant's failure to attend was an inexcusable neglect. In every case where there is an application to vacate a judgment on the ground of mistake, &c., the burden is on the applicant to show a proper ground. The least that can be expected of a person having a suit in Court is that he shall give it that amount of attention which a man of ordinary prudence usually gives to his important business.

Judgment appealed from reversed. Let this opinion be certified.

PER CURIAM. Judgment reversed.

JOHN A. LONG and others v. THE COMMISSIONERS OF RICHMOND COUNTY.

Taxation -- County Commissioners -- Duties and Powers -- Contract by County.

1. Under the statute (Bat. Rev., ch. 27, § 8,) there is no grade among the duties and powers of County Commissioners, and no preference is given to one over another.
2. A Court has no power to interfere with the domestic administration of the affairs of a County so long as the Board of Commissioners act *infra vires; Therefore*, where it was alleged that a Board of Commissioners had not levied a sufficient tax to defray the ordinary expenses of the County, including the support of the poor, on account of the levy of a tax to pay for repairing the Court House, *Held* to be no ground for interference by the Courts.
3. A tax levied professedly and improperly for one purpose can be collected and applied to any other legitimate purpose.
4. It is not fraudulent for a Board of County Commissioners to superadd their personal credit to the credit of the County in a contract concerning the necessary expenses of the County.

INJUNCTION, heard at Fall Term, 1876, of RICHMOND Superior Court, before *Furches, J.*

The complaint and affidavit of the plaintiff, which were heard before Judge Buxton, at Chambers on the 2 August, 1876, alleged, among other things, that the defendants had made the following levy of taxes for the current year, viz;

Special tax for Rail Road purposes; 30 cents on the $100 valuation and 60 cents on the poll.

For County purposes; 30 cents on the $100 and 60 cents on the poll; and ¾ of one per cent on income.

For Township purposes; 5 cents on the $100 valuation.

Special tax for repairs on Court House; 10 cents on the $100 valuation and 20 cents on the poll.

That including the State tax (which was 38 cents on the $100 and one 20-100 dollars on the poll) the total taxes levied were one 13-100 dollars on the $100 valuation of property and two 60-100 dollars on the poll.

Plaintiffs alleged that the taxes were in excess of the constitutional limitation and that defendants were proceeding to collect them, and asked that they be enjoined from collecting the special tax for repairs on the Court House. Plaintiffs admitted the tax levied for railroad purposes to be valid. His Honor ordered the defendants to appear and show cause at the ensuing Fall Term of the Court why they should not reform the assessment of County taxes by striking out the tax levied for repairs on Court House as being in excess of the constitutional limitation and in the meantime restrained them from proceeding in its collection.

On the 26th August, the defendants reformed the tax levy by striking out the tax for Township purposes from 30 cents on the $100 to 16⅔, but retained the tax levied for repairs on the Court House. At the regular Term the defendants answered, setting out the facts as above and asked that they be allowed to proceed in the collection of the taxes. The plaintiffs resisted and alleged fraudulent motives in passing the order reforming the tax list; that defendants had made themselves personally liable for the Court House repairs and on that account retained the tax levied for that purpose and also that the ordinary County expenses would require more than would be raised by the reduced taxation for that purpose.

His Honor held that the defendants had the right to reform the tax levy; that as to the alleged fraud it was not such as the Court could consider; that the levy of 26⅔ cents must be sustained being for County purposes including the repairs on the Court House of the necessity for which the defendants were judges; that the levy of 20 cents on the poll for repairs could not be sustained on the ground that

that the poll tax must be appropriated for purposes of education and the support of the poor.

Thereupon the Court ordered that the restraining order theretofore made, be modified so as to restrain the collection of the poll tax and for repairs on the Court House.

From this order both the plaintiffs and defendants appealed.

Mr. John D. Shaw for the plaintiffs, cited, *Allen* v. *Pearce* 6 Jones, Eq. 309; *Carter* v. *Hoke* 64 N. C. 348; *Lowe* v. *Com'rs.* 70 N. C. 532; *Blossom* v *Van Amringe*, Phil. Eq. 133; *Key* v. *Dobson*, Ibid 170; *Howes* v. *Mauney*, 66 N. C. 218; *French* v. *Com'rs*, 74 N. C. 698; *Tucker* v. *City of Raleigh*. 75 N. C. 271-2.

It is a general principle that all transactions can be avoided for fraud, and there is nothing to take this out of the general rule.

Messrs. Platt D. Walker and *J. N. Staples* for the defendants, cited, *Brodnax* v. *Groom*, 64 N. C. 244; *Holden* v. *Univ. R. R. Co.* 63 N. C. 410; *Simmons* v. *Webb*, 66 N. C. 336; *Haughton* v. *Com'rs.* 70 N. C. 466; *Brothers* v. *Com'rs.* 70 N. C. 726; *Uzzell* v. *Com'rs*, 70 N. C. 567; *Mitchell* v. *School Com.* 71 N. C. 400; *Wilson* v. *City of Charlotte*, 74 N. C. 748; *Street* v. *Com'rs.* 70 N. C. 644. Plaintiffs do not show wherein fraud consists, but charge it in general terms, *Mitchell* v. *Com'rs.* 74 N. C. 487.

The counsel for both parties also referred to the provisions of the Constitution and Acts of Assembly, regulating the manner of collecting taxes and the purposes to which they should be applied.

RODMAN, J. It is admitted by both parties that the original tax levy was excessive and *ultra vires* and that the plaintiffs were entitled to have the collection of it enjoined as to the excess.

The prayer of the complaint was to enjoin the collection of that part of the tax which it appeared was intended to pay for certain repairs on the Court House of the County, being 10 cents on the $100 valuation of property and 20 cents on the poll. *Buxton, J.*, granted a restraining order limited to this tax and permitting the collection of the other taxes. Afterwards and before the next term of the Superior Court of Richmond at which the defendants were ordered to appear and show cause, &c, the defendants revised the tax levy which was complained of. They reduced the tax for County purposes to 16⅔ cents on the $100 valuation of property and 60 cents on the poll and struck out the tax for Township purposes, but retained the tax for the repairs of the Court House which it was the prayer of the complaint to enjoin. They thus brought the total tax within the admittedly legal limit of 26⅔ cents on the valuation and 80 cents on the poll. At the next term of the Superior Court the plaintiffs moved to continue the injunction granted by *Buxton, J.*, to the hearing, and the defendants on the ground of the revision and reduction aforesaid, opposed the motion and moved to vacate the injunction, which was unnecessary, as it expired at the term, if not continued, by its own limitation. The Judge vacated the injunction except as to the tax of 20 cents on the poll for repairs of the Court House, as to which he continued it; and from this order the plaintiffs appealed to this Court.

They contend here that the original injunction should have been continued and make several objections to the conduct of the defendants in making the revision and to its legal effect upon the matter in controversy.

They object: 1st. That the revision of the tax levy was fraudulent, in this; that the Commissioners had become personally liable for the cost of the repairs on the Court House and that the tax for that purpose was not retained *bona fide* and in the honest exercise of their discretion in

repairing the public buildings of the County, but for the purpose of saving themselves harmless from the personal liability they had incurred. The Commissioners deny that they had by any agreement made themselves personally liable as charged and Mr. Carr the contractor for the repairs corroborates their denial. So that if they had made any contract of personal liability his affidavit discharges them so far as he is concerned.

But if they had become and continued to be sureties for the County for the payment of the cost of the repairs, we are at a loss to see wherein the fraud upon the tax payers consists or what principle of public policy is violated by their doing so. To repair a public building is within the class of necessary expenses for which the County Commissioners have power to tax within the constitutional limit. A contract made by them for such a purpose is valid and binds the County. If they can contract on better terms for the County by adding their personal credit to that of the County, we know of no reason why it should be unlawful. Besides, if such a contract was illegal as being contrary to public policy, it would be void and the plaintiff's argument would fail, as there would then be no personal liability.

The contract for the repairs appears from the affidavit of Carr to have been made in July, 1876, before the bringing of this action. No reason is shown why this contract was not binding on the County. An injunction to prevent the Commissioners from collecting the tax laid to enable the County to perform it would not annul the contract or exonerate the County from liability to damages for a breach of it. To retain this tax therefore by cutting down the others cannot be regarded as a fraudulent act on the part of the Commissioners, if by fraud is meant an act to their own advantage at the expense of their constituents. And we can conceive of no other legal meaning to be attached to the epithet fraudulent in this connection.

2nd. That the tax levied by the revised levy for County purposes other than the repair of the Court House, including the maintenance of the poor, the payment of jurors, the support of prisoners, &c, is manifestly insufficient for those purposes and the inadequacy will cause a serious and manifest damage to the County. That these objects are essential to the welfare of the County and more necessary than the repair of the Court House and that the Commissioners do not honestly and cannot legally cut down the tax necessary for these primary and essential objects in favor of one subordinate in its nature.

Whether the tax levied for County purposes as defined above will be adequate or not for those purposes we do not undertake to inquire.

The Act prescribing the duties and powers of County Commissioners, (Bat. Rev. ch. 27, § 8) enumerates among others, (sub. section 10) to repair the County buildings and raise the expense thereof by tax, (sub. section 13) to raise necessary highway moneys, (sub. section 11) to erect bridges, (sub. section 24) to provide by tax for the maintenance and well ordering of the poor, (ch. 89, § 9) to feed prisoners, (ch. 105, § 23) to pay jurors. To these others might be added but it is unnecessary for the purpose in view. All of these duties are obligatory. The expenses for each and all of them are of the class of necessary expenses. The statntes make no difference in grade or necessity among them. They give no preference to one of these objects over another. They leave to the representatives elected by the people of the County and being its local legislature to provide for them all if they can within their limited power of taxation, and if not to apportion the County revenue according to their discretion among the several objects, subject to this limitation only, that the proceeds of the poll tax shall be applied to education and the support of the poor alone.

It may happen that the County Commissioners with the limited amount at their command may not be able to provide adequately even in their own opinion for all these objects. It may be necessary to pare down the appropriations for one object in favor of another; for example, to economize in the maintenance of the poor in order to feed the prisoners in the jail, or to pay the jurors, or even to repair the Court House. That is matter of domestic administration, with which so long as the Commissioners act *infra vires*, no Court has the power to interfere. If the Superior Courts should undertake in any case to do so, they would undertake to supersede the local legislatures in their peculiar functions and would soon be called on to administer the domestic affairs of all the municipal corporations in the State.

When County Commissioners undertake to act *ultra vires* the Courts will restrain them. But when they act *infra vires* no Court can control their discretion. I will not undertake to say that no case can be conceived in which while acting *infra vires* the act may not be so manifestly fraudulent that a Court would not restrain it.

But I know of no precedent for such a power in the Courts and I cannot at present imagine such a case. And I here use the word fraudulent, not in the sense in which it seems to be used in the complaint and by the plaintiffs' counsel as applicable to an unwise or indiscreet act, but in its proper and legal sense as applicable to an *illegal* act, done for the benefit of the party to the injury of those whom he represents. Certainly in most if not in all of such cases, the *law* would furnish an adequate remedy and there would be no necessity for an application to the extraordinary powers of the Courts under their equitable jurisdiction. The present is not a case demanding the use of those powers. The appropriation of the County revenue which the defendants propose to make is within their discretion and the

Courts have no control over it. If the Commissioners wilfully neglect any of their duties they become responsible to the criminal law.

3. It has been stated above that the Judge continued the injunction as to the tax of 20 cents on the poll, levied professedly for the repair of the Court House. It is admitted that the Commissioners have no right to apply any portion of the County poll tax to pay for repairing public buildings. That tax is appropriated by the Constitution exclusively to education and the support of the poor, and the Judge would have been plainly right, if instead of enjoining the collection of the tax, he had enjoined its application to any but the purposes allowed by the Constitution.

The tax in question was not *ultra vires*. It did not, when added to the poll tax for other County purposes, exceed the constitutional limit. We know of no statute nor any rule of law or of public policy which prevents County Commissioners from applying a tax raised professedly for one purpose, to any other legitimate purpose. There may perhaps be an exception where a tax is levied by a special authority from the Legislature, or upon the vote of the people, which would not otherwise be lawful. We speak only of a tax levied under the ordinary powers of the Commissioners. If they cannot apply the proceeds of such a tax otherwise than for its professed purpose, what would become of it if the purpose become inexpedient or impossible, or of the excess, if by chance an excess was left after the purpose was accomplished? For example, after building a bridge. There is no reason why the excess or the whole amount of the tax in the cases supposed should not be carried into the general County fund and applied to any legitimate purpose. There is no law requiring the County Commissioners to state for what particular purpose any tax levied under their general powers, is levied, and such a statement if made is voluntary and not binding on them. A contrary rule would be inconvenient.

We have endeavored to state and consider every material argument for the plaintiffs.

The injunction granted by *Buxton, J.*, is not continued. The injunction by the Judge of the Superior Court of Richmond is vacated.

The Commissioners of Richmond County are enjoined from applying any part of the poll tax levied by them to any other objects than education and the maintenance of the poor.

The plaintiffs will recover costs of the proceedings up to the term of Richmond Superior Court. The defendants will recover costs accrued subsequent to that term including those of this Court.

Case remanded to be proceeded in, &c.

Let this opinion be certified.

PER CURIAM. Judgment accordingly.

RODMAN, J. The opinion and judgment in this case on the appeal by plaintiffs, render unnecessary any further opinion on the appeal by defendants. The judgment is the same as on the plaintiffs' appeal.

*ALICE S. JACKSON v. THE COMMISSIONERS OF GREENE COUNTY.

Negligence -- Liability of County -- Judge's Charge.

1. When His Honor below, in his charge to the jury, singles out a witness (there being others testifying to the same matter) and tells the jury that if they believe the evidence of such witness, then, &c., *Held* to be error.
2. One who attempts to cross a swollen stream, the bridge over it being out of repair, when it is apparent that the stream is swollen and dangerous to cross, is guilty of contributory negligence and in case of injury cannot recover damages of the County for failure to repair the bridge.
3. The fact that such bridge was down and out of repair for some time *after* the injury to the plaintiff is not evidence of negligence on the part of the County.

(*Anderson* v. *Steamboat Co.*, 64 N. C. 399; *Willey* v. *Gatling*, 70 N. C. 410, cited and approved.

CIVIL ACTION for Damages, tried at Spring Term, 1876, of WILSON Superior Court, before *Kerr*, *J.*

The action was brought to the Superior Court of Greene and removed to Wilson. The plaintiff claimed damages of the defendants for injuries received in consequence of their failure to construct and keep in repair a public bridge across Nahunta Creek in Greene County.

The material facts are, that plaintiff and Miss R., her friend, on the 21st of September, 1874, were travelling a public road leading from Lenoir to Wilson County. Upon arriving at said creek they found the bridge down and undergoing repairs. They then turned back, and leaving the main road, followed a path which led to the creek about two hun-

*Faircloth, J., being of counsel in the Court below did not sit at the hearing of this case.

dred yards below the bridge. In attempting to cross the creek they went down the stream about fifty yards when they saw an opening in the trees on the opposite bank, and got into water deep enough to float them from their seat. Miss R. got on top of the buggy in which they were riding, and the plaintiff stood on a trunk behind the buggy, the water being above the waist of plaintiff, in which condition they remained for some time and until rescued by persons living in the vicinity. Their horse was drowned. The creek was swollen and the current rapid, in consequence of heavy rains.

There was much evidence—notably that of one Rawls—relating to the contract for repairing said bridge, the length of time in which the work was in progress, the breaking of parts of the machinery at the mill where lumber was prepared, the necessity of hauling said lumber a considerable distance, and the delay which was thereby unavoidably occasioned.

His Honor charged the jury that defendants were entitled to a reasonable time to repair the bridge, and if they believed the testimony of the witness Rawls, defendants were not liable. If however considering the whole evidence, they believed the bridge was out of order for four or five weeks, the defendants were liable; and further, assuming such liability, if plaintiff left the public highway and went to the creek when it was so swollen and in such condition as to put persons of ordinary prudence on their guard, and attempted to cross and was thereby injured, she was guilty of contributory negligence and would not be entitled to a verdict.

Under these instructions the jury rendered a verdict in favor of defendants. Judgment. Appeal by plaintiff.

Messrs. Smith & Strong, for plaintiff.
Mr. H. F. Grainger, for defendants.

READE, J. His Honor in singling out the testimony of the witness Rawls when there were several others testifying to the same matters, and charging the jury that if they believed his evidence, then there was no negligence on the part of the defendant, put himself in conflict with *Anderson* v. *C. F. Steamboat Co.* 64 N. C. 399, and *Willey* v. *Gatling*, 70 N. C. 410. And if the case turned upon that, then it may be that we would have to grant a new trial.

And so we think His Honor was in error in charging the jury that if the bridge was down four or five weeks, then there was negligence on the part of the defendants. For no matter how long it was down *after* the injury to the plaintiff, she would have no right to complain. The question which she had the right to make is, how long was the bridge down from the time when it was taken down until she was injured? Had there been time enough to complete the repairs? And upon that point the only evidence was that it was taken down on the 8th, and the complaint states that she was injured on the 21st of the same month, thirteen days. But this error was against the defendants and they do not appeal.

But these errors were cured by what His Honor correctly charged that even if the defendants were guilty of negligence in not repairing the bridge within reasonable time, still the plaintiff could not recover because the plaintiff was guilty of contributory negligence.

It is not stated whether there was a ford at the bridge. If there was and the plaintiff had ventured to cross there when it was apparent that the stream was swollen and dangerous to cross and injury had resulted, the defendants would not have been liable; because they were not obliged to keep a servant there to warn off from a danger which was palpable. It has not been usual nor is it necessary for those who have the care of public roads to keep servants at crossings to give notice when the streams are "up." And secondly

because it would have been contributory negligence on the part of the plaintiff to venture to cross a stream so swollen.

If it would have been negligence in the plaintiff to have attempted to cross the ford at the bridge, how much more negligent it was to leave the public road and to take an unusual path and attempt to cross at an unused ford, and then instead of going across and out at the only place used for crossing and going out, to "turn down the stream for fifty yards" to try to go out where there was an "opening in the trees."

As no great harm came to the good plaintiff we may be excused for the pleasantry of saying that the venture rivals the famous "wade through the big swamp when it was up."

No error.

PER CURIAM. Judgment affirmed.

JOHN BEARD and wife v. CHARLES J. BINGHAM and others.

Court of Equity -- Practice -- Usurious Contracts.

A Court of Equity will not permit the enforcement of a usurious contract, but when called upon by the borrower for assistance will compel him to do equity by paying the principal money with legal interest.

(*Ballinger* v. *Edwards*, 4 Ire. Eq. 449, cited and approved.)

MOTION to dissolve an Injunction, heard at Chambers on the 10th day of November, 1876, before *Cloud*, *J.*

The plaintiffs alleged that in January, 1874, they executed a note for $321.52, with interest at 10 per cent. to Thomas E. Brown one of the defendants, and to secure the payment

thereof executed a mortgage deed to defendant Bingham conveying certain lands in Rowan County, being the homestead of plaintiffs.

Subsequently defendant Brown assigned the note to defendant Kesler who purchased with notice of the usurious interest. A sale of the land was advertised by defendant Bingham under the power contained in the deed, but an order was made by *Kerr, J.*, restraining him from selling and directing him to appear before the Judge of the 8th District and show cause why the injunction should not be made perpetual.

The defendants appeared and filed an answer alleging that they did not intend to exact the 10 per cent. interest by reason of an Act to prevent usury, ratified on the 22nd of February, 1875; that the original consideration of said note was for money borrowed of one Swink, that Swink was indebted to defendant Brown for the purchase of a house and lot in Salisbury, and assigned the said note to said Brown as part payment; that plaintiffs have never paid any part thereof; the defendants ask that the injunction be dissolved and the said land be sold to pay the debt.

His Honor dissolved the injunction and ordered that defendants be allowed to collect the principal of the note and six per cent interest, and adjudged that defendant Bingham the trustee proceed to sell the land.

Appeal by plaintiffs.

No counsel for the plaintiffs.

Mr. J. M. McCorkle for the defendants, cited *Ballinger* v. *Edwards*, 4 Ire. Eq. 449; *McBrayer* v. *Roberts*, 2 Dev. Eq. 75, and *State Bank* v. *Knox*, 1 D & B. Eq. 50.

FAIRCLOTH, J. A Court of Equity is as much bound by the Statute of Usury as a Court of Law, and will not allow the lender to enforce his usurious contract; and when called

upon by the borrower for assistance to protect him it will give it, but will require him to do equity by paying the principal money and the legal interest. *Ballinger* v. *Edwards*, 4 Ire. Eq. 449, and the cases cited.

In this action the order below of His Honor is affirmed, with the modification, that if the plaintiffs fail to pay and satisfy said judgment for thirty days after service of a certified copy of this opinion then the defendants may proceed to foreclose their mortgage by sale and satisfy their said judgment. Defendants will recover their costs in this Court.

Let this be certified.

PER CURIAM. Judgment accordingly.

WILLIAM E. ALLEN and others v. JOHN CHAPPELL.

County Court of Granville -- Sale of Land for Partition.

1. Under the provisions of ch. 41, Laws 1851–'2, the former County Court of Granville had authority to order the sale of land for partition.
2. When the record of the Court in such case shows no order of sale, but a report of sale, a new sale ordered and confirmed and a deed made to the purchaser, it sufficiently appears that such sale was made by *order of the Court.*

CIVIL ACTION to recover possession of Real Estate, tried at August Special Term, 1876, of GRANVILLE Superior Court, before *Seymour*, *J.*

The plaintiffs are heirs at law of one Charles Allen who died intestate in the year 1858, in possession of the land in controversy. In a proceeding had in the late County Court

of Granville under the provisions of ch. 41, Laws 1851–'2, said land was sold for partition in 1860, and bought by the defendant who has been in possession of the same since that time.

The plaintiffs insisted that they were entitled to recover upon the ground that the said County Court did not have jurisdiction of the action and that the proceedings therein did not show that any order of sale had been made. Thereupon the plaintiffs moved for judgment on the facts found by the jury, the substance of which is above stated. His Honor however being of opinion that said County Court had the jurisdiction and power exercised by it in said proceeding to sell said land for partition, refused the motion and gave judgment in favor of defendant. Appeal by plaintiffs.

Messrs. L. C. Edwards and *J. B. Batchelor*, for plaintiffs.

Messrs. Busbee & Busbee and *Merrimon, Fuller & Ashe*, for defendants.

FAIRCLOTH, J. The County and Superior Courts and the Court of Equity by early statutes had authority to order partition of lands among tenants in common, &c., and by the Act of 1812, the Court of Equity had authority to order a sale of such lands for division whenever it sufficiently appeared that actual partition could not be made without injury to some or all of the parties interested, and by the Act of Assembly of 1852, ch. 41., power to order such sales was conferred upon the County Court of Granville County, under the same rules, regulations and restrictions as applied to the Court of Equity in such cases. The plaintiffs filed a petition to sell the land in controversy in said County Court under said Act and the lands were sold and deed made to the defendant by the Clerk of the Court. One of the questions raised in this action was the jurisdiction of the Court

in said proceedings, the plaintiffs denying the same. We find that the preamble recites the reason, and that the Act in express terms confers the power, and we see no ground to doubt the jurisdiction.

The plaintiffs also insist that the record of said sale shows no order of sale by the Court, and that therefore no title passed and that they still have it, and they bring this action to establish their title in opposition to said sale and not under it for the purpose of enforcing it. The defendant offered evidence to prove payment of the purchase money, which was excluded and the plaintiffs excepted to the ruling of His Honor on the question of damages, but neither of these questions are of any importance, unless the plaintiffs can establish their first allegation, to wit; that they have the title. The record of the County Court appears regular in all respects except that it does not show an order of sale *prior* to the report of sale by the Clerk, but it shows that the report was set aside and "a new sale ordered" by the Court, which was had and confirmed and was completed by a deed to the purchaser, and it therefore sufficiently appears that said sale was made by order of the Court having jurisdiction.

If the plaintiffs were endeavoring to have said sale enforced in any manner as to collect the purchase money, &c., if in fact it has not been paid, then the questions of evidence touching payment, damages, &c., would be material and important, but at present they are not. We therefore affirm the judgment below without prejudice to the parties in any other form of proceeding.

No error. Let this be certified.

PER CURIAM. Judgment affirmed.

O. P. JAMES Guardian and others v. OWEN WEST.

Homestead -- Failure of Lien.

The lien created by a levy made under execution prior to the adoption of the Constitution of 1868, is lost by a failure to take out a *ven. ex.* and the issuing of an *alias fi. fa.* after the Constitution went into effect.

(*McKethan* v. *Terry*, 64 N. C 25; *Yarboro* v. *State Bank*, 2 Dev. 23, cited and approved.)

CIVIL ACTION, for the recovery of Land, tried at Fall Term, 1876, of WAYNE Superior Court, before *Seymour*, *J.*

The action was brought to the Superior Court of Duplin County and removed to Wayne.

The plaintiff claimed under a deed executed by the Sheriff of Duplin, and introduced a transcript of a judgment rendered at Fall Term, 1867, of the Superior Court of said County in an action wherein Jere. Pearsall, G'd'n, &c. was plaintiff and the defendant, Owen West *et. al* were defendants.

On said judgment an execution issued January 9th, 1868, and was returned levied February 3rd, 1868, on the *locus in quo*.

On the 15th of October, 1868, another execution issued on said judgment but by direction of the creditor was not levied on the property of West. On the 10th of March, 1869, another execution issued on said judgment returnable to Spring Term, 1869, and upon which the former levies were entered and under which on May 1, 1869, the Sheriff sold the land in dispute when W. R. Ward became the purchaser and transferred his bid to the plaintiff to whom the Sheriff executed a deed.

The defendant claimed the land as a homestead it being admitted that it did not exceed $1,000 in value. Plaintiff

insisted that by reason of the levy of February 3d, 1868, the defendant was not entitled to a homestead but upon an intimation of His Honor that this levy was waived by the issuing of subsequent executions, the plaintiff submitted to a nonsuit and appealed.

Messrs. Smith & Strong, for plaintiff.
Mr. J. L. Stewart, for defendant.

READE, J. The levy of February, 1868 was prior to the Constitution which establishes a homestead and created a lien which if it had been kept up would have defeated the defendants' homestead. *McKethan* v. *Terry*, 64 N. C. 25.

But the plaintiff instead of taking out a *ven. ex.* with a *fi. fa.* clause, took out an *alias fi. fa.* after the Constitution went into effect. And he thereby lost his prior lien. *Yarboro* v. *State Bank*, 2 Dev. 23.

There is no error.

PER CURIAM. Judgment affirmed.

HENRY VON GLAHN and others v. A. J. DeROSSETT and others.

Practice -- Severance of Defence -- Demurrer.

1. In an action against several defendants whose liability is joint and whose interest in the action is identical, the defendants will not be permitted to sever in their defence.
2. A demurrer, which in order to sustain itself invokes the aid of a fact not appearing upon the complaint must be overruled.

(Suggestions by *Pearson, C. J.*, to Clerks of the Superior Courts upon the manner of making up records on appeal to the Supreme Court.)

(*Von Glahn* v. *Harris*, 73 N. C. 323, cited and approved.)

CIVIL ACTION, tried at Fall Term, 1876, of BRUNSWICK Superior Court, before *McKoy, J.*

The action was commenced in New Hanover and removed to Brunswick on affidavit of plaintiff.

As the subject of the decision of this Court is a question of pleading a statement of the facts is unnecessary. The demurrer of defendant Kidder was sustained by the Court below and plaintiffs appealed.

Messrs. W. S. & D. J. Devane and *D. L. Russell*, for plaintiffs.

No counsel for defendants.

PEARSON, C. J. In *Von Glahn* v. *Harris*, 73 N. C. 323, it is held that one creditor could not maintain an action against one stockholder; but that the action should be in the nature of a "creditors bill," in the name of one or more of the creditors in behalf of themselves and all of the other creditors who may choose to become plaintiffs against all of the stockholders.

Accordingly this action is by Von Glahn and the other creditors against DeRossett, Kidder and others, who are all

of the stockholders known to plaintiffs, with leave to make defendants any other stockholders who may become known to the plaintiffs.

DeRossett and the others defend by way of answer, except Kidder, who defends by way of demurrer.

The case now comes before us upon the demurrer of Kidder.

This is a novel mode of procedure and we are not willing to allow the case to be split up in that way. The defendants are under a joint liability; their interest in the questions involved is identical and much obscurity and confusion will result from a severance in the mode of defence. When there is but one defendant he is not allowed to demur and also to answer; after the demurrer is overruled he can put in an answer but he cannot defend in both modes at the same time; that would be double pleading in a way not provided for by the statute of Anne.

Here we have several defendants whose liability is joint and whose interest in the question is identical. To allow a severance in the mode of defence would let in all of the inconveniences which the rule of the common law in regard to practice, by which double pleading is not allowed, was intended to exclude. For illustration; If the demurrer of the defendant Kidder be disposed of, that will decide the merits of the case, and the defendants DeRossett and others will not have had an opportunity of being heard by counsel. If the demurrer should be overruled, the case will in effect be decided against them, and if it be sustained the case will be dismissed as to Kidder and they will be left in an anomalous condition.

By the old equity practice, when the Court is unwilling to sustain a plea and yet hesitates to overrule it absolutely a middle course is adopted, the plea is overruled "reserving the equity until final hearing." See Mitford's Pleading. Pursuing this analogy, the demurrer will be overruled with

leave for the defendant to make the same defence by way of answer—the point not being now decided.

The second ground of demurrer is subject to another objection. It is "a speaking demurrer," as styled by the books. That is, in order to sustain itself, the aid of a fact not appearing upon the complaint is invoked, to-wit; the allegation that at the expiration of the charter, the Bank held a fund which should be first applied to the satisfaction of the debts of the plaintiffs. Whether there be any fund left on hand at the expiration of the charter of the Bank is a question of fact that cannot be inquired into upon demurrer, which raises only an issue of law in regard to the cause of action set out in the complaint.

Error. Demurrer overruled, reserving the equity of the defendant.

Should this case extending now to 110 pages be brought up again we will not open the papers unless all of the material pleadings are printed or unless there be "an index" to the several pages.

The Court will say to the Clerks of the Superior Courts, "instead of *attaching all* of the *papers together*, so as to make it "a labor" for the Justices to keep the "legal cap" from "folding up" &c. which provision was imported from the State of New York into our State, where fortunately there has not been any use for it, we would be better pleased if you endorse a file of papers "complaint and answer"; another file, "evidence and charge of Judge"; another "judgment and appeal."

In this way the members of the Court will be relieved from a labor that has got to be intolerable; i. e. 123 pages of manuscript to decide a demurrer which is not conclusive npon the other defendants

Error.

PER CURIAM. Judgment reversed.

WILLIAM A. QUINCEY v. W. L. M. PERKINS.

Practice -- New Trial -- Absence of Witness.

The terms of § 236, C. C. P. do not include all the grounds upon which a Court may grant a new trial, but are additional to the grounds mentioned in § 133, C. C. P. *Therefore*, when the Court below refused to continue an action on account of the absence of a material witness for the defendant and after judgment in favor of the plaintiff granted the defendant a new trial on account of the absence of such witness; *Held*, not to be error.

CIVIL ACTION, tried at August Special Term, 1876, of GRANVILLE Superior Court, before *Seymour*, *J.*

On the trial in the Court below the plaintiff read his complaint and the defendant his answer and each rested his case.

Under instructions of the Court the jury found a special verdict in favor of plaintiff for $562.16 subject to the opinion of His Honor.

The counsel for defendant then made a motion for a new trial upon the ground previously taken by him for a continuance, to-wit; the absence of a material witness. His Honor being of opinion that substantial justice could only be obtained by a new trial set aside the verdict and ordered the case to be continued. Plaintiff excepted and moved for judgment on complaint and answer which was refused. Plaintiff appealed.

Messrs. L. C. Edwards and *J. B. Batchelor*, for plaintiff.

Messrs. Merrimon, Fuller & Ashe, T. L. Hargrove and *T. B. Venable*, for defendant.

RODMAN, J. The defendant moved for a continuance on the ground of the absence of his material witness. This

motion was refused by the Judge. The defendant was thus compelled to go to trial, and inasmuch as by his answer he had admitted the execution of the note sued on and that a part of it remained unpaid and as he could not give any evidence of his defence in avoidance, the jury of course found for the plaintiff. The defendant moved for a new trial on the same ground on which he had moved for a continuance, and the Judge set aside the verdict and granted a new trial. It was argued by Mr. Batchelor for the plaintiff that the Judge could grant a new trial only in the cases mentioned in sub-section 4 of § 236 of C. C. P., and that none of the reasons there mentioned existed in the case. If § 236 is read in connection with § 133 it will be seen that § 236 was not intended as a statement of all the cases in which the Judge might grant a new trial, but as an addition to the cases or grounds mentioned in § 133, and also to prescribe that in the cases there mentioned the motion must be heard at the term at which the trial is had.

By § 133 the Judge in his discretion may relieve a party from a judgment, order or other proceeding taken against him through his surprise, &c., at any time within one year, &c. Of course therefore he may do it at the term at which a verdict (for this is included in the term "other proceeding") is taken. In the present case the Judge evidently thought that the defendant had been surprised by the absence of his witness and wished to review his refusal of the motion to continue, which he could only do by granting a new trial.

We cannot say that the discretion of the Judge was improperly exercised.

There is no error.

PER CURIAM. Judgment affirmed.

OTHO V. POOL v. J. B. TREXLER and wife.

Draining Wet Lands -- Constitutionality of Act.

The Act concerning "Draining wet lands" (Battle's Revisal, ch. 39) is constitutional.

(BYNUM, J. *Dissenting.*)

(*Brown* v. *Keener*, 74 N. C. 714, cited and approved)

This was a PROCEEDING under the Act concerning "Draining Wet Lands" (Bat. Rev. ch. 39.) heard at Fall Term, 1876, of ROWAN Superior Court, before *Cloud, J.*

The action was instituted before the County Commissioners and brought by appeal to the Superior Court.

The defendant insisted that said Act authorizing the assessment, &c. was unconstitutional, in that; private property was taken for private uses without compensation to the owner thereof.

His Honor sustained the position taken by defendant and gave judgment accordingly. Appeal by plaintiff.

Mr. J. E. Kerr, for plaintiff.
Mr. J. M. McCorkle, for defendant.

PEARSON, C. J. Every citizen holds his land subservient to such "police regulations" as the General Assembly may in its wisdom enact in order to promote the general welfare. *Brown* v. *Keener*, 74 N. C. 714.

I take this proposition to be settled and will not attempt to make "a rehash" of the cases set out by Cooley, ch. 16, "Constitutional Limitations."

If the General Assembly has power to make regulations for draining a swamp containing 10,000 acres it has the same

power in regard to a swamp containing 1,000 acres. So of 100 acres, so of 1 acre.

There is no distinction in the principle; the only difference is in regard to the degree.

We declare our opinion to be that the police power of the General Assembly authorized it to pass the Act under which this action is brought, to-wit; the Act entitled "Draining wet lands." Bat. Rev. ch. 39.

It is said the General Assembly has no power to take one acre of the land of A and give it to B, on the ground that B is the better farmer of the two and will make the one acre produce more. That proposition is granted except when "the power of eminent domain" is exerted for public purposes; as when land is taken for a railroad. These two powers "eminent domain" and "police regulations" are distinct and yet they are frequently confounded. By the one, the property of A is given to B. By the other, the property of A is left in him, but is made subservient to the general welfare. "Cart ways," Bat. Rev. ch. 104, § 38, furnishes an analogy. Under the power to make "police regulations" the land of A is made subservient to the land of B for the purposes of a road. After some contestation the question of the power of the General Assembly was yielded. So in our case the power of the General Assembly to make the land of A subservient to the land of B for the purpose of drainage must also be yielded upon the authorities and upon the reason of the thing.

Error.

PER CURIAM. Judgment reversed, and *procedendo.*

JOHN S. MANNIX Administrator of J. H. HAUGHTON v. ROSS R. IHRIE and wife and others.

Administrator -- Sale of Land for Assets -- Special Proceeding.

1. Where in contemplation of marriage, A conveyed land to B, his intended wife, for life with remainder to her children by such marriage; and afterwards judgments were obtained against A; and thereafter A conveyed all his remaining interest in the land in trust to secure a debt; and afterwards A and B died without children and a petition was filed by the Administrator of A to sell the land for assets; *Held*, that the Administrator should make the sale and pay the purchase money into Court, to be distributed under the order of the Court.
2. Under Bat. Rev. ch. 45, § 71, every interest in real estate, whether legal or equitable, is subject to sale by an Administrator for assets.
3. Only such equitable interests in land as are authorized by the Act of 1812, can be sold under execution.

This was a SPECIAL PROCEEDING had before the Clerk of the Superior Court of CRAVEN County the object of which was to obtain an order to sell real estate for assets.

The Clerk granted the prayer of the plaintiff and made an order of sale from which the defendant Craycroft appealed and the case was heard on the 16th of December, 1876, at Chambers, before *Seymour, J.*

The question submitted to His Honor was one of law arising on the pleadings and especially the answer and exhibits of Craycroft; whether there was any estate in John H. Haughton at the time of his death which can be sold by his administrator for payment of debts, and if so, what estate?

The material parts of the deeds which are incorporated in the answer of defendant Craycroft are stated in the opinion of this Court.

His Honor approved and confirmed the judgment of the Clerk and ordered the Administrator to sell the land described in the petition. Defendant appealed.

Messrs. Green & Stevenson, for the plaintiff.
Messrs. Smith & Strong for the defendants.

FAIRCLOTH, J. By an ante-nuptial agreement dated August 12th, 1868, the plaintiff's intestate conveyed a house and lot in Craven County to his intended wife, "during her natural life, remainder to any child or children of said intend ed marriage." The wife died on the 26th of May, 1876, without any child or children, and the husband died on the 30th of May, 1876, leaving children by a former marriage.

After the marriage several judgments against plaintiff's intestate were docketed in said County, before the 24th of December, 1874, when by deed he conveyed all his remaining interest in said property to B. B. Craycroft, in trust, as collateral security for the payment of a judgment rendered against him in November, 1874, in favor of B. B. Craycroft & Co.

The defendants insist that plaintiff's intestate at the time of his death had no such interest in said house and lot as the plaintiff can sell for assets, and that during his wife's life estate he had a vested remainder which passed to Craycroft and became absolute and indefeasible at her death, independently of said judgments.

The real estate which an Administrator may sell includes "all the deceased may have conveyed with intent to defraud his creditors and all rights of entry and rights of action, and all other rights and interests in lands, tenements and hereditaments which he may devise, or by law would descend to his heirs. Bat. Rev. ch. 45, § 71. This certainly includes every interest, legal or equitable, and is not limited to such an equitable interest as can be sold under an execution. Before the C. C. P. *only* such an equitable interest could be sold under an execution as was authorized by the Act of 1812—such as an equity of redemption or an interest resulting from a pure, unmixed trust—and the judgment cred-

itor could acquire a lien on any other equitable interest by filing a bill to subject it to his debt, but could not do so by issuing an execution.

Since the C. C. P, § 254, a docketed judgment becomes a lien on the whole interest, legal and equitable; but the judgment creditor cannot levy upon and sell the equitable interest except such as are authorized by the Act of 1812, as above explained. And therefore after the death of the debtor it is the duty of the Administrator by proper proceedings to sell such property or as much as may be necessary to pay the debts, and in this case it is admitted that the personal estate is insufficient to pay the debts and expenses of administration. Of course this lien may be waived or lost by unreasonable delay as other rights may be; and to allow a sale of these contingent interests under an execution would tend to encourage speculation and sacrifice of property.

The estate or interest of plaintiff's intestate during the life time of his wife was contingent, and liable to be defeated altogether in the event of a child or children by said marriage, and of course such an event would have defeated his conveyance to Craycroft; which conveyance could be held to pass an absolute estate only by way of estoppel after the death of the wife.

The resulting interest from the trust to Craycroft is also an interest which can be made available for creditors only by the administrator's sale. When the administrator has sold and collected the money, creditors, purchasers and others interested may assert their rights and he will pay out the money under the direction of the Court to those entitled to it. We do not undertake now to settle these questions as the ascertainment of other facts may become material before doing so.

There is no error. Let this be certified.

PER CURIAM. Judgment affirmed.

P. ZELL & SONS v. WILLIAM A. JOHNSTON.

Arbitration and Award -- Practice.

1. In an arbitration when the claims and evidence of both parties have been presented, it is not necessary to notify the parties of the time when the arbitrators will meet and dispose of the case.
2. If the decision of a question submitted to arbitrators involves the decision of another question not submitted, their decision of the latter is not error.

CIVIL ACTION, tried at a Special Term of HALIFAX Superior Court (held in June, 1876,) before *Watts, J.*

The plaintiffs, residents of the City of Baltimore, were engaged in the manufacture of commercial fertilizers and the defendant a merchant residing in said County had been acting as their agent for the sale of the same. By reason of the transactions had between them the plaintiffs alleged that the defendant became indebted to them in a considerable amount. A lengthy correspondence ensued which resulted in effecting an agreement in writing between the parties that their differences should be submitted to P. A. Dunn and H. F. Zollicoffer, both of the City of Baltimore, who subsequently made an award which is substantially as follows:

1. That defendant should not be charged with fertilizers carried over from the season of 1872 to that of 1873.

2. That defendant should have credit for the bags supplied by him for those damaged &c.

3. That defendant is entitled to commissions only on ten tons of said fertilizers carried over from the season of 1872 and sold by him.

4. That plaintiffs are entitled to $435.43 the balance due by defendant (as exhibited by an account stated by the arbitrators.)

The plaintiffs further alleged that the defendant refused to abide by the award and demanded payment of said sum.

In his answer the defendant denied that he had acquiesced in the manner of settlement as stated by plaintiffs; that he had no notice as to when said arbitrators would consider the matters in dispute; that they had no right to determine any question arising out of the relation between the parties—the agency—and that said award was of no binding effect on the defendant because the agreement to submit the matter to said arbitrators was too vague and uncertain for definite action.

In the statement of facts as agreed upon the said award was included together with the further facts that the defendant selected said Dunn as one of the arbitrators; that he was not notified of the time and place of hearing the case; that neither party was present and the whole evidence consisted of the correspondence and written agreement as aforesaid.

His Honor held that said award was binding on the defendant and adjudged that the plaintiff recover the amount ascertained to be due. Appeal by the defendant.

Messrs. Mullen & Moore and *Walter Clark*, for plaintiffs.
Messrs. Moore & Gatling and *E. Conigland*, for defendant.

RODMAN, J. It is argued for the defendant that the award is not binding, for that:

1. The defendant had no notice of the time when the arbitrators would proceed in the case.

Of course ordinarily notice to the parties to an arbitration is essential in order that they may present their respective claims and the evidence in support of them to the arbitrators.

But when such claims and evidence have been presented there is no reason why the parties should be notified of the

time when the arbitrators will meet to consider and dispose of the case. In the present case it is clear that the defendant had reasonable opportunity to and did in fact present his defence and evidence in support of it as fully as it was possible for him to do. What reason could there be for giving him any notice when the arbitrators would meet to pass on the case. Arbitrators are not bound to hear arguments from the parties or from counsel; they certainly are not, when it is not requested of them; and it was not requested and does not seem to have been expected in this case.

We think also that the defendant clearly waived any other notice than what he had.

2. The award is based on the question of agency which was not submitted to the arbitrators; the question submitted to them being the right of the defendant to commissions for fertilizers which he contracted to sell in 1873, but which the plaintiffs did not deliver to him. It is admitted that the single question submitted to the arbitrators was the defendant's right to commissions. But the decision of this depended directly upon the question whether plaintiffs had agreed to supply defendant with fertilizers for sale as their agent in 1873. The arbitrators find that plaintiffs had not so agreed, which is a direct decision of the question submitted to them. The two questions are in substance the same. It was not necessary for the arbitrators to find in the precise words of the submission.

It is sufficient if they decide upon the matter in difference.

3. The arbitrators embraced in their award other matters not submitted, such as the defendant's claims for bags furnished, &c. which were not in dispute.

The finding of the arbitrators on these items was in favor of the defendant and gave him all that he claimed in respect to them. It was separate from their finding upon the matter in difference and could not in any way prejudice him.

On a fair view of the award the statement of the amounts of these several items is not a part of the award at all. They had been agreed on by the parties and seem to have been put to the credit of the defendant merely for the purpose of showing the balance owing by him upon an account, of which no item was disputed except that of commissions, submitted to the arbitrators and which they decided. The statement of an account including these items as credits was unnecessary but did not vitiate the award. Judgment according to the case agreed that plaintiff recover of defendant $435.43 with interest from 10th December, 1873, and costs.

PER CURIAM. Judgment affirmed.

N. A. JACKSON and others v. S. J. SLOAN and others.

Lien of Judgment -- Sale of Property Subject to Lien by Judgment Debtor -- Injunction.

1. Where a debtor whose real estate is encumbered with a judgment lien sells a portion of it a judgment creditor who has a lien upon the whole land is compelled to exhaust the unsold portion for the satisfaction of his judgment before resorting to that which has been sold.
2. This however is not to be done when it trenches upon the rights or operates to the prejudice of such judgment creditor.
3. So where A obtained judgment against two partners and under execution issued thereon certain real estate (alleged to be the property of the partners, which allegation was not sufficiently denied in the answer) was sold by the Sheriff who held the proceeds of sale; *Held*, in an action by B (who had purchased from the partners certain other real estate on which the lien of A's judgment rested) to restrain A from selling under his execution the land purchased by plaintiff, that A should be restrained from selling until an account could be taken of the fund in the hands of the Sheriff and a distribution made of the same, so as to ascertain whether or not A's judgment would be satisfied therefrom.

(*Roberts* v. *Oldham*, 63 N. C. 297, cited and approved.)

APPEAL from an ORDER vacating an Injunction, made on the 29th of November, 1876, at Chambers in Charlotte by *Schenck, J.*

The action was commenced in the Superior Court of Gaston County. The controversy in this appeal is between the plaintiff Jackson and the defendant S. J. Sloan. Sloan obtained a judgment against the firm of J. & E. B. Stowe, which constituted a lien upon the "Stowesville Factory" belonging to the firm. Afterwards Jackson purchased of J. & E. B. Stowe the factory in question and of course subject to the lien of the judgment. Sloan had caused an execution to be issued for the sale of this property for the satisfaction of his debt. Jackson applied for an injunction against the sale

and obtained a restraining order until Sloan could show cause. Upon his answer coming in the restraining order was vacated and the injunction refused and from this the plaintiff appealed to this Court.

The complaint alleged as the grounds for an injunction that besides the "Stowesville factory" the firm of J. & E. B. Stowe also owned another valuable property known as the "Spring Shoal" tract of land which was subject in like manner to the lien of the Sloan judgment; and that since his purchase of the factory this latter tract of land has been sold under executions issued upon the Sloan and other judgments and the proceeds of sale amounting to $12,000 are now in the hands of the Sheriff of Gaston County and held subject to the discharge of these judgments in such order as the Court may direct. The complaint further alleges that this fund is sufficient to pay the Sloan judgment and all other liens upon the factory property which the plaintiff had purchased.

The answer of Sloan denies that the "Spring Shoal" tract belonged to the firm of J. & E. B. Stowe and avers that it was the separate property of J. Stowe; and it denies that the proceeds of its sale are sufficient to satisfy all the liens upon it of a prior dignity to the Sloan judgment and the Sloan debt also. The answer however *does not deny* the allegation that the "Spring Shoal" tract was sold under executions issued upon the *Sloan* and other judgments, and it admits that Sloan has caused an execution to issue upon the judgment and is threatening to sell under it the "Stowesville Factory" theretofore purchased by the plaintiff.

His Honor vacated the restraining order and refused the injunction as aforesaid. From this ruling the plaintiff appealed.

Mr. J. W. Hinsdale, for plaintiff.
No counsel for defendants.

BYNUM, J. (After stating the facts as above.) Upon this state of facts the plaintiff demands that the defendant Sloan be enjoined from selling the "Stowesville Factory" and be compelled *first* to look to the fund arising from the sale of the "Spring Shoal" tract for the satisfaction of his judgment. The question is whether the plaintiff is entitled to this relief. From the admissions expressed and implied in the answer, we think he is.

What are the obstacles preventing the Sheriff from paying out the "Spring Shoal" fund in discharge of the executions under which that property was sold, does not appear. As from the defendant's not denying it, we are to assume that this sale was in part at his instance and under his judgment, it was his duty to explain why he abandoned his claim to the satisfaction of his debt out of that fund and now resorts to another. It may be that in due course of disbursement by the Sheriff it would have satisfied the defendant's judgment and disencumbered the land purchased by the plaintiff. The sale of the "Spring Shoal" having been made at the instance of the defendant and for the satisfaction of his debt, it is certainly not inequitable to restrict him to that fund until it is exhausted, without reaching and discharging his judgment. For otherwise the rights of the subsequent purchaser of the "Stowesville Factory," would be necessarily affected by the continuing lien of a judgment which the fund ought to have discharged.

The ground upon which the defendant resists an injunction against his selling the "Stowesville Factory," is the alleged fact that the "Spring Shoal" is the separate property of J. Stowe and primarily liable for his separate debts, and the further fact that the fund arising from that sale is insufficient to pay his debt according to the priority of lien. *Roberts* v. *Oldham*, 63 N. C. 297.

If these two facts clearly appeared to the Court, it would be a sufficient answer to the application of the plaintiff.

But the complaint *specifies* the judgments which are a lien upon the "Spring Shoal," whether considered as firm or separate property and shows therefrom in detail that the fund is sufficient to discharge all the liens prior to and including the Sloan debt. The answer to this by the defendant is general. It neither denies the particulars set out, nor specifies a single judgment in addition to those named by the plaintiff, which constitutes a lien prior to his own upon either the firm or separate property of J. and E. B. Stowe. And whether the "Spring Shoal" fund is sufficient to reach and pay his judgment, can be best ascertained by the actual disbursement of that fund according to the legal priorities of the claimants.

It is reasonably clear from the whole case that this fund will discharge the Sloan judgment all or in part. This judgment against the firm is a lien both upon the partnership and separate property with this difference in equity, that the partnership is the primary and the separate property the secondary fund for the payment of a firm debt. If therefore it had clearly appeared that the "Spring Shoal" was the separate property of J. Stowe and that the defendant with others had not in the first instance resorted to and sold it for the payment of his debt, there is no principle upon which the Court can compel the defendant to seek satisfaction out of a secondary instead of the primary fund, to-wit; the "Stowesville Factory," although the subsequent purchaser should be discommoded by its sale. But the answer to the complaint does not sufficiently negative the allegation that the "Spring Shoal" was the property of the firm. Assuming then that both the "Stowesville Factory" and the "Spring Shoal" were partnership property the rule of equity is, that when one creditor can resort to two funds for the satisfaction of his debt, and another to one only of the funds, the former shall first resort to the fund upon which the latter has no claim, as that by this means of distribution both may

be paid. And it is an analagous principle of equity that where a debtor whose lands are encumbered by a judgment lien sells one portion of it, the creditor who has a lien upon that which is sold aud upon that which is unsold, shall be compelled to take his satisfaction out of the undisposed of land, so that thus the creditor and the purchaser both may be saved. *Rollins* v. *Thompson*, 21 Miss. 521; *Russell* v. *Howard*, 2 McL. 489; *Alston* v. *Munford*, 1 Brock. 267; Herman on Ex. § 224. But this however is never done when it trenches on the rights or operates to the prejudice of the party entitled to go upon both funds. *Meech* v. *Allen*, 17 N. Y. 300; *United States* v. *Duncan*, 4 McL. 607; *Mc Culloch* v. *Dashiell*, 1 Harris & Gill, 96.

No appreciable injury to the defendant can arise here, for his lien extends to both funds which are amply sufficient to secure his debt. He can lose nothing then by awaiting the legal disposition of the "Spring Shoal" fund before resorting to the factory property. The delay, if it operates as such, is an incident common to the complications of a large insolvent estate and cannot ordinarily be avoided. Whether the plaintiff is pursuing the speediest way to disencumber his purchase and get a good title instead of subrogating himself to the rights of the defendant by the purchase and assignment of his judgment, it is unnecessary to inquire. As the plaintiff has with notice and voluntarily purchased and put himself in his present situation and the defendant is in no default, the latter ought not to be subject to any costs or charges in or about this proceeding. Therefore before an injunction is allowed the plaintiff must give bond to indemnify and save harmless the defendant Sloan against any and all costs of this suit and any loss which may result from granting the injunction. Subject to these conditions the plaintiff is entitled to an injunction restraining the defendant S. J. Sloan from selling the "Stowesville Factory" property until an account is taken of the fund in the hands of

the Sheriff of Gaston County and the judgments which constitute a lien thereon, and the disbursement of the fund according to the priorities of the judgments.

There is error. Judgment reversed and cause remanded to be proceeded with in accordance with this opinion.

PER CURIAM. Judgment reversed.

REUBEN HENRY v. THOMAS J. SMITH and others.

Purchaser for Value Without Notice.

Where a party seeking relief against an innocent purchaser for value without notice, is in default, the loss must fall upon him; *Therefore*, where the plaintiff executed a lease for a term of years for the consideration of $25, when the intention and agreement of the parties thereto was that the consideration should be $25 *per annum* and the error occurred through the inadvertance of the draftsman, and afterwards the lease was assigned to an innocent purchaser for value without notice; *Held*, that as to such purchaser the plaintiff was not entitled to have the lease corrected.

CIVIL ACTION, tried at Fall Term, 1875, of ANSON Superior Court before *Buxton, J.*

By consent of parties His Honor found the facts to be substantially as follows:

The plaintiff executed a lease to defendant, Francis Lynch, on the 25th of November, 1861.

Through inadvertance of the draftsman the consideration was stated to be $25.00 in hand paid, &c., whereas the contract was and so intended to be stated, that said consideration was $25.00 to be annually paid during the term of 99 years.

Defendant William C. Smith assignee of Francis Lynch, had actual notice of the real agreement between the original parties and had paid rent accordingly.

Defendant Thomas J. Smith assignee of William C. Smith had no notice of said agreement, except the information contained in the original lease and other deeds of conveyance which were duly recorded in the office of the Register of Deeds for said County.

His Honor held as a matter of law that said deeds registered as aforesaid, operated as constructive notice to said Thomas J. Smith, and further adjudged that said lease be corrected so as to express the intention of the parties thereto.

Judgment accordingly against defendants and also for the amount of rent due by them respectively to the plaintiff.

Appeal by defendants.

Messrs. Dargan & Pemberton and *John Manning*, for plaintiffs.

Messrs. Battle & Mordecai for defendants.

BYNUM, J. As the indenture of lease is written, executed and registered, the only construction we can put upon it is, that it conveyed the whole term for the consideration of twenty-five dollars. That is admitted by the plaintiff, and hence he seeks to have the deed corrected so as to show that the consideration was the sum of twenty-five dollars annually to be paid as rent during the continuance of the term. We are satisfied that such was the meaning of the parties to the lease and that therefore as between the plaintiff and Lynch, the immediate lessee, the correction of the deed could be made and so as to all subsequent assignees with notice. But the ultimate purchaser of the term, to-wit, Thomas J. Smith against whom the relief is asked, is an assignee for full value and without notice. In purchasing and

for his own protection, he was bound to trace back his title through all the mesne conveyances, up to the original lease made by the plaintiff. None of these furnished any notice of the mistake in the deed or that the lease was subject to an annual rental. They all showed that the entire term of ninety-nine years was conveyed in consideration of the specific sum of twenty-five dollars in hand paid on the execution of the deed. The party seeking relief committed the mistake and is in default. The defendant is an innocent purchaser and is in no default. In such cases when one of the two parties must suffer, the loss must fall upon him who is in default. He must abide by his own laches. 2 Sugden on Vendors 360, 362.

A jury trial was waived below and the Court found as a fact, that Francis Lynch and W. C. Smith had actual notice of the mistake in the deed and had paid rent, but that Thomas J. Smith had no actual or other notice than what was contained in the several assignments.

The Court decided as a matter of law that the deeds of assignment operated as constructive notice to Thomas J. Smith. In that His Honor erred. The plaintiff is entitled to the relief he asked as to Francis Lynch and also to W. C. Smith, who is insolvent, if he desires it, but not as to Thomas J. Smith.

There is error. The judgment is reversed as to Thomas J. Smith and affirmed as to Francis Lynch and W. C. Smith. The case is remanded.

PER CURIAM. Judgment accordingly.

ABEL COX v. WILLIAM F. BROOKSHIRE.

Usury -- Compound interest -- Evidence.

1. An agreement to pay interest upon a note "at the rate of six per cent. per annum to be compounded annually" renders the contract usurious.
2. In the trial of an action when the defendant pleads usury it is incompetent to prove that the plaintiff has theretofore been sued for the penalty prescribed in the statute against usury.

(*Bledsoe* v. *Nixon*, 69 N. C. 89, cited, distinguished and approved.)

CIVIL ACTION, tried at Spring Term, 1876, of RANDOLPH Superior Court, before *Kerr*, *J.*

The plaintiff demanded payment of $2,696.99, due by several notes.

The defendant admitted the execution of the notes, but resisted payment upon the ground that the contract was usurious.

The defendant testified in substance; that plaintiff and he had been partners in business; that he bought the interest of plaintiff and executed the notes sued on in consideration of the purchase; "that the agreement between them was that the interest should be paid at the rate of six per cent. per annum to be compounded annually; that by virtue of said agreement he had paid to plaintiff interest upon interest at divers times;" that no time was fixed when the interest was to be due or payable, but witness supposed it would be at the end of each year.

The plaintiff testified that he had never received of defendant a greater rate of interest than six per cent. On cross-examination the counsel for defendant proposed to ask witness if he had not been sued in several cases for the penalty incurred under the statute against usury. The question was ruled out by the Court and defendant excepted.

Under the instructions of His Honor the jury rendered a verdict for plaintiff. Judgment. Appeal by defendant.

Mr. E. G. Haywood, for plaintiff.
Messrs. J. A. Gilmer and *Gray & Stamps*, for defendant.

RODMAN, J. The statements of the two parties who were examined as witnesses differed widely as to what their contract was. As it was stated to be by the plaintiff it was not usurious. As stated by the defendant we think it was. The Judge instead of leaving it to the jury upon the conflicting evidence as to what the contract was, instructed them in effect that even if they believed the contract to have been as stated by the defendant it was not usurious. We think he misconceived the decision in *Bledsoe* v. *Nixon*, 69 N. C. 89. It was held in that case that on an agreement to pay the interest annually, if the interest was not paid at the date when it became due interest might lawfully be collected on the interest at the rate stipulated for. But this was distinguished from compound interest where the interest is added to the principal at the end of each year *continually*. Practically the cases would be the same for two years if the debt was paid at the end of that time. But if the debt continued unpaid after that time the agreement in *Bledsoe* v. *Nixon* would not give compound interest, for although the first accretion of interest (resembling a coupon) would bear interest, the interest upon it would not. The language of the Judge described accurately a case of compound interest as distinct from that which was held lawful in *Bledsoe* v. *Nixon*.

The act entitled Usury in the Rev. Code which was the one in force at the date of the contract between these parties has always been considered as forbidding compound interest.

The Act making an exception in favor of guardians was a legislative exposition of the meaning of the Usury Act in

that sense. The evidence that the plaintiff had been sued for usury and was reputed an usurer was properly rejected.

PER CURIAM. Judgment reversed.

J. M. YOUNG v. THE COMMISSIONERS OF BUNCOMBE.

County -- Liability for Board of Jury -- for Pay of Witnesses.

1. A County is not liable for the board of a jury in a capital case during the pendency of the trial.
2. A witness in a criminal action has no claim upon the County, until the liability of the County for the costs is passed upon by the Court.

(*Brandon* v. *Com'rs of Caswell*, 71 N. C. 62, cited and approved.)

CIVIL ACTION, commenced before a Justice of the Peace in BUNCOMBE COUNTY and taken by appeal to the Superior Court, heard at Chambers on the 23rd of January, 1877, before *Henry, J.*

1. During a trial for a capital felony at Spring Term, 1876, of said Court the plaintiff furnished the jury with board for six days. The defendant in the case was acquitted and the plaintiff brought this action to recover $117 the amount of his bill.

2. The plaintiff also alleged that he was entitled to an additional amount of $6.30 for attendance as a witness in a criminal action removed from said County to Henderson County. The defendant in this case was convicted and being insolvent the Clerk at Henderson certified the bill of costs to Buncombe and the defendants refused to pay.

His Honor dismissed the action and the plaintiff appealed.

Messrs. W. H. Malone and *M. E. Carter*, for plaintiff.
Mr. J. H. Merrimon, for defendants.

READE, J. 1. The pay of jurors is whatever the County Commissioners shall allow not exceeding one dollar and fifty cents per day. Bat. Rev. ch. 105 § 23.

The presiding Judge has no power to increase that allowance in any given case. And we suppose that when His Honor directed the Sheriff to furnish the jury with "board and lodging" during the trial he only meant what is usual, to allow the jury to have refreshments during the trial to be procured of course at their own expense. And as the jurors could not separate to procure refreshments the officer was directed to wait upon them. *Brandon* v. *Com'rs of Caswell*, 71 N. C. 62.

2. The witness ticket which the plaintiff obtained from the Clerk for his attendance as a witness was merely evidence that he had attended as a witness, but it furnished no evidence as to how he was to be paid. That was to be passed upon and had not been passed upon by the Judge. Until that is done the Commissioners of Buncombe are not liable.

No error.

PER CURIAM. Judgment affirmed.

ELIZABETH BOYKIN v. BARNES & GODWIN.

Contract -- Scale -- Confederate Currency.

Where A was indebted to C by note dated September, 1860, and B in 1863 by agreement with A executed his note to C, ante-dated as of the date of the original note and in substitution therefor; *Held*, that it was not subject to the scale of deprecation, &c.

(*Summers* v. *McKay*, 64 N. C. 555; *State* v. *Brown*, 67 N. C. 475, cited, distinguished and approved.)

CIVIL ACTION tried at Fall Term, 1875, of WILSON Superior Court, before *Seymour*, *J.*

This action was commenced in a Justice's Court by the plaintiff against the defendants for the recovery of $158 and carried by appeal to the Superior Court.

The plaintiff held a note against one D. W. Eure for said sum dated September 20th, 1860. The defendants bought a Turpentine Distillery of said Eure on the 13th of August, 1863, and at his (Eure's) request executed a note for said sum ante-dating the same so as to correspond with the original note. Thereupon at the request of the defendants Eure delivered this note to plaintiff and took up his own note and cancelled it.

The defendants insisted that if plaintiff was entitled to recover at all, the note should be subjected to the scale as of August, 1863.

The jury returned a special verdict subject to the opinion of the Court on the question of scale.

Upon this His Honor ruled against defendants and gave judgment in favor of plaintiff for the amount of the note and interest. Appeal by defendants.

No counsel for plaintiff.

Messrs. Smith & Strong, for defendants, cited *Green* v.

Brown, 64, N. C. 553 ; *Summers* v. *McKay*, *Ibid* 555 ; *Howard* v. *Beatty*, *Ibid* 559 ; *Cable* v. *Hardin*, 67 N. C. 472.

BYNUM, J. The presumption raised by our statute that the note sued on was solvable in Confederate currency is rebutted by the facts stated in the special verdict.

The plaintiff held a note for $158.00 on one Eure given in 1860 for money loaned. In 1863, the defendants made an arrangement with Eure by which they agreed to assume the debt. They thereupon went to Miss Boykin and substituted their note for Eure's, ante-dating the note to the date of the Eure note which was then surrendered.

Clearly the new note was not given in satisfaction of the debt but was intended to make the defendants stand in the shoes of Eure and become the paymasters and subject to all his liabilities.

They put themselves in the same situation as if they had originally given the note instead of Eure.

The new note was substituted in place of the old, not at the instance or for the benefit of Miss Boykin, and no consideration passed between her and the defendants. She was content with Eure's note.

What consideration passed between Eure and the defendants does not appear, and it is not material, as the plaintiff was no party thereto.

If the defendants had become the endorsers of the Eure note in 1863 when they gave their own instead, they would have been bound just as Eure was bound and not entitled to the benefit of the scale law. *Summers* v. *McKay* 64 N. C. 555.

They certainly have not placed themselves in a better situation. The defendants had the right to contract to pay the Eure note just as Eure was bound to pay it and that is what they have done. *State* v. *Brown*, 67 N. C. 475, does

not apply; there was no *novation* here. The note sued on was not subject to scale.

There is no error.

PER CURIAM. Judgment affirmed.

PAUL W. CRUTCHFIELD v. THE RICHMOND & DANVILLE RAILROAD COMPANY.

Negligence -- Liability of Master -- Judge's Charge.

1. A master is liable for an injury to a servant resulting from the negligence of a fellow servant if the master contributes to the negligence.
2. It is the duty of a servant to notify his master when anything is out of order in his peculiar department and if he neglects to do so and continues in his employment and is injured, he cannot recover damages of the master.
3. A Judge should not state to the jury his estimate of a witness or how he appears to him. *Therefore*, when a witness was introduced for the purpose of impeaching a former witness and the Judge told the jury that the former was "a man of high character in his profession and appears to be a man of culture" and said nothing concerning the latter; *Held* to be error.

Hardy v. *C. C Railway Co.* 74 N. C. 734, and same case *ante* 5, cited and approved.)

CIVIL ACTION, tried at Fall Term, 1876, of FORSYTHE Superior Court before *Kerr, J.*

The plaintiff was a brakesman on that portion of defendant's road known as the North Western N. C. Rail Road, and while in the discharge of his duty as such was badly and permanently crippled by a defective engine and road bed of defendant company. This action was brought to recover damages for the injuries so received.

The evidence was that the engine was defective and one witness testified "that while engaged on the road as fireman he had seen the engine 'walk off when no one was about it, and when the steam was shut off;' that the road bed was in bad order at the place where the accident happened and that while plaintiff was engaged in coupling cars the train made a sudden rush backward, cutting and crushing the elbow of plaintiff."

The defendant insisted that plaintiff contributed to this injury by his own negligence and introduced Jacob Hicks who testified "that he was engineer on the train when plaintiff was injured, that the engine attached to the train was a good one, and that he could control it and did control it prior to and at the time of the injury to plaintiff."

Dr. Bahnsen, who had previously been examined as an expert, as to the extent, &c. of the injuries received by plaintiff, was recalled and testified in substance, that the night after the accident, he was returning from attendance on plaintiff and passed the depot in Greensboro, where he met the witness Hicks. He inquired of Hicks the cause of the injury. Hicks replied "that the engine was old and worn out, and that he could not stop it within several feet of the place he wanted to and at the time of the accident he felt the engine jerk backward."

There was other conflicting testimony, the statement of which is not necessary to an understanding of the opinion. His Honor submitted issues to the jury who found as follows;

1. The injury to plaintiff was caused by the negligence of defendant.

2. Plaintiff was not guilty of contributory negligence.

3. The injury was not caused by the negligence of any employee of defendant.

4. That plaintiff is entitled to $4.000 damages. Verdict for plaintiff. Judgment. Appeal by defendant.

Messrs. T. J. Wilson and *Watson & Glenn*, for plaintiff, cited *State* v. *Davis*, 4 Dev. 612; *State* v. *Miller*, 1 D. & B. 503; *State* v. *Harris*, 1 Jones, 190; *Ill. R. R.* v. *Read*, 37 Ill. 484; *Rail Road* v. *Pratt*, 22 Wallace, 134.

Mr. J. M. McCorkle, for defendant.

READE, J. 1st. An *accident* is "an event from an unknown cause," or 'an unusual and unexpected event from a known cause," "chance, casualty." As if a railroad bed be in good order and the engine and cars be in good order, and the engineer and other attendants be skilful and careful; and yet a rail breaks, the train is crushed and the employees and passengers are killed; that is an unusual and unexpected event from a known cause, an *accident*.

But if the track be out of order and the engine worn and unmanageable and on account thereof there be the like result as above stated on the good road, that is not an unusual and unexpected event, but a usual and expected event from such a cause. It is not *accident* but it is *negligence*.

Suppose then it were true as contended for by the defendant, that the plaintiff either from the general nature of his employment on the defendant's road or by express contract, assumed the risk of all *accidents*, yet it would not follow that he would not be entitled to recover. He would still be entitled to recover if his injury resulted not from *accident* but from the *negligence* of the defendant.

2nd. But suppose the plaintiff as an employee on the road knew that the road and the engine were out of order, could he recover?

It would seem that if an engineer whose peculiar duty it is to know the condition of the engine and to give notice of any fault in order that it may be repaired, runs the engine out of order without giving such notice and is injured, he is guilty of at least contributory negligence and could not recover.

So, if a brakeman, as the plaintiff was, knows that the brakes are out of order and does not communicate it in order that they may be repaired, and injury results to him therefrom, he would be guilty of at least contributory negligence and could not recover. This is so for two reasons: *First.* It is the duty of the employees to inform the employer when anything is out of order in their peculiar departments that it may be put right. *Second.* Because if it be not put right, then it is their privilege to leave the service.

3rd. But here the fault was not in the plaintiff's department of brakes so that he cannot be said to be directly guilty of contributory negligence in not disclosing it or in continuing in the service after he knew it. Yet, if the injury was from the negligence of his *fellow servant*, can he recover of the defendant?

The decisions both English and American go very far towards the conclusion that one servant cannot recover of the employer for any injury which results from the negligence of a fellow servant in a business common to both. There may be exceptions, but grant that to be so for the sake of the argument; yet it is not so where the employer contributes to the negligence of the fellow servant or to the injury; as if he employ an unfit servant or as in the case of a bad engine, knows that it is bad and fails to repair it. So in this case, if the defendant answers that the plaintiff cannot recover because the injury resulted from the negligence of his fellow servant, the engineer, the plaintiff may reply that the defendant contributed to the negligence of the engineer and to the injury by having a bad engine.

What we have said will be found to be well supported by Wharton's Law of Negligence in his chapter on "Master's Liability to Servants;" and by his references, some of which I have consulted. And also by Redfield on Railways, § 170, *et seq.*

See also *Hardy* v. *N. C. C. R. R. Co.* 74 N. C. 734. And the same case upon petition to rehear to be reported in 76 N. C. (See *ante* 5.)

4th. It being the principal matter in dispute, whether the engine was a good or a bad one, the defendant introduced the engineer, Hicks, who swore that it was a good one. And thereupon the plaintiff introduced Dr. Bahnsen, who swore that Hicks told him that the engine was a bad one.

His Honor in his charge to the jury said that it was not denied but that Dr. Bahnsen was a gentleman of unquestionably high character in his profession and that he appeared to be a gentleman of culture. And the defendant insists that thereby His Honor expressed an opinion upon the facts. To this the plaintiff replies that His Honor did not say that of Dr. Bahnsen, in reference to his contradiction of Hicks, but in reference to his testimony as an expert, as to the injury which the plaintiff had received; and that at any rate if he erred in praising Dr. Bahnsen and not praising Hicks the error was cured, by his telling the jury that the credibility of the witnesses was a question for them.

Suppose we put His Honor's charge in this form: 'Gentlemen of the jury; Hicks is an engineer by profession and he swears that the engine was a good one Dr. Bahnsen is a physician by profession and he swears that Hicks told him that the engine was a bad one. Dr. Bahnsen is a man of high character in his profession and appears to be a man of culture; Hicks is not, in his profession, but you are the judges of their credibility." Would there be any doubt as to which witness His Honor thought the jury ought to believe? Yet putting it in this form, only makes the contrast which was drawn between the two witnesses a little more striking. Nor does it matter if His Honor was, (if he was) speaking of another part of Dr. Bahnsen's testimony when he put his

estimate upon him as a physician of high character and a gentleman of culture. That was the mark put upon the *man* and it attached to every part of his testimony. A Judge ought not to state to the jury his estimate of a witness or how he appears to him.

In a late case before us two witnesses had sworn contrary and the Judge told the jury that both were gentlemen and it was only a matter of memory. And we had to give a new trial.

Error.

PER CURIAM. *Venire de novo.*

JOHN C. BLAKE v. WILLIAM F. ASKEW.

Practice in Supreme Court -- Feigned Issue.

An action upon a feigned issue, brought by appeal to this Court, will be dismissed.

CIVIL ACTION, tried at Fall Term, 1875, of WAKE Superior Court before *Henry, J.*

The action was commenced in a Justice's Court and taken by appeal to the Superior Court and the facts were found to be as follows:

That the plaintiff in June, 1874, entered into an agreement with defendant, to-wit; "For and in consideration of one dollar paid by said Askew to said Blake and in further consideration of the mutual promise herein set forth, that said Blake is to deliver to said Askew one coupon bond of the State of North Carolina issued since the war, valid and

binding upon the said State and of the par value of $1,000. That upon the delivery of the said bond the said Askew will pay the said Blake the sum of $200, as the consideration for the purchase of said State bond." (This instrument of writing was signed by the plaintiff and defendant in this action.)

That plaintiff tendered the bond in discharge of his part of said agreement and defendant refused to accept the same. Thereupon the plaintiff brought this action to recover the said $200.

That said bond with others was issued under ch. 20, Laws 1868–'69, to aid in the construction of the Western Division of the Western North Carolina Railroad and was delivered by the Public Treasurer to the President of said Western Division.

That at the time said Act was ratified, to-wit; January 29th, 1869, the bonds of the State were not at par and the subject of the appropriation as made was not submitted to a vote of the people of the State.

That at the time of the adoption of the Constitution of 1868, no work had been done on that portion of said road for which said bond was issued, to-wit; the Western Division, &c.

Upon these facts His Honor held that said bond was not "valid and binding on the State of North Carolina."

Judgment for defendant. Appeal by plaintiff.

Messrs. Battle & Mordecai, for plaintiff.

Messrs. Merrimon, Fuller & Ashe and *Smith & Strong*, for defendant.

READE, J. If feigned issues were ever entertained in this State, they are abolished by the Constitution, Art. 4, § 1.

This is manifest by a feigned issue based upon a wager to test the validity of certain bonds said to have been issued

by the State alleged in the pleadings to amount to $5,000,000.

Besides the objection that it is a feigned issue which is forbidden by the Constitution, it is an attempted fraud upon the State, by putting her interests in jeopardy and affecting her credit, in a controvery to which she is not a party.

The action is "not fit to be entertained" and is therefore dismissed.

Each party will pay his own costs.

PER CURIAM. Judgment accordingly.

F. M. MOYE, Admr. v. R. S. PETWAY, Admr. of W. Swift and others.

Settlement of Estate -- Fraud -- Practice -- Judgment non obstante veredicto.

1. Where an administrator loans money belonging to the estate of his intestate to the husband of one of the next of kin, and takes a note with the understanding that it is to be accepted as part of his wife's distributive share on final settlement; *Held*, that there is no presumption of law that the transaction is fraudulent.
2. The practice of granting judgment *non obstante veredicto* is very restricted and is confined to cases where a plea confesses a cause of action and the matter relied upon in avoidance is insufficient.

(*Arrington* v. *Yarborough*, 1 Jones Eq 72, cited and approved.)

This was a CIVIL ACTION brought by the plaintiff to WILSON Superior Court to obtain satisfaction of a judgment for $3,750.00 alleged to be due the plaintiff, and removed to WAYNE Superior Court and tried at Fall Term, 1876, before *Seymour, J.*

The judgment was recovered at Spring Term, 1876, of Wilson Superior Court and subsequently set aside. (See *Moye* v. *Petway*, 75 N. C. 165.)

The only issue submitted to the jury was in substance, "whether the $11,000 paid by R. S. Petway, Admr. of W. D. Petway to W. Swift in his life-time was a loan of money or the payment of a part of the distributive share of Mrs. Swift." Upon this issue the only evidence was that of M. J. Edwards, witness for plaintiff, who testified after objection by defendant as follows; "I attended the sale of land of Dr. Swift (the intestate of defendant); met R. S. Petway and told him I had heard that the $11,000 which was received by W. Swift was the payment of Mrs. Swift's distributive share of the estate of W. D. Petway. He said that was so. But the case was altered since Swift's death and that the money went to Mrs. Rawls" (who was Mrs. Swift.)

The Court refused to charge that from the facts admitted in the pleadings and the evidence there was a presumption of law that there was a fraud; but instructed the jury that Dr. Swift having executed his notes to R. S. Petway, Admr. of W. D. Petway for the $11,000, the transaction was on its face a loan and that the *onus* was on the plaintiff to show the contrary. This he endeavored to do by the evidence of the witness (Edwards); that the weight to be given to this evidence was for the jury to determine, bearing in mind that words are easily forgotten or misapprehended after the lapse of time; and also considering the bearing of witness while on the stand, his intelligence and apparent fairness.

The jury rendered a verdict for the defendant. The plaintiff moved for a new trial upon the ground of misdirection which was refused. He then moved for judgment *non obstante veredicto* which was also refused. Judgment for defendant for costs. Appeal by plaintiff.

Mr. S. W. Isler, for plaintiff.

Messrs. Smith & Strong, for defendants.

PEARSON, C. J. The plaintiff moved for a new trial on the ground of misdirection.

1st. There is no error in the instructions given to the jury; on the contrary the issue upon which the parties put the case was left to the jury in a very lucid manner.

2nd. There is no error in the refusal of His Honor to charge, "that from the facts admitted in the pleadings and the evidence there was a presumption of law that it was a fraud."

So far from a presumption of fraud as a matter of law, we can see no evidence of fraud as a matter of fact to be passed on by the jury.

The husband of the next of kin buys property at the sale of the administrator and is required to give his note like other purchasers. There can be no fraud in that. Afterwards the husband borrows money from the administrator and gives a note. There is no fraud in that; although it is reasonable to suppose that the husband had an expectation that his note would be taken in part payment of the amount to which his wife would be entitled upon the final settlement of the estate.

Indeed we are inclined to the opinion that if there had been an express understanding between the administrator and the husband when the notes were given, that they would be accepted in part of the wife's distributive share on final settlement, the event of the husband's death before the settlement would as a matter of law defeat the effect of this executory agreement. The right of the wife attaches to the fund except in case of an executed agreement, as when the administrator pays money to the husband and takes his receipt for the amount as a part payment of the distributive share. See *Arrington* v. *Yarborough*, 1 Jones Eq. 72, where all of the cases are cited and reviewed and the subject of a wife's right after the death of the husband is fully discussed.

The motion for judgment in favor of the plaintiff *non obstante veredicto* has nothing to rest on; that practice is very restricted and is confined to cases where a plea confesses the cause of action and the matter relied upon in avoidance is insufficient. In such cases the plaintiff may sign judgment as on "*nil dicit*," treating the plea as "a sham one," and even if he traverses the matter relied on in avoidance although the issue be found against him, he is still allowed to take judgment notwithstanding the verdict. This practice was adopted to discourage "sham pleas." Here there is no "sham plea" in the case.

The cases *Young* v. *Black*, 7 Cranch, 565, *Lamb* v. *Smith*, 11 Wheaton 172, *Gibson* v. *Hunter*, 2 H. Blackstone, 187, cited by Mr. Isler, in his "supplemental brief," relate to "demurrers to evidence" which are *made by the defendant before* verdict for insufficiency of the *plaintiff's evidence*, and have not the slightest bearing upon a "motion for judgment *non obstante*," which is made by *the plaintiff after* verdict for insufficiency of the *defendant's matter of avoidance*. There are no two matters of practice more entirely different in all respects.

No error.

PER CURIAM. Judgment affirmed.

*LEE L. JAMES and others v. WILLIAM G. JAMES and others,

Advancement -- Deed of Gift to Child -- Wife's Distributive Share.

1. Where a parent conveyed to his child by a deed of gift certain personal property, the deed setting out that it was "an absolute gift and intended as an advancement and was not to be accounted for in the distribution of his estate," and afterwards died intestate; *Held*, that the value of said property is not to be accounted for as an advancement in the distribution of the parent's estate.

2. A deed of gift made by a husband (who dies intestate) with intent to defeat the right of his wife to a distributive share of his personal estate is not void.

SPECIAL PROCEEDING commenced in the Probate Court of CATAWBA County, taken by appeal to the Superior Court of said County, removed on affidavit to Iredell County, and tried at Fall Term, 1876, of IREDELL Superior Court, before *Buxton, J.*

One James James died intestate in Catawba County in the year 1864, leaving a large estate consisting of land, negroes, money, notes, &c. The parties to this proceeding are the widow, children and administrators of said intestate.

A petition was filed for the sale of land for partition and for an account and settlement. A. C McIntosh Esqr. was appointed Referee to state an account, who reported a balance of $6,864.31, in the hands of the administrators, irrespective of advancements to certain children who were not charged with the same, by reason of the fact that said intestate in certain instruments of writing conveying property to

*Bynum, J. being of counsel in the Court below did not sit on the hearing of this case.

said children, expressly stated that the same "was not given as advancements nor to be accounted for as such."

There were exceptions filed to the Referee's report.

His Honor being of opinion that the Referee erred in deciding that the property conveyed to the children as above stated was not to be considered as advancements, reformed the account in that particular so as to charge the various amounts as advancements, and decreed a distribution of the estate in accordance with such reformed account. From which decree there was an appeal to this Court.

Messrs. R. F. Armfield and *Scott & Caldwell*, for plaintiffs.
Mr. M. L. McCorkle, for defendants.

PEARSON, C. J. On the argument it was agreed that the decision of two points of law will dispose of the case.

1. Father makes a deed of gift to son of several slaves, setting out in the deed that it was "an absolute gift and was intended as an advancement and was not to be accounted for in the distribution of his estate." The father dies intestate. Is the value of the slaves to be accounted for among the children as an advancement?

"A man has the right to do with his own property as he chooses," is a proposition agreed to on all hands. The restriction is he shall not interfere with the rights of other persons which are recognized either at law or in equity; hence he is not at liberty either by sale or gift to dispose of property to which another person is entitled by mortgage or deed of trust, nor is he at liberty to dispose of his property by gift in respect to his creditors unless he retains property amply sufficient to pay his debts.

A child is not a creditor of his father and has no right to object either in law or in equity to the father's right of disposition. The child has a mere "expectancy." He cannot

assign it or dispose of it by testament nor does it devolve upon his representative.

His Honor was led into error by looking at children as creditors whereas they have never been so recognized either at law or in equity except to the extent that the parent is bound to give his children maintenance and an education according to his own notions in regard to the fitness of things, and as a corresponding right is entitled to the services of the child until coming to the age of 21 years. But the idea that a child is the creditor of his parent and has a right to restrict the *jus disponendi* in any manner or to any extent is a novel one.

A child says to his father, "You shan't give brother that slave or that horse; if you do I will make him account for the value in the settlement of the estate." The father replies quietly (supposing him to be a man of even temper,) "My son, this is a matter in which you have no right to control me. I will do as I please with my own property; and to punish you for undutiful behavior I shall make a will cutting you off with a sixpence."

The father can do so without at all interfering with the legal or equitable rights of the child. That is clear. If he can do so by will why has he not a right to do so by deed of gift?

The doctrine of advancements is based on the idea that parents are presumed to intend, in the absence of a will, an "equality of partition" among the children; hence a gift of property or money to a child is *prima facie* an advancement, that is property or money paid in anticipation of distribution of his estate, but surely this presumption may be rebutted by an express declaration in the deed of gift that it is not intended to be an advancement but is intended to be an absolute gift; otherwise what becomes of the proposition, "a man may do with his own property as he chooses?"

2. Is the value of the slaves to be accounted for as against the widow?

In regard to dower the statute which cuts it down to such lands as the husband *dies seized of* contains an express provision making void, deeds made with intent to defeat the dower; so it is provided by statute that in case a husband dies leaving a will, the wife may dissent, but there is no statutory provision that in case a husband dies intestate, any deeds of gift made by him with intent to defeat the wife's right to a distributive share of his personal estate shall be void.

This may be "*casus omissus*" on the part of the law makers, but the Courts have no power to help the deficiency.

The judgment below is reversed and modified.

The report of the referee will be reformed according to this opinion by the Clerk of this Court and a decree will be entered accordingly.

PER CURIAM. Judgment accordingly.

EDWIN G. CHEATHAM v. WILLIAM J. HAWKINS and others.

Mortgage of Personal Property -- Possession of Mortgagor -- Presumptive Fraud.

1. A mortgage of a stock of merchandise, containing the provision that the mortgagor is to remain in possession and continue to sell the goods, approaches the verge of being on its face fraudulent in law, but is not so.
2. In such case the mortgage affords the strongest possible ground of presumptive fraud and the burden of disproving the fraud is upon the party claiming under the mortgage.

(*Young* v. *Booe*, 11 Ire. 347; *Hardy* v. *Skinner*, 9 Ire. 191; *Gilmer* v. *Earnhardt*, 1 Jones, 559; *Lee* v. *Flannagan*, 7 Ire. 471; *Palmer* v. *Giles*, 5 Jones Eq. 75; *London* v. *Parsley*, 7 Jones, 313; *Foster* v. *Woodfin*, 11 Ire. 339; *Hardy* v. *Simpson*, 13 Ire. 132; *Askew* v. *Reynolds*, 1 D. & B. 367; *Gregory* v. *Perkins*, 4 Dev. 50, cited, distinguished and approved.)

CIVIL ACTION tried at a Special Term of GRANVILLE Superior Court, (held in August, 1876,) before *Seymour, J.*

The plaintiff was a judgment creditor of the defendant Walter C. Harris, and brought this suit to set aside a mortgage deed executed by said Harris to the defendants W. J. and C. M. Hawkins, upon the ground that said deed was upon its face fraudulent and void.

It was agreed that His Honor upon hearing the evidence should find the facts which are as follows;

The plaintiff obtained judgment by confession against said Harris on June 12th, 1875, for $1320:20 and two days thereafter, execution issued thereon. Previous to this transaction, viz; February 23d, 1875, said Harris executed to the other defendants, (who were trading under the firm name of Hawkins & Co.) a mortgage deed conveying a general stock of merchandise at Henderson in said County, and remained in possession and continued to sell the goods until the 20th of May, 1875, purchasing other goods and keeping no sepa-

rate account of those in the store at the date of said deed and those purchased subsequent thereto.

The amount of purchases made by said Harris during this period, was $5,915.94, and the amount of sales $6,291.95.

On said 20th May, 1875, said Harris was insolvent and surrendered said stock of goods, his only property, to one P. A. Andrews, agent of said Hawkins & Co. the purpose of which transaction was not to defraud creditors but to secure a *bona fide* debt.

Subsequently under proceedings had in said Court in an action between J. R Young & Co. (who had a judgment lien prior to that of this plaintiff) and the defendants Harris and Hawkins & Co., a Receiver was appointed and said stock of goods were sold by him. The proceeds of said sale of goods purchased before the 23d of February, 1875, were applied to the payment of claims in favor of Hawkins & Co.; and of those purchased after said date, to the judgment of said J. R. Young & Co. neither of which was paid in full by reason of the fund becoming exhausted.

His Honor held, that Hawkins & Co. were entitled to retain the money paid under order of Court in the case of said Young & Co against Harris and others, and adjudged that the defendants in this case recover their costs. From which judgment the plaintiff appealed.

Mr. Geo. Badger Harris, for plaintiff.
Messrs. L. C. Edwards and *J. B. Batchelor*, for defedants.

BYNUM, J. This deed approaches the verge of being fraudulent in law, but is not so. To find fraud, as a matter of law, it must so expressly and plainly appear in the deed itself as to be incapable of explanation by evidence *dehors*. If the deed of mortgage had expressed that there were other outstanding debts unsecured by the deed and that the property therein conveyed was all the bargainor possessed,

then, with the reservation of the possession contained in this instrument, the Court would hold that such a deed was fraudulent and void on its face. But the Court cannot so declare where it is possible to show by extraneous evidence that the mortgage was executed in good faith and for a legal purpose. If for instance it could be shown that when this deed was made, Harris owed no other debts or that owing them, he had other property outside of the mortgage and liable to execution amply sufficient to pay them, as matter of law, the deed must be upheld. Admitting this to be so, it is yet clear that the mortgage affords the strongest possible example of presumptive fraud and one which can be scarcely rebutted by any existing facts outside of the deed.

To secure a debt the bargainor conveys in mortgage an entire stock of miscellaneous merchandise and at the same time in the deed expressly reserves the possession of them, for at least nine months. The implication is irresistible, from the very nature of the business that he was to continue in selling and trading as before; otherwise why retain possession of goods, which would be a dead incumbrance upon his hands, without the power of disposition? There is no provision for his accounting for the proceeds of sale. He could apply the money in payment of debts, other than the mortgage debt; he could apply it to family expenses, or even to the purposes of pleasure or waste. Substantially the proceeds belonged to him until the maturity of the Hawkins debt to be expended as he pleased; and in the meantime, the entire stock of goods was to be secure from the reach of his creditors. This case is unlike and stronger than the cases of *Young* v. *Booe*, 11 Ire. 347; *Hardy* v. *Skinner*, 9 Ire. 191; *Gilmer* v. *Earnhardt*, 1 Jones, 559; *Lee* v. *Flannagan*, 7 Ire. 471, and that class of cases. In these, the property conveyed was of such a permanent and substantial nature that it could be followed and identified. In this the merchandise retailed lost the power of identity as soon as sold. The

corpus itself was lost and destroyed beyond pursuit or recovery. That kind of business could not be conducted without this result. The power to sell was the power to destroy and the sale was the destruction and extinction of the property. If there were other unsecured creditors at the time of this assignment and no other property of the debtor than that conveyed in the mortgage, out of which creditors could make their debts, the fraudulent intent would seem to be irrebuttable. A clear benefit is secured to the debtor and a clear right is withheld from the creditor beyond what the law permits. An assignment cannot cover up and preserve the property for the debtor's use or protect it from the remedies and demands of the creditors. Here is not only a retention of possession by the assignor, which is presumptive evidence of fraud, but there is the further power to dispose of it for the debtor's benefit, and still more, the exercise of that power annihilates the thing itself. We have then one of the strongest cases of presumptive fraud. It is clear that if there is no proof to rebut the presumption there is nothing for the jury to pass upon and the presumption of fraud raised by the law becomes conclusive. *Kendall* v. *Hitchcock*, 15 Mo. 416; Bump on Fraud. Conv. 158–161; *Palmer* v. *Giles*, 5 Jones Eq. 75; *London* v. *Parsley*, 7 Jones, 313; *Foster* v. *Woodfin*, 11 Ire. 339, and *Hardy* v. *Simpson*, 13 Ire. 132. The burden of disproving the fraud was cast upon the party claiming under the mortgage. What rebutting proof His Honor had before him does not appear, nor does it appear that he had any evidence outside of the deed itself which affected the infirmity upon its face. Certainly the facts found that the debtor was insolvent, owing eighteen thousand dollars and having no property except his stock of goods which he had thus conveyed, do not remove or tend to remove the presumption of fraud. Indeed they are the very facts which if they had been inserted in the deed of assignment would have authorized the Court

to declare the deed upon its face fraudulent in law and void.

The presumption of fraud having arisen, the case stated sets out no evidence in rebuttal or in explanation of the possession retained by the debtor. *Askew* v. *Reynolds*, 1 Dev. & Bat. 367; *Gregory* v. *Perkins*, 4 Dev. 50; *Foster* v. *Woodfin*, 11 Ire. 339.

His Honor therefore acting both as Court and jury erred in instructing himself that there was evidence before him authorizing his findings of fact, in rebuttal or explanation of the presumption of fraud. This is the precise question brought before us by the appeal and for the error before stated there must be a *venire de novo*. The point therefore forcibly pressed by Mr. Batchelor, that the receiver appointed in another action at the instance of another creditor having sold the goods and disbursed the proceeds in payment of that and the Hawkins debt secured in the mortgage and not denied to be *bona fide*, before the plaintiff in this action acquired a lien or instituted an action, it is now too late for the plaintiff to attack the assignment for fraud, even if it existed, is further on and is an interesting question. It does not appear to have been made upon the trial below but may properly be raised on the next trial.

There is error.

PER CURIAM. *Venire de novo.*

*BANK OF NEW HANOVER v WILLIAM R. KENAN.

Banks -- Collection of Commercial Paper -- Agency.

1. When a bank receives a check for collection and retains it for four days without presenting it for payment or making any effort for its collection or giving any notice to the depositor of its non-payment, the bank is liable if loss thereby ensues.
2. In such case a promise thereafter made by the depositor to pay to the bank the amount due by reason of the loss, is *nudum pactum*.
3. When paper is placed in the hands of a bank for collection, the bank must take the necessary steps to secure its prompt payment by presentation at maturity. If it is not paid, the bank, in order to fix the liability of the drawer, must have it protested and due notice of its dishonor given to the depositor. If it is not presented, the fact that if it had been presented it would not have been paid, does not excuse the liability of the bank.
4. When one voluntarily assumes an agency or trust to manage the interests of another, such agent will not be allowed to sacrifice the interests of his principal to his own; *Therefore*, when a bank received a check upon itself for collection, being at the same time a large creditor of the drawer, and failed without excuse to notify the depositor of the non-payment of the check; *Held*, to be in law, negligence.
5. In such case the bank made the check its own and is fixed with its full amount.

(*Costin* v. *Rankin*, 3 Jones, 387; *Stowe* v *Bank of Cape Fear*, 3 Dev. 408, cited and approved.)

CIVIL ACTION, tried at Spring Term, 1876, of NEW HANOVER Superior Court, before *McKoy, J.*

The case is so fully considered by Mr. Justice BYNUM in delivering the opinion of this Court as to render any further statement unnecessary.

*Faircloth, J., being a stockholder in plaintiff bank did not sit at the hearing of the case.

There was judgment for the plaintiff and the defendant appealed.

Messrs. Wright & Stedman and *D. L. Russell* for plaintiff.
Messrs. R. Strange and *W. S. & D. J. Devane* for defendant.

BYNUM, J. The defendant had drawn from the plaintiff Bank a considerable amount exceeding his deposits, and the Bank called upon him to make good the deficit. The defendant had sold but not delivered to Moffit & Co. 300 barrels of rosin for $864, and to enable him to meet the demand of the Bank on the 6th of September, 1873, Moffit drew and delivered to the defendant his check upon the Bank for the purchase money of the rosin, payable on the 9th of September. This check the defendant offered to the Bank as a payment on the balance against him. The President of the Bank received the check and it was pinned to a deposit slip, which read thus, "Bank of New Hanover, deposited by W. R. Kenan, September 9th, 1863, currency——— checks, $864.00."

The plaintiff in his replication to the answer, avers that the check was received for collection only, and the defendant insisted that it was received as a payment on his bank debt. How that was, was upon the evidence submitted to the jury and they found that the check was received for collection. The check was neither collected nor attempted to be by the Bank, and on the 13th of September, Moffit failed, and on the evening of that day the defendant received notice that the check had not been paid. By the admission of the plaintiff then, and the finding of the jury, the Bank received *for collection* this check, which was payable at its own counter, on the 9th of September and retained the same, without presenting it for payment or any effort for its collection or any notice to the defendant of its non-pay-

ment, until after the failure of Moffit, on the evening of the 13th of September, when the debt was lost.. For that neglect the Bank is responsible. The Bank however insists that on the 15th of September and after the failure of Moffit, the defendant promised to pay the balance due it which the check was deposited to meet, and that that promise constituted a waiver of any claim on the Bank for its failure to collect the check. This defence is unavailing. There is no evidence of such a waiver. On the 15th of September the Bank requested the defendant to arrange the balance of his overdraw. He replied that "he would pay it," but immediately added, "but what about Moffit's check?" and in answer to that the President said he thought Moffit would arrange it during the day. So far from being a waiver, here was an express notice to the Bank, that it was looked to, and its answer was certainly evasive but did not deny its liability. But suppose the defendant had then and there, promised absolutely to pay the balance due the Bank. The express promise was only what the law implied without it; it neither added to the validity of the debt or his obligation to pay it. It was *nudum pactum; vox et præterea nil.* Suppose the check had been placed in one Bank for collection, and the overdraw had been in another. The failure to collect by one Bank would have been no answer for a failure to pay in the other; and the payment of the balance due in one would have been no waiver of the other's liability for a neglect to collect. The fact that the whole transaction was in one Bank cannot change the relations or lessen the liability of the parties. We, therefore, put out of view the question of waiver and come to the main question, the liability of the Bank as an agent for the collection of the check. An important and profitable part of the regular business of banking is the collection of commercial paper. The advantages arising from business associations and the temporary use of the money for purposes of discount or exchange, form a val-

uable consideration for the undertaking. *Hall* v. *Bank of the State*, 3 Rich. 366; 1 Daniel on Neg. Instruments, 324-5. The Bank at which paper is made payable and at which it is deposited for collection, is the agent of the depositor to receive the money at its maturity. When a bill, note or check is placed in its hands for collection, it is the duty of the Bank to take the necessary steps to its prompt payment by making presentment for payment at maturity. If it be not then paid, the Bank must at once fix the liability of the drawer, by having it protested and by giving due notice of its dishonor to the depositor for collection. If the Bank fail in any of these duties it becomes immediately liable in damages to the holder or depositor. *West Branch Bank* v. *Fulmer*, 3 Barr. 399; *Ivory* v. *Bank of State*, 36 Mo. 475; 1 Daniel on Neg. Instruments, § 327; *Costin* v. *Rankin*, 3 Jones, 387. The agent must use such skill and diligence as are necessary to the due execution of his trust. This check was questionable and the Bank knew and acknowledged it to be so. Here then was superadded to its duty a spur to the most active vigilance in pressing the collection and giving prompt notice of its dishonor. If by this neglect or delay to give notice the payee was prevented from taking such immediate measures against the drawer as might possibly have secured the payee in some way or other, the Bank must be held responsible at least to the amount of the damage received. Nor is it an excuse that if the check had been presented for payment it would not have been paid or that there were not sufficient funds in Bank to meet it at maturity. That is not for the consideration of the agent. For it might well be, that had due notice been given the depositor, an immediate demand on Moffit with such other legal measures as their business relations might render advisable, would have led to the payment of the check.

"Our whole system of negotiable paper and its responsibilities, formed as it is by long experience admirably adap-

ted to the varied uses of commerce, rests upon the single principle of strict punctuality in demands, presentments and notices, as well as payments." *Allen* v. *Suydam*, 20 Wend. 321. Notice of non-payment of the check, should have been given on the 9th and at farthest on the 10th of September. Up to the 12th the rosin for which the check had been given remained on board the Bark *Osterlide*, in the port; $20,000 had been paid into the Bank and checked out again by Moffit, between the 6th and the 13th of September; Moffit himself testifies that had the defendant demanded payment of the check he should have been compelled to pay it or have failed some days sooner than the 13th, and it is evident that he was straining every nerve to keep up his credit as long as it was possible It is therefore possible, if not probable, that prompt notice by the Bank would have resulted in securing the debt or its payment.

The Bank is presented to us in another unfavorable attitude. It voluntarily assumed the agency to collect this check, when itself was a large creditor of Moffit; had secured most of his effects; was aware of his embarrassment and was making exertions to save itself from loss. The undertaking therefore to collect this debt, was antagonistic to the duties and purposes of the Bank, to save itself by seizing the only plank in the shipwreck. The natural if not the intentional result was that the interests of the defendant were pretermitted and he became the victim of censurable neglect. When the interests of the plaintiff and defendant conflict and the plaintiff voluntarily assumes the agency and trust to manage the interests of the other, the rule of good faith which is equity, will not allow the agent to sacrifice the interests of his principal to his own.

It was therefore the duty of the Court to have instructed the jury that the failure of the plaintiff from the 9th to the 13th of September, to notify the defendant of the non-payment of the check without any excuse therefor, was in law negli-

gence; and that the only inquiry for them was, what amount of damages the defendant was entitled to recover.

The measure of damages which the holder is entitled to recover of the Bank or collecting agent who has been guilty of negligence is the actual loss which has been suffered. That loss, *prima facie*, is the full amount of the bill or note; but evidence is admissible to reduce it to the actual loss. *Stowe* v. *Bank of Cape Fear*, 3 Dev. 408; 1 Daniel on Neg. Instr. § § 328–30. But this is the rule of general application only and is modified in its adaptation to a particular class of cases of which the present is an example.

Here the Bank was the creditor and the check was drawn on and was payable by the Bank—the agent. The undertaking of the Bank was to collect a check on itself. Of necessity it must be assumed that it was presented for payment, that is acted upon, at the time it was payable by the Bank.

If it was then accepted by the Bank, the amount of the check became a cash deposit to the credit of the defendant, paid out of the funds of Moffit or charged to his account with the Bank. If it was not accepted it was the duty of the agent to give notice to the holder and return the check. The Bank did neither. There can be no doubt that a Bank can so deal with a check that the law will imply an acceptance on its part. When the holder of a check presents it for payment the drawee has only a reasonable time to inspect his accounts and ascertain whether he is in funds to meet the demand; and such reasonable time is held not to exceed twenty-four hours; after this lapse of time the holder has the right to know whether the check is accepted or dishonored. If the holder himself presents or sends the check to the Bank he must apply at the end of this reasonable time, to know whether it is accepted; but if it is in the hands of the Bank as a collecting agent, *it* must give the notice of acceptance or dishonor. The Bank was here both drawee and

collecting agent; it was fully cognizant of the state of its accounts with Moffit on the 9th of September; it both received and paid out large deposits made by him up to the 13th of September and even the bill of lading for the rosin and the whole cargo went into the Bank to the credit of Moffit on the 8th of September; on the 6th of September the Bank had possessed itself of all the valuable assets of Moffit so much so that the assignee of Moffit could pay nothing to the creditors; and Bates the assistant cashier, testifies that "Moffit came to the Bank every day from the 6th to the 13th of September and sometimes three or four times a day and *made provision* for payment of his checks." Why was this check not provided for? Moffit says he thought it had been and had been paid out of his deposits and had he known that it had not been paid he would have paid it or have failed sooner. Why was payment of the check not demanded and why was the defendant kept in ignorance of its non-payment until after the failure of Moffit became known to the world four days after it was payable? Upon the plainest principles of justice these peculiar circumstances of wilful neglect of a known duty constitute a case of constructive acceptance of the check and fix the Bank for the full amount of it. The negligence of the Bank has made the check its own and the case is taken out of the general rule as to the measure of damages. *Allen* v. *Suydam*, 20 Wend. 321. 2 Dan'l on Neg. Instr. § 1619 and notes.

There is error.

PER CURIAM. Judgment reversed.

S. C. WILSON and others v. T. T. SANDIFER and others.

Construction of Bond -- Parol Evidence Inadmissible to Vary Written Contract.

1. Where certain tenants in common entered into an obligation binding "themselves in this bond to resist by law any claim that may be set up by the heirs of Jno. M. Wilson, and in case of a law suit each is to bear his or her proportionate share," and afterwards the land is sold for partition and the purchaser (one of the tenants in common and a party to the obligation) is compelled to pay a certain sum for said Jno. M. Wilson's interest in the land; *Held*, that the obligation is not an indemnity so as to entitle the purchaser to reimbursement from the other parties thereto, but is simply an agreement to resist any claim that might be set up by Jno. M. Wilson's heirs.
2. Parol evidence is inadmissible to vary a written contract.

CIVIL ACTION, tried at Fall Term, 1875, of MECKLENBURG Superior Court, before *Schenck, J.*

The suit was brought to sell land for partition among the parties, plaintiffs and defendants, as tenants in common. By virtue of a decree in the cause the land was sold and a part of it was bought by the defendant T. T. Sandifer, who gave notes for the purchase money.

The defendant Sandifer alleged that certain of the other tenants in common had agreed in writing to indemnify him against loss in the event that the title of one John M. Wilson should be found to be valid; that subsequently he had been compelled to pay $350 for the interest of said Wilson, and asked to be allowed the same out of the purchase money due to the parties who had given the indemnity as aforesaid, which is as follows;

"Know all men by these presents that we, T. T. Sandifer, M. A. Wilson &c. are held and firmly bound to each other in the sum of $2,000. * * * The condition of the above

obligation is such that whereas, by an instrument executed by the late Robert Wilson debarring the heirs of John M. Wilson deceased of any further share in his estate; and whereas by the death of Isaac A. Wilson, it might appear that the said heirs of John M. Wilson would come in for a share of his estate; Now therefore in case the heirs of John M. Wilson should bring suit for a share of said Isaac A. Wilson's portion of the estate devised to him by his father (the late Robert Wilson,) the undersigned heirs of Robert Wilson bind themselves in this bond to resist by law any claim that may be set up by the heirs of John M. Wilson, and in case of a law suit each is to bear his or her proportionate share."

His Honor held that the contract was not one in which the parties agreed to indemnify the defendant Sandifer, but was a mutual agreement to resist the claim of S. C. Wilson, the plaintiff and the son of John M. Wilson.

The defendant then offered to prove by parol that the understanding of the parties was that said contract should be one of indemnity. This testimony was ruled out by the Court and defendant excepted. Judgment. Appeal by defendant.

Messrs. C. Dowd and *J. E. Brown*, for plaintiffs.
Messrs. Wilson & Son, for defendants.

READE, J. 1. This is not to be treated as an original proceeding but as a motion founded upon a petition in the original proceeding for partition. There cannot therefore be any trouble about parties or about notice.

2. We agree with His Honor that the writing in question is not an indemnity but is simply a mutual agreement among the parties to it to resist any claim which might be set up by "the heirs of John M. Wilson" to a share in the estate of Isaac A. Wilson, bequeathed to him by his father.

3. We are also of the opinion that the parol evidence offered to prove that said writing was *intended* to be an indemnity was properly rejected. The rule is that parol evidence is inadmissible to *vary* a written contract.

There is no error.

PER CURIAM. Judgment affirmed.

THOMAS H. PEGRAM v. SAMUEL STOLTZ.

Slander -- Damages.

1. Words falsely spoken, charging one with an infamous offence or with an infectious disease or impeaching his trade or profession, are *per se* actionable.
2. Where the words spoken do not on their face import such degradation, the plaintiff in order to recover must aver some special damage and must show by proof that he has in fact sustained a loss.
3. If at the time of the alleged slanderous words, the person concerning whom they are spoken is not liable to an infamous punisment by reason of the offence charged, the words are not *per se* actionable. *Therefore*, when the defendant in 1870 said of the plaintiff that he had sworn falsely in 1867 before the Board of Registrars of Davidson County, then acting under the provisions of the Act of Congress, entitled "an Act to provide for the more efficient government of the rebel States" which Act ceased to operate in this State before 1870. *Held*, that the plaintiff, no special damage being alleged, could not recover.

CIVIL ACTION, tried at Fall Term, 1876, of FORSYTHE Superior Court, before *Kerr, J.*

This was an action of Slander to recover damages for injury to the plaintiff's character and the material facts are as follows;

The defendant on the 4th day of August, 1870, said of the plaintiff. "He is a perjured man. He went to David-

son County and swore before the Board of Registrars of said County that he was a citizen of Davidson County when he knew that he was a citizen of Forsythe." The plaintiff was advised by said Board that he had a right to register in Davidson although he lived in Forsythe County and did so register in the latter part of the year 1867 or early in 1868. Said Board of Registration was acting under the authority of the Provisional Government of the State, established by an Act of Congress entitled "an Act to provide for the more efficient government of the rebel states" passed March 2nd, 1867 and the Acts supplemental thereto.

The jury rendered a verdict for the plaintiff. Judgment. Appeal by defendant.

Messrs. J. A Gilmer, Watson & Glenn and *T. J. Wilson*, for plaintiff.

Mr. J. M. McCorkle, for defendant.

FAIRCLOTH, J. (After stating the facts as above.) The State being in an anomalous condition, the above recited Act was passed to meet the particular emergency then existing and was so intended as appears from its preamble. It was made applicable by its terms only to those States lately in rebellion and was therefore a local Act and not a general law of the United States. It provided the manner and means by which it was to be executed, by giving the Military Officer in command of the District authority to punish all criminals and disturbers of the public peace, &c. by establishing local civil tribunals and organizing Military Courts whenever he saw fit to do so, and provided further that any interference with those matters by State authority should be null and void and in general that any citizen violating the law should be punished by the authority of said Act.

It furthermore provided, among other things, that when the qualified electors of the State should adopt a State Con-

stitution as therein provided and the same should be approved by Congress, each of which was done on or before the 25th of June, 1868, then said Act of Congress should cease to be operative in North Carolina.

Perjury is an offence against public justice and is visited with infamous punishment, because it is a heinous crime and because it *necessarily* tends to defeat and obstruct the administration of justice. At common law it can be committed only in some judicial proceeding, civil or criminal, in a matter material to the issue in question by taking a wilful false oath in a Court of justice or before some Magistrate or officer having authority to administer the same. The law takes no notice of a false oath however wickedly taken, other than as above stated, as if it be extrajudicial or in regard to some private matter.

In such instances, if private persons are affected, they have their remedy by action for damages but it doth not concern the public and is not therefore punishable as for perjury. 4 Bl. Com. 137 *et seq.*

A man whose character or reputation is injured by slanderous words, may have his action for damages and if the words falsely spoken charge him with an infamous offence or with having an infectious disease or impeach his trade or profession, these words are *per se* actionable, because these words do necessarily tend to his degradation and injury and he may recover as a matter of course without showing that he has actually sustained a damage. But when the words spoken are such as do not on their face import such degradation as will of course be injurious, as to call a man a rascal or heretic, then the plaintiff must aver some special damage which is called laying his action with a *per quod* and must show by proof that he has in point of fact sustained a loss before he can recover. 3 Bl. Com. 123.

With these general principles applied to the facts in the case before us was the plaintiff entitled to recover? No

special damage was alleged nor was there any evidence to support such an allegation. So that view is out of the case. The alleged false swearing before the Board of Registrars occurred late in 1867 or early in 1868, and the authority to punish the offence charged, if it had been committed, had ceased to operate in North Carolina certainly by June 25th, 1868, by the terms of the said Act of Congress, and the slanderous words were spoken subsequently. So that at that time the plaintiff was not liable to an infamous punishment, if the words had been true, for the reasons above stated, *i. e.* the words spoken were not *per se* actionable and the plaintiff cannot recover. There was a second count in the complaint for perjury without any specification, but it was not supported by evidence and the case was tried on the first allegation.

Elaborate briefs were filed but no authorities cited on the point above decided. Let this be certified.

There is error.

PER CURIAM. Judgment reversed.

JESSE HILL v. JOHN SPRINKLE and another.

Judge's Charge -- Prayer for Instructions.

Where a prayer for instructions to the jury is distinct, the response of the Court should be equally distinct; *Therefore*, where counsel asked the Court to charge "that when there is a conflict of testimony between witnesses of equal respectability, one of whom is a party in interest and the other not, the jury have the right to consider the question of interest in deciding upon the credibility of the witnesses;" and the Court in response told the jury that they had a right to consider all the circumstances attending the examination of the witnesses on the trial and to weigh their testimony accordingly; *Held* to be error.

CIVIL ACTION, tried at Fall Term, 1876, of FORSYTHE Superior Court, before *Kerr, J.*

The plaintiff demanded payment of $300, balance due on a bond given for the purchase money of a tract of land.

As the only point decided in this Court involved the correctness of His Honor's charge to the jury in the Court below in response to instructions asked by plaintiff, which are set out by Mr. Justice BYNUM in delivering the opinion, a full statement of the facts is deemed unnecessary.

Verdict for the defendant. Judgment. Appeal by the plaintiff.

Mr. T. J. Wilson, for plaintiff.
No counsel for defendant.

BYNUM, J. Upon the trial, the defendant was introduced as a witness in his own behalf and his testimony was contradicted by one Lehman, a witness and former agent of the plaintiff.

The counsel of the plaintiff asked the Court to instruct the jury, "that when there is a conflict of testimony between witnesses of equal respectability one of whom is a

party in interest and the other not, the jury have the right to consider the question of interest in deciding upon the credibility of the witnesses." His Honor did not give the instructions in so many words, but told the jury "that they had a right to consider all the circumstances attending the examination of the witnesses on the trial and to weigh their testimony accordingly." The plaintiff had a right to the instructions asked and it may be that the Court intended those given as a substantial compliance with the prayer for instructions. But we do not think they were or that the jury so understood th m It is questionable whether they or others understood that the interest of the defendant in the suit as affecting his credibility, was a circumstance attending the examination of a witness as distinguished from deportment, intelligence means of knowledge and the like, which are more frequently understood as circumstances attending the examination of witnesses At all events, the charge was not such a clear and distinct enunciation of an important principle of evidence as could leave no reasonable doubt of its meaning in the minds of the jury. The prayer was distinct and the response should have been equally so. For generations past and up to within the last few years, interest in the event of the action, however small, excluded a party altogether as a witness and that upon the ground, not that he may not sometimes state the truth, but because it would not ordinarily be safe to rely on his testimony. This rule is still applauded by great judges as a rule founded in good sense and sound policy." 1 Greenl. § 330.

Parties to the action are now competent witnesses, but the reasons which once excluded them still exist but go only to their credibility.

Interest like infamy does go to the credibility; and therefore especially in the inauguration of the new rules of evidence, the relation of interest to credibility should be

impressed upon the jury in all cases of conflict of testimony, not as necessarily turning the scale in matters of doubt, but as an important fact to be considered by the jury in weighing one man's testimony against another's. The plaintiff having asked for was entitled to the specific instructions.

For this error there must be another trial.

PER CURIAM. *Venire de novo.*

SAMUEL F. JONES v. EDWARD R. STANLY.

Contract -- Liability of One Maliciously Causing Breach of.

One who maliciously persuades another to break a contract with a third person is liable to such person for damages; *Therefore*, in an action for damages where the plaintiff had made a contract with a Rail Road Company of which the defendant was President and Superintendent which contract the defendant maliciously and in order to injure the plaintiff, refused to complete. *Held*, that the plaintiff is entitled to recover.

(*Haskins* v *Royster*, 70 N. C. 601, cited and approved.)

CIVIL ACTION, tried at Fall Term, 1875, of CRAVEN Superior Court, before *Seymour, J.*

The suit was brought to recover damages of the defendant for breach of contract.

The facts necessary to an understanding of the points decided are sufficiently stated in the opinion of this Court. The jury rendered a verdict for the plaintiff for $3,000 upon which judgment was entered. The Court thereafter upon motion of defendant arrested the judgment and plaintiff appealed to this Court.

Messrs. Smith & Strong, for plaintiff.
Mr. C. R. Thomas, for defendant.

RODMAN, J. It was decided in *Haskins* v. *Royster*, 70 N. C. 601, that if a person maliciously entices laborers or croppers to break their contracts with their employer and desert his service, the employer may recover damages against such person. The same reasons cover every case where one person maliciously persuades another to break *any* contract with a third person. It is not confined to contracts for service. In the present case the plaintiff made a contract with the Atlantic & North Carolina Railroad Company of which the defendant was President and Superintendent, by which the Company agreed to transport from points on their road to Morehead City a large number of cross-ties which plaintiff had contracted to deliver in Cuba. After the contract had been partly performed the defendant being still President and Superintendent of the Company maliciously and for the purpose of injuring the plaintiff, as the jury have found, refused to complete the contract whereby plaintiff was injured. After the jury had found a verdict for the plaintiff and assessed his damages the Judge arrested the judgment and the plaintiff appealed. In this we think the Judge erred and his judgment must be reversed.

It is the duty of this Court to give such judgment as it appears on the record that the Court below should have given. The plaintiff moves here for judgment upon the verdict. There are no exceptions by defendant to the Judge's charge, and it does not appear that he asked for a new trial. The instructions of the Judge on the question of damages are not full, but it does not appear that he was requested to give any others. If he had thought the damages excessive he would have set the verdict aside and given a

new trial on that ground. We neither do nor can know anything of the evidence and if we did we could not set aside the verdict and give a new trial on that ground except perhaps where it appeared to be a very gross case of excess

Judgment below reversed and judgment in this Court for the plaintiff according to the verdict.

PER CURIAM. Judgment reversed.

ALPHA CATON v. A. H. STEWART.

Contract against the Policy of the Law.

Where a store-keeper (under the U. S. Revenue Laws) in charge of a distillery belonging to A, promised to give A a certain sum per month as long as he "continued to carry on a distillery;" *Held*, in an action by A upon the promise, that the contract was against the policy of the law and A was not entitled to recover.

CIVIL ACTION, tried at Fall Term, 1876, of DAVIE Superior Court, before *Kerr, J.*

This action was brought in a Justice's Court and taken by appeal to the Superior Court.

The plaintiff alleged that the defendant had promised to pay him $25.00 per month for a specified time, "while the plaintiff continued to carry on a distillery." The distillery was a licensed one. The defendant was an officer of the United States Government, a store-keeper, and stationed at the distillery of the plaintiff.

The defendant denied the promise and insisted that if such promise had been made it was against the policy of the law.

The plaintiff informed the defendant that he would be compelled to suspend the distillery business as he was not realizing any profit therefrom; and the defendant thereupon proposed that if he would continue the business so that his office of store-keeper and its emoluments would not be interfered with he would pay plaintiff $25.00 per month. In consideration of this promise the plaintiff did continue the business. There was no intention to defraud the Government nor was the Government defrauded by the arrangement, but the plaintiff continued to pay taxes as they fell due. The defendant paid for a part of the time according to contract but afterwards refused, and thereupon this action was brought.

Under the instructions of the Court the jury rendered a verdict for the plaintiff. Judgment. Appeal by the defendant.

Messrs. Watson & Glenn and *J. A. Gilmer*, for plaintiff.

Mr. J. M. McCorkle, for defendant, argued; That it was an indirect agreement tending to induce the defendant not to do his duty as store-keeper and therefore void. Rev. Stat. U. S. § § 3153, 3154–3273 *et seq.* Addison on Contracts, § § 253–259; Comyn on Contracts, 34; *McNeil* v. *Cahill*, 3 Bligh's Rep. 229; *Egerton* v. *Earl Brownlow*, 4 H. L. Cases 235; *Nerot* v. *Wallace*, 3 Term Rep. 17; *McLeod* v. *McCall*, 3 Jones, 87; *King* v. *Winants*, 71 N. C. 469.

PEARSON, C. J. Prisoner feeds the watch dog and the dog fondles upon prisoner. There is no use in keeping the dog on watch longer. So in our case, as soon as the distiller became a prisoner of the store-keeper and the store-keeper agreed "to divide profits" there was no use in having *such a store-keeper*, and the policy of the government in providing "store-keepers" at high wages was thereby completely frustrated.

By this agreement the store-keeper was "led into temptation," for he could not deal hard, that is "watch closely" his prisoner and dependant, because their mutual interests required that the distillery should be kept in operation.

The distiller was led into temptation to defraud the Government for he had an assurance that his operations would not be watched very closely. Had this arrangement been made known to the Revenue Officer it would have been his duty instantly to discharge the store-keeper.

The transaction as nearly approaches "bribery and corruption" as can be well imagined.

If the store-keeper had agreed to receive of the distiller $25.00 a month out of his profits it would have been a case of bribery. Here the store-keeper agrees to pay the distiller $25.00 a month out of his wages in order to induce him to continue his operations, and the corruption consists in the fact that the distiller was thereby assured that he would not be closely watched, thus defeating the policy of the Act of Congress in the regulations for the appointment of store-keepers at high wages and detailed instructions to watch the operations of distillers.

Whenever parties enter into an arrangement whereby the policy of the law is defeated, they are in "*pari delicto*," and the law will not aid either party. See the cases cited in the brief of *Mc Corkle*, counsel for defendant.

There is error. Judgment below reversed, and upon the facts agreed judgment that defendant go without day and recover his costs.

PER CURIAM. Judgment reversed.

W. T. BRYAN v. W. D. HARRISON and others.

Evidence -- Judge's Charge -- Challenges to Jury.

1. What is meant by the word "dollar" in a note can be shown by *parol* evidence.
2. A general exception to the whole instruction of the Court below must be overruled if any part of it is right.
3. Whether there are one or more plaintiffs or defendants, only four peremptory challenges to the jury on either side are allowable.

CIVIL ACTION, to recover the Value of a Note given by defendant on the 10th day of September, 1862, tried at Spring Term, 1876, of NASH Superior Court, before *Watts, J.*

It was in evidence that in January, 1862, the plaintiff W. T. Bryan sold to one John W. Earl a tract of land for $3,300 under a verbal contract that Earl was to pay for the same in cotton at ten cents a pound (so far as the amount he had on hand would go) and the balance in good notes. The amount of cotton was estimated at thirty bales and the price at ten cents a pound in gold. Confederate money had not circulated in the vicinity in which the parties lived up to the time of the contract. Earl did not deliver the cotton at all but held it in his possession until the price advanced to fifteen cents a pound and sold it at that price.

Earl did not execute any note at the time the contract was made, but in September, 1862, he paid Bryan $300 in Confederate money on account of the profit made by the sale of the cotton and also executed two notes—one for $2,100 and the other for $1,200—with defendants as sureties. The $1,200 note is the subject of this action and was given in confirmation of the sale of January, 1862, the land being the consideration.

The defendants knew the terms of the sale before they signed said note. Nothing was said about the currency in which the money was to be paid but Bryan further testified

that he did not sell for Confederate money and that he told the defendants Harrison and Stallings what the consideration was, viz; the tract of land, for which no deed was executed until September, 1862. Earl failed to comply with the terms of the contract and refused to yield to the demand of Bryan for possession.

The defendants objected to the evidence relating to the consideration of the contract of January, and as to whether the notes given in September were in confirmation of said contract and as to the value of the cotton in gold in January, 1862, and also because only four peremptory challenges were allowed both defendants. Under the instructions of the Court the jury found the following under the issues submitted

Findings of the Jury;

1. The plaintiff and Earl intended that the contract of January should be discharged in notes and cotton at gold prices.

2. The notes given in September, 1862, were in substitution for and confirmation of the contract of January, 1862.

3. In January, 1862, the cotton was worth ten cents per pound.

4. The note sued on, according to the agreement between the parties, was payable in gold or specie or its equivalent.

Verdict for plaintiff for $1,200 with interest from January 1st, 1862. Judgment. Appeal by defendants.

Messrs. Moore & Gatling, for plaintiff.

Mr. J. B. Batchelor, for defendants.

RODMAN, J. 1. Parol evidence was admissible to ascertain what the parties meant by the word "dollar" in the note sued on.

The plaintiff was a competent witness.

It is objected here however that some portions of his evidence must have been rather his conclusions from facts than the facts themselves. Conceding that this appears to be so, as his evidence is presented in the case which does not profess to set out his evidence in *hæc verba*, yet it does not appear that any such objection was made at the trial.

We must presume either that the Judge in stating the case has given merely the substance and result of the evidence, instead of giving it in the words of the witness; or that if objection had been made at the time on the ground now assigned, the Judge would have stricken out the objectionable expressions, and confined the witness to what were strictly the facts. The defendant had the opportunity on cross-examination to bring out the facts apart from any opinion of the witness as to their legal effect. So that the jury could not have been misled except by his omission to do so.

2. No particular instruction of the Judge is excepted to as being erroneous and it is a familiar rule that a general exception to the whole instruction must be overruled if any part of it is right.

It seems to us however that the issue as to what sort of dollars was meant by the parties was fairly submitted to the jury and that there is nothing in the charge of the Judge calculated to mislead them.

3. There were two defendants and the Judge allowed to them both four peremptory challenges only.

We think this is the true construction of R. C. ch. 31, § 35, to be found in the addenda to Bat. Rev. p. 861, § 229. a. It says "the parties or their counsel for them may challenge peremptorily four jurors upon the said panel." That is to say the party plaintiff whether consisting of one person or of several may challenge four and the party defendant whether

consisting of one or several persons may challenge four. Such has been the uniform construction in the experience of all of us.

PER CURIAM. Judgment affirmed.

D. D. COLGROVE and others v. ELLEN KOONCE and others.

Parties -- Action to Recover Real Estate.

In an action for the recovery of real estate, a third person who claims title paramount and adverse both to plaintiff and defendant, should not be permitted under §§ 61 and 65, C. C. P. to make himself a party to the action.

(*Wise* v *Wheeler*, 6 Ire. 196, and *Smitherman* v. *Saunders*, 70 N. C. 270, cited and approved.)

MOTION in an ACTION to recover the possession of Real Estate brought by D. D. Colgrove against the defendant Koonce, the party in possession, to the Superior Court of JONES County, heard by *Seymour*, *J.* and transmitted to this Court in obedience to an order for a *Certiorari* dated June 10, 1876.

The case as stated by His Honor is as follows:

"At Spring Term, 1873, Isler was made a party defendant upon his own motion and filed an answer in the case at ——— Term of said Court. At Spring Term, 1875, a motion was made by all parties, excepting Isler, to strike out the name of Isler upon the ground that his claim to the land had no connection with the controversy between Colgrove and Ellen Koonce. This motion was continued until Fall Term, 1875, at which Term the plaintiff Colgrove withdrew from the motion which was however, insisted on by defendant Koonce. Upon the hearing of the motion, Isler

offered to prove that he claimed under one J. C. B. Koonce, the deceased husband of defendant Ellen Koonce. This evidence was rejected and the motion to strike out allowed."

Appeal by defendant Isler.

Mr. A. G. Hubbard, for plaintiffs.

Messrs. Green & Stevenson and *S. W. Isler* for defendants.

RODMAN, J. This is an action to recover land. During its pendency Isler moved to be made a party defendant without setting forth, so far as appears on record, any claim to the land or any reason why he should be made defendant. The motion was allowed and Isler filed an answer, in which he claimed a title paramount and adverse to both plaintiff and defendants. At a subsequent term the original defendants moved to supersede the order by which Isler was allowed to become a party defendant. The Judge granted the motion and Isler appealed to this Court. By the law prior to the Code of Civil Procedure, no person but one claiming to be the landlord of the tenant in possession (the defendant in the action of ejectment) had a right to be made defendant without the consent of the plaintiff. *Wise* v. *Wheeler* 6 Ire. 196. By C. C. P. § 61, the landlord may be joined as a defendant; "and any person claiming title or right of possession to real estate may be made party plaintiff or defendant as the case may require."

It seems to us that this section applies only when the person applying to be made a party is connected in interest with one or the other of the original parties and not when he claims adversely to both. As, for example, if he claims to be a co-tenant with the plaintiff, or in privity with the defendant or a common possession with them. Section 65 says: "The Court * * * * may determine any controversy before it when it can be done without prejudice to the rights of others, or by saving their rights; but when a

complete determination of the controversy cannot be had without the presence of other parties, the Court *must* cause them to be brought in. And when in an action for the recovery of real or personal property, a person not a party to the action but having an interest in the subject thereof, makes application to the Court to be made a party it may order him to be brought in by the proper amendment." It is clear that Isler does not come within the first paragraph of this section. It is not necessary to pass on his claim in order to a complete determination of the controversy between the original parties.

It is equally clear that he does come within the terms of the second paragraph, and in such case it is discretionary with the Court to order him to be made a party or not, according to the nature of his claim and the circumstances of the case.

Isler may now sue the present defendants or any others who may be in possession when he brings his suit.

The considerations therefore which must determine the discretion of the Judge in deciding whether he will leave Isler to his separate action or make him a party to the present action, seem to be whether justice would be furthered and circuity of action prevented by making him a party; in other words would it be convenient in the legal sense.

If he were made a party plaintiff and the plaintiffs recovered, the right to the possession would still be undetermined between him and the original plaintiff. Or else it would be necessary in the course of the trial to decide upon the respective rights of the co-plaintiffs, thus having a trial within a trial and making a multiplication of issues likely to confuse a jury. This we think would not be convenient.

If he were made a defendant and the plaintiff should recover, his rights would be determined along with those of his co-defendants.

If, however, the defendants should have judgment, it would still remain to be determined whether he or the original defendants was entitled to the possession.

We are unable to perceive therefore how any convenience would be attained by allowing Isler to become a party to the present action. His claims will not be prejudiced by its result whatever that may be, nor are they by its pendency. These views are substantially those held in *Smitherman* v. *Saunders*, 70 N. C. 270.

The Judge did not err in excluding Isler.

PER CURIAM. Judgment affirmed.

J. J. LANSDELL, Admr. *de bonis non.* v. C. S. WINSTEAD.

Administrator -- Account and Settlement -- Practice.

1. In an action against an administrator for an account and settlement where no final account appears to have been had, it is the intendment of the law that no final judgment or decree was ever rendered in such action.
2. An action brought by an administrator d. b. n. against a surety on the bond of a former administrator d. b. n. of the same estate for assets wasted by him, is properly brought in the name of the last administrator. The next of kin cannot call for an account and settlement without having an administrator before the Court.

(*Taylor* v. *Brooks*, 4 D. & B. 139; *State* v. *Johnson*, 8 Ire. 397; *State* v. *Britton*, 11 Ire. 110; *State* v. *Moore*, *Ibid*, 160; and *Conrad* v. *Dalton*, 3 Dev. 251, cited and approved.)

CIVIL ACTION, brought by plaintiff against defendant as Surety upon the Bond of one John G. Dillihay, Administra-

tor *de bonis non* of George T. Fulcher, tried at Fall Term, 1876, of PERSON Superior Court, before *Kerr, J.*

The facts appear in the opinion. The defendant filed a demurrer to the plaintiff's complaint, which His Honor sustained and gave judgment that the action be dismissed. Appeal by plaintiff.

Mr. E. G. Haywood, for plaintiff.

Messrs. Graham & Ruffin, for defendant.

BYNUM, J. The case is before us on two questions raised by the demurrer to the complaint.

I. Is a sufficient cause of action set out in the complaint? George T. Fulcher died intestate in 1860, and Eliza Fulcher administered upon his estate. Having partly administered, Eliza died in 1861, and John G. Dillihay became administrator *de bonis non* of the estate of G. T. Fulcher and gave the usual bond with the defendant, Winstead, as surety thereon; and this is the bond now in suit. Dillihay collected a note of $1,010 belonging to the estate and having wasted the money he died insolvent and the present plaintiff then became administrator *de bonis non* of the same estate, and brings this action upon the administration bond of his immediate predecessor, Dillihay.

It further appears that in 1867, one Beaver and wife Lucinda Beaver, filed a petition in the County Court of Person, against Dillihay as administrator *de bonis non* of G. T. Fulcher, praying for an account and settlement. He answered admitting that he was the administrator of *Eliza* Fulcher and submitted to an account. "An account was found among the papers in the said cause, charging Dillihay with $100, for property sold belonging to the estate of *Fulcher.*" The complaint further alleges that this account and charge of $100 was not an account of the estate of G. T. Fulcher,

but of the estate of Eliza Fulcher, Dillihay being also the administrator of her estate, and as such, having sold some of her property, but never having sold any of the estate of G. T. Fulcher. In further explanation the complaint alleges that the sum of $1,010 for which this action is brought was money collected by Dillihay on a note payable to Eliza Fulcher as administratrix of G. T. Fulcher and a part of his estate and wasted by him.

The foregoing are the facts admitted by the demurrer and from them no conclusion can be drawn that the account found among the papers in the case, related to the estate of G. T. Fulcher rather than to the estate of Eliza. But whether it related to the one or the other it neither appears that it was a final account confirmed by the Court, nor that the amount has ever been paid. As demurrers are not favored, the intendment of the law is that no final judgment or decree was ever rendered in the action of Beaver and others for an account or that any such action is now pending. Nothing therefore appears which can operate as an estoppel to prevent the action.

II. It is next insisted that the action can be maintained only in the names of the next of kin and not in the name of the administrator *de bonis non*. Wasting an estate is not administering it. An administration can be effected only by collecting the assets, paying the debts and making a final distribution of the surplus among the next of kin. If an administrator dies before this is done, an administrator *de bonis non* must be appointed and so on *ad infinitum*, until a final settlement and distribution of the estate are made. The assets which were wasted by Dillihay were unadministered and can be administered after his death only through an administrator *de bonis non* in whose name only can they when recovered be subjected to the demands of creditors and the claims of the next of kin. The rule is therefore inflexible that the next of kin cannot call for an account and distribu-

tion of an intestate's estate without having an administrator before the Court. The action is in the name of the proper party. *Taylor* v. *Brooks*, 4 Dev. & Bat. 139; *State* v. *Johnston*, 8 Ire. 397; *State* v. *Britton*, 11 Ire. 110; *State* v. *Moore*, 11 Ire. 160; *Conrad* v. *Dalton*, 3 Dev. 251.

There is error.

PER CURIAM. Judgment reversed.

LEWIS D. GAY and wife and others v. MARY E. STANCELL and others.

Practice -- Former Judgment.

Where a fact has been decided in a Court of Record, neither of the parties shall be allowed to call it in question and have it tried over again, as long as the judgment stands unreversed; *Therefore*, in an action against the defendant to recover possession of a tract of land which had been allotted to her as dower in an action theretofore had between herself and the plaintiffs herein; *Held*, that the plaintiffs were estopped by the judgment in the former action.

(*Armfield* v. *Moore*, Busb. 157, cited and approved.

CIVIL ACTION, tried at Spring Term, 1876, of NORTHAMPTON Superior Court, before *Watts*, *J.*

The subject matter of this controversy was a tract of land which belonged to Green Stancell who died in said County in the year 1862, leaving a last will and testament. No executor being named therein, the plaintiff Lewis D. Gay and one Samuel T. Stancell were appointed administrators with the will annexed. The testator directed his lands to be sold and the proceeds to be divided between his children then

living and the issue of a deceased daughter, the latter to take the share of their mother.

Under this power the administrators sold the land at public sale on 22nd December, 1862, and W. W. Peebles became the purchaser in the sum of $3,282 84, obtained a deed on 17th January, 1863, and on the same day reconveyed the land to Samuel T. Stancell. No money was paid by either of the parties in consideration of the purchase of the land and execution of the deeds as aforesaid but the transaction was had by virtue of a verbal agreement between Gay, Stancell and Peebles, that Peebles should bid off the land for Stancell. In their account of sales returned to Court the administrators stated that Samuel T. Stancell was the purchaser of said land.

Subsequently judgments were recovered at the instance of creditors in the United States Circuit Court against said Samuel T. Stancell, upon which execution issued and said land was sold by the U. S. Marshal and Robert H. Stancell (one of the plaintiffs) became the purchaser, obtained a deed from the Marshal and reconveyed to Samuel T. Stancell who remained in possession of said land from the date of the said administrators' sale, December 22, 1862, until his death in the year 1872 He left no children or the issue of such. Robert H. Stancell was appointed administrator of said Samuel and is one of the parties plaintiff in his own right and as administrator aforesaid.

The defendant, widow of said Samuel T. Stancell shortly after his death instituted proceedings against the plaintiffs, his heirs at law, for dower in said land, alleging seisin in fee in her said husband and also that said land had descended to the plaintiffs in this action as heirs at law of her intestate husband.

In said proceeding for dower, two of the defendants (now plaintiffs in this action,) Samuel E. and Mattie D. Long were minors and represented by a guardian *ad litem.*

Upon this statement of facts His Honor adjudged that the plaintiffs were not estopped or concluded from asserting title to said land and gave judgment that they were entitled to recover. Appeal by the defendant.

Mr. D. A. Barnes, for plaintiffs.
Messrs. Smith & Strong, for defendants.

BYNUM, J. The land in dispute belonged to one Green Stancell who died in 1862, leaving a last will and testament wherein he directed the land to be sold and the proceeds to be divided between his children and two grand children, who were to take the share of their deceased mother. One of the children (Samuel T. Stancell) and Lewis D. Gay became the administrators with the will annexed and under the power in the will, sold the land which by agreement was bid off by W. W. Peebles, who received a deed therefor and shortly afterwards conveyed the land to the administrator, Samuel T. Stancell, no consideration passing between them. The land was subsequently sold for the debts of Samuel and bid off by his brother Robert who reconveyed to him. But this latter sale is immaterial to the question presented. Samuel T. Stancell held possession of the land from his purchase in 1862 until his death in 1872. He left a widow but no children, and the plaintiffs are his heirs at law and also the heirs at law and devisees of Green Stancell, the testator.

The defendant, Mary, the widow of Samuel T. Stancell, instituted legal proceedings against the plaintiffs, the heirs at law of her intestate husband, for the recovery and assignment to her of dower in the lands of which her husband died seized; and therein alleged seisin in fee in the intestate at his death in the land claimed in this action and that the same at his death descended to his heirs at law, the

plaintiffs who were all made parties to the proceedings. Such action was had in these proceedings that the land in controversy was duly allotted and assigned to her as her dower. The plaintiffs now bring this action against the widow to recover the land as the heirs at law of Green Stancell. She sets up the proceedings and judgment in the suit for dower, as an estoppel and bar to this action; and whether the judgment is an estoppel, is the question.

The maxim is *Nemo bis vexari debet pro una et eadem causa* and is the counterpart of the rule in the criminal law, that no one shall be twice brought in jeopardy of life or limb. Hence the judgment of a Court of competent jurisdiction may be relied on as an estoppel in any subsequent case founded upon the same cause of action; and it is immaterial whether the cause of action in which the judgment was given, was the same in the subsequent action or not. The rule is that a point once determined between the parties, or those under whom they claim, may be relied upon as an estoppel in any cause of action that may be thereafter tried. Bigelow on Estoppel, *Introduction*. It is essential, however, that the point should be the same in both cases. But when a fact has been decided in a Court of record, neither of the parties shall be allowed to call it in question and have it tried over again as long as the judgment stands unreversed.

When the defendant, Mary E. Stancell, filed her petition for dower, it was necessary for her to allege that her husband died seized of the premises in fee simple and to bring the heirs at law into Court, as parties to the action. Upon the death of the husband, the lands descended to his heirs at law, and the very purpose of the law in requiring them to be made parties defendant, is that they may litigate their rights and have a judicial determination of the title. The right of dower depended upon the title. The defendants in the action for dower were called upon to contest the title of the intestate or to set up their own, if they had an ad-

verse one. The litigation resulted in a judgment for the widow. Whether the heirs set up any claim of title under Green Stancell, does not appear; if they did, the judgment of the Court was adverse to the claim; if they did not, they had the opportunity which the law provides for their protection and they failed to avail themselves of it; and in either case the judgment is against them as *res adjudicata* and is conclusive between the same parties in this action. The case is not distinguishable from *Armfield* v. *Moore*, Busb. 157. There James Moore, Jane Moore and Elizabeth Carns, filed a petition for partition of four slaves which they alleged that they held as tenants in common. Such proceedings thereupon were had, that the slaves were divided among them. Jane Moore sold hers to Armfield, out of whose possession the negro was afterwards taken by James Moore. Armfield brought an action of replevin against James, who defended upon the ground that Jane Moore was not in fact entitled to a third of the slaves as tenant in common at the time of the partition and in truth was entitled to no share at all, but that that third sold by her to Armfield belonged to James Moore, as the administrator of her husband, Milton Moore. But the Court held that the judgment between the parties in the partition concluded their rights and estopped James Moore from setting up title not only in his own right but also *en autre droit*, as the administrator of Milton Moore, in which right, but for the judgment, he was clearly entitled to recover. As James Moore in the action of replevin was estopped in both rights, personally and as administrator, so here the plaintiffs, who were all defendants in the proceedings for dower, are estopped by the judgment there rendered, not only as the heirs at law of Samuel T. Stancell, but also as the heirs at law of Green Stancell under whom they now claim. So where it appeared that the plaintiff had some years before erected buildings on his wife's land, upon her death her heir at law recovered judgment for the land

and entered into possession under the judgment. The plaintiff subsequently brought suit against the heir to recover the value of the buildings. But the action was not sustained, upon the ground that it was the plaintiff's duty in the former action to defend and protect all his rights. The judgment and possession were a bar to the suit. *Doak* v. *Wiswell*, 33 Maine, 355. Big. on Estop. 99, 103. The ground of the rule, that in a subsequent action you are not permitted to go behind the judgment deciding the same point between the same parties, is that otherwise there would be no end of litigation. It may sometimes operate apparent hardships, but not more so than statutes of limitation and other rules of repose, the necessity and convenience of which all acknowledge. *Duchess of Kingston's case*, 2 Smith L. C. 435 (note). It would appear from the case stated, that the lands of Green Stancell so purchased by Samuel, had never been paid for by him, and that the plaintiffs had received no part thereof as directed by the will. Taking that to be so, two courses of action were left open to the plaintiffs. One treating the sale as void by a direct proceeding to vacate and set aside the judgment in the action for dower and asking for a sale and division pursuant to the terms of the will. The other ratifying the sale by a proceeding to enforce the payment of the purchase money and as ancillary thereto, asserting a lien upon the land. Whether they can now put themselves in a situation to do either, does not sufficiently appear in this case. In no point of view can the plaintiff recover in this action which is brought to recover the land itself. If they claimed as heirs of Samuel T. Stancell, the widow would be entitled to the dower assigned to her. If they claim as the heirs of Green Stancell apart from the estoppel, they are not entitled to recover the land still, as by express provisions of the will they are entitled only to the proceeds of the sale of the land to be divided among them as therein directed.

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

PER CURIAM. Judgment reversed.

STATE ex rel. J. N. D. WILSON, Guardian, v. H. M. HOUSTON, Admr. and others.

Parties -- Action by Guardian.

Where an action is brought by a guardian upon the bond of a former guardian, to which bond the plaintiff guardian is surety, it is necessary that the wards of the plaintiff shall be made parties plaintiff and a *prochein ami* appointed to protect their interests.

CIVIL ACTION, tried at Fall Term, 1876, of CABARRUS Superior Court, before *Schenck, J.*

The action was brought on a Guardian Bond executed by the intestate of defendant, to which the plaintiff guardian was one of the sureties.

Before this action was commenced the plaintiff guardian demanded of the defendant's intestate a settlement of the estate of his wards, and asked that an account be taken, &c.

The defendants demurred to the complaint and assigned as cause:

1. That plaintiff has not legal capacity to sue in this, that he is the plaintiff in this action and one of the sureties of the bond sued on.

2. That there is a defect of parties, in this, that the wards should be made parties plaintiff.

3. That the complaint does not state facts sufficient to constitute a cause of action, that a copy of the bond referred to is not appended thereto, and that no breach of said bond is assigned.

His Honor overruled the demurrer and the defendants appealed.

Mr. W. J. Montgomery, for plaintiff.
Messrs. Wilson & Son, for defendants.

READE, J. The plaintiff guardian is one of the obligors in the bond sued on, it being the bond of a former guardian of the plaintiff's wards. So that while the plaintiff is interested to effect a recovery for his wards, he is interested to defeat a recovery against himself or which may enure against himself.

This action could not be sustained at law; and even in equity where it might be sustained, it would be necessary to have the interests of the wards protected by a disinterested person other than the plaintiff guardian.

So much of the demurrer as raises this point is sustained. And the case is remanded, to the end that the wards may be made parties plaintiff and a *prochein ami* be appointed to protect their interests.

There is error. Case will be remanded. Costs in this Court will be paid by plaintiff.

PER CURIAM. Judgment accordingly.

ELIZA BLANKENSHIP and others v JAMES HUNT.

Parties--Action by Personal Representative.

An action upon a note executed to a deceased person during his life-time for land sold by him, should be brought in the name of his personal representative.

CIVIL ACTION, tried at Spring Term, 1876, of RUTHERFORD Superior Court, before *Schenck, J.*

The plaintiffs are the widow and heirs at law of one William Blankenship, who previous to his death executed a deed for certain lands to the defendant in consideration of about $1,500, the greater part of which remains due and unpaid, as appears by notes of defendant. The plaintiffs insisted that said deed conveyed only a life estate, and by the terms thereof, the title remained in said Blankenship and his heirs until all the purchase money was paid and demanded that said deed be surrendered, the land be sold and the proceeds applied to the payment of the purchase money, &c.

The defendant demurred to the complaint and assigned as cause:

1. That the action should have been brought by the personal representative of the deceased.

2. That said deed conveys to defendant, either an estate in fee, or for the life of defendant, and that the same has been paid for by him in money and notes and that he is in possession of said land.

His Honor held that defendant was entitled to judgment upon said demurrer, and adjudged that plaintiffs pay the costs of the action. From which ruling the plaintiffs appealed.

Mr. D. G. Fowle, for plaintiffs.

Messrs. W. J. Montgomery and *M. H. Justice*, for defendant.

BYNUM, J. It is unnecessary to decide what estate in the land was passed to the defendant, by the deed of W. W. Blankenship. He certainly should be content with his title, if he claims to have the fee simple. The notes for the land were executed by the defendant to Blankenship, and upon his death, they devolved upon his personal representative.

They can be collected by suit only in the name of the administrator.

The plaintiffs who are the wife and children of the intestate, have no interest in the notes or their proceeds, legal or equitable, until the debts and liabilities of the estate are discharged and there shall remain a surplus for distribution. How that will be, there is no allegation or proof. Why the notes were not sued on by an administrator of the estate it is hard to conceive. The defendant is not entitled to a homestead as against the debt for the purchase of the land; on the contrary the land is liable to sale under execution for the debt, at least all the estate which the defendant acquired by the deed. Whether the estate is a fee simple or a life estate, we not decide. Whatever it is, it is a legal estate unaffected by any trust for the benefit of the plaintiffs under which they can enforce a sale by a decree of this Court, according to the prayer of the complaint. The demurrer must therefore be sustained upon both grounds.

There is no error.

PER CURIAM. Judgment affirmed.

MARY A. PHŒBE v. EPHRAIM BLACK and others.

Parties -- Appearance -- Trustee and Cestui que Trust.

1. No one can prosecute or defend an action except in person or by an attorney authorized by some writing.
2. But a *cestui que trust* in prosecuting an action for his equitable property is entitled to make his trustee a party and avail himself of the legal estate in such trustee.
3. If such trustee voluntarily makes himself a party plaintiff to sustain some interest of his own, no one can represent him without authority in writing and he must give a prosecution bond. If however he is made a party plaintiff by his *cestui que trust*, without his consent, no authority from him to prosecute is necessary and no prosecution bond can be required of him.
4. A Court has no power to permit a *cestui que trust* to make his trustee a party plaintiff without his consent, except *upon notice to him* and an adjudication that he is a trustee.

CIVIL ACTION, tried at Fall Term, 1876, of LINCOLN Superior Court, before *Schenck, J.*

The plaintiff brought this action to recover a tract of land which had belonged to one Marcus Harvy. James J. Sample the agent of said Harvy conveyed the same by deed to John B. Harvy, the grantor of the plaintiff.

The decision made in this Court however is based upon an amendment made to the proceedings in the Court below and a motion to dismiss the suit as to Marcus Harvy—a non-resident of said County—under the facts and circumstances set out in the opinion delivered by Mr. Justice RODMAN. His Honor ruled for the defendants and the plaintiff appealed.

Mr. J. F. Hoke, for plaintiff.

Messrs. Montgomery & Cobb and *Shipp & Bailey*, for defendant.

PHŒBE *v.* BLACK.

RODMAN, J. This action is to recover land. The plaintiff having given as surety to her prosecution bond one who was held insufficient was allowed upon affidavit of her poverty, &c. to continue her action without further surety and as a pauper. At Spring Term, 1876, she made oath that the land in controversy had belonged to Marcus Harvy whose Attorney, one Sample, had undertaken to convey it to John B. Harvy (from whom she bought) but from ignorance or mistake had made and signed the deed of conveyance in his own name instead of in that of his principal who nevertheless received the money and thus was a trustee for her. She thereupon moved to amend her complaint by making Marcus Harvy a plaintiff to her use. This the Judge allowed and the amendment was made. The defendants then claimed that plaintiff's counsel had no right to represent said Harvy without a power of attorney from him which it was admitted they did not have. The defendants also moved to dismiss the action of Harvy for want of a prosecution bond there being no proof of his poverty.

The Judge was of opinion with the defendants on both motions and dismissed the action of Harvy, leaving it to stand in the name of Phœbe as plaintiff. As the principles which apply to both motions are substantially the same we may conveniently consider them together.

The general rule is not disputed. No one can prosecute or defend an action except in person or by an Attorney authorized by some writing

A *cestui que trust* may however prosecute an action in the name of his trustee as plaintiff if it be necessary to do so. For example; under the law before the Code, the assignee (as distinct from the endorsee) of a bond or note was compelled to bring his action at law in the name of the payee. But if the trust was admitted by the payee or had been determined by a Court of Equity, no power of attorney from

such nominal plaintiff could be required; nor any prosecution bond, that given by the *cestui que trust* standing in its place. Under the present law every *cestui que trust* in prosecuting an action for his equitable property is entitled to make his trustee a party and to avail himself of the legal estate in such trustee. In general it would not be material whether such trustee were a plaintiff or defendant. But if there be any case in which it is material that he should be a plaintiff (as perhaps there may be where there is an express trust) the Court on proof of the trust can compel him to allow his name to be used as such upon his receiving a bond of indemnity from costs from his *cestui que trust*. The distinction is this; if a trustee voluntarily makes himself a plaintiff to sustain some interest of his own no one can represent him without authority in writing and he must give a prosecution bond. If one claiming to be a *cestui que trust* makes a supposed trustee a party without his consent which can only be done by order of Court and after due notice to him and opportunity of defence to the motion, in such case no power of attorney to prosecute and no prosecution bond can be required. The reason is obvious.

A Court may dismiss an action unless it appears that the Attorney has authority to bring it, or for want of a prosecution bond. But no Court can compel a man *specifically* to give a power of Attorney or a prosecution bond. And where the trustee is a naked trustee, without interest, to dismiss his action for want of one or the other, is to refuse a remedy to the *cestui que trust* who is the only plaintiff in interest.

To apply these principles to the present action. Harvy if a trustee at all was a naked trustee, and the Judge had no power to allow the plaintiff Phœbe to make him a plaintiff either in her stead or with her, without his consent and *without notice to him* and an adjudication that he was a trustee which, however, supposing he had been duly served with

process and notice, might be made at any convenient stage of the case.

Evidently his rights might be prejudiced by an adjudication that he was a trustee in his absence. The plaintiff Phœbe, however, could attain all she desired by bringing in Harvy as a defendant, by service of process by publication or otherwise according to the circumstances. If on being so brought in, he admitted the trust, or if it were adjudicated against him, his name could be inserted in the complaint as plaintiff along with that of Phœbe, if from any reason that was thought necessary or convenient. In such case no power of attorney to *prosecute the action* could be required from him and no prosecution bond. The permission granted to Phœbe to sue as a pauper would extend to a trustee for her, brought in without his consent although he was not a pauper.

We think therefore the Judge was right in dismissing the action as to Harvy ; but the plaintiff may still bring him in by process and if he admits the trust, he may then be made a plaintiff if necessary ; or if he denies it, she may litigate that question with him, and then try the issue of title with the defendants.

The judgment is affirmed and the case remanded to be proceeded in according to law. Let this opinion be certified.

PER CURIAM. Judgment affirmed.

BURWELL & PARHAM v. EDWARD LAFFERTY.

Attachment -- Order of Publication -- Service of Summons.

In a proceeding by attachment, where the order for publication was for four weeks instead of six, and no order was made to deposit a copy of the summons and complaint in the post-office directed to the defendant nor was such deposit made, the attachment should be vacated.

(*Spiers* v. *Halsted*, 71 N. C. 209, cited and approved.)

ATTACHMENT, granted December 27, 1875, at Chambers in Franklinton, by *Watts, J.*

The plaintiffs alleged that the defendant was indebted to them in the sum of $381.43 and had removed from this State to Canada to avoid the service of legal process. For irregularities in the proceedings in the Court below the substance of which is stated in the opinion, the case was not decided upon its merits. No further statement of the facts is deemed necessary.

Judgment for plaintiffs. Appeal by defendant.

Mr. W. H. Young, for plaintiffs.

Messrs. Moore & Gatling and *C. A. Cook*, for defendant.

FAIRCLOTH, J. It would be tedious to mention all the defects and irregularities of the proceedings on which the judgment was rendered in this case. There was no personal service of the summons nor any by publication as required by C. C. P. ch. 17, § 84. The order for publication was for four weeks whereas the statute requires six weeks and although it appears from the affidavit that the residence of the defendant was known, no order was made to deposit a copy of the summons and complaint in the post office directed to the defendant as required by said section nor was such deposit in fact made. The case of *Spiers* v. *Halsted*, 71

N. C. 209, is decisive of this case. This Court has so repeatedly defined the modes of proceeding in attachments that it is not necessary to repeat them here.

The defendant's motion is to vacate said judgment which His Honor refused. We think it should have been allowed.

There is error.

PER CURIAM. Judgment reversed.

THOMAS P. HAYWOOD, Admr. v. ROBERT W. HARDIE.

Attachment--Costs and Expenses of--Incompetency of Witness.

1. Where an attachment against A is levied upon the goods of B. which being perishable are sold by the Sheriff, and B interpleads in the action and recovers judgment. *Held*, that the costs and expenses of the attachment, sale, &c., are not properly chargeable against the fund arising from such sale.

2. In such case, after the death of B. the Sheriff is not a competent witness as to any communication made to him by B.

CIVIL ACTION, to recover Damages, tried at January Special Term, 1876, of CUMBERLAND Superior Court, before *Buxton, J.*

This action was commenced on the 6th of June, 1870, by one Moses Haywood, the intestate of plaintiff. The complaint alleged that the defendant, Sheriff of said County, had seized and sold certain goods of said intestate. The answer denied that intestate was the owner of the goods, and justified the seizure by an attachment in the hands of said Sheriff, against one E. L. Phillips. The defendant alleged

that he was induced to believe that said goods belonged to Phillips by the acts and declarations of Haywood and that being perishable property he sold the same according to law, after obtaining a bond of indemnity from the plaintiff in the attachment. Under a reference to the Clerk of said Court, he reported the amount of sale to be $2,544.56, and no exception being taken thereto, the report was confirmed.

It appeared from the record of the suit in which said attachment was granted, that W. Devries & Co. were plaintiffs and said Phillips, defendant. The plaintiff's intestate, Moses Haywood, interpleaded in that suit, claiming the property as his own, and on appeal to this Court it was decided in favor of said Haywood, (64 N. C. 83.) who subsequently received of the Sheriff $2,250 of the proceeds of the sale of the goods attached, leaving a balance of $294.56 in the hands of the Sheriff.

Out of the last mentioned sum, the Sheriff paid a freight bill of $13.50, and the plaintiff in this action asked for judgment for balance, $281.06 with interest.

The defendant replied that this amount had been applied in payment of expenses, costs, &c., and insisted that the plaintiff had already been paid, as set forth above, and was not entitled to recover.

Under the instructions of His Honor the jury rendered a verdict for plaintiff. Judgment for 281.06, interest, &c. Appeal by defendant.

Messrs. Neill McKay, N. W. Ray and *J. W. Hinsdale*, for plaintiff.

Messrs. B. Fuller and *Merrimon, Fuller & Ashe*, for defendant.

READE, J. Devries & Co. sued out an attachment against Phillips, and the defendant as Sheriff levied the attachment

on goods which he supposed to be Phillips, but which were in fact the property of Moses Haywood, who was plaintiff's intestate. After the levy Moses Haywood interpleaded that the goods were his and was made a party; and the interplea was found in his favor. In the meantime the defendant Sheriff had sold the goods, the same being perishable, for the sum of $2,544.56; and in the same suit it was referred without objection, to ascertain the value of the goods; and the referee reported that the amount of the sale was the value, $2,544.56; and there being no exceptions to the report, Moses Haywood recovered that sum and the defendant Sheriff paid Moses Haywood $2,250 and refused to pay the balance $294.56, because he says he expended $13 50 for ocean freight, which sum was allowed and reduced the balance to $281.06 and that this balance he had expended in and about the sale.

We are of the opinion that he was not entitled to retain for the expenses of the sale, because it was his own wrongful act to take Haywood's goods and sell them.

It would be monstrous if one man could take the property of another against his will and sell it and charge for doing it. Nor is the matter altered by the fact that the defendant was Sheriff; because he had the right to require an indemnity from the plaintiff Devries & Co. as in fact he did.

In order to show the amount of the defendant's liability the plaintiff introduces the record of the suit between Devries & Co. and Phillips and Haywood's interpleader, containing the defendant's official levy and sale. To this the defendant objected. We think it was competent for the purpose for which it was offered.

The defendant offered to prove by his own oath that the plaintiff's intestate induced him, by something that he said, to levy on the goods as the property of Phillips.

We think this was properly refused him under our statute

which forbids a party to testify as to a transaction between himself and the intestate of the other party.

There is no error.

PER CURIAM. Judgment affirmed.

MARY A. MOSBY v. M. C. HODGE.

Mortgage Deed -- Power of Sale.

Powers of sale in mortgage deeds are looked upon by the Courts with extreme jealousy and whenever there is a controversy between the parties as to the amount due or other complication, the Court will require the foreclosure to be made under judicial direction and after all controverted matters have been adjusted and the balance due fixed.

(*Whitehead* v *Hellen*, *ante* 99; *Kornegay* v. *Spicer*, *ante* 95, cited and approved)

MOTION to dissolve an Injunction, heard at Chambers in RALEIGH, on the 13th of October, 1876, before *Watts*, *J.*

The action was commenced in the Superior Court of Warren County, and the plaintiff obtained an order restraining the defendant from selling certain lands under a power contained in a mortgage deed.

The facts stated by the CHIEF JUSTICE in delivering the opinion of this Court are sufficient to an understanding of the points decided.

His Honor in the Court below, upon the pleadings and affidavits of the parties, ordered that the Injunction be dissolved and that the defendant be allowed to proceed according to the terms of the mortgage. From which ruling the plaintiff appealed.

Messrs C. A. Cook and *W. W. Jones*, for plaintiff.
Messrs. Badger & Devereux, for defendant.

PEARSON, C. J. In *Whitehead* v. *Hellen* and *Kornegay* v. *Spicer*, decided at this term, the practice of inserting in a mortgage a power of sale by the mortgagee is fully discussed and it is held that such powers are looked upon by the Courts with extreme jealousy, because the mortgagor is thereby put entirely in the power of the mortgagee.

The exercise of the power is only allowed in plain cases when there is no complication and no controversy as to the amount due upon the mortgage debt and the power is given merely to avoid the expense of foreclosing the mortgage by action; but that when there is such complication and controversy, the Court will interfere and require the foreclosure to be made under the direction of the Court, after all the controverted matters have been adjusted and the balance due is fixed, so that the property may be brought to sale when purchasers will be assured of a title and not be deterred by the idea that they are "buying a law suit." That doctrine disposes of this motion to dissolve the injunction upon complaint and answer.

Here the matter is much complicated and the balance due is not ascertained but is the subject of serious controversy.

The deed calls for 750 acres of land which the plaintiff avers is the true quantity. The defendant avers it contains only about 400 acres.

The plaintiff avers that the $675 ought to be applied to the mortgage debt. The defendant avers that it has been applied to pay the note of $175 mentioned in the pleadings and $26 for expenses incurred in attempting to make the sale on the 6th of May, 1876, leaving only a balance of $216.26 to be credited on the mortgage debt.

The plaintiff avers that under the Act of 1866, she was not bound to pay the note of $175 which was given as usu-

rious interest when the debt was originally contracted and that she was required to pay this note as a consideration for the forbearance given in May, 1876, which made the transaction usurious and subjected the defendant to a forfeiture to her as the person suing for the same of $5,000 under the Act of 1874–'5, and she claims the excess after discharging the mortgage debt by way of counter claim.

The defendant avers that the note of $175 was not secured by the mortgage, (I confess I am unable to see the force of that) and as it has been paid the Act of 1866 does not bear on it and that he is not chargeable with usury under the Act of 1874-'5 for after that, the mortgage debt only bore 8 per cent interest, and says nothing to the allegation that in order to get the forbearance the plaintiff was required to pay the note of $175 for which she was not bound, but charges fraudulent misrepresentation on the part of Little the surety and agent of plaintiff.

All of these matters show that if the defendant is allowed to sell under his power set out in the mortgage the land cannot bring anything like a fair price and that under "the cloud" he will be the only bidder and will get an absolute title at a nominal price by reason of the right which is given to him in the mortgage deed to bid for the land and acquire an absolute estate.

We will remark that this is an unusual clause in the power of sale; had he been allowed to bid in and hold the land upon the same trust, it would have been well enough to prevent the land from being sold at a sacrifice; but when to this is added, that by force of his bid, he is to become the absolute owner, it is apparent that he took advantage of a necessitous person and imposed oppressive terms.

There is another ground upon which His Honor ought to have continued the injunction until the hearing. Under the old equity practice, "a common injunction" was dissolved when the answer was responsive and denied the equity

of the bill; but "a special injunction" was continued until the hearing, whenever the answer set out facts, showing that the plaintiff had probable ground to support an equity so as to leave the matter in doubt, treating the bill and the answer as affidavits.

This is "a special injunction." If the defendant is permitted to sell the land under his power, the plaintiff will be turned out of house and home, and the defendant will still hold the balance of his debt over her. In the language of the complaint, "it will result in irreparable damage, if not her entire ruin." Whereas, so far as concerns the defendant, it will only result in a short delay of the collection of his "monies," as Shylock says, for which he has the additional security of $500 injunction bond.

We put out of view the consideration that by not allow the defendant to sell, he will be disappointed in his calculation of being able to buy the land for less than its value, for that would be an unconscientious gain and we are not at liberty to impute such a motive to him.

There is error in the order dissolving the injunction. There will be an order continuing the injunction until final hearing; and the Court below will direct a reference to the Clerk, to report the amount due on the mortgage debt; and upon the coming in of his report, the questions of usury under the Act of 1866 and under the Act of 1874-'5, can be presented on exceptions. There will also be an order that the Clerk cause the land to be surveyed, so as to fix the number of acres, and upon the confirmation of those reports, there will be a final decree for a sale by the Clerk of that Court.

Error.

PER CURIAM. Judgment accordingly.

WILLIAM BROWN and others v. WILLIAM COBLE and others.

Practice -- Sale Under Decree of Court -- Description of Land -- Joinder of Action.

1. It does not require an order of Court to authorize the *bona fide* receipt of money by a Clerk and Master upon a bond before its maturity, given for the purchase of land at a sale under decree of Court which has been duly confirmed.
2. After the payment of the purchase money for land sold under decree of Court an order of Court is not necessary to enable the Master to make a valid deed to the purchaser. In such case, however, the Master and purchaser take upon themselves the risk of determining that the case is one in which such an order would be fit and proper.
3. "That John Brown, the ancestor of the petitioners died seized and possessed of a tract of land in said County of Guilford, on the waters of 'Stinking Quarter' adjoining the lands of ————," is not so defective a description that it may not be possible to identify with certainty the land meant.
4. A claim for the recovery of real estate which has been sold under decree of a Court of Equity can not be joined in the same action with a claim against the Clerk and Master for the purchase money.

(*Broughton* v. *Haywood*, Phil. 389; *Dockery* v. *French*, 73 N. C. 420, cited, distinguished and approved.)

CIVIL ACTION, tried at Spring Term, 1876, of GUILFORD Superior Court, before *Kerr*, *J.*

This suit was instituted to recover a tract of land, which had been sold by the late Clerk and Master, under a Decree of the late Court of Equity for said County, made at Fall Term, 1862, in a proceeding for partition, on a credit of twelve months, when one W. E. Goley became the purchaser at $1,575 and gave bond and security for the payment thereof. The money—Confederate currency—was paid before it was due and thereupon the Master executed a deed to the purchaser.

After Goley's death, the said land was sold by order of the County Court for assets, when Ferebee Goley his widow became the purchaser, obtained a deed and conveyed to the defendant William Coble.

It did not appear that there was any order of the Court of Equity to collect and distribute the proceeds of sale, or to execute a deed for the land.

The original petition for the sale of said land for partition and the papers in the case in said Court of Equity were transferred by the petitioners therein, who are the present plaintiffs, to the Superior Court, on January 3, 1872, and at December Term, 1873, of said Court, they moved for judgment against the sureties on the bond of the purchaser (Goley.)

The docket of said Court did not show that any disposition of the case had been made under said motion.

The plaintiffs demanded that the deed from the Clerk and Master to Goley be cancelled and that they be let into possession of the land; or if upon consideration of the whole case the Court should be of opinion that they were not so entitled, then in that event they demanded judgment against the administrator of the late Clerk and Master for the value of the money received by his intestate.

The defendants insisted that under the proceedings had they were entitled to the said possession.

Upon the issues submitted and under the instructions of His Honor, the jury rendered a verdict for defendants. Judgment. Appeal by plaintiffs.

Messrs. Scott & Caldwell, for plaintiffs.
Messrs. Dillard & Gilmer, for defendants.

RODMAN, J. It is argued for the plaintiffs that Goley who purchased at the sale by the Master on 13th December, 1862, acquired no title, because the Court of Equity never

ordered the purchase money to be collected and never ordered a deed to be made to the purchaser.

1. When a Court orders a sale on a certain credit, as of twelve months in this case, and a sale is so made and the bond of the purchaser is taken payable at the end of the credit given, and the sale is confirmed, the Master is authorized by a necessary implication to receive the money when it falls due; for it is the right of every debtor to pay at that time. It is not his right to pay before. The creditor, however, may waive his right and consent to receive payment before maturity. A Clerk and Master may do this without an order of the Court; or at least if he does it, he and the sureties to his bond become liable for the sum received. This was decided in *Broughton* v. *Haywood*, Phil. 380.

In this case as the full amount of the note was paid without discount the prepayment did not damage the plaintiffs.

No question has been made as to the effect of the payment having been made in Confederate currency and therefore no observations are necessary on it.

There is no allegation that the payment was fraudulently made as in *Dockery* v. *French*, 73 N. C. 420.

2. An order that the Master make a deed to the purchaser is not necessary *after the payment of the purchase money* and a deed made without such order passes the title. The withholding of the title can have no other object *after the sale has been confirmed*, than to secure the purchase money and when that is paid, the purchaser, in the absence of special circumstances, has an absolute right to a conveyance of the legal estate. Such an order is both usual and proper. But ordinarily when the money has been paid and there is no special reason making it unfit, it is an order of course. Its advantage is that it is an adjudication of the Court that it is in all respects a fit case for such an order, binding the parties to the action and protecting the Master and the purchaser.

Without such an order the Master and the purchaser take on themselves the risk of determining that the case is one in which such an order would be fit and proper.

If the case be really such, then the order being of course will be presumed to have been made and its actual entry of record is unnecessary.

In the present case no fact is stated and no reason is assigned why the order would not have been of course, at any time since the payment of the money, and why it should not be so now.

3. The plaintiffs further contend that the deed to Goley did not convey any title to him, because the description of the land in the petition for partition was too indefinite. That part of the petition which describes the land is as follows; "That said John Brown (the ancestor of the petitioners) died seized and possessed of a tract of land in said County of Guilford, on the waters of 'Stinking Quarter,' adjoining the lands of ————." The order of sale only describes it as "the said land." The description in the deed from the Master is by metes and bounds, and the deed recites that the sale was made on the premises. The description in the petition is not so defective that it may not be possible to identify with certainty the land meant. It is in a certain County, on a certain stream and is that piece of land of which John Brown died seized and possessed. Appropriate evidence either of written title in John Brown or of actual possession by him would be competent to ascertain the land. If indeed by mistake or otherwise the deed from the Master covered land of the plaintiffs, not described in the petition or order of sale, no doubt they would have a remedy.

But the case states that the land sued for is that which was sold under the proceedings for partition.

4. Without considering that one or two of the plaintiffs are alleged to have compromised and released their rights, we are of the opinion upon the reasons above, that the plain-

tiffs are not entitled to recover the land from the defendant Coble now in possession.

5. The plaintiffs in their complaint demand that if they shall be adjudged not entitled to the land, they may have judgment against the administrator of the deceased Clerk and Master for the purchase money.

We cannot consider in this action what their rights in this respect may be, because we think it clear that a claim to the land cannot be joined with a claim against the Master for the purchase money.

In the first demand, the representative of the Master has no interest, and in the second the other defendants have none.

Judgment affirmed and action dismissed without prejudice to any rights of the plaintiffs or of any of them against the representative of the deceased Clerk and Master, or against the sureties to his official bond.

PER CURIAM. Judgment affirmed.

T. A. ALLEN v. NATHAN McMINN and others.

Practice -- Report of Referee.

Where in an action against three defendants for goods alleged to have been sold and delivered to two of them at the request of the third, which action is tried before a referee who does not find any fact fixing a liability on the third defendent, but reports that plaintiff should have judgment against *the defendant; Held*, that the plaintiff is not entitled to judgment against the third defendant.

CIVIL ACTION, tried at Fall Term, 1876, of HENDERSON Superior Court, before *Henry, J.*

The plaintiff demanded the payment of $446.88 and interest, alleged to be due by defendants for merchandise sold and delivered at the request of defendant Nathan McMinn to the other defendants who assumed the payment of said sum.

An answer was filed denying the amount of the debt and an order made to refer the case to M. M. Patton to state an account. In pursuance of said order the referee reports the amount due plaintiff to be $258.40, and defendant Nathan McMinn excepts to the report on the ground; 1st. That it did not appear that the defendants were jointly indebted; 2. That the report did not show that this defendant was in any way indebted to plaintiff; 3d. Nor to whom the goods were sold or delivered; 4th. For uncertainty in that the referee does not state which one of the defendants should be held liable, but says the plaintiff should have judgment against *the defendant.*

The defendant Nathan also filed an affidavit stating that he had no notice of the time or place for taking said account, and was not present when the same was done. A similar affidavit was made by defendant J. J. McMinn.

At the hearing of the case His Honor overruled the exceptions, confirmed the report of the referee and gave judgment in favor of plaintiff against defendants Nathan and G. W. McMinn for the amount ascertained to be due. Appeal by defendants.

Mr. T. D. Johnston, for the plaintiff.
Mr. J. H. Merrimon, for the defendants.

FAIRCLOTH, J. This is an action against three defendants for the value of goods sold and delivered to two of the defendants and their families. An account was stated under a reference and a report made, to which the other defendant filed exceptions, which were overruled and judgment ren-

dered for plaintiff against all the defendants, from which ruling the third defendant appealed to this Court. The record shows only a meagre account of the transactions between the parties. No fact is found by the referee fixing any liability for the debt on the appellant, nor do we discover any sufficient evidence to authorize a judgment against the defendant Nathan McMinn. As to him there is error.

Let this be certified, &c.

Error.

PER CURIAM. Judgment reversed.

STEPHEN JOHNSON v. THEOPHILUS WOODY.

Practice -- Verdict of Jury on Issue of Forgery.

Where a jury upon an issue of forgery find a verdict in favor of the defendant, the circumstances upon which the plaintiff relied in that issue cannot have the force to *estop* the defendant from claiming under the instrument.

(*Holmes* v. *Crowell*, 73 N. C. 613; *Exum* v. *Cogdell*, 74 N. C. 139, cited, distinguished and approved.)

CIVIL ACTION, to recover an interest in Land, tried at Fall Term, 1876, of ALEXANDER Superior Court, before *Buxton*, *J.*

The case was removed from Wilkes County, and the facts necessary to an understanding of the opinion are sufficiently stated by Mr. Justice READE.

Upon the issues submitted and under the instructions of the Court below, the jury rendered a verdict for the defendant. Judgment. Appeal by the plaintiff.

Messrs. M. L. McCorkle and *Scott & Caldwell*, for plaintiff
Messrs. R. F. Armfield and *G. N. Folk*, for defendant.

READE, J. It is admitted that the land in dispute was at one time the property of William Woody; and the plaintiff insists that said William Woody was seized and possessed of the land at the time of his death; and that the same descended to his children and heirs at law; and that he the plaintiff bought six ninths of the undivided shares of the heirs; and that he now owns the same and he claims to be let into possession with the defendant, who is one of the heirs at law, as tenant in common.

The defendant who is one of the children and heirs at law of the deceased William Woody, claims under an alleged purchase from his father, and shows a deed for the whole land. To this the plaintiff replied that the said deed was a forgery

There was an issue submitted to the jury, 'whether that deed was a forgery?" And the jury found that it was not.

Upon the trial of that issue the plaintiff proved and relied upon a number of circumstances to show that the deed was a forgery, such as, that the grantor remained in possession all his life, that the defendant paid him rent for a portion of it, that he took a deed from him for fifty acres of it, that the defendant took out a grant from the State for it, that he did not pay taxes for it, that he took the insolvent debtor's oath, that he only claimed one ninth of it after his father's death, that he purchased the share of one of the other heirs; which circumstances together with others, it would seem, must have made a pretty formidable array against the defendant upon the question of forgery. But still the jury found that the deed was not a forgery. And it would seem that this should have put an end to the plaintiff's case. And so His Honor below held. But the plaintiff's learned and ingenious counsel now insist

that although these circumstances had not the force to induce the jury to find the deed a forgery, yet they should have the force to *estop* the defendant from claiming title under it. And for this he cites *Holmes* v. *Crowell*, 73 N. C. 613; *Exum* v. *Cogdell*, 74 N. C. 139, and Bigelow on Estoppel, 438. But before that doctrine can avail the plaintiff, it must appear at least that the defendant concealed his title when he knew that it was calculated to deceive the plaintiff and induce him to buy; and that he was thereby deceived and induced to buy. But here there was no issue involving the question, and no evidence tending to prove it.

There is no error.

PER CURIAM. Judgment affirmed.

RHODA McDANIEL v. CHARLES WATKINS

Practice -- Vacation of Judgment.

Where judgment was rendered against the defendant in a Justice's Court from which he appealed to the Superior Court, where judgment was again rendered against him, he making no defence to the action, and more than one year after the docketing of the judgment, the Judge of the Superior Court set the same aside and ordered the case to be re-opened on the ground that defendant had had no notice of the judgment; *Held*, to be error.

(*Hudgins* v. *White*, 65 N. C. 393, cited and approved.)

MOTION to set aside a Judgment, heard on the 26th of September, 1876, at Chambers in Asheville, before *Henry, J*

The plaintiff recovered judgment against the defendant and others in a Justice's Court on the 11th of July, 1874, for

$137.60, and on the 22nd of said month the defendant gave written notice of appeal. The case was docketed in the Superior Court of Buncombe and was continued from term to term until Spring Term, 1875, when judgment was rendered against defendant, he making no defence.

The defendant had no notice of the existence of said judgment except such as appeared upon the records of the Court.

This motion was made by defendant more than a year after the rendition and docketing of said judgment.

His Honor allowed the motion and ordered the case to be re-opened and set for trial at the next term of the Court. From which ruling the plaintiff appealed.

Mr. J. H. Merrimon, for plaintiff.
No counsel for defendant.

PEARSON, C. J. This Court will not overrule the order of a Judge of the Superior Court, setting aside a judgment under C. C. P. § 133, except for error of law apparent from the proceeding. *Hudgins* v. *White*, 65 N. C. 393.

We think His Honor erred in respect to "what amounts to notice of a judgment," which is a matter of law. Suppose judgment by default be taken at the appearance term, in an action commenced in the Superior Court, the defendant has notice of this judgment at the term to which the summons is returnable and cannot be heard to say, when he asks for relief under section 133, that he did not have notice of the judgment. Of course he had notice; for the summons in so many words tells him to take notice that a judgment will be entered unless he answers, &c. He is not at liberty to treat the summons with perfect indifference, make no inquiry whatever as to whether a judgment had been entered, and two years thereafter to say he had no notice that the judgment was entered. Our case is still stronger; judgment was entered before a Justice of the Peace against

defendant and two others for a debt due by promissory note. This defendant, Watkins, one of the defendants, within the fifteen days allowed by law in case of judgment by default, gives a written notice of his appeal. Here the matter ends so far as he takes any action; he does not prosecute his appeal by paying the Justice the fee for making return, nor does he look after the case any further, but folds his arms and leaves the plaintiff to pay the fees of the Justice, and have the appeal docketed and take her judgment, a practice of familiar use in this Court, when an appellant does not follow up his appeal. Three years after the Justice had entered judgment from which the defendant gave written notice of appeal, and two years after the judgment was entered in the Superior Court, the defendant says he had no notice of judgment. What further notice was called for? He knew that the Justice had given judgment against him, and he knew that as a matter of course that unless he prosecuted his appeal, judgment would be entered against him in the Superior Court.

After more than three executions had been issued from term to term, he applies to the Judge to set aside the judgment, on the ground that he "did not consent to the judgment or have any knowledge thereof until just before the last term." In other words, that he was fool enough to think that after the judgment by the Justice, and the appeal, the proceeding stopped and he need make no further inquiry about it. "*Leges vigilantibus non dormientibus factæ sunt.*"

This defendant slept too long upon his rights.

Error.

PER CURIAM. Judgment reversed.

J. R. HOPPER v. W. J. T. MILLER and others.

Practice -- Claim and Delivery -- Action by Bailee.

One in the rightful possession of property as bailee can maintain an action of claim and delivery against a wrong-doer depriving him of possession; *Therefore*, where the plaintiff was in possession of a mule under an agreement with the owner either to pay him $30 at the end of the year as the hire of the mule, or $110 and acquire an absolute ownership thereof; *Held*, that the plaintiff was entitled to recover in an action against the defendants for converting the mule.

(*Barwick* v. *Barwick*, 11 Ire. 80; *Jarman* v. *Ward*, 67 N. C. 32, cited, distinguished and approved.)

CIVIL ACTION, tried at Fall Term, 1876, of CLEAVELAND Superior Court, before *Schenck, J.*

The action was brought to recover possession of a mule or the price thereof. The plaintiff testified in his own behalf that he lived in South Carolina and in August, 1875, loaned his father the mule to drive to Shelby in said County; that the mule was worth $110 and that he had demanded possession of the same before the commencement of this action.

He further testified on cross-examination, that he got the mule of one Brown who was his landlord in the Spring of 1875, and in the ensuing Fall was to pay Brown $30 for the hire of the mule, or $110 and keep the mule. The amount paid by plaintiff under this contract was $30.

Brown corroborated the statement of plaintiff, and further testified, that the plaintiff was not to have any right or title to the mule until he paid for it, if paid for within a year; that after the mule was taken by defendants, he went to Shelby, claimed the property, demanded possession and made an ineffectual effort to compromise the matter; that upon his return to his home in South Carolina, he took

plaintiff's note for $110 less $30 (paid as aforesaid) and also took a mortgage on the mule to secure the payment of the note.

The defendants admitted the taking, demand and refusal.

Upon the issue submitted and under the instructions of the Court the jury found "that the plaintiff did not own the mule in controversy in August, 1875."

Judgment for defendants. Appeal by plaintiff.

Messrs. R. McBrayer, J. F. Hoke and *Smith & Strong*, for plaintiff, cited Story on Bailments 93, 94; 2 Kent Com. 585; *Nicholls* v. *Bastard*, 2 C. M. & R. 659, and Pomeroy on Remedies, &c. 662.

Messrs. W. J. Montgomery and *Shipp & Bailey*, for defendants, cited *Creach* v. *McRae*, 5 Jones 122; *Houston* v. *Bibb*, *Ibid*, 83; *Barwick* v. *Barwick*, 11 Ire. 80; *Foscue* v. *Eubank* 10 Ire. 424; *Shepard* v *Edwards*, 2 Hay. 185; C. C. P. §§ 55, 177.

PEARSON, C. J. On the argument, the counsel of defendants relied upon *Barwick* v. *Barwick*, 11 Ire. 80, to sustain the ruling in the Court below.

That case has no bearing upon our case. There the plaintiff was *wrongfully in possession*, and the defendant wrongfully converted it the owner being known; and it is held that the plaintiff could not recover the *value* of the property, for if the defendant satisfied the judgment, that would not give him a good title, and he would still be exposed to the action of the owner and be forced to pay for the property a second time. The case is distinguished from *Armory* v. *Delamirie*, 1 Smith's L. C. 151, on the ground that in that case the owner was unknown, and so the defendant was not exposed to a double liability.

In our case the plaintiff had a *rightful possession* of the mule, as a bailee for hire for the term of one year with the right to acquire the absolute ownership by the payment of $110 as the price of the mule, otherwise to pay $30 for the year's hire.

The question is, can the plaintiff maintain an action to recover the mule or the value thereof against a wrongdoer?

A bailee for one year or for any definite time has a special ownership. The general ownership being in the bailor, it follows, if the property be lost by death or by larceny or otherwise, the loss for the term of the bailment falls upon the bailee, and for the ultimate estate it falls upon the bailor.

It is settled that in an indictment for larceny, the thing may be charged as the property of the bailee and the bailee may have replevin or detinue, so as to have the thing for the bailor at the end of the bailment. It is also well settled that the bailee may in an action of trover recover the value of the property, and will hold the money for the bailor, in place of the thing for which the bailment makes him responsible, and that the bailor cannot have an action against one of whom the bailee has recovered judgment, and from whom he has received the value of the thing; for the payment of the price is a judicial sale and vests the title in the defendant. See the authorities cited in the brief of the counsel of plaintiff.

Under C. C. P. § 176, the action of "claim and delivery" is a substitute for the action of replevin if bond be given by the plaintiff, if not it is a substitute for the action of detinue or trover. *Jarman* v. *Ward*, 67 N. C. 32. Either of these actions may, as we have seen, be maintained by a bailee for one year or for any definite time. The fact that in our case the plaintiff was a bailee for one year, but had a farther right on the payment of $110 to hold the mule as absolute owner, makes his case the stronger. And the fact

that after the commencement of the action he gave his note to the bailor for the $110 and secured its payment by mortgage, makes it still stronger, for it explains the testimony of Brown, i. e. that plaintiff was to have no "title, right or interest in the mule until it was paid for;" and shows it to mean merely that Brown retained the title as a security for the price, but the special ownership was in the plaintiff as bailee for one year, to be enlarged into an absolute estate on payment of $110.

There is error.

PER CURIAM. *Venire de novo.*

S. M. NOBLE, Admr. v. F. D. KOONCE and others.

Practice -- Taxation of Costs.

In a proceeding to make real estate assets, where the defendants set up title to the land in controversy which issue is found against them; *Held*, that the costs of the proceeding (except those of filing the petition) are properly taxable against the defendants.

MOTION to retax Costs, heard at Fall Term, 1876, of ONSLOW Superior Court, before *McKoy, J.*

In a Special Proceeding before the Clerk of said Court to make the lands of the plaintiff's intestate, John Mills, assets for the payments of his debts, the defendants set up title to said land and were made parties. On the trial of the question of title the jury found that the deed under which defendants claimed was fraudulent. Thereupon at Spring Term, 1876, there was judgment for the plaintiff and also a decree for the sale of the land for assets. The costs for fil-

ing the petition to sell the land were taxed against the plaintiff, and the costs of the proceeding from the time that defendants resisted the petition to the termination of the suit were taxed against the defendants. His Honor refused to disturb the judgment heretofore rendered and over-ruled the motion to retax the costs. Appeal by defendants.

Messrs. Merrimon, Fuller & Ashe and *H. R. Kornegay*, for plaintiff.

Messrs. A. G. Hubbard and *Battle & Mordecai*, for defendants.

FAIRCLOTH, J. It is a rule that the party's costs in an action is taxed with the costs unless otherwise ordered by the Court. The costs in special proceedings shall be as herein allowed in civil actions, unless when otherwise specially provided. C. C. P. ch. 17, § 294. Costs shall be allowed of course to the plaintiff in an action for the recovery of real property, or when a claim of title to real property arises on the pleadings, or is certified by the Court to come in question at the trial. C. C. P. ch. 17, § 276, (1.)

These provisions applied to the present case show that the defendants are liable for the costs of which they complain, and we think His Honor properly taxed them with that portion of the cost which would not have been incurred but for their attempt to set up title in themselves by a fraudulent deed to the premises in controversy.

The attempt by the defendants to show title was an experiment, and even if made *bona fide*, in the event of failure they would be liable for the *whole* costs of the effort without any regard to the value of property acquired by them by inheritance, devise, bequest or distribution from their decedent, as that rule applies against the debts of the decedent and not against their own liabilities.

There is no allegation before us that the Clerk failed to apportion the costs according to the order of the Court.

No error. Let this be certified.

PER CURIAM. Judgment affirmed.

JAMES G. McCORKLE and others v. WALTER BREM, Exr. and others.

Practice -- Injunction.

Where the granting of an injunction can work harm to neither party and a refusal to grant it will probably subject one of the parties to further litigation, cost and trouble, the injunction should be granted until the hearing; *Therefore*, when it is alleged in the complaint that the defendants' testator occupied a fiduciary relation to the plaintiffs and invested their money in certain real estate (which allegation the answer denies) and no settlement of accounts has been had between the plaintiffs and such fiduciary; *Held*, that the defendants should be restrained until the hearing from selling such real estate for assets.

MOTION to continue an Injunction, heard on the 28th of December, 1876, at Chambers, before *Schenck, J.*

The plaintiffs are the heirs at law of one John Harty. Thomas H. Brem the deceased ancestor of the defendants was administrator of said Harty and as such came into possession of a certain amount of money, a part of which was invested in the purchase of a lot in the City of Charlotte for the use and benefit of plaintiffs.

It was alleged that the deed for said lot was made to said Brem personally and did not recite the trust according to an agreement between the parties, and thereupon the plaintiffs demanded judgment that the defendants execute a deed con-

veying the legal estate to plaintiffs and that the executors of said Brem be enjoined from selling said lot (under an order previously granted) for assets to pay debts of their testator.

His Honor granted a restraining order in accordance with the demand of plaintiffs, and the defendants then filed an answer stating among other things that said Brem had filed his account as administrator of said Harty in the Probate Court of Mecklenburg County, exhibiting a balance due said administrator in the settlement of the estate of his intestate.

Upon the hearing of the cause on complaint and answer the Court overruled the motion to continue the restraining order heretofore granted. From which judgment the plaintiffs appealed.

Mr. C. Dowd, for plaintiffs.
Messrs. Wilson & Son, for defendants.

Faircloth, J. As a general rule an injunction will be refused when the answer fully and distinctly denies all the grounds on which the equity of the complaint is founded. This rule however is not inflexible, and the Court in the exercise of a sound discretion will view all the facts and circumstances surrounding each case and be governed accordingly. When it can do neither party any harm to grant the injunction, except merely delay to the hearing, and when a refusal to grant it would probably subject one of the parties to further litigation, cost and trouble, the Court will interfere by orders until the way is made plainer.

In the present case it appears from both complaint and answer that Thomas H. Brem did occupy a fiduciary relation to the plaintiffs as administrator of their ancestor, and that a large amount of assets came to his hands and that no settlement of the same has been yet had with the plaintiffs,

and that no account of said administration has been given except Brem's own *ex parte* statement filed with the Probate Court.

The plaintiffs have a right to a full investigation of these accounts, and they allege that said Brem after paying debts had a certain sum still in hand, and that he agreed with them to invest the sum, or a part of it, in a certain described lot in the City of Charlotte for their benefit, and that he did so except that he took the deed to himself absolutely.

The answer denies this allegation but it does appear from the answer that he purchased this *particular* lot subsequent to the time of the alleged agreement.

The defendants as the representatives of said Brem deny the agreement on information and belief only, whereas the plaintiffs testify to a contract made with them personally. These are matters fit to be investigated before further complications arise among the parties. Suppose the sale takes place and the proceeds are paid to Brem's heirs, and finally the plaintiffs establish their equity and recover the lot of land or its equivalent from the purchaser, it would be easy to see the difficulties added to the settlement of both estates and the wrong done to the purchaser and the probable loss of the purchase price to him.

Therefore to avoid troubles of this character we think His Honor should have continued the restraining order until the final hearing. There is error. Let this be certified.

Error.

PER CURIAM. Judgment reversed.

P. M. MORRIS, Admr. with will annexed, v. SAMUEL A. GRIER and others.

Practice -- Arbitration -- Reference of Action by Attorney.

A reference of an action or controversy to arbitrators by an Attorney, although without the knowledge or authority of his client, is binding upon the client.

(*Moye* v. *Cogdell*, 69 N. C. 93, cited and approved.)

MOTION to confirm an Award as to valuation of land, heard at Fall Term, 1876, of CABARRUS Superior Court, before *Schenck, J.*

The facts bearing on the points decided are; that one James R. Campbell after his marriage with the defendant Sarah E. Gilmer, employed Paul B. Means, Esq. as counsel to represent his interest and that of his wife in this action, which was instituted to obtain a construction of a will in which the defendants were devisees. No restriction being placed on the power of Mr. Means as attorney, he agreed to refer the matters in controversy to arbitrators. Campbell was not consulted when said agreement was made and signed by Mr. Means, and the Docket of said Court showed that he had been of counsel for defendants since Fall Term, 1873.

Upon this state of facts the Court was of opinion that said attorney had power to bind said Campbell and wife by the agreement aforesaid, and adjudged that the award of the arbitrators be in all respects confirmed. From which judgment the defendants appealed.

Messrs. R. Barringer and *W J. Montgomery*, for plaintiff.
Messrs. Wilson & Son, for defendants.

FAIRCLOTH, J. This action was brought to obtain a construction of a will and a settlement with the defendant devisees in said will.

The defendants employed an Attorney to represent their interest in the suit. For the purpose of equalizing the legacies as required by the will, the Attorney agreed to refer the matter to arbitrators whose award was to be the judgment of the Court. He had no special authority to do so. Are his clients bound by the reference? There is no doubt that the Attorney's agreements about continuances, about evidence, the conduct of the trial and the like, will generally bind the client. He cannot enter into a compromise without the consent of his client. *Holker* v. *Parker*, *infra*. He cannot accept a draft in payment of a judgment debt payable in future, without special authority from his client. *Moye* v. *Cogdell*, 69 N. C. 93.

In England it was held that the Attorney has power to submit a case to arbitration although the client desired it should not be done. The client's remedy in such cases being an action against the Attorney for damages. *Thomas* v. *Hews*, 2 C. & M. 327. So he may modify the terms of submission when the client has agreed to refer and may enlarge time for the abitrators to make their award. *Rex* v. *Hill*, 7 Price, 630.

An authority to prosecute or defend a suit, implies a power to refer it by rule of Court. *Buckland* v. *Conway*, 16 Mass. 396. The general rule is that he may submit the matter in dispute to arbitration, because by the implied assent of his client arising from his employment, he may do anything which the Court may approve in the progress of the cause when there is a suit pending. *Jenkins* v. *Gillespie*, 10 vol. Sm. and M. 31, (Mississippi.)

An Attorney at law, as such, has authority to submit the cause to arbitration. *Holker* v. *Parker*, 7 Cranch 436, where the Court say, "It is believed to be the practice throughout the Union for suits to be referred by consent of counsel without special authority." Upon the weight of these and other authorities, we are of opinion that the defendants are

bound by the rule of reference made by their Attorney in this case without their special assent. The reason of our decision being that arbitration is one of the legal modes of trying disputed questions to which the client's cause may be submitted by the Attorney under his general authority to prosecute or defend.

No error.

PER CURIAM. Judgment affirmed.

E. M. ADAMS v. R. E. & M. C. REEVES.

Practice -- Amendment of Record -- Security for Costs.

1. An amendment of a record of a Court must be made in the Court where the *record* was originally made.
2. The exercise of the discretionary power of the Court below in regard to security for costs is not subject to review in this Court.

(*Jones* v. *Cox*, 1 Jones 373, cited and approved.)

CIVIL ACTION, tried at a Special Term of the Superior Court of GUILFORD County (held in December, 1876,) before *Kerr*, *J.*

The point decided in this Court involved the exercise of discretionary power by His Honor in refusing to allow the motion of defendants for additional security for the prosecution of the suit. The facts appear in the opinion. The defendants appealed from the ruling of the Court below.

Messrs. Scott & Caldwell, for plaintiff.

Messrs. Watson & Glenn, *Gray & Stamps*, and *W. H. Bailey*, for defendants.

ADAMS *v.* REEVES.

FAIRCLOTH, J. At Spring Term, 1876, of Davidson Superior Court, this cause was removed to Guilford County for trial and at the same term the following order was made; "Rule on the plaintiff to give additional security or justify the present on or before ———— of next term of Guilford Superior Court." At Fall Term of the latter Court the plaintiff justified his present security and the rule was discharged. It was at the same Term suggested by defendant that the order made at Davidson was one for additional security only, and that the Clerk of Davidson County had not entered the order on the docket correctly. His Honor held that he could not go behind the record. The rule was then "continued by consent until the present Term," when a motion was made on the original affidavit for additional security, which motion was refused by the Court in the exercise of discretionary power, and the original rule was not called up or otherwise referred to. It nowhere appears that an appeal has been taken from anything except from an appeal bond of defendant dated Dec. 15th, 1876.

We will however consider the case before us, and we are of opinion that His Honor was right in refusing to go behind the record. An amendment of a judgment or order should be in the Court where the record itself was made originally. To allow it to be done in another County would be inconvenient and would make the record inconsistent with itself in the same action and between the same parties.

The motion next made for additional security was purely a discretionary matter and we are not authorized to review it. *Jones* v. *Cox*, 1 Jones, 373.

There is no error. Let this be certified.

PER CURIAM. Judgment affirmed.

MAY MURRILL and others v. D. A. HUMPHREY and wife.

Practice -- Records of a Court -- Amendment of.

1. In a motion to amend the records of a Court the facts found by His Honor below are conclusive upon this Court.
2. Upon such motion strict proof will be required, particularly when the rights of minors are involved.

MOTION by defendants to restore and amend the Record of the late Court of Equity, heard at Spring Term, 1876, of ONSLOW Superior Court, before *McKoy, J.*

The original proceeding upon which this motion was based was a petition filed by one A. J. Murrill, wife and others, in the late Court of Equity of said County, asking for the sale and partition of certain lands known as the "Ambrose lands"

In answer to a writ of *Certiorari* issued by this Court, His Honor made return substantially as follows:

This was a motion made before the Clerk of the Superior Court of Onslow County to set up lost records as stated in transcript, and among them to have a certain paper writing (written in pencil) set up and declared to be a record of said Court of Equity. The following is a copy of said paper writing:

"A. J. Murrill, wife and others, Spring Term, 1855. It appearing to the Court that the bonds taken for the purchase money have been paid to the guardian and other parties interested under the orders in this cause; *It is ordered*, that Jasper Etheridge, the Commissioner named, make title to the purchaser of said land."

The motion was allowed by the Clerk and the plaintiffs appealed to the Superior Court where trial by jury was waived by the parties and His Honor found the following facts:

1. That the writings set out by the defendants in the transcript which were stated to be the records of said Court were made and filed as alleged and that said pencil writing was written by George S. Attmore, Attorney for petitioners and found among the papers in the cause.

2. There is no satisfactory evidence that said writing was ever submitted to said Court of Equity, or sanctioned by it, or that its enrolment had been ordered by it.

3. The bonds given for the purchase money mentioned in said writing were never paid to the guardian, but remain in the hands of the Commissioner, Jasper Etheridge, and have never been paid.

4. One witness testified that "he saw all the orders recorded in a book and that they were all regular," but the Court found upon such testimony (not stating *what* was seen recorded &c.) there was no evidence that such a record ever existed.

5. Said A. J. Murrill was one of the petitioners in right of his wife; was Clerk and Master in Equity; purchased the land at the sale, and afterwards became guardian of the infant petitioners.

6. Petition was filed in 1851 and no title made until 1869; notes for purchase money worthless; there was no decree confirming the sale or ordering title to be made.

His Honor was of the opinion upon the facts in this case that strict proof should be had before the rights of the plaintiffs (minors) could be taken away or even endangered, and adjudged that the motion be refused. Judgment against defendants for costs. Appeal by defendants.

Messrs. Smith & Strong, for plaintiffs.
Mr. A. G. Hubbard, for defendants.

BYNUM, J. The findings of fact by His Honor below are conclusive upon this Court and we are precluded from any

inquiry into their correctness; and if we were not the evidence satisfies us that the facts have been truly found.

We also concur with His Honor in his conclusions of law and for the reasons stated by him.

There is no error.

PER CURIAM. Judgment affirmed.

GEORGE W. LOGAN and others v. A. D. K. WALLIS and others.

Practice -- Joinder of Actions -- Demurrer.

1. A cause of action founded on a tort cannot be joined with one founded on contract; but where a cause of action founded on a conversion of personal property was joined with other causes of action founded on contract; *Held*, not to be error; that the plaintiff might waive the tort and sue on the implied contract.
2. A cause of action against one on a joint contract as a partner may be joined with a cause of action against such partner individually.
3. Causes of action which may be joined must affect all the parties to the action; *Therefore*, when a complete determination of a cause of action joined with others requires parties not necessary to the other causes of action; *Held*, to be demurrable.

CIVIL ACTION, tried at Spring Term, 1876, of RUTHERFORD Superior Court, before *Schenck, J.*

The plaintiffs in this case are R. W. Logan and George W. Logan, and the defendants are three in number, to-wit, A. D. K. Wallis, W. O. Wallis, and R. J. Williams.

The complaint states five causes of action in respect to which it demanded relief.

1. For the rent of a house at Chimney Rock which George W. Logan demised to A. D. K. Wallis.

2. For the rent of another house and field which George W. Logan demised to A. D. K. Wallis.

3. For the rent of a third piece of land which one Justice, who was a partner of A. D. K. Wallis, rented of George W. Logan.

4. For the value of a certain quantity of corn which was on a piece of land demised to A. D. K. Wallis and which the said Wallace consumed.

5. That R. W. Logan purchased a house and lot from A. D. K. Wallis, paid a part of the price, and gave his note for the residue of $330, dated 7th November, 1873, and payable on 1st March, 1874. On 28th August, 1874, A. D. K. Wallis endorsed the note without recourse to the defendant Williams. R. W. Logan did not receive any conveyance from A. D. K. Wallis for said lot, but said A. D. K. Wallis and W. O. Wallis gave said Logan a bond of the same date with the note aforesaid to make him a title on payment of the purchase money.

On the 1st February, 1874, R. W. Logan assigned said bond for title to George W. Logan. Before the assignment of the note aforesaid to Williams, A. D. K. Wallis the payee had notice of the assignment by R. W. Logan of the bond for title aforesaid, and also that George W. Logan had assumed the liability upon said note, and would allow it upon a settlement of accounts between him and said A. D. K. Wallis.

The plaintiffs demand judgment that A. D. K. Wallis account with George W. Logan; that said note of R. W. Logan be charged against George W. Logan in such account; that A. D. K. Wallis pay any balance which may thereupon be found owing to George W. Logan; and that he make to said George a title to the lot aforesaid.

The defendants demurred to this complaint as misjoining parties, both plaintiff and defendant, and as misjoining the

causes of action. The Court sustained the demurrer and the plaintiffs appealed.

Mess s. D. G. Fowle and *J. C. L. Harris*, for plaintiffs.

Messrs. M. H. Justice and *W. J. Montgomery*, for defendants.

RODMAN, J. (After stating the facts as above.) It will be convenient to consider first the misjoinder of subjects of action because our conclusion upon that may make unnecessary any consideration of the other causes of demurrer.

It must be admitted that the first three causes of action may properly be joined. C. C. P. § 126, (sub sec. 2.) For although Justice might have been sued as a joint contractor with A. D. K. Wallis, the plaintiff might sue the latter alone. C. C. P. § 63. These causes of action are all founded on contract. No cause of action founded on a tort could be joined with these unless the plaintiff could waive the tort and sue on an implied contract.

The fourth cause of action is for the conversion of the plaintiff George's corn. The plaintiff could have sued for the wrongful conversion. But we think he might also waive the tort and sue on the implied contract. The corn was on the land which George demised to A. D. K. Wallis and he was consequently a bailee of it. Without undertaking to state accurately the rule, it will suffice to say that this cause of action comes within that established by the authorities.

The leading cases on this subject are cited in 1 Chit. Pl. 100-107, and note. Chitty says, "Where the goods of a trader, after his act of bankruptcy, are taken in execution or otherwise tortiously disposed of without the concurrence of the assignees, they may waive the tort and declare in assumpsit, &c." "Assumpsit also lies to recover money paid, or goods delivered by a bankrupt by the way of fraudulent

preference." The case of *Goldthwaite* v. *Kempton*, 13 N. H. 449, closely resembles ours.

The fifth cause of action is misjoined with the others. It will be observed that the plaintiff R. W. Logan and the defendants W. O. Wallis and Williams are in no wise connected with the first four causes of action. To a complete determination of the matters alleged as the fifth cause of action, they are or may be necessary parties. C. C. P. § 125, says that the causes of action which may be joined must affect all the parties to the action. We concur with the Judge in sustaining the demurrer.

Judgment affirmed with leave to plaintiff to amend his complaint. Case remanded. Let this opinion be certified.

PER CURIAM. Judgment affirmed.

D. E. YOUNG and others v. THE TOWN OF HENDERSON.

Practice -- Judgment Against Municipal Corporation -- Impeachment of -- Taxation by City or Town -- Extending Streets Thereof -- Charter of Town of Henderson.

1. The expense of extending streets is of the class of necessary expenses of a City or Town, of which the corporate authorities are the sole judges.
2. Under the provisions of the charter of the Town of Henderson (Private Laws, 1868-'9, ch. 79, § 22,) the Town can incur no debt without the authority of the General Assembly previously obtained.
3. A judgment regularly obtained against a Municipal Corporation can not be impeached in an action brought by citizens and tax-payers to restrain the Corporation from collecting a tax levied to pay the judgment, there being no suggestion of fraud.
4. In such case the plaintiffs should have interpleaded in the original proceedings and alleged the want of authority in the Corporation to contract the debt, upon which judgment was obtained.
5. While the *Constitution* fixes no limit to the *amount* of taxation which a City or Town may impose, it does require that the rate of taxation shall be uniform on *all* property and that the proportion fixed between the tax on property and on polls shall be observed.
6. A tax levied by a town on the 24th May, 1876, "on each $100 of merchandise purchased for twelve months prior to the 1st May, 1876" is retroactive and forbidden by Art. 1, § 32, of the Constitution.

(*Wilson* v. *City of Charlotte*, 74 N. C. 748; *Cobb* v. *Elizabeth City*, 75 N. C. 1; *Tucker* v. *City of Raleigh*, *Ibid*, 267; *French* v. *City of Wilmington*, *Ibid*, 477, and *Weinstein* v. *City of Newbern*, 71 N. C. 535, cited and approved.)

CIVIL ACTION, tried at a Special Term of GRANVILLE Superior Court, (held in August, 1876,) before *Seymour, J.*

The Commissioners of the Town of Henderson caused a street to be opened in said Town and for that purpose condemned a portion of the land belonging to one George B. Reavis. A committee of appraisers reported that the value

of the land so condemned was $50, which was tendered to and refused by said Reavis. The amount was then deposited in the office of the Clerk of said Court for the use of said Reavis, who appealed from the action of the Commissioners to the Superior Court. At Fall Term, 1873, the case was referred by consent to John W. Hays, Esq., and in accordance with his report filed at Spring Term, 1874, a judgment was rendered in favor of said Reavis and against said Town for $450. At Spring Term, 1875, upon petition of said Reavis a peremptory *mandamus* was granted commanding the Commissioners of said Town to levy and collect a tax for the purpose of paying said $450 and interest and costs, and thereupon said Commissioners appointed a Board of three Assessors to value the real estate in said Town. On the 24th of May, 1876, upon such valuation, a tax of 75 cents on the $100 worth of real estate was levied, which was greater in amount than that levied by the Township Trustees on the same property. They also levied a tax of 25 cents on each $100 worth of merchandise purchased for twelve months prior to May 1st, 1876, and $2.00 on the poll.

On the 8th of June, 1876, the plaintiffs suing in their own behalf and also in behalf of other citizens and tax-payers of said town, obtained from His Honor, Judge Watts, an order restraining the defendants from proceeding in the collection of the taxes levied as aforesaid.

At the August Term of the Court, His Honor, Judge Seymour, on motion of defendants, vacated the restraining order of Judge Watts, except as to the tax of 75 cents on the $100 worth of real estate, and as to that ordered that the defendants collect a tax of 75 cents on the $100 as valued by the Board of Township Trustees. From this judgment the plaintiffs appealed.

Messrs. G. Badger Harris and *Smith & Strong*, for the plaintiffs.

Messrs. Busbee & Busbee and *W. H. Young*, for the defendants.

RODMAN, J. The debt to Reavis was one which the Commissioners, independent of any statute to the contrary, had power to contract. The expense of extending a street is of the class of necessary expenses, and being of that class, the corporate authorities alone were entitled to judge whether it was actually necessary or not. *Wilson* v. *City of Charlotte*, 74 N. C. 748, and cases there cited; *Tucker* v. *City of Raleigh*, 75 N. C. 267. But the charter of the town which is found in the Private Acts of 1868–'9, ch. 79, § 22, enacts, "That among the powers hereby conferred on the Commissioners, they may borrow money, pledge the credit of the town and contract debts for the improvement of the town; *Provided nevertheless*, that these powers shall be exercised strictly in accordance with Art. 7, § 7, of the Constitution of North Carolina, and *after the consent of the General Assembly* of North Carolina first had and obtained in the manner prescribed in Art. 2, § 16 of the same Constitution." In effect this section provides that the Town shall incur no debt without being previously authorized thereto by the General Assembly. But here is a debt which has been contracted, so far as affirmatively appears, without such consent, and a judgment and execution have been obtained upon it. The want of such authority might have been pleaded by Reavis as a bar to the proceedings to condemn his land for the street.

Perhaps also it would have been available to the corporation as a defence to the action of Reavis against them upon their giving up the land condemned. Any tax payer of the corporation would have been allowed to intervene in the proceedings against Reavis, on the ground that the corporate authorities were contracting a debt without the authority required by the charter. They might perhaps also have intervened in the action of Reavis against the Town,

upon the ground that the corporate authorities were acting unfaithfully and fraudulently in defending the action. But it is a different question whether the tax payers can *now* interpose to prevent the execution of the judgment by the levy of *a legal tax*, upon the ground that the improvement was unauthorized and the judgment was erroneous.

We are of opinion that the plaintiffs are estopped from denying the debt to Reavis. It is *res adjudicata*, which cannot be collaterally impeached except for fraud, which is not alleged. The judgment for the debt so long as it stands binds the corporation and all its members and it can not be collaterally impeached by any of them. We must assume that the debt was legally due. It was the duty of the corporate authorities to pay it without waiting for an execution. The effect of the *mandamus* was to enforce this duty. But it required the Commissioners to pay the debt by a legal tax and not by an illegal one. The question then is, was the tax which they actually levied and the collection of which is sought to be enjoined a legal or an illegal one? In obedience as they supposed to the *mandamus*, on the 26th May, 1876, they levied a tax of 75 cents on each $100 worth of real estate in the town; of 25 cents on each $100 worth of merchandise purchased for twelve months prior to the first day of May, 1876; and $2.00 on each taxable poll. No *ad valorem* tax is levied on personal property owned and possessed within the town on any fixed day.

It is settled by several decisions of this Court, that while the Constitution fixes no limit to the *amount* of taxation which the corporate authorities of a town or city may impose, it does require that the rate of taxation shall be uniform on all property in the town and that the proportion fixed by the Constitution between the tax on property and on polls shall be observed. *French* v. *City of Wilmington*, 75 N. C. 477; *Cobb* v. *Corporation of Elizabeth City*, 1, *Ibid Weinstein* v. *Com'rs. of Newbern*, 71 N. C. 535.

Section 34 of the charter enacts that the Commissioners may annually levy and collect the following taxes:

1. On real estate not over $1 on the $100 in value.
2. On resident polls not exceeding $2.00.
3. On every $100 worth of goods purchased, &c., not exceeding 50 cents.
4. On dogs, &c.
5. On swine and goats, &c.

It is obvious that these provisions of the charter and the tax levy made in accordance with them, ignore and violate the provisions of the Constitution.

All property is not taxed *ad valorem*. Personal property in possession is not taxed at all. The proportion of tax between property and polls is not observed. The tax on purchases by merchants is retrospective, which is forbidden by Art. 1, § 32 of the Constitution. It is impossible to maintain that any part of the tax levy is good. The illegality pervades it all. The plaintiffs are entitled upon the pleadings to a perpetual injunction against the collection of the taxes complained of. The corporate authorities can proceed to levy a legal tax to pay the debt. Judgment reversed and perpetual injunction ordered.

Let this opinion be certified.

PER CURIAM. Judgment reversed.

*HENRY W. FAISON v. H. BOWDEN, Executor.

Statute of Limitations -- New Pomise.

1. An acknowledgment of a debt, barred by the statute of limitations, in the following language, viz: "I owe A a considerable sum, $1,000 or $1,200, and I reckon more, and I want it paid. A is not uneasy about it," is not sufficient to take the case out of the operation of the statute.
2. An acknowledgment or promise in order to take the case out of the operation of the statute of limitations, must be made to the *creditor himself.*

(*Parker*, Adm'r. v. *Shuford*, Adm'r. *ante* 219, cited and approved.)

CIVIL ACTION, tried at Fall Term, 1876, of WAYNE Superior Court, before *Seymour, J.*

The suit was brought to recover the amount of a medical bill against the testator of defendant, running from 1854 to 1861. The defendant relied on the statute of limitations. (See 72 N. C. 405.)

His Honor held that the statute was no bar to any part of plaintiff's claim. Judgment. Appeal by defendant.

Messrs. Smith & Strong and *H. F. Grainger*, for plaintiff.
Messrs. Battle & Mordecai and *J. L. Stewart*, for defendant.

READE, J. This case was before us and is reported in 72 N. C. 405. It was held that the acknowledgment of the debt was too vague and indefinite to take the case out of the operation of the statute of limitations. The acknowledgment now is a little different from what it was then, but it is still liable to the same objection.

The acknowledgment relied upon now is, "I owe Dr. Faison a considerable sum—$1,000 or $1,200, and I reckon

*Faircloth, J. being of counsel in the Court below did not sit at the hearing of this case.

more, and I want it paid. Dr. Faison is not uneasy about it." Now what did he owe him about? He does not say. Probably it was for medical services; it may have been for a tract of land; it was probably an account; it may have been a bond. No paper was shown or referred to. No amount was fixed; probably it was $1,000; it may have been $1,200; it was claimed to have been more than $1,900.

The evil of allowing vague acknowledgments or careless promises and these dependent upon the memory of witnesses to bring to life a debt which was dead, has been remedied, none too soon, by a statute which requires all such acknowledgments and promises to be in writing. But that statute was subsequent to this claim and does not affect it.

There is another objection which is fatal to the plaintiff; the acknowledgment was not made to the plaintiff, but to a stranger.

We have decided at this time in *Parker*, Adm'r. v. *Shuford*, Adm'r. that the acknowledgment or promise must be to the creditor himself. See that case and the authorities there cited, which it is unnecessary to repeat.

There is error.

PER CURIAM. *Venire de novo.*

KELLY W. DAVIS v. SAMPSON B. GLENN and others.

Bond -- Evidence -- Confederate Currency.

On the trial of an action brought upon a bond dated August 19th, 1864, and payable six months after date and expressed "to be paid in current funds when called for," it is not competent to prove that there was an agreement at the time the bond was executed that it was not to be paid in Confederate money.

CIVIL ACTION, to recover the Value of a Note, tried at December Term, 1876, of GUILFORD Superior Court, before *Kerr, J.*

(For the facts in this case, see same case, reported in 72 N. C. 519.)

Messrs. Scott & Caldwell, for plaintiff.

Messrs. J. A. Gilmer and *Mendenhall & Staples,* for defendants.

READE, J. The words of the bond are that it is "to be paid in current funds when called for;" dated 19th August, 1864, and due six months after date.

When this case was before us heretofore (72 N. C. 519) we held that it was payable in Confederate Treasury notes and subject to the scale as of its date.

Upon the last trial the plaintiff offered to show that it was expressly agreed at the time the bond was given that it was not to be paid in Confederate money. That would make no difference because it would contradict the express words of the bond.

His Honor correctly instructed the jury according to the decision *supra,* that current funds meant Confederate money.

No error.

PER CURIAM. Judgment affirmed.

HESS, ROGERS & CO. v. THOMAS M. BROWER.

Attachment -- Sufficiency of Affidavit.

In proceedings in attachment, an affidavit which sets out; "1st. That the defendant is indebted. &c. 2nd. That the defendant has departed from this State with intent, as affiant is informed and believes, to avoid the service of summons," is sufficient.

(*Love* v. *Young*, 69 N. C. 65; *Hughes* v. *Person*, 63 N C. 548. cited and approved)

MOTION to vacate a Warrant of Attachment, heard at Fall Term, 1876, of SURRY Superior Court, before *Cloud*, *J.*

The motion was made by the defendant upon the ground of insufficiency of the affidavit of plaintiff. The affidavit is as follows:

"W. A. Moore agent of the plaintiffs above named being duly sworn says;

1. That defendant Thomas M. Brower is indebted to plaintiffs in the sum of $780.60 due by bonds.

2. That said defendant has departed from this State with intent, as affiant is informed and believes, to avoid the service of summons."

Sworn to and subscribed before the Clerk of the Superior Court.

His Honor being of opinion with the defendant allowed the motion and set aside the order of attachment. Plaintiffs appealed.

Messrs. Watson & Glenn, for plaintiffs.
Mr. J. F. Graves, for defendant.

BYNUM, J. We think the affidavit is sufficient though not as full and explicit as it in caution should have been

made. It states a fact accomplished, to-wit; that the defendant has departed from the State and then concludes with the averment that it was with the intent to avoid the service of a summons as the affiant is informed and believes. It is not always convenient or prudent to state the source of one's information in the affidavit, yet it may be a sufficient ground of belief to authorize the Clerk to issue the warrant of attachment. If the affiant in point of fact had received no such information and had no reasonable grounds for his belief we see no reason why he could not be indicted for perjury in this particular. We think the affidavit is in substantial compliance with C. C. P. § 201. *Love* v. *Young*, 69 N. C. 65. *Hughes* v. *Person*, 63 N. C. 548. There is error. Judgment is reversed and the cause is remanded for further proceedings according to law.

PER CURIAM. Judgment reversed.

SAMUEL BARRETT v. WILLIAM B. RICHARDSON and others.

Homestead -- Purchase at Execution Sale.

1. The Homestead Laws of North Carolina apply to pre-existing contracts and are not unconstitutional.
2. Where land is sold at execution sale "subject to homestead," the purchaser buys subject to that exception.

(*Hill* v. *Kessler*, 63 N. C. 437; *Garrett* v. *Cheshire*, 69 N. C. 396, cited and approved.)

CIVIL ACTION to recover the possession of Real Estate, tried at Spring Term, 1876, of MOORE Superior Court, before *Buxton, J.*

On the 19th of August, 1867, the plaintiff was the owner of a house and lot in the Town of Carthage, and on the 22nd of July, 1869, said property was allotted to plaintiff by the Sheriff (who had an execution against him) as a homestead at the valuation of $750.

The property had been rented to defendant Campbell by his co-defendants who claimed the ownership of the same and had received the amounts due for rent. Before the commencement of this action the plaintiff demanded of defendant Campbell the rent then due and also a surrender of the possession, which was refused upon the ground that he was forbidden to do so by his co-defendants. He also refused to pay rent to either party after said demand.

The defendants introduced a record of a suit (in which the present plaintiff was one of the defendants) which showed that said property had been sold under execution and bought by one J. D. McIver at $330, upon payment of which the Sheriff executed a deed on the 2nd of March, 1870. On the 5th of March, 1873, said McIver conveyed the said property to the defendants, Richardson and David S. Barrett, in consideration of $450, who insisted that they had acquired the title of plaintiff. The plaintiff replied that said property was sold subject to the homestead; to which the defendants rejoined that said judgment and execution were based upon debts incurred before the adoption of the Constitution of 1868, and that the docketing of the same created a lien on said property.

In accordance with the instructions of His Honor, the jury rendered a verdict for the plaintiff. Rule for new trial. Rule discharged. Judgment for the possession of the property and $381.45 damages and costs. Appeal by defendants.

Mr. Neill McKay, for plaintiff.
Mr. John Manning, for defendants.

READE, J. The plaintiff was the owner of the land in controversy, and in July, 1869, he had his homestead therein laid off by metes and bounds according to law. Subsequent thereto, judgments were obtained against him on debts which he owed before the adoption of the Constitution which secures a homestead. These judgments were docketed; and executions issued thereon were levied on the land in controversy "subject to homestead."

The sale was made by the Sheriff under the levy and his deed to the purchaser recites the levy. The defendants, who claim under said purchaser, claim the land discharged of the homestead, upon the ground that the debts for which the land was sold were contracted prior to the adoption of the Constitution aforesaid; and that therefore the plaintiff had no right to claim a homestead as against those debts.

Grant that, for the sake of argument; and grant that the plaintiffs in these executions might have had the lands levied on and sold, yet they were not obliged to do it and did not do it. On the contrary, the levy, sale and Sheriff's deed were "subject to homestead." If the deed under which the defendants claim, recognizes the homestead, a thing laid off by metes and bounds, as exempt from its operation, how can the defendants claim what their deed does not profess to convey? If it was the purpose to sell the land in spite of the homestead, why not say so? Why sacrifice the debtor's property under the pretence that it was encumbered if it was not? The sale was not made subject to homestead *if* there is any, but unconditionally and without qualification, "subject to homestead." The fact that the plaintiff's homestead had been laid off was notorious and the bidders must have understood that they were buying subject to that exception. Before the statute and the decisions exempting it, it was generally understood that the *reversion*, in case of a homestead, might be sold; and the small sum for which the land sold would seem to indicate that such was the notion

at this sale. The premises sold for $330, whereas but a short time before, they had been valued to the plaintiff at $750. Such a levy and deed cannot be supported as conveying the premises discharged of the homestead. There stand the premises, let the creditors levy upon them and sell them if they think they have the right to do so. It was stated by the defendants' counsel at this bar that he desired the opinion of this Court as to whether the plaintiff is entitled to a homestead in the premises as against debts contracted as these were. Such is our opinion as expressed in numerous cases. Notably, *Hill* v. *Kessler*, 63 N. C. 437, and *Garrett* v. *Cheshire*, 69 N. C. 396.

No error.

PER CURIAM. Judgment affirmed.

SARAH E. TAYLOR v. DAVID TAYLOR.

Divorce -- A mensa et thoro -- Sufficiency of Evidence.

1. Under the language of the statute (Bat. Rev. ch. 37, § 5,) the Courts, in actions for divorce *a mensa et thoro*, are to deal with and determine each particular case upon its own peculiar circumstances.
2. In such action, where the evidence showed that the defendant had repeatedly threatened to chastise the feme plaintiff and had boasted of having done so; that braises were found upon her person inflicted by him; that she offered to return and live with him if he would agree not to whip her, which offer he declined &c.; *Held*, that the facts constituted a case of such indignities to the person as to render her "condition intolerable and life burdensome" and to entitle her to a divorce.
3. *Quære?* Are not the parties in such action competent witnesses and compellable to give evidence for or against each other, except as to adultery?

(*Joyner* v. *Joyner*, 6 Jones Eq. 322; *Everton* v. *Everton*, 5 Jones 202; *Coble* v. *Coble*, 2 Jones Eq. 392; *Erwin* v. *Erwin*, 4 Jones Eq. 82, cited, distinguished and approved.)

CIVIL ACTION for Divorce *a mensa et thoro*, brought by the plaintiff against the defendant and tried at Spring Term, 1876, of HERTFORD Superior Court, before *Moore, J.*

Upon the facts in the case, which are sufficiently stated in the opinion, His Honor held that admitting them to be true they did not constitute a sufficient cause for Divorce *a mensa et thoro*, and thereupon the plaintiff submitted to a nonsuit and appealed.

Messrs. J. B. Batchelor and *Gilliam & Pruden*, for plaintiff.
Mr. Walter Clark, for defendant.

BYNUM, J. This is an action for divorce *a mensa et thoro*, or as it is called in the English law, *a judicial separation*.

For although the prayer of the complaint is for a divorce from the bonds of matrimony, there are no facts set forth in the complaint which would entitle the plaintiff to that relief, and the case will therefore be considered under the prayer for general relief as an action for divorce from bed and board; for in this light only was the case considered and tried.

The action is brought under the 5th section of chapter 37 of Battle's Revisal, which is in these words; "The Superior Courts may grant divorces from bed and board, on the application of the parties injured in the following cases; * * *

"4th. If either party shall offer such indignities to the person of the other as to render his or her condition intolerable and life burdensome."

We are to consider whether the plaintiff has set forth in her complaint and proved on the trial, facts sufficient to entitle her to a divorce from bed and board under this section of the statute.

She alleges in her complaint and proves on the trial; 1. By the witness Steal, who lived in the family in 1871–'2, that he heard the defendant threaten to whip his wife and on one occasion saw two whips about the size of the little finger in the house, on the safe, and heard defendant say "he got them to brush his wife." 2. Another witness Gay lived with the defendant in 1871–'2, and testified that he heard him threaten to whip his wife and that he called her "a liar, a fool, and told her she was like her folks, the Vaughns, and had no sense;" and also told the witness that he had "brushed" her and that if he had had a board he would have used that also; and on another occasion he said that he had slapped her. 3. Witness Sarah Gay lived with the defendant in 1872, and heard him threaten to whip his wife and had seen *bruises*, two on her face and one on her rump, each as large as a half dollar. 4. Mrs. Hays lived with the family from 1869 to 1871, and heard the defendant

threaten to whip his wife and on one occasion saw him take her violently and angrily from her chair; and testified that he was unkind and fretful; spoke abusively to her and of her family. 5. Vaughn testified that on one occasion he went to the house of the defendant who met him and said, "I have just whipped your sister you can go in and see her if you wish." He went into the house and saw a *bruise* on her face. 6. Moore, at the request of mutual friends after they parted, for the purpose of effecting a reconciliation, went to see the plaintiff and defendant. The former told him that if the defendant would promise not to whip her, she would return and live with him. Moore communicated this message to him, and he refused to make the promise and said that he would whip her when she deserved it or when he saw fit, he did not remember which." The whippings occurred about eight months before the separation. There is evidence that the wife bore this treatment with patience and in silence; and there is no evidence whatever that she gave, by word or deed, any provocation for the conduct of the defendant.

The objection is taken to the allegations of the complaint in the nature of a demurrer that they "are not stated with sufficient precision of time and date." But they are stated as if not more definitely than were the charges in the cases of *Coble* v. *Coble*, and *Ervin* v. *Ervin*, (*infra*) where this Court held that the allegations of the grounds for the divorce were sufficiently specific.

The question then is, do the facts alleged and proved constitute such "indignities to the person as to render her condition intolerable and life burdensome," within the meaning of the statute? We think they do. The only case which apparently opposes this conclusion is *Joyner* v. *Joyner*, 6 Jones Eq. 322. But that case is clearly distinguishable from ours. There it was held that inasmuch as there may be circumstances under which a husband may strike his wife

with a horse whip or with a switch, the application for divorce should set forth the provocation if any and the circumstances under which the blows were inflicted: in other words should negative any legal provocation. The divorce in that case was denied, mainly upon the ground of the insufficiency of the pleadings in this respect, and not upon the ground that the blows and other indignities alleged in the complaint in that case, if committed without provocation, were insufficient to authorize the Court to grant a divorce *a mensa et thoro*.

Everton v. *Everton*, 5 Jones 262, is another case where a divorce was denied. But the decision of the Court in that, is no authority against the decision in this case: for there no personal violence was committed or threatened. On the other hand, *Coble* v. *Coble*, 2 Jones Eq. 392, is an express authority that the statute is satisfied even though no violence may have been inflicted on the person, if threats of violence have been made, accompanied by charges of infidelity and the withdrawal of intercourse and the refusal to bed with the wife; so in *Erwin* v. *Erwin*, 4 Jones Eq. 85. No personal violence was done, but threats were made by the jealous husband and he denied the paternity of the child with which his wife was pregnant. In the two last named cases the charges were held sufficient under the statute and a divorce from bed and board was decided.

The decisions of the Court in *Coble* v. *Coble* and *Erwin* v. *Erwin*, have not been controverted and must be taken to have settled the meaning of the words "indignities to the person" as used in the statute. Insulting and disgraceful language by itself addressed to the wife by the husband, may not be an "indignity to the person" in a legal sense, and so, slight personal violence without injury to the body or health, of itself, will not justify a divorce: but both combined and frequently repeated would indicate such a degree of depravity and loss of self command as much more readily

to induce a Court to believe there was danger of bodily harm, and such a just apprehension of personal injury as to render cohabition unsafe. No undeviating rule has been as yet agreed upon by the Courts, or probably can be, which will apply to all cases in determining what indignities are grounds of divorce, because they render the condition of the party injured intolerable. The station in life, the temperament, state of health, habits and feelings of different persons are so unlike, that treatment which would send the broken heart of one to the grave, would make no sensible impression upon another.

In *Evans* v. *Evans*, 4 Eng. C. C. 310-11, the leading case upon the subject, Lord Stowell observed, that "a blow between parties in the lower conditions and in the highest stations of life bears a very different aspect. Among the lower clases, blows sometimes pass between married couples who in the main are very happy and have no desire to part; amidst very coarse habits such incidents occur almost as freely as rude or reproachful words; a word and a blow go together, still, even among the very lowest classes, there is generally a feeling of something unmanly in striking a woman; but if a gentleman, a person of education, the discipline of which *emollit mores* and tends to extinguish ferocity, if a nobleman of high rank and ancient family uses personal violence to his wife, his equal in rank, the choice of his affection, the friend of his bosom, the mother of his offspring, such conduct in such a person carries with it something so degrading to the husband and so insulting and mortifying to the wife, as to render the injury itself far more severe and insupportable. We may assume then that the legislature purposely omitted to specify the particular acts of indignity for which divorces may in all cases be obtained. The matter is left at large under general words, thus leaving the Courts to deal with each particular case and to determine it

upon its own peculiar circumstances, so as to carry into effect the purpose and remedial object of the statute.

In the present case, the parties, we are led to assume, belong to the respectable walks of life. What can be more humiliating and degrading to the wife, than to be told in the presence of the family and servants, that she is "a fool, a liar and like her folks the Vaughns, and had no sense!" He repeatedly threatens to chastise her, declares and boasts to his employees and servants that he has whipped her; that he brushed her and would have used a board also if he had had it. He lays up whips in the house and boasts that they were put there to "brush" his wife. Bruises are found upon her face and upon her rump, showing that he had subjected her to the most degrading and ignominious chastisement, and on one occasion he had the indecent and insulting assurance to tell her brother that he had whipped his sister and asked him into the house to see her bruised face. When she offers to return to him if he would agree not to whip her, he not only rejects the offer, but repeats his determination to chastise her when she deserved it or he saw fit. Yet the case shows not a single provocation by word or act on her part. His conduct then, was wanton and malicious, unmanly and cruel, betraying such a spirit of insult, injury and wickedness, as evidently "rendered her condition intolerable and life burdensome." It was such conduct on the part of the husband "as rendered further cohabitation dangerous to the physical safety of the wife, or created in her such reasonable apprehension of bodily harm as materially to interfere with the discharge of marital duty." 1 Bishop on Marriage and Divorce, § 715, and following, where the subject is fully discussed and the cases referred to. Shelford on Marriage, &c. 427. We therefore think that the facts in evidence, if believed by the jury, entitled the plaintiff to a divorce from the bed and board of her husband.

As the case goes back for another trial, attention is called

to the question, whether both the plaintiff and defendant are not competent witnesses and compellable to give evidence for or against each other, upon all matters except to prove adultery. See Bat. Rev. ch. 37 § 7. ch. 17 § § 333, 338, 341, 342.

Error.

PER CURIAM. *Venire de novo.*

STEPHEN JOHNSON, Adm'r. v. P. A. MILLER and others.

Contract -- Confederate Currency.

Where a note was given February 4th, 1865, payable twelve months after date, "in the common currency of the country, that which will pay tax;" *Held*, that the Legislative scale did not apply and that the note was solvable in United States currency.

(*Terrell* v. *Walker*, 66 N. C. 244; *McKesson* v. *Jones*, *Ibid* 258; *Cherry* v. *Savage*, 64 N. C. 103; *McCombs* v. *Griffith*, 67 N. C. 83; *Williams* v. *Monroe*, *Ibid.* 133; *Howard* v. *Beatty*, 64 N. C. 559, cited, distinguished and approved.)

CIVIL ACTION, tried at Spring Term, 1876, of YADKIN Superior Court, before *Cloud*, *J.*

This action was commenced in a Justice's Court and was founded upon an instrument of writing of which the following is a copy:

"Twelve months after date, we, or either of us promise to pay Samuel Johnson the sum of one hundred and ninety-nine dollars and fifty-two cents, in the common currency of the country, that which will pay tax, for value received of him.

Witness our hands and seals.

R. M. Allison. [*Seal.*]
P. A. Miller. [*Seal.*]

Witness: H. G. Hampton.
February 4th, 1865."

It was agreed that this note was given for a quantity of bacon bought at a public sale made by Samuel Johnson, the intestate of plaintiff, and that it was publicly announced at said sale that Confederate money would not be taken, but that parties purchasing might pay in North Carolina Treasury notes if payment was made on day of sale, or might give notes payable twelve months after date in the "common currency of the country—that which would pay taxes."

The plaintiff claimed the full amount of the note in United States currency, but the defendant insisted that the value of the property bought, was the true value of the note.

His Honor being of opinion with the plaintiff, gave judgment accordingly, and the defendant appealed.

Mr. J. F. Graves, for plaintiff.
Mr. J. M. McCorkle, for defendants.

RODMAN, J. When during the recent war a note was given for payment of a certain number of dollars, generally without specifying what sort of dollars, it contained a latent ambiguity from the fact of there being several sorts of dollars either actually in use at the time and place of contract or possibly in the contemplation of the parties.

Hence on the principles of the common law, parol evidence was held admissible to explain, by the circumstances attending the contract, what sort of dollars the parties had in contemplation. *Thorington* v. *Smith*, 8 Wall. 1.

The Act of 1866 made a presumption that the parties intended dollars in Confederate currency, but allowed this

presumption to be rebutted by proof of a different intent. *Terrell* v. *Walker*, 66 N. C. 244; *McKesson* v. *Jones*, 66 N. C. 258; and *Cherry* v. *Savage*, 64 N. C. 103.

It has however never been held, where the written contract by its terms specified in what sort of dollars it should be payable, that parol evidence was competent to prove that it was payable in some other sort of dollars than that specified on its face. Cases cited above. *McCombs* v. *Griffith*, 67 N. C. 83; *Williams* v. *Monroe*, 67 N. C. 133.

In such a case there is no ambiguity, and to allow such evidence would not be to explain an ambiguity, but to contradict a contract in writing by parol, which is inadmissible.

In the present case there is no ambiguity in the words on the 4th of February, 1865. The makers promise twelve months after date, to pay one hundred and ninety-nine dollars and fifty-two cents, "*in the common currency of the country, that which will pay tax.*" These words express with reasonable certainty, that the dollars in which payment is to be made, shall be those which are the common currency of the country and which will be receivable in payment of taxes, *at the time when* the payment of the dollar is to be made.

This contract was what the Court of Appeals of Virginia has aptly termed, a contract of hazard; that is to say, that each party took the risk of what the common currency, &c. might be at the maturity of the note.

If the war had continued and Confederate currency had continued to be common currency and receivable for taxes, (as it probably would have been if the Confederate Government had maintained its occupation of the country,) no matter how much more worthless for other purposes it might have become, it would have been a good tender under the contract and the makers of the note might have profited by the depreciation.

Probably, as the event has occurred, the makers of the note will have to pay for the bacon more than they anticipated when they purchased it, and perhaps more than they would have given had they foreseen what the course of events would be. That was a risk which they took, and they must abide it. *Howard* v. *Beatty*, 64 N. C. 559, is cited as in opposition to this view. In that case the note was dated 3 April, 1865, payable twelve months after date, "in current money." The Judge of the Superior Court held as a matter of law, that upon the facts, "current money" meant "money current" at the maturity of the note. This Court held that these words left it uncertain whether the money meant was such as was current at the making of the note or such as should be current at its maturity, and held that parol evidence was competent to show the intention of the parties. In the present case, the language is more definite and points to a future time which can be no other than the maturity of the note.

There is no error.

PER CURIAM. Judgment affirmed.

FEREBEE JUSTICE and others v. JOHN A. GUION.

Contingent Remainder -- Power of Court to Sell Land.

A Court has no power to order a sale of land for the purpose of converting it into other property where it is limited in contingent remainder.

(*Watson* v. *Watson*, 3 Jones Eq. 400; *Williams* v. *Hassell*, 74 N. C. 434, cited and approved.)

CIVIL ACTION, tried at Fall Term, 1876, of CRAVEN Superior Court, before *Seymour*, *J.*

The action was brought to obtain an order to sell a certain house and lot in the City of Newbern. In 1853, this property was conveyed by one Sarah Tilman to a trustee "for the benefit of her niece (the plaintiff Ferebee Justice) for life, with remainder to the children of said Ferebee who should survive her to be equally divided between them, with a further provision that if any child of said Ferebee should die before her leaving a child or children, such child or children should represent its or their parent in the division."

The trustee named in the deed was H. T. Guion now deceased, a brother of said Ferebee. The defendant is one of the brothers and one of the heirs at law of the deceased trustee, and was made a party to this suit to the end that an adjudication may be had upon the questions involved.

Ferebee Justice who has been a widow for twenty years has three children, the youngest of whom is over the age of twenty-one, two of whom are married and have children and one of whom is unmarried.

The plaintiffs demand that the said land be sold and the proceeds re-invested in other property under the same trusts, and that H. C. Justice be appointed trustee.

The defendant demurred to the complaint and assigned as cause, that the class of persons to whom the land is limited in contingent remainder are not *in esse*, and not represented in Court as parties.

His Honor granted an order to appoint a trustee and sustained the demurrer, from which judgment the plaintiffs appealed.

No counsel for plaintiffs.

Mr. A. G. Hubbard, for defendant.

FAIRCLOTH, J. The petition alleges that a sale of the premises and re-investment of the proceeds would greatly promote the interests of the plaintiffs, and this allegation is

admitted by the demurrer of the defendant, who however denies the power of the Court to order a sale on the ground that the plaintiffs' interest in the premises, except the life tenant, is contingent. The property was conveyed by deed to the defendant in trust for Mrs. Justice during her life, and then to be surrendered to her children who "shall survive her and be living at her decease," to be equally divided &c. The Court would gladly aid the petitioners in promoting their interest, but it has not the power to do so. The estate of the plaintiffs is a contingent remainder and the contingency arises out of the uncertainty of the persons who will be able to take the estate at their mother's decease. Some of the children now living may die without issue and others may be born before the life estate terminates. No one can *now* tell how these matters may *then* be. This rule has been long and well settled. The leading text books are uniform on the subject. In our State the leading case is *Watson* v. *Watson*, 3 Jones Eq. 400, and the last case is *Williams* v. *Hassell*, 74 N. C. 434; and we can add nothing to the reasoning to be found in those authorities and do not consider it necessary to repeat it in this case. The demurrer must be sustained.

No error.

PER CURIAM. Judgment affirmed.

JOHN BRADSHER, Adm'r of W. A BRADSHER and others v. JOHN P. CANNADY and wife CORINNA and D. W. BRADSHER.

Advancement -- Gift by Parent.

1. Whether a gift by a parent is an "advancement" or not, depends upon the intention of the parent *at the time the gift is made.*
2. A gift, absolute when it is made, cannot be converted into an advancement by any subsequent statement of a wish to that effect by the parent, short of a legally executed will.
3. As a general rule money expended in the education of a child is presumed not to be an "advancement"

(*Meadows* v. *Meadows*, 11 Ire 148, cited and approved)

CIVIL ACTION, tried at Fall Term, 1876, of PERSON Superior Court, before *Kerr, J.*

This was a Case Agreed and the material facts are as follows: W. A. Bradsher died in 1874, leaving him surviving, Kate Bradsher his widow, and the following named children, viz; Corinna, wife of J. P. Cannady, Darcy W. Bradsher, and Sidney and Seth Bradsher, minors. John Bradsher was duly appointed administrator. After paying all the debts of his intestate there remained in his hands a sum for distribution. A controversy arose between the parties as to the amount due each distributee, in consequence of certain memoranda being found among the valuable papers of the intestate, of which the following are copies:

"Corinna F. Bradshaw, now Corinna F. Cannady, to $800 for her education, by advancement, and all other advancements made unto her to account for to my estate without interest."

"Darcy W. Bradsher, to $800, for his education, by advancement and all other advancements made unto him to account for to my estate without interest. This is all done

to make my two little boys equal in my estate." Signed by authority of the intestate and witnessed.

In reply to questions submitted, His Honor held: "That a parent has the right to charge as advancements the money spent by him in the education of a child. And if he expressly thus charges money so given to his child, it constitutes an advancement. The paper writing (above set forth) is a valid and legal paper, and determines the intent of the intestate in respect to the money expended on Corinna and Darcy, and they must account for said sums as advancements, in the distribution of their father's estate. And the husband of Corinna must account for money placed in his hands after his marriage to buy land *or she* must be held to account for it in addition to the advancements. That the widow takes one-fifth, being a child's part, in the distribution of the personal estate."

Judgment. Appeal by defendants.

No counsel for the plaintiffs.

Mr. John W. Graham, for defendants, cited *Meadows* v. *Meadows*, 11 Ire. 148; *Pusey* v. *Debouverie*, 3 Peere Williams, 317, note.

RODMAN, J. The North Carolina statute concerning advancements, (Bat. Rev. ch. 45, § § 104, 105, 106) is founded on the statute of Distributions (22 and 23 Car. 2. ch. 10) and it is supposed does not differ in principle from the statutes of the other States which are likewise founded on that Act.

Although the N. C. Act (§ 105) requires a child to whom his intestate had given "any personal property of what nature or kind soever," to give to the administrator an inventory thereof, &c. it has been uniformly held that these general words have a restricted meaning. Every gift of personal property by a donor who dies intestate is not necessarily

an advancement. A parent may *give* his child property instead of advancing it to him. Whether a gift is an advancement or not depends on the intention of the parent *at the time the gift is made*. *Osgood* v. *Breed's heirs*, 17 Mass. 357; *Riddle's estate*, 19 Pa. 431; 6 Whart. 370.

In the absence of direct evidence of the intention at that time, it must be inferred from the nature of the gift and from the circumstances under which it was made.

In *Meadows* v. *Meadows*, 11 Ire. 148, it is said; "Advancements are understood to be gifts of money or personal property for the preferment or settling of a child in life, and not such as are mere presents of small value or such as are required for the maintenance or education of the child, which the law throws on the father at all events."

"As a general rule money expended in the education of a child is not presumed to be an advancement. The presumption is that the parent makes these expenditures in the discharge of his parental duties and that all of his children are treated with equality in this respect. But this presumption may be repelled by evidence." *Riddle's estate*, 19 Pa. 431; *Pusey* v. *Desbouverie*, 3 P. Will. 317; *Mitchell* v. *Mitchell*, 8 Ala. N. S. 414.

A parent may however make the expense of a child's education an advancement, as it was held he did in *Riddle's case*, *ante*.

In this case it is said in substance, that the tastes, talents and constitution of one child may be such as to make it prudent in the parent to give such child his intended share of his estate in an education adapted to his character rather than in anything else; while with respect to another child of a different character a different course would be prudent. The law therefore allows the parent to do either.

The presumption that a parent intended the expenses of a child's education to be an absolute gift will not be repelled by any declaration afterwards of a wish that they shall be

deemed an advancement, unless contained in a will legally executed *Mitchell* v. *Mitchell*, 8 Ala. N. S. 414.

In the present case it is agreed by the Attorneys in this Court (although it is not stated in the case agreed) that the writing dated June, 1874, and which appears to have been signed by the intestate W. A. Bradsher, was executed long after the sums had been expended for the education of the children mentioned in it. Evidently it was not co-temporaneous with the expenditure. It does not appear that the writing was executed with the formalities necessary to make it a valid will and it has never been propounded as such.

We think that the intestate could not convert what was an absolute gift when it was made, into an advancement by any subsequent statement of a wish to that effect short of a will. To do so would be to revoke an executed and perfect gift. This case closely resembles that of *Mitchell* v. *Mitchell*, above cited. In that case it is said; "It appears that the intestate kept an account against his son Columbus which is added up on the book and amounts to $8,632, at the close of which is this entry: 'Accounted for as so much that he has had of his portion of my estate, if it is over his portion he must pay it back to them.'" No question arises upon this instrument as a testamentary paper nor does it appear to have been proved as such. It appears to have been offered as evidence of an advancement. Some of the items of which the account is composed are for expenses at college, whilst travelling, and reading law. It is very certain that some of these items could not be considered an advancement under the statute, being expenditures which it was the duty of the parent to make, or at least of the propriety of making which he was the sole judge. It is true that a parent who had expended more upon the education of one of his children than upon the rest, might think it his duty to make the others equal with him by giving him proportionately less of his

estate, but he could only accomplish this by a will, it could not be effected by considering it an advancement."

We think His Honor the Judge below erred in considering that Corinna and Darcy Bradsher should account for the sums expended for their education.

The writing spoken of speaks of other sums advanced to Corinna and Darcy. What these sums were and under what circumstances they were given does not appear. We are therefore unable to say whether they should be considered advancements or not.

We concur with His Honor that the widow takes a child's part of the personal estate, viz; one-fifth.

Judgment reversed and case remanded to be proceeded in according to this opinion.

Let this opinion be certified.

PER CURIAM. Judgment reversed.

WILLIS MEADOWS v. JAMES C. COZART and others.

Evidence -- Negotiable Instrument -- Action by Endorsee -- Date -- Possession by Endorsee.

1. In an action by an endorsee against the payers of a promissory note, wherein A (who in an action of attachment against the payee and endorser had garnisheed the payers) had made himself a party defendant and alleged a want of consideration in the endorsement: *Held*, that a letter from the payee to the payers, claiming the money due on the note and demanding payment of the same, was not admissible in evidence.
2. The date of a deed or other writing is *prima facie* evidence of the time of its execution.
3. The possession and production in evidence of a negotiable note by an endorsee imports that he acquired it *bona fide* for full value before maturity and without notice of any fact impeaching its validity. But when it is shown that there was fraud or illegality in the transfer the holder is called on to rebut the presumption by proving an adequate consideration.

(*Lyerly* v. *Wheeler*, 12 Ire. 280; *McArthur* v. *McLeod*, 6 Jones, 475, cited and approved.)

CIVIL ACTION, brought by the plaintiff as Endorsee of a Promissory Note, tried at a Special Term of GRANVILLE Superior Court, (August, 1876) before *Seymour, J.*

By consent of the parties, His Honor found the facts (which are substantially set out by Mr. Justice Bynum in delivering the opinion of this Court) and adjudged;

1. That plaintiff was the owner of and entitled to maintain this action upon the note sued on.

2. That said note in the hands of plaintiff is not subject to any equities between defendant and the payee thereof.

3. That plaintiff have judgment for $625.00 and interest and costs.

From this judgment the defendant Cozart appealed.

Messrs. Merrimon, Fuller & Ashe, for plaintiff.
Messrs. L. C. Edwards and *J. B. Batchelor*, for defendants.

BYNUM, J. This is an action on a promissory note executed by Clement & Gooch to one Allen Waller on the 27th of October, 1867, for $625 and due the 27th of October, 1868; and by Waller assigned by endorsement to the plaintiff on the 15th of July, 1868, before maturity. On the 4th of January, 1869, the defendant Cozart, instituted an action against Waller on a note due him; and Waller being a non-resident he summoned Clement & Gooch by attachment process as debtors to Waller upon the said note of $625 now sued on. In 1875, Cozart obtained a final judgment against Waller alone and now on his own application is made a party defendant in this action, claiming a judgment against his co-defendants, Clement & Gooch, on the note sued on by the plaintiff. He alleges that the assignment of the note by Waller to the plaintiff was without consideration and fraudulent against creditors and that he has acquired a lien upon it by his proceedings in attachment. The question of evidence relied on by the defendant will be first disposed of.

On the trial the defendants Clement and Cozart became witnesses in their own behalf and offered in evidence a letter from Waller to Clement, dated in December, 1870, which claimed the money due on the bond in suit and demanded its payment to him. This evidence offered was ruled out by the Court on objection by the plaintiff. The evidence was incompetent on two grounds: first because Waller was not a party to the suit, and was a competent witness; and second, the letter was his declarations made after he had parted with the possession and title in the note, by endorsement and delivery to the plaintiff and therefore inadmissible. The defendants, however, attempt to parry the force

of the objection to the competency of the declarations of Waller, by insisting that the date upon the endorsement is no evidence as to creditors that it is the true date. The answer to this is, that it has been expressly held in *Lyerly* v. *Wheeler*, 12 Ire. 290, that the date of a deed or other writing is *prima facie* evidence of the time of its execution upon the general principle that the acts of every person in transacting business are presumed to be consistent with truth, in the absence of any motive for falsehood. The defendant Cozart again insists that having in his answer denied that the endorsement by Waller to the plaintiff was for value, and having alleged that the assignment was without consideration and void, it was a necessary part of the plaintiff's case to show the consideration. And that is the only question. The plaintiff proved the execution of the note and the endorsement and rested his case. At common law, a promise without a consideration was void, and to enforce a contract, a consideration must have been averred and proved. The first exception to this rule was in regard to promises under seal. The solemnity of the act of sealing an instrument was held to impart a consideration and to estop the party from denying it. The next relaxation of the rule was induced by the necessities of commerce, and bills of exchange and promissory notes were held to be *prima facie* evidence of consideration. A distinction was at one time attempted to be made between bills of exchange and promissory notes, holding that the former were negotiable and the latter not, but the statute 3 and 4 Anne, ended the controversy, by making promissory notes "assignable or endorsable over in the same manner as inland bills of exchange are, or may be, according to the custom of merchants." 1. Lord Raymond 757.

One effect of this statute, (and ours is but a copy of the English Statute; Battle's Revisal chapter 10 § 1,)

was, that an action of debt might be maintained on a promissory note, without alleging a consideration and of course without proving one. As the execution of a promissory note imports a consideration, so likewise does an endorsement, and for the same reason; and the endorsee holds just as the payee held. *McArthur* v. *McLeod*, 6 Jones 475. The possession and production in evidence of a negotiable note by the endorsee, imports that he acquired it *bona fide* for full value before maturity and without notice of any fact impeaching its validity. That establishes a *prima facie* case, and he may there rest it. *Nallet* v. *Parker*, 6 Wend. 615; *McCann* v. *Lewis*, 9 Cal. 246; 1 Daniel on Neg. Instr. § § 160, 170, 812. As the law presumes that every man acts fairly, it rests with the defendant to show some probable ground of suspicion, before the plaintiff can be required to do more than produce the note on which he founds his action. But when this is done, when the defendant shows there was fraud or illegality in the transfer to the plaintiff, another phase is thrown on the transaction and the holder is called on to rebut the suspicion by proving an adequate consideration. *Holmes* v. *Kursper*, 5 Binn. 469; 1 Daniel on Neg. Instr. § § 814, 815. In our case no competent evidence was offered by the defendant to rebut the presumption of consideration for the endorsement. Cozart is therefore not entitled to judgment, but the plaintiff is.

No error.

PER CURIAM. Judgment affirmed.

*ISAAC FORBES v. THE ATLANTIC & NORTH CAROLINA RAILROAD COMPANY.

Negligence -- Failure of Rail Road Company to Provide Brakes -- Injury to Stock -- Contributory Negligence.

1. It is the duty of a Rail Road Company to provide a sufficient number of brakes upon a train to stop it within a reasonable time and distance, and a failure to do so is negligence.
2. If one wantonly or carelessly drives stock upon the track of a rail road he is guilty of contributory negligence, and if the stock is injured, cannot recover in an action against the Rail Road Company.

CIVIL ACTION to recover Damages of the defendant Company for killing two mules belonging to the plaintiff, tried at Fall Term, 1876, of CRAVEN Superior Court, before *Seymour, J.*

The defendant admitted that the mules were killed by a freight train as alleged, but insisted that the accident was unavoidable.

The engineer of the train testified that the mules came on the track from an old road which crossed the railroad about 300 yards ahead of the locomotive; that the train was running at the rate of about thirteen miles an hour down grade; that as soon as he saw the mules "he blew brakes, reversed the engine and blew the usual alarm whistle for frightening stock from the track;" that all the brakes were applied, being four in number on the train which consisted of ten cars heavily laden, and that it was impossible to stop the train to prevent injury to the mules. This evidence was corroborated by another engineer who was on the train as a passenger, and by the brakesmen, one of whom further tes-

*Faircloth, J. being a stockholder in defendant Company did not sit at the hearing of this case.

tified that he had been in the service of defendant company for several years as brakesman, and that in his opinion it was impossible to stop the train under the circumstances as aforesaid.

It was also in evidence that the woods on both sides of the track were very thick at the place of the accident, and that two boys were driving the mules, and instead of crossing the track the mules turned and went down the same ahead of the train.

The plaintiff then introduced one Hardison who testified that the road in which said mules were being driven was and had been a public highway for forty years; that defendant had built a bridge across a ditch on the east side of the track, which bridge had become rotten and had fallen in and the road at that point was impassable; that to avoid this obstruction and enable persons or stock to cross the rail road track it was necessary to go down the track; that said public road led to a mill and that said track was used in the manner described by persons living in the neighborhood.

It was also in evidence for the plaintiff that the train was running at the rate of about 25 miles an hour and that there was no diminution of the speed at the time of the accident.

Under the instructions of His Honor the jury rendered a verdict for the plaintiff assessing the damage at $400. Judgment. Appeal by defendant.

Messrs. Green & Stevenson, for plaintiff.
Mr. A. G. Hubbard, for defendant.

READE, J. The statute makes the mere fact of injuring cattle by a railroad *prima facie* evidence of neglect, provided suit is commenced in six months; so that the case has to be considered with that disadvantage to the defendant.

In order to remove that burden the defendant offered evidence tending to show that the mules of the plaintiff came upon the road suddenly at a place where they could not have been seen before they came upon it, and that the train was so near to them that it could not be stopped before it had killed them, although the servants on the train blew the alarm whistle and put down the brakes, and did everything in their power to stop it. This evidence, if believed, made out for the defendant a complete defence if nothing more had appeared.

But the plaintiff replies that the reason why the defendant could not stop his train was because the train was running at too high a rate of speed and that there was not a sufficient number of brakes upon it. And upon this question both sides offered evidence. The plaintiff's evidence tending to show that the train was running twenty odd miles an hour; and the defendant's, that it was only running twelve or thirteen miles an hour. There was no evidence as to the usual or necessary number of brakes for that train, nor was it left to the jury as a fact; but His Honor charged the jury as a matter of law that if the train was running at the usual speed of a freight train, then the number of brakes were sufficient and that there was no negligence; but if it was running at the speed of a mail train, then the number of brakes was not sufficient and that there was negligence.

In this we think there was error.

Our attention was not called to any statute regulating the speed of freight trains or mail trains, or the number of brakes to each. And we are not aware of any such statute. There is certainly no rule of the common law to that effect. The law is, that there must be a sufficient number of brakes to stop the train within a reasonable time and distance. And whether there was such a number in this case, was a question of fact. And whether that fact was to be tried by the Court or by the jury it was to be tried upon evidence.

And here there was no evidence to guide His Honor or the jury and none to guide us. If an expert had testified that the number of brakes on this train was not the usual and necessary number and that a greater number would have stopped the train before it struck the mules, then His Honor might have charged as a matter of law that there was negligence in not having the usual and necessary number of brakes, and in not stopping the train before it struck the mules. Or if an expert had testified that the speed was too high and that therefore it was not and could not have been stopped within reasonable time and space, His Honor might have charged that there was negligence. But there was no evidence of that kind.

The defendant insists further that the plaintiff's servants wantonly, or at least carelessly, drove his mules upon the defendant's road and were thereby guilty of contributory negligence. If the fact be so then it is a good defence.

Railroads are lawful and useful and while they must use care not to injure the citizen, the citizen must use care also. And he cannot complain if harm come to him by his own negligence.

The plaintiff however replies that he was driving his mules along a public road and that a bridge was down which it was the defendant's duty to keep up, and that on that account, his mules could not cross the defendant's road and escape as otherwise they would have done.

The facts in regard to this are not sufficiently stated to enable us to see how it was.

What we have already said will be sufficient to guide the next trial.

Error.

PER CURIAM. *Venire de novo.*

W. S. SUDDERTH and others v. JOSEPH BRITTAIN, Sheriff and others.

County Commissioners -- Levy of Taxes.

1. County Commissioners have no power to assess additional taxes for previous years upon land on a subsequent increased valuation, after the taxes for such previous years have been paid.

2. The understatement of the area of a tract of land by the person listing it for taxation even if it be fraudulent, does not warrant the County Commissioners in going back and levying taxes upon the difference between the listed and actual area, after the payment of the taxes originally levied.

CIVIL ACTION, tried at Fall Term, 1876, of BURKE Superior Court, before *Henry, J.*

His Honor made an order restraining the defendants, Sheriff and Board of Commissioners of said County, from the collection of taxes assessed upon the land described in the complaint and alleged to be due. The facts are sufficiently stated by Mr. Justice RODMAN in delivering the opinion of this Court.

The defendants appealed from said order.

Mr. A. C. Avery, for plaintiff.
Mr. G. N. Folk, for defendants.

RODMAN, J. The very difficult hand-writing of this record and the great mass of irrelevant matter which it contains, make it extremely difficult to ascertain what are the pertinent facts and what the questions presented for our determination.

We think however that the facts stripped of all unnecessary detail, and so far as they are material to our decision, which appear not to be disputed, are these:

The plaintiffs, or those whom they represent, in 1871-'2-'3-'4-'5, owned and still own a certain piece of land lying in several townships of Burke County. In 1871-'2-'3-'4, they listed it for taxes as containing 1,450 acres. It was valued by the proper County officers at fifty cents per acre, and the taxes at that valuation were duly paid for those years. In November, 1875, the County Commissioners, supposing that the real area was greatly in excess of that at which it had been listed by plaintiffs, caused it to be listed at 12,245 acres, and valued it at 33 cents per acre and ordered the Sheriff to collect taxes upon that valuation for 1871-'2-'3-'4-'5. The taxes for 1875 were also paid. but on what valuation does not distinctly appear. The plaintiffs demand an injunction against the collection of any taxes for those years, (1871'2-'3-'4 and 5) on the ground that they have paid all that were duly levied.

The question presented is thus seen to be this; Could the County Commissioners of Burke, upon a valuation of land made in 1875 or 1876, collect taxes upon that land for previous years, after the taxes upon the valuation of those years had been paid? Can a valuation be retrospective? The answer depends upon our legislation. Battle's Revisal ch. 102, enacts as follows;

Sec. 1. The township trustees on 1st April in each year, (or thereabouts, for the time seems to be left somewhat indefinite) shall list all lands for taxes.

Sec. 16. On the third Monday in May, the County Commissioners shall revise such lists and valuation reported to them.

Sec. 21. Tax lists shall be delivered to the Sheriffs for collection, on or before the first Monday in July.

Sec. 24. Provides for a re-valuation in certain cases where by accident the value has decreased, *before the tax becomes due.*

Sec. 25. Provides that if *before the tax becomes due*, the property has increased 25 per cent in value, otherwise than by reason of improvements made by the owner, the valuation may be increased.

This is the only legislation pertinent to the question that we are aware of. County Commissioners are created by legislation. They have no powers not conferred on them by some Act of the Legislature. We know of no Act which empowers them to alter the valuation of property after the tax has become due. They cannot do so after the tax lists have been delivered to the Sheriffs except in cases specified in sections 24 and 25. The necessary implication from these sections is that the power to alter is denied to the Commissioners in cases not covered by them. The express grant of the power limited as to time, excludes the idea of the previous existence of the power unlimited as to the time in which it may be used. If the power claimed by the Commissioners had existed, these sections would have been unmeaning and superfluous.

It is argued however that the statement of the area by the plaintiffs, was so grossly less than the real area, as to imply fraud; and that in such case the Commissioners may go back and levy the taxes thus withheld.

The mere understatement of the area is not proof and is very slight evidence of a fraudulent understatement.

The area of very few tracts of wild mountain or swamp land is accurately known or capable of being ascertained except at an expense exceeding the value of the land. Old grants when carefully surveyed are generally found to overrun the quantity called for; but sometimes by reason of the inclusion of prior grants, they fall short.

Land is not now taxed uniformly by the acre as it once was.

The County officers are required to value the land and in

such valuation the quantity is not an element of sale or even of primary importance. Speaking generally, the land of an owner which is occupied together as one piece is to be valued as a whole. The Act (§ 9) requires the owner of land in listing it to state the quantity owned by him in the township and *to describe it by its name if it have one, or otherwise in such way that it may be identified.* The valuers have to ascertain the market value, and in this, quantity is an aid but not an absolute guide. Many other things must be considered, as the situation, as in a city or in the country, the income which is or may be derived from it in its present state, the demand for that sort of property, and others which will readily occur. For this reason the land is required to be identified by description. The Township Trustees who value in the first instance are presumed to be informed of all the circumstances affecting the value of all the lands in their Township, and the revising Commissioners may examine witnesses if they think proper. The valuers in the course of their valuation may, if they find it convenient, put the land at so much per acre in the first instance, but they must in every instance at last value it as a whole, as in no other way can the percentage of taxation be applied and the tax be calculated as is required to be done, before giving the lists to the Sheriff. But if it were admitted that the plaintiffs had knowingly understated the quantity, it is not seen how this fraud could give to the County Commissioners a power to re-value, which the Act has not given. If they can go back one year they may go back indefinitely. If the ownership of the land at the date of the re-valuation continued the same that it had been in the previous years, such a power would be impolitic and evil, as it would expose all men, who whether ignorantly or wilfully had at any time understated the quantity of their land, although the quantity had not sensibly influenced the valuation, to vexatious or

malicious prosecutions. But if the land had changed owners either by division of an inheritance or by purchase during the years for which the Commissioners undertook to review the valuation, the consequences would be unjust in the extreme. Taxes duly levied are a lien on land until paid, no matter into whose hands it may go. An heir on partition of the realty of his ancestor or a purchaser may readily inform himself, whether the taxes appearing on the tax lists for two years preceding have been paid, and he is bound to do so. They are open incumbrances. But he could in no way inform himself of the liability of the land to taxes upon a new valuation in consequence of an undervaluation years before. The possibility of such a secret incumbrance being sprung upon a purchaser would discourage sales. Fortunately the Act of Assembly gives no countenance to such a claim. The County Commissioners have time from the day on which the valuations are returned to them by the Township Trustees, up to the time when the tax lists are delivered to the Sheriffs, in which to revise the valuations and in the cases mentioned in sections 24 and 25, they have up to the day when the taxes are due. After that time their power to act on the subject ceases.

We content ourselves with stating the general principles which govern this case. We cannot gather with certainty when or upon what valuation the taxes of 1875 were paid. Any questions of fact respecting the taxes of 1875 and 1876, are left open to be decided if necessary in the Superior Court.

It was objected by defendants that plaintiffs might have obtained all the relief to which they were entitled upon an appeal from the Board of Commissioners to the Superior Court. This objection was not pressed before us no doubt because the parties desired a decision on the merits. The orders of the Board respecting the re-valuation were not very

definite and this taken in connection with the prolonged negotiation for a compromise differ this case from an ordinary one where property is improperly valued. Without discussing the question, we think under all the circumstances, the present mode of seeking relief may be sustained.

There is no error in the judgment appealed from and it is affirmed. Case remanded. Let this opinion be certified.

PER CURIAM. Judgment affirmed.

WILLIAM CLARKE v. D. M. WAGNER and others.

Ejectment -- Natural Boundaries -- Conflict of in Grant.

Although natural boundaries control course and distance and require a straight line from one corner to another, yet where the grant has such other description by natural boundaries (as the boundary of an island) as to require a departure from a straight line, the latter will control.

CIVIL ACTION to recover possession of Real Estate, tried at Fall Term, 1876, of IREDELL Superior Court, before *Buxton, J.*

The facts are stated in *Clarke* v. *Wagner*, 74 N. C. 791.

Verdict and judgment for defendants. Appeal by plaintiff.

Messrs. M. L. McCorkle and *R. F. Armfield*, for plaintiff.
Messrs. Scott & Caldwell, for defendants.

PEARSON, C. J. This case was before us at January Term, 1876, reported in 74 N. C. 791. The reporter sets out a correct and well engraved plat of the localities, material to the question of boundary, presented in the case.

The finding of the jury, that Island No. 1 was *the* Island called for in the Houston grant, is decisive of the case.

The upper end of the Island is the beginning corner. The lower end of the Island is the second corner. The "course and distance" in the grant from the "upper end of the Island to the lower end," do not hit the lower end of the Island, and is out of the case. We suppose that circumstance was allowed due weight by the jury as to Island No. 1 and Island No. 2. The corner of the upper end of the Island which is fixed by the verdict to be Island No. 1, and the corner at the lower end of the Island, are natural boundaries which control course and distance and require a straight line from the one corner to the other even though it splits Island No. 1, unless there be some other description by natural boundaries to control the straight line from the one corner to the other. But the grant has such other description by natural boundaries which requires a departure from a straight line, to-wit; "including two small Islands;" and to fit in this description the line from the upper end of the Island to the lower end thereof must be made to run from the upper end of Island No. 1, to the upper end of Island No. 2; thence along its western margin to its lower end; thence a straight course to the lower end of Island No. 1—a fixed natural boundary—thence to the post oak corner, &c.

The point made by the astute counsel for the plaintiff, that a straight line from the lower end of Island No. 1, to the post oak corner is controlled by the "white oak" which is marked as "a fore and aft line tree," has nothing to rest on, for this is not a case of lappage. Both parties claim to the true line of the Houston grant, and that being fixed, settles the controversy.

PER CURIAM. Judgment affirmed.

N. L. STITH v. JACOB LOOKABILL.

Trustee -- Possession of Land by Equitable Owner.

1. A grantee of a trustee who holds only the legal title to land stands in the shoes of the trustee.

2. In an action by such grantee against the person entitled to the equitable estate who is in possession, for the recovery of the land; *Held*, that the plaintiff is not entitled to recover.

CIVIL ACTION to recover possession of Real Estate, tried at Fall Term, 1875, of CABARRUS Superior Court, before *Schenck, J.*

The plaintiff claimed as devisee of one A. B. Stith, who bought the land in controversy at execution sale. The defendant claimed as tenant of one Sturges who claimed to be the owner in fee of said land, or if not the owner in fee, then the beneficiary owner, and entitled to the equitable fee therein, but by consent of both parties the Court found the facts to be as follows:

1. Plaintiff and defendant both derive title from one John M. Lisle, who executed a deed in trust to one Camman on the 9th July, 1853.

2 Under certain proceedings, (which were admitted,) in which said A. B. Stith was plaintiff and said Camman defendant, a levy was made on the 27th of September, 1855, and thereafter a sale and deed were made by the Sheriff to said A. B. Stith, conveying the land in dispute. A. B. Stith died leaving a last will and testament in which he devised said land to plaintiff.

3. That said deed in trust from Lisle to Camman conveying said land was executed at the instance and by the direction of the Conrad Hill Gold and Copper Company.

4. That one George R. Haywell negotiated said sale to said Company at $40,000 and that in pursuance of their original purpose, the North Carolina Mining Company, through the efforts of said Haywell, a member thereof, became a branch of said Gold and Copper Company.

5. Said property went into the possession of said Mining Company on 7th of July, but the said deed from Lisle to Camman was not really executed on the 9th of July, 1853.

6. On the 19th of October, 1854, said Mining Company executed a deed in trust conveying said land to one Sloan, who took possession of the same; and during his occupancy of about six years, he paid certain debts against both of said Companies, and contracted others in course of his operations, and to pay these he advertised and sold said land according to the provisions of said trust, when one Russell Sturges became the purchaser and obtained a deed.

7. That plaintiff and his devisor were stockholders in said Mining Company and assisted in its organization; that said Sturges was a member of said Gold and Copper Company, and that said Camman, individually and as trustee, had full knowledge of all of said proceedings and assented thereto.

His Honor thereupon held, that plaintiff was the owner of the legal estate subject to the equities of the *cestui que trusts* under the Camman deed. The devisor of plaintiff being a purchaser at Sheriff's sale, succeeded only to the rights of the defendant in execution and is affected by all the equities against him; in other words Stith stands in the shoes of Camman. *Wolke* v. *Moody*, 65 N. C. 599. If Camman is estopped to deny the equitable or legal title of Sturges, so is Stith and his devisee, the plaintiff; and Camman taking interest and advantage by and under his acts and deed is estopped from denying the deed of Sturges who claims directly through him.

The motion of plaintiff for writ of possession was overruled. Judgment that defendant go without day and recover costs. Appeal by plaintiff.

Mr. W. H. Bailey, for plaintiff.

Messrs. Dillard & Gilmer and *J. M. McCorkle* for defendant.

READE, J. Land is conveyed to A in trust for B.

A has the legal title and conveys to C.

B has the equitable title and conveys to D.

Who is entitled to hold the land in this Court, C or D ?

Very clearly D is entitled to hold the land in a Court of equity as this is.

That is substantially this case, and that principle settles this case in favor of the defendant.

John M. Lisle, conveyed the land to one Camman in trust for certain persons. The plaintiff's devisor had an execution against Camman levied on the land and bought it at Sheriff's sale. That puts the plaintiff in the shoes of Camman with the naked legal title.

The *cestui que trusts* conveyed to Sloan who conveyed to the defendant's landlord. That puts the defendant in the shoes of the *cestui que trusts* with the equitable title.

The plaintiff insists that even if that principle be correct, yet it does not apply here because the defendant does not represent the *cestui que trusts*; that the *cestui que trusts* were the Conrad Hill Gold and Copper Company; and that that Company attempted to join and merge itself into the North Carolina Mining Company, by proceedings which were irregular and ineffectual for that purpose, and that the said North Carolina Mining Company conveyed to Sloan, &c.

It may be admitted as contended by the plaintiff, that the deeds and proceedings relied on by the defendant, are irregular and ineffectual to pass the legal title, for if they had been ever so regular and formal they could not have passed the legal title. The legal title was in the plaintiff and not in the *cestui que trusts*. But what the defendant

rightly insists upon is that the deeds and proceedings coupled with the facts that they were for value and were fair and *bona fide*, operate as assignments of the equitable interest of the *cestui que trusts*; and that having the possession of the land he is entitled to hold it.

There is no error.

PER CURIAM. Judgment affirmed.

J. B. LITTLEJOHN and wife v. C. J. EGERTON and another.

Homestead -- Waiver by Husband.

A husband who by *parol* waives his homestead and by assurances and representations that he never intends to claim his homestead, induces another to purchase the same, is not thereby estopped from afterwards asserting his claim thereto.

CIVIL ACTION, tried at Spring Term, 1875, of FRANKLIN Superior Court, before *Watts, J.*

The complaint states substantially that the plaintiff J. B. Littlejohn in October, 1868, was seized of a tract of land in Franklin County containing about 930 acres and that during the years 1867–'8, sundry judgments were obtained against him and executions issued thereon and placed in the hands of the Sheriff subsequent to the adoption of the Constitution in 1868. The homestead and personal property exemption were allotted to said defendant on the 28th of November, 1868, in the manner prescribed by an Act ratified August 22nd, 1868; two hundred acres of said tract being set apart as a homestead. On the 30th of November, 1868, the Sheriff sold said tract by virtue of said executions and W. H. Lit-

tlejohn (the son of plaintiff) purchased with notice that said homestead had been allotted, and subsequently sold the land to Yarborough, who sold to Minnitree, who sold to the defendant C. J. Egerton.

That soon after said defendant obtained a deed from Minnitree he demanded possession of the plaintiff, who had remained in possession and occupied the same as a homestead. The plaintiff being advised that he was not entitled to a homestead and apprehending litigation surrendered the possession to the defendant, and that thereafter the plaintiff was advised of his legal rights in the premises and demanded possession of that part of the land set apart as a homestead, although the same had not been allotted by metes and bounds.

The defendants in their anwser insisted that the executions as set forth in the first allegation of the complaint were levied before the adoption of the Constitution of 1868, and created a lien upon said land. They further insisted that the said allottment had not been made as provided for by said Act and alleged numerous irregularities in the proceeding therefor.

The defendants further insisted that plaintiff was not entitled to a homestead by reason of the lien created as aforesaid, and that plaintiff had waived all claim to the same in consideration of a compromise agreed upon between him and certain creditors at or about the time of said Sheriff's sale, with which agreement the plaintiff had failed to comply.

That said compromise was arranged by said W. H. Littlejohn with the consent and approval of his father, the plaintiff, J. B. Littlejohn.

That before buying the property, the defendant was informed by the plaintiff that there would be no difficulty in his getting immediate possession.

That defendant was a *bona fide* purchaser for value without notice of any claim on the part of the plaintiff.

The plaintiff demurred to defendants' answer.

His Honor overruled the demurrer and adjudged that defendants recover costs.

The plaintiffs thereafter, to-wit; on the 2nd March, 1876, filed a petition for a *Certiorari* which was granted and the case brought to this Court as on appeal by plaintiffs.

Messrs. A. M. Lewis and *Busbee & Busbee*, for plaintiffs.

Messrs. Batchelor & Son for defendants, cited *McKethan* v. *Terry*, 64 N. C. 25; *Mayo* v. *Cotten*, 69 N. C. 289; *Miller* v. *L. & L. Co.*, 66 N. C. 503; *Mason* v. *Williams*, *Ibid*, 570; *Smith* v. *Hunt*, 68 N. C. 482; *Blackwood* v. *Jones*, 4 Jones Eq. 54; *Gunn* v. *Barry*, 15 Wallace, 610; *Sherrill* v. *Sherrill*, 73 N. C. 8.

PEARSON, C. J. The question presented by the pleadings is this: Can a husband who by parol waives his homestead and by assurances and representations that he never intends to claim a homestead induces persons to buy the land at full price including the homestead, afterwards change his mind and claim the homestead, or is he estopped by matter *in pais* because the successive purchasers would be injured by his false assurances and misrepresentations?

The Constitution Art. X § 8, permits a husband to dispose of his homestead *by deed* provided the wife signs the deed "and is privily examined according to law." So the idea of an estoppel by matter *in pais* is out of the question.

We declare our opinion to be that the plaintiffs are entitled to a homestead, but we cannot give judgment or order a writ of possession for the reason that it appears by the complaint that a homestead has not been assigned by "metes and bounds." And the allegations in the answer; that the assessment was in many respects irregular; that it is greatly

in excess of the sum of $1000; and that it was not registered until 1873, after these several sales had been consummated which are admitted by the demurrer, show that a homestead has not been duly assigned.

So we cannot order a writ of possession until the plaintiffs have the homestead assigned according to law by metes and bounds and a certified copy is filed in this Court, when the plaintiffs will have leave to move for a writ of possession.

There is error. The plaintiffs may proceed as they are advised.

PER CURIAM. Judgment reversed.

JACKSON B. HARE, Adm'r. v. SALLIE D. JERNIGAN and others

Deed -- Not Valid Without Registration.

A deed executed and delivered but never registered does not pass the legal estate; *Therefore*, where A purchased and obtained a deed in fee to real estate, which was never registered and thereafter the grantor at A's request executed and delivered a deed in fee to A's wife for the same land, which deed was duly registered, (A having other property fully sufficient to satisfy all his then creditors;) *Held*, that A's wife acquired an absolute estate in the land.

(*Triplet* v. *Witherspoon*, 74 N. C. 475; *Wilson* v. *Sparks*, 72 N. C. 208; *Hogan* v. *Strayhorn*, 65 N. C. 279; *McMillan* v. *Edwards*, 75 N. C. 81; *Linker* v. *Long*, 64 N. C. 296, cited, distinguished and approved.)

CIVIL ACTION, tried at Spring Term, 1876, of HERTFORD Superior Court before *Moore*, *J.*

In February, 1866, the plaintiff's intestate, John H. Jernigan, bought of one Jacob Sharpe a water mill for the sum of $6,350 and obtained a deed in fee simple. He took pos-

session of the same and expended in repairs, &c., about $1200 of his own funds.

In June, 1866, Sharpe, at the request of said intestate, executed in his presence a deed for the same mill to the defendant Sallie D. Jernigan, the wife of intestate J.H. Jernigan, who delivered the deed to his wife in the absence of Sharpe.

Sharpe stated that he thought the first deed was surrendered to him and destroyed.

The deed to Mrs. Jernigan was registered after the death of her husband which occurred in 1870; but the said deed of February, 1866, was never proved or registered. The only money paid to Sharpe in consideration of said purchase was by the intestate at the date of first deed. In February, 1868, Jernigan and wife conveyed the said property to the other defendant, Seth Nowell, and took in payment several notes made payable to defendant Sallie D. Jernigan, which she has since held and claimed as her own property.

These notes are the subject of this action and the plaintiff as administrator of Jernigan demands judgment for the sum due thereon to the end that it may be applied to the payment of the outstanding debts of his intestate.

It was admitted that the intestate was solvent until 1868, when he became insolvent and continued so until his death in 1870.

The facts found by the jury were:

1. "That in June, 1866, the date of the deed to Mrs. Jernigan, the intestate owned property in his own right of the value of $6800, exclusive of said mill; that he expended on the mill $1200, and was indebted $2300."

2. "That the surrender of the deed to himself and the execution of the deed to the defendant were not done or procured to be done by the plaintiff's intestate with the intent to defraud creditors."

Upon this finding, His Honor declared that in June, 1866,

the plaintiff's intestate retained property fully sufficient and available for the satisfaction of all his then creditors, and held that the title to said property under the deed of February, 1866, remained in John H. Jernigan, (notwithstanding the alleged surrender,) until divested by the sale to Nowell, in February, 1868.

The said intestate being insolvent at the time of said sale, His Honor was also of opinion that the proceeds of the same should be chargeable with the payment of his debts and gave judgment in favor of the plaintiff. Appeal by defendants.

Mr. Walter Clark, for plaintiff.

Messrs. Moore & Gatling and *Gilliam & Pruden*, for defendants.

BYNUM, J. Suppose the deed from Sharpe to John H. Jernigan had been duly registered so as to pass the title to him, in February, 1866, and that in the following June, Jernigan had conveyed to the use of his wife by deed duly registered. The title of the wife would have been good against all the world, for upon a proper issue submitted, the jury have found that at the time of the execution of the the second deed, the husband owned property subject to execution twice the amount of his debts, and upon that finding the Court adjudged, as matter of law, that Jernigan "retained property fully sufficient to satisfy all his then creditors;" and from that judgment the plaintiff does not appeal. The jury also found by their verdict, that the surrender of the first and execution of the second deed, were "without the intent to hinder, delay or defraud creditors." Upon such a view of the case, of course the plaintiff could not recover. Hence he is compelled to take the ground that the first deed vested the legal estate in John H. Jernigan, and that the deed of Jernigan and wife, executed to Nowell

in 1868, was the conveyance of the husband's land, and that he being then insolvent, the deed was fraudulent as against his creditors and that the notes for the purchase money belonged to his estate.

This presents the single question, whether a deed executed and delivered, but never registered, passes the legal estate. It is indisputably settled in North Carolina, that it does not, under our statute, Bat. Rev. ch. 35, § 1. *Triplett* v. *Witherspoon*, 74 N. C. 475; *Wilson* v. *Sparks*, 72 N. C. 208; *Hogan* v. *Strayhorn*, 65 N. C. 279; *McMillan* v. *Edwards*, 75 N. C. 81.

The title therefore not having passed to John H. Jernigan by the deed of February, remained in Sharpe, the bargainor, and was by him passed to Mrs. Jernigan by the deed of June, which was duly proved and registered. The husband having means "fully sufficient" to pay all his debts after the purchase of the land, and the jury having negatived all fraudulent intent as to creditors, it was certainly lawful for him to direct the deed to be made to his wife or any body else. It was his own concern.

Linker v. *Long*, 64 N. C. 296, cited by Mr. Clark, has no application, for there the deed was registered and the registration related back, so as to pass the title from the date of the deed. The deed was therefore admissible as evidence of title, although it had been re-delivered by the bargainee to the bargainor.

The maxim *eo legamine quo legatur* has been shorn of much of its unrelenting nature. All mortgages and deeds of trust though proved and registered, may now be discharged and the title be revested in the grantors, by a simple endorsement upon the margin of the Register's book, that the provisions thereof have been satisfied. Bat. Rev. ch. 35, § 29. As the title to lands may be thus passed without deed, so on the other hand, the title sometimes cannot be passed

by a deed duly executed and delivered without other observances. The whole matter is regulated by statute.

The exceptions to evidence, taken by the plaintiff in the progress of the trial and overruled by the Court, cannot be considered, as no appeal appears to have been taken by him. They appear not to have been insisted on in this Court, and we take it that they were abandoned as untenable.

There is no error. The defendant, Sallie D. Jernigan, is entitled to judgment against the plaintiff on the verdict, and we are of opinion that she is entitled to judgment against her co-defendant, Nowell, upon the notes. C. C. P. § 248.

The judgment is reversed and the case remanded to be proceeded with in accordance with this opinion.

Error.

PER CURIAM. Judgment reversed.

J. C. HALL and others v. WILLIAM A. HOLLIFIELD.

Entry and Grant -- Waiver of Entry.

No estate or interest in land is acquired by an entry; only a right of preference. So where A and B enter land jointly and afterwards B declines to take out a grant from the State and A takes out one in his own name, paying the purchase money therefor; *Held*, that B has no estate in the land.

(*Beaman* v. *Simmons*, *ante* 43; *Testerman* v. *Poe*, 2 D. & B. 103, cited and approved.)

CASE AGREED, heard at Spring Term, 1876, of MITCHELL Superior Court, before *Henry, J.*

The following are the material facts in this case, viz; The defendant and one E. A. Hall (deceased ancestor of plaintiffs) had an entry made for a tract of land on the books of the Entry Taker in Mitchell County in their joint names, the defendant paying the Entry Taker's fee and Hall agreeing to reimburse him one half of fees, which he never did. Subsequently defendant proposed that they should take out a grant from the State for the land so entered, &c. when Hall told him that he had declined the idea of doing so as he was fearful of a prior entry and that he, the defendant, could get some one else to go into it with him. The defendant made arrangements and took out a grant in his own name and paid the whole of the purchase money and afterwards sold the land to other parties. After Hall's death his heirs insist in this proceeding that the defendant holds one half of said land in trust for them.

His Honor gave judgment for defendant for costs. Appeal by plaintiffs.

Messrs. W. W. Flemming, and *R. W. Sandifer*, for plaintiffs, cited *Featherston* v. *Mills*, 4 Dev. 596; *Crow* v. *Holland*, *Ibid*, 417; Bat. Rev. ch. 50 § 10.

Mr. A. C. Avery, for defendant, cited 3 Mur. 68; Adams Eq. 155–7, (note) *Henderson* v. *Hoke*, 1 D. & B. 149; *Pegues* v. *Pegues*, 5 Ire. Eq. 418; *King* v. *Wecks*, 70 N. C. 372.

FAIRCLOTH, J. (After stating the facts as above.) The public lands of the State are open to entry by any of its citizens and the first declaration of intention is made on the books of the Entry Taker in the County where the land lies and this gives priority, called a pre-emption right. No estate or interest in the land is thereby acquired. No consideration is paid and none of the requisites for that purpose are performed, but simply the right to be preferred when the money is paid and the other formalities required by the statute are complied with.

In *Beaman* v. *Simmons*, decided at the present term it was held, that although the defendant had sold land to the plaintiff, received a part of the purchase money and delivered him a deed, a surrender of the deed by agreement before it was registered gave the defendant a good title free from any equity of the plaintiff. One who bids off land at a Sheriff's sale may relinquish or assign his bid by *parol* to another and the Sheriff's deed to the latter will be valid. *Testerman* v. *Pope*, 2 D. & B. 103.

The first purchaser has no further concern or interest in the matter unless by agreement the assignment is made for his benefit. If in matters of contract like these, an assignment may be made by *parol*, we can see no reason why a mere inchoate pre-emption right like the one before us cannot be assigned in like manner.

When Hall relinquished his right, there was no agreement that defendant would obtain title and hold the land or any

part of it for his benefit; on the contrary he expressly directed the defendant to get somebody else to go into it with him.

No error.

PER CURIAM. Judgment affirmed.

K. M C. WILLIAMSON v. LOCK'S CREEK CANAL COMPANY.

Action for Diverting Water -- Evidence.

In an action for damages against a Canal Company for diverting water from plaintiff's mill by cutting a ditch which drained a swamp from which the supply of water was obtained, it is necessary for the plaintiff to show that his mill was in use before the charter of the defendant Company was granted.

Quære. Does the amended charter of 1871-'2 relate back to the original charter so as to give the defendant an inchoate title by occupancy?

Quære. Is notice of occupancy to be presumed from the nature of the thing, *i. e.*, from the character of the swamp land and the presumption that it would be drained at some time?

CIVIL ACTION for Damages, tried at Fall Term, 1876, of MOORE Superior Court, before *Furches, J.*

This action was instituted in Cumberland and on affidavit of plaintiff removed to Moore.

The plaintiff had a mill on Lock's Creek and brought this action to recover damages for the diversion of the natural flow of water (which in part supplied said mill) caused by cutting a canal by means of which the waters of Lock's Creek and Evans' Creek were carried into the Cape Fear River above the plaintiff's mill.

The facts bearing upon the point decided in this Court are sufficiently stated by the CHIEF JUSTICE in delivering the opinion.

His Honor in the Court below submitted certain issues to the jury who found in favor of the plaintiff. Judgment. Appeal by the defendant.

Mr. N. W. Ray, for plaintiff.
Messrs. McRae & Broadfoot, for defendant.

PEARSON, C. J. In looking over the papers a point presented itself which is fatal to the plaintiff's recovery. It is this;

The complaint shows that the canal was cut in 1873, but it nowhere appears at what time the mill was built.

The issue; was the plaintiff the owner of the land and in the possession of it at the time the action was commenced? does not enable the Court to see that the mill was built and the water appropriated to its use before the charter of the defendant in 1871–'72.

The merits of the action rest upon this fact; for manifestly, if the defendant had acquired the right to drain the swamp before the plaintiff had acquired title to the use of the water "by occupancy," (a mode of acquiring title to "light, air and running water" and to animals *feræ naturæ*,) by erecting his mill and appropriating the water of the swamp to run it, he has no cause of action.

The error is that the case does not fix the time when the mill was built.

We are therefore of the opinion that the plaintiff has no cause of action if the mill was built after the charter of the company was granted; for the company then with the sanction of the General Assembly gave notice of an intention to appropriate so much of the water of the swamp as could be drained off, and any person who built a mill upon the out-

let of the swamp after this charter, with the expectation of acquiring by occupancy a title to all of the waters of the swamp, acted of his own folly.

As much as he could reasonably have counted on was a right to use for the purposes of his mill so much of the water of the swamp as was not drained off and would continue to flow down the outlet.

It may be that the notice of occupancy by the defendant will relate back to the original charter, of which, the charter set out in the pleadings is an amendment.

One who starts a deer and is in pursuit has acquired an inchoate title by occupancy and no third person has a right to kill the animal before his hounds; for there is notice of an intention to appropriate the thing which is *ferœ naturæ*.

This furnishes an analogy because water like wild animals is the subject of title by occupancy; and the original charter like "the cry of the dogs" gives notice.

Upon our consultation it was suggested by Justice Rodman who comes from a land that abounds in swamps and lakes, that notice should be presumed from the nature of the thing; for when 20,000 acres of land that by draining can be made fit for the purposes of agriculture are covered by water some one or two feet deep, every one must know that at some time or other the swamp will be drained, and the plaintiff will be presumed to have built his mill with an intention to use the water of the swamp until it was drained; and after that to use such of the water only as was left to flow through the outlet to his mill.

There is force in this suggestion and we shall be pleased to have it discussed, should the case come before us a second time.

This suggestion recalls to my memory a case tried before me while acting as one of the Judges of the "Superior Courts of Law and Equity" in the County of Perquimans.

The plaintiff owned a mill on the outlet of a swamp, some miles below its entrance. The defendant cleaned out and deepened the outlet above the plaintiff's mill and partially drained the swamp by means of ditches. The gravamen of the action was that the defendant had by his operations injured the mill which was of long standing, in this; that instead of letting the water of the swamp flow to the mill in its natural way by which there was a regular supply of water, the acts of the defendant caused the water in time of a rain to run off in excess and leave no regular supply to be retained by the swamp as it used to be; *Held*, that the plaintiff had no cause of action; *damnum absque injuria*.

This decision was submitted to by the plaintiff's attorneys, the late Judge Moore and Mr. Charles Kinney, both of whom were men as learned and able as any who have ever belonged to the Bar of this State.

I am inclined to the opinion that the mill was built with notice that the swamp would be drained.

In the mountain country one may use the vacant land as a range until it is granted by the State.

In this connection the evidence in regard to the "McAlister ditch" and the other ditches cut many years ago disturbing the water of the swamp would seem to be relevant. At all events the title of the plaintiff to the water of the swamp by occupancy was subject to the right of eminent domain. Whether the charter of the defendant covers a case of this kind where the injury is collateral and remote, or is confined to cases of benefit or damage caused directly by the cutting of the canal, we will not now discuss, because it can be met by an amendment of the charter.

Error.

PER CURIAM. *Venire de novo.*

BANK OF GREENSBORO v. ABRAM CLAPP and others.

Contract of Sale -- Vendee's Interest Therein -- Trustee -- Misapplication of Trust Fund -- Liability of One Who Participates.

1. The interest in real estate of a vendee under a contract of sale, is an equitable estate and capable of assignment or mortgage.
2. When the vendee has conveyed such interest by deed of trust and also by a posterior mortgage, the mortgagee has an equity to be re-imbursed such portion of the purchase money unpaid by the vendee as he may pay to perfect the legal title to the premises.
3. Where a Bank, in whose hands is a trust fund, participates with the trustee in a misapplication of the fund; *Held*, that the Bank is liable to the *cestui que trust* for any loss thereby incurred.

CIVIL ACTION, tried at Fall Term, 1876, of GUILFORD Superior Court, before *Kerr, J.*

The plaintiffs alleged that theretofore the firm of Shields & Co. owned certain premises (mentioned in the complaint,) and were conducting a licensed distillery thereon. They became indebted to the government for taxes and said premises were sold at public auction for cash on the 27th of May, 1871, when the defendant Owen became the purchaser in the sum of $2700. In order to raise the money to pay his bid he borrowed said amount of the plaintiff, upon the execution of an instrument of writing, of which the following is a copy:

"This instrument witnesseth, that whereas on the 27th of May, 1871, the premises of the 'Greensboro Steam Distillery'—about five acres of land with improvements, steam engine, boilers, &c.—were sold by order of C. S. Winstead, Collector of Internal Revenue, on account of taxes assessed upon Shields & Co., the proprietors and owners of said property; and whereas, Thomas M. Owen became the purchaser at $2700; and whereas, the Bank of Greensboro did advance

and lend to me, for the purpose of paying for said property, the said sum of $2700, as per my note of this date; Therefore, I do hereby assign, transfer and make over to said Bank, my bid for, and right, title and interest in said property, as a guaranty for the payment of said note. And said Collector or his successor in office is hereby empowered and requested to make a deed at the twelve months maturity, to the said Bank instead of to me. This instrument to be void in case I discharge said note to the satisfaction of said Bank.

Thomas M. Owen.

June 1st, 1871."

Knowing that Shields & Co. had the right to redeem their property at any time within twelve months, the defendant Owen, in order more effectually to secure the plaintiff, executed another instrument, of which the following is a copy:

"To Mr. C. S. Winstead, Collector, &c. In case Shields & Co. should redeem the property sold by Thomas M. Owen, Dep. Collector and bought by me, I will thank you to pay the said money to the Bank of Greensboro, as I borrowed the purchase money from the Bank and gave them an instrument transferring my bid for and interest in said property to secure the payment of my note to said Bank for said purchase money. June 5th, 1871. Thomas M. Owen."

Shields & Co. failed to redeem and thereupon the plaintiff applied to the Collector for a deed but was informed that $835.40 of the purchase money had not been paid by defendant Owen, and that no deed would be executed until it was paid. So the plaintiff paid the amount on the 25th of January, 1875, and obtained a deed.

The plaintiff insists that it is entitled to hold said property as a security for both of said amounts, $2,700 and $835.40, and demands a sale of the premises to satisfy the same.

The defendant Clapp alleged, that under a decree of Court in another action wherein the Executors of one Summers were plaintiffs, and Mrs. Wright and Mrs. Cobb, femes covert, were defendants, his co-defendant Owen had been appointed trustee for said femes covert. In that action it was adjudged that the defendants Wright and Cobb, the heirs of said Summers, were entitled to a sum of money to be paid by said Executors, and that said Owen their trustee should execute a deed in trust to the defendant Clapp, who was then the Clerk of said Court, to secure and protect the estate of said femes covert. Accordingly Owen executed the deed to Clapp on the 23d day of May, 1872, conveying the premises hereinbefore mentioned, to the end that such funds as should come into his hands as trustee aforesaid, might be secured.

The said deed from Owen to Clapp was registered on the 11th of September, 1872, and the said instrument from Owen to plaintiff was not registered until the 2d of March, 1876.

After the execution of said deed to Clapp, the money to which the said femes covert were entitled as heirs of Summers, was paid to said Owen as their trustee, who still held it by virtue of his appointment as trustee and by his conveying said premises in trust to secure the payment thereof.

The defendant Owen paid to plaintiff an amount sufficient to discharge the said note for $2,700, but the money was not applied to said note as directed by Owen. It was also alleged that the plaintiff contracted for and took from said Owen, usurious interest.

The defendant Clapp insisted that said premises should be sold and the proceeds applied to the payment of the amount due from said Owen to said femes covert.

The other facts material to the points decided are stated by the CHIEF JUSTICE in delivering the opinion of this Court.

The jury rendered a verdict in favor of the plaintiff. Judgment. Appeal by defendants.

Messrs. Smith & Strong and *Scott & Caldwell*, for plaintiff.
Mr. Thomas Ruffin, for defendants.

PEARSON, C. J. On the argument, the counsel properly conceded that as both sides claim under Owen and as the Collector of Internal Revenue had ratified the transaction and had passed the legal title, neither side could call in question the validity of Owen's bid.

1. Taking Owen's bid to be valid, the first question is in regard to the character of the instrument executed by Owen to plaintiff on the 1st June, 1871. Every feature in the face of that instrument shows it to be a mortgage. It is a present conveyance of an estate, to be void on repayment of money lent. In other words it is a conveyance of an estate as a security for the payment of Owen's note to the Bank. The instrument uses apt words of present conveyance and cannot be tortured into a mere executory contract of substitution.

Owen by force of his bid had the equitable estate, which he could transfer absolutely or by way of mortgage. A mortgagor transfers his equity of redemption, the conveyance to be void on the payment of a debt. This is a second or what is termed "an imperfect mortgage," because the legal estate does not pass. Still it is a mortgage and must be registered. About this there can be no question.

A vendee by force of the contract of sale becomes the equitable owner; this is taken for granted in all of the books, and he may assign or mortgage his equitable estate.

When Owen bid off this property he thereby became the owner of an equitable estate. Why could he not transfer it by way of mortgage? True, it is an imperfect mortgage, because the legal estate did not pass and could not be called

for until the price, to-wit, the amount of his bid, was paid. Still it is a mortgage and falls under the operation of the Registration Act. This is too plain for discussion.

2. Having "opened the log," as rail splitters say, all that is left to be done is to work up the parts.

Conceding that the defendant Clapp acquired a prior title to the equitable estate of Owen by the registration of the deed of trust, the plaintiff says; "In order to get the legal title I was obliged to pay $835. This was not an officious act; the United States Revenue Officer would not make the deed until that amount was paid, being the balance due on Owen's bid. I thought I was getting the legal title for my own benefit in the first instance; it turns out that you have a prior title to the equitable estate and I am to be postponed; but surely the amount paid by me to acquire the legal title, as it enures to the benefit of both of us, is a charge on the property in the absence of any suggestion of fraud or underhand dealing on my part."

This charge of $835 on the property is a clear equity It remains to be seen whether the defendant has established a counter claim sufficient to meet it and as he says to overrun it.

3. At the time, Owen, by his appointment of trustee for Mrs. Wright and Mrs. Cobb, was authorized to receive the trust fund, it was in the hands of the plaintiff and the executors of Summers held certificates of deposit; the fund was transferred to Owen by a transfer of those certificates. Thereupon Owen checked out $2,500 cash and left the residue $3,022 in the hands of the plaintiff. The plaintiff was not bound to see to the application of the $2,500; but was bound to abstain from any participation in a breach of trust on the part of Owen. Here the plaintiff not only participated in Owen's misapplication of the trust fund, but took "the lions share," and applied the whole $3,022 to the discharge of old debts of Owen on the ground that these old

debts were not secured, whereas the debt of $2,700 as it was supposed was secured by the property transferred by mortgage, 1 June, 1871.

In making this application the plaintiff acted under an entire misapprehension in respect to the rights of Owen over the trust fund. It was his duty to invest the fund for the benefit of his *cestui que trusts* and although he had given security not to violate that duty, that did not authorize him to commit a breach of trust in using the money as if it was his own. Nor did it authorize the plaintiff in order to save a desperate debt to participate in a breach of trust, in order to reap the benefit thereof.

The fact that the plaintiff, that is to say, Mr. Lindsay the President, Mr. Gray the Cashier and the Officers had notice that the fund transferred to the credit of Owen was a trust fund belonging to Mrs. Wright and Mrs. Cobb is conceded; for it is set out on the books of the Bank, and the wonder is, that intelligent gentlemen, with the hope of saving a desperate debt, should allow themselves to participate in a gross fraud, attempted to be practiced by Owen upon these two good ladies. Fortunately for them they are able to trace the fund and have a right to follow it in the hands of any one who is not a *bona fide* purchaser for valuable consideration, which character the plaintiff very clearly does not fill.

4. We are not called on to decide the question made by the answer as to the effect of the plaintiff's having lent the money to Owen at 1½ per cent a month or to investigate the question for what reason was Owen required to pay out of the amount of his note a debt of some $1,400, due to the Bank by Shields; or whether Owen's evidence that when he left the $3,022 in Bank he directed that enough thereof should be applied to pay off the balance due to the Bank by reason of his note of $2,700, so as to let Mrs. Wright and Mrs. Cobb have a clear title under the deed to Clapp, ought

to have been received or rejected; nor to consider the bearing of the fact that the Officers of the Bank at the time of the misapplication believed the Bank held a prior title to a part of the property conveyed to Clapp to secure the trust fund.

5. Decree in the Court below reversed. There will be a decree here, that the property conveyed by the deed of trust to defendant Clapp be sold by the Clerk of this Court and the proceeds of sale will be held subject to further order. If requested by plaintiff the Clerk will take an account of the other property conveyed by the deed of trust to defendant Clapp, with a view of marshalling the assets if necessary.

The proceeds of the sale of the property bought by Owen at the sale for the taxes of Shields & Co. will be applied to replace the trust fund which he misapplied, to-wit; the $2,500 checked out by him and the $3,022, minus the $835 used by plaintiff to obtain the deed of the Collector of Revenue. Should there be an excess the plaintiff is entitled to it, should there be a deficit to make good the $3,022, (minus $835) wrongfully applied by the plaintiff to Owen's old debts, the defendant Clapp, as trustee of the fund will have a decree, that the plaintiff pay to him the amount necessary to re-imburse that sum to the trust fund as to which there may, after the report of sale, be an account, if either of the parties be so advised.

PER CURIAM. Judgment accordingly.

EDWARD BELO v. THE COMMISSIONERS of FORSYTHE COUNTY.

Municipal Bonds -- Conditions Precedent -- Action by Purchaser for Value -- Injunction by Tax Payer -- Retrospective Statute -- Judge's Charge -- Evidence.

1. Municipal bonds unpaid at maturity are dishonored like other commercial paper, and a purchaser after maturity holds them subject to all defects which would invalidate them in the hands of the original holder.
2. In an action against a municipal corporation upon a bond issued by it, by a purchaser for value without notice, the plaintiff need only show a *power* in the corporate body to issue the bond.
3. If a municipal corporation has the power to issue bonds upon certain conditions precedent, and such bonds are issued. the presumption is that the conditions were complied with and the bonds are *prima facie* valid. The corporation, however, can show the contrary, unless it is *estopped* by its own acts from so doing.
4. When authority to issue municipal bonds upon the performance of certain conditions precedent, is conferred by statute upon a particular tribunal, such tribunal has the sole power to determine the fact whether the conditions have been performed or not.
5. In an action by a *bona fide* purchaser for value against a County upon a bond issued by the former County Court of such County under an Act of the Legislature, the records of such Court are conclusive upon the County. The recitals in the bond are also conclusive upon the County and consitute an estoppel *in pais*.
6. A tax payer, for sufficient cause, can intervene in apt time and enjoin the issuing of municipal bonds, but this must be done before the bonds are issued and negotiated and pass into circulation as commercial securities.
7. It is competent for the Legislature by a retrospective statute to validate an irregular or defective execution of a power by the authorities of a municipal corporation acting under a former statute, where no contract is impaired and the rights of third persons are not injuriously affected.
8. Where the plaintiff testified on the trial below and introduced evidence of good character, and the defendant asked His Honor to charge the jury that they were not bound to believe the plaintiff in passing upon

the issue, which His Honor refused and charged the jury that "they were not bound to believe anybody," and added "that when men, who have proved a good character before the jury, testify, the presumption is that they will not lie, &c." *Held*, not to be error.

(*Chester & Lenoir R. R. Co.* v. *Comr's. of Caldwell*, 72 N. C. 486, cited and approved.)

This was an ACTION for a Mandamus, to compel the defendants to provide for the payment of certain bonds alleged to have been issued pursuant to law by the County of Forsythe, tried at Spring Term, 1876, of DAVIDSON Superior Court, before *Cloud, J.*

The action was commenced in Forsythe and removed to Davidson.

The question presented for the decision of this Court is so elaborately discussed by Mr. Justice BYNUM in delivering the opinion, that a statement of the facts is deemed unnecessary.

Upon the issues submitted and under the instructions of His Honor in the Court below, the jury rendered a verdict for the plaintiff. Judgment. Appeal by the defendants.

Mr. J. M. McCorkle, for plaintiff.

Messrs. Dillard & Gilmer, Shipp & Bailey and *Watson & Glenn*, for defendants.

BYNUM, J. The North Western North Carolina Railroad Company was incorporated by an ordinance of the Convention of 1868, and by Section 12 of the charter, the same power to subscribe to the capital stock of the company and subject to the like regulations and restrictions, is given to Counties and Towns, as was conferred by an Act incorporating the Atlantic & N. C. Railroad Company, passed by the Legislature of 1852. By section 34 of the latter Act, the Justices of the County through or near which the road was

located, "a majority concurring," are authorized to fix upon a subscription sum and submit it to the voters of the County. If the majority favored subscription, the Justices were to choose an agent to subscribe the stock voted and to prepare and issue County bonds, as the Justices should direct. The minutes of the Special Term of the County Court of Forsythe County which ordered the proposition to be submitted to the popular vote, recite that a majority of the Justices were present, concurring in the order. The vote resulted in favor of subscription and was so certified to the succeeding Court, held in June, 1868.

The minutes of that Term recite that 35 Justices were present, which number is admitted to be a majority of the whole number. At this latter Term of the Court, the Justices ordered the subscription to be made to the capital stock of the Company, and the bonds to be prepared and issued and sold by the agent then chosen. The bonds were accordingly put upon the market and among them the identical bonds now sued on were by the agent sold to one Lemly, at his Banking House in Salem, on 5th of March, 1869. These bonds recite that they were "authorized by an ordinance of 1868, by an order of the Court of Pleas and Quarter Sessions of Forsythe County at June Term, 1868, and re-enacted and ratified and confirmed by an Act of the General Assembly, ratified the 11th of August, 1868."

At the same Term at which the subscription was made, the Justices assessed a special tax upon the County to meet the semi-annual interest on the bonds. This Special Railroad Tax was annually assessed, levied and collected and applied in the discharge of the accruing interest upon the bonds from that time until 1872. A certificate for the stock subscribed was issued by the Railroad Company to the County, which it yet holds; an agent was annually chosen to represent and did represent the County stock in all

the meetings of the Company. Under the new State Constitution of 1868, a Board of County Commissioners succeeded to all the powers and duties of the Justices; and up to 1872, this Board unanimously caused the levy and collection of the Railroad Tax and its application to the discharge of the coupons due upon the bonds. But the Board elected in 1872 refused to assess any further tax and to pay any further interest upon the bonds, alleging as the reason therefor, that the subscription of stock so made by the County was illegal and void.

I. The plaintiff purchased the bonds in suit of Lemly, in May, 1873, *after* they fell due. The bonds were then dishonored, like other commercial paper remaining unpaid at maturity, and the plaintiff is a purchaser with notice of all defects which would invalidate them in the hands of Lemly. He acquired no better title than his transferrer. Any defence which could be asserted against the claim of Lemly can be maintained by the County against the plaintiff. 1 Daniel on Negotiable Instruments, § 782; *Arrents* v. *Commonwealth*, 18 Grat. 773; 14 Minn. 79. The question then is, were the bonds invalid in the hands of Lemly, who purchased them from the County before maturity. The defence to the action is that the election could be ordered and the subscription of stock made only by the concurrence of a majority of the Justices of the County; and that in point of fact, no such majority did concur, and therefore the subscription and the bonds issued therefor are void, even in the hands of a *bona fide* holder of the bonds before they fell due. This proposition cannot be maintained. Municipal bonds are negotiable instruments, and the legal rights of the holders of such paper do not so much rest upon abstract propositions, though true, as upon a system of practical rules found by experience to be essential to healthy commercial life. For the public protection and the convenience of trade, every intendment is made in favor of the validity of nego-

tiable instruments. Where bonds have been issued and sold in the market, and have come into the hands of a *bona fide* holder, before maturity, as a general rule such bonds are *prima facie* valid and the *onus* is upon the party impeaching them, to show the contrary. This rule however, which subsists between individuals, is much modified in respect to corporate bonds. Such bonds can be issued only in pursuance of a special grant of power, and the party claiming the benefit of such bonds must show a *power* in the corporate body to issue them. But if he is a purchaser for value without notice and before maturity, he need do no more. If a municipal corporation has the power to issue bonds only on a compliance with conditions precedent, as for instance, as here, in pursuance of a popular vote and the bonds are issued, the presumption is that the conditions have been observed and they are *prima facie* valid, though the defendant may show the contrary unless he is *estopped* by his own acts from doing so. The principle, however, of equitable estoppel is a most important element in the transaction. For whether conditions precedent have been complied with is a matter of fact to be determined by some tribunal invested with the power and authority to decide it, and the decision when made should be final. It is not disputed that the *power* to make the subscription of stock and issue the bonds was conferred upon the County of Forsythe by the Ordinance of the Convention. It is equally clear that the tribunal which was authorized to issue the bonds only on compliance with conditions precedent, was the sole tribunal to determine the fact whether the conditions had been fulfilled. In our case the Justices of the County, a majority concurring, was the Court or tribunal designated to carry the law into effect, and was the tribunal to decide whether the conditions had been complied with, and their decision is final in a suit by a *bona fide* holder of the bonds against the municipality. This determination of a question of fact by the

Justices is manifested in two ways; first, by the records of their Court, and second, by the recitals in the bonds issued by them. The Justices were authorized by the Act to take the sense of the people, declare the result and issue the bonds. Their declaration spread upon the Minutes of the Court and made a record, is conclusive against the County in favor of all *bona fide* bondholders without notice. If they purchased before maturity, they need look no further. *Marcy* v. *Township of Oswego*, 92 U. S. Rep. 637; *Dunning* v. *Houston*, 18 Am. Rep. 253 and note. If there was fraud in making the record, or irregularities in the election, which would vitiate the bonds, upon exceptions taken in apt time any tax payer of the County could intervene and enjoin their issue. But this could only have been done before the bonds were issued, negotiated and passed into circulation as commercial securities, with the insignia of validity impressed upon their face. *Chester & Lenoir R. R. Co.* v. *Caldwell Co.*, 72 N. C. 486. If intentionally or by neglect the tax payers fail to protest, interfere or assert their legal rights; if they suffer the election to be held, a false result declared, the bonds to be issued and sold, and the proceeds received by their agents; if for the period of four years they annually submit to a special tax, which is applied in payment of the accruing interest on the bonds; if they still retain the Railroad stock, without an offer to surrender it and continue to have it represented in the meetings of the Company; they cannot now disaffirm the acts of their public agents, who issued and negotiated the sale of the bonds. They had the opportunity to intervene and protect themselves before the rights of third persons accrued. Their acquiescence is a ratification by the principal of the acts of his agent, and according to all the leading authorities upon this question, the doctrine of equitable estoppel is a complete bar and is strictly applied to the enforcement of these

municipal obligations. 2 Daniel on Neg. Instr. § 479; *State* v. *Vanhorne*, 7 Ohio St. 331; *Barrett* v. *County Court*, 44 Mo. 201.

While the decisions are very uniform that the record of the Justices' Court affirming the fact of compliance with the conditions precedent to the subscription of stock, is conclusive and estops the County from denying the validity of the bonds in the hands of a *bona fide* holder before maturity, they are equally uniform in giving the same effect to the *recitals* in the bonds themselves that they had been issued in pursuance of the law which authorized their issue. The recital is a determination of the question and the holder has the right to rely on it. *Town of Coloma* v. *Evans*, 92 U. S. Rep. 484; *Lynch* v. *Winnebago*, 16 Wall. 13; *Knox County* v. *Aspinwall*, 21 How. 539. In delivering the opinion of the Court in *Coloma* v. *Evans*, Mr. Justice Strong says: "In the leading case of *Knox County* v. *Aspinwall*, the decision was rested upon two grounds. One of them was that the mere issue of the bonds containing a recital that they were issued in pursuance of the Legislative Act was a sufficient basis for the assumption by the purchaser that the conditions on which the County was authorized to issue them, had been complied with, and it was said, the purchaser was not bound to look further for evidence of such compliance, though the recital did not affirm it. This position was supported by reference to the *Royal British Bank* v. *Turquand*, 6 Ellis and Blackburn, 327, a case in the Exchequer Chamber, which fully sustains it and the decision in which was concurred in by all the Judges. This position has been more than once re-affirmed in this Court. It was in *Moran* v. *Miami County*, 2 Black. 732; in *Mercer County* v. *Hacket*, 1 Wall. 83; in *Supervisors* v. *Schenck*, 5 Wall. 784, and in *Meyer* v. *Muscatine*, 1 Wall. 384. It has never been overruled and whatever

doubts may have been suggested respecting its correctness to the full extent to which it has been some times announced, there should be no doubt of the entire correctness of the other rule asserted in *Knox* v *Aspinwall* That has been so firmly seated in reason and authority that it cannot be shaken." To the same effect is the recent case of *Humbolt Township* v. *Long*, 92 U. S. Rep. 642. See also a valuable summary of the doctrine as established by the decisions of the Supreme Court of the United States, by Judge Dillon, "Law of Municipal Bonds" § 11; the result of which is that the recitals in the bonds to that effect, are conclusive of compliance with the conditions precedent and constitute an estoppel *in pais*, upon the municipalities.

Up to this point the discussion has been upon the idea that the bonds were, in fact, irregularly issued and were good only in the hands of a *bona fide* purchaser before maturity and without notice. It may well be doubted whether this is not conceding too much. Suppose the plaintiff had been the original purchaser from the County, after the bonds matured and therefore fixed with notice, and suppose further, that the County in defence could go behind the action of the Justices and the recitals in the bonds, it by no means follows that their invalidity could then be established. For the County was clothed with the power to issue them and it is admitted that a majority vote sanctioned the subscription of stock and the issue of the bonds. The real condition precedent was the consent of the tax-payers and that had been thus regularly obtained. The provisions of the Act as to the mode of submitting the question were subordinate and conducive to the main purpose, and may therefore be properly considered as directory only and not of the essence. When the subscription was voted there is authority and reason for asserting that the Justices could have been com-

pelled by process of law, to make the subscription, unless in defence they could have shown that the election was not fairly conducted but was influenced by the fraud of the Railroad Company. *People* v. *Supervisors*, 27 Cal. 655. As the case is presented to us, that question does not arise and we do not decide it.

So far, as to the rights of the parties under the original Act of the Railroad Corporation, granted by the Convention of 1868.

II. But the plaintiff further relies upon a subsequent Act of the Legislature, ratified the 11th of August, 1868, which confirms the original charter of March, 1868. This Act in express terms "ratifies all Acts and things heretofore done under the provisions of said ordinance," and confers upon the "Board of Commissioners of the County, full power and authority to levy from time to time such tax as may be sufficient to pay the subscription made by said County to the capital stock of the North Western North Carolina Railroad Company and any interest due thereon, or to liquidate any debt created by the County in borrowing money to pay such stock subscription."

The competency of the Legislature to enact retrospective statutes, to validate an irregular or defective execution of power by a County corporation, is well settled. In *St. Joseph Township* v. *Rogers*, 16 Wall. 644, the election at which the subscription was approved was held before the law authorizing the subscription, and the Court there decide that this and all defective subscriptions of the kind may be ratified, where the Legislature could have originally conferred the power, and that such laws when they do not impair any contract or injuriously affect the rights of third persons are never objectionable. Dillon's Law of Municipal Bonds, § 21. *Butler* v. *Dubois*, 29 Ill. 105; 49 Mo. 225. The ratification operates as a previous authority. 2 Daniel

on Neg. Instr. 492; Cooley on Const. Lim. § § 370–381. *Knap* v. *Grant.*, 27 Wis. 147.

Declaring as we do that the ratifying Act of August, 1868, was a curative Act and validated both the County subscription and the issue of the bonds, if any defects existed therein —and it has been one purpose of this opinion to show that the bonds were valid in the hands of *bona fide* holders without the aid of this healing Act—the proposed evidence of the defendant became immaterial and irrelevant. As a matter of law the bonds were valid and the Court did not err in so declaring.

The only issue submitted to the jury was; "Is the plaintiff the *bona fide* owner and for value of the bonds and coupons mentioned in the pleadings, and was he such at the commencement of the action?" Upon the trial of this issue the plaintiff was introduced and testified as a witness. The defendant requested the Court to charge the jury that they were not bound to believe the plaintiff in passing upon the issue. The Court refused so to charge, but told the jury "they were not bound to believe anybody, and added that when men who have proved a good character before the jury, testify, the presumption is that they will not lie; and that there was evidence before the jury that the plaintiff was a man of good character and no witness had been introduced to assail his character." There was no error in that. Without this reinforcement of a proved good character, men are presumed to tell the truth. The whole theory of jury trials and indeed of all human intercourse is based upon that presumption.

His Honor expressed himself with needless emphasis, but we do not see that the jury were misled thereby.

It is estimated that the municipal indebtedness of this country has already reached the enormous sum of $900,000,000 and is rapidly increasing; nearly the whole of which is evidenced by negotiable securities issued for almost every

conceivable purpose by cities, counties and townships. These bonds represent a large portion of the wealth of the country and whether held for investment or active employment they enter into the complex business of commercial life. This municipal power to issue bonds which is the growth of the last thirty years has already overwhelmed the country with an indebtedness which threatens political society and social order to their foundations. No check against our indebtedness is so effectual as that *you must pay as you go*, but this is utterly disregarded in the legislation which authorizes the issue of bonds payable at a remote future period. As soon as the sting of taxation is felt, the self-burdened people cast about for relief and after some hesitating scruples, plunge into repudiation or other methods involving the sacrifice of public faith, with its dismal train of evils. No refuge for repudiation can be found in the legal tribunals of the country. They have sternly resisted every subterfuge to escape the just obligation of these contracts. No branch of the law has been more thoroughly investigated and discussed, with the view of setting it upon a just and pure foundation. And it is the glory of the law that while by the application of legal principles it enforces the discharge of such obligations, it at the same time preserves the public morals in maintaining the integrity of solemn contracts inviolable. In no other practical way perhaps will the tax-payers be sooner brought to a more vigilant watchfulness over their own affairs, and a more careful selection of their public agents. See Dillon on Municipal Bonds, § 1.

There is no error.

PER CURIAM. Judgment affirmed.

INDEX.

ADMINISTRATORS.

ADVANCEMENT.

CONVEYANCE.

See DEEDS.

CONVICTION.

The term "Conviction" in Art. III, § 6, of the Constitution denotes a verdict of guilty rendered by a jury; *Therefore*, when the defendant, after verdict and judgment in the Court below, appealed to this Court and pending such appeal was pardoned by the Governor; *Held*, that such pardon is authorized by the Constitution and is valid. *State* v. *Alexander*, 231.

LANDLORD AND TENANT.

PROCESS.

PUBLICATION.

PURCHASER.

1. One who claims against a prior donee or creditor as a purchaser for value, must prove a fair consideration, not up to the full value, but a price paid which does not cause surprise or warrant a suspicion of fraud or contrivance on the part of the purchaser. *Worthy* v. *Caddell*, 82.
2. Where A procures his land to be sold under execution with intent to defraud his creditors, and B purchases it at a grossly inadequate price without knowledge of the fraudulent contrivance of A, he is not a *bona fide* purchaser for valuable consideration. *Ibid.*
3. Where A, with intent to defraud his creditors, furnished money to his daughters (being indebted to them at the time) with which to purchase his land at execution sale, they not being parties to his fraudulent purpose and not buying for his use, and the daughters purchased the land for a fair value; *Held*, that the daughters obtained a good title. *Sharpe* v. *Williams*, 87.
4. Where a party seeking relief against an innocent purchaser for value without notice, is in default, the loss must fall upon him; *Therefore*, where the plaintiff executed a lease for a term of years for the consideration of $25, when the intention and agreement of the parties thereto was that the consideration should be $25 *per annum* and the error occurred through the inadvertance of the draftsman, and afterwards the lease was assigned to an innocent purchaser for value without notice; *Held*, that as to such purchaser the plaintiff was not entitled to have the lease corrected. *Henry* v. *Smith*, 311.

RAILROAD COMPANIES.